IN THE UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 13-cr-20371
	:	Judge Victoria A. Roberts
DOREEN HENDRICKSON	:	

DOREEN HENDRICKSON'S REPLY TO THE GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

On May 6, 2015, the government filed an Opposition to Defendant's Motion for Release Pending Appeal. Mrs. Hendrickson, through her undersigned counsel, offers this short Reply.

As an initial matter, in its Opposition the government does not contend that Mrs. Hendrickson is a flight risk or danger to any persons or the community, as must be proven by clear and convincing evidence in order for a defendant to be entitled to release pending appeal. *See* 18 U.S.C. § 3143(b)(1)(A). The government does contend, however, that Mrs. Hendrickson fails to establish that her appeal "raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment." Section 3143(b)(1)(B). Thus, the only issue before this Court is whether the arguments raised by Mrs. Hendrickson raise a substantial question on appeal.

Additionally, the government overstates the burden Mrs. Hendrickson must meet in order to establish that her appeal raises a substantial question. Mrs. Hendrickson need not prove by clear and convincing evidence that her case presents a substantial question. *See* Government's Opposition, Doc 136, p. 8-9. Rather, the portion of Section 3143 that requires a clear and convincing showing only applies to the requirement that she not be a flight risk or danger to persons or the community. *See* Section 3143(b)(1)(A). A substantial question is merely a "close

question or one that could go either way" that is significant enough to the defendant's case "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). Ultimately, the government's argument in response to the various substantial questions raised by Mrs. Hendrickson's appeal are unconvincing and this Court should order her released pending appeal.

I. REPLY TO ARGUMENTS RAISED BY THE GOVERNMENT IN OPPOSITION TO MRS. HENDRICKSON'S ARGUMENT REGARDING THE COURT'S FAILURE TO DELIVER A SPECIFIC UNANIMITY INSTRUCTION.

Mrs. Hendrickson's argues that the Court's failure to deliver a specific unanimity instruction raises a substantial question because the nature of the acts in question are only marginally related to each other. The government responds that the acts were not unrelated because they were set forth in one Order. In doing so, the government dramatically over-simplifies this issue and fails to acknowledge that the Order in question sets forth two distinct injunctions that were allegedly violated in completely distinct ways.

The government claims there exists no support in the record for the notion that there were two separate injunctions set forth in the Order that Mrs. Hendrickson was said to have contemptuously violated. *See* Government's Opposition, Doc 136, p. 6, n.1. Even a cursory review of the Indictment in this case demonstrates the palpable inaccuracy of this assertion. The Indictment alleges that Mrs. Hendrickson "did knowingly and willfully disobey and resist the lawful ***orders*** of a Court of the United States," both of which are then separately identified in block format with their disparate dates and underlying conduct. Indictment attached as Exhibit "A," p. 2-3. The Indictment was no doubt drafted in this manner because it reflects the Order it was derived from, which sets forth two different orders, both of which are designated by separate paragraph

which commence with an all capitalized "ORDERED." *See* Judge Edmunds' Order attached as Exhibit "B," pp. 7-8.

As demonstrated by Mrs. Hendrickson in her Motion for Release Pending Appeal, the means by which she was said to have violated Judge Edmunds' Order were only marginally related to one another. The fact that they happen to appear in a single document does not negate the obvious; that two separate injunctions and "orders" - as specified in the Indictment - were allegedly violated in this matter based on conduct involving completely different acts and during different time periods. This issue certainly raises a close question on appeal that could go either way and this Court should grant Mrs. Hendrickson release pending appeal.

II. REPLY TO ARGUMENTS RAISED BY THE GOVERNMENT IN OPPOSITION TO MRS. HENDRICKSON'S ARGUMENT REGARDING HER STANDBY TRIAL COUNSEL'S VIOLATION OF HER SIXTH AMENDMENT RIGHT TO CONDUCT HER OWN DEFENSE.

In response to Mrs. Hendrickson's argument that her standby trial counsel violated her Sixth Amendment right to conduct her own defense by impermissibly failing to ask her the questions she had directed him to ask, the government contends that this issue does not raise a substantial question because it is not sufficiently present in the record.[1] This issue is

[1] The government proposes in a footnote that Mrs. Hendrickson's Sixth Amendment argument may be waived because she did not object to the format designated by the Court wherein she provided questions to her counsel who would ask them to her on the stand, as opposed to testifying directly to the jury. This argument is meritless. As established by Mrs. Hendrickson in her Motion for Release Pending Appeal, the Court clearly instructed that this would be the format followed during both her first and second trial in this case. Further, Mrs. Hendrickson does not argue that her Sixth Amendment rights were violated because she was not permitted to testify directly to the jury, but because her counsel failed to ask her questions as instructed. Mrs. Hendrickson's willingness to abide without objection to having stand-by counsel ask her questions, as directed by the Court, was not a relinquishment of her right to control the questions she was to be asked. Thus, Mrs. Hendrickson's failure to object to the procedural mechanism through which her right to conduct her own defense was violated does nothing to undermine the nature of the violation or the fact that a violation occurred.

unquestionably in the record, in that it has been argued by Mrs. Hendrickson in various filings and supported by documents that accompanied these filings, including her Declaration to the court addressing the matter and a hard copy of the questions that counsel failed to ask.

Additionally, Mrs. Hendrickson has attached hereto a "Statement" prepared by her standby counsel, Andrew Wise of the Federal Defender Office, wherein counsel confirms the fact that he did not ask questions as designated by Mrs. Hendrickson. *See* Statement of Andrew Wise attached as Exhibit "C." As standby counsel clearly states in his Statement:

> The final set of questions proposed by Mrs. Hendrickson concerned her reliance on cases dealing with the First Amendment and the government's ability to compel speech. In light of the previous difficulties during her direct examination, I elected not to ask these questions. I did not consult with Mrs. Hendrickson or seek her permission before I elected not to ask those questions.

Id. at 2. Thus, the record fully supports raising this issue before Your Honor and clearly establishes that the factual basis underlying this argument - that standby counsel did not ask questions as designated by Mrs. Hendrickson - is true. Meanwhile, the government has offered nothing to rebut the fact that standby counsel's impermissible interference occurred.

The government further argues that standby counsel's error does not raise a substantial question because the questions counsel failed to ask were cumulative and otherwise would likely have resulted in sustained objections. In particular, the government argues that the questions unasked and therefore unanswered, as well as the various court opinions related to these questions, which address an individual's First Amendment rights and the nature and significance of void judgments, would "invade the province of the Court to instruct the jury on the law." Government's Opposition, Doc 136, p. 12. This assertion belies the history of Mrs. Hendrickson's case. Not only were the Supreme Court and Sixth Circuit cases referred to in the unasked questions read to the

jury in Mrs. Hendrickson's first trial without objection, but the purpose of presenting these rulings was not to instruct the jury as to the law, but rather to show Mrs. Hendrickson's good-faith conclusions that she was not under a valid legal duty to obey the orders which she was charged with criminally resisting, as is her unambiguous right.

In addition to the government's analysis being incorrect in substance, it is more importantly irrelevant to the argument in question because, as Mrs. Hendrickson established in her Motion, the violation of her right to conduct her own defense resulted in a categorical constitutional violation that is not subject to harmless error analysis. *McKaskle v. Wiggins* 465 U.S. 168, 177, n.8 (1984); *Washington v. Renico*, 455 F.3d 722, 734 (6th Cir. 2006).

The violation of Mrs. Hendrickson's right to conduct her own defense raises a substantial question on appeal and the Court should order her released pending appeal.

III. REPLY TO ARGUMENTS RAISED BY THE GOVERNMENT IN OPPOSITION TO MRS. HENDRICKSON'S ARGUMENT THAT THE COURT COMMITTED PROCEDURAL ERROR BY IMPROPERLY CALCULATING THE ADVISORY SENTENCING GUIDELINE RANGE IN HER CASE.

The government argues that the Court was entitled to invoke the improperly claimed refund of $20,380.96 attributed to Mrs. Hendrickson and use this figure in determining her sentence, despite the fact that hers was a failure to file case, because Application Note 1 to U.S.S.G. § 2T1.1 states that "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," and that this language gave the Court free reign to apply whatever provision of Section 2T1.1 it was inclined to use. This is simply not the case.

Application Note 1 does not grant sentencing courts unlimited latitude to use as many methods set forth in Section 2T1.1(c) as might be necessary to get the outcome desired by the government or the Court, but only those suited to "the circumstances of the case." Section

2T1.1(c)(4) has no relationship to "the circumstances of this case." This case is about Mrs. Hendrickson not filing returns as ordered and in no regard about her allegedly claiming refunds, proper or improper.

Mrs. Hendrickson faces a contempt charge, not a tax evasion, false return, fraudulent return, or fraudulent refund claim charge. The *only* possibly analogous 2T1.1 charge related to the contempt of which Mrs. Hendrickson was accused was "failure to file," as the Court determined, and "failure to file" CANNOT involve any kind of claim of refunds, both as a matter of fact and a matter of law:

> Special rules applicable to income tax.
>
> (a) In the case of a claim for credit or refund filed after June 30, 1976—
>
> (1) In general, in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment ***shall be made on the appropriate income tax return***

26 CFR §301.6402-3. Thus, even if Mrs. Hendrickson has criminally failed to file, or engaged in behavior analogous to that offense as determined by the Court for purposes of sentencing, she cannot have done anything in which any claim for refund could be involved.

Furthermore, Mrs. Hendrickson's alleged failure to file the amended returns has no relevance to any alleged "tax loss" relating to supposed liabilities regarding 2002 and 2003, or "refund claim" as argued by the government and determined by the Court. Judge Edmunds had already made a determination regarding those alleged liabilities. Mrs. Hendrickson's alleged failure to comply with the order to file "amended returns" occurred in a context in which the government and courts contend that "tax loss" had already been adjudicated and settled.

Thus, Mrs. Hendrickson's behavior in response to Judge Edmunds order concerning "amended returns" was not capable of causing a tax loss and cannot have been based on any intention to cause a tax loss. Thus, Mrs. Hendrickson's decisions and actions in regard to Judge Edmunds order to file "amended returns" took place in the knowledge and in the objective reality that she was incapable of causing any "loss" to the government in regard to 2002 and 2003, whether she filed the ordered "amended returns" or did not.

The above analysis proves that even if the Court correctly resorted to the guidelines and treated Mrs. Hendrickson's case as a failure to file tax returns case, the Court nonetheless applied an inapplicable sentencing guideline. Thus, under the Court's theory - had it been applied correctly - Mrs. Hendrickson's sentencing guideline range should have been 0 to 6 months, not 12 to 18 months. Under this model, her sentencing range would be such that she is entitled to release pending appeal under governing law.

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

CONCLUSION

For the reasons set forth above and in Mrs. Hendrickson's Motion for Release Pending Appeal, the Court should order the Defendant, Doreen Hendrickson, released pending appeal.

Respectfully submitted,

CEDRONE & MANCANO, LLC

Dated: May 8, 2015

By: */s Mark E. Cedrone*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 8th day of May, 2015, via the Court's Electronic Case Filing ("ECF") System, upon the following:

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