IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Docket No. 15-1446
	:	
DOREEN HENDRICKSON	:	

APPELLANT DOREEN HENDRICKSON'S BRIEF
IN SUPPORTOF HER MOTION FOR RELEASE PENDING APPEAL

I. INTRODUCUTION

Appellant, Doreen Hendrickson, hereby requests this Court to order her released pending the outcome of her appeal. On June 10, 2015, the district court in her case entered an Order denying her Motion for Release Pending Appeal. (Dist. Crt. Docket No. 2:13-cr-20371-1, Doc. 141). Contrary to the district court's ruling, Mrs. Hendrickson should be released pending appeal because she is neither a flight risk nor a danger to any persons or the community and her appeal raises several substantial questions. Specifically, Mrs. Hendrickson's appeal raises at least the following substantial issues:[1] (1) the district court erred in failing to instruct the petit jury in Mrs. Hendrickson's case that specific unanimity was required in order to convict her; (2) Mrs. Hendrickson was denied her Sixth Amendment right to present her own defense due to the interference of her standby counsel; and (3) the district court clearly erred in calculating Mrs. Hendrickson's advisory sentencing guideline

[1] Mrs. Hendrickson may raise additional issues in her brief (currently due by July 20, 2015), including but not limited to significant First Amendment issues.

range and sentencing by reference to that calculation. The district court committed clear error in denying Mrs. Hendrickson' Motion for Release Pending Appeal and this Court should reverse this ruling and order Mrs. Hendrickson's immediate release from federal custody.

II. DISCUSSION

This Court has summarized the requirements for bail pending appeal as follows:

> Title 18 U.S.C. § 3143(b) requires a district court to make two findings before granting bail pending appeal. First, a district court must find that the convicted person will not flee or pose a danger to the community if the court grants bail. Second, the district court must find that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

United States v. Pollard, 778 F.2d 1177, 1181 (6th Cir. 1985) (quoting 18 U.S.C. § 3143(b) (statute governing release pending appeal)).

This Court has described a "substantial question of law or fact" as:

> a close question or one that could go either way and that the question is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor.

Id. at 1182 (quoting *United States v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985)). A defendant is not obligated to convince the district court that it committed reversible error. *Id.* at 1181-82 (citing multiple circuit courts that concur in this

holding, including *Powell*, 761 F.2d at 1234 ("the defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal")).

While Section 3143 contains a presumption against post-conviction release (*United States v. Vance*, 851 F.2d 166, 170 (6th Cir. 1988)), when the above-described standard is met, district courts "shall order the release of the person in accordance with section 3142(b) or (c) of this title." 18 U.S.C. § 3143(b)(B) (emphasis added). Thus, in crafting Section 3143, Congress expressed the specific intent to release defendants when the designated circumstances are present in their case. *See United States v. Lamp*, 606 F.Supp. 193, 198 (W.D. Tex. 1985) (affirmed 868 F.2d 1270).[2]

Because Doreen Hendrickson is not a flight risk, nor a danger to any persons or the community, and because her appeal is not for the purpose of delay and raises several substantial questions, the Court must order her released pending appeal.

A. Doreen Hendrickson is not a Flight Risk nor a Danger to the Community.

In denying her Motion for Release Pending Appeal, the district court did not conclude that Mrs. Hendrickson was a flight risk or danger to any persons or the community, nor did the government argue that she was in its Opposition to Mrs. Hendrickson's Motion. As such, Mrs. Hendrickson will not belabor this issue and

[2] An appellate court reviews a district court's bail ruling under an abuse of discretion standard. *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002).

the Court can be confident that these requirements post no obstacle to ordering her release.

B. Doreen Hendrickson's Appeal Raises Substantial Issues of Law and Fact.

1. The Trial Court Erred While Instructing the Jury That its Verdict Did Not Require Unanimity.

The Indictment in this case (Dist. Crt. Docket No. 2:13-cr-20371-1, Doc. 3) charged a single count of criminal contempt based on Mrs. Hendrickson allegedly knowingly and willfully disobeying two injunctions set forth in a May 2, 2007 "Amended Judgment and Order of Permanent Injunction" (Dist. Crt. Docket No. 2:06-cv-11753, Doc. 34) centered in a civil tax case against Appellant and her husband by the Honorable Nancy G. Edmunds of the United States district court for the Eastern District of Michigan.

Judge Edmunds' Order, while one document, directs two separate and distinct forms of injunctive relief: (1) that the Hendricksons thereafter *not submit any filings* to the IRS based on the claims set forth in Cracking the Code[3]; and (2) that the Hendricksons *actively file* amended 2002 and 2003 returns in a manner specified in the Order. (Dist. Crt. Docket No. 2:06-cv-11753, Doc. 34 ¶ 27).

The Indictment alleged that Mrs. Hendrickson contemptuously violated Judge Edmunds' Order through separate and distinct criminal acts, each of which

[3] Cracking the Code is a book authored by Mrs. Hendrickson's husband, which Judge Edmunds incorrectly interpreted to suggest that only government employees are subject to federal income tax or federal tax withholding.

respectively corresponded to a separate and distinct injunction set forth in Judge Edmunds' Order. Specifically, the Indictment alleged Mrs. Hendrickson violated Judge Edmunds' Order that she *not submit any filings* to the IRS based on the tenets of Cracking the Code by, on March 23, 2009, "filing a 2008 U.S. Income Tax Return for Single and Joint Filers with No Dependents, Form 1040EZ which falsely reported that she earned zero wages in 2008." (Dist. Crt. Docket No. 2:13-cr-20371-1, Doc. 3, p. 3). Meanwhile, the Indictment also alleged that Mrs. Hendrickson violated a separate injunction requiring her to *actively file* amended 2002 and 2003 returns by "failing to file with the IRS Amended U.S. Individual Income Tax Returns for 2002 and 2003" from the date this directive was ripe, or on June 1, 2007, to the present day. *Id.* Thus, the Indictment charged Mrs. Hendrickson with violating Judge Edmunds' Order in two distinct ways through two completely unrelated acts.

Even a cursory of the Indictment confirms that the grand jury perceived the Orders as separate and distinct. The Indictment, which reflects the Order it was derived from, alleges that Mrs. Hendrickson "did knowingly and willfully disobey and resist the lawful orders (plural) of a Court of the United States," both of which are then separately identified in block format with their disparate dates and underlying conduct. *Id.*, pp. 2-3.[4]

[4] Prior to trial, Mrs. Hendrickson unsuccessfully moved the district court to order a dismissal or revision of the Indictment to correct its confusing formulation of a single count containing two disparate acts related to two obviously distinct orders. (Dist. Crt. Doc. 63).

At trial, the district court - over Mrs. Hendrickson's objection – instructed the jury that it was not required to unanimously find guilt as to either or both of the underlying acts offered in support of the charge set forth in the Indictment. The district court concluded that these were not individual acts allegedly committed in violation of individual injunctions, but were simply different means by which a single injunction was violated. (Notes of Testimony ("N.T."), 07/24/14, pp. 120-21). Accordingly, the Court delivered an instruction which tracked Sixth Circuit Model Jury Instruction 8.03B. (N.T., 07/25/14, p. 99). Even if the district court were correct on this particular point, however, under governing law the Court nonetheless erred by delivering the cited jury instruction.

In *United States v. Miller*, this Court explained when a specific unanimity instruction - such as that suggested by Mrs. Hendrickson on this issue at trial - is required:

> Only a general unanimity instruction [as opposed to a specific unanimity instruction] is required even where an indictment count provides multiple factual bases under which a conviction could rest, unless: (1) the nature of the evidence is exceptionally complex or ***the alternative specifications are contradictory or only marginally related to each other***; or (2) there is a variance between the indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity.

734 F.3d 530, 538-39 (6th Cir. 2013) (quoting *United States v. Damra*, 621 F.3d 474, 504-05 (6th Cir. 2010) *quoting United States v. Duncan*, 850 F.2d 1104, 1113-

14 (6th Cir. 1988)). Because the acts at issue here are, at most, only "marginally related to each other," unanimity was required and the court erred in delivering the instruction in question.

The facts in *Miller* support this conclusion. In *Miller*, the defendant was charged with making a false statement to a bank. *Id.* at 534. This false statement - wherein he indicated in documents that he had the authority to pledge a business's property - was made six different times on four different dates. *Id.* at 536. Nevertheless, it was the *same* false statement and "[t]hese documents [were] not contradictory or marginally related to each other: they were all presented in connection with the loan closing." *Id.* 539. Thus, although the means by which the defendant in *Miller* committed the charged offense consisted of multiple acts, these acts were all the same and were made as part of a single commercial transaction.

United States v. Schmeltz, 667 F.3d 685 (6th Cir. 2011) likewise supports Mrs. Hendrickson's position. In *Schmeltz,* the defendant was charged in two counts of submitting two, separate, false documents. *Id.* at 686-87. Each of the counts respectively relied on one of the two documents submitted, despite the fact that both documents pertained to a single incident. *Id.* at 685-86. The government's evidence alleged that each individual document contained multiple falsehoods. *Id.*

The *Schmeltz* Court held that a specific unanimity instruction was not required with respect to the multiple alleged misrepresentations in each document. *Id.* at 687-88. As in *Miller*, the multiple factual bases cited on in the Indictment were not "only

marginally related to each other," but several false averments set forth in a single document. Further, in *Schmeltz,* the government notably charged the defendant with *separate Counts that correlated to each document submitted*. Thus, because the multiple means of committing the charged crime were contained within a single document and separately charged, a unanimity instruction was not required.

In contrast, the purported means by which Mrs. Hendrickson ostensibly committed criminal contempt consisted of two disparate acts associated with two distinct injunctive directives. The Indictment and evidence in Mrs. Hendrickson's case dispositively demonstrated that the acts in question are not related and, if so, are "only marginally related." *Miller*, 734 F.3d at 538-39. One involved the affirmative act of filing a 2008 tax returns in March of 2009 while the other was the failure to file amended 2002 and 2003 returns by June 1, 2007 and thereafter. Not only are the acts in Mrs. Hendrickson's case different in kind, but - unlike in *Miller and Schmeltz* - there exists a significant temporal disparity between them. *See Miller,* 734 F.3d at 536 (all six false statements were identical and made during approximately four month period during the course of single transaction); *Schmeltz,* 667 F.3d at 697-88 (all misstatements made contemporaneously during the creation of a single document).

Further, neither of the acts at issue in Mrs. Hendrickson's case were said to have violated both of the injunctions set forth in Judge Edmunds' Order. Rather, each act correlated to one or the other injunction. These were neither two interrelated

events associated with a single transaction, like in *Miller*, nor were the allegedly contemptuous violations of each injunction separately charged with respect to its underlying violative act, as in *Schmeltz*.

In its Order denying Mrs. Hendrickson's Motion for Release Pending Appeal, the district court mischaracterized the two separate injunctive orders as "a single injunction that contained two directives." (Dist. Crt. Docket No. 2:13-cr-20371-1, Doc. 141, p. 3). The district court concluded that the separate acts in question were not "only marginally related to each other," but rather because they both involved and were aimed at addressing the general underlying conduct of "filing false tax returns," this "link" rendered the two acts sufficiently related to not require specific unanimity. *Id*. This is simply untrue.

Regardless how the district court labels the mandates in Judge Edmunds' Order, that Order contains two separate injunctions directing Mrs. Hendrickson to do two separate things. *See Black's Law Dictionary* 540 (6th ed. 1991) (defining "Injunction" as "[a] court order prohibiting someone from doing *some specified act*" and "A judicial process operating in personam, and requiring person to whom it is directed to do or refrain from doing *a particular thing*") (emphasis added). While the injunctions may be tangentially related based on Judge Edmunds' perceived intent to address the general issue of "filing false tax returns" (Opinion at 3),[5] any

[5] Mrs. Hendrickson does not agree that the Order in question could have effectuated any unexpressed intent on Judge Edmunds' behalf, as the district court concludes, given that the Order was entirely written by the government and merely signed by

such relationship is marginal in nature and not overcome by the fact that the Indictment alleged two separate acts that were violative of two separate injunctive orders.

The plain language of Judge Edmunds' Order demonstrates the falsity of the district court's conclusion that the two injunctions were related by being generally aimed at keeping Mrs. Hendrickson from filing false tax returns. For example, the language of Judge Edmonds' Order relating to future filings is quite specific and detailed, carefully and specifically ordering Mrs. Hendrickson and her husband to refrain from filing returns "based on the claim [purportedly, but actually not] found in Cracking the Code that only federal, state, and local government workers are subject to the income tax." The Order simply does not state that Mrs. Hendrickson is, generally, not to file false returns. Rather, Mrs. Hendrickson could file "false" returns in multiple ways and not be in violation of the Order in question, so long as the supposed tenants of Cracking the Code are not the basis of any such filing.

While the district court cites the correct legal standard governing whether an issue on appeal raises a substantial question (Opinion at 2), the Court did not faithfully apply this standard. To be entitled to release pending appeal, Mrs. Hendrickson need not prove that the district court committed reversible error. Instead, she must establish that the issue at hand is a close question that could go either way and if successful, is an important enough issue to the case that the

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Judge Edmunds. (Notes of Testimony ("N.T."), 07/23/14, p. 56).

defendant's conviction would be overturned and/or a new trial granted. *Pollard*, 778 F.2d at 1182. The district court's failure to deliver a unanimity instruction certainly raises a "close question" and would necessitate a new trial should Mrs. Hendrickson succeed with this argument on appeal. As such, this Court should order her released pending appeal.

2. Doreen Hendrickson's Sixth Amendment Right to Conduct her own Defense was Violated when her Standby Counsel Failed to Ask Questions as Instructed by Mrs. Hendrickson as she was Testifying During her Trial.

Mrs. Hendrickson's standby counsel violated her Sixth Amendment right to self-representation in violation of *Faretta v. California* (422 U.S. 806 (1975)) by failing to ask Mrs. Hendrickson questions as directed at trial. In response to this argument, the district court concluded that because Mrs. Hendrickson failed to address the matter on the record at trial, she "acquiesce[d]" to counsels actions and, therefore, cannot now successfully pursue this argument on appeal. (Dist. Crt. Docket No. 2:13-cr-20371-1, Doc. 141, pp. 4-5) (citing *McKaskle v. Wiggins*, 465 U.S. 169, 182 (1984). The district court's ruling misunderstands and misapplies the law on this issue.

The district court's citation to "acquiescence" applies only where a defendant consistently and deliberately relinquishes control over his trial to standby counsel and, thus, cannot thereafter complain that his Sixth Amendment rights were violated by counsel taking independent action at trial:

> Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced.

McKaskle, 465 U.S. at 183.

Mrs. Hendrickson never relinquished any control over her case to standby counsel or otherwise invited, agreed or "acquiesced" to his failure to ask her questions as directed. Meanwhile, the format that precipitated counsel's interference in her case, wherein Mrs. Hendrickson testified through her counsel reading to her questions Mrs. Hendrickson had previously dictated, as opposed to providing direct narrative testimony to the jury, was a scenario imposed by the Court. (N.T., 10/30/13, pp. 155-56; 11/01/13, pp. 19-21; 07/23/14, p. 108; 07/24/14, pp. 45-47). Nothing in the record suggests that Mrs. Hendrickson "acquiesced" to Counsel's actions. Rather, the record clearly establishes that Mrs. Hendrickson confronted standby counsel in considerable dismay and denunciation of his actions at the first chance to do so outside the presence of the jury, and outside the presence of her government opponents, where such confrontations might have done her harm. Certainly, Mrs. Hendrickson had not “acquiesced” in the usurpation of her defense.

Otherwise, the district court's ruling on this issue could be understood as reaching the conclusion that Mrs. Hendrickson waived her *Farretta* argument by not timely raising it when the error in question occurred at trial. The district court's failure to explicitly reach this conclusion may reflect the fact that this argument has

been thoroughly addressed below and, thus, has in no way been waived. It was presented in Mrs. Hendrickson's Motion to Vacate or for New Trial on Multiple Grounds (Dist. Crt. Doc. 103) and related Motion for Reconsideration (Dist. Crt. Doc. 116), in support of which Mrs. Hendrickson provided the district court with a "Declaration of Doreen Hendrickson," wherein she described what occurred with respect to standby counsel's interference in her case. Exhibit "A." Standby counsel later provided a "Statement" to the Court that corroborated Mrs. Hendrickson's account of what occurred. Exhibit "B."

The facts are clear. At the conclusion of his direct examination, standby counsel simply failed to ask Mrs. Hendrickson certain questions that had been provided to him. A hard copy of the questions not asked was also provided to the district court. Exhibit "C." As explained by Mrs. Hendrickson and confirmed by counsel, after his oversight, Mrs. Hendrickson confronted counsel, who suggested that Mrs. Hendrickson would be able to address during her closing argument the points that would have otherwise been presented through the questions counsel did not ask. However, because the subject matter of these questions was not in evidence, Mrs. Hendrickson was not permitted to discuss this subject during her closing. *See* (N.T., 07/25/14, pp. 80-81).[6]

[6] This is in contrast to Mrs. Hendrickson's first trial, where counsel asked her the omitted questions, Mrs. Hendrickson answered them and discussed the subject matter during her closing argument. (N.T., 11/01/13, pp. 49-52; 110).

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court recognized that a defendant in a criminal case has a Sixth Amendment right to conduct her own defense. Later, the Supreme Court elaborated on the right of self-representation as follows:

> A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant ***must be allowed to control the organization and content of his own defense***, to make motions, to argue points of law, to participate in voir dire, ***to question witnesses***, and to address the court and the jury at appropriate points in the trial.

McKaskle v. Wiggins, 465 U.S. 168, 174 (1984) (emphasis added).

A defendant's right to "preserve actual control of the case [s]he chooses to present to the jury" is considered "the core of the *Faretta* right" and directly applies to the violation of Mrs. Hendrickson's Sixth Amendment rights at trial. *Id.* The record demonstrates that Mrs. Hendrickson's right to control her own defense was impermissibly compromised by her standby counsel's failure to ask her questions as she directed.

As this Court knows, a violation of the Sixth Amendment right in question results in a categorical constitutional violation that is not subject to harmless error analysis. *Id.* at 177, n.8 ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless"). As such, if the district

court's denial of Mrs. Hendrickson's Motion were construed by the Court as finding that she waived the argument by not timely addressing it, she would still be entitled to relief because the denial of her Sixth Amendment right is not subject to harmless error and/or plain error analysis. *United States v. Olano*, 507 U.S. 725, 734-35 (1993) (Determination of prejudice for purposes of harmless error analysis is the same normally required for determination of prejudice for plain error purposes, except that defendant, rather than government, bears the burden of persuasion with respect to prejudice on claim of plain error) (citing Fed. R. Crim. P. 52(a) and (b)).

The record confirms that standby counsel did not ask Mrs. Hendrickson certain questions as she explicitly instructed. The district court's ruling did not rebut this fact, but rather denied Mrs. Hendrickson release pending appeal based on the mistaken conclusion that she "acquiesced" to counsel's error. The constitutional violation in question was categorical in nature and, thus, this issue raises a "substantial question" on appeal and entitles Mrs. Hendrickson to release pending appeal. Further, the subject matter of the questions not asked - whether, why, and to what extent Mrs. Hendrickson believed that she was not contemptuously violating Judge Edmunds' Order based on her understanding of governing case law - was an absolutely central issue to her defense. *See United States v. Bishop*, 412 U.S. 346, 361 (1973) ("an offense committed 'willfully' is not met [] if a taxpayer has relied in good faith on a prior decision of this Court"). By Mrs. Hendrickson not being able to substantiate this claim by confirming that it was, in her opinion, supported by

governing legal precedent, her case was seriously undermined. Thus, the error in question was "integral to the merits of the conviction" and the Court should order Mrs. Hendrickson released pending appeal.

3. The District Court Clearly Erred at Sentencing by Incorrectly Calculating Mrs. Hendrickson's Advisory Guideline Range and Sentencing her According to this Calculation.

In determining the advisory guideline range applicable to Mrs. Hendrickson at sentencing, the district court focused its ruling on the conduct associated with Mrs. Hendrickson's failure to file amended 2002 and 2003 tax returns. (N.T., 04/09/15, p. 20-21). The Court concluded that this conduct was most-equivalent to the criminal offense of failure to file a tax return in violation of 26 U.S.C. § 7203 and, accordingly, invoked guideline section 2T1.1, which governs violations of Section 7203. Thus, the Court sought to sentence Mrs. Hendrickson as if her contempt conviction constituted a failure to file tax returns case and based its sentencing analysis on her perceived failure to file amended 2002 and 2003 tax returns as directed in Judge Edmunds' Order.

Section 2T1.1(c)(2) governs cases where "the offense involved failure to file a tax return."[7] Despite characterizing this as a failure to file tax returns case, the

[7] This section of the guidelines was discussed by Mrs. Hendrickson when the Court asked the parties on the eve of sentencing to submit supplemental sentencing memoranda addressing the significance of Section 2T1.1 to Mrs. Hendrickson's case. *See* (Dist. Crt. Docket No. 2:13-cr-20371, Doc. 125").

district court did not apply Section 2T1.1(c)(2), but rather opted to apply Section 2T1.1(c)(4), which is controlling in cases where "the offense involved improperly claiming a refund to which the claimant was not entitled." (N.T., 04/09/15, p. 21-22). The Court employed Section 2T1.1(c)(4) because Judge Edmunds Order referred to the fact that Mrs. Hendrickson and her husband were jointly indebted to the government due to erroneous refunds that were filed in 2002 and 2003, to the tune of $20,380.96. (N.T., 04/09/15, p. 22); (Dist. Crt. Docket No. 2:06-cv-11753, Doc. 34, pp. 1-2).

As a result of applying this over $20,000 figure, the district court determined a base offense level of 12 was to apply, which ultimately resulted in an advisory guideline range of 12 to 18 months imprisonment. *Id.* Had the "failure to file" guidelines been properly applied, Mrs. Hendrickson would have had a base offense level of 6 or, at worst, 8; either of which would have called for a guideline range of 0 to 6 months. (Dist. Crt. Docket No. 2:13-cr-20371, Doc. 125, pp. 3-7). Thus, the Court's ruling resulted in an advisory sentencing range that tripled Mrs. Hendrickson's advisory sentencing exposure and eliminated what would have been a probationary sentence advised by the guidelines.

In sentencing Mrs. Hendrickson, the Court plainly applied the incorrect sentencing guidelines. It was clear error for the Court to characterize Mrs. Hendrickson's offense conduct as the failure to file tax returns and then sentence her under an alternative theory by invoking a reference in Judge Edmund's Order that

had no bearing on the conduct she was accused of committing in support of her conviction. Judge Edmunds' Order directed Mrs. Hendrickson to file amended 2002 and 2003 returns and to not file returns in the future based on the teachings supposedly set forth in Cracking the Code. Judge Edmunds' Order did not direct Mrs. Hendrickson to pay the $20,380.96 judgment jointly imposed on her and her husband, nor was this debt the subject-matter of the allegedly-violated Order. Nor was this debt an element or aspect of the count charged in the Indictment, proven by the government at trial, or defended by Mrs. Hendrickson.

The actions by which the government claimed Mrs. Hendrickson violated the injunctions were wholly unrelated to the existence of the fact that she and her husband may be indebted to the government because of an alleged improperly received refund. Indeed, it is impossible for a "failure to file" to involve an improper claim for refund, given that a refund can only be claimed - whether properly or improperly - by *filing* a tax return. Thus, the district court could not have credibly concluded that "the offense involved improperly claiming a refund to which the claimant was not entitled."

Simply put, once the district court concluded that Mrs. Hendrickson would be sentenced as if her conviction were a failure to file tax returns case, the Court was obligated to sentence her according to the guidelines standard that controls such cases; Section 2T1.1(c)(2). The guidelines provided a mechanism for sentencing

Mrs. Hendrickson as if hers was a failure to file case, but the district court ignored these instructions.

In its Opinion denying Mrs. Hendrickson's Motion for Release Pending Appeal, the district court invoked an application note to Section 2T1.1 stating "[i]n determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case." (Dist. Crt. Docket No. 2:13-cr-20371-1, Doc. 141, p. 6). This language does not afford a sentencing court free rein to invoke any dollar figure tangentially related to the offense conduct in sentencing a defendant. In claiming that this $20,380.00 figure provides a "more accurate determination of the tax loss," the Court unavoidably acknowledged that it was sentencing Mrs. Hendrickson as if hers was a "filing false tax returns" case, not a failure to file case as it had previously ruled. *Id.*

Further, while the District analogized Mrs. Hendrickson's contempt conviction to a failure to file case for sentencing purposes, that did not authorize the Court to use as a basis for sentencing any aspect of the underlying civil tax case that was the basis of Judge Edmunds' Order. Doreen Hendrickson was accused of contempt for failing to file amended returns from June 1, 2007 onward and for filing a return ostensibly in violation of Judge Edmunds' Order in March 23, 2009, not for filing false 2002-2003 returns or for improperly claiming a tax refund. It was illogical and in clear violation of the sentencing guidelines for the Court to base its

sentence on conduct and dollar figures that were not the simply subject matter of Mrs. Hendrickson's conviction.

Further, perhaps the most glaring error by the district court was that in employing the $20,380 figure, the Court was sentencing *Doreen Hendrickson* based on earnings almost all of which were attributable to her husband, *Peter Hendrickson*. *See* (Dist. Crt. Docket No. 2:06-cv-11753, Doc. 34, pp. 2-5) (according to the Order, in 2002 and 2003, Peter Hendrickson earned $119,573 while Doreen Hendrickson earned $6,961). Thus, the district court sentenced Mrs. Hendrickson for her failure to file a tax return but did so by reference to a tax loss calculation based in large part in earnings that did not apply to her. Assuming the district court correctly treated Mrs. Hendrickson's case as a failure to file tax returns case, the Court applied the wrong sentencing guidelines provision in doing so. Thus, the Court abused its discretion by committing procedural error and imposing an unreasonable sentence in Mrs. Hendrickson's case. *See United States v. Bolds*, 511 F.3d 568, 579 (6th Cir. 2007) ("a sentence is procedurally unreasonable if it fails to calculate *or improperly calculates* the sentencing guidelines range") (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)) (emphasis added).

Under the district court's theory - had it been applied correctly - Mrs. Hendrickson's sentencing guidelines range should have been 0 to 6 months, not 12 to 18 months. 18 U.S.C. § 3143(b)(B) instructs that, in addition to the absence of a risk of flight or danger to the community, a defendant shall be released pending

appeal when the appeal, if successful is "likely to result in-- . . . (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." Given that the sentencing scheme employed by the district court, if properly applied, would have resulted in an offense level of 6, or at most, 8 months, Mrs. Hendrickson would likely have been sentenced to either probation or, at most, 6 months' imprisonment had guidelines been properly implemented. Further, even if she were sentenced 6 months incarceration, this is "less than the total of the time already served plus the expected duration of the appeal process." Thus, the error in question, if corrected on appeal, would result in an advisory sentencing guideline range that mandates releasing Mrs. Hendrickson on appeal.

The clear error committed by the district court at sentencing raises a substantial question on appeal and this Court should order Mrs. Hendrickson release pending appeal.

III. CONCLUSION

For the reasons set forth above, the Court should order Doreen Hendrickson released pending the outcome of her appeal.

Respectfully submitted,

CEDRONE & MANCANO, LLC

Dated: June 18, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 18th day of June, 2015, via the Court's Electronic Case Filing ("ECF") System, upon the following:

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