IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 13-cr-20371
	:	Honorable Victoria A. Roberts
DOREEN HENDRICKSON,	:	
	:	
Defendant.	:	

DOREEN HENDRICKSON'S RESPONSE TO THE GOVERNMENT'S "TRIAL BRIEF"

The government has filed (apparently in disregard of the court's scheduling order, and in any event without seeking Mrs. Hendrickson's concurrence) a "Trial Brief" in part urging the Court to withhold from consideration by Mrs. Hendrickson's jury two elements of the offense with which she is charged. Unable to locate any actual support for its law-defying request, the government resorts to misrepresentation of a 6th Circuit precedent in an effort to suggest otherwise. Tellingly, that misrepresented case itself actually stands against the government's position, as does overwhelming authority from every quarter. Here then, is Mrs. Hendrickson's Response to the government's Brief.

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STATEMENT OF ISSUES

The government has asked the Court to relieve it of two of its burdens of proof-- that of proving, and having Mrs. Hendrickson's jury pass on, the explicit statutory element of the "lawfulness" of the orders she is accused of criminally resisting and that of proving, and having Mrs. Hendrickson's jury pass on, "willfulness". The government's request is supported by no authority whatever-- in fact, the government resorted to misrepresentation of a 6th Circuit ruling in a vain and mendacious effort to conceal this lack of actual support. This request is effectively for a directed conviction on two elements of the charged offense, and Mrs. Hendrickson strongly opposes it and asks the Court to reject it, at the very least.

CONTROLLING AUTHORITY

The issues addressed here are most closely controlled by the Fifth and Sixth Amendments to the United States Constitution, and 18 U.S.C. § 401(3).

Argument

The government has filed a "Trial Brief" in which it argues that "lawfulness"-- an explicit statutory element by which the offense charged in this case is defined-- should be kept from the consideration and determination of Mrs. Hendrickson's jury in the trial scheduled to begin on October 30th. The government's object is apparently to evade the full measure of its burden of proof, and to deny Mrs. Hendrickson the full protection of a trial by jury. In addition to this "trial brief" argument, in its Proposed Jury Instructions filed with the Court October 24th the government likewise omits "lawful" from its proposed "Definition of the Crime" language, and even asks, in its proposed "Contempt-Defense" instruction, that Mrs. Hendrickson's jury be instructed that *her own* perception of the lawfulness of the orders involved in this case be outside the jury's consideration, thus adding an egregious attack on the element of "willfulness," and making for an overall governmental effort to evade not just one but *two* of its elemental burdens of proof.

The government has no authority to support its argument for the exclusion of "lawfulness" from the jury's consideration in either respect. Indeed, the government is so bereft of authority for this manifestly wrong position that it misrepresents a Sixth Circuit ruling in an effort to pretend otherwise. In its brief the government declares:

"In order to prove that the defendant violated § 401(3), the government must prove beyond a reasonable doubt the following elements:

1. The defendant resisted or disobeyed a court's writ, process, order, rule, decree or command;

2. The act of disobedience or resistance must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation."

See In re Smothers, 322 F.3d 438, 441-42 (6th Cir. 2003) (internal citations omitted)."

However, left unsaid in this representation and apparently meant to be overlooked by the Court to the government's benefit and Mrs. Hendrickson's harm is the following explicit acknowledgement by the *Smothers* court that "lawfulness" of an order IS VERY MUCH a statutory element needing to be proven before disobedience or resistance can qualify as criminal contempt under 18 U.S.C. § 401(3):

> "The law governing the court's ability to punish Smothers's conduct is 18 U.S.C. § 401(3). This section grants federal courts the power to punish when there is "disobedience or resistance to its **lawful** writ, process, order, rule, decree or command." ... "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their **lawful** mandates." *Chambers,* 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (quoting *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L.Ed. 242 (1821))"

In re Smothers, 322 F3d 438 (6th Cir. 2003) (emphasis added).

Plainly, *Smothers* not only doesn't serve the government's purpose-- it stands against that purpose. That the government resorts to it is evidence of the fact that with all its resources, the government is unable to marshal any actual support for its evil effort to deny Mrs. Hendrickson the full protection of her jury and due process by fully carrying its burdens and having the case fairly decided where such decisions should be made. (The government makes the same misrepresentation of *Smothers* in its Proposed Jury Instructions, along with a similar misrepresentation of *United States v. Strickland*, No. 89-3815, (6th. Cir. 1990), to the same effect, omitting from its excerpt of the ruling this plain invocation of the "lawful" element: "...the court **properly** ordered him to answer the questions posed in the grand jury proceeding." (emphasis added).)

Further, not only does *Smothers* stand against the government's argument and desires, but massive authority stands with the Sixth Circuit in that ruling. First of all, of course, the statute itself is clear, criminalizing only,

> *"Disobedience or resistance to its **lawful** writ, process, order, rule, decree, or command,"*

18 U.S.C. § 401(3) (emphasis added).

Then, in addition to the Sixth Circuit in *Smothers* and the Supreme Court in *Chambers* and *Anderson* cited and quoted therein, and in *Strickland*, we can look to *United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir. 1987) and cases cited:

> "... Moore has been punished...based on a determination that he was disobedient to **a <u>lawful</u> order** of the district court... **The essential elements of the criminal contempt...are that the court entered a <u>lawful</u> order of reasonable specificity, Moore violated it, and the violation was <u>wilful</u>. Guilt may be determined and punishment imposed only if each of these elements has been proved beyond a reasonable doubt.** Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 266 U.S. 42, 66, 45 S.Ct. 18, 20, 69 L.Ed. 162 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444, 31 S.Ct. 492, 499, 55 L.Ed. 797 (1911); In re Stewart, 571 F.2d 958 (5th Cir.1978)."

United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987) (emphasis added).

> The D.C. Circuit says the same in *In re Holloway:*
>
> "The elements of contempt under § 401(3) are straightforward. First, the alleged contemnor must "[d]isobe[y] or resist[] ... **[the] <u>lawful</u>** writ, process, order, rule, decree, or command" of the court. 18 U.S.C. § 401(3)."

In re Holloway, 995 F.2d 1080, 1082 n.1 (D.C. Cir. 1993) (emphasis added).

The 11th Circuit is again crystal-clear in *United States v. Koblitz*:

> "A civil contempt order can only be upheld if it is supported by clear and convincing evidence that **(1) the underlying order allegedly violated <u>was valid and lawful</u>**, *Smith v. Sullivan,* 611 F.2d 1050, 1052-54 (5th Cir. 1980); *ITT Community Development Corp. v. Barton,* 569 F.2d 1351, 1356 (5th Cir.1978)"

United States v. Koblitz, 803 F.2d 1523, 1527 (11th Cir. 1986) (emphasis added).

"Lawfulness" is plainly an element of the offense in this case that the government must attempt to prove and that must be decided upon by Mrs. Hendrickson's jury. *United States v. Gaudin*, 515 U.S. 506 (1995) ("The prosecution's failure to provide minimal evidence of materiality, like its failure to provide minimal evidence of any other element, of course raises a question of

“law” that warrants dismissal."); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (“The prosecution bears the burden of proving all ... of the facts necessary to establish each of th[e] elements.”).

Beyond the authorities uniformly recognizing "lawfulness" as an explicit element of the offense charged in this case, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994). Since, as the Sixth Circuit points out in *Hudson v. Coleman*, 347 F.3d 138, 141 (6th Cir. 2003): “[I]t is well established that federal courts are courts of limited jurisdiction, possessing only that power authorized by the Constitution and statute.”, therefore a punishment meted out by this court for resisting orders not proven by the government and determined by Mrs. Hendrickson's jury to be lawful would be an exercise of jurisdiction not established as being within the limited scope of what is authorized by Constitution and statute.

Further, it is *the jury's* unquestionable authority and proper role to determine the lawfulness of government action against any defendant, even where "lawful" is not an explicit, declared qualifying element of an offense, as it is in this case. As "Federalist" author and first United States Supreme Court Chief Justice, John Jay declares to one of the rare juries convened to deliberate in a Supreme Court case:

> “It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it

> is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, **you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy**. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the court are the best judges of the law. But still **both objects** are lawfully within your power of decision."

Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794) (emphasis added).

In *Sparf and Hansen v. United States*, 156 U.S. 51 (1895), Justices Gray and Shiras said the same and with references particularly apt to Mrs. Hendrickson's case:

> "The people themselves have it in their power effectually to resist usurpation, [the wrongful seizure of authority] without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation." Elliot's Debates, 94; 2 Bancroft's History of the Constitution, p.267."

Sparf and Hansen v. United States, 156 U.S. 51 (1895) (Dissenting Opinion: Gray, Shiras, JJ., 144).

The government offers no legal citation or case support for its notion that it may drop off from the list of "elements" of the crime the fact that Congress included the word "lawful" in the law holding someone in contempt of a court order. This is because there *is* no such support, nor could be, since the obvious

implication of including this word is that Congress did not deem it to be a crime to resist an unlawful order.

The Department of Justice may not rewrite the statute to suit its whims. The United States Supreme Court has stated that it is Congress that determines the elements of a federal crime:

> "Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts. In federal prosecutions, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" alleging all the elements of the crime. U. S. Const., Amdt. 5; see Hamling v. United States, 418 U. S. 87, 117 (1974). "In all criminal prosecutions," state and federal, "the accused shall enjoy the right to ... trial ... by an impartial jury," U. S. Const., Amdt. 6; see Duncan v. Louisiana, 391 U. S. 145, 149 (1968), at which the government must prove each element beyond a reasonable doubt, see In re Winship, 397 U. S. 358, 364 (1970)."

Harris v. United States, 536 U.S. 545 (2002).

See also this detailed and thoroughly supported analysis from *Criminal Law Handbook*, Vol. 48 No. 3, pp. 556-557 (Reuters, 2012):

> "First, all federal criminal laws are creatures of statute; there are no federal common law crimes. [FN2] Second, each federal statute is comprised of elements, which, by definition, are what the government must prove beyond a reasonable doubt. [FN3] Juries are instructed in each criminal case that they must find each element of the crime, unanimously, beyond a reasonable doubt. [FN4] If they do so, then, leaving aside affirmative defenses, they must find the defendant guilty. [FN5] Third, to determine what the elements of a crime are, the court must look to the statute itself, for Congress defines crimes, and Congress therefore determines the elements that comprise each crime. [FN6].
>
> "[Footnotes: [2] See, e.g., U.S. v. Bass, 404 U.S. 336, 348, 92 S. Ct. 515, 30

L. Ed. 2d 488 (1971); U.S. v. Hudson, 11 U.S. 32, 3 L. Ed. 259, 1812 WL 1524 (1812).

"[3] See, e.g., Richardson v. U.S., 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999); Schad v. Arizona, 501 U.S. 624, 641–42, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion); Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

"[4] See, e.g., U.S. v. Edmonds, 52 F.3d 1236, 1241 (3d Cir. 1995), reh'g en banc granted, opinion vacated on other grounds, (93-1890) (June 29, 1995) and on reh'g en banc, 80 F.3d 810 (3d Cir. 1996).

"[5] See, e.g., U.S. v. Birbal, 62 F.3d 456, 462–63, 42 Fed. R. Evid. Serv. 1256 (2d Cir. 1995).

"[6] See, e.g., U.S. v. Booker, 543 U.S. 220, 330, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (Breyer, J., dissenting); United States v. Edmonds, 80 F.3d at 817 n.7."

It is simply and plainly improper for the government to urge the court in its trial brief that, in considering the "elements" of the crime, the court may ignore the word "lawful" placed there by Congress:

> "An indictment must set forth each element of the crime that it charges. Hamling v. United States, [418 U.S. 87] at 117 [1974]. ... See Staples v. United States , 511 U.S. 600, 604 (1994) (definition of a criminal offense entrusted to the legislature, " 'particularly in the case of federal crimes, which are solely creatures of statute' ") (quoting Liparota v. United States , 471 U.S. 419, 424 (1985)). **We therefore look to the statute before us and ask what Congress intended.... we look to the statute's language,** structure, subject matter, context, and history --factors that typically help courts determine a statute's objectives and thereby illuminate its text. See, e.g. , United States v. Wells , 519 U. S. --, -(1997) (slip op., at 10-11); Garrett v. United States , 471 U.S. 773, 779 (1985)."

Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (emphasis added);

> "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In re Winship, 397 U.S. 358, 364 (1970).

Since the substance of what the jury must find is prescribed by the Due Process Clause, it is not harmless error, but rather a structural defect, to keep from the jury's view an essential element of the crime. See *Sullivan v. Louisiana,* 508 U.S. 275, 281-282 (1993) *, United States v. Gaudin*, 115 S. Ct. 2310 (1995).

Conclusion and Motion to Dismiss

Mrs. Hendrickson respectfully urges this Honorable Court to reject the government's effort to evade its burdens of proof and deny her the full protections of trial by her jury, and further, moves the Court to dismiss this indictment in light of the government's implicit admission of its inability to carry its burdens and prove its case, and its having revealed its willingness to misrepresent precedent and mislead the Court in order to evade those burdens.

Respectfully submitted this 28th day of October, 2013,

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Doreen Hendrickson, in propria persona