UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Respondent/Plaintiff	:	
	:	
v.	:	Case Nos. 10-1726; 10-1819
	:	
PETER HENDRICKSON,	:	
	:	
Appellant/Defendant.	:	

MOTION OF DEFENDANT PETER HENDRICKSON FOR RELEASE PENDING APPEAL

Pursuant to Sixth Circuit Rule 9 and 18 U.S.C. § 3143(b), Appellant/Defendant Peter Hendrickson respectfully moves this Court for release pending the completion of his appeal of his conviction. In support of this Motion, Peter Hendrickson represents as follows:

1. On October 26, 2009, a jury in the Eastern District of Michigan, Chief District Court Judge Gerald Rosen presiding, convicted Mr. Hendrickson of ten counts of willfully filing a false document under 26 U.S.C. § 7206(1).

2. The criteria for release pending appeal are set forth in 18 U.S.C. § 3143(b)(1). Under section 3141(b)(1), the Court must release a convicted defendant if: (1) the defendant is not likely to flee or pose a danger to the safety of

others or to the community in general; (2) the purpose of the appeal is not to delay; (3) the appeal raises a substantial question of law or fact; and (4) a favorable determination on appeal likely would result in reversal of the decision below or a reduced term of imprisonment that may expire prior to the completion of the appeal. 18 U.S.C. § 3143(b)(1).

3. In the context of a conviction under 26 U.S.C. § 7206(1), in *U.S. v. DeSimone*, 424 F.Supp.2d 344 (D.R.I. 2006), the Rhode Island Federal District Court, the Honorable William E. Smith presiding, held that release on bail is appropriate where the Defendant presented a "close question" for appeal based on the trial court's evidentiary decision to preclude the Defendant from introducing evidence that formed the basis for his belief in filing the allegedly false tax return. The Court, after noting that a violation of section 7206(1) is a "specific intent" crime according to the 1991 United States Supreme Court decision in *Cheek v. United States*, 489 U.S. 192 (1991), granted the defendant's motion for release on bail because the trial court had excluded evidence that, if admitted, would have showed that the defendant believed that his filings complied with the requirements of the tax code when he filed them:

> Defendant signed his tax return believing that the return complied with the requirements of the tax code, that evidentiary errors at trial precluded the jury from hearing this exculpatory evidence and reversal is likely to result. 424 F. Supp.2d at 345.

The Sixth Circuit has, to date, not decided a release on bail motion under section 3143(b)(1) in the context of a conviction under 26 U.S.C. § 7206(1). In *DeSimone* the Court excluded evidence of conversations between the defendant and his tax advisors. The trial court's decision to exclude relevant evidence that formed the basis of the defendant's filings was sufficient for the *DeSimone* Court to release the defendant pending resolution his appeal. In the present case the District Court excluded from evidence the actual statutes upon which Mr. Hendrickson based his filings. *Accord, U.S. v. Bass*, 784 F.2d 1282 (5th Cir. 1986) (trial court reversed for usurping the role of the jury by instructing the jury that defendant, as a matter of law, was an employee as defined by the Internal Revenue Code).

4. Mr. Hendrickson does not present a risk of flight or of danger to any other person or to the community in general. He is married, an author, father of two children and a longtime resident of Commerce Township, Michigan. He has made no attempt to evade, resist or avoid the justice system. Mr. Hendrickson is very involved in his children's lives and intellectual development. His daughter Katie is 19, was home-educated, achieved a 32 ACT and earned a full scholarship to Lawrence Technical College, where she is a member of the Dean's List. Son "T.J." (Thomas Jefferson) is 14, is also home-educated, is learning at the 10th and 11th grade levels, plays competitive soccer and is involved in performance guitar

and a state-recognized choir. Mr. Hendrickson also provides essential care to his father, who is in the late stages of Alzheimer's.

5. Mr. Hendrickson moved the District Court for release pending appeal in June 2010. The District Court denied Mr. Hendrickson's motion on June 14, 2010.

6. As explained further in the accompanying Memorandum of Law, the appeal raises several substantial issues that warrant reversal, including whether the Court's instructions to the jury were legally correct and whether the Court substantially prejudiced Mr. Hendrickson when it failed to grant the jury's request to review sections 3401 and 3121 of the Internal Revenue Code, the sections upon which Mr. Hendrickson based his tax filings and concluded that those filings were legally and factually correct. Further, the record also shows that the District Court violated the principles set forth in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009) and its own pre-trial motion in limine order by allowing the government to introduce out-of-court statements and documents supporting the government's otherwise unsubstantiated claim that Mr. Hendrickson's earnings were "wages" as defined by section 3401 and also that Mr. Hendrickson was engaged in "employment" as that term is defined in section 3121. Finally, this case involves an important intersection between the United States Supreme Court's

decisions in *Cheek v. United States,* 489 U.S. 192 (1991) (willfulness requires proof of subjective belief in falsity of statement) and *U.S. v. Gaudin,* 515 U.S. 506 (1995) (government bears the burden of proving "materiality"; that is, that the defendant made a false statement that impeded the tax collection process). The trial record unequivocally shows Mr. Hendrickson has a powerful and well supported belief that his filings are not only true, but that his filings are perfectly true. The government introduced no evidence that Mr. Hendrickson's returns were in fact false. The government introduced no direct, reliable, subject-to-cross-examination evidence that Mr. Hendrickson's earnings constituted taxable income according to the Internal Revenue Code. Although *Cheek* contemplates the admission of extrinsic evidence to show intent, *Gaudin* commands that the government show that the defendant's under oath statement was materially false. The government here completely failed to make this showing.

7. A favorable appellate outcome will result in, at a minimum, a new trial and perhaps even a dismissal of the government's indictment against Mr. Hendrickson.

8. Mr. Hendrickson is the author of a book about the Internal Revenue Code entitled "Cracking the Code." Mr. Hendrickson has made it his vocation to study the origins and structure of the Code, has sold tens of thousands of this book

and maintains a website entitled www.losthorizons.com where hundreds of individuals have presented Mr. Hendrickson's analysis to government agents and persuaded those agents to return income tax withholding payments and FICA/FUTA payments.

9. Mr. Hendrickson's years of detailed study and understanding of the Code is essential to his defense. For this Court to fully and fairly rule on this appeal, Mr. Hendrickson's counsel must have easy access to him and Mr. Hendrickson must be able to easily communicate the fruits of years of research and analysis.

Accordingly, and for reasons further articulated in the accompanying Memorandum of Law, Mr. Hendrickson respectfully requests that this Court grant his motion for release on bond pending resolution of the present appeal.

Respectfully submitted,

William B. Butler

Dated: June 23, 2010 By: */s/ William B. Butler*

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELEASE PENDING APPEAL

Section 3142(b)(1) of the United States Code commands that the Court shall order release pending appeal if: (1) the defendant is not likely to flee or pose a danger to the safety of others or to the community in general; (2) the purpose of the appeal is not to delay; (3) the appeal raises a substantial question of law or fact; and (4) a favorable determination on appeal likely would result in reversal of the decision below or a reduced term of imprisonment that may expire prior to the completion of the appeal. 18 U.S.C. § 3143(b)(1). These criteria are met in this case.

Consistent with the holding in *U.S. v. DeSimone*, 424 F.Supp.2d 344 (D. R.I. 2006), the Court's evidentiary rulings and jury instructions precluded the jury from

fairly evaluating whether Mr. Hendrickson specifically, willfully intended to file a false return. These errors create a close question for appeal and therefore warrant Mr. Hendrickson's release pending appeal.

1. <u>The Defendant Is Not Likely To Flee Or Pose A Danger.</u>

Mr. Hendrickson does not present a risk of flight, or a danger to any other person or to the community in general. Mr. Hendrickson was indicted on the instant, non-violent offense on November 6, 2008 and has been free on an own-recognizance bond since that date. He has not violated any condition of his bail. Mr. Hendrickson and his family are deeply rooted in their Commerce Township, Michigan community. Mr. Hendrickson has not resisted, avoided or in any way circumvented the justice system since his conviction in October 2009.

2. <u>The Appeal Is Not For The Purpose Of Delay.</u>

As explained further below, Mr. Hendrickson's imminent appeal is based on a sound foundation of fundamental principles of law, evidence and due process.

3. <u>The Appeal Raises Substantial Questions Of Law Or Fact</u>.

In *U.S. v. DeSimone,* 424 F.Supp.2d 344 (D.R.I. 2006), the Rhode Island Federal District Court, the Honorable William E. Smith presiding, held that release on bail for a conviction under section 7206(1) is appropriate where the Defendant

presented a "close question" for appeal where the trial precluded the Defendant from introducing evidence that formed the basis for his belief in filing the allegedly false tax return. The Court, after noting that a violation of section 7206(1) is a "specific intent" crime according to the 1991 United States Supreme Court decision in *Cheek v. United States,* 489 U.S. 192 (1991), granted the defendant's motion for release on bail because the trial court had excluded evidence that, if admitted, would have showed that ***the defendant believed*** that his filings complied with the requirements of the tax code when he filed them:

> Defendant signed his tax return believing that the return complied with the requirements of the tax code, that evidentiary errors at trial precluded the jury from hearing this exculpatory evidence and reversal is likely to result. 424 F. Supp.2d at 345. *Accord, U.S. v. Bass,* 784 F.2d 1282 (5th Cir. 1986) (trial court reversed for usurping the role of the jury by instructing the jury that defendant, as a matter of law, was an "employee" as defined by the Code).

The Sixth Circuit has, to date, not decided a release on bail motion under section 3143(b)(1) in the context of a conviction under 26 U.S.C. § 7206(1).

The excluded evidence in *DeSimone* consisted of conversations between the defendant's business attorney and tax accountant and the defendant and the business attorney. The defendant offered this hearsay evidence not for the truth of the matter asserted—that the filings were legally and factually truthful—but rather to show that defendant believed his filings to be true and correct. The defendant in

DeSimone sought to admit this evidence because, consistent with the United States Supreme Court's decision in *Cheek v. United States*, 489 U.S. 192 (1991), a violation of section 7206(1) requires "willfulness" and willfulness requires a showing that the defendant specifically intended to violate the law. Compared to the evidence excluded in *DeSimone*, the evidence excluded in the present case was not hearsay and is much more powerfully exculpatory. The Court in the present case denied the jury access to the most fundamental facts upon which Mr. Hendrickson framed his state of mind in filing all ten documents at issue—the actual text of sections 3401 and 3121 of the Internal Revenue Code.

A. THE COURT'S JURY INSTRUCTIONS ON SECTION 3401 AND 3121 WERE CLEARLY ERRONEOUS

Mr. Hendrickson's tax filings were informed and shaped by a fundamental analysis of the Internal Revenue Code, the history of the income tax in the United States and basic principles of logic, law and grammar. Because the Internal Revenue Code contains over 3 million words and is structurally and substantively complex, identifying the Code's basic structure is essential to understanding Mr. Hendrickson's analysis and state of mind when he filed the returns at issue. Applying fundamental analytical tools and principles to the Code also shows why the Court's jury instruction was clearly erroneous and constitutes reversible error.

The basic organizational structure of the Code is as follows:

Title
Subtitle
Chapter
Subchapter
Part
Section

These concentric circles of substantive law only sometimes overlap. Some Code definitions apply to the entire "Title" of the Code while many others are limited to the particular "chapter" in which they are found.

In the present case, the definitions found in Section 3401 relate to the income withholding tax and are found in Code chapter 24 entitled "Collection of Income Tax at Source on Wages." The definitions found in Section 3121, on the other hand, are found in chapter 21 and relate to the FICA and FUTA federal insurance taxes. This is broadly illustrated below:

Title 26—Internal Revenue Code
Subtitle C—Employment Taxes
Chapter 21—Federal Insurance Contributions Act
Subchapter C—General Provisions
Section 3121—Definitions
Chapter 24—Collection of Income Tax at Source on Wages
Section 3401—Definitions

Although the structure of Chapters 21 and 24 is slightly different—Chapter 21 breaks down first into subchapters and then sections while Chapter 24 breaks down immediately into sections, this difference has no effect on the applicable scope of these sections. This is because each and every definition at issue in this case and contained in Sections 3401 and 3121 begins with the admonition that the definitions contained in those sections are limited to the "purposes of this chapter." *See, e.g.* 26 U.S.C. § 3121(a) ("wages" defined "for purposes of this chapter"); § 3121(b) ("employment" defined "for purposes of this chapter") § 3121(d) ("employee" defined "for purposes of this chapter"); § 3401(a) ("wages" defined "for purposes of this chapter"); § 3401(c) ("employee" defined "for purposes of this chapter"); and § 3401(d) ("employer" defined "for purposes of this chapter"). *See also,* 26 U.S.C. § 3121(e) (defining "State," "United States," and "citizen" "for purposes of this chapter").

To illustrate, § 3401(c)'s definition of "employee" (upon which the chapter's definition of "wages" is based) is relatively narrow and expressly limited to the purposes of Subtitle C, Chapter 24, the Code's chapter entitled "Collection of Income Tax at Source on Wages":

> **(c) Employee**
> For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or

> instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

As Mr. Hendrickson clearly testified at trial, he based his tax filings in part on this definition and his understanding that his earnings are not section 3401(a) "wages" because he is not, and never has been, a section 3401(c) "employee."

In contrast, the definition of "employment" contained in § 3121, Subtitle C, Chapter 21, the definitional section applicable to the "Federal Insurance Contributions Act", upon which the definition of Chapter 21 "wages" is based, is much broader. This broader definition is expressly limited to the FICA/FUTA insurance chapter of the Code:

> **(b) Employment**
> **For purposes of this chapter**, the term "employment" means any service, of whatever nature, performed
> **(A)** by an employee for the person employing him, irrespective of the citizenship or residence of either,
> **(i) within the United States**, or
> **(ii)** on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States

26 U.S.C. § 3121(b) (*nota bene*, section 3121 does not define "employee").

Because this broader definition expressly applies only to employment "within the United States," in order to determine the geographical scope of Section

3121(b) "employment," it is necessary to determine whether Chapter 21 separately defines "United States." Section 3121(e) does provide a definition of "United States" "for purposes of" Chapter 21:

> **(e) State, United States, and citizen**
> **For purposes of this chapter—**
> **(1) State**
> The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.
> **(2) United States**
> The term "United States" when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

26 U.S.C. § 3121(e).

The use of the term "***within*** the United States" in section 3121(b) clearly uses the term United States in a geographical sense. Section 3121(b)'s use of the word "within" contemplates employment within a geographic place. Section 3121(e) "includes" only federal territories within its geographical definition, does not include any of the 50 States and does not include the State of Michigan. When Mr. Hendrickson filed tax returns requesting that the IRS return wrongfully retained FICA/FUTA payments, he based those filings on the four-corners reading of section 3121, which by its own terms does not have geographic application within the State of Michigan.

Mr. Hendrickson's modest, common-sense analysis of the Code—that the

income tax is an excise tax on "income" and applies exclusively to income derived from the exercise of federal positions, licenses or privileges, is powerfully supported by the actual, literal text of sections 3401 and 3121. It is the actual words of these statutes that informed Mr. Hendrickson's tax filings.

In stark contrast, the Court's instructions to the jury on sections 3401 and 3121 completely obliterated any distinction between these very different, subject-matter specific definitions and ignored the actual words of these statutes. The Court not only combined the definitions, but invaded the jury's province as the finder of fact by effectively instructing the jury to find, as a matter of law, that Mr. Hendrickson was an "employee" who earned "wages":

> WAGES DEFINED
> As it relates to the charges in this case, I instruct you that the term "wages" means all payments for services performed by an employee for his employer. The term wages applies to all employees and is not restricted to persons working for the government.
> 26 U.S.C. § 3401(a); 26 U.S.C. § 3121(a).
>
> EMPLOYER DEFINED
> As it relates to the charges in this case, I instruct you that the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person. This definition applies to all employers, whether private or government.
> 26 U.S.C. § 3401(d); 26 U.S.C. § 3121(b).
>
> EMPLOYEE DEFINED
> As it relates to the charges in this case, I instruct you that the term "employee" means any individual who performs services and who has a legal employer-employee relationship with the person for whom he performs

these services.

26 U.S.C. § 3121(d)(2); 26 U.S.C. § 3401(c).

By combining sections 3401 and 3121, the Court effectively instructed the jury to ignore Mr. Hendrickson's testimony (which flatly contradicted the Court's instructions and comported perfectly with the literal language of sections 3401 and 3121) and find, as a matter of law, that Mr. Hendrickson was a "section 3401(c) employee" and that his work was "section 3121 employment." After receiving the foregoing instructions, the jury had little choice but to convict Mr. Hendrickson.

Mr. Hendrickson very clearly and very concisely testified that his tax filings were based on his analysis and understanding that the Internal Revenue Code has a limited scope and that his earnings are not within that scope. A fair paraphrasing of Mr. Hendrickson's analysis is that the federal income tax is an excise tax that attaches to some "income." Because the income tax is an excise tax on a legal *res* or thing—income—one must look to the statutorily-defined subjects of the tax and the statutorily-defined taxable activities in order to identify the "incomes" to which the taxes apply. Mr. Hendrickson very carefully read the rules, studied the history of the Internal Revenue Code and concluded that the taxes did not apply to his earnings. Rather than allow the jury to evaluate Mr. Hendrickson's state of mind by allowing the jury to read the same rules that informed Mr. Hendrickson's filings

(the actual text of sections 3401 and 3121), the Court ordered the jury to accept that Mr. Hendrickson's earnings were "wages," that Mr. Hendrickson was an "employee," and that Mr. Hendrickson's analysis was therefore wrong.

In *U.S. v. Bass*, 784 F.2d 1282 (5th Cir. 1986), the Fifth Circuit reversed a false tax filing conviction where the district court's instruction to the jury invaded the jury's role as finder of fact and effectively instructed the jury to find, as a matter of law, that the defendant was an "employee" as defined by the Internal Revenue Code. Mr. Hendrickson objected to the Court's instructions and requested that the Court instruct the jury on sections 3401 and 3121 by allowing the jury to read the actual, literal language of these statutes.[1] To deny the jury access to the actual statutes that informed Mr. Hendrickson's filings is clear, reversible error.

The Court's instruction that wages "means all payments for services performed by an employee for his employer" is so palpably erroneous and overbroad that it does not even comport with much narrower United States Treasury regulations:

> § 31.3401(a)-2 Exclusions from wages.
> (a) *In general.* (1) The term "wages" **does not include any remuneration** for services performed by an employee for his employer **which is specifically excepted from wages under section 3401(a).**
>
> § 31.3401(c)-1 Employee.

[1] Vol. 5 Trial Tr. 807-808 l. 16-25, 1

> (h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, **that the remuneration paid for such services does not constitute wages within the meaning of section 3401(a).**

26 C.F.R. § 31.3401(a)-2; *see also,* 26 C.F.R. § 31.3121(b)-4 (similarly limiting the definition of "employment" under section 3121).

As Mr. Hendrickson eloquently articulated at his April 19 allocution, the government and the Court stubbornly claim that "all" earnings are taxable when the law (including Treasury regulations) clearly states that only "some" earnings are taxable. The government has never shown and cannot show that "all" earnings are taxable and has never shown that Mr. Hendrickson's earnings are within the "some" taxable wages. The District Court committed clear error in instructing the jury and justice compels that Mr. Hendrickson be free until this clear error is corrected.

B. THE COURT'S DENIAL OF THE JURY'S REQUEST TO "SEE" SECTIONS 3401 AND 3121 WAS PREJUDICIAL ERROR.

Mr. Hendrickson provided the jury with clear, concise testimony of his understanding of the definitions contained in sections 3401 and 3121 of the Code. Mr. Hendrickson's understanding of these statutes is completely, 100 percent consistent with the verbatim words contained in these statutes. Mr. Hendrickson also indicated to the jury that he filed the tax returns at issue in this case based on

his reading and understanding of sections 3401 and 3121. The jury, clearly cognizant of the vital importance and perhaps outcome-determinative status of the words contained in sections 3401 and 3121, insightfully asked the Court if the jury could "see sections 3401 and 3121".[2] (Tr. Trans. 657-58.) The Court denied this request.

Mr. Hendrickson clearly and forcefully testified that the returns at issue were informed by his analysis of the Code, and particularly sections 3401 and 3121:

> Q. You also stated …that, you did not have wages. Is that correct?
> A. **I stated that I did not have wages as defined in sections 3401(a) of Title 26,** which is what this form specifically asks for.
> The instructions for the use of the W-2 and the 4852, as well as a substitute for that form doesn't ask for a [report] of whatever got paid, **it asks for reports specifically of wages as defined at 26 U.S.C. 3401(a) on that line**.[3]
> * * *
> Q. What then were you saying to the government?
> A. What I was saying is that I don't believe I received what qualifies as wages **under the definitions specified for the use of this form and for the use of the W-2, which is wages as defined at 3401(a) and also 3121(a)**.[4]
> ***
> Q. What did you state [to the government]?
> A. Used company provided records and the statutory language behind IRC **Sections 3401 and 3121 and others**.
> Which is to say that the statutory language informed me of what was to be reported on this form and informed me that what was to be reported was not simply what got paid to me just in terms of money, **but only what qualified as wages as defined at the relevant sections.** And amounts withheld, the

[2] Vol. 4 Trial Tr. 657-658 l. 19-25, 1-3 (Oct. 23, 2009)
[3] *Id.* 595 l. 11-22
[4] *Id.* at 596-97 l. 23-25, 1-3.

company provided records supplied that information.[5]
* * *
A. As I note in response to question eight: **How did you determine the amounts in item seven above, which includes those categories of items. Company provided records and the statutory language behind Internal Revenue Code Sections 3401, 3121, and others. It's those sections that contain the statutory definitions of the wages that are asked about and are intended to be reported on this form.** And it was in reference to that – those definitions and that statutory language that I concluded that I had not received any of those wages and noted that accordingly. And the company provided records and supplied the information on the amounts withheld.[6]
* * *
Q. [By the Prosecutor Michael Leibson]:
What do you actually claim statutorily? Why are you not supposed to be paying on these wages – paying taxes on them? Why are these not wages--
A. The statute specifies that wages are remuneration paid to certain classes of people.
Q. What are those classes?
A. Well, I have the statute right here.
Q. I assumed you would. It's essentially government workers?
A. Well, not exclusively, no.[7]
* * *
The Witness: Okay. 3401(c) definition of employee is:
An officer, employee or elected official of the United States, state or any political subdivision thereof or the District of Columbia or any agency or instrumentality of any one or more of the foregoing. The term of employee also includes an officer of corporation.
Q. I assume – you're claiming, what? Why aren't you –
A. I'm certainly not in that list.
Q. You're saying the term wages, as defined in the Code, applies only to that class of people which is government workers?
A. Not exclusively to those specific listed people, but to that class of people, yes.[8]

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[5] *Id.* at 599 l. 6-18.

[6] *Id.* at 608 l. 7-22.

[7] *Id.* at 627 l. 13-23.

[8] *Id.* at 628 l. 9-25.

Mr. Hendrickson's repeated references to sections 3401 and 3121 ultimately caused the jury to specifically ask to see these statutes:

> The Court: Any questions from our jurors?
> * * *
> The question is:
>
> **Can we see Section 3401 and 3121?**
>
> The Court: And that would really involve legal inquiry.[9]
> As I told all of you, of course, we'll instruct you on the law. …[10]

The court's refusal to grant the jury's request to see sections 3401 and 3121 when Mr. Hendrickson very clearly, repeatedly testified that these sections informed his tax filings is plain, reversible error. The Court had the opportunity to correct this error by instructing the jury on the actual, verbatim text of sections 3401 and 3121. Instead, as indicated above, the Court instructed the jury to accept as a matter of law that Mr. Hendrickson's analysis was wrong and denied the jury the right to read the law itself.

The standard of review of the district court's actions is plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[11] Plain error is error which is clear or

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[9] Vol. 5, Trial Tr. 657 l. 19-25 (Oct. 23, 2009).

[10] *Id.* at 658 l. 1-2.

[11] Fed. R. Crim. P. 52(b); *U.S. v. Jones,* 108 F.3d 668, 670 (6th Cir. 1997)(en banc) ("our inquiry under

obvious.[12]

By denying the jury's request the Court improperly excluded material documentary evidence upon which Mr. Hendrickson framed his mind in making all ten filings at issue. Criminal tax convictions require proof of willfulness. "Willfulness … requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of his duty, and that he voluntarily and intentionally violated that duty."[13] If, as in the present case, a defendant "truly believed" that the Internal Revenue Code did not apply to his earnings, "the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief."[14]

"Forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision."[15] "Although a district court may exclude evidence of what the law *is* or *should be*, it cannot exclude evidence relevant to a jury's determination of what a defendant

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Rule 52(b) consists of the following four distinct, though interrelated, analyses: (1) whether an error occurred in the district court; (2) if error occurred, whether the error was plain; (3) if the error was plain, whether the plain error affected substantial rights; and (4) 'even if all three factors exist, we must then consider whether to exercise our discretionary power under Rule 52(b), or in other words, we must decide whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings.'" (*quoting U.S. v. Thomas,* 11 F.3d 620, 630 (6th Cir.1993)).

[12] *U.S. v. Barid,* 134 F.3d 1276, 1282(6th Cir. 1998).

[13] *Cheek,* 498 U.S. at 201.

[14] *Id.* at 202.

[15] *Id.* at 203.

thought the law was in [this §7206 case] because "willfulness" is an element of the offense."[16] In this prosecution, statutes (or case law) that the defendant actually relied upon as the basis for his belief are admissible.

This Circuit agrees that a defendant should be allowed to present the relevant contents of legal materials as "facts" informing his state of mind:[17]

> As a legal matter, the exhibits do not validate [the defendant's] views. As a factual matter, however, we think a jury might have discerned a nexus between these materials and [the defendant's] stated belief that he was not required to file income tax returns.…[18]

This proposition remains good law in the Sixth Circuit: "A defendant should be allowed to present to the jury the pertinent excerpts from the documents on which he or she relied."[19] This is especially necessitated where the statutes are factual evidence negating the criminal element of willfulness as testified through the defendant regarding his belief that should be weighed by the jury in its deliberations. This lack of deliberation by the jury has constitutional consequences of an immense magnitude that deprived Hendrickson "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful testing.'"[20]

The court made no finding and provided no rationale for excluding the

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[16] *U.S. v. Powell,* 955 F.2d 1206, 1214 (9th Cir. 1992) (emphasis in the original, citations omitted).

[17] *U.S. v. Gaumer,* 972 F.2d 723, 725 (6th Cir. 1992), rehr'g denied (Jan. 29, 1003).

[18] *Id.*

[19] *United States v. Nash,* 175 F.3d 429, 436 (6th Cir. 1999).

[20] *Crane v. Kentucky,* 476 U.S. 683, 690-91 (1986) *quoting U.S. v. Cronic.* 466 U.S. 648, 656 (1984).

actual language of sections 3121 and 3401. Before excluding relevant evidence, Fed. R. Evid. 403, requires that the Court make a finding that the admission of the evidence (here demanded by the jury) would "unfairly" prejudice a party or confuse the jury and further that such prejudice and/or confusion would "substantially outweigh" the probative value of the relevant evidence. Here, the Court excluded the statutes without even an argument from the government. The Court incorrectly concluded that admission of the statutes would somehow invade the Court's exclusive province over "the law."

This plain error undermined Mr. Hendrickson's substantial rights. Plain error "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings."[21] Excluding relevant evidence negating willfulness is prejudicial error since the outcome could have been acquittal versus conviction.[22]

Finally, the last prong of the court's plain error rule standard requires an inquiry regarding the matter of discretion under Rule 52(b) — whether to reverse the conviction as necessary to avoid a miscarriage of justice. It requires a determination of whether or not the plain error "'seriously affect[s] the fairness,

[21] *U.S. v. Baird,* 134 F.3d 1276, 1283 (6th Cir. 1998), *quoting U.S. v. Olano,* 507 U.S. 725, 734 (1993).

[22] *See U.S. v. Green,* 670 F.2d 1148, 1158 (C.A.D.C. 1981) (the outcome of the hearing-the suppression vel non of evidence-may often determine the eventual outcome of conviction or acquittal).

integrity or public reputation of judicial proceedings …'"[23] and does not require that Mr. Hendrickson be "actually innocent."[24] Here, the integrity of the proceeding was undermined. The jury, by the very nature of its question — "[c]an we see Section 3401 and 3121?" — wanted to actually read the statutes upon which Mr. Hendrickson framed his mind in making the filings in the indictment. It matters not whether the Court believes that Mr. Hendrickson's analysis is incorrect and/or heretical. What mattered to the jury was ***the basis of Mr. Hendrickson's analysis***. The only reason the jury would want to see the actual statutes is to determine if Mr. Hendrickson's analysis had some merit and therefore whether his filings were false or "willfully" false. The District Court's unreasoned, reflexive decision to deny the jury access to these statutes resulted in a wrongful conviction and a miscarriage of justice.

C. DOCUMENTS AND TESTIMONY ADMITTED INTO EVIDENCE VIOLATED THE *MELENDEZ-DIAZ* DOCTRINE AND ALLOWED THE GOVERNMENT TO CONVICT DEFENDANT BASED ON UNIMPEACHABLE HEARSAY

Compounding the foregoing errors, in direct violation of its own pretrial order in limine, the District Court also allowed the admission of testimony and documents that violated the *Melendez-Diaz* doctrine and had the effect of allowing

[23] *Baird,* 134 F.3d at 1383 *quoting Olano,* 507 U.S. at 736 (*quoting U.S. v. Atkinson,* 297 U.S. 157, 160 (1936).

[24] *Barid,* 134 F.3d at 1383.

the government to present a case based entirely on unimpeachable hearsay.

In *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), the United States Supreme Court held that the admission of an expert report, without giving the defendant the right to cross-examine its author, violated the defendant's right to confront his accusers. *Melendez-Diaz,* simply stated, bars the prosecution from admitting into evidence the hearsay testimony of experts relating to potentially outcome-determinative facts.

In the present case, the core issue is whether Mr. Hendrickson's earnings were "wages" as defined by the Code and therefore represented taxable income. The proper application of *Melendez-Diaz* in the present case would exclude any out of court testimony or documents evidencing that Mr. Hendrickson's earnings constituted taxable income. This would include W-2s which, while standing alone are admissible business records, also contain the out-of-court hearsay allegation that the W-2 target earned "wages" and therefore had taxable income. *Melendez-Diaz* says that Mr. Hendrickson has a right to confront his accusers, including anyone who claims that his earnings are "wages" under section 3401. Mr. Hendrickson's trial counsel clearly articulated this position in both a pre-trial motion in limine and at pages 496-98 of the trial transcript. The Court nevertheless admitted substantive statements contained within the W-2s (hearsay within

hearsay), thus admitting into evidence out of court statements which were clearly accepted by the jury to prove the truth of the matter asserted—that Mr. Hendrickson's earnings were taxable income. The following colloquy shows that the District Court intended that the jury rely on the substance of the W-2s to determine whether Mr. Hendrickson's earnings were taxable income:

> THE COURT: "What about [defense attorney] Mr. Cedrone's argument that the issue of wages is not simply a matter of definition for the Court as a matter of law, but must be submitted in the form of factual proofs?
>
> [Prosecutor] MR. DALY: Your Honor, there's evidence in the amounts he was paid of each year. They're W-2's, the document, the amount he received. It's then up to the jury to make a conclusion as to whether those are wages."
>
> THE COURT: "Under the legal instructions that I g[i]ve them."
> MR DALY: "Precisely. Precisely."
>
> MR. CEDRONE: "The problem with that is that there's no evidence to support what the characterization of those payments are."
>
> THE COURT: "The characterization of the payments is what is stated on the W-2s; that is, the characterizations. The legal interpretation as to whether these are, quote, wages, will be supplied to the jury-- well, the jury will receive legal-- will receive the Court's legal instruction as to what are wages and the jury can determine whether the numbers that are on the W-2 Forms are, in fact, wages, on the Court's legal instructions."

(Tr. Trans. pp. 496-98.)

The Court also admitted into evidence numerous additional documents, including IRS and Michigan Revenue Department filings and correspondence (Tr.

Trans. 437-76), civil court decisions and correspondence between Mr. Hendrickson and the business for which he worked (Tr. Trans. 345-68). None of the government's witnesses claimed or otherwise testified that Mr. Hendrickson's earnings were Code-defined "wages." Yet the Court allowed the government to use these witnesses to admit documents (W-2s) and other out-of-court statements indicating that Mr. Hendrickson's earnings constituted taxable income.

Indeed, in response to Mr. Hendrickson's motion to dismiss at the conclusion of the government's case-in-chief, the Court declared that Mr. Hendrickson's status as an "employee" "as it is defined in law" was established by "inference"[25], and the government asserted that the allegations on exhibited W-2s constituted "evidence" that specific amounts paid to Mr. Hendrickson were taxable "wages"[26]. Any document containing the assertion that Mr. Hendrickson's earnings constituted taxable "wages" or "income" is a document that contains inadmissible hearsay. While the document itself may be admissible as a business record, the statement in the document—Mr. Hendrickson's earnings are taxable "wages" or "income"—is an out-of-court statement that the government was improperly allowed to admit to prove the truth of the matter asserted. This is basic, hearsay-within-hearsay analysis. A business record (e.g. a W-2) may be admissible, but its

[25] Vol. 3 Trial Tr. 493 l. 13-16
[26] *Id.* at 496 l. 15-17

contents (e.g. the No. 1 box for "wages") may be inadmissible when the definition of wages may determine the outcome of a criminal case.

A proper application of *Melendez-Diaz* would bar any document or statement containing or implying a claim or conclusion, such as that Mr. Hendrickson was an "employee" as defined in the law, had earnings in any particular amounts, or that any of his earnings were "wages" as defined by sections 3401 and 3121. The human being who prepared these documents and thereby alleged that Mr. Hendrickson was a Code-defined "employee" who earned Code-defined "wages" must be subject to cross examination.

The Court's instruction to the jury did not satisfy the requirements of *Melendez-Diaz.* The documents admitted contained material and prejudicial hearsay statements. The government was allowed to use these documents to suggest that a number of biased and self-interested government agents (who were not present and not subject to cross examination) disagreed with Mr. Hendrickson. This allowed the government to unfairly launch an *ad hominem* attack on Mr. Hendrickson without ever discussing the merits of his analysis. The Court's treatment of the government's witnesses and documents abetted this attack.

D. THE GOVERNMENT FAILED TO PROVE A PRIMA FACIE CASE

As part of the government's burden of proof, section 7206 expressly requires

the government to show that Mr. Hendrickson signed the ten forms at issue believing that the forms were false and further that this falsity related to a "material" matter. Again, section 7206 states that it is federal felony when a "person":

> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and **which he does not believe to be true and correct as to <u>every material matter</u>**.

According the United States Supreme Court, materiality is a question of fact and is therefore an issue for the jury, not an issue of law exclusively for the judge. *U.S. v. Gaudin*, 515 U.S. 506 (1995). In *Gaudin* the Court held

> The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed that right. The judgment of the Court of Appeals is affirmed.

In *U.S. v Lee*, 2004 FED App. 0063P (6th Cir.) the Sixth Circuit has expressly accepted the authority of *Gaudin* and independently held that materiality is a fact issue for the jury which the government must prove in order to sustain a conviction.

Black's Law Dictionary defines "material representation" for purposes of the "law of deceit" as:

> …a statement or undertaking of sufficient substance and importance as to be

the foundation of an action if such representation is false.
Black's Law Dictionary, p. 881 (West 5th ed. 1979).

In *United States v. Uchimura*, 107 F. 3d 1321 (1997), the Ninth Circuit, applying *Gaudin* to the materiality requirement contained in section 7206, held, in effect, that the government must present evidence showing that the information on the return was false or, alternatively, present admissible, reliable evidence showing the correct information and thus, by comparison, showing that the defendant's return was materially false:

> "Under 26 U.S.C. § 7206(1), deciding whether a statement is material surely requires a similar determination of (a) "what statement was made?"; and (b) "**what information was necessary in this case to a determination of whether income tax was owed?".**
>
> "The government correctly notes that the answer to (b) is spelled out in detail in the Internal Revenue Code and Regulations. Appellee Br. at 31. The answer to (b) in Section 7206 cases is therefore not "purely" a matter of historical fact. But each case is different, and the answer to (b) in each case is necessarily different. For example, a taxpayer is required to report her Social Security number on her tax return. But willfully falsifying one's Social Security number, while it may hinder the IRS' record keeping, normally does not affect a determination of whether income tax is owed. As a more cogent example, if one's legitimate deductions exceed one's true gross income, taxable income will be zero. Failure to report all income will thus have no effect on taxes owed, at least for that year, and unreported income will not be necessary to a determination of whether income tax is owed.
>
> "… Even if any failure to report income is material in *most* circumstances, it is not necessarily material in *all* circumstances, since the materiality of an underreporting of income necessarily depends on the facts of each case. "
> *United States v. Uchimura*, 107 F. 3d 1321 (1997)

Uchimura makes clear that the government bears the burden of showing, through direct, admissible evidence, not only that the challenged item of information on the sworn document is objectively false, but also that the item of information is "necessary" to determine the proper tax. Here, the government presented not even a scintilla of evidence supporting either of these essential elements. No witness directly testified that anything on Mr. Hendrickson's forms is false. Further, the government presented no witness or document supporting the notion that providing a number other than "zero" on any of the forms at issue is "necessary" to the determination of Mr. Hendrickson's alleged tax liability. In fact, the prosecution based its case on the proposition that all that is needed to determine Mr. Hendrickson's tax liabilities are the unverified W-2's filed with the IRS by the company for which Mr. Hendrickson worked.

In sum, the government, with the Court's assistance, successfully portrayed Mr. Hendrickson as doggedly disagreeing with IRS officials (some of whom ultimately agreed with Mr. Hendrickson) and federal judges on the issue of whether his "earnings" were taxable income. The government did not, however, present one witness or one document directly evidencing that Mr. Hendrickson's filings were "false" or, further, that they were false as to any "material" matter. The government tried a case by mere implication—presenting evidence only that

the company for which Mr. Hendrickson worked inserted numbers on unsigned, unverified W-2 forms and sent those forms to the IRS, and the IRS in some cases accepted those numbers and rejected Mr. Hendrickson's under-oath rebuttals declaring that the correct number for Code-defined "wages" was zero. The government presented no witness testifying how or why the W-2s were correct and truthful, or how or why Mr. Hendrickson's rebuttals were not correct and truthful. Indeed, the government did not offer one word of substantive testimony about the contents of any of these forms. Nor did it present any testimony about how or why Mr. Hendrickson's rebuttals in any way obstructed or prevented the IRS from determining the proper amount of taxes. The government therefore failed completely to present any evidence of "falseness" or of "materiality".

4. <u>The Appellate Issues Will, If The Defendant Prevails, Result In Reversal Of The Decision Below.</u>

As indicated above, all of the issues presented—clearly erroneous jury instructions, plain error in failing to grant the jury's request to "see" sections 3401 and 3121, admission of documents and testimony that violated the *Melendez-Diaz* doctrine and failure to make a prima facie case as to at least "falseness" and "materiality"—are all reversible errors on which Mr. Hendrickson has presented for appeal.

CONCLUSION

Mr. Hendrickson satisfies the elements of 18 U.S.C. § 3143(b)(1). He is not a flight risk; he presents no danger to anyone. He will raise several important issues for this Court, including the proper application of the United States Supreme Court's decisions in *Cheek v. United States*, 489 U.S. 192 (1991), *U.S. v. Gaudin*, 515 U.S. 506 (1995) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) in the context of a prosecution under 26 U.S.C. § 7206(1). Mr. Hendrickson has also shown fundamental and palpable errors in the District Court warranting release pending the resolution of his appeal. Finally, Mr. Hendrickson's relatively short sentence (33 months) in relation to the powerfully significant issues before the Court, issues that may ultimately be resolved by the United States Supreme Court, compel allowing Mr. Hendrickson to remain free pending a final resolution of his appeal.

Respectfully submitted,

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Dated: June 23, 2010

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Certificate of Service

I hereby certify that on June 23, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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