UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA v. JAMES E. SNYDER	No. 16 CR 160 Judge Holly A. Brady

GOVERNMENT'S SUBMISSION REGARDING SCOPE OF REMAND AND LEADER/ORGANIZER ENHANCEMENT

The UNITED STATES OF AMERICA respectfully submits the following brief regarding the scope of remand and the applicability of the leader/organizer enhancement under Guideline § 3B1.1(c) pursuant to this Court's order (R. 672).

PROCEDURAL HISTORY

At his first trial, on February 14, 2019, defendant was convicted of felony violations of 18 U.S.C. § 666 (Count Three) and 26 U.S.C. § 7212 (Count Four) and acquitted of an additional count charging violation of 18 U.S.C. § 666 (Count One). R. 256. At his second trial in 2021, which focused only on Count Three, defendant was once again convicted by a jury. R. 508. At sentencing on the counts of conviction, the district court made findings on the applicable guidelines, including that the leader/organizer enhancement under Guideline § 3B1.1(c) applied to Count Four. Defendant appealed his convictions but did not appeal his sentence or the district court's findings of the applicable guideline range. *See* R. 569 (defendant's notice of appeal, stating "Mr. Snyder appeals from the jury's guilty verdicts in this case").

The Seventh Circuit affirmed the convictions as to both Counts Three and Four. *United States v. Snyder*, 71 F.4th 555 (7th Cir. 2023) ("*Snyder I*").

Defendant did not seek *certiorari* to the Supreme Court concerning his tax conviction (Count Four), but instead sought *certiorari* based on his § 666 conviction (Count Three). *See Snyder v. United States,* No. 21-2986, Aug. 3, 2023 (U.S.) (Snyder's petition for certiorari).

On June 26, 2024, the Supreme Court held that § 666 applies only to bribery, reversed the judgment of the Seventh Circuit, and remanded the case to the Seventh Circuit for further proceedings. *See Snyder v. United States*, 603 U.S. 1, 10-20 (2024). On remand, defendant sought dismissal of the § 666 count, and the government asked the court to vacate defendant's § 666 conviction and remand for a new trial limited to a bribery theory. *United States v. Snyder*, No. 21-2986, at R. 76 (7th Cir.). The Seventh Circuit determined that the evidence was sufficient to support a bribery conviction and held that "the evidence would support a finding of bribery here, beyond a reasonable doubt." *United States v. Snyder*, No. 21-2986, 2024 WL 4834037, at *2 (7th Cir. Nov. 20, 2024) ("*Snyder II*"). The Seventh Circuit remanded for a new trial, concluding that the Supreme Court's decision was "best understood as having found the jury instructions were erroneous because they permitted the jury to convict on a gratuity theory," which the Supreme Court had foreclosed. *Id.*

The government elected not to pursue a retrial on Count Three. R. 634. After significant motion practice, including defendant's attacks on his conviction under Count Four, sentencing is currently scheduled for March 10, 2026. R. 672.

ARGUMENT

I. THE SCOPE OF REMAND PRECLUDES RECONSIDERATION OF THE GUIDELINES CALCULATIONS, INCLUDING APPLICATION OF GUIDELINE § 3B1.1(C), BASED ON DEFENDANT'S WAIVER.

After defendant's initial sentencing hearing, defendant appealed his convictions but chose not to appeal the district court's guideline calculations or the sentence imposed. Defendant did not seek certiorari to the Supreme Court of the Seventh Circuit's rulings related to the tax count or sentencing and only defendant's § 666 count was reversed by the Supreme Court. *See Snyder v. United States,* No. 21-2986, Aug. 3, 2023 (U.S.) (Snyder's petition for certiorari); *Snyder II*, 2024 WL 4834037, at *1 (noting that the Supreme Court had "reversed Snyder's conviction under 18 U.S.C. § 666 . . ."). Thus, when the case was remanded by the Seventh Circuit, the scope of that remand was limited to a re-trial on the § 666 count "if the government [chose] to pursue it." *Id.* at *4.

Under 28 U.S.C. § 2106, a court of appeals may limit the scope of its remand order. The Seventh Circuit has held that: "[i]f [it] identif[ies] a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error." *United States v. Andrade*, 376 F. App'x 600, 602 (7th Cir. 2010) (internal quotation marks omitted) (discussing the "mandate rule" and finding the district court's denial of a motion to dismiss as outside the scope of a limited remand order proper).

As the Seventh Circuit has articulated, there are two limitations on the scope of a remand: first, waiver; and second, any issue determined by the Seventh Circuit on a first appeal. *See United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002).

These limitations foreclose defendant's challenges to the Guidelines calculation at his first sentencing.

Regarding waiver, "[a]ny issue that could have been but was not raised on appeal is waived and thus not remanded." *Id.* (citing *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) ("[P]arties cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal."); *see also Andrade*, 376 F. App'x at 602 ("[W]e have consistently held that new arguments, outside the scope of the plain language of a limited remand order, shall be treated as waived[.]").

Regarding direct appeal, the Seventh Circuit has foreclosed later challenges to guideline calculations when those issues were not raised during an initial appeal. In *United States v. Swanson*, 394 F.3d 520, 521 (7th Cir. 2005) ("*Swanson I*"), the defendant was convicted of wire fraud, money laundering, interstate transportation of stolen funds, and income tax evasion. At sentencing, the district court calculated restitution and forfeiture amounts. *Id.* at 528-30. On appeal, defendant raised several challenges but did not contest the district court's application of Guideline § 3B1.1. *United States v. Swanson*, 483 F.3d 509 (7th Cir. 2007) ("*Swanson II*"). Based on certain errors at sentencing – the application of the incorrect guidelines manual and failures in calculating loss, restitution, and forfeiture – the Seventh Circuit remanded the case for re-sentencing. *Swanson I*, 394 F.3d at 530. In doing so, the Seventh Circuit observed that the district court may need to reconsider the application of the

aggravating role enhancement based on the outcome of *United States v. Booker*, 543 U.S. 220 (2005), which was pending. *Swanson I*, 394 F.3d at 526 & n.1.

After a second appeal, the Seventh Circuit determined that because *Booker* did not change the court's role in applying an aggravating role enhancement at sentencing, "any factual dispute as to [the] application [of Guideline § 3B1.1] was beyond the scope of our remand." *Swanson II*, 483 F.3d at 515. Even though the district court considered the waived argument at re-sentencing, the Seventh Circuit decided "not [to] similarly indulge [the defendant's] argument on appeal." *Id.* Ultimately, the Seventh Circuit observed, even in the context of a case remanded for re-sentencing, that the defendant "waived this issue by failing to raise it during his first appeal." *Id.*

Defendant has similarly waived his Guidelines challenges here. Defendant could have appealed Judge Kennelly's calculation of the Guidelines and application of the organizer/leader enhancement pursuant to Guideline § 3B1.1(c). He chose not to. Defendant's knowing and voluntarily relinquishment of a known right, *United States v. Burns*, 843 F.3d 679, 685 (7th Cir. 2016), precludes this Court's reconsideration of the application of the enhancement because the issue is outside the scope of the Seventh Circuit's remand.

The scope of the remand and defendant's waiver preclude defendant from relitigating Judge Kennelly's finding that the total adjusted offense level as to the tax count was 20, because the defendant did not challenge any of the Guidelines calculations on direct appeal. Judge Kennelly's finding as to Guideline § 3B1.1(c), and

the other guideline enhancements, thus constitutes the "law of the case." *See, e.g., United States v. Wilson*, 344 F. App'x 259, 261 (7th Cir. 2009) ("[T]he 'law of the case doctrine" precludes a defendant from raising arguments at a re-sentencing that were not challenged on direct appeal, absent intervening legal authority, new evidence, or some other changed circumstances."); *United States v. Sumner*, 325 F.3d 884, 891-92 (7th Cir. 2003) (law of the case doctrine bars defendant from raising arguments at re-sentencing that he did not raise in first appeal, because "changes in litigation position on successive appeals are barred except where justified by intervening authority, new and previously undiscoverable evidence, or other changed circumstances").[1]

II. THE DISTRICT COURT PROPERLY APPLIED THE ORGANIZER/LEADER GUIDELINE ENHANCEMENT UNDER GUIDELINE § 3B1.1(C).

Even if the organizer/leader enhancement under Guideline § 3B1.1(c) was within the scope of the remand and was not waived, Judge Kennelly correctly ruled that defendant was a leader or organizer of criminal activity involving fewer than five people, and thus a two-level enhancement under Guideline § 3B1.1(c) applied.

A. Overview

Count Four charged defendant with engaging in a scheme to impede and obstruct the administration of the Internal Revenue Laws from January 2010 through April 2, 2013, relating to *both* defendant's business and personal tax liability. R. 1 at 13. The charge centered on defendant's efforts to lie and shield income, both individual and corporate, from the IRS from 2010 through 2013, even though the tax

[1] Defendant did not challenge this authority (R. 662 at 2), which was cited in the government's prior sentencing submission. R. 658 at 2. His argument is waived for this reason as well.

years at issue were 2007 to 2009. As alleged and proven at trial, defendant's scheme involved the use of an agent – Steve Dalton – to prepare falsified records to submit to defendant's accountant (Daniel Pickhart), which were in turn used in submissions to the IRS on behalf of defendant and his companies. Defendant managed and supervised Dalton as part of the scheme to obstruct and impede the IRS.

B. Background on Dalton

Dalton testified in the grand jury that he was a "friend" of Snyder's and performed paid consulting work for "First Financial Mortgage" (FFTM), defendant's company. R. 673, Exhibit B at 4. 6.[2] Dalton was also a "20 percent owner" and partner at FFTM until January 2008, while defendant was a 60 percent owner. *Id.* at 7-8. Starting in the fall of 2007, Dalton began to get more involved in the day-to-day activities of FFTM, including auditing the company's financials. *Id.* at 8, 21-22.

In later years, and at the same time defendant was endeavoring to hide his and his company's assets from the IRS, defendant paid Dalton to help with defendant's personal and business financial statements. R. 673, Exhibit B at 55-58. As discussed below, Dalton admitted in his grand jury testimony that he was trying to hide income from the IRS on defendant's behalf and that he had provided phony accounting figures to defendant's accountant (Pickhart) for the purpose of submitting this information to the IRS. *Id.* at 58-59.

[2] This Court can consider grand jury testimony at sentencing in making its preponderance findings. *See United States v. Norwood*, 982 F.3d 1032, 1059 n.38 (7th Cir. 2020).

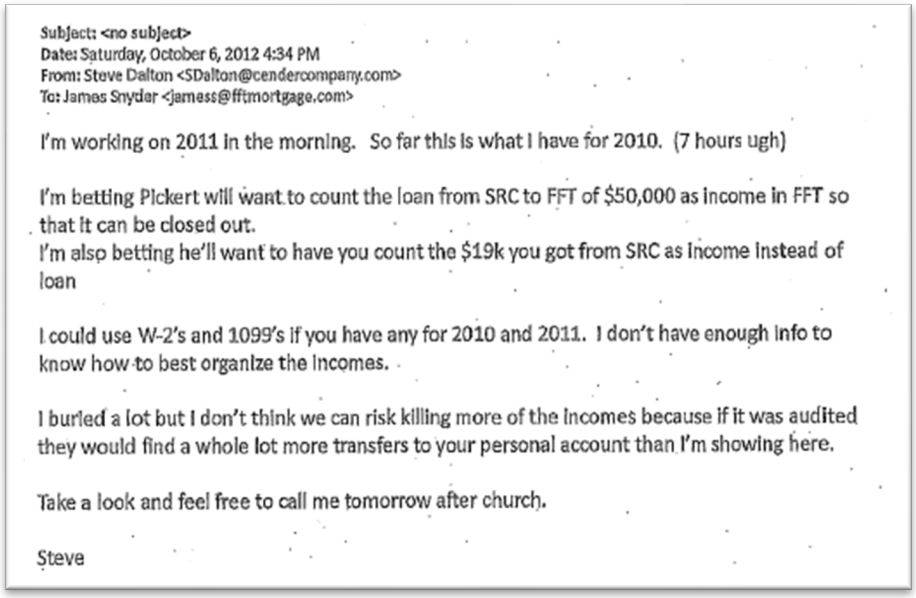
C. Dalton's Work for Defendant to Respond to the IRS

By 2011, defendant knew that the IRS was attempting to collect FFTM's payroll tax debt and had been since 2009. PSR ¶¶ 18, 2627. In August 2011, the IRS sent defendant a Notice of Intent to Levy regarding the unpaid payroll taxes stating its intent to seize defendant's personal assets. PSR ¶ 28. Part of the IRS's inquiry culminated in September 2013, when the IRS informed defendant that he was personally responsible for a $39,000 penalty for failure to pay the FFTM payroll taxes. PSR ¶ 30.

Between those notices from the IRS, in around October 2012, defendant was preparing to untimely file his individual income tax returns for 2010 and 2011 and corporate income tax returns for FFTM for 2010 and 2011. PSR ¶ 37. As part of that process in 2012, Dalton worked on defendant's behalf to review and categorize the income and expenses of defendant and SRC (the company defendant created in 2009 to which he diverted funds and assets in order to avoid paying FFTM's taxes). PSR ¶ 25.

D. Dalton Exchanges Emails with Defendant About "Bury[ing]" Income and "Fabricat[ing]" Defendant's Financials in 2012

In 2012, as he assisted defendant for purposes of defendant's tax filings, Dalton sent explicit emails to defendant about "bury[ing]" income and "fabricat[ing]" records for defendant's accountant [Pickhart] to send to the IRS. Two of these emails are excerpted below:



Subject: <no subject>
Date: Saturday, October 6, 2012 4:34 PM
From: Steve Dalton <SDalton@cendercompany.com>
To: James Snyder <jamess@fftmortgage.com>

I'm working on 2011 in the morning. So far this is what I have for 2010. (7 hours ugh)

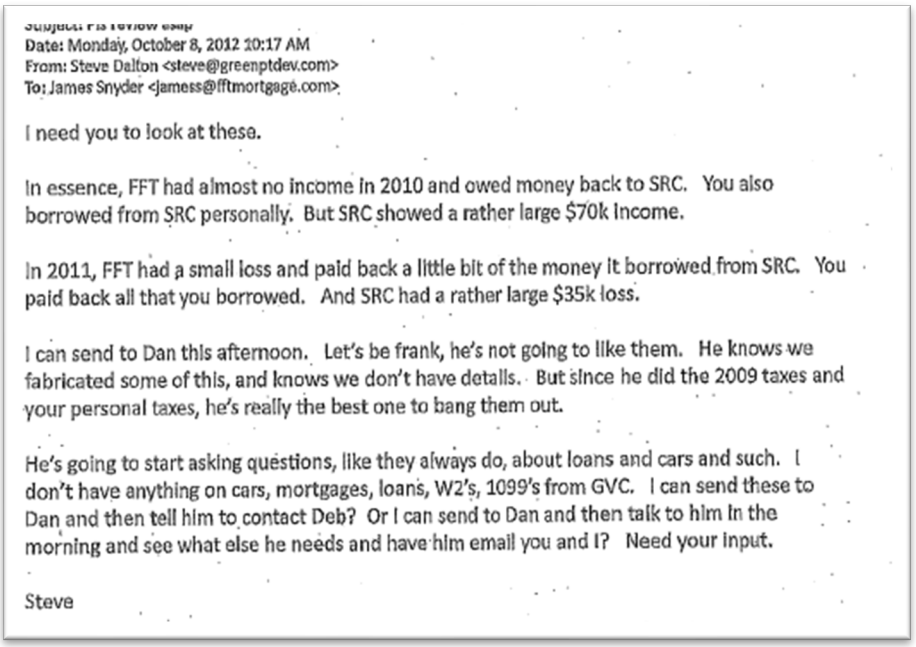
I'm betting Pickert will want to count the loan from SRC to FFT of $50,000 as income in FFT so that it can be closed out.
I'm also betting he'll want to have you count the $19k you got from SRC as income instead of loan

I could use W-2's and 1099's if you have any for 2010 and 2011. I don't have enough info to know how to best organize the incomes.

I buried a lot but I don't think we can risk killing more of the incomes because if it was audited they would find a whole lot more transfers to your personal account than I'm showing here.

Take a look and feel free to call me tomorrow after church.

Steve



Date: Monday, October 8, 2012 10:17 AM
From: Steve Dalton <steve@greenptdev.com>
To: James Snyder <jamess@fftmortgage.com>

I need you to look at these.

In essence, FFT had almost no income in 2010 and owed money back to SRC. You also borrowed from SRC personally. But SRC showed a rather large $70k income.

In 2011, FFT had a small loss and paid back a little bit of the money it borrowed from SRC. You paid back all that you borrowed. And SRC had a rather large $35k loss.

I can send to Dan this afternoon. Let's be frank, he's not going to like them. He knows we fabricated some of this, and knows we don't have details. But since he did the 2009 taxes and your personal taxes, he's really the best one to bang them out.

He's going to start asking questions, like they always do, about loans and cars and such. I don't have anything on cars, mortgages, loans, W2's, 1099's from GVC. I can send these to Dan and then tell him to contact Deb? Or I can send to Dan and then talk to him in the morning and see what else he needs and have him email you and I? Need your input.

Steve

GX25A & GX25B.

In the above emails, Dalton noted the "rather large 70K income" on SRC's books, even though FFTM "had almost no income in 2010." GX25B. This was the core allegation in Count Four—defendant schemed to deplete FFTM of assets, while failing to disclose to the IRS his new company, SRC's, earnings—even though SRC

performed the same work and had the same employees. The emails also reflect defendant and Dalton's efforts to "bury" income (without risking "killing" all of it, which would have raised additional red flags) and the falsification of records for Pickhart, which would be used for tax filings and in response to the IRS's inquiries.

E. Dalton's Admissions Before the Grand Jury Regarding His Work on Behalf of Defendant to Falsify Records to be Submitted to the IRS

Dalton testified in the grand jury that he knew defendant owed money to the IRS, including amounts that had been withheld from employee paychecks but not paid to the IRS. R. 673, Exhibit B at 37. Dalton also admitted to preparing information for defendant to share with his tax accountant and knowing it was false. Specifically, when Dalton was asked questions about the above emails, which showed Dalton was helping defendant "bury" income and "fabricate" details in preparing defendant's financial statements for tax purposes, Dalton initially hedged: "I think that it's possible that by the time we got to the second set of Excel spreadsheets, they were incorrect enough that I knew they were fabricated," and that he participated in that fabrication by "create[ing] the Excel spreadsheet," which figures were submitted to the IRS. *Id.* at 47. When asked, point blank, "[y]ou were trying to hide income from the IRS, correct . . . on behalf of James Snyder?" Dalton responded "Right," and "Yes." *Id.* at 55. After being confronted with his emails, Dalton admitted that he had provided these "illegitimate" numbers to defendant's accountant, Dan Pickhart. *Id.* at 58-59. Dalton knew that the false information he provided to Pickhart made it onto Snyder's 2010 tax returns. *Id.* at 76-77.

Dalton testified that he did not benefit from these fabrications, but that defendant paid him for his work. Dalton testified that: "[t]he only person that would have made a request would have been James [Snyder]." *Id.* at 48-49.

F. Judge Kennelly's Ruling at Trial and at Defendant's Original Sentencing

Judge Kennelly properly admitted Dalton's emails to the defendant (GX25A and 25B) at trial, because they were specifically alleged in the indictment (R. 1 at 12) and because "there's enough evidence there to establish that Dalton has a relationship with Mr. Snyder in terms of doing accounting work for Mr. Snyder, so I think the IRS can rely on the fact that they consider him to be an agent of Mr. Snyder." R. 231, Trial Tr., Vol. 3, p. 51. As discussed above, this ruling was plainly correct—and was not disturbed, let alone challenged, on direct appeal. *See Snyder*, 71 F.4th at 571.

Based on the trial record and materials submitted before sentencing, Judge Kennelly also correctly found that defendant's leadership and supervision of Dalton warranted the organizer/leader guideline enhancement under Guideline § 3B1.1(c). At sentencing, Judge Kennelly observed:

> What's significant is that Mr. Dalton did what he did and he was working at the behest of Mr. Snyder, and there is a sufficient basis for an inference that he did it at Mr. Snyder's behest. So, I think that enhancement applies.

R. 586 at 121:14-19.

The evidence supported Judge Kennelly's determination. Defendant plainly exercised control over Dalton's work and had "real and direct influence" over Dalton's efforts to falsely represent defendant's financial picture to the IRS, at a time when

defendant knew the IRS was trying to recover unpaid tax liability. This plainly satisfies Guideline § 3B1.1(c), as Judge Kennelly ruled. *See United States v. Causey*, 748 F.3d 310, 321-22 (7th Cir. 2014); *United States v. Sierra*, 188 F.3d 798, 803 (7th Cir. 1999).

CONCLUSION

Based on the limited scope of the remand, this Court should reject any challenge to the application of Guideline § 3B1.1(c) and the other Guidelines findings made by Judge Kennelly, which defendant waived by failing to address on appeal. Even if the Court were to consider the application of Guideline § 3B1.1(c), the evidence abundantly a preponderance finding that defendant was a leader or organizer under Guideline § 3B1.1(c).

Respectfully submitted,

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