No. 06-10199
consolidated with
06-10145 and 06-10201

IN THE U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES,
Plaintiff-Appellee

v.

IRWIN SCHIFF,
Defendant-Appellant

APPELLANT SCHIFF'S REPLY BRIEF

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ARGUMENT

I. JUDGE DAWSON VIOLATED SCHIFF'S DUE PROCESS RIGHT TO A FAIR TRIAL AND, AS A RESULT, SCHIFF RECEIVED A FUNDAMENTALLY UNFAIR TRIAL. THE DOCTRINE OF HARMLESS ERROR DOES NOT TRUMP A DUE PROCESS VIOLATION.

A. DAWSON EXCLUDED RELEVANT EVIDENCE AND IMPAIRED SCHIFF'S GOOD FAITH DEFENSE.

B. DAWSON REQUIRED SCHIFF TO PRODUCE A WITNESS LIST AND MAKE A PROFFER FAR IN ADVANCE OF THE TRIAL AS TO WHAT THE TESTIMONY FOR EACH WITNESS WOULD BE; WHEN HE DID NOT REQUIRE THE SAME FROM THE GOVERNMENT. THIS WAS USED AS A WAY OF WEEDING OUT RELEVANT WITNESSES BEFORE TRIAL.

C. DAWSON DEMEANED AND HUMILIATED SCHIFF IN FRONT OF AND OUTSIDE THE JURY'S PRESENCE.

D. DAWSON DID NOT ALLOW SCHIFF THE COMPETENCY HEARING TO WHICH HE WAS ENTITLED.

E. DAWSON DID NOT ALLOW A HYBRID ATTORNEY OR AN APPOINTED ATTORNEY.

F. DAWSON IMPROPERLY FOUND SCHIFF IN CONTEMPT OF COURT AND IMPOSED AN ILLEGAL AND VINDICTIVE SENTENCE WITHOUT THE JURY TRIAL TO WHICH HE WAS ENTITLED.

G. DAWSON GAVE SCHIFF A VINDICTIVE SENTENCE AFTER SCHIFF MOVED TO RECUSE HIM.

H. DAWSON INTENTIONALLY GAVE ERRONEOUS INSTRUCTIONS TO THE JURY.

I. DAWSON WAITED UNTIL THE LAST MOMENT TO RULE ON SCHIFF'S PRETRIAL MOTIONS.

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I.

JUDGE DAWSON VIOLATED SCHIFF'S DUE PROCESS RIGHT TO A FAIR TRIAL AND, AS A RESULT, SCHIFF RECEIVED A FUNDAMENTALLY UNFAIR TRIAL. THE DOCTRINE OF HARMLESS ERROR DOES NOT TRUMP A DUE PROCESS VIOLATION.

The government misinterprets the scope of Appellant's Opening Brief by insisting that all of Schiff's claims of error are avoidable because any error, if there was error at all, was harmless and, therefore, not cognizable by this Court to overturn the conviction. The Opening Brief may not have sufficiently stressed the fact that Schiff is claiming that the cumulative error amounted to an unfair trial, as it is known under the Due Process clause of the Fifth Amendment to the Constitution. Cumulative error can produce a reversal without a finding that any individual allegation of error requires reversal.

These principles of Fundamental Fairness are embodied in many decisions of the Supreme Court, as well as this Court, as follows:

"…the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness (and reversal of the Defendant's conviction is required)".***Taylor v. Kentucky,*** **436 U.S. 478, 488 (1978).**

"Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial. Karis, 283 F.3d at 1132." ***Williamsv.Woodford***, 384F.3d 567,613 (9thCir. 2004).

"In cases where there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir.1996) (quoting United States v. Wallace, 848 F.2d 1464, 1476 (9th Cir.1988)). In other words, '[e]rrors

that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.' Thomas v. Hubbard, 273 F.3d 1164, 1180 (9th Cir.2001) (quoting Matlock v. Rose, 731 F.2d 1236, 1244 (6th Cir.1984)), overruled on other grounds by Payton v. Woodford, 299 F.3d 815, 829 n. 11 (9th Cir.2002) (en banc)."***Alcala v. Woodford,* 334 F.3d 862, 883 (9th Cir. 2003).**

"Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant. Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir.1992), cert. denied, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993)."***Ceja v. Stewart,* 97 F.3d 1246, 1254 (9th Cir. 1996).**

"We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death. See United States v. Tucker, 716 F.2d 576, 595 (9th Cir.1983) (a court may find unfairness-and thus prejudice-from the totality…) Ewing v. Williams, 596 F.2d 391, 395 (9th Cir.1979)…prejudice may result from the cumulative impact of multiple deficiencies, quoting Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir.1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979))."***Mak v. Blodgett,* 970 F.2d 614, 622 (9th Cir.,1992).**

"Cumulative errors in prosecution for conspiracy to possess and distribute cocaine violated due process, even though errors individually would have been harmless**…" *U.S. v. Parker*, 997 F. 2d 219 (6th Cir. 1993).**

The Government's arguments are weak. The Brief is overly annotated with 170 case citations. It appears the impression they want to leave is that it is "locked up" law that they are advocating. However the authority they cite does not appear to be specifically connected with the unusual facts of this case. The further impression is that they are avoiding the facts by their reliance on case law. When a Constitutionally unfair trial has occurred, such as what we allege occurred at

Schiff's trial, it is not enough to state it is: "not plain error", "not error", "not clearly erroneous", harmless error", or "not abuse of discretion."

As stated at the end of Schiff's Opening Brief: "Schiff may not be entitled to a perfect trial, but he was entitled to a fair trial." S Br. At 59. One knows an unfair trial when one sees one or reads the transcript of one.

A. DAWSON EXCLUDED RELEVANT EVIDENCE AND IMPAIRED SCHIFF'S GOOD FAITH DEFENSE.

A wise court would have chosen to allow Schiff to introduce whatever evidence he wanted, as to his interpretation of the law, in order to assure an error free trial. Then he would have presented the law in his instructions, as the court viewed the law. This would have allowed the jury to properly determine Schiff's good faith defense that depended on an exposition of what that good faith belief was.

But Judge Dawson appeared to fear that Schiff would somehow mesmerize the jury into believing that he actually had a good faith belief that the law did not impose liability for payment of the income tax—or worse they might believe that he is correct. There are others with greater credentials than Mr. Schiff, who hold similar beliefs, such as Congressman Ron Paul—currently a candidate for the Republican nomination—who has said the income tax is unconstitutional.

B. DAWSON REQUIRED SCHIFF TO PRODUCE A WITNESS LIST AND MAKE A PROFFER FAR IN ADVANCE OF THE TRIAL AS TO WHAT THE TESTIMONY FOR EACH WITNESS WOULD BE; WHEN HE DID NOT REQUIRE THE SAME FROM THE GOVERNMENT. THIS WAS USED AS A WAY OF WEEDING OUT RELEVANT WITNESSES BEFORE TRIAL.

(Irwin put in transcript cites on this)

C. DAWSON DEMEANED AND HUMILIATED SCHIFF IN FRONT OF THE JURY AND OUTSIDE THE JURY'S PRESENCE.

Mr. Schiff might as well have had on a prison jumpsuit. That was the way he was treated and that was the way he must have appeared to the jury. Unfortunately, the transcript does not reveal the sound and manner of the Dawson's speech, but it can be inferred by some of his remarks. See, S Opening Brief at p. 58.

The government argues that Dawson's remarks "reflected at most impatience. They did not in any way disparage Schiff or indicate any views as to his guilt or innocence." G. Br. At 59. So the government argues that

calling Schiff's arguments "garbage" does not rise to a level of improper commentary and intimidation. This is sophistry.

The government attempts to make a distinction about whether Judge Dawson's mean remarks were okay because some of them were outside the presence of the jury. Moreover, they rely on Judge Dawson's stock cautionary instructions that the jury is not to infer anything by his remarks. These are distinctions without a difference.

If Schiff was berated outside the presence of the jury, it had an intimidating effect on Schiff that carried over to his performance before the jury. Moreover, if court proceedings are frequently interrupted with hearings with the jury being led out of court, the jury has a pretty good idea, if somebody is going to be berated, notwithstanding any attempts at a curative instruction.

It is the same with the government's claim that Judge Dawson's repeated "sanctions" (done according to the government to be nice to Schiff) did not impact the jury. It was clear to the jury that Judge Dawson was beating Schiff up and therefore they too became intimidated into arriving at a verdict contrary to the evidence.

D. DAWSON DID NOT ALLOW SCHIFF THE COMPETENCY HEARING TO WHICH HE WAS ENTITLED.

Madness is madness and it's madness for anybody to believe that any Federal Court would have the fortitude to invalidate the Internal Revenue Code after all this time has gone by—even if it was true and provable. But this is the delusion that Schiff has—the very essence of his delusion. He devoutly believes that a courageous Federal Court will give him the fair hearing that he has asked for and will declare for the record that the IRC does in fact not require the payment of tax on income. Judge Dawson wouldn't even let Schiff present his evidence.

A delusion is a symptom of a psychotic break from reality. If it is chronic, the victim is in a constant state of psychosis. Before changes in diagnostics, mental disorders (diseases) were broken down into two branches: Psychosis and Neurosis. Neurosis is now called a personality disorder.

Schiff has been diagnosed as manic depressive, now called Bipolar Disease, which is listed under the generic category of Mood Disorders. It is a psychotic condition. Many, if not most chronic psychotics, are unaware of their illness. The voices they hear are real and they can't be dissuaded from that—even with medication.

Psychosis is a disorder of the brain that manifests itself in delusional thinking. "Delusional" means that a person thinks that something is real and true when it is not. It is beyond comprehension that neither two Magistrates nor Judge

Dawson ordered a competency hearing. There were apparent conflicting opinions that were never resolved.

Either Schiff is delusional (therefore not competent and not capable of forming specific intent to commit a crime) or he is not. Testimony was necessary to resolve the fact conflicts. Moreover, the competency hearing would have shed some light on whether Schiff could have used testimony from a psychiatrist and a clinical psychologist. Their testimony was later barred by Dawson without any hearing. Schiff was not permitted to offer evidence that his delusion affected his ability and to prove to the jury that he lacked the requisite ***mens rea*** to commit the felonies with which he was charged.

The government attempts to escape the conclusion that a reversal is requied by Judge Dawson's failure to hold a competency hearing and the failure of the two Magistrates to draft findings of fact and law, by a sophisticated argument that no hearing or findings of fact were necessary. The law requiring a hearing under the facts in this case is well recited in Schiff's Opening Brief, notwithstanding the government's attempt to equate the facts below with an unpublished Eighth Circuit opinion.

E. DAWSON DID NOT ALLOW A HYBRID ATTORNEY OR AN APPOINTED ATTORNEY.

The government does not make a persuasive argument that Schiff made an explicit or unequivocal choice to act as his own attorney, nor do they address why Schiff only had two choices. A "hybrid" attorney would have assisted the court—not hindered it.

The fact that Schifff did not have an attorney—one that had time to learn his case—contributed greatly to the difficulties that occurred during the trial.

F. DAWSON IMPROPERLY FOUND SCHIFF IN CONTEMPT OF COURT AND IMPOSED AN ILLEGAL AND VINDICTIVE SENTENCE WITHOUT THE JURY TRIAL TO WHICH HE WAS ENTITLED.

The government's argument (G.Br. at 29-38) that Judge Dawson acted properly in its contempt assessments are disingenuous and the reasoning is contorted. There was no need to further punish Schiff. Judge Dawson's conduct in limiting Schiff's defense had achieved the desired results—Schiff was found guilty. There was no open and serious threat to the court's orderly procedure. There are no facts that Schiff represented a clear and present danger to the court that required a summary procedure. One is reminded of the antics of deceased District Judge Julius Hoffman and his contempt charges against lawyer William Kuntsler and others in the "Chicago Seven" case.

Moreover, Schiff's behavior was affected by his delusional beliefs and the court's restrictions on his defense. Schiff was driven by his delusion to tell the truth as he perceived it. And in his mind he could not accept the law as told by Judge Dawson because he "knew" it to be erroneous.

G. DAWSON GAVE SCHIFF A VINDICTIVE SENTENCE AFTER SCHIFF MOVED TO RECUSE HIM.

If Dawson had any sense of compassion, he wouldn't have sentenced an old man as he did and with a consecutive one year kicker thereafter. Wouldn't it have been better to suspend the jail sentence, subject to a long probationary period with appropriate conditions concerning his anti-tax activities? If the IRS is truly reformed and compassionate, wouldn't it be better for them to just stop the activity (See, www.paynoincometax.com) rather than criminally prosecuting good faith believers? Or does the IRS want to continue to entrap people? The IRS has used the injunction against books; why not people too?

Moreover, the government's argument (G.Br. at 41) that the court was not required to moderate his sentence because Schiff did not raise the age issue is also disingenuous. The court was required to consider the age issue whether Schiff raised it or not.

As to Dawson's failure to recuse himself, the government's argument that Dawson's bias was not proven by "compelling evidence" and that the letters did

not constitute an “extrajudicial source” is again disingenuous. The letters certainly caused Judge Dawson to view Schiff as a personal antagonist.

The government argues that the threats were “apparently” generalized. However, since the matter was never adequately explained on the record, Judge Dawson purposefully attempted to downplay the significance of the letters. A letter sufficiently threatening to have it sent to the FBI must have had an affect that should have provoked a ***sua sponte*** recusal.

H. DAWSON INTENTIONALLY GAVE ERRONEOUS INSTRUCTIONS TO THE JURY.

(Irwin put your argument here and make it brief)

I. DAWSON WAITED UNTIL THE LAST MOMENT TO RULE ON SCHIFF’S PRETRIAL MOTIONS.

The failure to rule on Schiff’s Motions until just before trial was premeditated. It was all “garbage” to Judge Dawson and there was no reason to take them seriously. They were all going to be denied anyway. So what was the hurry? In the denial of the Motions, there was no serious reasoning as to why they didn’t have any merit. This was also the way the IRS responded to Schiff’s letters to them about why only corporate income could be taxed. They were garbage and not worth a logical response.

J. DAWSON IMPEDED SCHIFF'S CROSS-EXAMINATION OF WITNESSES.

(Irwin I need some transcript cites on this)

K. DAWSON GAVE A SUA SPONTE INTERIM INSTRUCTION AFTER HOLDING AN EXPARTE CONFERENCE WITH PROSECUTORS.

(I need transcript cites for this).

II.

SCHIFF PROVED AS A MATTER OF LAW THAT HE COULD NOT BE GUILTY OF THE OFFENSES FOR WHICH HE WAS CHARGED AND THE JUDGEMENT OF CONVICTION SHOULD BE REVERSED BY THIS COURT FOR LACK OF PROOF OF THE COMMISSION OF ANY OFFENSE CHARGED IN THE INDICTMENT.

A. There was no deficiency

B.

(Irwin this is your baby. Make it brief)

III.
CONCLUSION

Irwin Schiff is a man who has railed against Big Government for most of his life. He is a strong advocate of Freedom from tyrannical Government, as were our Founders. He rebels against the manipulation of our monetary system and he rebels against an unfair tax system that allows the government to grow way beyond what was intended by the Founders. See, "Kingdom of Moltz—A Tale by Irwin Schiff—About Inflation and Where It Comes From" (Freedom Books, 1980).

As were our Founders, Schiff is a rebel. But he is a peaceful rebel. He uses words instead of guns. He rebels against anything that he considers to be contrary to what our Founders planned for our Government to be.

Everybody knows that the income tax is a joke and that it is unfair. Noted Harvard Professor, Irving Younger, many years ago, wrote a "tongue in cheek (or maybe not)" article in the ABA Journal in which a mythical U.S. District Court found the Internal Revenue Code to be unconstitutional and void for vagueness, citing a section of the Code that contained a 159 word paragraph that had only one period at the end. ***"Misera est servitus, ubi jus est vagum aut incerturm"*--**Maxim of Law—"It is a miserable slavery where the law is vague or uncertain."

Perhaps it can be said that Mr. Schiff took a wrong avenue in his peaceful protest, but under no circumstances should it be stated that his protest was false

and fraudulent and the convictions should be reversed outright and/or remanded for a fair trial before a fair judge.

By never answering Schiff's innumerable queries about the law, the IRS perpetuated Schiff's good faith belief that he was correct in his interpretation of the law. There is nothing unusual about this. When someone is evasive or doesn't respond to an assertion, we tend to believe more strongly than before that the assertion is correct.

After all, the IRS had knowledge of Schiff's activities since at least 1979. Freedom Books had been in business at least since that date. Since 1990, Schiff's storefront on heavily trafficked Sahara Street in Las Vegas advertised "Pay No Tax" on a large sign in his parking lot.

In other words, the IRS and DOJ waited until 2004-05—leaving Schiff to continue his activities and delusional beliefs for a period of 25 years. This failure to stop him during this period of time and the failure of the IRS to respond to Schiff's assertions, convinced Schiff that he was correct. This government behavior amounts to a form of entrapment—yet another Due Process violation.

Moreover, the government in its Brief (G.Br. at 40) attempts to show that Judge Dawson properly sentenced Schiff so severely because he viewed Schiff as an immoral mercenary only interested in making money. However, all five of Schiff's character witnesses testified that Schiff was a moral, law abiding, honest individual and that he engaged in his activities as a civic service.

Dated: July , 2007

Respectfully submitted,

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