UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 10-1726

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

PETER E. HENDRICKSON

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN (ROSEN, G.)

APPELLANT'S PETITION FOR REHEARING EN BANC

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I. STATEMENT REQUIRED BY RULE 35(b)

Appellant, Mr. Hendrickson, respectfully requests a rehearing *en banc* of the panel ruling issued February 8, 2010 in the above-captioned case, to address all portions of the decision other than that concerning the "obstruction of justice" sentence enhancement. The remainder of the ruling creates a multitude of conflicts with well-settled precedents of this Court, numerous other circuits and the Supreme Court. Cases in conflict include: *U.S. v. Gaudin*, 515 U.S. 506 (S.Ct. 1995), *Kungys v. U.S.*, 485 US 759 (S.Ct. 1997), *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), *Crawford v. Washington*, 541 US 36 (S.Ct. 2004), *Helvering v. Morgan's, Inc.*, 293 US 121 (S.Ct. 1934), *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 US 95 (S.Ct. 1941), *Sims v. U.S.*, 359 US 108 (S.Ct. 1959), *Neal v. Clark*, 95 US 704 (S.Ct. 1878), *Meese v. Keene*, 481 US 465 (S.Ct. 1987), *Western Union v. Lenroot*, 323 US 490 (S.Ct. 1945), *Stenberg v. Carhart*, 530 US 914 (S.Ct. 2000), *U.S. v. Tarwater*, 308 F.3d 494 (6CA 2002), *U.S. v. Latouf*, 132 F.3d 320 (6CA 1997), *U.S. v. Ayoub*, 498 F.3d 532 (6CA 2007), *U.S. v. Safa*, 484 F.3d 818 (6CA 2007), *U.S. v. Lee*, 359 F.3d 412 (6CA 2004), *U.S. v. Kratt*, 579 F.3d 558 (6CA 2009), *U.S. v. Williams*, 952 F.2d 1504 (6CA 1991), *Mobley v. CIR*, 532 F.3d 491 (6CA 2008), *U.S. v. Uchimura*, 107 F.3d 1321 (9CA 1997), *Brigham v. U.S.*, 160 F.3d 759 (1CA 1998), *U.S. v. Bass*, 784 F.2d 1282

(5CA 1986), *U.S. v. Peters*, 153 F.3d 445 (7CA 1998), *U.S. v. Reynolds*, 919 F.2d 435 (7CA 1990) and *U.S. v. Borman*, 992 F.2d 124 (7CA 1993).

In light of the degree of conflict between multiple aspects of this ruling and a multitude of other federal courts, not least including this Honorable Court's own well-settled precedents, this case presents matters of exceptional importance.

II. REASONS WHY THIS APPEAL SHOULD BE RE-HEARD *EN BANC*

A. The Conclusion That "Materiality" Need Not Be Proven Is In Conflict With The Precedents of This Court, The Supreme Court And At Least The 9th Circuit

In 1995, in *U.S. v. Gaudin*, 515 U.S. 506, the Supreme Court held that "materiality" is a "mixed question of law and fact" which can never be deemed inherent or inferred. On the contrary, "materiality" must be established by testable evidence. In fact, in *Gaudin* the Supreme Court finds that a failure to present evidence of "materiality" "raises a question of "law" that warrants dismissal" (*Gaudin* at 517). Two years later, in *Kungys v. U.S.*, 485 U.S. 759, the Court emphasizes that "materiality" must be proven with "clear, unequivocal and convincing evidence" rather than inference or implication.

This Court explicitly adopted the *Gaudin* doctrine in *U.S. v. Latouf*, 132 F.3d 320 (1997), and has consistently upheld that doctrine. Until now.

In Mr. Hendrickson's trial, the term "material" was not uttered in any form by any prosecution witness. No effort was made to prove "materiality" to the jury. Nonetheless, the panel has denied his appeal on this issue.

In explanation of its denial, the panel presents only this: "Further, "[i]n a prosecution under sec. 7206(1), any failure to report income is material." *United States v. Tarwater*, 308 F.3d 494, 505 (6th Cir. 2002) (internal quotation marks omitted)." This language suggests that any (presumably proven) failure to report income is thus established as "material" without further evidence.

However, the language quoted is actually from a pre-*Gaudin* 1989 9th circuit case, *United States v. Holland*, 880 F.2d 1091, expressing a doctrine long-since rejected by the 9th Circuit itself (see *U.S. v. Uchimura*, 107 F.3d 1321 (9CA 1997). It appears in *Tarwater* simply as supplemental support for another cite used to *define* "material" for that case (."..capable of influencing ... the ability of the IRS to audit or verify the accuracy of a return.").

The *Tarwater* Court expresses its actual doctrine on *proving* "materiality" immediately following the *Holland* cite: "Here, materiality was established by [IRS Revenue Agent] Barton's testimony that Tarwater's failure to report sizeable amounts of income was capable of influencing the IRS in the audit of Tarwater's tax returns."

The government was required to produce testimony in its effort to prove that Tarwater's failure to report income was, in fact, "material," in keeping with this Court's actual doctrine. In his case, no relevant witnesses testified and no effort was made to carry the government's burden of proof.

The denial of his appeal over the government's failure to prove "materiality" is not only unsupported by any authority, but is in conflict with the very ruling of this Court cited in that denial. It is also in conflict with this Court's rulings in at least *U.S. v. Latouf*, 132 F.3d 320 (1997), *U.S. v. Ayoub*, 498 F.3d 532 (2007), *U.S. v. Safa*, 484 F.3d 818 (2007), *U.S. v. Lee*, 359 F.3d 412 (2004) and *U.S. v. Kratt*, 579 F.3d 558 (2009); as well as the Supreme Court in *U.S. v. Gaudin*, 515 U.S. 506 (1995) and *Kungys v. U.S.*, 485 759 (1997), and the 9th Circuit in *U.S. v. Uchimura*, 107 F.3d 1321 (1997).

B. The Conclusion That Untestable Documents Can Be Submitted As Evidence Of Inculpatory Conclusions Of Their Creators Without Violating Confrontation Rights Is In Conflict With The Supreme Court

The Supreme Court has clearly established that documents unsupported by competent testimony subject to challenge cannot be presented as evidence for any matter asserted on, or represented by, the document itself.

At trial, the district court allowed the government to publish to the jury 739 pages of witnessless documents, over Mr. Hendrickson's objections. This was despite the fact that these documents were published for the express purpose of

serving as evidence that "the Internal Revenue Service was of the view that Personnel Management Inc.'s payments to Mr. Hendrickson constituted wages," as was declared twice to his jury by Judge Rosen (Trial Transcript, Vol. 2 at 267; Vol. 3 at 437).

The panel denies Mr. Hendrickson's appeal of this issue by saying that, "…the documents, even if testimonial, were admissible because they were used only to show that Hendrickson was on notice that his interpretation of tax law concerning wages had been rejected and that his refusal to comply with the law was therefore willful, not to show that Hendrickson's earnings constituted taxable wages." No explanation is given for how evidence of his knowing that someone else might have a differing view of the law than his own could be relevant to "willfulness."

In any event, this language misstates both the record and his argument on this issue. The documents were not used only to show what the panel says, and Mr. Hendrickson does not argue that his confrontation rights were violated because the documents "show that Hendrickson's earnings constituted taxable wages" or were expressly introduced to persuade the jury toward that conclusion (however obvious it is that they will have had precisely that prejudicial effect on a jury, who will presume the alleged holders of this official "view" to have the appropriate

expertise, relevant knowledge of the facts and honesty needed to express meaningful conclusions about his earnings).

What Mr. Hendrickson actually argue is that his rights were violated because the documents were explicitly used to assert that "the IRS was of the view" that his earnings constitute taxable wages. If made at all, this assertion should have been made by those allegedly of that "view" – on the stand and under oath. Mr. Hendrickson should have had an opportunity to impeach that assertion and possibly prove that no one at the IRS actually IS of this "view," or that if they are, they have no qualifications and/or personal fact knowledge on which to legitimately base such a view.

In short, his appeal on this issue concerns his right under the Confrontation Clause to test the truth of a matter which his jury was expressly instructed to take as proven by these documents.

Having focused on a non-issue, the panel has rendered a denial on the real issue. Thus, the panel upholds a violation of Mr. Hendrickson's right under the Confrontation Clause, putting this Court in conflict with the Supreme Court's rulings in at least *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) and *Crawford v. Washington*, 541 U.S. 36 (2004).

C. The Conclusion Concerning Jury Instructions Puts This Court In Multi-Faceted Conflicts With Its Own Precedents And Those Of The Supreme And Other Courts

In trial, Mr. Hendrickson insisted that his jury be instructed with the actual statutory definitions relevant to the qualifications of "wages" required to be reported as such on tax returns found at 26 U.S.C. §3401(a) and §3121(a). In lieu of the actual statutes, and over his objection, the judge gave his jury prosecution-written "interpretations" of these definitions instead, which were so designed as to lead the jury to conclude that ALL pay to ANYONE for providing services qualifies as "wages."

The simple fact that the actual statutory definitions contain numerous excepted categories of payments not qualifying as "wages" means these "interpretations" are manifestly incorrect. Further, and in any event, the fact that they were given at all is a tacit admission that they ARE meaningfully different from the language in lieu of which they were given.

In light of the foregoing; the fact that the charges concern the accuracy of his assertions that Mr. Hendrickson did not believe himself to have received what qualifies as "wages"; and the fact that his defense focused on the fact that not all payments are "wages"; his requested instructions are NOT substantially covered by the charge actually given to the jury, and concern a point so important in the trial that the failure to give it substantially impaired his defense.

In its ruling, the panel fails to address Mr. Hendrickson's appeal on this point at all. This is made clear by its disposal of this issue:

> The district court properly defined both "wages" and "employee," rejecting Hendrickson's claim that the term "employee" includes only the persons listed in 26 U.S.C. 3401(c).

In fact, Mr. Hendrickson did NOT claim that the term "employee" includes only the persons listed in 26 U.S.C. §3401(c). Nor did Mr. Hendrickson argue that "wages" are limited to payments to those listed persons.

Rather, Mr. Hendrickson very clearly and exhaustively pointed out that the meaning of "wages" in §3401(a) is limited in the statutory structure to payments for services rendered to those in the CLASS exemplified by those persons enumerated in §3401(c), not the listed persons themselves (and that of "wages" in §3121(a) is limited to payments to those qualifying as "in employment" as defined in Chapter 21 of the Internal Revenue Code).

For example: "The term "employee" is defined "for purposes of this chapter" at 26 U.S.C. §3401(c) as a particular class of workers, illustrated by the following list of specific members: [the enumerated list follows]." (Appellate Supp. Brief, page 14.) In response to a question on the subject from the government in trial, Mr. Hendrickson said: "Not exclusively to those specific listed people, but to that class of people, yes." (Trial Transcript Vol. 4 at 627, Appellant's Brief p. 15.)

More to the immediate point, the purpose of that presentation was not to argue about the proper construction of "employee." The point was the illumination of the real meaning of "wages," which is the actual subject of this issue on appeal.

Thus, the panel issued a ruling on a point never in contention, while failing to rule on the *actual* issue presented regarding the jury instructions, to which the proper limits of the term "employee" as defined in §3401(c) is merely peripheral. Again, his actual challenge concerns the objective correctness of what his jury was led to believe qualifies as "wages" required to be reported as such on federal tax forms.

To actually dispute or deny his challenge on this issue, even if sticking to the "employee" aspect of the statutory structure, the panel would have to declare something to the effect of: ""Employee" as meant in §3401(c) includes ALL workers of ALL kinds and ALL circumstances" or even, "The district court properly rejected Hendrickson's claim that the term "employee" includes only those in the CLASS of persons exemplified by those enumerated in its definition."

The panel says neither of these things, or anything like them. Instead it merely knocks down a straw-man.

Having failed to address the real issue of the erroneous "wage" instruction and the refusal to instruct with the actual statutory language, the ruling puts this

Court in conflict with its own correct doctrine on this issue as explicated in *United States v. Williams*, 952 F.2d 1504 (1991).

Further, though the avoidance of his real argument actually concedes its correctness, the denial of his appeal gives an appearance of endorsing a construction of explicit statutory definitions as being merely complementary of some external definition rather than exclusive. This puts the Court in conflict with Supreme Court rulings in *Meese v. Keene,* 481 U.S. 465 (1987), *Stenberg v. Carhart,* 530 U.S. 914 (2000) and *Western Union v. Lenroot,* 323 U.S. 490 (1945).

The same construction gloss also suggests that the "includes" mechanism used in the statutory definition of "employee" at §3401(c) should be read as meaning "also includes." This puts the Court in direct conflict with its own very recent and plainly-articulated precedent in *Mobley v. CIR*, 532 F.3d 491 (2008), as well as with the additional Supreme Court rulings in *Helvering v. Morgan's, Inc*. 293 U.S. 121 (1934), *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), *Sims v. U.S.*, 359 U.S. 108 (1959), *Neal v. Clark*, 95 U.S. 704 (1878), and with at least the 1st Circuit in *Brigham v. U.S.*, 160 F.3d 759 (1998) and the 5th Circuit in *U.S. v. Bass*, 784 F.2d 1282 (1986).

D. The Conclusion That Objective Falseness Need Not Be Proven In This Case Puts The Court In Conflict With Its Own Precedents And Those Of The Supreme And Other Courts

The instructions given to his jury were calculated to force a conclusion that if ANY payment were proven to have been made to Mr. Hendrickson (a simple matter, since Mr. Hendrickson readily admitted being paid for his work), a report of $0 "wages" on his tax forms would be objectively false – that is, factually incorrect. As discussed above, this formulation was itself false, and in his appeal Mr. Hendrickson challenge the conviction for the government's failure to attempt any actual proof of the element of "objective falseness." No mention of this issue appears in the panel's ruling.

In order to prove that his reports were objectively false, the government would need to prove that Mr. Hendrickson actually DID receive "wages." This cannot be done by merely proving that Mr. Hendrickson received payments, nor by false jury instructions suggesting that all payments are "wages."

Certainly, no good-faith effort to prove this element would proceed this way. A good-faith effort would have *someone* take the stand and explain what are and are not "wages," or a comprehensive explanation would be provided to the jury from the bench, and in neither case would "words of art" be deployed. Then the government would attempt to present competent testimony as to facts allegedly putting payments to Mr. Hendrickson in the "wages" category.

Here, instead, we have a trial in which complex, contrived "interpretations" of statutes suggesting that all payments are "wages" are given to the jury, but with no one ever actually daring to say this on the stand. Here, we have hundreds of pages of documents which the judge declares to be evidence of "official views" that his earnings are "wages," but without anyone ever actually daring to say this on the stand.

The alleged objective "falseness" of Mr. Hendrickson's reports was clearly never proven, and no attempt to prove it was made in his trial.

In any event, objective "falseness" is not mentioned even once in the panel's ruling.

The panel's failure to address this issue constructively holds that "objective falseness" need not be proven. This puts the Court in conflict with its own precedent in *U.S. v. Kratt*, 579 F.3d 558 (2009); the Supreme Court in *U.S. v. Gaudin*, 515 U.S. 506 (1995) and the 7th Circuit in *U.S. v. Peters*, 153 F.3d 445 (1998), *U.S. v. Reynolds*, 919 F.2d, 435 (1990) and *U.S. v. Borman*, 992 F.2d 124 (1993)

E. The Conclusion On The Issue Of "Willfulness" Puts The Court In Conflict With Its Own Precedents And Those Of The Supreme And Other Courts

The one time the term "false" appears in the ruling it is treated as exclusively relevant to "willfulness":

> The prosecution presented evidence that Hendrickson received remuneration during the years in question and that he had reported similar payments as taxable wages in previous years. Based on that evidence, a rational juror could have concluded that Hendrickson was aware that his earnings constituted taxable wages and that his tax forms asserting to the contrary were knowingly false.

This explanation does NOT say, "The prosecution presented evidence that Hendrickson received 'wages' for the years in question," suggesting that the panel itself is not willing to say his earnings qualify as "wages," and also that whether they so qualify is irrelevant to the question of whether Mr. Hendrickson violated a "legal duty." In any event, the overall reasoning here fails under analysis.

After all, if a rational juror could come to the suggested conclusion from the raw material described, then one could as legitimately conclude that a grown man would be lying were he to deny believing in Santa Claus. After all, at one time the perjurious villain actually wrote letters to the jolly old elf.

Furthermore, the raw material described is actually misrepresented, and even if this "logic" were sound, his old filings would not serve its needs. Mr. Hendrickson's previous filings all contained disclaimers denying that any payments to him qualified as "income." These older returns simply pre-dated his understanding that "wages" itself is a custom-defined term referring to a subclass of such "income," and needing to be independently and directly disclaimed.

Thus, the panel's ruling concerning "willfulness" lacks a valid foundation. No direct evidence of "willfulness" was presented, and even if the government's "circumstantial evidence" logic was sound, it would be unavailing in this case.

It is worth observing that the government avoided its opportunity to try to make its fallacious "past practices" argument legitimately, in trial. It could have asked Mr. Hendrickson about his previous filings while he was on the stand, testing its "implications" argument against an explanation. Instead, it simply had the old returns introduced without explanation by a "record-keeper" and published to the jury as part of a foot-thick stack of other unexplained documents.

The presentation of those returns was not part of a good-faith effort to make a case for "willfulness" for the benefit of a rational juror. Rather, it was the slipping of something into the record which could later be called upon to rationalize a juror's confused conclusions.

There having actually been no evidence proving "willfulness" presented in trial, the panel's ruling is in conflict with its own precedents, such as in *U.S. v. Kratt*, 579 F.3d 558 (2009); and the Supreme Court's, as in *U.S. v. Gaudin*, 515 U.S. 506 (1995).

F. The Panel Overlooked Mr. Hendrickson's Argument That He Is Not A Statutorily-Defined "Person" Relevant To The Charges

Since the panel, even if simply by oversight, tolerated the government's failure to prove Mr. Hendrickson qualified as a §7343 "person" relevant to the

charges, the ruling conflicts with 6th Circuit precedent in *U.S. v. Kratt*, 579 F.3d 558 (2009)and with the Supreme Court in *U.S. v. Gaudin*, 515 U.S. 506 (1995).

CONCLUSION

It is clear that the ruling on "materiality" is in irreconcilable conflict with this Court's own well-settled precedents as well as those of the Supreme Court and other circuits. The same is true of the rulings on the confrontation issue, the jury instruction issue, and the failure of the government to prove other elements of the offense.

If space permitted, Mr. Hendrickson could identify many other issues in the appeal misapprehended in the ruling. But what has been presented above is more than sufficient to make clear that an *en banc* re-hearing of this appeal is not only warranted in the interest of justice but is needed to correct what otherwise will be exceptionally significant conflicts within the federal courts.

Thus, Mr. Hendrickson respectfully requests this Honorable Court to re-hear this appeal *en banc* so as to produce a ruling on the case in harmony with its own precedent, with the other courts and with the law of the land.

Respectfully submitted this 22nd day of February, 2012.

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Peter Eric Hendrickson
proceeding *in propria persona*