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	:	

DEFENDANT DOREEN HENDRICKSON'S
MOTION FOR RELEASE PENDING APPEAL

The Defendant, Doreen Hendrickson, by and through her undersigned counsel, hereby moves for the Court to release her pending the outcome of her appeal filed in the above-captioned matter, and in support thereof avers as follows:

1. On or about May 14, 2013, a grand jury sitting within this judicial district charged Doreen Hendrickson with one count of criminal contempt in violation of 18 U.S.C. § 401(3).

2. The grand jury alleged that Mrs. Hendrickson violated an Amended Order dated May 2, 2007 issued by The Honorable Nancy Edmunds as part of a ruling in a lawsuit brought against Mrs. Hendrickson by the United States. In particular, the grand jury alleged that Mrs. Hendrickson violated Judge Edmunds's Order by: i) filing a 2008 income tax return through which Mrs. Hendrickson sought a $5 refund; and ii) by failing to file amended 2002 and 2003 tax returns containing content dictated by the government.

3. On or about July 25, 2014, a petit jury convicted Mrs. Hendrickson of the charges set forth in the Indictment.

4. On or about April 9, 2015, the Court imposed sentence. Specifically, the Court sentenced Mrs. Hendrickson to eighteen (18) months in prison and one year of supervised release. Due to Mrs. Hendrickson's precarious financial predicament, the Court waived a fine.

Additionally, since there were no victims of Mrs. Hendrickson's conduct, restitution was not an issue in the case and, hence, the Court ordered none.

5. In sentencing Mrs. Hendrickson, the Court delayed execution of her sentence and allowed her to report to the institution designated by the Bureau of Prisons ("BOP") within sixty (60) days of the date of sentencing, with the condition that she file amended tax returns for 2002 and 2003 in a manner dictated by the Court.[1] At the time of filing the instant Motion for Release Pending Appeal, Mrs. Hendrickson remains released pending self-surrender.

6. Mrs. Hendrickson has appealed her conviction and this Court's sentence.

7. Mrs. Hendrickson requests that the Court order her released pending appeal. The Court should grant this Motion because Mrs. Hendrickson is not a flight risk, does not pose a danger to the safety of any persons or the community and because her appeal is not for the purpose of delay and raises a substantial question of law or fact that is likely to result in reversal, an order for a new trial, and/or a noncustodial sentence or a reduced sentence that is less than the total of the time that will span the duration of the appeal process.

8. Concurrence was sought from the United States Attorney's Office with respect to the subject matter of the instant Motion and was refused.

[1] Mrs. Hendrickson has filed a Motion to Modify the Conditions of her Release, wherein she requested that the Court rescind the condition imposed on her right to self-surrender.

WHEREFORE, the defendant, Doreen Hendrickson, respectfully requests that the Court order her released pending appeal.

Respectfully submitted,

CEDRONE & MANCANO, LLC

Dated: April 28, 2015

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BRIEF IN SUPPORT OF DEFENDANT
DOREEN HENDRICKSON'S MOTION FOR RELEASE PENDING APPEAL

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CONCISE STATEMENT OF THE ISSUES PRESENTED

The issue presented is whether the Defendant, Doreen Hendrickson, should be released pending appeal. While Mrs. Hendrickson has several meritorious arguments she intends to raise on appeal, the three specified herein raise substantial questions that - along with the fact that she is neither a flight risk nor a danger to any persons or the community - mandate her release pending appeal. The substantial legal arguments supporting release pending appeal are as follows: (1) the 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 Court committed clear error by incorrectly calculating Mrs. Hendrickson's advisory sentencing guideline range and sentencing by reference to that calculation.

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

The authority controlling the relief sought is set forth at 18 U.S.C. § 3143(b), which governs the release of criminal defendants pending appeal, as this statute has been interpreted by the Sixth Circuit Court of Appeals in *United States v. Pollard,* 778 F.2d 1177 (6th Cir. 1985).

ARGUMENT

I. THE LAW GOVERNING RELEASE OF A DEFENDANT PENDING APPEAL.

Release of a defendant pending appeal is governed by 18 U.S.C. § 3143. This statute reads, in pertinent part:

> **(b) Release or detention pending appeal by the defendant. (1)** Except as provided in paragraph (2), the 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--
>
> **(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
>
> **(B)** that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in--
>
> **(i)** reversal,
>
> **(ii)** an order for a new trial,
>
> **(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.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

18 U.S.C. § 3143 (1992).

The Sixth Circuit 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)).

With respect to what constitutes an appeal that "raises a substantial question of law or fact," the Sixth Circuit applies the following standard:

> an appeal raises a substantial question when 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."

Id. at 1182 (quoting *United States v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985)). The *Pollard* Court emphasized that a defendant is not obligated under Section 3143 to convince the district court that it committed reversible error. *Id.* at 1181-82 (citing multiple other 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")). Rather, in determining whether a substantial question is raised on appeal, "'a judge must essentially evaluate the difficulty of the question [she] previously decided.'" *United States v. Sutherlin*, 84 Fed.Appx. 630, 631 (6th Cir. Dec. 15, 2003) (quoting *United States v. Shoffner*, 791 F.2d 586, 589 (7th Cir. 1986).

While Section 3143 creates a presumption against post-conviction release (*United States v. Vance*, 851 F.2d 166, 170 (6th Cir. 1988)), so long as the above-described legal 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). 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).

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.

II. DOREEN HENDRICKSON IS NOT A FLIGHT RISK NOR A DANGER TO THE COMMUNITY.

In permitting Mrs. Hendrickson to remain released from custody prior to her trial, following her conviction, and after she was sentenced to eighteen (18) months in prison, the Court has effectively already ruled that she is not a flight risk or a danger to the community. Section § 3143(b) invokes 18 U.S.C. § 3142(b) and (c), which governs release pending trial, with respect to whether flight and/or danger to persons or the community are at issue in releasing a defendant pending sentence, execution of sentence, or on appeal. The only distinction between Section 3143 and 3142 concerning this issue is that under 3143, lack of flight risk and danger to the community must be established under a clear and convincing standard. *See* 18 U.S.C. § 3143(b)(A).

To have released Mrs. Hendrickson after both her conviction and the imposition of her prison sentence, the Court necessarily found, by clear and convincing evidence, that she was not a flight risk or danger to the community. *See* 18 U.S.C. § 3143(a) governing "[r]elease or detention *pending* sentence" (in order to release defendant pending sentence, judicial officer must "find[] 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") (emphasis added). It is understandable that the Court would

make such a ruling, given Mrs. Hendrickson's strong personal ties to the Eastern District of Michigan and otherwise non-violent nature.

The Court commented during Mrs. Hendrickson's sentence hearing that it deemed her a "dangerous person." This characterization of Mrs. Hendrickson was based on the Court's conclusion that she does not believe the law applies to her. Specifically, the Court stated:

> Criminal contempt is a serious offense. Laws are in place for order and unity within this country and those who deliberately disobey the orders disrupt the unity. The Court believes that it is dangerous for individuals to believe that rules don't apply to them, and this Court does believe that Miss Hendrickson is a dangerous person because of her views and attitudes and how she cannot harness them to abide by the law.

(Notes of Testimony ("N.T."), 04/09/15 (Exhibit "A"), p. 49.

This characterization of Mrs. Hendrickson as a "dangerous person" could not have been made in reference to her being a "danger to the safety of any other person or the community" as this concept functions in Sections 3142 and 3143, given that the Court, in making this statement, thereafter ordered Mrs. Hendrickson's post-sentence release. This Order, of course, could only have been entered based on the conclusion that there was clear and convincing evidence that Mrs. Hendrickson was not a danger to the community.

Further, the Court's comments were otherwise consistent with its ruling permitting Mrs. Hendrickson's release, in that a general conclusion that a defendant is a danger to the community does not, in-and-of-itself, justify pretrial or post-conviction detention. *See United States v. Ploof*, 851 F.2d 7, 10-12 (1st Cir. 1988) ("where detention is based on dangerousness grounds, it can be ordered only in cases involving one of the circumstances set forth in § 3142(f)(1),"[1] unless there

[1] Section 3142(f)(1) refers to serious offenses other than the contempt charge at issue in Mrs.

is a "serious risk" of obstruction of justice or witness or juror intimidation) (following *United States v. Himler*, 797 F.2d 156 (3d Cir. 1986)). Thus, even if the Court found that Mrs. Hendrickson was, generally, a "dangerous person" because she does not follow laws and orders, this conclusion would not justify detention under 18 U.S.C. §§ 3142 or 3143. *See United States v. Salerno*, 481 U.S. 739, 747 (the Bail Reform Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes") (citing Section 3142(f)).

Further, to the extent the Court concludes Doreen Hendrickson is dangerous because she does not comply with court orders, it is her compliance with such orders, or lack thereof, that is subject to appeal. Thus, the subject matter the Court relies on in reaching the conclusion that Mrs. Hendrickson is dangerous is the very subject matter that raises a substantial question on appeal.

As the Court has previously ruled by implication, there is clear and convincing evidence that Doreen Hendrickson is not a flight risk or danger to any persons or the community. Thus, with respect to this requirement under Section 3143(b), she is entitled to release pending appeal.

III. DOREEN HENDRICKSON'S APPEAL RAISES SUBSTANTIAL ISSUES OF LAW AND FACT.

A. The Jury Instruction Delivered by the Court Concerning Unanimity in Reaching a Verdict in Mrs. Hendrickson's Case Raises a Substantial Issue of Law and Fact.

As the Court is well aware, the Indictment charging Mrs. Hendrickson (see Exhibit "B") alleged a single count of criminal contempt based on Mrs. Hendrickson knowingly and willfully disobeying "paragraph 27" of the May 2, 2007 "Amended Judgment and Order of Permanent Injunction" entered by the Honorable Nancy G. Edmunds. Judge Edmunds' Order was entered in

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Hendrickson's case.

a civil tax case involving Mrs. Hendrickson and her husband. Paragraph 27 of this May 2, 2007 Order, which sets forth the two injunctions entered against Mrs. Hendrickson, reads as follows:

> 27. Accordingly, it is hereby
>
> ORDERED, that Defendants are prohibited from filing any tax return, amended return, form (including, but not limited to Form 4852 ("Substitute for Form W-2 Wage and Tax Statement, etc.")) or other writing or paper with the IRS that is based on the false and frivolous claims set forth in Cracking the Code that only federal, state or local government workers are liable for the payment of federal income tax or subject to the withholding of federal income, social security and Medicare taxes from their wages under the internal revenue laws (26 U.S.C.); and it is further
>
> ORDERED, that within 30 days of the entry of this Amended Judgment and Order of Permanent Injunction, Defendants will file amended U.S. Individual Income Tax Returns for the taxable years ending December 31, 2002 and December 31, 2003 with the Internal Revenue Service. The amended tax returns to be filed by Defendants shall include, in Defendants' gross income for the 2002 and 2003 taxable years, the amounts that Defendant Peter Hendrickson received from his former employer, Personnel Management, Inc., during 2002 and 2003, as well as the amounts that Defendant Doreen Hendrickson received from Una E. Dworkin during 2002 and 2003.

Exhibit C, ¶ 27, p. 7-9.

Judge Edmunds' Order, while one document, sets forth 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, a book the Court incorrectly interpreted to suggest that only government employees are subject to federal income tax or federal tax withholding; and (2)

that the Hendricksons *actively file* amended 2002 and 2003 returns in a manner specified in the Order.

The Indictment alleged that Mrs. Hendrickson contemptuously violated this Order through separate and distinct criminal acts, each of which corresponded to the separate and distinct injunctions 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." Exhibit B, p. 3. Additionally, the Indictment alleged that Mrs. Hendrickson violated the separate injunction obligating her to *actively file* the 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 charging Mrs. Hendrickson with violating Judge Edmunds' Order involved two different injunctive orders that were each separately violated by two different alleged predicate acts.

At trial, the parties disagreed over whether in order to convict Mrs. Hendrickson, the jury had to unanimously conclude that she committed one or either of the predicate acts set forth in the Indictment beyond a reasonable doubt. (N.T., 07/24/2014, pp. 118-21 (Exhibit “D”)). Whether such specific unanimity is required generally depends on whether the facts in question are elements of the charged offense or, instead, a means by which the elements can be violated. *See Richardson v. United States*, 526 U.S. 813, 817 (1999) (citing *Schad v. United States*, 501 U.S. 624, 631-32 (1991) (plurality opinion). Ultimately, the Court agreed with the government that the acts set forth in the Indictment were means by which the offense could be committed (N.T., 07/24/14, pp. 120-21 (Exhibit “E”)) and delivered an instruction in accordance with this conclusion:

> One more point about the requirement that your verdict 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.

(N.T., 07/25/14, p. 99 ("Exhibit "F")). This cited instruction was proposed by the government and tracked Sixth Circuit Model Jury Instruction 8.03B.

Mrs. Hendrickson objected to this instruction (which had also been adopted by the Court in the first trial held in of this case in October of 2013) and proposed instead that the jury be instructed as follows:

> UNANIMITY IS REQUIRED AS TO BOTH ALLEGED ACTS OF VIOLATION
>
> (1) The indictment's single count charges Mrs. Hendrickson with committing two acts, and joins them into one alleged crime by titling them as "violation" in the singular-- rather than "violations" in the plural-- and by the use of the conjunctive "and" between them, rather than the disjunctive "or".
>
> (2) Therefore, it is not sufficient for some of you to believe that Mrs. Hendrickson violated one order and the rest believe she violated the other, or for all of you to believe that Mrs. Hendrickson violated only one order. If you do not unanimously agree that the

> government has proven the violation of both orders beyond a reasonable doubt, you cannot find Mrs. Hendrickson guilty.
>
> OR (If the Court deems each violation to be separately alleged)
>
> UNANIMITY IS REQUIRED AS TO AT LEAST ONE ALLEGED VIOLATION
> (1) Each act or omission alleged in the indictment is, if an offense at all, a complete offense. There is no crime of "bad attitude"-- criminal contempt as is charged in this case consists only of the willful violation of a lawful order.
>
> (2) It is not sufficient for some of you to believe that Mrs. Hendrickson violated one order and the rest believe she violated the other. If you do not unanimously agree that the government has proven the violation of the same order or orders beyond a reasonable doubt, you cannot find Mrs. Hendrickson guilty.

See Exhibit "G."

Mrs. Hendrickson does not concede that the Court correctly concluded that the predicate acts in the Indictment were not elements of the offense, but for the purpose of this Motion, it is clear that even if the Court were correct on this particular point, under governing law the Court none the less erred by delivering the cited jury instruction.

In *United States v. Miller*, the Sixth Circuit 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 in Mrs. Hendricksons case are only "marginally related to each other," specific unanimity was required and the Court erred in delivering the unanimity instruction in question.

The facts in *Miller* demonstrate why a specific unanimity instruction was necessary in Mrs. Hendrickson's case. 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 that a specific unanimity instruction was required in her case. 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 in which the defendant was involved in the abusive treatment of an inmate, who ultimately died from his injuries. *Id.* at 685-86. The government's evidence alleged that each individual document contained multiple falsehoods. *Id.*

The *Schmeltz* Court ruled 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 relied 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 orders. The Indictment in Mrs. Hendrickson's case dispositively demonstrates 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 from 2007 onward. Not only are the acts in Mrs. Hendrickson's case different in kind, but - unlike in *Miller and Schmeltz* - there is a vast 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 these acts 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 not two interrelated events associated with a single transaction, such as in *Miller*, but two unrelated or only "marginally related" events. Nor was the allegedly contemptuous violation of each injunction set forth in Judge Edmunds' Order separately charged with respect to its underlying violative act, as in *Schmeltz*. As such, even if the Court correctly ruled that a specific unanimity instruction was unwarranted because the acts in questions were not elements of the offense, but rather means to

commit it, the Court remained obligated to deliver a specific unanimity instruction because the acts in question were unrelated or, at best, only "marginally related" to one another.

The Court's failure to deliver a specific unanimity instruction certainly raises a "close question that could go either way"[2] and given that this issue goes to the heart of the charge against Mrs. Hendrickson, it is "integral to the merits of the conviction" and success on this close question would undoubtedly entitle her to a new trial. *See Pollard*, 778 F.2d at 1182. The Court should, accordingly, order her released pending appeal.

B. 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.

In her Motion to Vacate or for New Trial on Multiple Grounds (Doc. 103) and related Motion for Reconsideration (Doc. 116), Mrs. Hendrickson argued that her Sixth Amendment right to conduct her own defense was violated when her standby trial counsel[3] failed to ask Mrs. Hendrickson certain questions she had instructed him to ask while she was testifying on direct examination.[4]

In support of this argument, Mrs. Hendrickson provided the Court with a "Declaration of Doreen Hendrickson," wherein she certified under penalty of perjury that during Standby counsel's direct examination of her, he simply failed to ask her questions that Mrs. Hendrickson had provided

[2] Mrs. Hendrickson need not demonstrate that she is likely to prevail on appeal in order to be entitled to release pending appeal, but only that her arguments raise a "close question."

[3] Andrew Wise, Esquire, of the Federal Defenders Office, served as Mrs. Hendrickson's standby counsel at trial.

[4] The scenario being discussed wherein standby counsel was asking Mrs. Hendrickson questions that Mrs. Hendrickson had provided to him arose due to the Court's preference that she be examined in this manner, rather than directly offer narrative testimony to the jury. (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 (Exhibit “H”)).

to him. *See* attached Exhibit "I." After he failed to ask these question, Mrs. Hendrickson quietly turned to the Court and asked to speak with standby counsel, but the Court refused this request.[5] *Id.* Standby counsel thereafter explained to Mrs. Hendrickson during a recess that he did not ask the questions she had prepared because he thought the Court would not permit him to do so and that she could still present these points during her closing argument. *Id.* A hard copy of the questions that were not asked was attached to the Reconsideration Motion filed by Mrs. Hendrickson and are attached hereto as Exhibit "K."

Despite standby counsel's reassurances to the contrary, because the subject matter of these questions was not in evidence, Mrs. Hendrickson was not permitted to discuss this subject during her closing argument. *See* (N.T., 07/25/14, pp. 80-81 ("Exhibit L")). This is in contrast to her first trial, during which standby counsel also served as Mrs. Hendrickson standby counsel and freely asked her the questions he failed to ask at the second trial. (N.T., 11/01/13, pp. 49-52 (Exhibit "M")) (wherein Mrs. Hendrickson discusses various appellate court opinions that provided a basis for her understanding of her legal duty under the law, specifically the First Amendment). Given that her testimony on the subject was in the record, she was able to address this subject matter during her closing. (N.T., 11/1/13, p. 110 ("Exhibit N")) (wherein Mrs. Hendrickson discusses her understanding of the Supreme Court's position on the First Amendment). When the subject matter of Mrs. Hendrickson's understanding of the law came up at her second trial, standby counsel simply did not ask the questions he had been provided:

> Q: Mrs. Hendrickson, do you believe the Government has authority to control or dictate your speech even through an Order by the Court?

[5] This exchange between Mrs. Hendrickson and the Court does not appear in the notes of testimony from the trial. *See* (N.T., 07/25/14, pp. 103-04 (Exhibit "J")).

> A. No, I do not.
>
> Q. Why do you believe that?
>
> A. Because we have a First Amendment in this county.
>
> Q. And do you believe that that position is supported by cases from the Supreme Court and other Courts of the United States?
>
> A. I know that it is.
>
> Q. One moment, Your Honor. I think that concludes my Direct Examination.

(N.T., 07/24/14, pp. 103-04 ("Exhibit O")). By doing so, standby counsel blatantly violated Mrs. Hendrickson's Sixth Amendment right to conduct her own defense.

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. With respect to what this right encompasses, the Court in *McKaskle v. Wiggins* identified certain fundamental aspects of the trial process that must be left to the control of a *pro se* defendant:

> 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.

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

A *pro se* defendant's Sixth Amendment rights are violated when their standby counsel undermines and interferes with their right to control these fundamental aspects of the trial. *Id.* at 177 ("the objectives underlying the right to proceed *pro se* may be undermined by unsolicited and excessively intrusive participation by standby counsel"). As the *McKaskle* Court stated, "the

primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id.* at 176.

There are two independent aspects of a *pro se* defendant's right to not have their case unconstitutionally compromised by standby counsel. These include the right to "preserve actual control of the case he chooses to present to the jury" and to not have counsel's behavior "destroy the jury's perception that the defendant is representing himself." *Id.* at 178. The former right 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 Court in *McKaskle* describes precisely the sort of circumstance that occurred in Mrs. Hendrickson's case when they summarized the quintessential Sixth Amendment violation that occurs when standby counsel impermissible intrudes on a *pro se* defendant's case:

> If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, ***or to control the questioning of witnesses,*** or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded.

Id. The violation of this right results in a categorical constitutional violation that is not subject to harmless error analysis. *Id.* at 177, n.8; *Washington v. Renico*, 455 F.3d 722, 734 (6th Cir. 2006).

In its Order denying Mrs. Hendrickson's Motion to Vacate or for a New Trial, the Court rejected Mrs. Hendrickson's Sixth Amendment argument based on the conclusion that she "fail[ed] to demonstrate that standby counsel made it appear to the jury that she was not proceeding *pro se*." Doc. 112, p. 8 (Exhibit "P"). In so ruling, this Court has wrongly concluded that *McKaskle* required such a showing. As the Supreme Court's discussion in *McKaskle* makes clear, the right to not have counsel interfere with a *pro se* defendant's case and the right to not have it appear as if

the defendant is not representing themselves are two independent rights under the Sixth Amendment. Thus, whether standby counsel's failure made it appear as if Mrs. Hendrickson was not in control of her defense has no bearing on whether her Sixth Amendment rights were violated by him interfering with the presentation of her case.

Further, the Court's analysis that the testimony that would have been elicited by this abandoned line of questioning would have been cumulative and, therefore, Mrs. Hendrickson was not entitled to relief, is likewise erroneous in that such harmless error analysis has no bearing on the type of Sixth Amendment violation in question. *McKaskle*, 465 U.S. 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") (see also *Gonzalez-Lopez v. United States*, 548 U.S. 140, 145-46 (2006) (where defendant's Sixth Amendment right to counsel of his choice was violated because the disqualification of his chosen counsel was erroneous, no additional showing of prejudice was required to make the violation complete)).

Even if this sort of harmless error analysis were appropriate, the Court's assertion that the evidence in question was cumulative was simply false. The Court incorrectly concluded that the evidence in question was cumulative because Mrs. Hendrickson had the opportunity to argue that "[Judge] Edmunds' Order was unconstitutional, and the First Amendment excused her from compliance." (Doc. 112, pp. 8-9, *see* Exhibit “P”). What Mrs. Hendrickson was unable to testify about and then argue during her closing due to standby counsel's impermissible interference was that her actions were supported by her understanding of specific Supreme Court and 6th Circuit Case law, not the general idea that the first amendment justified her actions. Meanwhile, were this evidence and argument available to her, it could have provided her with a defense that she was

otherwise unable to invoke. *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").

The blatant violation of Mrs. Hendrickson's Sixth Amendment rights due to her standby counsel failing to ask her questions as directed presents a compelling argument on appeal and unquestionably constitutes a "close question that could go either way." Further, whether, why, and to what extent Mrs. Hendrickson believed that she was not violating the law based on her understanding of governing case law was an absolutely central issue. *See Bishop, supra*. 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." This issue raises a substantial question on appeal and the Court should order Mrs. Hendrickson released pending appeal.

C. The Court Committed Clear Error 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 Court grounded its ruling on the conduct associated with Mrs. Hendrickson's failure to file amended 2002 and 2003 tax returns.[6] (N.T., 04/09/15, p. 20-21 (Exhibit "Q")). 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

[6] Mrs. Hendrickson will present numerous arguments on appeal with respect to the manner in which she was sentenced but, for the purposes of this Motion, will abstain from addressing the various errors she believes were committed and narrow her argument to that set forth herein. This should in no way be understood as indicating an agreement by Mrs. Hendrickson concerning the various rulings made by the Court during the imposition of her sentencing.

contempt conviction constitutes a failure to file tax returns case and based its sentencing analysis on her perceived failure to file amended 2002 and 2003 tax returns.

Section 2T1.1(c)(2) governs cases where "the offense involved failure to file a tax return." 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 memorandums addressing the significance of Section 2T1.1 to Mrs. Hendrickson's case. *See* Doc. 125, p. 3 (Exhibit "R"). Despite characterizing this as a failure to file tax returns case, rather than apply Section 2T1.1(c)(2) - which the guidelines specify governs such cases - the Court 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 (Exhibit "S")). The Court employed this Section because Judge Edmunds "Amended Judgment and Order of Permanent Injunction" 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. *Id.* at 22; Exhibit C, pp. 1-2.

As a result of applying this over $20,000 figure, the 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, she 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. (Doc 125, pp. 3-7, *see* Exhibit "R"). Thus, the Court's ruling resulted in an advisory sentencing range that tripled Mrs. Hendrickson's exposure at the high end of the guideline range 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 what 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 fraudulent returns in the future. It did not order her 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 Court could not credibly conclude that "the offense involved improperly claiming a refund to which the claimant was not entitled."

The above analysis demonstrates that even if the 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 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 Court, if properly applied, would have resulted in a guideline range of 0 to 6 months, if the Court had correctly implemented the guidelines Mrs. Hendrickson would likely have been sentence to either probation or, at most, 6 months' imprisonment. 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 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, the Court should order the Defendant, Doreen Hendrickson, released pending appeal.

Respectfully submitted,

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Dated: April 28, 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 28th day of April, 2015, via the Court's Electronic Case Filing ("ECF") System, upon the following:

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