Docket No.

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2019

COURTNEY JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mark A. Berman, Esq.
Counsel of Record

HARTMANN DOHERTY ROSA BERMAN & BULBULIA, LLC
433 Hackensack Avenue, Suite 1002
Hackensack, New Jersey 07601
(201) 441-9056
mberman@hdrbb.com

Attorneys for Petitioner Courtney Johnson

QUESTION PRESENTED FOR REVIEW

WHETHER A DISTRICT COURT ERRS BY IMPOSING A FINE UPON AN INDIGENT DEFENDANT, REPRESENTED BY APPOINTED COUNSEL, WITHOUT MAKING ANY INQUIRY INTO THE DEFENDANT'S ABILITY TO PAY A FINE, WHERE 18 U.S.C. § 3572 COMMANDS THAT THE COURT "SHALL CONSIDER" A DEFENDANT'S ABILITY TO PAY A FINE.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Courtney Johnson
2. United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Docket No.

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2019

COURTNEY JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Courtney Johnson respectfully asks the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 29, 2019, in the captioned matter.

CITATIONS OF OPINIONS AND ORDERS

The unreported opinion of the United States Court of Appeals for the Third Circuit, affirming Petitioner's conviction in this matter, is attached as Exhibit A.

BASIS FOR JURISDICTION

Petitioner petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on August 29, 2019. Jurisdiction to review such judgment by writ of certiorari is conferred upon The U.S. Court of Appeals for the Third Circuit by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3572 provides in relevant part as follows:

> (a) Factors To Be Considered. In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—
>
> (1) the defendant's income, earning capacity, and financial resources;
>
> (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose; ....

STATEMENT OF THE CASE

On June 19, 2013, the government charged Defendant Courtney Johnson and his wife, Carol Johnson, in a multi-count indictment with one count of conspiracy to defraud the IRS by filing false tax returns, in violation of 18 U.S.C. § 371, and multiple counts of aiding and assisting in the preparation of false federal tax returns, in violation of 26 U.S.C. § 7206(2). Immediately before trial, Mrs. Johnson pleaded guilty to a single count of misprision

of felony. Courtney Johnson pleaded not guilty and went to trial on a Second Superseding Indictment, which charged a single conspiracy count and seven substantive false tax return counts. He was represented by privately retained counsel.

On June 16, 2015, Johnson was convicted by a jury of six substantive false tax return counts. By judgment entered on November 23, 2015, the district court sentenced Johnson to 48 months in prison, a $50,000 fine, and restitution.

Johnson began serving his sentence in federal prison.

Johnson filed a timely notice of appeal and moved for the appointment of counsel due to indigency. The Court of Appeals found Johnson to be indigent, granted his application, and appointed the Office of the Federal Public Defender to represent him on appeal.

By way of an unpublished decision, entered on April 6, 2017, the Court of Appeals affirmed Defendant's conviction but vacated his sentence and remanded for resentencing. On remand, Defendant continued to be represented by the Office of the Federal Public Defender.

By Amended Judgment of Conviction, entered on April 27, 2018 (Ex. C), the district court resentenced Defendant to a term of 48-months' imprisonment. The district court also re-imposed the $50,000.00 fine it had included in Defendant's original sentence,

without addressing the impact of Defendant's changed circumstances upon his ability to pay a fine.

The Federal Public Defender did not object based upon Defendant's inability to pay a fine due to his changed economic circumstances, including his incarceration, and the district court did not independently consider whether Defendant had the ability to pay a fine. At the time of the resentencing proceeding, however, the district court was aware that Defendant had been found by the Court of Appeals to be indigent and that he continued to be represented by appointed counsel before the district court. In addition, at the time of his resentencing, Defendant had been incarcerated and unemployed for over two years. Nevertheless, the district court ordered Defendant to pay the same $50,000.00 fine without considering his ability to pay a fine.

On May 3, 2018, Defendant filed a timely Notice of Appeal from the sentence imposed by the district court. The Court of Appeals appointed undersigned counsel to represent Defendant Johnson on appeal from resentencing. One issue raised on appeal was whether the district court had erred by re-imposing a $50,000.00 fine without considering Defendant's ability to pay.

On August 29, 2019, the Court of Appeals entered a not-for-publication decision affirming Defendant's sentence. Reviewing for plain error, the Court of Appeals held:

> [T]he District Court did not plainly err in re-imposing a $50,000 fine. Our review is for plain error because Johnson admittedly failed to raise this issue in the District Court. Johnson takes no umbrage at the ability-to-pay determination at his first sentencing. At that time, he had significant debts, and the District Court based its finding largely on his future earning capacity. The Court imposed the fine without interest and decided against prohibiting Johnson from working in accounting in light of his "need to pay his obligations to the court." Johnson argues that, on remand, his circumstances had obviously and materially changed: at the time of his first sentencing he did not qualify for appointed counsel, but by his re-sentencing he was represented by the Federal Public Defender, and he had obviously been unemployed due to his incarceration.
>
> Johnson's qualification for appointed counsel neither forecloses the imposition of a fine nor obviously impacts future earning potential, so we cannot say that the need for a new ability-to-pay finding would have been obvious to the District Court, particularly in light of Johnson's burden to present evidence on this issue. Further, Johnson has not explained how such an error affected his substantial rights.

Ex. A (Slip Op. at 4-5).

Defendant now asks the Court to issue a writ of certiorari to review the Court of Appeals' determination that the re-imposition of a $50,000 fine upon an indigent defendant, without consideration of the defendant's ability to pay, was in error.

REASONS CERTIORARI SHOULD BE GRANTED

THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO RESOLVE A CIRCUIT SPLIT BY HOLDING THAT, UNDER THE PLAIN LANGUAGE OF 18 U.S.C. § 3572, A DISTRICT COURT "SHALL CONSIDER" A DEFENDANT'S ABILITY TO PAY BEFORE IMPOSING A FINE UPON AN INDIGENT DEFENDANT.

Federal law commands district courts to consider a defendant's ability to pay a fine before imposing a fine at sentencing. 18 U.S.C. § 3572. Specifically, Section 3572(a) provides that "the court shall consider, in addition to the factors set forth in [18 U.S.C.] section 3553(a)— (1) the defendant's income, earning capacity, and financial resources; [and] (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose ...." Notwithstanding the mandatory language of the statute, the United States Courts of Appeals have taken different approaches to the need for factual findings regarding a defendant's ability to pay: In this case, the Third Circuit excused the district court from inquiring into an indigent defendant's ability to pay a fine; the Fourth Circuit has repeatedly held that the mandatory language of Section 3572 means what it says. See United States v. Harvey, 885 F.2d 181 (4th Cir. 1989) (holding that Section 3572 requires the district court to make factual findings regarding a defendant's

ability to pay a fine); see also United States v. Arnoldt, 947 F.2d 1120, 1127 (4th Cir. 1991) ("Because the district court imposed the fine without complying with Harvey, we vacate the sentence and remand for consideration of those statutory factors."). Cf. Vasquez v. United States, 877 F. Supp. 178, 180 (S.D.N.Y. 1995) (recognizing that Second Circuit rejects Fourth Circuit approach) (citing United States v. Sellers, 42 F.3d 116, 120 (2d Cir. 1994); United States v. Puello, 21 F.3d 7, 11 (2d Cir. 1994)); United States v. Wilfred Am. Educ. Corp., 953 F.2d 717, 720 (1st Cir. 1992) (rejecting Fourth Circuit approach) (citing United States v. Hooshmand, 931 F.2d 725, 737-38 (11th Cir. 1991); United States v. Wright, 930 F.2d 808, 810 (10th Cir. 1991); United States v. Weir, 861 F.2d 542, 545 (9th Cir. 1988)); see also United States v. Radix Labs., Inc., 963 F.2d 1034, 1043 (7th Cir. 1992) (explaining that Seventh Circuit has not required courts to make findings with respect to every listed factor but has remanded for resentencing "where the district court made no findings with respect to any of the factors.") (citing cases from other circuits with different approaches). This Court should grant certiorari to resolve this circuit split and remind the lower federal courts that Section 3572(a) means what the words of Congress clearly state, specifically, that the courts "shall consider" a defendant's ability to pay a fine, particularly where – as here – the defendant is judicially determined to be indigent.

At trial, Defendant was represented by private counsel because the district court denied his motion for the appointment of the Federal Public Defender's Office. On appeal, however, the Court of Appeals determined that Defendant was indigent and, as a result, Defendant was represented by the Federal Public Defender's Office on appeal and at resentencing before the district court.

Despite the court of appeals' determination that Defendant could not even afford to pay for his own attorney, which was a prerequisite for the appointment of counsel, the district court – without any inquiry whatsoever regarding Defendant's ability to pay a financial penalty – resentenced Defendant to pay a fine in the same amount originally imposed: $50,000.00. The district court's failure to consider Defendant's ability to pay a fine prior to imposing a financial penalty violated the plain terms of 18 U.S.C. § 3572.

"A district court must make a finding on the defendant's ability to pay [a] fine." United States v. Parasconda, 69 F. App'x 74, 76 (3d Cir. 2003) (citing United States v. Electrodyne Sys. Corp., 147 F.3d 250, 252-55 (3d Cir. 1998) ("Here the district judge failed to make any findings pertaining to imposition of a fine. Without factual findings there can be no meaningful appellate review."); see also United States v. Patient Transfer Serv., Inc., 465 F.3d 826, 827 (8th Cir. 2006) ("A sentencing court must make specific factual findings on the record demonstrating that it has

considered the defendant's ability to pay the fine"). Such finding must encompass the factors listed in 18 U.S.C. § 3572. Id.

Although the Sentencing Guidelines require the court to impose a fine "except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine," U.S.S.G. § 5E1.2(a), the guidelines do not and cannot trump Section 3572's statutory requirement that district courts actually consider a defendant's ability to pay a fine. "It is an incorrect application of the guidelines to impose a fine that a defendant has little chance of paying." United States v. Granados, 962 F.2d 767, 774 (8th Cir. 1992). Improperly imposing a fine can constitute an illegal sentence which affects a substantial right and amounts to plain error. See United States v. Diaz, 245 F.3d 294, 312 (3d Cir. 2001); United States v. Coates, 178 F.3d 681, 684 (3d Cir. 1999).

A defendant who has been found to be indigent (in this case by the court of appeals), by definition, should alert the district court to the need to inquire into the defendant's ability to pay a fine. Indeed, the Sentencing Guidelines provide that "the fact that a defendant is represented by ... assigned counsel" is a "significant indicator[] of present inability to pay any fine," and "may also indicate that the defendant is not likely to become able to pay any fine." U.S.S.G. § 5E1.2, comment., n.3 (emphasis added). And, contrary to the Third Circuit's holding in this case,

the Fifth Circuit has concluding that, where a defendant is found to indigent, the government must demonstrate that he has assets or earning potential before the court can impose a fine, which is consistent with the command of 18 U.S.C. § 3572. United States v. Fair, 979 F.2d 1037 (5th Cir. 1992). See also United States v. Rivera, 971 F.2d 876 (2d Cir. 1992) (vacating $17,500 fine imposed on indigent defendant and stating that "If the defendant is indigent, a fine should not be imposed absent evidence in the record that he will have the earning capacity to pay the fine after release from prison.").

Hence, the "preferable practice" when a defendant is declared indigent is either to decline to impose a fine or to accompany such a fine with an explanation. United States v. Levy, 865 F.2d 551, 560-61 (3d Cir. 1989) (vacating fine imposed on "a defendant who was determined at the commencement of this appeal to be [indigent]"). Regardless, the plain language of Section 3572 does not allow a district simply to impose a fine upon an indigent defendant without first inquiring into the defendant's ability to pay the fine.

By the time of his resentencing, Defendant had been judicially determined to be indigent. Nevertheless, the district court did not direct the Probation Office to update the original PSR prior to resentencing to assess Defendant's changed circumstances (i.e.,

his incarceration and need for appointed counsel) upon his ability to pay a fine.

There was other evidence before the district court that indicated Defendant would be unable to pay a fine. The original PSR reported that Defendant had a negative net worth (-$127,215.00), PSR ¶ 95; the Johnsons were delinquent on their $457,926 mortgage in the amount of $86,999, PSR ¶ 98; Carol Johnson had been unemployed since 2011, PSR ¶ 78; Johnson has a six-year old daughter with his wife, PSR ¶ 78; and a nine-year old son with Suzette Lloyd, to whom he owes a child support judgment in the amount of $20,727, PSR ¶ 79a; and, Johnson is a compulsive gambler, PSR ¶¶ 81, 84, 84a, 97 & Docket #149 (Bail Modification Order) (prohibiting Defendant from gambling as a condition of pre-sentencing release). After sentencing, Johnson was remanded to the Bureau of Prisons as of January 5, 2016, see Docket #158 (Minute Entry re Sentencing); after this Court vacated his sentence and remanded for resentencing, the district court denied his motion for release pending resentencing, see Docket #182 (Order denying motion for release) and remained incarcerated and unemployed on the date he appeared for resentencing on April 13, 2018.

In addition to these circumstances, Defendant's indigency, his extended incarceration, and his resulting unemployment were all known to the district court and put the court on notice that Defendant might not have the resources to pay a fine, just as he

did not have the resources to pay for an attorney to defend him before the court of appeals or the district court. Under such circumstance, it was error for the district court to re-impose a fine without giving any indication of having considered Defendant's ability to pay a fine, as required by the plain terms of 18 U.S.C. § 3572. See United States v. Bauer, 19 F.3d 409, 413 (8th Cir. 1994) (vacating fine because "the district court did not expressly find that [defendant] had the ability to pay a $2,500,000 fine," the court's other findings suggested that the defendant actually had no "ability to pay a $2,500,000 fine," and "the court [failed to] explain how it took this and the other § 5E1.2 factors into account in determining the amount of the fine."); United States v. Patient Transfer Serv., Inc., 413 F.3d 734, 745 (8th Cir. 2005) (vacating fine where the district court failed to make findings "show[ing] that it considered the defendant's ability to pay the fine and its burden on the defendant," "and the financial information in the PSR suggest[ed] that [the defendant] may not be able to pay the large sum assessed against it"); United States v. Seminole, 882 F.2d 441, 443 (9th Cir. 1989) (vacating sentence where district court imposed fine without making findings regarding indigent defendant's ability to pay following his release from prison).

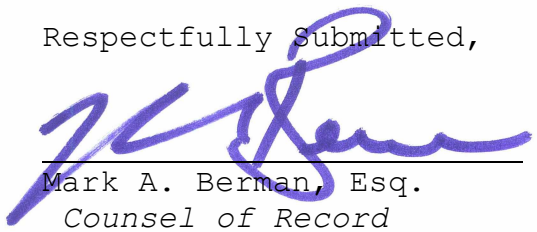
Section 3572 means what it says: the court "shall consider" the defendant's ability to pay before imposing a fine as part of

a sentence. Here, the district court simply re-imposed the same fine it originally imposed without any consideration or explanation of the Defendant's changed circumstances (most notably his judicially determined indigency), or his ability to pay. Therefore, the Court should issue of writ of certiorari to address and resolve the circuit split discussed above regarding a sentencing court's obligation to consider an indigent defendant's ability to pay a fine.

CONCLUSION

For these reasons, Petitioner Courtney Johnson respectfully asks the Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,



Mark A. Berman, Esq.
Counsel of Record

HARTMANN DOHERTY ROSA BERMAN & BULBULIA, LLC
433 Hackensack Avenue, Suite 1002
Hackensack, New Jersey 07601
(201) 441-9056

Attorneys for Petitioner Courtney Johnson

Dated: November 5, 2019

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

CASE NUMBER 3:13-CR-00417-AET-1

COURTNEY JOHNSON

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Date of Original Judgment: 11/23/2015
Reason for Amendment: Correction of Sentence on Remand (18 U.S.C. §§ 3742(f)(1) and (2))

The defendant, COURTNEY JOHNSON, was represented by ANDREA BERGMAN, AFPD.

On motion of the United States, the court has dismissed counts 1ss & 6ss.

The defendant was found guilty on counts 2, 3, 4, 5, 7 & 8 of the Second Superseding Indictment by a jury verdict on 6/16/2015 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Numbers
26:7206(2)	AIDING AND ASSISTING IN THE PREPARATION OF FALSE FEDERAL INCOME TAX RETURNS	4/15/2008	2ss, 3ss, 4ss& 5ss
26:7206(2)	AIDING AND ASSISTING IN THE PREPARATION OF FALSE FEDERAL INCOME TAX RETURNS	4/15/2010	7ss & 8ss

As pronounced on April 13, 2018, the defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must pay to the United States a special assessment of $100.00 for each count 2ss, 3ss, 4ss, 5ss, 7ss & 8ss for a total of $600.00, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

Signed this 23rd day of April, 2018.

Anne E. Thompson
Senior U.S. District Judge

07083

Ex. A

Defendant: COURTNEY JOHNSON
Case Number: 3:13-CR-00417-AET-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months on each of Counts 2ss, 3ss and 4ss, to be served concurrently, and terms of 12 months on each of Counts 5ss, 7ss and 8ss, to be served concurrently with each other, but consecutively to the terms imposed on Counts 2ss, 3ss, and 4ss, to the extent necessary to produce a total term of 48 months.

The defendant will remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Ex. A

Defendant: COURTNEY JOHNSON
Case Number: 3:13-CR-00417-AET-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 1 year. This term consists of terms of one year on each of Counts 2ss, 3ss, 4ss, 5ss, 7ss & 8ss, all such terms to run concurrently to the extent necessary to produce a total term of supervised release of one year.

Within 72 hours of release from custody of the Bureau of Prisons, you must report in person to the Probation Office in the district to which you are released.

While on supervised release, you must not commit another federal, state, or local crime, must refrain from any unlawful use of a controlled substance and must comply with the mandatory and standard conditions that have been adopted by this court as set forth below.

You must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

You must cooperate in the collection of DNA as directed by the probation officer

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it is a condition of supervised release that you pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

You must comply with the following special conditions:

GAMBLING RESTRICTIONS/REGISTRATION ON EXCLUSION LISTS

You must refrain from all gambling activities, legal or otherwise, to include the purchase or receipt of lottery tickets and internet gambling. You must register on the self-exclusion lists maintained by the New Jersey Casino Control Commission and Racetrack Commission within 60 days of the commencement of supervision and remain on these lists for the duration of supervision. The U.S. Probation Office will supervise your compliance with this condition.

INTERNAL REVENUE SERVICE - COOPERATION

You must fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and timely file all future returns that come due during the period of supervision. You must properly report all corrected taxable income and claim only allowable expenses on those returns. You must provide all appropriate documentation in support of said returns. Upon request, you must furnish the Internal Revenue Service with information pertaining to all assets and liabilities, and you must fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States.

MENTAL HEALTH TREATMENT

You must undergo treatment in a mental health program approved by the U.S. Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, as approved by the U.S. Probation Office, until discharged by the Court. The U.S. Probation Office will supervise your compliance with this condition.

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You must not encumber or liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

Ex. A

Defendant: COURTNEY JOHNSON
Case Number: 3:13-CR-00417-AET-1

GAMBLING ESTABLISHMENT RESTRICTIONS

You must not enter any gambling establishment without the permission of the U.S. Probation Office and/or the Court.

SELF-EMPLOYMENT/BUSINESS DISCLOSURE

You must cooperate with the U.S. Probation Office in the investigation and approval of any position of self-employment, including any independent, entrepreneurial, or freelance employment or business activity. If approved for self-employment, you must provide the U.S. Probation Office with full disclosure of your self-employment and other business records, including, but not limited to, all of the records identified in the Probation Form 48F (Request for Self Employment Records), or as otherwise requested by the U.S. Probation Office.

Defendant: COURTNEY JOHNSON
Case Number: 3:13-CR-00417-AET-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4) You must answer truthfully the questions asked by your probation officer.

5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have fulltime employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e.. anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

Ex. A

Defendant: COURTNEY JOHNSON
Case Number: 3:13-CR-00417-AET-1

STANDARD CONDITIONS OF SUPERVISION

13) You must follow the instructions of the probation officer related to the conditions of supervision.

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed)_____
Defendant Date

_____
U.S. Probation Officer/Designated Witness Date

Ex. A

Defendant: COURTNEY JOHNSON
Case Number: 3:13-CR-00417-AET-1

FINE

The defendant shall pay a fine of $50,000.00.

This fine is due immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program (IFRP). If the defendant participates in the IFRP, the fine shall be paid from those funds at a rate equivalent to $25 every 3 months. In the event the fine is not paid prior to the commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than $500, to commence 30 days after restitution in this case has been paid in full.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

This amount is the total of the fines imposed on individual counts, as follows:

Count 2ss: $10,000.00
Count 3ss: $8,000.00
Count 4ss: $8,000.00
Count 5ss: $8,000.00
Count 7ss: $8,000.00
Count 8ss: $8,000.00

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Ex. A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2009

UNITED STATES OF AMERICA

v.

COURTNEY JOHNSON,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-13-cr-00417-001)
District Judge: Honorable Anne E. Thompson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
June 21, 2019

Before: AMBRO, RESTREPO and FISHER, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on June 21, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered April 27, 2018, be and the same is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

Ex. B

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: August 29, 2019

Ex. B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2009

UNITED STATES OF AMERICA

v.

COURTNEY JOHNSON,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-13-cr-00417-001)
District Judge: Honorable Anne E. Thompson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
June 21, 2019

Before: AMBRO, RESTREPO and FISHER, *Circuit Judges*.

(Filed: August 29, 2019)

OPINION*

FISHER, *Circuit Judge*.

Courtney Johnson was re-sentenced on remand from this Court. In his prior

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

appeal, the panel ruled that the District Court erred in not explicitly resolving a disputed matter affecting his sentence.[1] On remand, the District Court imposed the same sentence as it had before, which included forty-eight months' imprisonment and a $50,000 fine. Johnson appeals the sentence, arguing that the District Court erred in two respects: first, in finding that he was the manager of "otherwise extensive" criminal activity and applying an aggravating role enhancement; and second, in re-imposing the $50,000 fine without reassessing his ability to pay. We will affirm.[2]

The District Court did not clearly err in finding Johnson's criminal activity "otherwise extensive,"[3] meaning there were "a total of five or more participants and countable non-participants."[4] Countable non-participants are those "whom the defendant

[1] *United States v. Johnson*, 682 F. App'x 118, 124 (3d Cir. 2017) (holding the District Court erred in failing to resolve a dispute about the loss associated with Johnson's preparation of false tax returns).

[2] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 18 U.S.C. § 3742(a). We review findings of fact for clear error. *United States v. Huynh*, 884 F.3d 160, 165, 171 (3d Cir. 2018). We review unpreserved issues for plain error, asking whether there is "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Paladino*, 769 F.3d 197, 201 (3d Cir. 2014) (quoting *United States v. Tai*, 750 F.3d 309, 313–14 (3d Cir. 2014)).

[3] U.S.S.G. § 3B1.1(b). The Government argues this issue is moot because Johnson has completed his prison term. Our review of this jurisdictional question is plenary. *State Nat'l Ins. Co. v. Cty. of Camden*, 824 F.3d 399, 404 (3d Cir. 2016). The issue is not moot because the "otherwise extensive" finding affects Johnson's offense level, which is the starting point for setting his fine under U.S.S.G. § 5E1.2(c)(3). Therefore, he stands to benefit from a favorable decision. *See United States v. Jackson*, 523 F.3d 234, 237 (3d Cir. 2008) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

[4] *Huynh*, 884 F.3d at 171.

employed with specific criminal intent for services that were peculiar and necessary to the scheme."[5] When a District Court's participants-and-countable-non-participants analysis is not explicit, we may affirm where "specific factual findings, viewed in light of the entire record," show the determination was not clearly erroneous.[6]

The District Court counted Johnson and his wife as participants and counted as non-participants: "staff persons" at the Johnsons' tax prep business "whose assistance and participation made it all possible;" the "Santa Barbara . . . connection;" Errol Walters; and Johnson's taxpayer clients.[7] Having identified those persons, the District Court found Johnson's activity "otherwise extensive." The record supports that finding. At trial, Johnson testified that five of his employees prepared returns and that he had to rely on them because he "ha[d] too much stuff to do to be doing returns."[8] Johnson's clients testified that fraudulent returns had been filed using Walters's Electronic Filing Identification Number (EFIN). Because this record supports the "otherwise extensive" finding the District Court did not clearly err.[9]

---

[5] *Id.* (citing *United States v. Helbling*, 209 F.3d 226, 248 (3d Cir. 2000)).

[6] *Id.* at 171-72.

[7] App. 36-37, 46.

[8] Supp. App. 997, 1248. On appeal, Johnson argues there was no evidence that his staff prepared Schedule C's—one of the forms used to perpetrate the fraud—but Johnson did in fact testify that his staff prepared Schedule C's with his oversight. *Id.* at 1124-25.

[9] We need only consider Johnson's employees and Walters to determine that there was no clear error. Therefore, we do not decide whether the District Court clearly erred when it also included Santa Barbara Bank & Trust and Johnson's taxpayer clients—the victims—as countable non-participants.

With regard to Johnson's second argument, the District Court did not plainly err in re-imposing a $50,000 fine. Our review is for plain error because Johnson admittedly failed to raise this issue in the District Court.[10] Johnson takes no umbrage at the ability-to-pay determination at his first sentencing. At that time, he had significant debts, and the District Court based its finding largely on his future earning capacity. The Court imposed the fine without interest and decided against prohibiting Johnson from working in accounting in light of his "need to pay his obligations to the court."[11] Johnson argues that, on remand, his circumstances had obviously and materially changed: at the time of his first sentencing he did not qualify for appointed counsel, but by his re-sentencing he was represented by the Federal Public Defender, and he had obviously been unemployed due to his incarceration.

Johnson's qualification for appointed counsel neither forecloses the imposition of a fine nor obviously impacts future earning potential,[12] so we cannot say that the need for a new ability-to-pay finding would have been obvious to the District Court, particularly in light of Johnson's burden to present evidence on this issue.[13] Further, Johnson has not

---

[10] *See Gov't of V.I. v. Rosa*, 399 F.3d 283, 290-91 (3d Cir. 2005). Because we conclude that the District Court did not plainly err, we assume without deciding that Johnson did not affirmatively waive this issue. *See id.* (explaining that forfeiture permits plain error review while waiver does not).

[11] Supp. App. 1703.

[12] *See United States v. Logar*, 975 F.2d 958, 962 (3d Cir. 1992) ("[I]ndigency at the time of sentencing is not a bar to ordering a defendant to pay restitution in the future.").

[13] *United States v. Kadonsky*, 242 F.3d 516, 520 (3d Cir. 2001).

explained how such an error affected his substantial rights.

Because the District Court properly calculated Johnson's offense level and did not plainly err in re-imposing a $50,000 fine, we will affirm.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	.	Case No. 13-cr-417(AET)
	.	
	.	
	.	402 East State Street
v.	.	Trenton, NJ 08608
	.	
COURTNEY JOHNSON and CAROL JOHNSON,	.	
	.	
	.	
Defendants.	.	April 13, 2018
. . . . .	..	11:23 a.m.

TRANSCRIPT OF RESENTENCING HEARING
BEFORE HONORABLE ANNE E. THOMPSON
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government:	Office of the United States Attorney By: ANDREW D. LEVEN, ESQ. 970 Broad Street, Rm. 700 Newark, NJ 07102
For the Defendant Courtney Johnson:	Office of the Federal Public Defender By: ANDREA BERGMAN, ESQ. 22 South Clinton Avenue Station Plaza #4, Fourth Floor Trenton, NJ 08609
Audio Operator:	Kimberly Stillman

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

Ex. C

I N D E X

EXHIBITS		ID.	PAGE EVD.
Summary Chart 1	Document regarding L.E.B.'s removal	12	--
Summary Chart 2	Schedule C's	12	--

Ex. C

COURTROOM DEPUTY: Please remain seated.

THE COURT: All right. Good morning, and let me have your appearances, please.

MR. LEVEN: Good morning, Your Honor. Andrew Leven, Assistant United States Attorney, for the United States.

THE COURT: Very well.

MS. BERGMAN: Good morning, Your Honor. Andrea Bergman, Assistant Federal Public Defender, for Mr. Johnson.

THE COURT: Very well. All right, we are here for a resentencing. The defendant's appeal was heard by the Third Circuit Court of Appeals which rendered an opinion which was filed on March 15th, 2017. In that opinion by Judges Ambro, Vanaskie and Scirica the conviction was affirmed. The Court of Appeals found that the elements necessary to sustain the counts of conviction were shown and that the jury could find beyond a reasonable doubt the defendant's guilt on those counts and, therefore, did not disturb the findings.

The Court, however, remanded for resentencing so that the Court could articulate the basis for certain elements of the sentencing, (1) the tax loss, (2) the enhancement for role in the offense, and (3) the authority for the restitution and that prompted considerable work on the part of the parties.

I know that both Ms. Bergman actually did an extensive review of witness testimony even to the point of Grand Jury testimony which, by the way, the Government consented to the

handing over or the distribution of the Grand Jury testimony so that Ms. Bergman could complete her investigation.

So, we are now here, and I should say to Ms. Bergman, have you reviewed the Third Circuit's opinion with your client and are you satisfied that he understands the scope of the hearing today?

MS. BERGMAN: Yes, Your Honor. I have provided to Mr. Johnson who, as the Court is well aware, is very well educated and able to, you know, independently research issues. I've had numerous discussions with him about the issues to be raised today after the Third Circuit remand.

THE COURT: Very well. Shall we start in, I guess, with some stipulations? I think there's some agreement, or at least a capitulation. I'm not sure exactly how to characterize it but at least the two sides when it comes to the detail work of the exact tax loss or concessions I think is probably the preferable, more accurate term to use. Mr. Leven, I'm going to ask you if you'll start out with that. What is there agreement about for today?

MR. LEVEN: Certainly, Your Honor. So, if I may just for the record, I would characterize what we're attempting to do the parties just a little bit differently than Your Honor has.

THE COURT: Very well.

MR. LEVEN: I don't really view it as a concession on either side. I think it's more a recognition that this is a

fairly complicated factual record on the tax loss issue given the testimony at trial and Ms. Bergman's subsequent investigation and the Government's cooperation in that investigation of things like --

THE COURT: I agree with all of that.

MR. LEVEN: Okay. And so what we're trying to do is really cut to the chase, clarify and simplify so that the decision can be reached in the most efficacious manner possible. That's how I'm understanding it. And along those lines, Your Honor, the Government has agreed to not ask that the Court reach a finding that the 90, approximately $90,000 in tax loss attributable to the person identified as L.E.B. --

THE COURT: Yes.

MR. LEVEN: -- in the various --

THE COURT: That had the trucking company, yes.

MR. LEVEN: Yes. That the Court need not reach a determination as to whether or not that tax loss should be attributable to Mr. Johnson in this sentencing.

THE COURT: Very well.

MR. LEVEN: In addition, Your Honor, we have scrubbed, the Government has, the tax loss chart in the PSR and, as the Court is aware, we have made a few minor deductions of monies in that tax loss chart. Ms. Bergman is going to say, I'm sure, that she has also made her own calculations. There's a minor divergence in that amount. If -- dependent upon Carol Johnson's

-- whether or not Carol Johnson's tax loss is relevant conduct putting that to the side, I think there's a $3,000 difference between the Government's math and defendant's math.

And, again, I think the parties in the spirit of trying to be as efficient as possible and trying to husband the Court's time as much as possible would like the Court to proceed as if -- two elements, the defendant has conceded a certain loss amount of about $220,000, tax loss amount, and then you have the Carol Johnson piece.

If the Court finds that Carol Johnson's conduct was relevant conduct, then the $3,000 difference isn't going to matter and, therefore, the parties are not going to ask the Court or the Government is not going to ask the Court to choose between $313,000 versus $316,000.

Does that cover it, Ms. Bergman? Okay.

THE COURT: Very well. All right, Ms. Bergman, let me hear from you.

MS. BERGMAN: Yes, Your Honor. Thank you. So, the two remaining guideline issues for the Court to address are, one, the tax loss issue of the $93,000 relevant conduct attributable to Carol Johnson, and then the second, of course, is the -- whether or not under 3(b)1.1(b) the three level enhancement for Mr. Johnson's exercise or supervisional or otherwise extensive criminal activity would apply. And so, you know, this matter has been thoroughly briefed. The facts have been thoroughly set

forth in our moving papers with the Court. That's also true of the Government. I am not going to belabor all of the points I made in the brief to the Court.

With respect to the relevant conduct, the $93,000 attributed to Carol Johnson, we have raised several facts that we ask the Court to consider in making a finding that that is not relevant conduct, that there was not jointly undertaken activity between Mr. and Mrs. Johnson. Those salient facts that we have raised are primarily that the marriage alone is not enough certainly to be able to prove the enhancement, that Mrs. Johnson was running the Jersey City office. There's ample testimony in the record to support that, not just from people who worked in the office such as Ms. Saunders, but also taxpayers who had their returns done at the Jersey City office and that Mr. Johnson's presence in that office was limited.

I want to also address the factual argument that the Government makes that there must have been jointly undertaken criminal activity because there's somehow a fraud pattern shown in the nature of the fraudulent deductions in the returns. I take big issue with that. I think anybody who's had another tax preparer case would agree that the kinds of deductions that were being taken in these returns are fairly typical, that it is precisely in the Schedule C with travel, with education credits, with uniforms. Those are all of the types of very common deductions that are taken in these types of tax preparer fraud

cases, and that I would not agree that some unique pattern exists here that would lead the Court to conclude that there must have been jointly undertaken criminal activity between Mr. and Mrs. Johnson.

Again, I think ultimately that when you're talking about jointly undertaken activity, you have to demonstrate that there was, in fact, a meeting of the minds to have agreed between the two and that that is what the trial evidence and what the remaining tax loss evidence seems to fall short of.

I want to make one last point and that is the reliance on Mr. Johnson's testimony that I think that the Government overstates the import of the testimony when he is questioned about his review of the tax returns. That if you look carefully at his testimony, the Government asked him repeatedly about individual tax payers and that the points where he made generalized statements about reviewing returns or all the returns, that it seems pretty clear to me that he was talking about reviewing returns that originated out of South Orange because he had two people, Mr. Noble and Ms. Bailey (phonetic) I believe who were initially helping to populate the returns and that he ultimately would, when there was a Schedule C, review those.

And so I think that it's an overstatement of the testimony to suggest that this enhancement or that the relevant conduct should be included based upon some blanket statement that

he reviewed every return that was completed in both offices. And with that, Your Honor, I would suggest that there just has been an insufficient proof by the Government to prove the nexus required.

THE COURT: All right, is there anything further that either side would like to address the Court? And I think you should summarize your critical points.

MR. LEVEN: Certainly, Judge. I know that, as you've mentioned, the parties have briefed these issues extensively and I know the Court has read those briefs. So, again, like Ms. Bergman, I do not want to belabor what the Court has already read and understands. I do want to on the tax loss issue and, Judge, if you could just give me a little bit of guidance here. Are we going to do it issue by issue or do you want --

THE COURT: Yes.

Mr. LEVEN: Okay. So, on the tax loss issue, Ms. Bergman mentioned a couple of things that I think are easily refuted. The fraud pattern shown at trial which the Government has spent a significant amount of time laying out, it's not very simple but it's also not incredibly complex either. The notion that gee, if you're a tax preparer and you're going to prepare fraudulent returns, these are the ones you're probably going to pick these deductions and, therefore, the fact that there's a shared pool of fraudulent deductions between Carol Johnson and Courtney Johnson, that's just the way it is when you're

fraudulent tax preparers. That doesn't show any concert of action.

The problem there, Your Honor, is Mr. Johnson said in front of --

THE COURT: That's the defendant's argument?

MR. LEVEN: That's the defendant's argument. The problem with it -- there are a number of problems. One of them is Mr. Johnson came before you in connection with a motion made by Carol Johnson pretrial, and Mr. Johnson submitted an affidavit in support of a severance motion by Carol Johnson. And the defendant said that Carol Johnson was innocent of these crimes, which obviously we now know is not true. She pleaded guilty to misprision in connection with the filing of fraudulent tax returns.

As far as overstating what the defendant said in his direct testimony at trial in front of this Court, I would submit that the Government has not overstated it. Among other things, Mr. Johnson said that nothing leaves his office without his review. Eleanor Saunders, who I believe is Mr. Johnson's family relative, testified that only she and Carol Johnson actually did tax returns. And Mr. Johnson, the defendant stated at trial before Your Honor, that Carol Johnson only did simple returns. She only did returns where there was a W-2 and nothing else. And what we see here in particular as to the Schedule C's where I guess there's been a little bit of confusion perhaps generated.

If there is, let me set it straight.

In the Government's reply letter brief dated April 2 of 2018, I tried to lay that out with some specificity. The basic idea is this, Your Honor. It's one thing to say, gee, I'm filing, she's filing, I don't know. It's another thing when you look at the Schedule C's in the context of Mr. Johnson's trial testimony. One of the things that's obvious is that Carol Johnson is not doing the Schedule C's. He's doing them. And as the Government has pointed out, in the 117 returns that are part of the PSR tax loss table, we see seven of them -- well, more than seven.

I'm sorry, let me -- just looking at the 12 witnesses that were called at trial by the Government in its direct case, we see multiple situations where Schedule C is falsified. It has to be by Mr. Johnson because he's the only one who's doing them. We see at least two occasions where the Schedule C is completely made up, meaning there was no business at all. There wasn't even a colorable answer if the IRS asks a question let me see what they gave you, let me see what your calculations were because there were no calculations. There was nothing submitted by the taxpayer because the business was literally fabricated out of whole cloth.

There are two instances just from the 12 witnesses who testified at trial where Mr. Johnson creates a wholly fabricated Schedule C and Carol Johnson's EFIN is on that return, meaning if

the IRS has a question, who are they going to go to? They're going to go to the person who prepared the return to ask questions. Mr. Johnson understood that and yet he felt confident enough to put her name on returns that contain Schedule C's that he knew he had wholly fabricated out of whole cloth.

So' the notion that this is by coincidence and that Courtney Johnson did not in his own mind understand that if the IRS called Carol Johnson and asked her about these Schedule C's, she would give the IRS the answer he needed her to give which is that they were appropriate, they were fine. She would lie. He had to know that or he wouldn't have done what he did.

THE COURT: Her EFIN was used on those two returns.

MR. LEVEN: Her EFIN -- and, Your Honor, if you'll bear with me for a moment, I would refer you to the portion of my letter brief that deals with that. That would be Page 3 at Footnote 3 of the April 2, 2018 letter brief reply. So, there is ample evidence.

And, Your Honor, if I may at this time, hand up and ask that the two charts that are referenced in the Government's submissions and have been submitted to the Court and defense counsel, summary charts be marked as exhibits for the record in this sentencing because I know one of the issues that we need to overcome here is to make a full record.

May I approach, Your Honor?

THE COURT: Yes.

MR. LEVEN: I have in front of me what has been marked Summary Chart Number 1 and Summary Chart Number 2. I will say that Summary Chart Number 1 reflects the Government's -- I mentioned earlier, Judge, that there was like a $3,000 discrepancy.

THE COURT: Yes.

MR. LEVEN: We have stated a $316,000 loss amount in Summary Chart 1 taking out L.E.B., taking L.E.B. out of the mix so there's a slight discrepancy there. Summary Chart 2 are the Schedule C's that are referenced in the Government's submissions and you'll see there are 15 wholly fictitious Schedule C's and what that means, a summary of that is provided in Footnote 3 of the April 2, 2018 chart.

THE COURT: All right.

MR. LEVEN: I've provided copies of those charts, of course, to defense counsel even this morning and they were served upon defense counsel in a timely fashion earlier.

The other thing, Judge, that Mr. Johnson simply can't get away from is common sense. No reason has been suggested, no reason has been offered and there is no reason in common sense why Carol Johnson who clearly had a subsidiary role in all of this would on her own without telling her husband start filing, filling out fraudulent deductions on tax returns as an independent operator as her own scheme by herself. Why would she do that? The Government has asked that question twice in its

initial submission on March 15 and again on April 2. We reiterated here.

In truth, Judge, there is no answer for that because that's not what happened. It makes no sense that Carol Johnson would on her own prepare the 30-plus fraudulent returns that are identified on Government Chart 1 while Courtney Johnson prepares 80-plus and they happen to share the same fraudulent deductions. That is not a coincidence. That is concerted action in the execution, in the actual actions taken. That is plain to see.

THE COURT: And I assume that there's no issue with regard to the restitution because both sides agree that somehow even though restitution of 10,000-something was ordered, it was ordered under the same -- under the -- it was -- on the paperwork it was attributed to the wrong authority?

MS. BERGMAN: That's correct.

THE COURT: That's all it was because I --

MR. LEVEN: That is the Government's position and Ms. Bergman's also.

THE COURT: Because I know that the intent at the time was just to order the restitution but somehow in the using of our forms, that's how it came out. All right. All right, thank you. Is there anything further that either side has to say with regard to this resentencing? If not --

MS. BERGMAN: Your Honor, moving on to just the one other guideline issue --

THE COURT: Right.

MS. BERGMAN: -- I'll briefly summarize for the record what our position is then.

THE COURT: Yes.

MS. BERGMAN: With respect to the issue over whether or not this was otherwise extensive, we have raised for the Court taking, of course, the three categories of non-participants that the Government has suggested would prove the enhancement, the employees of Johnson and Associates, Earl Walters and the taxpayers themselves, they, of course, have raised the issues that the taxpayers themselves are not participants for the first time here. They did not originally raise that. And so, you know, directing the Court to, of course, the Helbing factors that both parties have extensively briefed, factually I would point out first of all that there has just been zero evidence that Courtney Johnson directed any employees to do anything illegal. There's just nothing in the record to support that.

With respect to the taxpayers, I have simply suggested that this is not the type of participant that the guideline has in mind, that these taxpayers were going to have to sign the documents necessary to e-file their returns in any event and that, you know, certainly Mr. Johnson wasn't directing them to do something that they would not otherwise have been doing. The act in itself was not illegal. And that I would suggest that under the circumstances, the three-level enhancement is not

appropriate.

MR. LEVEN: Your Honor, if I may?

THE COURT: And is there -- so you're saying that there are not five people?

MS. BERGMAN: So, Your Honor, I think that for purposes of the subsection, the three --

THE COURT: Otherwise extensive, we don't have to have five people.

MS. BERGMAN: -- the otherwise extensive, we don't have to have five. I would suggest that there's case law suggesting that it would have to be at least five or more countable non-participants which is an understanding that these were unwitting, you know, players if you will, that here the parties are in clear agreement that the only knowing participants would be Mr. and Mrs. Johnson. And so that is why we are having the discussion --

THE COURT: I see.

MS. BERGMAN: -- about whether it's otherwise extensive.

THE COURT: I see. Thank you very much. Mr. Leven?

MR. LEVEN: Your Honor, the Government agrees that there are not five knowing participants, that is, persons who would be criminally culpable because of their mental state in the actions that they undertook. There is at least one which is Carol Johnson as we've explained in our papers.

As to the groups mentioned by defense counsel, so Earl

Walters, Your Honor, you were at the trial. We're both -- we, defense counsel and I are very familiar with the transcript. It's really quite clear that Earl Walters while he may have been, he may have been an unwitting participant and allowing his EFIN to be used by Courtney Johnson for a fee even though Courtney -- his name, Earl Walters' name is appearing on these tax returns as a preparer and he's not preparing them, he may have been an unwitting participant, he may have been a knowing participant. Putting that to the side, he clearly fits within the bucket of five people.

As to the taxpayers, it is correct, Your Honor, that other than an oblique reference by Ms. Yoon in, I believe, her initial sentencing submission to the Court back in the day, the Government did not press for the taxpayers as being unwitting participants.

It's also true, Your Honor, that under the case law and conceptually it's actually perfectly appropriate to look to those unwitting taxpayers in this case for a couple of reasons. First of all, you have written misrepresentations that the defendant caused various taxpayers to make and those have been pulled out and submitted. They were actually defense trial exhibits at the trial, that is, the forms by which unwitting taxpayers were telling the IRS I've reviewed this return, it's all accurate, go ahead, we can do the e-filing and I can get my refund.

Those misrepresentations were necessary and peculiar in

that sense to this schedule because the whole thing was set up and predicated upon, as the jury found, Mr. Johnson getting refunds from Santa Barbara directly so that he could take his monies out of those refunds before the taxpayers receive them and the way to do that was through the e-filing and the way the e-filing occurred was to fill out those forms that contain material misrepresentations, having the taxpayers do it.

The Government has only submitted because the defense at trial only offered into evidence several of those files, several of those forms but I think no one is going to dispute based upon our own world's experience, our own life's experience as taxpayers that the only way you can file electronically through your accountant is to fill out a form. There are about 60 taxpayers in the PSR tax loss chart and every one of them almost certainly, certainly had to fill out such a form and all of those forms say the same thing. So, there are approximately 60 discrete taxpayers who were used in this fashion.

There is, of course, the Embry case, Your Honor, and I understand that this is a Sixth Circuit decision. It's cited in the Government's March 15 submission and it's in the Federal Appendix. I understand that, too. But in response to defense counsel's suggestion that taxpayers are not an appropriate group to look to, I beg to differ based upon, (a) the rationale just stated to Your Honor, and (b) the fact that the Sixth Circuit has done exactly that, has looked at taxpayers as an appropriate

group of unwitting participants in a tax case. And in the Embry decision -- and I'll paraphrase -- there were 150 taxpayers -- instead of paraphrasing, I'll quote it -- were properly deemed to be non-participants whose signing of the false tax returns was peculiar and necessary to Embry's criminal scheme.

So, conceptually, in terms of what this particular guideline is designed to do which is to give the Court a way of differentiating relative culpability between different actors in a crime and in terms of the case law the Court was well-justified in actually coming down from what the Government had requested. The Government asked for a four level enhancement. Probation and the Court begged to differ, and ultimately the Court found three levels. The evidence is there, and the record is there to be made, Your Honor.

THE COURT: Thank you. Is there any other aspect of this resentencing that you wish to address?

MS. BERGMAN: Your Honor, we have --

THE COURT: Ms. Bergman?

MS. BERGMAN: -- of course raised the variance argument. Would you like me to address that now or --

THE COURT: Sure.

MS. BERGMAN: Yes? Whatever the Court determines with respect to the appropriate guideline range after making rulings on the loss and otherwise extensive issue, we do suggest that Mr. Johnson has demonstrated since his incarceration that through

self-help and educational programs and through service to other inmates, that a modest variance would be appropriate here because he has demonstrated rehabilitation, if you will.

I would suggest to the Court that he has used his skills in a way that he did not have to and you have letters from other inmates who have talked about how he has helped them out of the goodness of his heart really and that that is something that the Court should consider in determining whether there's mitigating evidence here to support a variance.

I would also suggest with respect to Mr. Johnson who is serving a prison term for obviously a non-violent, financial crime, that there might be other types of sentencing that could be imposed that would be perhaps more beneficial to the community such as community service. Mr. Johnson has a skill set that not many defendants have. He has demonstrated his willingness to use those skills to help others and I know that he's gotten a lot of gratification out of that and that he would continue and be willing to continue in the community in that vein.

And so I would suggest if the Court were willing to vary downward and to either give him a time served sentence or a sentence that would make release imminent, that during the course of his supervised release a community service component be added to that to reflect his ability to help others in the community.

THE COURT: And what was the Government's position with regard to --

MR. LEVEN: Your Honor, in a sense I would say that this is the hardest part of the sentencing for me, and the reason why is that on a personal level, while I certainly enjoy arguing, I don't enjoy sentences. They're very solemn occasions and they're solemn for a number of reasons. One of them is, as Mr. Johnson points out in his submission, every defendant who commits a crime also victimizes his family and so it is always the case and that is always a very hard part of this part of the world that we're in.

Unfortunately, that's the usual. That's the norm. There are a couple of things about this case that are a little unusual and are not quite in the norm and the Government suggests that they exemplify the fact that Mr. Johnson has a debt to pay for his actions and he needs to pay it and he needs to pay it to the full measure of what the Court initially imposed which was in truth on the lenient side of where the Court could have gone. What I mean by that specifically, Judge, is this is not just a case where a CPA exploits vulnerabilities in a system to victimize the Government although that was here and that is, in fact, what Mr. Johnson did.

He did two other things, actions which always speak louder than words, in my view, that are quite telling. The person who is identified as M.M.I. in the Government's submissions, the IRS is inquiring about M.M.I.'s tax return and Mr. Johnson fabricates a letter in the name of M.M.I. Mr.

Johnson knows that this tax return contains fraudulent inference. He knows there's exposure criminally and civilly. That's why he fabricates the letter in M.M.I.'s name and what does he say in that letter? He has M.M.I. taking full responsibility for that tax return. It's the functional equivalent of lying about an innocent person to exonerate yourself. That's unusual in a case like this.

Another unusual thing that Mr. Johnson did here, another action for which he has a debt to pay is he ripped off his own client. Now, Your Honor, I wasn't here and that was -- that individual is identified as Y.M. in the Government's submissions. At least one of these individuals was actually called out and mentioned by the Third Circuit in its opinion in affirming the convictions and pointing out that there was sufficient evidence for those convictions.

I didn't try this case as Your Honor knows. Ms. Bergman did not try it. We read the record. I didn't meet Y.M. I didn't meet M.M.I. I don't know really what their circumstances were. I do get the sense that they were not at the top of the socio-economic ladder. I do get the sense that they were hardworking people. And the notion that Mr. Johnson is going to rip off Y.M. for $5,000 just because he can is an action. It's more than exploiting the vulnerabilities of the system. It is the crassest kind of theft. It's a debt that he should pay and, therefore, the Government opposes a variance

downwards in this case.

THE COURT: Is there anything that Mr. Johnson would like to say on his own behalf?

MR. JOHNSON: Yes, Your Honor.

THE COURT: Ms. Bergman, you can bring your client to the podium --

MS. BERGMAN: Okay.

THE COURT: -- where he can be heard. Is the microphone working? Speak into the microphone. Okay.

MR. JOHNSON: Good afternoon, ladies and gentlemen.

Your Honor, I want to thank you for the opportunity to come back here. I want to -- first the IRS investigator is not here but I want to first say that I've written a letter to her and the district attorney where I said some maybe negative stuff. I want to take that back and I apologize for that. I just -- it was my interpretation that I didn't understand what she was doing but now I realize that's her job.

Your Honor, over the last two years I've come to realize a lot about the law. I loved the law before, as I testified at my trial, and I've become increasingly very, very in tune and in love with the law, and that's why I spent the last two years trying to understand the case, as well. Over the last two years I've devoted myself because I want to come to you so that you can know who I am, not what the Government says or what somebody else says.

I spent the last two years working as a tutor trying to get other inmates who are not -- who did not have certain opportunities to get their GED and to aspire to greater things in life. We got -- in one setting we got about 80 percent of the class were able to pass and obtain their GED. I've spent my time doing -- continuing professional courses, a lot of -- it's in the record -- significant amount of educational courses to show who I am and not what somebody else says I am.

In regards to what I've heard, I just -- I'm just going to say in one sentence. Some of those are mischaracterization maybe because of not full knowledge. And if you want, I can go into that, Your Honor, but I will leave it just like that for now. Most of what I've heard is mischaracterization or maybe not a full understanding of the issues.

Now, I have always treated my clients with the utmost respect and if you notice, none of them said that I did something to them that what I would describe as hurt them. They might have just said they were not aware of certain items on the tax return and maybe it's where as tax preparers get into the industry at the beginning, you thought or you think that you had certain leeway or certain understanding to help them based on what they said or based on what they have given information to you in the past and maybe that's where most of the mischaracterization came of.

But I am not a person that hurt people. I am not a

person that will consciously -- I always try to help people and that's why I spent my last two years to let you know, Your Honor, and to let the Government know and the people know that I am not a person that hurt people. I try to help people most of my life. Thank you.

THE COURT: Thank you. All right. I'll take a short break, five minutes, and we'll be back.

COURTROOM DEPUTY: All rise.

(Recess)

COURTROOM DEPUTY: Please remain seated.

THE COURT: All right. The Court has before it several issues to address before the actual sentencing, I think, and the first, of course, is the tax loss which the Circuit felt it was not clearly explained. The further work of Ms. Bergman and the Government has resulted in some agreement that the figures could be viewed from a different perspective or level of culpability, that there may have been some clerical errors, however, if the relevant conduct of Mrs. Johnson is counted, there is no change. The tax loss exceeds the $250,000 which would put him in the category to produce the offense level that we're talking about and I am thoroughly convinced that the calculation is correct, that the calculation to the sense that it certainly exceeds the $250,000, that the 18 levels added are appropriate and that the returns, the losses which were counted properly should be a part of the offense level.

Let me refer -- and, of course, that's going over specific taxpayers' L.E.B. with his trucking company, Ready B. Trucking (phonetic), and the discussion about his truck drivers, how they were paid and so on, all of that which was very meticulously investigated by Ms. Bergman. I appreciate the points she made but I am satisfied that there is no adjustment -- no critical adjustment, no material adjustment warranted.

As to the role of Mr. Johnson and whether Carol Johnson's conduct is relevant conduct to his criminal activity under the sentencing guidelines, let's just refer to that. The parties have extensively briefed the discussion of that. Relevant conduct is defined as all acts or omissions committed, aided, counseled, commanded, induced, procured or willfully caused by the defendant. The guidelines provide that in the case of a jointly undertaken criminal activity a criminal plan, scheme, endeavor or enterprise whether or not charged as a conspiracy, relevant conduct includes all acts, omissions of others that were within the scope of the jointly undertaken criminal activity and in furtherance of that criminal activity and reasonably foreseeable in connection with that criminal activity.

And the application of this relevant conduct provision does not hinge on trial proofs or the jury's verdict. Now, the jury did not find that defendant Johnson conspired with Mrs. Johnson and that didn't surprise me because Mrs. Johnson was not

at counsel table. Just minutes before, minutes before jury selection was to take place Mrs. Johnson's attorney and Mrs. Johnson decided that she would plead guilty to misprision of a felony, and, therefore, she was not a part of the trial. She was not physically present at counsel table and the proofs, while directed at the enterprise, did not emphasize her coordination with him in the way probably it would have been done if there had been a joint trial, but there was not a joint trial.

Now, it was a full scale almost two-weeks jury trial with the defendant himself taking the witness stand and testifying under oath with regard to all of these activities. There was no question that Mrs. Johnson was, in addition to another job, working at the Jersey City office of the company, the enterprise of Mr. Johnson, that the two of them were working together. Mention was made of his using her EFIN, how he testified that he -- nothing leaves his office without his review, that she did the simpler returns who was doing the Schedule C's. That was very clearly testified to by him. I think there were two returns the Government mentioned that he had falsified were submitted with her EFIN used.

But having sat here as the trial judge and listening to the testimony at the trial, there was no question that this was a Mr. and Mrs. criminal activity that was undertaken jointly and cooperatively and one could not have successfully operated without the other without the cooperation and the participation

of the other and there was reliance on the confidence of what -- how the other would respond with regard to those tax returns.

And so there's no question in my mind but that the guidelines description of what is relevant conduct would apply to the returns for which Mrs. Johnson was responsible and that Mr. Johnson who was clearly the dominant partner if you will in this enterprise, that her conduct would be relevant conduct to be chargeable against him. Counting the tax loss attributable to Mrs. Johnson, there's no dispute that the tax loss would be over the $250,000 which would account for the correct guideline calculation on Mrs. Johnson for the tax loss.

Now, there was a concern about role in the offense. The four person enhancement that the Government sought was reduced by me to a three level enhancement because obviously, there's no bright line for determining exactly a four level enhancement as opposed to a three-level enhancement. Sometimes it could be a two-plus. But in this case there was no question who was the boss here. He was the boss of the operation, and it was not a simple operation.

Mr. Johnson, a certified public accountant, an educated, very intelligent man running two offices for tax preparation, a sizable client base. The Government presented 12 witnesses, ten what -- eight clients from Mr. Johnson, two returns the persons for whom she -- Mrs. Johnson did the returns. I think that's the right number, eight and two. But at any rate,

the point is there were many people in this tax -- in this clientele base.

The two offices, there were persons in those offices, staff persons. We don't -- there's no evidence that they were knowing participants in criminal activity but they were staff persons who were there whose assistance and participation made it all possible. Then there was the Santa Barbara, California, connection that Mr. Johnson had arranged so that the clients could get their refunds immediately and he could get his fees paid promptly so that this was not a simple, unsophisticated operation that Mr. Johnson was running and for a substantial period of time.

He had the cooperation of other people even a Mr. Walters who he arranged to use his EFIN, I believe. There was an arrangement with Mr. Walters when Mr. Johnson had gotten into some hot water or had some limitations with his own practice. And he knew how to reach out, how to use others. We're not sure the extent of their knowledge of what his criminal activity was but this was an extensive operation under the guidelines. I am fully satisfied that the otherwise extensive application under the guidelines applies here and that just because conduct was -- criminal conduct was not charged doesn't mean it wasn't a part of this operation.

Now, the restitution is imposed. I would reimpose that obviously as a condition of supervisory release. Nobody seems to

dispute the sum that the IRS has determined under the counts of conviction. It appears that the figure is 10,000 to 180. Therefore, the Court is required to resentence Mr. Courtney Johnson and I want to make sure we use the same figures as to concurrent and consecutive because there was some limitation with regard to the exposure on certain counts. Yes?

MS. BERGMAN: Your Honor, if I may? I'm obligated under Third Circuit precedent to identify for the Court if there's been a procedural error. To the extent that the Court has not addressed the downward variance motion, I don't know if the Court was --

THE COURT: Oh, I'm going to do that.

MS. BERGMAN: I'm sorry. Okay.

THE COURT: Oh, yes, without question. And, you know? I was trying to decide should I do it before or after but yes, you're probably right.

MS. BERGMAN: I was getting confused.

THE COURT: I should do it now. No, I shall do it now. Let's talk about the variance because you have gone to a lot of trouble, Ms. Bergman, to provide me with materials about Mr. Johnson's rehabilitation in the correctional facilities and an argument that he could do greater good for society released rather than in custody. And I think -- I give credit to Mr. Leven for addressing this whole business of sentencing because it is complicated. It has counterveiling issues and points to be

considered.

But custody has been determined to be the sentence that most emphasizes the wrongfulness of criminal conduct and the sentence which seems to get the attention for general deterrence of society in general, and so a custodial sentence for a person who is not a physical threat to anybody may seem unwarranted, nevertheless, there is justification in our society for having as punishment a custodial sentence.

Ms. Bergman has provided exhibits for the fact that Mr. Courtney -- Mr. Johnson who is better educated than I am sure I don't know what the percentage would be in the facilities in which he's incarcerated, but I know from having been a judge in the court and seeing the defendants who come before the Court that he is unusual in terms of his education, his intelligence, his sophistication, his ability, just his ability. And so the fact that he has taken it upon himself to instead of sitting on his cot and looking at television or curled up in a blanket he has decided to help other prisoners learn something so that when they are released, they can perhaps become worthwhile citizens is tremendously to his credit, and I do appreciate that.

I think that's really fine that he has decided to help the other inmates in there who most of the time have learning disabilities, went barely beyond second and third grade, rarely has anyone finished high school. And here, with the education that Mr. Johnson has is just a tremendous benefit for those

prisoners the work he's willing to do to help them, and I really respect that.

And then he himself has made himself a student for programs that have been provided in the federal institution, and I give him credit for that because here, again, some inmates decide they don't care about anything, don't care about life, don't care about improving themselves, and he evidently has decided that he is going to do something about it. He had a gambling addiction which was, as I recall, evidenced in the trial. And, evidently, he has decided that he's going to try to improve himself and take the benefit of the programs that are available in the institution, and I respect that. And I would like to say you have shown yourself to be, for all I can see, a model person.

I am not granting the variance. However, because I am as sure now as I was when I imposed sentence that this sentence was warranted, that it's a matter of general deterrence, that what he was doing, taking advantage of people who he may have treated them with respect and courtesy but he was jipping them, he was cheating them. He was putting them in a position to be in trouble with the Government, as well as stealing from them. He was manufacturing and fabricating and dumping on them with the fabrications and the manufacturing. So, that is -- that's bad conduct.

And the sentencing range for this defendant was 46 to

57 I believe we -- I'm going to go over that in just a minute. But that was the guideline range, not statutory, guideline range. And I think it was fully warranted. Taking advantage of unsuspecting immigrants. He's from Haiti. These are people for most of -- many of them were from the Caribbean. People -- they were hardworking people with minimal level jobs. These are not wealthy people. These are all just barely making it people, and they were taken advantage of knowingly by an intelligent, well-educated man.

So, good things to say about Mr. Johnson, but that's the bad side and it's not erased. I think the Government said it right. He still has a debt to pay for that and I think I was -- I did not impose the maximum sentence even under the guidelines but I see no reason to reduce or to vary on the resentencing.

All right, we have an offense level of 23. We have criminal history category 1. We have a guideline exposure of recommended jail term in months of 46 to 57 months. I think I have explained why I am giving the sentence that I'm giving. Having sat here as the trial judge and having heard the testimony as well as the testimony of the defendant himself, I feel that I'm qualified to say what the facts showed and what was presented at the trial in this case.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Courtney Johnson, is hereby committed to the Custody of the Bureau of Prisons to be

imprisoned for a term of 36 months on each of Counts 2, 3 and 4, to be served concurrently, and 12 months on each of Counts 5, 7 and 8 to be served concurrently with each other, but consecutively to the terms imposed on 2, 3 and 4 to the extent necessary to produce a total term of 48 months.

Upon release from imprisonment the defendant shall be placed on supervisory release for a term of one year. This term consists of terms of one year on each of Counts 2, 3, 4, 5, 7 and 8, all such terms to run concurrently to the extent necessary to produce a total term of supervised release of one year. Within 72 hours of release from the Custody of the Bureau of Prisons he shall report in person to the probation office in the district to which he's released.

While on supervisory release he shall not commit another federal, state or local crime, he shall be prohibited from possessing a firearm or other dangerous device, he shall not possess an illegal controlled substance and shall comply with the other standard conditions that have been adopted by the Court. Based on the information presented, the defendant is excused from mandatory drug testing, however, he may be requested to submit to drug testing during the period of supervision if the officer determines a risk of substance abuse.

The defendant shall comply with the following special conditions. He must refrain from all gambling activities, legal or otherwise. That includes purchase of lottery tickets. And he

shall register on the self-exclusion list maintained at the New Jersey Casino Control Commission and Racetrack Commission within 60 days of the commencement of supervision and remain on these lists for the duration of supervision. You shall not enter any gambling establishment without the permission of the U.S. probation officer and the Court.

You are to fully cooperate with Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and to timely file all future returns that come due during the period of supervision. You shall undergo treatment in a mental health program approved by the orobation office until discharged by the Court. Said treatment may also include treatment for gambling, domestic violence, anger management and so on.

You are prohibited from incurring any new credit charges, opening additional lines of credit or incurring any new monetary loan obligation or debt without approval of the probation office. You may not liquidate or encumber interest in any assets unless it's in direct service of the restitution ordered by the Court. You shall cooperate with probation in the investigation and approval of any position of self-employment including any independent entrepreneurial or freelance employment or business activity.

It is further ordered that the defendant is to pay a total fine of $50,000. That's Count 2 a fine of 10,000, Count 3

a fine of 8,000, Count 4 a count of 8,000, Count 5 a fine of 8,000, Count 7 a fine of 8,000, Count 8 a fine of 8,000. The fine is due immediately. It's certainly recommended that the defendant participate in the IFRP while incarcerated. At that time funds may be paid at a rate equivalent to $25 every three months, but if the fine is not paid prior to the commencement of supervision, the defendant must satisfy the amount due in monthly installments of no less than $500 to commence 30 days after restitution in this case has been paid in full.

The defendant must notify the U.S. Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution or fine remains unpaid. The special assessment may have been already paid but if not, of course, that was $600. The defendant is hereby remanded to the custody of the U.S. marshals and the defendant has a right to appeal the sentence of this Court to the Third Circuit Court of Appeals subject to any preexisting appellate waiver. And if he cannot afford to pay for the notice of appeal, he may request the clerk of the court to file it without cost. Yes, Mr. Leven?

MR. LEVEN: Your Honor, I do have something in the nature of a housekeeping issue and I raise it only because I think all of us in this proceeding understand the difference between the cold record that the Third Circuit looks at and what we have heard and seen in this court and to the extent there's

any disconnect between the two, I just want to address that.

So, Your Honor, I'm understanding that the Court's holding as to relevant conduct is based at least in part on the information provided to the Court in Government Charts 1 and 2 and that the Court's ruling as to role is based at least in part on the defendant's causing the various individual taxpayers to make material misrepresentations to the IRS.

THE COURT: It is based on the Court's hearing, the evidence that was presented at trial at which the taxpayer clients testified as to what they did, what was done, what they knew about when their returns were being prepared about -- I have considered obviously the presentence report and the materials submitted thereby. I'm not sure I understand what your concern is, Mr. Leven, and you should take time --

MR. LEVEN: Your Honor, concern is too strong of a word. It just occurred to me in preparing the Government's position in this case I thought that Your Honor was rather thorough in the initial sentencing and yet we know what a cold record looks like and how it can be misconstrued. And given that the Third Circuit has remanded for you to find -- make specific findings of fact, as you pointed out yourself, Your Honor, at the initial trial Carol Johnson was not sitting at the defense table.

The Government's proofs did not come in presumably in the same way that they would have if she were there. The Government has, therefore, gone to the trouble here of in

Government Charts 1 and 2 actually laying out jot and tittle where these points of convergence are in terms of concerted, jointly undertaken action. And if the Court is at least in part relying upon that new analysis, I'm just asking Your Honor to state so.

THE COURT: Oh, absolutely.

MR. LEVEN: And --

THE COURT: The materials that have been -- the charts that you submitted from the Government were studied by me and considered.

MR. LEVEN: And I understood that, Judge, just from listening to you. It's just because of this record.

THE COURT: Oh, I understand.

MR. LEVEN: And the other point on the role, as Ms. Bergman mentioned, we did not -- none of the parties focused on the taxpayers as unwitting participants at the initial sentencing.

THE COURT: Well, but I heard those taxpayers testify. Every nuance I listened because these were not educated people. You could just tell they didn't really know what their obligations were, what deductions they were entitled to. They just knew whether or not they had to wear uniforms. They knew what their job descriptions were like. But they didn't. It was clear. But they were a part of this otherwise extensive operation that Mr. Johnson was running and they were a part of

the partnership that was being conducted.

MR. LEVEN: Thank you for that clarification on the record, Your Honor. I appreciate it.

THE COURT: Ms. Bergman?

MS. BERGMAN: Yes, Your Honor. Just with respect to the restitution, while I understand that the Court is ordering the same restitution, I would ask that it be made clear that it is being ordered as a condition of supervised release and that the Court set some sort of payment schedule with respect to that as a condition of supervised release and that the judgment make it also clear that it's not being ordered to be paid immediately in light of the fact that it is supervisory release conditioned.

THE COURT: Well, you know? Even when I make restitution to be paid immediately, it always is subject to $25, you know, every three months. There's no question that Section 3663 does not permit the imposition of restitution for violations of Section 7206 and, therefore, the restitution has to be ordered as a condition of supervisory release. That was probably the only undisputed aspect of today's proceeding I think. All right, thank you very much.

MR. LEVEN: Thank you, Judge.

* * * * *

C E R T I F I C A T I O N

I, MARY POLITO, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of my ability.

/s/ Mary Polito

MARY POLITO

J&J COURT TRANSCRIBERS, INC. DATE: November 19, 2018

Ex. C