

*HESSER V. UNITED STATES*: ELEVENTH CIRCUIT HOLDS  
THAT THE GOVERNMENT MUST PRESENT EVIDENCE OF  
AN ILLEGAL AFFIRMATIVE ACT IN ITS CASE-IN-CHIEF  
TO SUSTAIN A CONVICTION FOR ATTEMPTED TAX  
EVASION

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In *Hesser v. United States*, the United States Court of Appeals for the Eleventh Circuit reversed a district court decision denying a petition for relief under 28 U.S.C. § 2255 on the grounds of ineffective counsel.<sup>1</sup> The Eleventh Circuit addressed whether the Government failed to meet the evidentiary burden necessary to sustain a conviction for attempted tax evasion and, in turn, whether Hesser’s counsel was ineffective for failing to move for a judgment of acquittal.<sup>2</sup>

In 2013, Peter Hesser was convicted on three counts of tax fraud and one count of attempted tax evasion.<sup>3</sup> He was sentenced and ordered to pay restitution.<sup>4</sup> Hesser appealed on the grounds that the evidence presented in the Government’s case-in-chief was not sufficient to support a conviction on all four counts.<sup>5</sup> He also claimed that his counsel failed to object to the Government’s evidence under Fed. R. Crim. P. 29.<sup>6</sup> On appeal, the Eleventh Circuit held that, while the evidence would not have been sufficient under a *de novo* standard, there was ultimately no “miscarriage of justice” relating to the three tax fraud convictions, and the court upheld the conviction.<sup>7</sup> With regards to count four—the count of tax evasion—the court held that there was “ample evidence” and therefore no “miscarriage of justice” occurred, so the court upheld that conviction as well.<sup>8</sup>

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<sup>1</sup> 40 F.4th 1221, 1223 (11th Cir. 2022).

<sup>2</sup> *Id.* at 1224.

<sup>3</sup> *Id.* at 1223.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* “After the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a).

<sup>7</sup> *Hesser*, 40 F.4th at 1223.

<sup>8</sup> *Id.*

Following this ruling, Hesser filed a habeas petition under 28 U.S.C. § 2255, claiming his counsel was ineffective on three counts.<sup>9</sup> First, Hesser argued that his counsel failed to move for a judgment of acquittal even though the Government presented insufficient evidence in its case-in-chief.<sup>10</sup> Second, he claimed that his counsel “was ineffective for calling him as a witness at trial.”<sup>11</sup> Third, he stated that his attorney failed to “warn him of the dangers of testifying in his own defense.”<sup>12</sup> The United States District Court for the Middle District of Florida ultimately vacated the three convictions of tax fraud but let the fourth count for tax evasion stand.<sup>13</sup>

Hesser appealed on the same grounds argued in the district court.<sup>14</sup> In determining whether Hesser had ineffective counsel, the Eleventh Circuit first had to determine whether the evidence supported a conviction for attempted tax evasion.<sup>15</sup> To obtain a conviction for attempted tax evasion under 26 U.S.C. § 7201, the Government must prove three elements: (1) willfulness, (2) the existence of a tax deficiency, and (3) an affirmative act constituting an evasion or an attempted evasion of the tax.<sup>16</sup> With regard to the third element, the Government pointed to three separate affirmative acts.<sup>17</sup> First, the Government introduced evidence that Hesser had prevented his assets from being examined by the IRS “by converting them into gold and that he had quitclaimed his house to a trust.”<sup>18</sup> Second, the Government alleged that Hesser filed a fraudulent tax return in 2007.<sup>19</sup> Third, the Government contended that Hesser had filed “false income tax returns for 2005 and 2006.”<sup>20</sup>

The court evaluated whether the evidence the Government introduced in its case-in-chief “sufficiently proved” any of these alleged affirmative acts.<sup>21</sup> The court acknowledged that it previously addressed

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<sup>9</sup> *Id.* at 1224. 28 U.S.C. § 2255 allows a prisoner to petition a court to “vacate, set aside or correct [a] sentence” that “was imposed in violation of the Constitution or laws of the United States.” Thus, a prisoner can petition a court under this provision if he or she lacked effective assistance of counsel, which is protected by the Sixth Amendment of the Constitution. *See id.* § 2255(a).

<sup>10</sup> *Hesser*, 40 F.4th at 1224.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Hesser*, 40 F.4th at 1225 (citing *United States v. Hesser*, 800 F.3d 1310, 1323 (11th Cir. 2015)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1226.

count four on direct appeal and ultimately held that the Government failed to prove that Hesser's tax return had been "false under a de novo standard."<sup>22</sup> In addition, the court held that the Government had failed to prove that the 2005 and 2006 tax returns were false, explaining that Hesser's testimony had filled in the gaps and that the Government's evidence alone did not sufficiently support the finding of an affirmative act.<sup>23</sup> After "knock[ing] out the second and third alleged affirmative acts," the court explained that Hesser's counsel would not be considered ineffective if the Government had sufficiently proven the first set of affirmative acts in its case-in-chief.<sup>24</sup>

The first set of affirmative acts the Government introduced alleged that Hesser hid his assets from the IRS by converting them into gold and that he had quitclaimed his house into a trust.<sup>25</sup> The court then addressed whether these facts could be used to satisfy the affirmative act requirement of attempted tax evasion.<sup>26</sup> While it was undisputed that Hesser hid gold from the IRS, it was disputed if that action constituted an affirmative act of attempted tax evasion.<sup>27</sup> The court reasoned that this act could be a relevant affirmative act if the Government had shown that the gold was taxable to Hesser; however, the Government failed to show that the gold had even belonged to Hesser.<sup>28</sup> In failing to prove the gold belonged to Hesser, the Government left open the possibility that Hesser had "committed a mistake of law—that he thought he was doing something criminal that was in fact innocuous—or that he did not even think he was doing something criminal in hiding money for the family trust."<sup>29</sup> The court held the Government did not prove its burden since hiding gold from the IRS alone is not attempted tax evasion.<sup>30</sup>

The court then considered another alleged affirmative act—Hesser's transfer of his house into a trust around the time when the IRS filed a tax lien against him.<sup>31</sup> The court explained that this could be an

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<sup>22</sup> *Hesser*, 40 F.4th at 1225 (citing *United States v. Hesser*, 800 F.3d 1310, 1323, 1324 (11th Cir. 2015)).

<sup>23</sup> *Id.* at 1226 (citing *Hesser*, 800 F.3d at 1320).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Hesser*, 40 F.4th at 1226.

<sup>29</sup> *Id.* at 1227. "[S]omeone can be convicted for attempt when they mistake the facts but not when they simply mistake the law." *Id.* The Government failed to show that Hesser attempted to evade paying his taxes and that tax liability had accrued to him before he began hiding gold, so instead they are left with a defendant hiding random gold which does not amount tax evasion or attempted tax evasion. *Id.*

<sup>30</sup> *Id.* at 1227.

<sup>31</sup> *Id.*

affirmative act of attempted tax evasion if the Government proved that it would have influenced Hesser's tax liability.<sup>32</sup> Hesser did not dispute that he knew tax liability accrued when he transferred his house into a trust.<sup>33</sup> However, a lien was not put on his house until 2007, which was after he had already transferred it into a trust.<sup>34</sup> The court concluded that this failed to be an affirmative act because the Government did not prove that Hesser's conduct "was aimed at some sort of tax evasion."<sup>35</sup>

The court reviews judgment of acquittal under a de novo standard and must take "all reasonable inferences" in the Government's favor."<sup>36</sup> The court found that because the Government failed to establish the affirmative act element of attempted tax evasion required under 26 U.S.C. § 7201, no jury could have found Hesser guilty beyond a reasonable doubt.<sup>37</sup> Thus, the district court would have been required to grant a motion for judgment of acquittal if one had been made.<sup>38</sup> In turn, the court ruled that Hesser's counsel was deficient by failing to move for judgment of acquittal when the Government did not meet its burden, which ultimately prejudiced Hesser.<sup>39</sup> Thus, the court granted Hesser's habeas petition and vacated his conviction under count four for tax evasion.<sup>40</sup>

The Eleventh Circuit's decision in *Hesser* established that, to meet the third element of attempted tax evasion, the Government must prove in its case-in-chief that the defendant actually sought to do something illegal when completing the affirmative act.<sup>41</sup> Failing to do so prevents the Government from meeting its evidentiary burden.<sup>42</sup> In addition, the court made it clear that when counsel does not move for judgment of acquittal after the Government fails to meet its evidentiary burden, that counsel's performance is deficient for purposes of an ineffective counsel claim.<sup>43</sup>

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<sup>32</sup> *Hesser*, 40 F.4th at 1228.

<sup>33</sup> *Id.* (citing *United States v. Hesser*, 800 F.3d 1310, 1316 (2015)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting *United States v. Fleury*, 20 F.4th 1353, 1367 (11th Cir. 2021) (citing *United States v. Browne*, 505 F.3d 1229, 1253 (11th Cir. 2007))).

<sup>37</sup> *Id.* at 1229.

<sup>38</sup> *Hesser*, 40 F.4th at 1229.

<sup>39</sup> *Id.*; see *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>40</sup> *Hesser*, 40 F.4th at 1229. The court, however, failed to address whether Hesser's counsel was deficient in calling him to the stand or failing to warn him of the dangers of testifying since the conviction for count four had already been vacated. *Id.*

<sup>41</sup> See *id.* at 1228.

<sup>42</sup> See *id.* at 1229.

<sup>43</sup> See *id.*