

An Excerpt From Doreen's Draft Petition For En Banc Re-Hearing In The Sixth Circuit Court Of Appeals Concerning The Panel's Disgraceful Struggle To Evade The "Lawful" Element Of A Criminal Contempt Charge

2. Regarding the panel's decision upholding the jury instruction removing an element of the charged offense from the jury's consideration.

Beyond its conflicts with well-settled precedents and the plain words of the Constitution concerning the illegality of the orders involved in Mrs. Hendrickson's case, the panel's decision does violence to another critically-important area of law. The panel holds that an element of a criminal charge can be withheld from a jury's consideration and the government's burden of proof.

In both of Mrs. Hendrickson's trials¹ the government requested and received an instruction to 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." Mrs. Hendrickson strenuously objected to this instruction.

The panel excuses this unprecedented removal of the "lawful" element from trial by arguing that to let the jury consider the lawfulness of the orders would compromise the "collateral bar" doctrine:

"Hendrickson's position [that "lawful" is an element and must be proven to the jury] is at odds with the prevailing interpretation of § 401(3) and the longstanding collateral bar rule." (Slip Op. at 8)

¹ Mrs. Hendrickson's first trial, in which she was able to read to the jury Sixth Circuit and Supreme Court rulings on First Amendment rights, ended with a hung jury. The second, where her stand-by counsel usurped control of the questions she had prepared for herself and prevented her from reading those case, resulted in conviction.

That doctrine, the panel effectively argues, should shield all judicial orders from all challenges, and at any cost-- even the sacrifice of a defendant's right to have her jury determine whether the government has successfully proven that she has actually committed a crime.

"Lawful" is an *express* statutory element of the offense of criminal contempt:

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

18 U.S.C. 401(3) (emphasis added)

"Lawfulness" is thus an element of a contempt charge *by definition*, in the most classic and concrete sense of that expression.

Plainly, if Congress had meant for a judge's orders to be spared any challenge, and their lawfulness to not be a matter for the determination of a jury, it would not have put "lawful" in the contempt statute. But it DID put it in the statute, and for obviously good reasons.

The first of those good reasons is this: No one is under a legal duty to obey unlawful orders. Axiomatically, unlawful orders *have no force of law*, and it is not a crime to disobey them.

Thus, the lawfulness of the orders is the most basic element of a charge of criminal contempt, and that leads to the second very good reasons Congress expressly includes "lawful" as an element of criminal contempt: We have a jury requirement in the Constitution because courts have often been used as tools by corrupt governments,

issuing unlawful orders in furtherance of illegal government purposes. The jury is there to oversee the courts in this regard, among others.

Mrs. Hendrickson's is a perfect case study of why the Framers provided for juries, and why Congress expressly invokes their oversight in criminal contempt cases. Judge Nancy Edmunds issued illegal orders as requested by a corrupt executive department. Every court dealing with these orders has struggled to shield them from review. The jury is there, and "lawful" is specified, to protect Mrs. Hendrickson and any other defendant from this institutional abuse.

But the panel that heard Mrs. Hendrickson's appeal has elevated "collateral bar" above Congress, above the jury and above even the Constitution from which the federal courts derive all their authority. This is a logical and legal fallacy and embraced for no good purpose, since the only utility of removing "lawfulness" from a jury's consideration is to shield orders which cannot be proven lawful to the satisfaction of 12 American citizens. The panel's decision on this issue is obviously wrong.

Struggling to shore up its "collateral bar"-trumps-the-Sixth-Amendment argument, the panel continues on page 8 of its decision with the contention that "lawful" isn't even really an element of 18 U.S.C. § 401(3) anyway:

"This court has stated that the elements for criminal contempt under § 401(3) are that the defendant (1) had notice of a reasonably specific court order, (2) disobeyed it, and (3) acted with intent or willfulness in doing so."

The panel then cites to a handful of cases supposedly supporting this one-element-short description of criminal contempt. But of course, none of these cases actually say

what the panel suggests, and which it very carefully and very significantly puts as "stated", rather than "defined" or "held".

None of the cited cases say "lawfulness is not an element", or "lawfulness need not be proven to a jury in a trial for contempt" or anything like either of those things. Instead, the panel has simply found a few cases in which the issue of lawfulness never arose (or was taken as so fundamental and obvious as to need no mention), and so went unstated. The very fact that the panel attempts this absurd and mendacious deception reveals that it is at cross-purposes with the law.

When courts DO speak authoritatively of the elements of contempt "lawfulness" is invariably among them (all emphasis added):

"The essential elements of [] criminal contempt...are that the court entered a *lawful order* of reasonable specificity, [it was] violated [], and the violation was willful. Guilt may be determined and punishment imposed *only if each of these elements has been proved beyond a reasonable doubt*. (citations omitted)"

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

"...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... submission to their *lawful* mandates. (citations omitted)."

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

"A [] contempt order can only be upheld if it is supported by clear and convincing evidence that (1) *the underlying order allegedly violated was valid and lawful*. (citations omitted)"

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

"Lawful" IS an element of criminal contempt. The question of the lawfulness of the orders in this case was required to go to the jury to determine whether the government had carried its burden of proof on this element:

(4) The government must prove every element of the crime charged beyond a reasonable doubt.

Sixth Circuit Pattern Instruction 1.03

"The Sixth Circuit has approved the entire 1.03 instruction as correct."

United States v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006).

Saying otherwise, as the panel does, is in direct conflict with this Court's well-settled precedents, those of the Supreme Court, Congress, and the Sixth Amendment itself. Page-count limits on this petition prevent discussion, but the panel then goes on in its decision on this issue to also sacrifice *mens rea* on its voracious altar of collateral bar, which, as the panel sees it, will have no other gods before it.