No. 15-1446

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DOREEN M. HENDRICKSON,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

Defendant Doreen Hendrickson appeals the judgment entered against her by the United States District Court for the Eastern District of Michigan (Hon. Victoria A. Roberts, presiding). The district court had jurisdiction under 18 U.S.C. § 3231. The judgment of the district court constitutes an appealable final order. The district court sentenced defendant on April 9, 2015, and entered its judgment on April 14, 2015 (Judgment, R. 126, Page ID # 2696).[1] Defendant Doreen

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[1] "R." references are to documents in the district court's record, as numbered by the Clerk of the District Court. "Br." references are to defendant's opening brief. "Tr." references are to the court reporter's transcript of proceedings. "G.Ex." references are to the government trial exhibits.

Hendrickson filed a timely notice of appeal on April 17, 2015 (Notice of Appeal, R. 127, Page ID # 2699-2700). *See* Fed. R. App. P. 4(b)(1)(A). Jurisdiction for this appeals lies under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF RELATED CASES

The following cases and opinions, previously before this Court and courts below, are related to this case:

United States v. Peter Hendrickson, 460 Fed. Appx. 516 (6th Cir. Feb. 8, 2012) (No. 10-1726) (direct appeal of criminal tax convictions of Peter Hendrickson);

United States v. Peter & Doreen Hendrickson, No. 10-1824, Slip Op. (6th Cir. Nov. 22, 2011) (direct appeal of civil injunction);

United States v. Peter & Doreen Hendrickson, No. 07-1510, Slip Op. (6th Cir. June 12, 2008) (interlocutory appeal in civil injunction case);

United States v. Peter & Doreen Hendrickson, No. 06-cv-11753 (E.D. Mich. May 21, 2010) (civil injunction case) (2007 WL 647569 - Magistrate Report & Recommendation) (2007 WL 647570 Order Adopting Magistrate Report) (2007 WL 1203729 Magistrate Report & Recommendation 2) (2007 WL 2385071 Amended Judgment and Order of Permanent Injunction) (2007 WL 2380180 Order Denying Motion for Reconsideration)

STATEMENT OF THE ISSUES

1. Whether a defendant may challenge the propriety of an underlying district court injunction in a later criminal contempt prosecution.

2. Whether a specific unanimity instruction was required where the indictment alleged defendant violated a single court order – an order that, at its essence, simply directed defendant to file correct tax returns – in two ways.

3. Whether defendant was denied her Sixth Amendment right to self-representation when standby counsel did not ask certain questions during his direct examination of defendant, and defendant did not bring this constitutional claim to the district court's attention until after the jury had convicted her.

4. Whether the district court misapplied the sentencing guidelines and miscalculated the loss amount in determining defendant's sentence.

STATEMENT OF THE CASE

On May 2, 2007, pursuant to 26 U.S.C. §§ 7402 and 7408, the United States District Court for the Eastern District of Michigan (Honorable Nancy G. Edmunds, presiding) entered a permanent injunction against defendant. (*United States v. Peter Hendrickson & Doreen Hendrickson*, 2007 WL 2385071 (E.D. Mich. No. 2:06-cv-11753) (Amended Judgment and Order of Permanent Injunction).) The injunction enjoined defendant from filing any return, amended return, or other

document with the IRS that is based on certain specific frivolous and false claims, and required defendant to file within 30 days of the issuance of the injunction amended tax returns for the years 2002 and 2003. (*Id.*)

On May 14, 2013, a grand jury returned an indictment charging defendant Doreen Hendrickson with one count of criminal contempt for willful disobedience of the permanent injunction, in violation of 18 U.S.C. § 401(3). (Indictment, R. 3 Page ID # 7-10.) On July 25, 2014, after a six-day trial, the jury returned a verdict finding defendant guilty. (Jury Verdict, R. 101; Page ID # 1172.) On April 9, 2015, the district court sentenced Hendrickson to 18 months' incarceration, to be followed by one year of supervised release. (Judgment, R. 126; Page ID # 2693.) Defendant filed a timely notice of appeal. (Notice of Appeal, R. 127; Page ID # 2699.)

STATEMENT OF FACTS

In 2002 and 2003, defendant Doreen M. Hendrickson was employed as a tutor by Una Dowkin. (Trial Transcript, Vol. 2 at 56-59, R. 105, Page ID # 1385-88; PSR 13.) During those same years, defendant's husband, Peter Eric Hendrickson, was employed by Personnel Management, Inc. (Trial Transcript, Vol. 2 at 98, R. 105, Page ID # 1427.) Dworkin submitted IRS Forms 1099-MISC to defendant that reflected defendant's compensation for 2002 and 2003 in the amounts of $3,773 and $3,188, respectively. (Trial Transcript, Vol. 2 at 58-68, R.

105, Page ID # 1387-97 (*see* G.Ex. 32).) Personnel Management, Inc. submitted Forms W-2 for Peter Hendrickson that reflected wages in the amounts of $58,965 and $60,608 for those same years. (Trial Transcript, Vol. 2 at 98, R. 105, Page ID # 1427 (*see* G.Ex. 13).) However, when the Hendricksons filed their 2002 and 2003 joint income tax returns, they claimed that the money they had received was not income; instead, they submitted Forms 4852 "Substitute for Form W-2, Wage and Tax Statement" to "correct" Peter Hendrickson's Forms W-2. (Trial Transcript, Vol. 2 at 52-72, Page ID #1381-1401 (*see* G.Ex. 1, 4).) Based on these false submissions, the Hendricksons fraudulently sought refunds of the taxes withheld from Peter Hendrickson's wages. Specifically, they requested refunds of $10,152.96 for 2002 and $10,228 for 2003. (*Id.*) The IRS processed the requested refunds, which totaled $20,380.96, but applied the majority of the funds to penalties that the Hendricksons owed for previous tax years. On September 24, 2004, the IRS sent the Hendricksons a tax refund check for the balance, in the amount of $3,172.30. (Trial Transcript, Vol. 2 at 72, Page ID # 1401 (*see* G.Ex. 7).)

The false 2002 and 2003 Forms 1040 that the Hendricksons filed followed a method promoted in Peter Hendrickson's book, *Cracking the Code – The Fascinating Truth About Taxation In America*. (Trial Transcript, Vol. 2 at 99-102, R. 105, Page ID # 1428-31.) The basis for their refunds claim was the purported

theory that the earnings of persons who are neither government employees nor officers of corporations are not "wages," and are therefore not taxable income. (*Id.*) Ultimately, Peter Hendrickson posted a photograph of the refund check on his website, losthorizons.com, to promote the strategies for evading taxes that he outlined in his book. (Trial Transcript, Vol. 2 at 97, R. 105, Page ID # 1426 (*see* G.Ex. 32).)

On April 12, 2006, the government filed suit against the Hendricksons to recover, with interest, the erroneous refunds of federal income, Social Security, and Medicare taxes that Peter and Doreen Hendrickson had received as a result of the misrepresentations that they made on their 2002 and 2003 joint income tax returns, and to enjoin the Hendricksons under 26 U.S.C. § 7402 from filing false and fraudulent tax returns and forms with the IRS. (*United States v. Peter Hendrickson & Doreen Hendrickson*, No. 2:06-cv-11753 (E.D. Mich.), Complaint, R. 1 (April 12, 2006); (*see* G.Ex. 12.).)

The district court granted summary judgment in favor of the government on February 26, 2007, and ultimately issued an Amended Judgment and Order and Permanent Injunction on May 2, 2007. (*United States v. Peter Hendrickson & Doreen Hendrickson*, 2007 WL 2385071 (E.D. Mich. No. 2:06-cv-11753) (Amended Judgment and Order of Permanent Injunction, R. 34) (*see* G.Ex. 15).) In this order, the district court concluded that the Hendricksons were "jointly

indebted to [the United States] for erroneous refunds for the 2002 and 2003 tax years." (*Id*.) The district court found that the Hendricksons' claim that their income was not taxable was based on a "frivolous and false" theory. (*Id*.) The injunction prohibited the Hendricksons from filing any tax returns or other documents with the IRS based on the false and frivolous theories set forth in *Cracking the Code*, and required the Hendricksons to file by June 1, 2007 amended tax returns for 2002 and 2003 on which they correctly reported their income from Personnel Management, Inc. and Una Dworkin. (*Id*.) Defendant and her husband promptly proceeded to disregard the directives in the injunction.

On March 23, 2009, despite the court's 2007 injunction, defendant filed a false tax return for 2008 that followed the same bogus strategy as the 2002 and 2003 returns. (Trial Transcript, Vol. 2 at 72-81, R. 105, Page ID # 1401-1410 (*see* G.Ex. 8, 33).) In 2008, the defendant earned $59.20 working as a movie extra; she received a Form W-2 reflecting those earnings. (*Id.*) Although defendant was not legally required to file a tax return for 2008 because her income did not meet the filing threshold, she nevertheless filed a false tax return seeking a refund of the taxes withheld. (*Id.*) On the return, defendant reported $0 in wages and claimed a refund of $5. (*Id.*) As Peter had for 2002 and 2003, defendant used a false Form 4852 to "correct" her Form W-2. (*Id.*) When the IRS issued a refund check in the requested amount, Peter posted a photo of the refund check to his website on a

page called "More Victories for the Rule of Law," to once again promote his book and trumpet the success of his theories.[2] (Government's Sentencing Memorandum, R. 123 at 5-6; Page ID # 2599-2600.)

The Hendricksons also failed to file amended tax returns for 2002 or 2003 by June 1, 2007, as required by the district court's injunction. In June 2010, three years after they should have filed corrected returns, defendant and her husband submitted a set of document that included 2002 and 2003 Forms 1040X, the IRS forms for filing amended tax returns. (Trial Transcript, Vol. 3 at 72-76, R. 106, Page ID # 1513-17 (*see* G.Ex. 22, 23).) However, on these Forms 1040X, the Hendricksons wrote the words "UNDER DURESS" over their signatures and included an asterisk that incorporated an attached statement. (*Id.*) In that statement, the Hendricksons asserted that nothing in the returns should be taken as an admission that they had income for 2002 and 2003. (*Id.*) The IRS did not

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[2] On this "Victories" page, Peter Hendrickson wrote:

> Tens of thousands of readers of 'Cracking the Code- The Fascinating Truth About Taxation In America' have taken control of their own resources, in accordance with, and respect for, the law. The likely total amount reclaimed by these good Americans so far is upward of several billion dollars.

Peter also provided a running total of the amount of fraudulently-obtained federal and state tax refunds that he claimed had been issued to those following his strategies. The total was $11,605,323.31 as of March 2015. (*See* Government's Sentencing Memorandum, R. 123 at 6; Page ID # 2600.)

accept the documents as valid tax returns because of these alterations to the jurat, the portion of a tax return above the signature lines pursuant to which taxpayers declare that their returns are true and correct and are made under penalties of perjury. (Trial Transcript, Vol. 3 at 75, R. 106, Page ID # 1516.)

In January 2011, defendant submitted to the IRS another set of documents that contained a second set of 2002 and 2003 Forms 1040X. (Trial Transcript, Vol. 3 at 81-86, R. 106, Page ID # 1522-27 (*see* G.Ex. 27, 28, 29).) In Box C of the Forms, entitled "Explanation of changes," where taxpayers explain to the IRS why they are filing amended returns, defendant wrote: "See Affidavit of Doreen Hendrickson filed 1/07/2011 in U.S. District Court Eastern District of Michigan Case No. 2:06-cv-11753." (*Id.*) In this affidavit, defendant stated that, like the first set of Forms 1040X, this second set of Forms 1040X she was submitting to the IRS in January 2011 was also false, and that instead the couple's original 2002 and 2003 returns claiming fraudulent refunds were correct. (*Id.*) Defendant further stated that she "disclaim[s] these coerced returns because they are wholly false and fraudulent." (*Id.*) The IRS also did not accept this second set of Forms

1040X, because defendant had sworn in the referenced affidavit that the documents were false.[3] (*Id.*)

SUMMARY OF THE ARGUMENT

1. Defendant may not challenge the validity of the underlying district court injunction in this later case charging her with criminal contempt. *United States v. United Mine Workers*, 330 U.S. 258 (1947). At any rate, this Court has already upheld the validity of the injunction in defendant's direct appeal from the civil judgment and injunction: defendant may not now collaterally attack that ruling. Moreover, the jury was properly instructed that the legality of the injunction was not at issue, but that, if defendant believed in good faith that her actions did not violate the injunction, such a belief would negate criminal intent.

2. A specific unanimity instruction regarding the manner of defendant's violation of the injunction was not required here. A jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to

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[3] On November 6, 2008, Peter Hendrickson was indicted by a grand jury on ten counts of filing false tax returns, in violation of 26 U.S.C. § 7206(1). (*United States v. Peter Hendrickson*, No. 08-cr-20585 (E.D. Mich.), Indictment, R. 3 (Nov. 12, 2008).) On October 26, 2009, Peter was convicted by a jury on all ten counts. (*United States v. Peter Hendrickson*, No. 08-cr-20585 (E.D. Mich.), Jury Verdict, R. 76.)

commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817 (1999). Here, the injunction was straightforward, and the manners in which the indictment alleged that defendant violated the injunction were related and noncomplex.

3. Defendant was not denied her Sixth Amendment right to self-representation when her standby counsel did not ask certain questions during his direct examination of defendant. Counsel's decision not to ask the questions was acquiesced to by defendant. Moreover, the questions were cumulative of other testimony and argument, and therefore did not amount to a structural denial of her right to self-representation. In any event, the failure to ask the questions did not affect the fairness of the proceedings as defendant presented nearly a day of testimony and nearly an hour of closing argument regarding her claimed anti-tax beliefs.

4. Criminal contempt does not have its own sentencing guideline; instead, the sentencing court is instructed to apply the guideline for the most analogous offense. U.S.S.G. § 2X5.1. Here, the district court reasonably determined that the most analogous offense was failing to file tax returns under 26 U.S.C. § 7203, because defendant had failed to file amended returns for 2002 and 2003 – as she had been ordered to do in the injunction – to correct the false returns through which she had obtained $20,380.96 in fraudulent refunds. The district court

correctly determined that $20,380.96 was the loss amount as the injunction that defendant violated specifically found that defendant and her husband were "jointly indebted" to the government in that amount.

ARGUMENT

I

The District Court Correctly Held that the Validity of the Underlying Injunction was not at Issue

Standard of Review

Questions of law are subject to *de novo* review. *See United States v. Khalife*, 106 F.3d 1300, 1302 (6th Cir. 1997); *United States v. Spinelle*, 41 F.3d 1056, 1057 (6th Cir. 1994). A district court's denial of a proposed jury instruction is reviewed for abuse of discretion. *United States v. Svoboda*, 633 F.3d 479, 483 (6th Cir. 2011). That means that a district court's denial of a proposed instruction will only be reversed if the proposed instruction "is (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *United States v. Franklin*, 415 F.3d 537, 553 (6th Cir. 2005) (internal quotation marks and citation omitted).

Argument

Defendant erroneously argues (Br. 18-22) that the district court's injunction underlying her contempt conviction was "unlawful" and that her conviction should

therefore be vacated. In the alternative, defendant mistakenly argues (Br. 22-31) that the jury should have decided whether the district court's injunction was "lawful," irrespective of the fact that this Court had previously found it to be so. Both of defendant's arguments lack merit.

A. A Defendant in a Criminal Contempt Proceeding Cannot Challenge the Validity of the Underlying Court Order

As an initial and fundamental matter, it is well-settled that a defendant is not permitted to challenge in a contempt proceeding the underlying order allegedly violated. *United States v. United Mine Workers of America*, 330 U.S. 258, 294 (1947) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."); *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 700 (6th Cir. 1985) ("Where, as here, the issuing court has jurisdiction, the validity of the injunction is not an issue in a criminal contempt prosecution."). The Supreme Court explained the rationale behind this principle in *Maggio v. Zeitz*, 333 U.S. 56, 68–69 (1948):

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be

> taken that orders issue . . . only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place.

Given the Supreme Court precedent – which defendant acknowledges (Br. 22, n.10) but unsuccessfully attempts to distinguish – defendant's arguments challenging the validity of the district court's permanent injunction are not appropriately addressed by this Court in this proceeding. *See also Dolman v. United States*, 439 U.S. 1395 (1978) (in a prosecution under § 401(3), "[t]here is no question . . . that a conviction for criminal contempt may be valid quite apart from the validity of the underlying injunction which was violated, and that the invalidity of an injunction may not ordinarily be raised as a defense in contempt proceedings for its violation"). Indeed, this Court has specifically held that a defendant may not challenge an underlying injunction regarding tax-protestor related conduct in a resulting civil contempt proceeding. *See United States v. Conces*, 507 F.3d 1028, 1037 (6th Cir. 2007) ("it is especially clear . . . that we lack the power to review the underlying . . . permanent injunction that preceded the contempt order"); *see also Cherokee Exp., Inc. v. Cherokee Exp., Inc.*, 924 F.2d 603, 607 (6th Cir. 1991) (barring a collateral attack on the validity of the

underlying judgment so long as the judgment came from a court of "competent jurisdiction"). [4]

Moreover, this Court has already ruled against defendant on the merits of this issue. In defendant's prior appeals challenging the permanent injunction, this Court rejected defendant's arguments, including First Amendment-based arguments, that the injunction violated her rights because filing "amended returns forced [her] to swear to a fact [she] did not believe, that [her] income constituted taxable wages." The Court similarly rejected her argument that "the [district] court could not hold [her] in contempt [because] the underlying judgment was

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[4] The single narrow exception to the principle that the underlying court order cannot be challenged in a contempt proceeding is when the court issuing the underlying order lacked jurisdiction to do so. *See Petition of Green*, 369 U.S. 689, 692 (1962) (holding that the defendant was entitled to a hearing that the state court that issued an injunction was without jurisdiction to do so); *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967); *see also Cherokee Exp.*, 924 F.2d at 607. Defendant does not now claim that the district court that issued the injunction lacked jurisdiction. Moreover, this Court rejected defendant's jurisdictional arguments in the direct appeal of the permanent injunction. (*United States v. Peter & Doreen Hendrickson*, No. 07-1510, slip op. at 2-3 (6th Cir. June 12, 2008) (unpublished) (characterizing the defendant's arguments "as plainly baseless tax protester arguments" and "patently meritless")). In fact, this Court sanctioned defendant and her husband in light of "the patent baselessness of the Hendricksons' assertions on appeal." *Id.* at 4. In 2009, the Supreme Court denied the petitions for certiorari and rehearing filed by the defendant and her husband. (*See id.*, R. 41, 42; *United States v. Peter & Doreen Hendrickson*, No. 10-1824, slip op. at 3–5 (6th Cir. Nov. 22, 2011) (unpublished)).

invalid." *United States v. Peter & Doreen Hendrickson*, No. 10-1824, *Slip Op.* at 2, 4-5 (6th Cir. Nov. 22, 2011); *see also* Appellant Brief, No. 10-1824, R. 30 at 22-27 (One of the arguments the Hendricksons made in their brief that this Court rejected was the claim that: "Since Congress could make no law abridging Our Rights of Speech . . . the District Court simply cannot have or find any lawful basis for its orders."). The Court opined that the Hendricksons' "numerous challenges" to the district court's judgment "can be characterized as plainly baseless tax protester arguments." *Id.* at 2. The Court should reject defendant's improper attempts to use her criminal case to mount a successive, collateral attack on the permanent injunction. *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1071 (6th Cir. 2014) (law of the case prevents relitigating an issue decided); *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994); *see Corley v. Commonwealth Industries, Inc. Cash Balance Plan*, 602 Fed. Appx. 637 (6th Cir. 2015) ("Because we squarely decided the issue in the first appeal, we hold that the law of the case doctrine precludes us from reconsidering it.").

At any rate, the propriety of the underlying injunction cannot be in doubt. Section 7408 of Title 26 permits a district court to enjoin persons from promoting or assisting in the preparation and presentation of false tax returns, or knowingly preparing affidavits, claims or other documents that will be used to improperly understate tax liability. *See* 26 U.S.C. § 7408; *United States v. Estate Pres.*

Services, 202 F.3d 1093, 1098, 1106 (9th Cir. 2000). And § 7402(a) of Title 26 gives district courts broad authority to issue such injunctions "as may be necessary or appropriate for the enforcement of the internal revenue laws."

Given this broad statutory language, there can be no serious dispute the district court possessed the power to enjoin defendant from sending the IRS false and frivolous documents, *see United States v. ITS Financial LLC*, 592 Fed. Appx. 387, 394-95 (6th Cir. 1997); *United States v. Schiff*, 379 F.3d 621, 624 (9th Cir. 2004); *United States v. Kahn*, 244 Fed. Appx. 270, 273 (11th Cir. 2007), or that it possessed the power to order defendant to file corrected tax returns, *see United States v. Krzyske*, 836 F.2d 1013, 1015 (6th Cir. 1988) (noting that, in appeal of bond conditions, order to file tax return had been upheld against First Amendment challenge); *United States v. Thompson*, 395 F. Supp. 2d 941, 942, 945-46 (E.D. Cal. 2005) (injunction requiring individual to file tax returns). Moreover, defendant's argument that filing tax returns infringed on her First Amendment right to freedom of speech has been uniformly rejected. *See United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by evoking the First Amendment"); *United States v. Kuball*, 976 F.2d 529, 531-32 (9th Cir. 1992); *United States v. Citrowske*, 951 F.2d 899, 901 (8th Cir. 1991); *see also Conces*, 507 F.3d at 1040 (post-judgment discovery order to tax counselor did

not violate First Amendment rights; "courts have rejected comparable claims by promoters of unlawful tax-avoidance schemes that their First Amendment rights or privileges were violated through orders directing them to comply with discovery requests or enjoining them from continuing to promote these schemes"); *Nelson v. United States*, 796 F.2d 164, 167-68 (6th Cir. 1986) (requirement of filing tax returns does not infringe on First Amendment free exercise of religion).[5] *See generally McDonald v. Smith*, 472 U.S. 479 (1985) (right to petition government, like other First Amendment freedoms, is not absolute and does not protect intentional falsehoods). Thus, the district court was well within its power in issuing the subject injunction under 26 U.S.C. § 7402(a). *See ITS Financial, LLC*, 592 Fed. Appx. at 394-95 (recognizing "broad grant of authority to enter injunctions" under § 7402(a), and collecting cases).

B. The District Court Correctly Instructed The Jury On The Crime of Contempt

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as

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[5] In addition, the injunction was plain and unambiguous as to the prohibited conduct. Indeed, in rejecting defendant's previous appeal, this Court found that "the district court's underlying orders set forth the Hendricksons' obligations in terms that were clear, specific, and unambiguous." *United States v. Peter & Doreen Hendrickson*, No. 10-1824, *Slip Op.* at 5 (6th Cir. Nov. 22, 2011).

. . . [d]isobedience or resistence to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401. The courts' contempt power has the dual functions of (1) vindicating the public interest by punishing contemptuous conduct and (2) coercing the contemnor to do what the law requires. *See Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947). To convict a defendant of contempt for violating an injunction under 18 U.S.C. § 401(3), the United States must prove beyond a reasonable doubt that there is a clear and definite order; that the defendant knew of the order; and that the defendant willfully disobeyed the order. *See In re Smothers*, 322 F.3d 438, 441-42 (6th Cir. 2003); *United States v. Strickland*, 899 F.2d 15, 1990 WL 33712 at *2 (6th Cir. 1990) (unpublished); *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986). Willfulness for purposes of § 401(3) is defined as "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States v. Baker*, 641 F.2d 1311, 1317 (9th Cir. 1981); *Downey v. Clauder*, 30 F.3d 681, 686 (6th Cir. 1994). It implies a "deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." *TWM Mfg. Co. v. Dura Corp*, 722 F.2d 1261, 1273 (6th Cir. 1983); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782 (9th Cir. 1983). Willfulness may be inferred from the facts and circumstances. *United States v. Thoreen*, 653 F.2d 1332, 1342 (9th Cir. 1981); *Baker*, 641 F.2d at 1317; *see United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975). "A good faith

effort to comply with the order is a defense [to a charge of criminal contempt], although delaying tactics or indifference to the order are not." *Baker*, 641 F.2d at 1317 (citing *Richmond Black Police Officers Ass'n v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977)); *United States v. Greyhound Corp*., 508 F.2d 529, 532 (7th Cir. 1974).

As discussed above, the district court correctly ruled that the legality of the underlying injunction was not at issue in the contempt trial. See *United Mine Workers*, 330 U.S. at 294; *Polo Fashions*, 760 F.2d at 700; *Conces*, 507 F.3d at 1037. It is the district court's duty to instruct the jury on the law. *See Torres v. Cnty. of Oakland*, 758 F.2d 147, 149 (6th Cir. 1985) (quoting *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983)); *CFE Racing Products, Inc. v. BMF Wheels, Inc*. 793 F.3d 571, 588 (6th Cir. 2015); *see also Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974); *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986); *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir. 1983). Indeed, the district court acts as the jury's sole source of the law. *See Cooley*, 501 F.2d at 1253. Thus, a trial court should not allow a defendant or the government to attempt through either evidence or argument to present to the jury a statement of law that is contrary to the instructions ultimately given by the district court. *Id*. The jury is not permitted to decide on its own what the law is. *Id*.

Given the applicable case law, the district court correctly instructed the jury that "[i]t is not a defense to the crime of Contempt that the Court Order that the Defendant is accused of violating was unlawful or unconstitutional." (Trial Transcript, Vol. 5 at 96, R. 108; Page ID # 1771.) Here, it was not up to the jury to decide whether the district court's injunction was legal. Acquitting defendant was proper only if the jury found that the defendant believed in good faith that she was complying with the injunction, not because the jury itself found the injunction to be "illegal." *See Polo Fashions*, 760 F.2d at 700; s*ee also Cheek v. United States*, 498 U.S. 192, 203 (1991). Accordingly, the district court was entirely correct in prohibiting the jury from considering the propriety of the underlying injunction in reaching its verdict. *See also United States v. Kahre*, 737 F.3d 554, 576 (9th Cir. 2013) (a district court instructs the jury on the law and should exclude evidence, argument, and instructions that would allow a jury to find that the law is otherwise).

Defendant correctly points out (Br. 25) that the government is required to prove "every element of a charged offense . . . beyond a reasonable doubt." But she provides no support for her apparent argument (Br. 28-30) that by withdrawing the question of the legality of the injunction from the jury's consideration, the

district court somehow shifted the burden of proof to defendant.[6] The district court's instructions properly asked the jury to apply the applicable law to the facts as the jury found them.

To the extent defendant is arguing the court's instructions impinged on her good faith defense, she is wrong. The district court's instructions specifically instructed the jury that "The burden of proving good faith does not rest with the Defendant because the Defendant has no obligation to prove anything to you. The Government has the burden of proving to you beyond a reasonable doubt that the Defendant acted wilfully." (Trial Transcript, Vol. 5 at 95, R. 108, Page ID #

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[6] Defendant contends (Br. 23, 24-28) that the "lawfulness" of the underlying order is an element of criminal contempt, but provides no authority for this proposition. Defendant cites three cases in a footnote (Br. 23, n.11) that she claims support her contention. The cases are readily distinguishable as all three involved interlocutory appeal of an underlying order that was contemporaneous with a contempt finding against an attorney-contemnor. Thus, in *United States v. Koblitz*, 803 F.2d 1523 (11th Cir. 1986), the appellants were attorneys directly appealing the order for which the court held them in civil contempt of court. *See id.* at 1524. The procedural position was the same for the attorney-appellants in both *United States v. Turner*, 812 F.2d 1552 (11th Cir. 1987) and *In re Smothers*, 322 F.3d 438, 440-42 (6th Cir. 2003), except that those attorneys were held in criminal contempt. In all three cases, there had been no appellate determination regarding the propriety of the underlying orders.

Defendant also attempts (Br. 25-26) to analogize state cases involving disobeying the orders of police officers. But the two situations are not similar. The legality of the actions of police officers are clearly subject to jury determinations, *see Coles v. Eagle*, 704 F.3d 624, 630-31 (9th Cir. 2012) (whether officer lawfully used force is factual issue for jury), while the final orders of a court of competent jurisdiction, upheld on appeal, are not. *United Mine Workers*, 330 U.S. at 294; *Polo Fashions*, 760 F.2d at 700; *Conces*, 507 F.3d at 1037.

1770.) The district court further instructed that "the good faith of the Defendant is a complete defense to the charge of criminal Contempt because good faith is simply inconsistent with wilfulness." (*Id.*) It instructed that "[a] person who acts on a belief or on an opinion honestly held is not punishable merely because that honest belief turns out to be incorrect or wrong." (*Id.*) The district court also correctly instructed that "[a]n inability to comply with an Order of the Court is a complete defense to the charge, a charge of Contempt." (*Id.* at 96; Page ID # 1771.) The rulings and instructions at issue, viewed in context, did not in any way "undermine" defendant's good faith defense. Indeed, the court's instruction specifically emphasized that while the legality of the injunction was not at issue, defendant could still believe in good faith that her actions did not violate the injunction, and such a belief would negate criminal intent. The district court's instructions were entirely correct. *See TWM Mfg.*, 722 F.2d at 1273; *Kahre*, 737 F.3d at 576; *Cheek*, 498 U.S. at 203. Whether defendant intended in good faith to comply with the injunction was squarely before the jury, and there was overwhelming evidence to support the jury's determination that she did not.

II

The District Court Properly Instructed the Jury
That Unanimity as to the Manner by Which
Defendant Committed Contempt Was Not Required

Standard of Review

This Court reviews a district court's refusal to deliver a requested jury instruction for abuse of discretion. *United States v. Gunter*, 551 F.3d 472, 484 (6th Cir. 2009). Even if an abuse of discretion is found, reversal is only warranted if the instructional error "concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991).

Argument

Defendant incorrectly argues (Br. 31-39) that the district court was required to instruct the jurors that they must be in "specific unanimity" as to the manner in which defendant violated the injunction before it could find her guilty. Defendant's argument lacks merit.

Defendant, together with her husband, filed false 2002 and 2003 tax returns improperly seeking and obtaining refunds totaling $20,380.96. The May 2, 2007 Amended Judgment and Order of Permanent Injunction issued by United States District Judge Nancy Edmunds prohibited defendant from filing additional tax returns or other documents that relied on the assertions made in the book *Cracking*

the Code that the wages of persons who are not government employees or corporate officers are not taxable. The injunction also required defendant to file within 30 days amended 2002 and 2003 tax returns that correctly reported her income. The indictment in this case (Indictment, R. 3, Page ID # 7-11) charged defendant with committing contempt by violating both prongs this injunction.

As noted above, the elements of criminal contempt are (1) the existence of a clear and definite order, (2) the defendant's knowledge of that order, and (3) the defendant's willful disobedience of that order. *See In re Smothers*, 322 F.3d at 441-42; *Strickland*, 899 F.2d 15, 1990 WL 33712 at *2. The district court instructed the jury using Sixth Circuit Pattern Criminal Jury Instruction 8.03B. In relevant part, the instruction stated:

> Your verdict, ladies and gentleman, whether it is guilty or not, must be unanimous. . . . The Indictment accuses the Defendant of committing the crime of Contempt in more than one possible way. The first is that she filed a 2008 U.S. Individual Income Tax Return for single and joint filers with no dependents, Form 1040-EZ which falsely reported that she earned zero wages in 2008. The second is that she failed to file with the IRS amended U.S. Individual Tax Returns for 2002 and 2003. The Government does not have to prove both of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all 12 of you must agree that at least one of these has been proved. However, all of you need not agree that the same one has been proved.

(Trial Transcript, Vol. 5 at 98-99, R. 108, Page ID # 1773-74.) This instruction and the district court's decision to give it were entirely proper.

A jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817 (1999). The jury must unanimously agree that each of the elements of a crime has been proven, but unanimity as to the "means" or "brute facts" constituting an element is typically not required. *Id*. at 817-19; *see also United States v. Eaton*, 784 F.3d 298, 308 (6th Cir. 2015). A specific unanimity instruction is not required, even where an indictment count provides multiple factual bases upon which a conviction could rest, unless: "(1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity." *United States v. Damra*, 621 F.3d 474, 504-05 (6th Cir. 2010).

Defendant claims (Br. 35-39) that the alternative specifications in the indictment were contradictory or only marginally related to each other, but this argument is based on the incorrect assertion that the injunction was really two separate and distinct injunctions. In fact, as the district court properly found, the injunction was a single injunction that contained two directives: (1) file amended

tax returns for years 2002 and 2003; and (2) refrain from filing tax returns that contained false information similar to that in the original 2002 and 2003 returns. (Order Denying Release Pending Appeal, R. 141 at 3; Page ID # 3004.) The conduct that provided the basis for the injunction was defendant's filing false tax returns based on a frivolous theory. The two prongs of the injunction were the means by which Judge Edmunds sought to correct and remedy this specific underlying behavior; they were neither contradictory nor only marginally related. Indeed, the injunction simply required defendant to comply with tax law by filing accurate returns instead of frivolous documents. And the indictment charged defendant with violating the single injunction in two ways. A specific unanimity instruction was not required. *See Damra*, 621 F.3d at 504-05; *see also United States v. Helmsley*, 941 F.2d 71, 93 (2d Cir. 1991) (unanimity instruction not required regarding false statements on tax forms). The district court correctly determined that "[t]he manners in which the Government alleged Hendrickson committed criminal contempt were not contradictory and were related to each other." (Order Denying Release Pending Appeal, R. 141 at 4; Page ID # 3005.)

Defendant cites (Br. 35-37) *United States v. Miller*, 734 F.3d 530 (6th Cir. 2013), and *United States v. Schmeltz*, 667 F.3d 685 (6th Cir. 2011), in support of her claim that the acts charged in the indictment were only marginally related to each other. These cases do not help her. The *Miller* Court held that multiple

documents containing iterations of the same false statement and presented in connection with a single loan closing did not require a specific unanimity instruction. 734 F.3d at 539. And the *Schmeltz* Court held that a specific unanimity instruction was not required where the defendant omitted three material facts from a single report. 667 F.3d at 688. Here, defendant's two violations of the injunction – an injunction intended to prevent and rectify the filing of a single type of false claim – also did not require a specific unanimity instruction. Moreover, and contrary to *Miller* and *Schmeltz*, this was a straightforward contempt prosecution involving a single count. It therefore presents an even weaker basis for a specific unanimity instruction than in those cases – cases in which this Court notably rejected the need for such an instruction.[7]

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[7] We note that defendant does not point in her brief to a single case in which a specific unanimity instruction has been required. Cases in which a specific unanimity instruction has been found to be necessary are very different from this case. *See, e.g., United States v. Johnson*, 219 F.3d 349, 353 (4th Cir. 2000) (jury must be unanimous as to series of violations that make up elements of Continuing Criminal Enterprise statute, but finding error did not "affect the fairness . . . of [the] judicial proceedings"); *United States v. Cauble*, 706 F.2d 1322, 1345 (5th Cir. 1983) ("better practice" for district court to instruct jury that it must be unanimous as to RICO predicates). In *United States v. Duncan*, 850 F.2d 1104, 1110-15 (6th Cir. 1988), *abrogated by Schad v. Arizona*, 501 U.S. 624, 634-35 (1991), the defendant was charged with filing a false return which was false as to two distinct and unrelated items: (1) reporting $115,000 in ordinary income as a capital gain, and (2) claiming a false $8,800 interest deduction. This Court required a specific unanimity instruction because the false items were "conceptually distinct" with "discrete facts requiring separate proof" and that complexity could lead to jury confusion. 850 F.2d at 1111-13. At any rate, *Duncan's* "conceptual groupings"

(continued…)

Furthermore, even if the district court erred, such error would be reviewed for harmlessness. *United States v. Tragas*, 727 F.3d 610, 617 (6th Cir. 2013). The court below found that "the verdict is supported by substantial and competent evidence." (Order, R. 112 at 8; Page ID # 2244.) Indeed, defendant did not even contest the underlying acts that formed the basis for the contempt charge, instead primarily arguing that she did not intend to violate the injunction or, at least, that she acted under a good faith belief that her conduct complied with the injunction. Given the overwhelming evidence that defendant's conduct violated both prongs of the injunction, even if the district court erred, the failure to instruct the jury on unanimity of the means was harmless, as that instruction was not relevant to defendant's central good faith defense (*see* Br. 47).

(…continued)

analysis that led it to find that a unanimity instruction was required was abrogated by the Supreme Court in *Schad*. *See United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992) (recognizing abrogation of *Duncan's* unanimity analysis).

III

Standby Counsel's Failure to Ask Certain Questions Did Not Deny Defendant Her Sixth Amendment Right to Self-Representation

Standard of Review

When reviewing an alleged denial of the Sixth Amendment right to self-representation, this Court reviews for clear error the district court's factual findings and reviews *de novo* the district court's legal conclusions. *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004); *United States v. Cope*, 312 F.3d 757, 772 (6th Cir. 2002). A denial of the Sixth Amendment right to self-representation is a structural error. *See Johnson v. United States*, 520 U.S. 461, 466-467 (1997). When no contemporaneous objection is made, this court reviews for plain error. *United States v. Lopez-Medina*, 461 F.3d 724, 746 (6th Cir. 2006). Although a defendant generally need not show that a structural error caused her prejudice in order to warrant reversal for plain error, a defendant must nevertheless demonstrate that the error "seriously affected the fairness, integrity, or public reputation of the proceedings." *United States v. Marcus*, 560 U.S. 258, 267 (2010); *United States v. Lawrence*, 735 F.3d 385, 403 (6th Cir. 2013).

Argument

Defendant incorrectly asserts (Br. 39-47) that she was denied her Sixth Amendment right to self-representation because her standby counsel, Andrew Wise, failed to ask defendant certain questions during his direct examination of

her. The questions that defendant contends went wrongly unasked concerned defendant's interpretation of legal cases she allegedly relied on to support her claimed good faith belief that she did not willfully violate the injunction. (*See* Br. 43-44.)

A criminal defendant's right to self-representation is violated when, "over the defendant's objection," standby counsel makes or substantially interferes with significant tactical decisions, speaks instead of the defendant on matters of importance, or controls the questioning of witnesses. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) (unsolicited participation of standby counsel did not violate defendant's Sixth Amendment right to self-representation). However, "a *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably." *Id*. at 182. "Once a pro se defendant invites or agrees to any substantial participation by [standby] counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." *Id*. at 183. Thus, "[a] defendant cannot seemingly acquiesce in [her] attorney's defense and after the trial has resulted adversely to [her] obtain a new trial" because her Sixth Amendment right were violated. *Gambill v. United States*, 276 F.2d 180, 181 (6th Cir. 1960).

Here, the district court concluded that defendant acquiesced in Wise's decision to omit the particular questions about which she now complains. The district court found that defendant failed to object to Wise's conduct during trial. (*See* Order Denying Release Pending Appeal, R.141 at 4-5; Page ID # 3005-06.) These factual findings are not erroneous. And they undermine defendant's claim that she was denied her Sixth Amendment right to self-representation.

Defendant originally claimed below that she "quietly turned to the Court and asked to speak with standby counsel" when counsel did not ask the questions defendant had proposed; as the district court correctly noted however, nothing in the record supported this assertion. (*Id.*, R. 141 at 4; Page ID # 3005.) In fact, the district court found that "Hendrickson never attempted to inform the Court that standby counsel omitted questions until after a jury lawfully convicted her." (*Id.*; *see also* Order Denying New Trial, R. 112 at 7; Page ID # 2243 ("It may be the case that this objection is waived because [defendant] did not object during trial."); *and* Order Denying Reconsideration, R. 118 at 3; Page ID # 2474 ("[T]hese questions should have been brought to the Court's attention when the omission occurred.")). And the district court's finding is supported by the trial transcript, which shows that at the conclusion of defendant's direct testimony, a sidebar conference was held, during which defendant did not mention the supposedly omitted questions. (Trial Transcript Vol. 5 at 103, R. 108; Page ID # 1778.)

In her brief to this Court, defendant does not repeat her assertion that she made any attempt to bring the matter to the district court's attention during her testimony or at any time prior to the jury's verdict, instead pointing to her Motion for New Trial and Motion for Reconsideration. (*See* Br. 42.) This failure is an implicit admission that defendant acquiesced in standby counsel's omission of the questions and only raised this issue after the fact because the jury convicted her. *See Gambill*, 276 F.2d at 181. While standby counsel lodged an affidavit in the district court stating (*see* Br. 43) that defendant expressed concern to him during trial regarding the questions not being asked, counsel does not state that defendant expressed any desire to reopen her testimony or that she opposed his suggestion that she cover the matter in her closing argument if she still so desired. (Statement of Wise, R. 137, Ex. 3 at 2; Page ID # 2991.) Thus, except for defendant's post hoc, unsupported claims, there is simply no factual basis in the record to support defendant's argument that her right to self-representation was infringed. Instead, the evidence supports only a finding that defendant acquiesced to standby counsel's decision to omit the questions. In any event, the district court factual findings in reaching this conclusion were not clearly erroneous.[8] *Cromer*, 389 F.3d at 679; *Cope*, 312 F.3d at 772.

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[8] We note that defendant did not object to the procedure whereby standby
(continued…)

Defendant also fails to show that this single incident constitutes substantial interference with a significant tactical decision or the usurping of her right to speak on a matter of importance. As a result, she cannot establish that there was a structural denial of her Sixth Amendment right to self-representation. *See McKaskle*, 465 U.S. at 178. Contrary to her suggestion (Br. 46-47), defendant was permitted to discuss her reliance on the First Amendment during her closing argument: in arguing that she should be acquitted, defendant referenced her belief "that the Supreme Court is right when it holds in repeated rulings over the centuries that no one may be forced or told what to say by the Government." (*See, e.g.*, Trial Transcript, Vol. 5 at 78, R. 108, Page ID # 1753.) Moreover, during her trial testimony, defendant discussed case law and statutes, and her interpretation of legal precedent. (*See, e.g.*, Trial Transcript, Vol. 4 at 63, 87, 101-03, R. 107, Page ID # 1615, 1639, 1653-55; Trial Transcript, Vol. 5 at 41, R. 108, Page ID # 1716.) Indeed, essentially all of defendant's testimony during the trial, as well as her closing argument, was aimed at establishing her asserted good faith belief that she complied with the injunction and did not willfully violate it. Thus, even if defendant did not acquiesce to standby counsel's omission of several questions,

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counsel asked her questions while she took the stand to testify. (*See* Trial Transcript, Vol. 4 at 45-47, R. 107, Page ID # 1597-99.)

these few unasked questions do not amount to a "structural" denial of the defendant's Sixth Amendment right to self-representation. *See McKaskle*, 465 U.S. at 177-78 ("the primary focus must be whether the defendant had a fair chance to present [her] case in [her] own way").

The district court found that the "presentation of the cases that supposedly furthered her First Amendment argument would be cumulative" of evidence presented during her testimony and through other witnesses. (Order Denying New Trial, R. 112 at 8; Page ID # 2244.) The court also found that "[t]he jury heard [defendant's] First Amendment reliance throughout the trial and still found her guilty." *Id*. Certainly any failure on the part of standby counsel to ask additional questions concerning defendant's anti-tax beliefs did not rise to the level of a "structural error" – a "very limited class of errors" that affect the entire "framework" within which the trial proceeds. *Johnson*, 520 U.S. at 468 (internal quotations omitted).

Finally, even if some infringement on defendant's right to self-representation did occur, reversal is only warranted if the error "seriously affects the fairness, integrity, or public reputation of the proceedings," because defendant failed to timely object to the alleged error. *Marcus*, 560 U.S. at 262, 267; *Lawrence*, 735 F.3d at 403; *see United States v. Olano*, 507 U.S. 725, 731-737 (1993). Here, defendant's trial consisted of more than three full trial days of

testimony and evidence regarding her violations of a straightforward district court injunction and the small set of documents defendant acknowledged sending to the IRS in obvious contravention of that injunction. Defendant herself testified for nearly a full day. (*See* Trial Transcript, Vol. 4 at 46-122; R. 107, Page ID # 1598-1694; Trial Transcript, Vol. 5 at 5-45; R. 108, Page ID # 1680-1720.) In addition, defendant presented her claimed views regarding the validity of tax laws during a closing argument lasting almost an hour. (Trial Transcript, Vol. 5 at 63-81; R. 108, Page ID # 1738-1756.) The jury was able to fully review the evidence and evaluate defendant's claimed beliefs. *See Johnson*, 520 U.S. at 467 ("in most circumstances, an error that does not affect the jury's verdict does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process"). Thus, defendant cannot reasonably claim that she did not receive a fair trial or that standby counsel's failure to ask certain additional questions regarding her alleged beliefs "impugned the fairness, integrity, or public reputation of the proceedings." *Marcus*, 560 U.S. at 262, 266-67 ("tiny risk" that jury would convict on small amount of inadmissible testimony "unlikely to cast serious doubt on fairness, integrity, or public reputation of judicial system"); *Lawrence*, 735 F.3d at 403 (failure to provide required jury-nondiscrimination certification, even if a structural error, did not affect the integrity of the proceedings; reversal not warranted). In

short, defendant's Sixth Amendment rights were not violated, and she received a fair trial.

IV

The District Court Properly Calculated the Tax Loss Under the Sentencing Guidelines

Standard of Review

This Court reviews a district court's legal conclusions concerning application of the Sentencing Guidelines de novo and related factual findings for clear error. *United States v. Kilgore*, 749 F.3d 463, 464 n.3 (6th Cir. 2014). A district court's loss calculation is reviewed for clear error, "meaning that a defendant must show that the calculation was not only inexact but outside the universe of acceptable computations." *United States v. Martinez*, 588 F.3d 301, 326 (6th Cir. 2009).

Argument

Defendant incorrectly argues (Br. 48-59) that the district court misapplied the guidelines and miscalculated the tax loss associated with her conduct. In fact, the district court did not commit reversible error. The district court correctly found that the loss amount fixed in the injunction was the loss amount for her contemptuous refusal to comply with the injunction.

Criminal contempt does not have its own sentencing guideline; instead, the sentencing court is instructed to apply the guideline for the most analogous offense.

U.S.S.G. § 2X5.1; *see United States v. Allmon*, 594 F.3d 981, 987 (8th Cir. 2010) ("we give due deference to the court's fact-bound selection of the most analogous guideline"). Defendant's offense involved two types of conduct: failing to file correct amended returns and filing false returns, both of which directly flowed from her failure to comply with a valid injunction requiring her to amend the false 2002 and 2003 returns she had previously filed and barring her from filing future false returns seeking fraudulent refunds. Based on defendant's specific conduct, the district court determined that the most analogous offense was failing to file tax returns under 26 U.S.C. § 7203, reasoning that defendant had failed to file amended returns for 2002 and 2003 – as she had been ordered to by the injunction – to correct the false returns through which she had fraudulently obtained refunds. (Sentencing Transcript, R. 133 at 21, Page ID # 2908). The sentencing guideline for both filing a false return and failing to file a tax return is U.S.S.G. § 2T1.1. That Section provides that the base offense level is the level provided in the Tax Table (Section 2T4.1) that corresponds to the tax loss.

Section 2T1.1(c) provides various methods for determining the tax loss. The first application note instructs the sentencing court:

> In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably

> calculate the loss that would have resulted had the offense been successfully completed.

Furthermore, Application Note 2 provides that, "in determining the total tax loss attributable to the offense . . . all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." *See also* U.S.S.G. § 1B1.3(a)(I)(A) (authorizing a court to consider all relevant conduct, which includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."). Tax loss includes "the amount of the loss that defendant intended to inflict, not the actual amount of the government's loss." *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996).

At sentencing, Judge Roberts found that the tax loss attributable to defendant was $20,380.96, which was the total amount of the fraudulent refunds that defendant and her husband obtained from the IRS by filing false 2002 and 2003 tax returns.[9] (Sentencing Transcript, R. 133 at 16-25, Page ID # 2902-2911). In accordance with the admonition in application note 1 to Section 2T1.1(c), the court, in determining that the tax loss was $20,380.96, looked to Section 2T1.1(c)(4) of

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[9] In issuing the May 2007 permanent injunction, Judge Edmunds found that defendant and her husband were "jointly indebted" to the government in that amount. (Amended Judgment and Order of Permanent Injunction, No. 06-cv-11753 (E.D. Mich) R. 34 at 1 (*see* G.Ex. 15) (available at 2007 WL 2385071).)

the Guidelines, which specifically provides that in cases involving improperly claimed refunds, "the tax loss is the amount of the claimed refund to which the claimant was not entitled." Then, recognizing that the injunction included Judge Edmunds's finding that defendant and her husband filed false returns claiming improper refunds and were indebted to the IRS in the amount of $20,380.96 as a result, the sentencing court found that the tax loss was that amount, which resulted in a base offense level of 12.

Defendant asserts (Br. 56-57) that it was error to use Section 2T1.1(c)(4), insisting instead that the district court should have used Section 2T1.1(c)(2), which provides that "if the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay." But the sentencing court was not, as defendant suggests, constrained to choose between the methods provided in Sections 2T1.1(c)(2) and 2T1.1(c)(4). Instead, the court was free to look to any method that fit the facts of the case. *Allmon*, 594 F.3d at 987. Indeed, as noted above, Application Note 1 to Section 2T1.1 *requires* the court to use as many methods as are necessary given the facts of the case.

The sentencing court did not erroneously calculate the sentencing guidelines applicable to defendant's conduct. First, defendant ignores that this is not a simple failure to file case. This is a contempt conviction stemming from defendant's violation of an injunction, issued as part of a civil action that had been initiated to

recover fraudulent refunds defendant had obtained in the amount of $20,380.96 and to enjoin defendant from filing false tax returns in the future. As instructed by Application Note 1 to Section 2T1.1, the district court properly used "as many methods set forth in subsection (c) and [the] commentary as were necessary given the circumstances of the particular case." In this case, defendant's refusal to file correct amended tax returns admitting that she wrongfully claimed refunds in excess of $20,000 was a direct and contemptuous violation of the injunction. Thus, defendant's assertion (Br. 49) that the $20,380.96 refund she obtained is "unrelated" to her contempt conviction strains credulity.

Moreover, applying Section 2T1.1(c)(2) would have resulted in the same tax loss figure. The note to 2T1.1(c)(2) provides that "[i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income . . . less any tax withheld or otherwise paid, *unless a more accurate determination of the tax loss can be made.*" (Emphasis added.). Here, the sentencing court found that the findings of the district court in the civil injunction case provided the most accurate determination of intended tax loss. And the injunction explicitly determined that defendant's conduct resulted in an intended tax loss of $20,380.96. (Permanent Injunction, No. 06-cv-11753, R. 34 at 1-2 (available at 2007 WL 2385071).) Thus, it was entirely appropriate for the sentencing court to use this figure to determine defendant's guideline sentence.

Finally, it is irrelevant that defendant owed $20,380.96 jointly with her husband. The issue for the sentencing court is not how much tax a defendant owes individually, but how much tax loss is caused or intended to be caused by a defendant's conduct. *See United States v. Thompson*, 518 F.3d 832, 867 (10th Cir. 2008); *United States v. Bishop*, 291 F.3d 1100, 1115 (9th Cir. 2002) ("the total tax loss, including the loss through the spouses, is attributable to each defendant. Tax loss is determined from the reasonably foreseeable conduct of all co-actors, not just the defendant's own conduct." (citation omitted)); *see also United States v. Benson*, 79 Fed. Appx. 813, 826 (6th Cir. 2003) (loss for joint activity is total amount, not the separate share for each actor). Defendant, together with her husband, filed two false tax returns that improperly sought and obtained refunds to which they were not entitled. The district court properly considered the total amount sought in determining defendant's sentence.

The district court's calculation of tax loss was based on a plain reading of Section 2T1.1 and its accompanying Notes. The district court correctly found that the amount fixed in the injunction was the loss amount for her contemptuous refusal to comply with the injunction. Defendant's claim that the district court abused its discretion in its application of the guidelines and in its calculation of the loss amount lacks merit. Defendant's sentence should be affirmed.

CONCLUSION

For the reasons stated above, the district court's judgment should be affirmed.

Respectfully submitted,

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DATED: September 18, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,372 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and has been prepared in a 14-point, proportionally spaced typeface (Times New Roman) using Microsoft Word 2010.

s/ Mark S. Determan
MARK S. DETERMAN
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Dated: September 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Mark S. Determan
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Designation of Relevant District Court Documents

Pursuant to Sixth Circuit Rule 30(g), appellee hereby designates the following items from the district court record:

Description of Entry	**Record Entry No.**	**Page ID #**
Indictment	3	7-10
Judgment	126	2696-98
Notice of Appeal	127	2699-2700
Jury Verdict (7/25/2014)	101	1172
Trial Transcript Vol. 2 (7/22/2014) & Voir Dire (Sealed)	105	1330-1441
Trial Transcript Vol. 3 (7/23/2014)	106	1442-1552
Trial Transcript Vol. 4 (7/24/2014)	107	1553-1674
Trial Transcript Vol. 5 (7/25/2014)	108	1676-1782
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