IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>DOREEN M. HENDRICKSON,<br><br>Defendant. | ) | Case No. 15-1446 |

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL**

The United States of America, by and through undersigned counsel, hereby opposes Defendant Doreen Hendrickson's Motion for Release Pending Appeal (Doc. No. 18).[1] Defendant asserts that the district court clearly erred by denying her motion for bond and asks this Court to order her immediate release. But because defendant does not meet the standard for release pending appeal, this Court should deny the motion. Defendant's anticipated appeal will not raise substantial issues of law or fact.

**BACKGROUND**

On July 25, 2014, a jury convicted defendant of criminal contempt, in violation of 18 U.S.C. § 401(3). (Jury Verdict, D.C. Doc. No. 101.) On April 9, 2015, the district court sentenced defendant to 18 months in prison, to be followed by one year of supervised release.

[1] Defendant earlier filed a Motion to Reverse the District Court's Denial of Her Motion for Release Pending Appeal (Doc. No. 17), which raises the same issues and is virtually identical to the Motion for Release Pending Appeal.

(Judgment, D.C. Doc. No. 126.) Defendant was ordered to surrender to the U.S. Marshal within 60 days. *Id*. Defendant is currently incarcerated.

On April 28, 2015, defendant filed a motion for release pending appeal in the district court, raising essentially the same grounds as the motion currently before this Court. (Motion, D.C. Doc. No. 132.) The district court denied the motion by written order on June 10, 2015. (Order Denying Release Pending Appeal, D.C. Doc. No. 141.)

## STANDARD OF REVIEW

This Court reviews a district court's denial of bail for abuse of discretion. *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002). The district court's factual findings are reviewed for clear error, and its legal conclusions are reviewed *de novo*. *Id*.

Bond pending appeal is governed by the Bail Reform Act, 18 U.S.C. §§ 3141-3150, which provides, in relevant part:

> [T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds--
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> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
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> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in--
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> (i) reversal,
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> (ii) an order for a new trial,
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> (iii) a sentence that does not include a term of imprisonment, or
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> (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.

18 U.S.C. § 3143(b)(1). The statute creates a presumption against release pending appeal. *Id.*; *United States v. Vance*, 851 F.2d 166, 168 (6th Cir. 1988).

Here, the district court denied defendant's motion because, the court determined, defendant failed to show that the appeal raised a substantial question of law or fact, as required by Section 3143(b)(1)(B). To satisfy that prong, a defendant must show that the "appeal presents 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." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (quotations omitted). Defendant has not made that showing here.

In the brief in support of her motion, defendant identifies (Doc. No. 18-2) three issues she intends to raise on appeal. First, she argues that the district court erred by failing to instruct the jurors that they must be unanimous as to the means by which defendant committed contempt. Second, defendant claims that her Sixth Amendment right to self-representation was violated when her standby counsel failed to ask certain questions of her during her direct examination. And third, defendant asserts that the district court incorrectly calculated the tax loss attributable to her offense conduct at sentencing. None of these issues satisfies the requirements of 18 U.S.C. § 3143(b)(1)(B).

## DISCUSSION

### A. The District Court Properly Instructed the Jury that Unanimity as to the Means by Which Defendant Committed Contempt Was Not Required

The indictment in this case (Indictment, D.C. Doc. No. 3) charged defendant with committing contempt by violating the May 2, 2007, Amended Judgment and Order of Permanent Injunction issued by United States District Judge Nancy Edmunds (hereinafter "the injunction").[2]

[2] *United States v. Peter Hendrickson and Doreen Hendrickson*, No. 06-11753 (E.D. Mich.).

The elements of criminal contempt are (1) the existence of a clear and definite order, (2) the defendant's knowledge of that order, and (3) the defendant's willful disobedience of that order. *See In re Smothers*, 322 F.3d 438, 441-42 (6th Cir. 2003). Defendant had previously filed false 2002 and 2003 tax returns improperly seeking two refunds totaling $20,380.96. The injunction prohibited defendant from filing additional tax returns that relied on the assertions made in the book *Cracking the Code*.[3] The injunction also required defendant to file amended 2002 and 2003 tax returns within 30 days. The indictment alleged that defendant violated both prongs of the injunction by filing a false 2008 tax return and by failing to file amended 2002 and 2003 returns. Defendant argues (Doc. No. 18-2, at 4) that the district court erred by failing to instruct the jury that it must unanimously agree on the manner in which defendant violated the injunction. Defendant is wrong.

The district court instructed the jury using the Sixth Circuit Pattern Criminal Jury Instruction 8.03B. In relevant part, the instruction stated:

> Your verdict, ladies and gentleman, whether it is guilty or not, must be unanimous. . . . The Indictment accuses the Defendant of committing the crime of Contempt in more than one possible way. The first is that she filed a 2008 U.S. Individual Income Tax Return for single and joint filers with no dependents, Form 1040-EZ which falsely reported that she earned zero wages in 2008. The second is that she failed to file with the IRS amended U.S. Individual Tax Returns for 2002 and 2003. The Government does not have to prove both of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all 12 of you must agree that at least one of these has been proved. However, all of you need not agree that the same one has been proved.

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[3] *Cracking the Code: The Fascinating Truth About Taxation in America*, which was written by Defendant's husband, Peter Hendrickson, asserts, among other things, that the earnings of persons who are neither government employees nor officers of corporations are not "wages," and are therefore not taxable income.

(5 Trial Tr. 98-99, D.C. Doc. No. 108.) This instruction and the district court's decision to give it were not erroneous.

A jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817 (1999). The jury must unanimously agree that each of the elements of a crime has been proven, but unanimity as to the "means" or "brute facts" constituting an element is typically not required. *Id*. at 817-19; *see also United States v. Eaton*, 784 F.3d 298, 308 (6th Cir. 2015). A specific unanimity instruction is not required, even where an indictment count provides multiple factual bases upon 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 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." *United States v. Damra*, 621 F.3d 474, 504-05 (6th Cir. 2010).

Defendant claims (Doc. No. 18-2, at 4, 9-10) that the alternative specifications in the indictment were contradictory or only marginally related to each other, but this argument is based on the incorrect assertion that the injunction was really two separate and distinct injunctions. In fact, as the district court properly found, the injunction was a single injunction that contained two directives: (1) file amended tax returns for years 2002 and 2003; and (2) refrain from filing tax returns that contained false information similar to that in the original 2002 and 2003 returns. (Order Denying Release Pending Appeal, D.C. Doc. No. 141, at 3.) The conduct that provided the basis for the injunction was defendant's filing false tax returns based

on a frivolous theory. The two prongs of the injunction were the means by which Judge Edmunds sought to correct and remedy this specific underlying behavior; they were neither contradictory nor only marginally related. The indictment simply charged defendant with violating the injunction in two ways. Therefore, a specific unanimity instruction was not required. *See Damra*, 621 F.3d at 504-05. "The manners in which the Government alleged Hendrickson committed criminal contempt were not contradictory and were related to each other." (Order Denying Release Pending Appeal, D.C. Doc. No. 141, at 4.)

Defendant cites *United States v. Miller*, 734 F.3d 530 (6th Cir. 2013), and *United States v. Schmeltz*, 667 F.3d 685 (6th Cir. 2011), in support of her claim that the acts charged in the indictment were only marginally related to each other, but these cases do not provide such support. The *Miller* Court held that multiple documents containing iterations of the same false statement and presented in connection with a single loan closing did not require a specific unanimity instruction. 734 F.3d at 539. Likewise here, defendant's multiple violations of the same injunction arising out of the same underlying false tax returns did not require a specific unanimity instruction. The *Schmeltz* Court held that a specific unanimity instruction was not required where the defendant omitted three material facts from a single report. 667 F.3d at 688. Again, defendant here violated a single court order in two different ways.

This issue does not raise a close question or one that could go either way on appeal. This was a straightforward contempt prosecution involving a single count. Furthermore, even if the district court erred, such error would be reviewed for harmlessness. *United States v. Tragas*, 727 F.3d 610, 617 (6th Cir. 2013). The court below found that "the verdict is supported by substantial and competent evidence." (Order, D.C. Doc. No. 112, at 8.) Given the ample

evidence that defendant, in fact, violated both prongs of the injunction, even if the district court erred, the error would not likely result in a new trial.

### B. Standby Counsel's Failure to Ask Certain Questions Did Not Violate Defendant's Sixth Amendment Right to Self-Representation

Defendant asserts that her standby counsel, Andrew Wise, violated her Sixth Amendment right to self-representation by failing to ask defendant certain questions during his direct examination of her. The questions defendant contends went wrongly unasked concerned defendant's interpretation of cases she allegedly relied on to support her claimed belief that she was not required to comply with the injunction.

A criminal defendant's right to self-representation is violated when, "over the defendant's objection," standby counsel makes or substantially interferes with significant tactical decisions, speaks instead of the defendant on matters of importance, or controls the questioning of witnesses. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). However, "a *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably." *Id*. at 182.

Here, the district court found that defendant acquiesced in Wise's decision to omit the particular questions about which she now complains and failed to object to Wise's conduct during trial. Defendant originally claimed below that she "quietly turned to the Court and asked to speak with standby counsel"; however, the district court correctly noted that nothing in the record supported this assertion. (Order Denying Release Pending Appeal, D.C. Doc. No. 112, at 4.) In fact, the district court found that "Hendrickson never attempted to inform the Court that standby counsel omitted questions until after a jury lawfully convicted her." (Order, D.C. Doc. No. 141, at 4); *see also* Order Denying New Trial, D.C. Doc. No. 112, at 4 ("It may be the case that this objection is waived because [defendant] did not object during trial."); *and* Order

Denying Reconsideration, D.C. No. 118, at 3 ("[T]hese questions should have been brought to the Court's attention when the omission occurred."). The district court's finding is supported by the trial transcript, which shows that at the conclusion of defendant's direct testimony, a sidebar conference was held, during which defendant did not mention the supposedly omitted questions. (5 Trial Tr., D.C. Doc. No. 108, at 104-108.) In her motion to this Court, defendant does not assert that she made any attempt to bring the matter to the district court's attention during her testimony or at any time prior to the jury's verdict. Her untimely objection constitutes waiver of the argument on appeal.

Defendant also fails to establish that this single incident constitutes substantial interference with a significant tactical decision, control of the questioning of witnesses, or the usurping of defendant's right to speak on a matter of importance, so as to constitute denial of the right to self-representation. *See McKaskle*, 465 U.S. at 178. The district court found that the "presentation of the cases that supposedly furthered her First Amendment argument would be cumulative" of evidence presented during her testimony and through other witnesses. (Order Denying New Trial, D.C. Doc. No. 112, at 8.) The court also found that "[t]he jury heard [defendant's] First Amendment reliance throughout the trial and still found her guilty." *Id.*

Contrary to defendant's assertion (Doc. No. 13) that she was not permitted to discuss her reliance on cases dealing with the First Amendment during her closing argument, the record shows that she did in fact discuss her belief "that the Supreme Court is right when it holds in repeated rulings over the centuries that no one may be forced or told what to say by the Government." (5 Trial Tr., D.C. Doc. No. 108, at 78.) Defendant was properly prevented from discussing cases on which she could not have relied because they were issued after she was

indicted or she learned about them during post-indictment research. (5 Trial Tr., D.C. Doc. No. 108, at 80.)

Given defendant's failure to object and failure to establish any violation of her right to self-representation, this issue also does not raise a close question or one that could go either way, and is not a valid basis for release pending appeal.

### C. The District Court Properly Calculated the Tax Loss Under the Sentencing Guidelines

The final issue defendant points to (Doc. No. 18-2, at 16) as justifying release pending appeal is her claim that the district court clearly erred in calculating the tax loss associated with her conduct. At sentencing, the district court found that the tax loss attributable to defendant was $20,380.96, which was the total amount of fraudulent refunds that defendant obtained from the IRS by filing false 2002 and 2003 tax returns.

Criminal contempt does not have its own sentencing guideline; instead, the sentencing court is instructed to apply the guideline for the most analogous offense. USSG § 2X5.1. Defendant's offense involved two types of conduct: failing to file amended returns and filing a false return. The district court determined that the most analogous offense was failing to file a tax return under 26 U.S.C. § 7203. The sentencing guideline for both filing a false return and failing to file a tax return is USSG § 2T1.1. That Section provides that the base offense level is the level provided in the Tax Table (Section 2T4.1) that corresponds to the tax loss.

Section 2T1.1(c) provides various methods for determining the tax loss. The first application note instructs the sentencing court:

> In 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. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate

> to reasonably calculate the loss that would have resulted had the offense been successfully completed.

Furthermore, Application Note 2 provides that, "in determining the total tax loss attributable to the offense . . . all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." In determining the tax loss, the court below looked to Section 2T1.1(c)(4), which provides that in cases involving improperly claimed refunds, "the tax loss is the amount of the claimed refund to which the claimant was not entitled." Because the injunction included Judge Edmunds's finding that defendant filed false returns claiming improper refunds, and the IRS paid defendant $20,380.96 as a result, the sentencing court found that the tax loss was $20,380, which resulted in a base offense level of 12.

Defendant asserts it was error to use Section 2T1.1(c)(4), insisting instead that the district court should have used Section 2T1.1(c)(2), which provides that "if the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay." But the sentencing court was not, as defendant suggests, constrained to choose between the methods provided in Sections 2T1.1(c)(2) and 2T1.1(c)(4). Instead, the court was free to look to any method that fit the facts of the case. Indeed, as noted above, Application Note 1 to Section 2T1.1 *requires* the court to use as many methods as are necessary given the facts of the case.

The sentencing court did not erroneously calculate defendant's sentencing guidelines. First, defendant ignores that this is not a simple failure to file case. This is a contempt conviction stemming from defendant's violation of an injunction, issued as part of a civil action initiated in part to recover fraudulent refunds, that enjoined defendant from filing false tax returns and which stated that she was indebted to the IRS in the amount of $20,380. As instructed by Application

Note 1 to Section 2T1.1, the district court properly used "as many methods set forth in subsection (c) and [the] commentary as were necessary given the circumstances of the particular case."

Moreover, applying Section 2T1.1(c)(2) would have resulted in the same tax loss figure. The note to 2T1.1(c)(2) provides that "[i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income . . . less any tax withheld or otherwise paid, *unless a more accurate determination of the tax loss can be made.*" (Emphasis added.). The sentencing court found that the injunction provided the most accurate determination of intended tax loss. The injunction stated that Hendrickson's conduct resulted in a tax loss of $ 20,380. Thus, it was appropriate for the sentencing court to use this figure to determine defendant's guideline sentence.

Furthermore, it is irrelevant that defendant owed the IRS $20,380 jointly with her husband. The issue for the sentencing court is not how much tax a defendant owes individually, but how much tax loss is caused or intended to be caused by a defendant's conduct. Defendant filed two false tax returns that improperly sought refunds. The district court properly considered that amount in determining her sentencing guideline.

The district court's calculation of tax loss was based on a plain reading of Section 2T1.1 and its accompanying Notes. As such, defendant's claim that the district court erred in its calculation does not raise a substantial issue of law or fact and is not a basis for release pending appeal.

## CONCLUSION

The three appellate issues defendant points to in her motion for release pending appeal fail to meet the standard set forth in 18 U.S.C. § 3143(b). Accordingly, this Court should deny defendant's motion.

Respectfully submitted,

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DATED: June 24, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 2015, a copy of this Response was served on all parties to this case via the Court's CM/ECF System.

s/ Katie Bagley
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