

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA

CRIMINAL NO. 20-139

VERSUS

**SECTION "I"
JUDGE LANCE M. AFRICK**

NICOLE E. BURDETT

**MAGISTRATE (3)
MAGISTRATE JUDGE DOUGLAS**

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

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Ms. Burdett was convicted at trial in Case No. 20-cr-139 of four counts of making and subscribing a false income tax return in violation of 26 U.S.C. § 7206(1) for tax years 2014 (Count 1), 2015 (Count 2), 2016 (Count 3), and 2017 (Count 4). Ms. Burdett was not charged with conspiring with or aiding and abetting tax preparer Henry Timothy to falsify her own returns; instead, she was charged only with the four substantive counts of perjury on her income tax returns. *See Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966) (“the gist of the offense is a false statement, willfully made, of a material matter”).

The jury acquitted Ms. Burdett in Case No. 20-55 of conspiring and aiding and abetting the filing of false returns for her co-defendant, Jason Williams, under 18 U.S.C. § 371 and 26 U.S.C. § 7206(2). The government’s theory regarding Mr. Williams’ returns was that the defendants knowingly and willfully conspired with Timothy to inflate the Schedule C expenses that were deducted from Mr. Williams’ gross income to unlawfully decrease his income tax liability.

The two significant differences between Case Nos. 20-cr-55 and 20-cr-139 are that Ms. Burdett’s returns—in addition to having Schedule Cs that included deductions that were identified and taken by Timothy—were filed listing her as head of household, and that she was charged under Section 7206(1) rather than under Section 7206(2).

Ms. Burdett timely moved for a judgment of acquittal on all counts after the close of the government’s case pursuant Rule 29(a). The Court reserved judgment until after the verdict pursuant to Rule 29(b). Rule 29 provides that the Court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The Court may on its own consider whether the evidence is insufficient to sustain a conviction.” *See Fed. R. Crim. Pro. 29(a)*.

The government presented two theories of falsity at trial: that Ms. Burdett “filed as head of household, even though she was married at the time, and the tax return contained false and fraudulent Schedule C business expenses.” *See* Doc. 1, Case No. 20-cr-139. The Court gave the jury a unanimity of theory instruction, but the jury was not polled on which theory it based its verdict. Ms. Burdett therefore briefs the failure of proof on both theories.

1. Rule 29 standards.

“The inquiry into the sufficiency of the evidence” when applying Rule 29 “is whether the jury could reasonably, logically and legally infer that the defendant was guilty beyond a reasonable doubt.” *United States v. Quiroz-Hernandez*, 48 F.3d 858, 865 (5th Cir. 1995). To be upheld, the verdict must be supported by “substantial evidence” on each element of the offense of conviction. *United States v. Martinez*, 555 F.2d 1269, 1271 (5th Cir. 1977) (a verdict must be reversed if not “supported by ‘substantial evidence’”); *see also Mortensen v. United States*, 322 U.S. 369, 374 (1944) (“[W]e have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict.”); *Greenspan v. Shalala*, 38 F.3d 232, 236 (5th Cir. 1994) (“Substantial evidence is more than a scintilla. . . . Substantial evidence is enough that a reasonable mind would support the conclusion.”); *United States v. Moreland*, 665 F.3d 137, 149 n.6 (5th Cir. 2011) (“We remain highly deferential to jury verdicts, but are obligated, as judges, to reverse a conviction where, having viewed all evidence in the light most favorable to the prosecution, we must conclude that the record cannot support a conclusion that the prosecution established guilt beyond a reasonable doubt.”).

When evaluating the evidence, the Court is to “consider the countervailing evidence as well as the evidence that supports the verdict.” *Moreland*, 665 F.3d at 149. The Court must

ensure that the verdict is not based on “mere suspicion, speculation, or conjecture, or an overly attenuated piling of inference on inference.” *Id.* (reversing conviction for insufficient evidence of knowledge). And when considering what inferences could have been drawn from the evidence, the Court must draw “only upon *reasonable* inferences from the record.” *Id.* (internal citation and quotation omitted) (emphasis added). “[N]o reasonable jury could convict a defendant where the government has done nothing more than pile inference upon inference to prove guilt.” *Id.* (internal citation and quotation omitted).

When “the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,” the Court “must reverse the convictions.” *United States v. Menesses*, 962 F.2d 420, 426 (5th Cir. 1992) (internal quotation and citation omitted). That is because when the evidence gives equal circumstantial support to a theory of guilt and one of innocence, “a reasonable jury must necessarily entertain a reasonable doubt.” *Clark v. Procnier*, 755 F.2d 394, 396 (5th Cir. 1985) (internal quotation and citation omitted).

Nor should the Court “pile inference upon inference” or draw gratuitous inferences in favor of the prosecution. *United States v. Stewart*, 145 F.3d 273, 280 (5th Cir. 1998); *see also Piaskowski v. Casperson*, 126 F. Supp. 2d 1149, 1159–60 (E.D. Wis. 2001) (“The ultimate finding of guilt in this case required the jury to pile speculation on top of the inferences drawn from more inferences. Each step along the way required the jury to eliminate one or more alternatives, thus multiplying the risk of error. Such verdict is not rational.”), *aff’d*, *Piaskowski v. Bett*, 256 F.3d 687, 692–93 (7th Cir. 2001) (“As strong suspicion that someone is involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt. . . . Although a jury may infer facts from other facts that are established by inference, each link in the chain of

inferences must be sufficiently strong to avoid a lapse into speculation.”). While the Court is required to draw in the government’s favor all inferences that are reasonably supported by the record evidence, the Court “cannot ‘credit [the prosecution with] inferences within the realm of possibility when those inferences are unreasonable.” *Moreland*, 665 F.3d at 149. And if the only reasonable inference to be drawn from a particular constellation of evidence is one that favors the defendant, the Court must consider that exculpatory inference. *See Evans-Smith v. Taylor*, 19 F.3d 899, 909 n.29 (4th Cir. 1994).

The Court must be particularly careful with inferences regarding facts that establish elements of the crime. There is a constitutionally significant distinction between an “‘evidentiary’ or ‘basic’ fact[],” on the one hand, and “an ‘ultimate’ or ‘elemental’ fact,” on the other. *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979). Where the government asked the jury to infer a fact that is also an element of the offense (*e.g.*, that the defendant possessed the requisite mental state—willfulness, here), it is not enough that the record evidence reasonably supports the prosecution’s desired inference. Instead, the prosecution’s burden was to adduce evidence sufficient to prove that inference “beyond a reasonable doubt.” *Id.*; *see also Regalado Cuellar v. United States*, 553 U.S. 550, 567 n.8 (2008) (reversing conviction because the prosecution failed to adduce evidence “from which it could be inferred beyond a reasonable doubt” that the defendant possessed the requisite mental state for money laundering). Thus, in *United States v. Alvarez*, the Fifth Circuit vacated a conviction where the prosecution “attempt[ed] to cobble together inferences from the testimony presented in support of the verdict against [the defendant].” 451 F.3d 320, 337 (5th Cir. 2006). The Fifth Circuit explained that, even though “a rational jury might make the chain of [evidentiary] inferences” proffered by the prosecution, “based only on the evidence presented, the arguments made by the Government, and

the inferences that could be drawn from that evidence, a reasonable jury could not conclude *beyond a reasonable doubt* that the elements of the crime have been proven.” *Id.*

And when, as here, the crucial witness’s “approach to the truth was so cavalier and insouciant that his word could hardly be trusted alone, and should be accepted only with special care, utmost caution/doubt, and requisite corroboration,” and when the record establishes that the witness’s “assumed and self-serving license to change the ‘truth’ to suit his (or the government’s) purposes or moods,” the Court may properly determine that the “government could meet its burden of proof . . . only if corroborating evidence existed to confirm [the witness’s] testimony . . . and raise it above his many other prevarications.” *United States v. Bowen*, 2011 U.S. Dist. LEXIS 163480, at *8 (E.D. La. Oct. 20, 2011) (Engelhardt, J.) (granting Rule 29 relief). *Accord United States v. Hemen*, 202 F. Supp. 3d 629, 632–44 (E.D. Tex. 2016) (evidence supporting conviction for conspiracy to distribute controlled substances insufficient where, although witness testified about defendant’s involvement in pharmacy and “[p]art of [that] testimony could be corroborated regarding the operation of the pharmacy,” “no evidence corroborated” testimony that defendant signed an unlawful agreement,” such that “[t]he testimony, and the additional evidence, . . . lack[ed] support for the contention that Defendant possessed the specific necessary *mens rea* for the charged conspiracy”); *Alvarez*, 451 F.3d at 333–34 (vacating conviction where the government’s proffered evidence of an essential element of the offense was “both circular and self-serving”).

Timothy’s approach to the truth was certainly cavalier. He admitted to lying to the IRS on his own returns, to his tax clients, to federal agents, to the grand jury, and under oath in civil litigation. Timothy lied on his tax returns by grossly understating his income and was the initial target of the government’s investigation. *See Timothy Tr. Day 2 at 38:19-39:7.* Timothy

testified that he falsely represented himself to be a CPA. *See* Timothy Tr. Day 1 at 71:22-72:25. Timothy admitted that he repeatedly lied to his own clients. *See* Timothy Tr. Day 2 at 40:3-6. Timothy admitted that he lied to S/A Marable by falsely claiming that his returns were accurate in all material respects during his interview with her. *See* Timothy Tr. Day 2 at 54:23-55:9; 56:14-16. Timothy admitted that he lied to the grand jury and falsely claimed to have an accounting degree. *See* Timothy Tr. Day 2 at 40:23-41:3. Timothy admitted under oath in civil litigation that he believed at the time that he prepared Ms. Burdett's returns that the deductions he took were appropriate and consistent with law—sworn testimony in direct contradiction to the testimony he gave at trial. *See* Exh. D-225.

Timothy also evidenced a willingness to change “the truth” for the government’s purposes. Timothy testified that he “didn’t know what the intent of what they [Agents Moore and Goodson] were looking at, and I thought I was being truthful; [during the first interview], but when we met again I found out I wasn’t truthful with them.” *See* Timothy Tr. Day 1 at 176:25-177:7. Timothy acknowledged that he was selective with the truth and continued to file false income tax returns for himself even after he came under investigation for understating his income and began cooperating with the government in its investigation of Mr. Williams. *See* Timothy Tr. Day 2 at 69:6-21.

Despite all this, Timothy acknowledged that his testimony was uncorroborated. *See* Timothy Tr. Day 2 at 26: 7-16 (“Q. So we have to rely solely on what you say? A. Yes, sir.”).

2. Elements of Section 7206(1).

Rule 29 “must be applied with explicit reference to the substantive elements” of the offense of conviction “as defined by law.” *Moreland*, 665 F.3d at 149.

Section 7206(1) “is a perjury statute.” *Kolaski*, 362 F.2d at 848. “[T]he gist of the offense is a false statement, willfully made, of a material matter,” and the alleged false statement “must be with respect to a fact or facts.” *Id.* The “truth or falsity” of the charged statement must be “susceptible of proof,” and the “truth or falsity of the statement is to be related to the time the statement [was] made.” *Id.*

The Court properly instructed the jury on the elements of 26 U.S.C. § 7206(1): “*first*, that Nicole Burdett signed an income tax return that contained a written declaration, made under penalties of perjury; *second*, that, in the return for the count you are considering (*i.e.*, count 1, 2, 3, or 4), Nicole Burdett falsely stated that she was head of household and/or falsely stated Schedule C business expenses exceeding the amount listed in each count of the indictment (*i.e.*, count 1, 2, 3, or 4); *third*, that Nicole Burdett knew the statement was false; *fourth*, that the false statement was material; and *fifth*, that Nicole Burdett made the statement willfully, that is, with intent to violate a known legal duty, as ‘willfully’ as been defined in these instructions.” *See* Doc. 418-2 (Jury Instructions); *United States v. Nicholson*, 961 F.3d 328, 339 (5th Cir. 2020) (quoting *United States v. Boyd*, 773 F.3d 637, 644 (5th Cir. 2014)).

As to the third element, the Court defined knowingly to “mean[] that the act was done voluntarily and intentionally, not because of mistake or accident.” *See* Doc. 418-2 (Jury Instructions). As to the fifth element, the Court defined willfully “in the context of the substantive criminal tax . . . statutes, means the voluntary, intentional violation of a known legal duty. To prove that a defendant acted willfully, the government must prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he or she voluntarily and intentionally violated that duty. If the government proves actual knowledge of the pertinent legal duty, then the government has satisfied the knowledge component of the willfulness

requirement.” *Id.* The Court continued that “a person’s conduct is not ‘willful’ if he or she acted through negligence, even gross negligence, inadvertence, justifiable excuse or mistake, or due to his or her good faith misunderstanding of the requirement of the law.” *Id.* The Court instructed that “to carry its burden of establishing that a defendant acted willfully, the government must prove the absence of good faith; in other words, the government must prove beyond a reasonable doubt that the defendant was not acting with the good faith belief that he or she was acting lawfully. A person who believes in good faith that his or her actions comply with the law does not act willfully, even if his or her belief that he or she is complying with the law is irrational or unreasonable.” *Id.*

Even so, “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). That is what happened here. “[W]hen such a conviction occurs . . . , it cannot constitutionally stand.” *Id.* at 318.

Neither party requested an instruction on the eligibility requirements for a filer to claim head of household. But because the government charged Ms. Burdett with falsely claiming eligibility to file as head of household, it was obligated to prove beyond a reasonable doubt that the filing statement was factually false. *Kolaski*, 362 F.2d at 848. On Rule 29, the Court must review the record to determine whether there was sufficient “evidence that would have supported a jury’s finding on the omitted element” of false head of household status. *United States v. Suarez*, 879 F.3d 626, 634, 636–37 (5th Cir. 2018) (in Rule 29 appeal, where “[p]ossession of a particular type of firearm [was] an element of the offense for purposes of the statutory ten-year minimum sentence but not for a conviction of possession of a firearm in furtherance of drug trafficking crime,” and the “jury instruction did not require that the jury find which of the two

firearms charged in Count II—the pistol or the sawed-off Winchester shotgun—formed the basis of its verdict,” holding that there was insufficient “evidence that would have supported a jury’s finding on the omitted element”).

3. The government failed to prove that Ms. Burdett signed the 2014 tax return that was charged as Count 1.

“The elements of filing a false tax return under 26 U.S.C. § 7206(1) are that a defendant ‘(1) made and signed a materially false federal income tax return; (2) *submitted a written declaration stating under penalties of perjury that the return was true and correct*; (3) did not believe that the return was true and correct when he signed it; and (4) signed it willfully and with the specific intent to violate the law.’” *United States v. Nicholson*, 961 F.3d 328, 339 (5th Cir. 2020) (quoting *United States v. Boyd*, 773 F.3d 637, 644 (5th Cir. 2014) (citing § 7206(1)) (emphases added). The signature-under-penalty-of-perjury requirement distinguishes section 7206(1). While “a person need not actually sign or prepare a false tax return to either conspire to or actually aid and abet the filing of a false income tax return” under 26 U.S.C. § 7206(2), *United States v. Clark*, 577 F.3d 273, 285 (5th Cir. 2009), the government charged Ms. Burdett under section 7206(1). To establish that crime beyond a reasonable doubt, the government “must prove . . . that the Defendant electronically signed an income tax return that contained a written declaration that it was made under penalties of perjury.” *United States v. Wise*, No. 2:15-CR-00188-1, 2015 U.S. Dist. LEXIS 36755, at *2–3 (S.D. Tex. Mar. 4, 2015).

Timothy electronically filed Ms. Burdett’s 2014 Form 1040 on April 28, 2015, at 2:21 p.m. *See* Exh. G-50 at 21. Timothy electronically signed the return, attesting that the “[d]eclaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge”:

Sign Here Joint return? See Instructions. Keep a copy for your records.	Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.			
	Your signature *****	Date 04-28-2015	Your occupation ATTORNEY	Daytime phone number
	Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.) [Redacted]
Paid Preparer Use Only	Print/type preparer's name Henry Timothy	Preparer's signature	Date 04-28-2015	Check <input type="checkbox"/> if self-employed PIN [Redacted]
	Firm's name ▶ B&B ACCOUNTING SERVICES HENRY TIMOTHY	Firm's EIN ▶ [Redacted]		
	Firm's address ▶ [Redacted] WESTWEGO, LA, 70094	Phone no [Redacted]		
www.irs.gov/form1040				Form 1040 (2014)

Id. at 3.

Timothy generated an electronic signature for the “Sign Here” section of the return that calls for the taxpayer to sign. Timothy was familiar with the Form 8879 and knew that it was required for him to electronically affix Ms. Burdett’s signature to the return:

Q. Sir, are you familiar with IRS form 8879?

A. Yes, ma’am.

Q. Can you tell the jury, what is that particular form?

A. That is the form that allows me to send off their tax return electronically once they have reviewed it and signed that form for me.

See Timothy Tr. Day 1 at 67:15-20.

But the government did not introduce an authorization to e-file (Form 8879) signed by Ms. Burdett for tax year 2014. The Form 8879 is required for the taxpayer to authorize the tax preparer to “enter or generate my PIN as my signature on my tax year [XXXX] electronically filed income tax return.” *See, e.g.*, Exh. G-161 (Form 8879 for 2015 tax year). The authorization to e-file contains a “Taxpayer Declaration and Signature Authorization” that is signed under penalty of perjury that verifies that to the best of the taxpayer’s “knowledge and belief,” the return and schedules are “true, correct, and complete,” and authorizes the tax

preparer to file the return. Without an authorization from Ms. Burdett permitting Timothy to affix her electronic signature to the tax return, the government failed to satisfy the signature element of Section 26 U.S.C. § 7206(1) for Count 1.

4. The government failed to prove that the head of household filing status was “false” for any of the four charged tax years.

For the government to satisfy the first element of 26 U.S.C. § 7206(1), it was required to introduce evidence proving beyond a reasonable doubt that the income tax return was “materially false.” *United States v. Nicholson*, 961 F.3d 328, 339 (5th Cir. 2020) (quoting *United States v. Boyd*, 773 F.3d 637, 644 (5th Cir. 2014) (citing § 7206(1)) (emphases added). On a Rule 29 motion, the Court is to assess whether there was “substantial evidence” to establish the alleged falsity. *United States v. Martinez*, 555 F.2d 1269, 1271 (5th Cir. 1977) (a verdict must be reversed if not “supported by ‘substantial evidence’”).

When the government charges a violation of § 7206(1), “the specific false statement charged is the very essence of the offense. In such cases,” the Court “must hold the government to proving the particular falsity it alleges even if the evidence should demonstrate that the defendant made other false statements for which liability could have properly attached.” *United States v. Adams*, 2009 U.S. App. LEXIS 2971, at *17 (5th Cir. Feb. 17, 2009).

The government did not prove the “very essence” of its head of household theory: it did not prove that the filing status was “false.” At trial, the government introduced IRS publications 535 (pertaining to Schedule C business expenses) and 1544 (pertaining to Form 8300). *See* Exh. G-470, Exh. G-469. The government did *not* introduce any IRS publication regarding eligibility to file as head of household. Instead, it elicited testimony from S/A Moore, who provided incorrect and incomplete information to the jury about the eligibility for filing as head of household by testifying that head of household is available only to “individuals that are not

married and would have a dependent.” The government also elicited testimony from Timothy that “[i]f you are married, you can only file married filing separately or married filing jointly.” See Timothy Tr. Day 1 at 108:2-5. This testimony is not correct as a matter of law.

A person is eligible to file as head of household if they meet the “marriage test,” the “qualifying person test,” and the “cost of keeping up a home test.” Head of household is available to people who are any of the following: (1) single; (2) divorced or legally separated; or (3) married, if the taxpayer’s spouse did not live with her during the last six months of the tax year, and certain additional conditions are met. See IRS Form 8860H-HOH (revised in 2015 and 2019).

To prove that the head of household filing status was false, the government was obligated to prove beyond a reasonable doubt that Ms. Burdett was not eligible to file as head of household—that is, the government had to prove that claiming head of household was *false*. The IRS guidance for completing the Form 1040 for each charged year¹ summarizes the complex tax code provisions, 26 C.F.R. § 1.2-2, on eligibility to file as head of household:

¹ See IRS 1040 Instructions (2014), Cat. No. 24811V, available at <https://www.irs.gov/pub/irs-prior/i1040gi--2014.pdf> (last accessed Aug. 5, 2022); IRS 1040 Instructions (2015), Cat. No. 24811V, available at <https://www.irs.gov/pub/irs-prior/i1040gi--2015.pdf> (last accessed Aug. 5, 2022); IRS 1040 Instructions (2016), Cat. No. 24811V, available at <https://www.irs.gov/pub/irs-prior/i1040gi--2016.pdf> (last accessed Aug. 5, 2022); IRS 1040 Instructions (2017), Cat. No. 24811V, available at <https://www.irs.gov/pub/irs-prior/i1040gi--2017.pdf> (last accessed Aug. 5, 2022).

Tax Year 2014 (Count 1)	Tax Year 2015 (Count 2)	Tax Year 2016 (Count 3)	Tax Year 2017 (Count 4)
<p>Line 4 Head of Household</p> <p>This filing status is for unmarried individuals who provide a home for certain other persons. You are considered unmarried for this purpose if any of the following applies.</p> <ul style="list-style-type: none"> You were legally separated according to your state law under a decree of divorce or separate maintenance at the end of 2014. But if, at the end of 2014, your divorce was not final (an interlocutory decree), you are considered married. You are married but lived apart from your spouse for the last 6 months of 2014 and you meet the other rules under <i>Married persons who live apart</i>. You are married to a nonresident alien at any time during the year and you do not choose to treat him or her as a resident alien. <p>Check the box on line 4 only if you are unmarried (or considered unmarried) and either <i>Test 1</i> or <i>Test 2</i> applies.</p> <p>Test 1. You paid over half the cost of keeping up a home that was the main home for all of 2014 of your parent whom you can claim as a dependent on line 6c, except under a multiple support agreement (see the line 6c instructions). Your parent did not have to live with you.</p> <p>Test 2. You paid over half the cost of keeping up a home in which you lived and in which one of the following also lived for more than half of the year (if half or less, see <i>Exception to time lived with you</i>).</p> <ol style="list-style-type: none"> Any person whom you can claim as a dependent on line 6c. But do not include: <ol style="list-style-type: none"> Your child whom you claim as your dependent because of the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions, Any person who is your dependent only because he or she lived with you for all of 2014, or Any person you claimed as a dependent under a multiple support agreement. See the line 6c instructions. <p style="text-align: center;">* * *</p>	<p>Line 4 Head of Household</p> <p>This filing status is for unmarried individuals who provide a home for certain other persons. You are considered unmarried for this purpose if any of the following applies.</p> <ul style="list-style-type: none"> You were legally separated according to your state law under a decree of divorce or separate maintenance at the end of 2015. But if, at the end of 2015, your divorce wasn't final (an interlocutory decree), you are considered married. You are married but lived apart from your spouse for the last 6 months of 2015 and you meet the other rules under <i>Married persons who live apart</i>. You are married to a nonresident alien at any time during the year and you do not choose to treat him or her as a resident alien. <p>Check the box on line 4 only if you are unmarried (or considered unmarried) and either <i>Test 1</i> or <i>Test 2</i> applies.</p> <p>Test 1. You paid over half the cost of keeping up a home that was the main home for all of 2015 of your parent whom you can claim as a dependent on line 6c, except under a multiple support agreement (see the line 6c instructions). Your parent didn't have to live with you.</p> <p>Test 2. You paid over half the cost of keeping up a home in which you lived and in which one of the following also lived for more than half of the year (if half or less, see <i>Exception to time lived with you</i>).</p> <ol style="list-style-type: none"> Any person whom you can claim as a dependent on line 6c. But do not include: <ol style="list-style-type: none"> Your child whom you claim as your dependent because of the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions, Any person who is your dependent only because he or she lived with you for all of 2015, or Any person you claimed as a dependent under a multiple support agreement. See the line 6c instructions. <p style="text-align: center;">* * *</p>	<p>Line 4 Head of Household</p> <p>This filing status is for unmarried individuals who provide a home for certain other persons. You are considered unmarried for this purpose if any of the following applies.</p> <ul style="list-style-type: none"> You were legally separated according to your state law under a decree of divorce or separate maintenance at the end of 2016. But if, at the end of 2016, your divorce wasn't final (an interlocutory decree), you are considered married. You are married but lived apart from your spouse for the last 6 months of 2016 and you meet the other rules under <i>Married persons who live apart</i>. You are married to a nonresident alien at any time during the year and you do not choose to treat him or her as a resident alien. <p>Check the box on line 4 only if you are unmarried (or considered unmarried) and either <i>Test 1</i> or <i>Test 2</i> applies.</p> <p>Test 1. You paid over half the cost of keeping up a home that was the main home for all of 2016 of your parent whom you can claim as a dependent on line 6c, except under a multiple support agreement (see the line 6c instructions). Your parent didn't have to live with you.</p> <p>Test 2. You paid over half the cost of keeping up a home in which you lived and in which one of the following also lived for more than half of the year (if half or less, see <i>Exception to time lived with you</i>).</p> <ol style="list-style-type: none"> Any person whom you can claim as a dependent on line 6c. But do not include: <ol style="list-style-type: none"> Your child whom you claim as your dependent because of the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions, Any person who is your dependent only because he or she lived with you for all of 2016, or Any person you claimed as a dependent under a multiple support agreement. See the line 6c instructions. <p style="text-align: center;">* * *</p>	<p>Line 4 Head of Household</p> <p>This filing status is for unmarried individuals who provide a home for certain other persons. You are considered unmarried for this purpose if any of the following applies.</p> <ul style="list-style-type: none"> You were legally separated according to your state law under a decree of divorce or separate maintenance at the end of 2017. But if, at the end of 2017, your divorce wasn't final (an interlocutory decree), you are considered married. You are married but lived apart from your spouse for the last 6 months of 2017 and you meet the other rules under <i>Married persons who live apart</i>. You are married to a nonresident alien at any time during the year and you don't choose to treat him or her as a resident alien. <p>Check the box on line 4 only if you are unmarried (or considered unmarried) and either <i>Test 1</i> or <i>Test 2</i> applies.</p> <p>Test 1. You paid over half the cost of keeping up a home that was the main home for all of 2017 of your parent whom you can claim as a dependent on line 6c, except under a multiple support agreement (see the line 6c instructions). Your parent didn't have to live with you.</p> <p>Test 2. You paid over half the cost of keeping up a home in which you lived and in which one of the following also lived for more than half of the year (if half or less, see <i>Exception to time lived with you</i>).</p> <ol style="list-style-type: none"> Any person whom you can claim as a dependent on line 6c. But don't include: <ol style="list-style-type: none"> Your child whom you claim as your dependent because of the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions, Any person who is your dependent only because he or she lived with you for all of 2017, or Any person you claimed as a dependent under a multiple support agreement. See the line 6c instructions. <p style="text-align: center;">* * *</p>

<p>Married persons who live apart. Even if you were not divorced or legally separated at the end of 2014, you are considered unmarried if all of the following apply.</p> <ul style="list-style-type: none"> • You lived apart from your spouse for the last 6 months of 2014. Temporary absences for special circumstances, such as for business, medical care, school, or military service, count as time lived in the home. • You file a separate return from your spouse. • You paid over half the cost of keeping up your home for 2014. • Your home was the main home of your child, stepchild, or foster child for more than half of 2014 (if half or less, see <i>Exception to time lived with you</i>, earlier). • You can claim this child as your dependent or could claim the child except that the child's other parent can claim him or her under the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions. 	<p>Married persons who live apart. Even if you were not divorced or legally separated at the end of 2015, you are considered unmarried if all of the following apply.</p> <ul style="list-style-type: none"> • You lived apart from your spouse for the last 6 months of 2015. Temporary absences for special circumstances, such as for business, medical care, school, or military service, count as time lived in the home. • You file a separate return from your spouse. • You paid over half the cost of keeping up your home for 2015. • Your home was the main home of your child, stepchild, or foster child for more than half of 2015 (if half or less, see <i>Exception to time lived with you</i>, earlier). • You can claim this child as your dependent or could claim the child except that the child's other parent can claim him or her under the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions. 	<p>Married persons who live apart. Even if you were not divorced or legally separated at the end of 2016, you are considered unmarried if all of the following apply.</p> <ul style="list-style-type: none"> • You lived apart from your spouse for the last 6 months of 2016. Temporary absences for special circumstances, such as for business, medical care, school, or military service, count as time lived in the home. • You file a separate return from your spouse. • You paid over half the cost of keeping up your home for 2016. • Your home was the main home of your child, stepchild, or foster child for more than half of 2016 (if half or less, see <i>Exception to time lived with you</i>, earlier). • You can claim this child as your dependent or could claim the child except that the child's other parent can claim him or her under the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions. 	<p>Married persons who live apart. Even if you weren't divorced or legally separated at the end of 2017, you are considered unmarried if all of the following apply.</p> <ul style="list-style-type: none"> • You lived apart from your spouse for the last 6 months of 2017. Temporary absences for special circumstances, such as for business, medical care, school, or military service, count as time lived in the home. • You file a separate return from your spouse. • You paid over half the cost of keeping up your home for 2017. • Your home was the main home of your child, stepchild, or foster child for more than half of 2017 (if half or less, see <i>Exception to time lived with you</i>, earlier). • You can claim this child as your dependent or could claim the child except that the child's other parent can claim him or her under the rule for <i>Children of divorced or separated parents</i> in the line 6c instructions.
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The government proved at trial that Ms. Burdett and Mr. Waguespack got married in 2010. See Exh. G-6 (Marriage Certificate). That is not enough. To prove that she was ineligible to file as head of household, the government was obligated to prove the additional facts: (1) that she and her husband were not legally separated during each charged tax year; or (2) that if still married, that she and her husband lived together for the second half of each charged tax year. If the government had proven that Ms. Burdett and her husband were still married but failed to prove that they lived together for the last six months of each charged tax year, the government would then have been obligated to prove either: (1) that Ms. Burdett did not pay more than half the cost of keeping up her household; or (2) that Ms. Burdett's dependents lived with her for less than six months out of the year, any one of which would have made Ms. Burdett ineligible to file as head of household and would have made the head of household filing status "false." But the government did not elicit any testimony or introduce evidence to establish that Ms. Burdett and her husband were not legally separated for each tax year; that Ms. Burdett's husband lived with

her during any of the last six months of each tax year charged; that Ms. Burdett did not pay over half the cost of keeping up the home in which she and a qualifying dependent lived for each tax year charged; or that her dependents lived with her for less than six months of the tax year.

The Fifth Circuit “has admonished the government to exercise care in satisfying its burden of proving” seemingly technical elements of federal offenses, “lest it suffer a reversed conviction on a seeming technicality.” *United States v. Davis*, 735 F.3d 194, 199 (5th Cir. 2013) (discussing financial institution element in bank fraud cases). The government did not introduce evidence from which a rational jury could conclude beyond a reasonable doubt that the head of household filing status was false for any of the charged tax years.

5. The government failed to prove the absence of good faith.

Ms. Burdett provided accurate and complete financial information, believed Timothy to be a CPA, and relied upon him to prepare her returns properly. The trial evidence of good faith reliance is properly considered on Rule 29 motion because the Court is to “consider the countervailing evidence as well as the evidence that supports the verdict.” *Moreland*, 665 F.3d at 149. And when the only reasonable inference to be drawn from evidence of good faith is one that favors the defendant, the Court must consider that exculpatory inference. *See Evans-Smith*, 19 F.3d at 909 n.29. When “the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,” the Court “must reverse the convictions.” *Menesses*, 962 F.2d at 426. *Accord Clark*, 755 F.2d at 396. The government bore the burden of proving the *absence* of good faith beyond a reasonable doubt. *Cheek v. United States*, 498 U.S. 190, 202 (1991) (“But carrying this burden requires negating a defendant’s claim of ignorance of the law or a claim . . . that he had a good-faith belief that he was not violating any of the provisions of the tax laws.”).

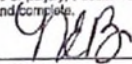
The Court properly instructed the jury that “reliance on a qualified tax preparer is a defense to a charge of willfully making false statements on a tax return. If Ms. Burdett relied on tax preparer, Henry Timothy, and provided full and complete information to him, and then in good faith, without knowing that the returns contained false statements, adopted, signed, and filed the tax returns as prepared by Henry Timothy, then you must find Ms. Burdett not guilty.” *See* Doc. 418-2 (Jury Instructions). The Court continued that “if, on the other hand, you find beyond a reasonable doubt that the defendant did not provide full and complete information to Henry Timothy, or that the defendant knew that the return as prepared by Henry Timothy contained false statements, then you may find the defendant guilty even though she did not prepare the return herself but rather had it prepared for her by another person.” *Id.*

Timothy had been a legitimate accountant with a full career before he started doing tax returns in 2010. *See* Timothy Tr. Day 1 at 5:9-17; 8:23-9:13; 12:1-10; 192:16-193:10; 199:15-200:11. Ms. Burdett was referred to Timothy by Timothy’s father-in-law, who had done Ms. Burdett’s mother’s tax returns in the past. *See* Timothy Tr. Day 1 at 22:1-4; 106:18-21. Timothy held himself out to Ms. Burdett as a CPA and testified that Ms. Burdett believed him to be a CPA. *See* Timothy Tr. Day 2 at 29:14-16. Ms. Burdett filed Form 2553 on November 22, 2011 and referred to Timothy as “my CPA.” *See* Exh. D-236 (Form 2553 re: Burdett Legal Consulting). This form contains Ms. Burdett’s signature and is dated in her handwriting:

If this S corporation election is being filed with Form 1120S, I declare that I had reasonable cause for not filing Form 2553 timely, and if this election is made by an entity eligible to elect to be treated as a corporation, I declare that I also had reasonable cause for not filing an entity classification election timely. See below for my explanation of the reasons the election or elections were not made on time (see instructions).

At the time I applied for my EIN I was unaware as to what tax status was appropriate for my company. After speaking my CPA, I was advised that I needed to change my tax status from a sole proprietor to S-Corp. Also, the LLC has not filed a tax return for the tax year beginning on the date entered on Line E

Under penalties of perjury, I declare that I have examined this election, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

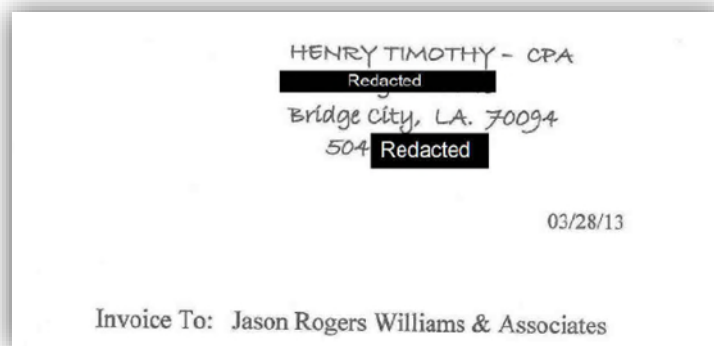
Sign Here  Title mgr/member Date 11/22/11
Signature of officer _____

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 18629R Form 2553 (Rev. 12-2007)

DEFENDANT'S TRIAL EXHIBIT D-236

Id. Timothy acknowledged that Ms. Burdett had consulted with him about the status of her corporation and—after reviewing this Form 2553—that Ms. Burdett believed him to be her CPA. See Timothy Tr. Day 2 at 29:1-4, 14-16.

In 2013—the year before the first charged tax year—Timothy sent Ms. Burdett an invoice for his work for JRWA in which he referred to himself as a CPA:



See Exh. G-126. Timothy testified that it was a “mistake” to include CPA on his invoices that resulted from his failing to update his Microsoft Word invoice template after having falsely

represented himself as a CPA to a different client for use in a bid package. *See* Timothy Tr. Day 1 at 71:25-72:8; 72:14-73:6.

Timothy testified that his clients relied on his expertise and not their own to prepare their tax returns. *See* Timothy Tr. Day 1 at 193:11-194:1.

The government's argument that Ms. Burdett sought out Timothy for the purpose of preparing fraudulent returns—when the evidence was that Timothy's father-in-law had been Ms. Burdett's parents' tax preparer, and he referred Ms. Burdett to Timothy because he was retiring, *see* Timothy Tr. Day 1 at 106:18-21; 199:15-19—is nothing more than a “bare assertion or speculation” that is insufficient to overcome the evidence of good faith, or to prove that Ms. Burdett knowingly and willfully subscribed false income tax returns. *See Moreland*, 665 F.3d at 152.

Schedule C Theory.

Ms. Burdett provided accurate and complete Profit & Loss statements generated from QuickBooks that comingled business and personal expenses but accurately described the expenses; accurate and complete supporting schedules from QuickBooks; accurate and complete Southwest credit card statements; accurate and complete 1099s, mortgage interest statements, student loan statements, and proof of health insurance. *See* Timothy Tr. Day 2 at 95:12-100:14; Exh. D-14, Exh. D-15, Exh. D-16, and Exh. D-17 (Ms. Burdett's tax packets for each charged year).

Ms. Burdett told Timothy when handing over the tax packets that she did not know what was deductible and what was not:

Q. Okay. You know and she told you that she didn't know what was deductible [and] what was not, right?

A. Yes, sir.

See Timothy Tr. Day 2 at 99:15-17. And Ms. Burdett told Timothy that she had probably listed things on the Profit & Loss statement that should not be there from an accounting perspective:

Q. Okay. At that time you told the agents that Burdett told you that she was not an accountant, so there were probably items on the profit and loss that should not have been there. Does that refresh your recollection?

A. If I said that to them and you have it in writing, I guess I did, but I don't recall saying that, no.

Q. All right. You don't contest that?

A. I don't contest it, no.

Q. If it's in the agents' reports, it's likely so?

A. Yes, sir.

Q. All right. So she relied upon you to make those decisions as to what was deductible, correct?

A. Yes, sir.

See Timothy Tr. Day 2 at 28:4-16.

Even though Ms. Burdett had provided accurate and complete information, Timothy never looked at the support for the QuickBooks Profit & Loss Statements to determine what expenses were business expenses and what expenses were personal expenses:

Q. She gave you these detailed -- basically these are check registers all of her checks and expenses, correct?

A. These reports here, yes.

Q. But you never looked at those?

A. I never reviewed them.

See Timothy Tr. Day 2 at 100:10-14. See also Timothy Tr. Day 2 at 99:4-14.

Q. Okay. It was a number of pages that were contained in those envelopes that you have talked about that she would bring you?

A. But all it would be would be was matching up to the numbers on the front P&L.

Q. Right. She was showing you where she got those numbers from, right?

A. That was just posting.

Q. Okay. All right. Again, that's up to you to decide what's appropriate to put in the return, right? Not Nicole. It's up to you.

A. On the return?

Q. Yeah.

A. Yes. That's why I used the profit and loss statement to do that.

See Timothy Tr. Day 1 at 228:16-229:5.

Timothy checked off the expenses that he selected and then returned the packet of information to Ms. Burdett and her as-filed tax returns, which included a Schedule C worksheet listing the expenses that Timothy claimed. Timothy acknowledged that these worksheets made it look to his clients like Timothy had taken legitimate deductions. Timothy also testified that it was his responsibility to determine what expenses were deductible:

Q. Okay. When you see these worksheets, it makes it look like this is legitimate because this is your worksheet, and you must have looked at stuff and paid attention to stuff. Is that fair? Is that the purpose for that, is to let the client know, "Look, I looked at this this, and this is my worksheet"?

A. Yes.

See Timothy Tr. Day 1 at 223:13-18.

Q. Because the bottom line is it's up to my accountant or my CPA to decide -- all the stuff that I may give them, they decide this is legitimate, this is not legitimate, right? You make those decisions as the tax preparer?

A. Yes, ma'am.

See Timothy Tr. Day 1 at 224:21-25.

Timothy's worksheets went to the IRS as part of Ms. Burdett's returns. That Timothy accurately described the expenses that he claimed on the supporting Schedule C worksheet that he sent to the IRS is inconsistent with his *client* knowing that the expenses were not deductible. From a client's perspective, if clothing was not deductible as a business expense, why would Timothy tell the IRS that he had deducted clothing as a business expense?

THE COURT: So the IRS had that attachment to the Schedule C and the 1040, right?

THE WITNESS: Yes, Your Honor.

See Timothy Tr. Day 2 at 6:8-10.

Q. You chose those things that you wanted to put on the worksheet, correct?

A. Yes.

Q. You didn't take everything from that profit and loss; you chose some things?

A. Yes.

Q. Like political contributions?

A. Yes.

Q. Then you would transfer that from the worksheet, then you would put that on the Schedule C which is filed with the IRS?

A. Yes, yes.

Q. The worksheets don't go to the IRS or did they go to the IRS too?

A. Yes, they do.

See Timothy Tr. Day 2 at 7:6-19. See also Timothy Tr. Day 2 at 97:9-11 ("Q. The tick marks mean you went through this and decided what was deductible and what was not, correct? A. Yes, sir."); Timothy Tr. Day 2 at 97:25-98:6 (Timothy decided to deduct clothing expenses; Ms. Burdett never told him to do so).

There is no reason for Ms. Burdett to have provided complete and accurate QuickBooks Profit and Loss statements, supporting transaction reports, accurate mortgage interest and student loan statements, and accurate and complete credit card statements if she were directing Timothy to take improper deductions, to inflate expenses, or to create numbers out of thin air.

Head of Household Theory.

As for the head of household filing status, Timothy testified that he initially selected this filing status for Ms. Burdett because he did not know that she and her husband were married. *See* Timothy Tr. Day 1 at 107:2-108:5. It was a simple mistake and one not done with any criminal intent. *See* Timothy Tr. Day 2 at 50:8-51:9. In 2012, Ms. Burdett's step-daughter listed her parents as having filed married separately on her Free Application for Federal Student Aid ("FAFSA"); Ms. Burdett then contacted Timothy to amend her returns to reflect married filing separately. *See* Timothy Tr. Day 1 at 147:25-148:10.

Timothy testified that the amendment had to be filed in paper (rather than using the Pro Series software that Timothy used to file the original returns) and that after the amendment of Ms. Burdett's filing status for 2012, he "didn't change it" for subsequent years. *See* Timothy Tr. Day 1 at 150:12-13 ("Q. Do the amended returns have to be mailed in? A. Yes, ma'am."); Timothy Tr. Day 1 at 193:24-194:1 (software); Timothy Tr. Day 2 at 47:2-22 ("Yes, I didn't change it.").

Timothy testified at trial that he *should have* gone back and amended Ms. Burdett's prior returns to reflect married filing separately. *See* Timothy Tr. Day 2 at 50:8-51:9. But Timothy never testified that he told Ms. Burdett that the prior head of household filing was illegal, nor did Timothy testify that he had any conversation with Ms. Burdett about what filing status to use going forward, nor did the government elicit any evidence that Ms. Burdett knew that Timothy

reverted to head of household for years 2013 through 2017. Instead, Ms. Burdett texted Timothy in subsequent years to check whether her returns were completed and specifically referenced her step-daughter’s FAFSA and financial aid—which Timothy testified is what prompted him to change Ms. Burdett’s filing status to married filing separately in the first place. *See* Exh. D-7 at 14; Exh. D-7 at 51. It is completely inconsistent with the inference of knowledge that the government argued to the jury for Ms. Burdett to text about FAFSA deadlines—when the evidence was that her request to amend her prior return to reflect married filing separately was prompted by her stepdaughter having reported that they were married filing separately on her FAFSA. The government did not introduce evidence that Ms. Burdett knew that head of household was an *unlawful* filing status—instead, the evidence was that she asked Timothy to amend her return to reflect what her stepdaughter had reported on her FAFSA.

Financial planner Kevin Conley testified that Ms. Burdett met with him in November 2018.² As part of the engagement, Conley reviewed Ms. Burdett’s prior tax returns, which she provided to him. Conley saw that Henry Timothy had been handling her taxes. Conley testified that he consulted various professional organizations’ websites and determined that Timothy was not a CPA. Conley notified Ms. Burdett that Timothy was not a CPA and recommended the CPA firm of Heinz & Macaluso. The consult with Conley in November 2018 and retention of Heinz & Macaluso in December 2018 occurred before the investigation into Mr. Williams’ Schedule C deductions became “overt.” IRS S/A Tim Moore testified that the investigation targeting Mr. Williams became “overt” on April 23, 2019, with the service of a grand jury subpoena upon the law firm Jason Rogers Williams & Associates.

² Timothy testified that he knew that Ms. Burdett and Mr. Williams had gone to a “financial advisor because they had won a big case” and the financial planner recommended that they go to someone else to handle their tax returns. *See* Timothy Tr. Day 1 at 104:4-12.

Heinz & Macaluso filed Ms. Burdett's 2018 Form 1040 as married filing jointly on June 10, 2019. *See* Exh. G-58 at 31. Ms. Burdett's individual tax returns did not become the target of the government's investigation until December 4, 2019, after she refused the government's offer of complete immunity in exchange for testimony against Mr. Williams.³

Ms. Burdett was not indicted until December 4, 2020. *See* Doc. 1 (Case No. 20-cr-139). At that time, she was charged with falsifying both her Schedule C deductions and her filing status. The timing is relevant because it establishes that Ms. Burdett went to new CPAs once Conley told her that Timothy was not the CPA he had claimed to be and—on the advice of new CPAs—filed with yet another filing status: married filing jointly.

6. The government failed to prove knowledge or willfulness for its Schedule C theory.

Ms. Burdett did the same thing for her personal tax returns as Burdett Legal Consulting that she did for Mr. Williams as the law firm JRWA: she printed out a complete QuickBooks ledger that accurately reflected her transactions for the year, but which comingled business and personal expenses; Profit & Loss statements generated from QuickBooks; and her credit card statements, and provided the complete package along with her Form 1099 from Jason Rogers Williams & Associates, proof of private health insurance, a copy of her vehicle registration, and her mortgage interest statement to Henry Timothy. *See* Exh. D-14, Exh. D-15, Exh. D-16, and Exh. D-17. She told Timothy that she was not an accountant and had therefore probably included things on the QuickBooks that should not have been there from an accounting perspective. *See* Timothy Tr. Day 2 at 28:4-16.

Timothy—when testifying about Mr. Williams' returns, for which Ms. Burdett was fully acquitted—claimed that when he completed the return, he would tell Ms. Burdett “what the

³ *See* Order (Doc. 261) at 5.

bottom line was,” meaning how much Mr. Williams would owe that year. *See* Timothy Tr. Day 1 at 60:14-24. Timothy claimed that after telling Ms. Burdett “the bottom line” for Mr. Williams’ returns, Ms. Burdett would call back and say “[e]ither it was okay or we needed to adjust it some more.” *See* Timothy Tr. Day 1 at 61:25-62:1.

In the complete absence of any evidence that Ms. Burdett directed Timothy to take improper deductions or to falsely inflate the expenses that were claimed,⁴ the government asked Timothy what *he* understood Ms. Burdett’s words to mean:

Q. When she said, “we need to adjust it some more,” what did you understand that to mean?

A. That means increase the expenses.

See Timothy Tr. Day 1 at 62:2-4.

The government’s follow-up questions improperly characterized Timothy’s answers as if Ms. Burdett had told Timothy to increase the expenses. *See* Timothy Tr. Day 1 at 62:8-12, 17-22. The government’s characterization of Timothy’s testimony in its questions is not evidence, and a rational jury could not rely upon the form of the government’s questions as evidence that Ms. Burdett directed Timothy to falsify the Schedule Cs.

Timothy testified at trial that he was responsible for determining what expenses listed were properly deductible as business expenses, that Ms. Burdett relied upon him to do that, and that he took improper deductions “just to help them out”:

⁴ Timothy’s testimony on direct about the alleged conversations about the “bottom line” was about Mr. Williams’ tax returns. His testimony on redirect about the “bottom line” number was unclear as to whether he was referring to Mr. Williams’ or Ms. Burdett’s returns. Ms. Burdett did text Timothy in June 2017 asking if he had “final numbers.” *See* Exh. D-7 at 35. In contrast with the vagaries of his testimony about these alleged conversations, Timothy’s testimony that Ms. Burdett never told him to inflate expenses or deduct personal expenses as business expenses was clear. *See* Timothy Tr. Day 1 at 63:13-64:10.

Q. What would happen after that if she [Ms. Burdett] wasn't satisfied?

A. I'd look to see if I can increase it some more, the expenses.

Q. Why did you do that?

A. Just to help them out.

Q. No, but did she tell you to do that?

A. No, she didn't tell me to do that.

See Timothy Tr. Day 1 at 63:13-19. In response to the Court's clarifying questions, Timothy again testified that Ms. Burdett never told him to adjust the business expenses:

THE COURT: A question: When Ms. Burdett allegedly told you to make some adjustments --

THE WITNESS: Yes.

THE COURT: -- so there would be less amount paid --

THE WITNESS: Yes, Your Honor.

THE COURT: -- did she specifically tell you about adjusting the business and personal expenses, or was she not specific about that? Was that just you, how you did it?

THE WITNESS: About categories, Your Honor, or --

THE COURT: When she allegedly told you to adjust the expenses, did she give any indication to you that you can recollect as to how to do that?

THE WITNESS: No.

See Timothy Tr. Day 1 at 63:23-64:10.

The government continued. Even in response to leading questions, the government did not elicit testimony from Timothy claiming that Ms. Burdett directed him to take improper deductions or to inflate expenses:

Q. Who decided what personal expenses to pull into the returns?

A. I did.

Q. When you were told to go lower, what did you understand that to mean?

A. To use figures that I shouldn't have used to start with.

Q. Is that because you had already used the legitimate business expenses to that point?

A. Yes.

See Timothy Tr. Day 1 at 64:12-20. Timothy did not have any factual basis for this claimed “understanding” that Ms. Burdett wanted him to falsify expenses.

Timothy testified that in the years 2015, 2016, and 2017—three of the four tax years for which Ms. Burdett was convicted—he did not have any discussion at all with her *at all* about the “bottom line”:

Q. You said “in the beginning.” What happened in the latter years?

A. In the latter years, we more or less -- I more or less knew what to adjust and where to be. I just would do it, then I'd give her the number. If it was okay, then we wouldn't have to have further discussions.

Q. Are you testifying that by that point you knew what to do?

A. Yes.

Q. By that, towards the latter part in '15, '16, '17, were you falsifying and inflating expenses on those returns?

A. Yes, I was.

See Timothy Tr. Day 1 at 65:2-12.

Timothy never testified that he reviewed the Schedule C expenses with Ms. Burdett before filing her returns, and he never testified that he told Ms. Burdett that he was claiming expenses that were not properly deductible. He never testified that he told Ms. Burdett that he was inflating expenses or making up numbers out of whole cloth.

When asked why he claimed nondeductible expenses on Ms. Burdett's returns, Timothy testified he did it to "help her out":

Q. Sir, did you falsify information on Ms. Burdett's returns also?

A. Yes.

Q. Why did you do that?

A. The same reason I did it for Jason: to help her out.

See Timothy Tr. Day 1 at 105:20-24.

Q. Why did you do that?

A. To help Nicole out.

Q. Sorry?

A. To help Nicole out.

See Timothy Tr. Day 1 at 128:17-20.

When asked about the inflated supplies that Timothy claimed for tax year 2016, Timothy again testified that he did so to "help her out":

Q. Why did you put \$64,000 in supplies? Did she have that amount in supplies?

A. No, she did not.

Q. Why did you do that?

A. To, again, help her out.

See Timothy Tr. Day 1 at 132:13-17.

This is consistent with his preparation of John Bowker's returns. Mr. Bowker testified that he put his tax information in an envelope that Ms. Burdett brought to Timothy and he received as-filed returns. Mr. Bowker was not aware that Timothy had claimed inflated Schedule C deductions on Mr. Bowker's returns until Mr. Bowker was interviewed by S/A Moore. When asked about it, Timothy testified:

Q. Did you inflate expenses on his [John Bowker's] return as well?

A. Yes I did.

Q. Did he ever tell you to do that?

[Objection and ruling omitted.]

A. No.

See Timothy Tr. Day 1 at 169:2-8.

Q. Probably. Okay. One thing I heard you say yesterday was that you fudged in similar ways on Mr. Bowker's tax returns as far as his business deductions, correct?

A. Yes.

Q. He never asked you to do that?

A. No.

Q. You just did it. I mean, you were like on a roll, or what's that about?

A. I assume it, but -- I assumed when I did it that he would accept it. That's why I asked him to review his tax return before we sent it off. But, no, he did not specifically tell me to do that.

Q. He didn't generally tell you to lie on his returns, did he?

A. No.

See Timothy Tr. Day 2 at 81:3-17.

Because it did not have any evidence that Ms. Burdett directed Timothy to deduct expenses that could not be properly deducted as business expenses or to inflate what expenses were claimed, the government proceeded with a theory that Timothy provided Ms. Burdett with the Schedule C worksheets before Timothy filed the returns, and that because Ms. Burdett never called to complain, she must have known that Timothy was taking deductions not authorized by the tax code and willfully therefore violated the tax laws:

Q. When you completed the tax returns, when you were given the okay that it was final, would you provide a copy to anyone?

A. Copy with all the detail.

Q. What do you mean by “all the detail”?

A. Well, wherever I did the -- increased the categories, I would have a worksheet attached to the back of the tax returns. When Nicole would pick them up, I would tell her to have Jason review these before we sent them in, that if there was anything they didn't like on the tax return, I would either adjust it -- before we sent it in. I needed their approval.

Q. Did you get their approval?

A. They never questioned it. They said it was okay to send off.

Q. So for all the years that you prepared the tax returns, 2010 to 2017, did Ms. Burdett or Mr. Williams ever call you back and tell you they were not happy with the tax return?

A. No, ma'am.

See Timothy Tr. Day 1 at 65:16-66:7.

The government's questions followed a negligence or recklessness theory: that Ms. Burdett willfully subscribed a false income tax return because Timothy did not “try to hide” what he was doing:

Q. Why did you include the [detailed Schedule C] worksheet in the email to Ms. Burdett?

A. So they would know exactly what amounts I was charging per line.

Q. Mr. Timothy, did you ever try to hide anything that you were doing from Ms. Burdett or Mr. Williams?

A. No, ma'am.

See Timothy Tr. Day 1 at 97:7-13.

Conspicuously absent from the trial evidence is any claim by Timothy that he *told* Ms. Burdett that the expenses he claimed were not properly deductible, nor any evidence that he told

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her that he inflated categories of expenses without support that Ms. Burdett did not—after providing accurate and complete financial records to Timothy, whom she believed to be a CPA—research the tax code herself and check Timothy’s math does not satisfy the government’s burden of proving *willfulness* with *evidence* beyond a reasonable doubt.

7. The government failed to prove knowledge or willfulness for its head of household theory.

Even if the government had proven that head of household was not a status lawfully available to Ms. Burdett for the charged tax year (it did not), the government failed to prove that Ms. Burdett had knowledge of the filing status for the charged tax years, and failed to prove that she knew that head of household was not lawfully available to her.

Timothy testified that he selected Ms. Burdett’s filing status the first year that he prepared her returns as head of household. He testified that this was an innocent error because he did not know at the time that she and her husband were married:

Q. Okay. When you met her in 2010, did you know at that time if she was married?

A. Not initially.

* * *

Q. Now, back in 2010, did you file separate returns for them [Ms. Burdett and Mr. Waguespack]?

A. Yes.

Q. Why did you do that?

A. Because I assumed they were not married.

Q. At a later point in time, did you learn they were, in fact, married?

A. Yes, I did.

See Timothy Tr. Day 1 at 107:2-20.

Q. The head of household issue that you discussed with Ms. Uebinger, you said that was a mistake on your part, correct?

A. Clarify what you're saying is a mistake. In other words --

THE COURT: Move closer to the microphone, please. Thank you.

BY MR. MAGNER:

Q. The fact that you listed both Ms. Burdett and Mr. Waguespack, her husband, as head of household on their respective returns.

A. If they were married at the time, which I found out later, yes, it was a mistake to keep filing them as head of household.

See Timothy Tr. Day 2 at 46:19-47:6.

Ms. Burdett and Mr. Waguespack lived together at the 3403 Loyola Drive address (which is Ms. Burdett's mother's home) at the time they applied for a marriage license on September 20, 2010. *See* Exh. G-6 (Certificate of Marriage); Exh. G-776 (Act of Donation of 3403 Loyola Drive). They have a separate property regime. *See* Exh. G-7 (Separation of Property Regime). Mr. Waguespack's employer continued to send his W-2s to the 3403 Loyola Drive address. *See* Exh. G-69 at 13; Exh. G-71 at 13; Exh. G-73 at 12; Exh. G-75 at 16; Exh. G-77 at 12.

The government introduced evidence establishing that Ms. Burdett learned in 2013 that Timothy had filed her 2012 returns as head of household. The government did *not* elicit any evidence that Ms. Burdett believed the head of household status to have been unlawful or improper. The government did not question Timothy about whether he discussed the head of household filing status with Ms. Burdett. The government did not elicit from Timothy any claim that he told Ms. Burdett that head of household was unlawful. The government did not introduce any evidence that Ms. Burdett knew the requirements to be eligible to file as head of household.

Timothy testified that he learned that Ms. Burdett was married when she contacted him and told him that her step-daughter had listed Ms. Burdett and her husband as married filing separately on her Free Application for Federal Student Aid:

Q. Why did you prepare that amended return?

A. That was the year her daughter was filing for the FAFTA for school.

Q. You mean the FAFSA?

A. FAFSA. She actually claimed that Nicole and Troy were married, so Nicole got in touch with me. We had to amend the taxes at that time.

Q. What did Ms. Burdett tell you when she got in touch with you?

A. That her daughter, when she filed for the taxes, put her married -- her filing status, it should have been married.

See Timothy Tr. Day 1 at 147:25-148:10.

Timothy testified that an amended return has to be filed and mailed in on paper; it could not have been electronically filed from the Pro Series tax filing software that Timothy used:

Q. Do the amended returns have to be mailed in?

A. Yes, ma'am.

See Timothy Tr. Day 1 at 150:12-13.

Timothy's testimony is correct on this point: for tax year 2012, the IRS required that Form 1040Xs be filed on paper. *See* Instructions for Form 1040-X, available at <https://www.irs.gov/pub/irs-pdf/i1040x.pdf> (last accessed Aug. 6, 2022) (referencing the availability of electronic filing only for years 2019 and later).

The Form 1040Xs that Timothy prepared for Ms. Burdett and Mr. Waguespack for tax year 2012 were, in fact, filed as paper amendments. *See* Exh. G-44; Exh. G-67. This is significant because filing a hard copy Form 1040X did not require or prompt Timothy to change

the tax filing information that he had for Ms. Burdett and Mr. Waguespack in his tax preparation software. For 2014-2017, the tax years charged, Timothy simply carried forward the address and filing status that he had put in his software in 2010—he “didn’t change it”:

Q. Okay. Then you changed it [from head of household to married filing separately] for one year -- you changed it for 2012, I think. Correct?

A. Yes, to married filing separately. We had to amend Ms. Burdett’s taxes.

Q. Right. That was because her daughter, Taylor, had run into problems with her student loan issues?

A. Financial aid.

Q. Financial aid. That’s the word I was looking for. Then you went back to listing them as head of household the next year, right?

A. Yes, I didn’t change it.

See Timothy Tr. Day 2 at 47:12-22.

A change in filing status from one year to another is not evidence that the taxpayer learned that a prior filing status was unlawful. Ms. Burdett could today lawfully file as married filing jointly or married filing separately. A change from one year to the next between filing statuses selected by the tax preparer is not evidence of willful violation of the tax laws. The Form 1040X read that the purpose was to “amend original tax return for incorrect filing status.” *See Exh. G-44 at 3.* The government did not introduce any evidence that Ms. Burdett knew that head of household was *unlawful*—that it was not a status that was available to her.

Nor did the government elicit any evidence that Ms. Burdett directed Timothy to file as head of household for tax years 2013 through 2017 (after the amendment of the 2012 returns), let alone any evidence that Ms. Burdett knew that Timothy had done so. Instead, Timothy testified

that “I didn’t change it”—the filing status—and that it was a “screwup” and that he “shouldn’t have continued on with it anyway”:

Q. Is it possible, Mr. Timothy, that you just made a mistake, an honest mistake, about whether Ms. Burdett and her husband were actually married in terms of putting that head of household on there?

A. In the beginning, no. But after I found out that we shouldn’t have done it --

Q: Right.

A: -- we should have gone back and amended those returns.

Q. All right. So that was just an honest error on your part?

A. In the beginning, yes.

THE COURT: What do you mean “in the beginning”? Speak into the microphone.

THE WITNESS: I’m sorry. When I started in 2010 doing their taxes, I never thought that they were married. When we found out that they were married and I continued to do the head of household, we should have initially gone back and amended her tax returns all the way to 2010 and filed either married separately or married filing jointly.

BY MR. MAGNER:

Q. As an experienced tax preparer, that’s something you knew you should have done, right?

A. Yes, sir.

Q. Okay. So what I’m asking you, was that just an honest error on your part, or did you do that with fraudulent intent? Did you just screw up?

A. It was a screwup, but I shouldn’t have continued on with it anyway.

See Timothy Tr. Day 2 at 50:8-51:9.

Even on direct, Timothy testified only that he continued to claim head of household “just to help them out”— but never claimed that he did so at Ms. Burdett’s request:

Q. After 2012, for 2013 through 2017, what was Ms. Burdett's filing status?

A. Head of household.

Q. What about Mr. Waguespack?

A. Same. Head of household.

Q. So even though you amended it for 2012, you went back to filing the incorrect filing status for them for all of those years?

A. Yes, ma'am.

Q. Was that was the right or wrong thing to do?

A. That was the wrong thing to do.

Q. Why did you continue doing it year after year?

A. Again, just to help them out.

See Timothy Tr. Day 1 at 150:19-151:6.

Timothy testified that the amendment of Ms. Burdett's 2012 filing status from head of household to married filing separately was prompted by her step-daughter having listed that status on her FAFSA. For tax year 2015, Ms. Burdett texted Timothy that he needed to complete her taxes in time for her step-daughter's student loan application deadline. *See* Exh. D-7 at 9, 14. For tax year 2016, Ms. Burdett again texted Timothy that she needed the taxes to be filed in time for her step-daughter's student loan application deadline. *See* Exh. D-7 at 32.⁵ Same for tax year 2017. *See* Exh. D-7 at 50.

It is inconsistent with the government's theory—and fills in the complete absence of evidence of willfulness and knowledge presented by the government—for Ms. Burdett to have

⁵ Also for tax year 2016, Ms. Burdett texted Timothy a summary of her husband's withholdings from his W-2s, which included that he was withholding enough for "Married and 3" dependents. *See* Exh. D-7 at 36.

knowingly filed in tax years 2014, 2015, 2016, and 2017 with the head of household status when Timothy’s testimony was that she wanted to amend her 2012 return to file as married filing separately⁶ for her step daughter’s student loan application. That is, the government did not elicit testimony from Timothy to establish that Ms. Burdett *knew* that he had selected the filing status of head of household in the years after the amendment of the 2012 return. The government did not introduce any communications between Timothy and Ms. Burdett regarding the filing status. The communications introduced—by the defense—are consistent with Ms. Burdett’s lack of knowledge of the head of household filing status.

The government did not introduce any drafts or correspondence with Ms. Burdett about the content of the return before Timothy e-filed it. The government did not establish that Ms. Burdett knew that filing head of household was prohibited under the tax code. The government did not establish knowledge or willfulness. The “knowing” requirement “is to insure that no one would be convicted for an act done because of mistake, accident, or other innocent reason.”

Masat, 948 F.2d at 931 n.15.

8. Timothy’s testimony that he had Ms. Burdett review the returns before he filed them is false and contradicted by the documentary evidence.

Timothy’s testimony about whether and when Ms. Burdett reviewed her returns was completely contradictory. Timothy testified that he would call and tell Ms. Burdett the “bottom

⁶ The government argued in closing that Ms. Burdett knew that Timothy was filing two different head of household returns because Ms. Burdett brought two separate envelopes to Timothy: one containing her own tax information, and another containing her husband’s tax information. But married filing separately is just what it sounds like: married people filing separate returns. *See* IRS Publication 501 at 7 (“You can choose married filing separately as your filing status if you are married. This filing status may benefit you if you want to be responsible only for your own tax or if it results in less tax than filing a joint return. . . . If you file a separate return, you generally report only your own income, credits, and deductions.”), available at <https://www.irs.gov/pub/irs-pdf/p501.pdf> (last accessed Aug. 3, 2022). The government’s argument to the contrary was misleading to the jury.

line” tax liability, but that they would not discuss the Schedule C expenses, what deductions to take, or how to lower the tax liability. Timothy did not claim at any point during his two days of testimony that he discussed the head of household filing status with Ms. Burdett, nor did he claim that he told her for tax years 2013 through 2017 that he had failed to “change it” to married filing separately for those years. Because he admittedly did not discuss the deductions or filing status with Ms. Burdett before he filed the returns, the government argued that Ms. Burdett had the chance to review her returns before Timothy filed them and her failure to complain about any of the deductions or filing status was evidence of knowledge and willfulness. This theory has two problems: first, it asked the jury to convict for negligence or recklessness, rather than knowledge and willfulness; and second, it is factually false and is contrary to the documentary evidence.

The government asked Timothy if he prepared the returns with improper and inflated Schedule C deductions and head of household status without Ms. Burdett’s knowledge. Timothy claimed that he wanted Ms. Burdett to review the returns so she would know what he was doing *before* he filed them:

Q. Was this all you, Mr. Timothy? Did you do this without their knowledge?

A. No, ma’am. That’s why I asked them to review the returns before I sent them off.

See Timothy Tr. Day 2 at 132:8-11.

But in other points in his testimony, Timothy claimed that he discussed the return with Ms. Burdett by phone—and that that was the mechanism by which she allegedly approved the returns:

THE COURT: You do not have the drafts, though; is that right?

THE WITNESS: Well, I didn't print what was accurate and then send it. We discussed it.

See Timothy Tr. Day 2 at 136:25-137:3.

For Ms. Burdett's returns, Timothy testified that he would provide the returns to Ms. Burdett with his worksheets and checkmarks, and asked her to review the returns and "let [him] know if she didn't like anything on the tax return then we would adjust it before we sent it off"

Q. I asked you this regarding Mr. Williams' returns, but regarding Ms. Burdett's returns, when you were finished preparing the tax returns, would you give her back this information?

A. Yes, I would.

Q. With your checkmarks on the profit and loss?

A. Yes, ma'am.

Q. Why did you give it back to her?

A. So she could see what I did and then keep it for her records.

See Timothy Tr. Day 1 at 130:6-15.

Q. Why did you represent to the IRS that Ms. Burdett, for her home office,⁷ that she had almost \$100,000 in supplies for two tax years?

A. All I can say is just to help her along.

Q. Did you ever hide that information from her or try to keep it from her?

A. No.

Q. Every year after you prepared the return, did you send it to her?

A. Yes. She got a copy of everything.

⁷ This question is itself misleading. Ms. Burdett was a 1099 contractor with JRWA and had expenses for both her work at JRWA and her home office. This is a point that is of course not dispositive because Timothy inflated her expenses without her knowledge, but is reflective of Timothy's attempt to perform for the government in response to leading questions.

Q. How would you do that? Would you hand it to her?

A. Yes, when she picked everybody else's tax returns up.

Q. Did you give her any instructions when you handed her that return?

A. Just to review the tax return, let me know if she didn't like anything on the tax return, and we would adjust it before we sent it off.

See Timothy Tr. Day 1 at 134:2-18.

Timothy testified that as long as he didn't receive a complaint from Ms. Burdett after he gave her the completed returns, it was her problem—not his:

Q. If Mr. Williams or Ms. Burdett were dissatisfied with something you did on these returns after sending them the worksheets and copies of the returns, what action would you have taken?

[Objection and ruling on objection omitted.]

THE WITNESS: If they would have wanted me to change anything, I would have been glad to. I never forced anyone to take what was on a return unless they gave me permission to send it off.

BY MS. UEBINGER: Why did you send her this emails with all these attachments? What was the point in doing that?

A. For them to review it before I sent it off and give me the okay.

See Timothy Tr. Day 1 at 98:3-24.

The Indictment charged Ms. Burdett with knowingly and willfully committing perjury on the date that Timothy filed each return. *See Doc. 1.* But the documents show that Timothy did not give Ms. Burdett a copy of her returns to review before they were filed:

Tax Year 2014 – Count 1.

Timothy filed Ms. Burdett's 2014 return on April 28, 2015. *See Exh. G-50 at 21.* The government did not introduce a Form 8879—the authorization to affix Ms. Burdett's electronic signature to the return—for tax year 2014 at all. The government did not introduce any emails or

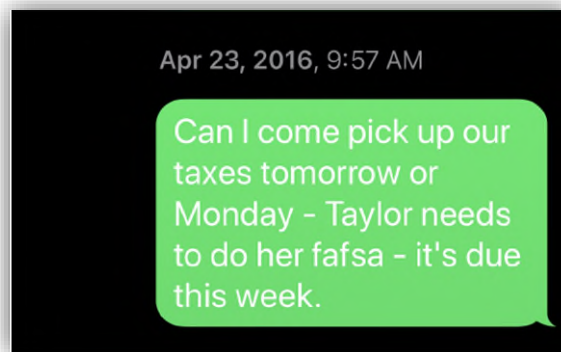
text messages between Timothy discussing the 2014 return, the Schedule C deductions, or the filing status. There is no documentary evidence corroborating Timothy's claim that he provided Ms. Burdett's 2014 return to her before he filed it.

Tax Year 2015 – Count 2.

Timothy filed Ms. Burdett's 2015 return on April 26, 2016. *See* Exh. G-52 at 24.

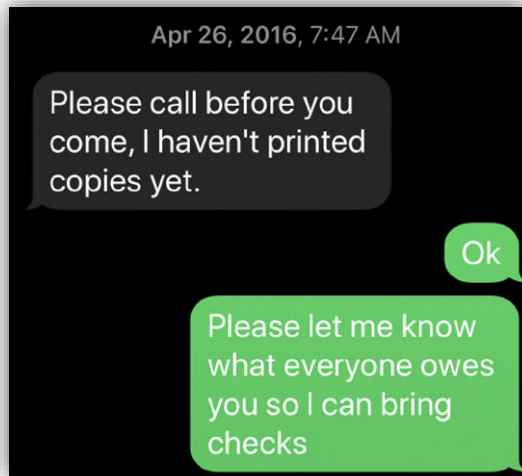
Timothy did not provide Ms. Burdett with a copy of her 2015 return until after it had been filed.

On April 23, 2016, Ms. Burdett texted Timothy and asked if she could come over to pick up the tax returns:



See Exh. D-7 at 14. In the text, Ms. Burdett mentions her step-daughter's deadline to complete her FAFSA. *Id.* Timothy testified that it was the FAFSA that had prompted Ms. Burdett to request an amendment and change in filing status from head of household to married filing separately for the 2012 tax year. But in this text exchange, there is absolutely no discussion of what filing status to use, no disclosure by Timothy that he "didn't change" the filing status to married filing separately for years after 2012, nor any substantive discussion about the returns at all.

Timothy responded at 7:47 a.m. on April 26, 2016 that he had not yet printed the returns:



Id. Timothy filed Ms. Burdett’s Form 1040 for Tax Year 2015 at 10:11 a.m. on April 26, 2016.

See Exh. G-52 at 24.

The government introduced the Form 8879 Authorization to E-File for tax year 2015, which was signed by Ms. Burdett—but dated with different handwriting.⁸

A scan of Form 8879, "Authorization to E-File for tax year 2015". The form has a white background with black text. At the top left, it says "Taxpayer's PIN: check one box only". There are two checkboxes. The first is checked and says "I authorize Henry Timothy" followed by a line for "ERO firm name" and "to enter or generate my PIN". Below this is the text "as my signature on my tax year 2015 electronically filed income tax return." The second checkbox is unchecked and says "I will enter my PIN as my signature on my tax year 2015 electronically filed income tax return. Check this box only if you are entering your own PIN and your return is filed using the Practitioner PIN method. The ERO must complete Part III below." At the bottom left, there is a line for "Your signature" with a handwritten signature and a line for "Date" with "4-26-16" written on it. On the right side, there is a black box with the word "REDACTED" in white, and below it, the text "Enter five digits, but do not enter all zeros".

See Exh. G-161. The government did not ask Timothy whether and when Ms. Burdett dated the Form 8879 for tax year 2015. *See* Timothy Tr. Day 1 at 134:22-136:4. The government did not elicit any evidence that Ms. Burdett signed this before Timothy electronically filed the return at 10:11 a.m. on April 26, 2016. The government did not elicit any evidence that Timothy

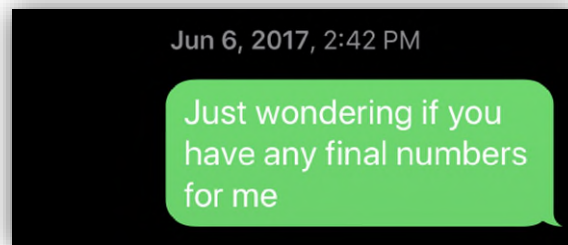
⁸ Ms. Burdett’s handwriting is on the front of the tax packet that she dropped off to Mr. Timothy each year. *See* Exh. D-14, Exh. D-15, Exh. D-16, Exh. D-17.

reviewed the Schedule C expenses or the head of household filing status with Ms. Burdett before he e-filed the return.

Tax Year 2016 – Count 3.

For tax year 2016, Ms. Burdett provided Timothy with her tax packet on April 24, 2017. *See* Exh. D-7 at 27. On May 13 and 15, 2017, she texted Timothy to ask if her taxes had been completed yet. *Id.* at 28. On May 15, 2017, Timothy responded, “Not yet I’ll try to finish by sometime tomorrow.” *Id.* at 29. Ms. Burdett again texted asking whether the taxes had been completed on May 17, May 18, and May 25. *Id.* at 29-32. Timothy did not respond. *Id.* On May 26, 2017, Ms. Burdett texted Timothy, “Now Taylor [her stepdaughter] is calling me telling me she needs her financial aid done for school so can you let me know a status asap so I can get her all squared away.” *Id.* at 32.

On June 2, 2017, Ms. Burdett texted Timothy, “Any word on final numbers for all my people (including me).” *Id.* at 35. No response. On June 6, 2017, Ms. Burdett texted Timothy to ask:



See Exh. D-7 at 35.

Timothy filed Ms. Burdett’s Form 1040 for tax year 2016 at 8:54 a.m. on June 17, 2017. *See* Exh. G-54 at 16. Timothy did not send Ms. Burdett a copy of her return until June 21, 2017, four days after it had been filed. *See* Exh. G-155.

The government introduced a signed authorization to e-file (Form 8879) for tax year 2016. *See* Exh. G-162. It is dated June 5, 2017—but in a different color ink from Ms. Burdett’s signature and in different handwriting. *Id.* And the text exchange between Ms. Burdett and Timothy establishes that Ms. Burdett had not received “final numbers” from Timothy as of June 6, 2017—the day *after* the authorization to e-file is dated:

The image shows a Form 8879 authorization to e-file for tax year 2016. The form is titled "Taxpayer's PIN: check one box only". The first option, which is checked with an 'X', is "I authorize B&B ACCOUNTING SERVICES / HENRY TIMOTHY to enter or generate my PIN as my signature on my tax year 2016 electronically filed income tax return." The second option is "I will enter my PIN as my signature on my tax year 2016 electronically filed income tax return. Check this box only if you are entering your own PIN and your return is filed using the Practitioner PIN method. The ERO must complete Part III below." The form includes a signature line with a handwritten signature and a date line with the handwritten date "6/5/17". A "REDACTED" box is present in the upper right corner of the form.

See Exh. G-162.

When questioned by the government about whether Ms. Burdett dated the Form 8879 for tax year 2016, Timothy gave a nonresponsive answer: he simply read the date that was written on the Form 8879. *See* Timothy Tr. Day 1 at 136:13-19.

Tax Year 2017 – Count 4.

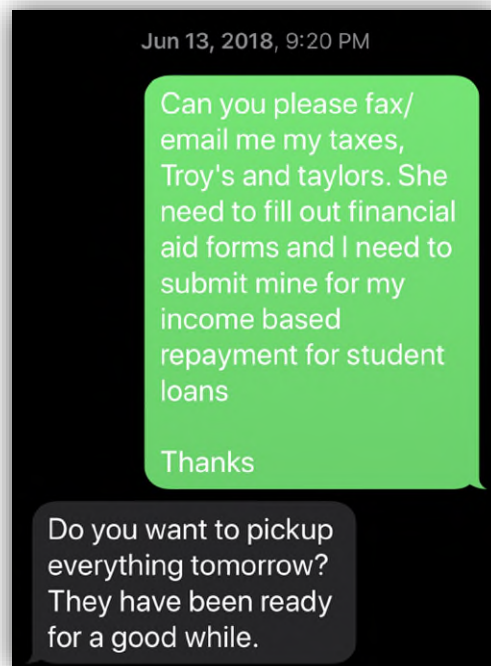
Henry Timothy filed Ms. Burdett’s Form 1040 for Tax Year 2017 at 6:36 a.m. on May 22, 2018. *See* Exh. G-56 at 18.

The government produced a Form 8879 authorization to e-file that is signed by Ms. Burdett and dated May 22, 2018—but again, the date is in different handwriting:

The image shows a Form 8879 authorization to e-file for tax year 2017. The form is titled "Taxpayer's PIN: check one box only". The first option, which is checked with an 'X', is "I authorize B&B ACCOUNTING SERVICES / HENRY TIMOTHY to enter or generate my PIN as my signature on my tax year 2017 electronically filed income tax return." The second option is "I will enter my PIN as my signature on my tax year 2017 electronically filed income tax return. Check this box only if you are entering your own PIN and your return is filed using the Practitioner PIN method. The ERO must complete Part III below." The form includes a signature line with a handwritten signature and a date line with the handwritten date "5/22/18". A "REDACTED" box is present in the upper right corner of the form.

See Exh. G-165. S/A Moore testified that he did not have any evidence that Ms. Burdett was at Timothy's house before 6:36 a.m. on May 22, 2018 to review the return before Timothy e-filed it.

The text communications bear out that Timothy did not provide the return to Ms. Burdett for review before he e-filed it. On June 13, 2018—more than three weeks after he e-filed Ms. Burdett's Form 1040—Ms. Burdett texted Timothy and asked him to email or fax the returns to her:



See Exh. D-7 at 51.

* * *

The government asked the jury to accept Timothy's uncorroborated and contradictory testimony that he provided Ms. Burdett with a copy of her returns to review before he e-filed them. This testimony is contradicted by timestamps on the electronically-filed returns and Ms. Burdett's contemporaneous text messages with Timothy. Instead, the evidence is that Timothy

did not provide Ms. Burdett with copies of her returns until *after* he had filed them electronically. And the only reasonable inference to be drawn from the backdated authorizations to e-file—with the dates in handwriting that differs from Ms. Burdett’s, and sometimes in ink that differs from the color she used to sign—is that Ms. Burdett signed blank authorizations to e-file and Timothy dated them. *See Evans-Smith*, 19 F.3d at 909 n.29. And when “the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,” the Court “must reverse the convictions,” *Menesses*, 962 F.2d at 426, because in those circumstances “a reasonable jury must necessarily entertain a reasonable doubt.” *Clark*, 755 F.2d at 396.

9. The government’s failure to amend theory asked the jury to convict for negligence or recklessness.

In the absence of evidence that Ms. Burdett reviewed her returns and knowingly and willfully subscribed a false return at the time they were filed, the government repeatedly attempted to elicit testimony that Ms. Burdett did not amend her tax returns to argue that failure to amend was evidence that at some point Ms. Burdett reviewed her returns and knew of their contents. But the “truth or falsity of the statement” charged in the indictment “is to be related to the time the statement is *made*”—that is, when each return was filed. *Kolaski*, 362 F.2d at 848 (emphasis added). And that is what the Indictment charged: that Ms. Burdett knowingly and willfully subscribed false income tax returns on the date each return was filed. *See* Doc. 1 (Indictment).

In addition to being insufficient to carry its burden to establish that Ms. Burdett knowingly and willfully subscribed a false income tax return at the time each return was filed, the government’s effort to elicit such testimony was contrary to the Court’s ruling *in limine* at trial a defendant’s failure to amend or failure to later pay taxes is not relevant to the defendant’s

state of mind at the time the returns were filed. *See* Doc. 261 at 26 n.19 (deferring the motion in limine until trial but noting that “a defendant’s failure to amend or failure to pay later has little if any relevance to a defendant’s state of mind at the time of the charged offense.”). The government’s “bare assertion or speculation” about how a defendant *should have* acted after she learned from financial planner Kevin Conley in November 2018 that Timothy was not a CPA is not sufficient to allow a jury to infer criminal intent. *Moreland*, 665 F.3d at 152. *Accord United States v. Harris*, 420 F.3d 467, 474 (5th Cir. 2005) (“Speculation may resolve the timing of Harris’s intent and the actions that night, but the speculation on the basis of evidence does not a reasonable inference make.”); *Martinez*, 555 F.2d at 1271 (where the jury’s verdict “could be reached only as a result of speculations or assumptions about matters not in evidence,” the jury’s verdict must be reversed).

And the government’s failure to amend theory asked the jury to convict for recklessness or negligence, rather than willfulness, and without evidence that Ms. Burdett had actual knowledge that Timothy claimed expenses that were not properly deductible, inflated expenses, and claimed a filing status for Ms. Burdett that was not available to her; second, Timothy’s claim that he provided the Schedule C worksheets and completed returns to Ms. Burdett before he filed them is factually false and contradicted by the documentary evidence; and third, the relevant inquiry is whether Ms. Burdett knowingly and willfully subscribed a false income return at “*the time the statement was made.*” *Kolaski*, 362 F.2d at 848 (emphasis added).

Even if Ms. Burdett reviewed her returns filed in 2014-2017 at some point (and there was no evidence that she did), that Ms. Burdett failed to catch Timothy’s errors in her deductions and filing status does not satisfy either the knowledge or the willfulness requirements to be convicted under Section 7206(1). *See Hull v. United States*, 356 F.2d 919, 920-21 (5th Cir. 1966)

(evidence that tax preparer claimed full value of manufacturing expenses that should have been depreciated “is insufficient to prove a willful violation, and at best shows merely an error in judgment. Therefore, the Government failed in its burden of proof”). While it may have been negligent or even reckless for Ms. Burdett not to review her returns before they were filed or after they were filed, negligence and recklessness does not satisfy the government’s obligation to prove *willfulness*. *United States v. Masat*, 948 F.2d 923, 931 & n.15 (5th Cir. 1991).

10. The government’s misleading motive evidence asked the jury to pile inference upon inference, and does not substitute for evidence of knowledge and willfulness.

The government’s misleading motive evidence—consisting of summary charts of travel expenses and four checks to an outdoor construction company—does not substitute for evidence of knowledge and willfulness. Financial analyst Jill Zeringue, who prepared the summary travel charts, admitted that she did not request the supporting records to distinguish between travel that was Ms. Burdett’s and that which was Mr. Waguespack’s *business* travel for which he received reimbursements. Those reimbursements were reflected on the P&L statements that Ms. Burdett provided to Henry Timothy and the government:

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9:59 PM
03/03/15
Accrual Basis

**Household
Profit & Loss
January through December 2014**

	Jan - Dec 14
Income	
Deposit	30,395.99
Interest Payment	0.30
JRW Fee Share	15,709.92
KK Bonus	2,541.66
KK Commission	15,190.35
KK Reimbursement	7,137.87
KK Salary	33,138.13
Refund	347.60
Sale of Rental Pty	14,459.55
Tax Refund	3,032.00
Transfer from Business	7,597.22
travel Allowance	2,000.00

See Exh. D-14 at 47 (highlighting added).

5:18 PM
04/04/16
Accrual Basis

Burdett Legal Consulting LLC 2016
Profit & Loss
January through December 2015

	Jan - Dec 15
Ordinary Income/Expense	
Income	
Advocare Commission	19.90
Car Allowance	1,500.00
Clerk of Court Refund	51.54
Income	0.03
Interest Payment	0.54
JRW Contract Payment	83,961.40
JRW Fee Share Contract	30,927.71
KK Commission	20,381.00
KK Reimbursement	6,609.79
KK Salary	35,307.36
KK Training	400.00

See Exh. D-15 at 19 (highlighting added).

7:14 PM
04/07/17
Accrual Basis

Burdett Legal Consulting LLC
Profit & Loss
January through December 2016

	Jan - Dec 16
Ordinary Income/Expense	
Income	
Interest Income	0.33
Interest Payment	0.16
JRW Payroll	
Fee Share	8,046.00
Health Insurance Allowance	1,301.05
JRW Payroll - Other	31,307.64
Total JRW Payroll	40,654.69
KK Bonus	2,485.36
KK Commission	18,637.65
KK Expense Reimbursement	19,652.23
KK Payroll	36,053.18
KK Reimbursement	600.00

See Exh. D-16 at 17 (highlighting added).

2:08 PM
03/05/18
Accrual Basis

Burdett Legal Consulting LLC
Profit & Loss
January through December 2017

	Jan - Dec 17
Ordinary Income/Expense	
Income	
Interest Income	0.17
Interest Payment	0.08
JRW Payroll	
Fee Share	18,195.64
JRW Payroll - Other	86,875.45
Total JRW Payroll	105,071.09
KK Bonus	12,637.53
KK Commission	10,302.64
KK Expense Reimbursement	23,072.12
KK Payroll	36,209.98

See Exh. D-17 at 19 (highlighting added).

As for the four checks to “Luxury Outdoor Design” in June 2015 totaling \$12,600, those checks were paid from an account jointly held by Ms. Burdett and her husband. See Exh. G-814. Those checks were not funded by unpaid taxes, as the government argued, but instead by a deposit into the joint account. See Exh. G-319 at 2. The government did not introduce the check detail for that deposit—but it certainly wasn’t from the IRS.

11. Conclusion.

The government relied upon inference piled upon inference. But that does not overcome the lack of evidence of actual knowledge and willfulness—and certainly does not satisfy the government’s burden of proving those inferences beyond a reasonable doubt. *Alvarez*, 451 F.3d at 333–34 (a reviewing court may not affirm a conviction that “rest[s] on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference”). The jury, though well-intended and properly-instructed, returned a conviction where there was not sufficient evidence to convict. The verdict was based upon an “overly attenuated piling of inference upon inference,” and the inferences the government argued were unreasonable. See

Moreland, 665 F.3d at 149. “[N]o reasonable jury could convict a defendant where the government has done nothing more than pile inference upon inference to prove guilt.” *Id.* (internal citation and quotation omitted).

Even viewing the evidence “in the light most favorable to the prosecution,” the result “gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged.” *Menesses*, 962 F.2d at 426.

The government’s case rested upon Henry Timothy’s testimony and it falls because of Henry Timothy’s testimony.

Respectfully submitted,

/s/ Avery B. Pardee

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CERTIFICATE OF SERVICE

I certify that on August 8, 2022, I electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF System, which will send a copy of the pleading to all parties via email.

/s/ Avery B. Pardee