IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Nos. 10-1726, 10-1819
	)	
PETER HENDRICKSON,	)	
	)	
Defendant/Appellant.	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR BAIL PENDING APPEAL

The United States of America, appellee herein, by and through undersigned counsel, hereby opposes defendant's motion for release pending appeal. For the reasons set forth below, defendant has not met the conditions required by 18 U.S.C. 3143(b); specifically, defendant has failed to show that he will raise a substantial issue on appeal.

STATEMENT OF THE CASE

On October 26, 2009, a federal jury in the Eastern District of Michigan found defendant Peter Hendrickson guilty of ten counts of willfully filing a false document in violation of 26 U.S.C. 7206(1). Chief Judge Gerald E. Rosen sentenced defendant to 33 months' incarceration, to be followed by one year of supervised release, on each count, to run concurrently. Judgment was entered May 25, 2010, and defendant filed a timely notice of appeal on May 31, 2010.

On June 9, 2010, defendant filed a motion seeking release pending appeal. The district court denied this motion on June 14, 2010.

Defendant is currently scheduled to report to the Bureau of Prisons on June 29, 2010. 1/

STANDARD OF REVIEW

This Court reviews a district court's denial of bail pending appeal only for abuse of discretion. *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002). This Court reviews the district court's underlying factual determinations for clear error and its legal determinations de novo. *Id*.

DISCUSSION

DEFENDANT DOES NOT QUALIFY FOR BAIL PENDING APPEAL

The Bail Reform Act of 1984, 18 U.S.C. 3143(b), provides that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who subsequently files an appeal, *shall* be detained, unless there is clear and convincing evidence that (1) the defendant is not likely to flee or pose a danger to the safety of any other person, and (2) the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include imprisonment, or a reduced sentence to a term of imprisonment less than the total time already served plus the expected duration of the appeal process.

The statute creates a presumption that a convicted defendant shall be incarcerated. *Chilingirian*, 280 F.3d at 709; *United States v. Vance*, 851 F.2d 166, 169-

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1/ Defendant is also currently in contempt of court for failing to comply with a court order in connection with a civil injunction and judgment to file amended tax returns and for failing to comply with a court order to compel responses to post-judgment financial discovery requests. Op. & Order, No. 06-11753 (E.D. Mich. June 10, 2010). That order provides that defendant is subject to incarceration after 14 days if he has not yet filed the returns and complied with discovery.

170 (6th Cir. 1988). Defendant bears the burden of proving, by clear and convincing evidence, that he meets the conditions for release. *Chilingirian*, 280 F.3d at 709; *Vance*, 851 F.2d at 168-170.

A "substantial question" is "'a close question or one that could go either way'" that "'is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor.'" *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (quoting *United States v. Powell*, 761 F.2d 1227, 1233-1234 (8th Cir. 1985)).

Defendant raises four claims of error in the memorandum supporting his motion for release pending appeal. Defendant asserts that (1) the court's instructions to the jury on 26 U.S.C. 3401 and 3121 were clearly erroneous (Memo. at 4-12); (2) the court's refusal to allow the jury to see a copy of 26 U.S.C. 3401 and 3121 was plain error (Memo. at 12-19); (3) the admission of Forms W-2, records of the IRS and the Michigan Department of Treasury, defendant's personnel records, and civil court decisions was error because those documents contained hearsay statements to the effect that defendant's earnings constituted taxable income (Memo. at 19-23); (4) the government failed to present a prima facie case that the documents defendant filed were false or that they were false as to a material matter (Memo. at 23-27). 2/ None of these arguments presents a close question likely to result in reversal. Because defendant fails to raise a substantial question on appeal, he is not entitled to release pending appeal.

2/ "R." references are to documents in the record on appeal, as numbered by the Clerk of the District Court. "Tr." references are to the court reporter's transcript of proceedings, by volume and page number. "Memo." refers to the memorandum of law that accompanied defendant's motion for bail pending appeal filed in this Court on June 23, 2010.

A. *The District Court's Jury Instructions Were Not Clearly Erroneous*

Defendant contends that the court's instructions to the jury defining the terms "wages," "employer," and "employee" were clearly erroneous. Defendant asserts, among other things, that the statutory term "employment" refers only to employment within the United States, and that the State of Michigan is not included in this definition. (Memo. at 7-8). Defendant also claims that the federal income tax "applies exclusively to income derived from the exercise of federal positions, licenses, or privileges." (Memo. at 9.)

Defendant's arguments regarding wages and employment are not only wrong, they are frivolous; and defendant is not entitled to jury instructions that misstate the law. *See*, *e.g.*, *United States v. Rashid*, 274 F.3d 407, 415 (6th Cir. 2001); *United States v. Shelton*, 30 F.3d 702, 705 (6th Cir. 1994); *United States v. Sassak*, 881 F.2d 276, 278 (6th Cir. 1989). Defendant's asserted views have been repeatedly rejected by courts. *United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1984) (The contention that "under 26 U.S.C. § 3401(c) the category of 'employee' does not include privately employed wage earners is a preposterous reading of the statute."); *see also*, *e.g.*, *Parker v. Commissioner*, 724 F.2d 469, 471-472 (5th Cir. 1984); *Perkins v. Commissioner*, 746 F.2d 1187, 1188 (6th Cir. 1984); *Peth v. Breitzmann*, 611 F. Supp. 50, 53 (E.D. Wis. 1985).

Indeed, in a prior civil proceeding to which defendant was a party, the district court found defendant's arguments "frivolous and false." *United States v. Hendrickson*, No. 06-11753, 2007 WL 2385071, at *3 (E.D. Mich. May 2, 2007). This Court affirmed that decision, finding that defendant's interpretations of the terms "wages" and "employee" were "plainly baseless" and "tantamount to a

typical tax protestor argument that the income at issue is not taxable." *United States v. Hendrickson*, No. 07-1510, at 4, 2 (6th Cir. Jun. 11, 2008). Because defendant's arguments were so "patently meritless," this Court imposed sanctions pursuant to Fed. R. App. 38. *Id*. at 4; *see also Connor v. Commissioner*, 770 F.2d 17, 20 (2d Cir. 1985) ("The argument that [wages] are not [income] has been rejected so frequently that the very raising of it justifies the imposition of sanctions.").

The court's definitions of "wages," "employee," and "employer" were straightforward, reasonable, and accurate statements of the pertinent provisions of the tax code. 26 U.S.C. 3401(a) defines "wages" as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash," and then lists 22 exceptions not here relevant, including active duty combat pay for members of the Armed Forces, certain agricultural work, and work done for a foreign government or international organization. The court instructed the jury that "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(d) defines "employer" as "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person." The court's instruction to the jury tracked this language exactly. Defendant fails to explain how the instructions misstated the law.

Defendant's argument (Memo. at 11) that the court's instruction fails to take into account these statutory exceptions to the term "wages" listed in 26 U.S.C.

3401(a) is unavailing. An instruction should not be given if it lacks evidentiary support. *United States v. James*, 819 F.2d 674, 675 (6th Cir. 1987). There was no evidence presented at trial suggesting that any of these exceptions applied to defendant; rather, the district court found that there was "unrefuted evidence" of defendant's "straightforward and ordinary working relationship with Personnel Management, Inc. and the conventional nature of the remuneration he received for this work." Op. & Order at 9-10 (R. 97).

Defendant's reliance on *United States v. Bass*, 784 F.2d 1282 (5th Cir. 1986), is misplaced. The district court in *Bass* instructed the jury that, as a matter of law, Bass was an employee. 784 F.2d at 1284. The district court in this case gave no such instruction; the court defined the term "employee," and the jury was permitted to determine, as a factual matter, whether defendant was an employee and whether his income qualified as wages.

This claim of error fails to raise a substantial issue and does not provide a basis for release pending appeal.

B. *The Court's Refusal to Provide Jury Copy of Statutes Was Not Error*

Defendant claims that the district court erred by denying the jury's request to see the text of 26 U.S.C. 3401 and 3121. (Memo. at 15.) Defendant did not object to this refusal during trial. (4 Tr. 657-658.) Therefore, this Court will review only for plain error. Fed. R. Crim. P. 52(d); *United States v. Sherrod,* 33 F.3d 723, 724 (6th Cir. 1994); *United States v. Jones*, 108 F.3d 668, 670 (6th Cir. 1997). For this Court to notice an error not raised at trial, it must find that (1) an error occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judi-

cial proceedings. *United States v. Thomas*, 11 F.3d 620, 630 (6th Cir. 1993). This evaluation must be done "in light of the entire trial record." *United States v. Wilkinson*, 26 F.3d 623, 625 (6th Cir. 1994); *see also Jones*, 108 F.3d at 670.

Because there was no error, defendant's claim fails. Defendant never attempted to introduce the statutes into evidence, and the court did not err in denying the jury's request to view documents not in evidence.

Defendant cites several cases for the proposition that it is error for a court to exclude evidence of materials on which a defendant relied in forming his belief that his conduct was legal. (Memo. at 16-18.) However, because defendant never sought to introduce a copy of the statutes into evidence, these cases are inapposite. 3/

At no point did defendant attempt to introduce copies of 26 U.S.C. 3401 and 3121 into evidence, nor did defendant seek to read the text of the statutes into evidence, with the single exception of 26 U.S.C. 3401(c), which was elicited by the government on cross-examination. (4 Tr. 628.) His complaint, therefore, is that the court did not admit the evidence *sua sponte*, or that the court did not permit the jury to view materials not introduced into evidence. Defendant cites no case, and the government is not aware of any case, holding that either of these situations involves an error, let alone plain error.

Even had defendant sought to admit these documents, it would not be plain error for the court to have excluded them. Decisions regarding the admission or

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3/ The court did admit evidence of other documents on which defendant claimed to have relied in forming his asserted beliefs regarding the lawfulness of his conduct, including materials from the IRS web site, and allowed them to be published to the jury. (3 Tr. 516-525.)

exclusion of evidence are committed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing that the court abused that discretion. *See*, *e.g.*, *United States v. Nash*, 175 F.3d 429, 436 (6th Cir. 1999). A court may exclude exhibits relevant to the issue of a defendant's good faith belief that his conduct was lawful if it finds that the probative value of the exhibits is substantially outweighed by the danger of confusing the jury. 4/ Fed. R. Evid. 403; *Nash*, 175 F.3d at 434-435; *see also United States v. Simkanin*, 420 F.3d 397, 412-13 (5th Cir. 2005); *United States v. Willie*, 941 F.2d 1384, 1395-98 (10th Cir. 1991).

Where a defendant seeks to admit written legal materials on which he claims to have relied, there is a danger that the jury may be confused as to what the law actually is, or may attempt to interpret the statutes for themselves or speculate as to the meaning of the law. *See Nash*, 175 F.3d at 435. It is the sole province of the court "'to determine the applicable law and to instruct the jury as to that law.'" *United States v. Hill*, 167 F.3d 1055, 1069 (6th Cir. 1999) (quoting *In re Air Crash Disaster*, 86 F.3d 498, 523 (6th Cir. 1996)). Juries may not decide what the law is and should not be given the opportunity to do so. *Hill*, 167 F.3d at 1069; *see also Cooley v. United States*, 501 F.2d 1249, 1254 (9th Cir. 1974) ("[I]t would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be.").

4/ This Court has indicated that, in such a case, the trial court should permit the defendant to read to the jury relevant excerpts of documents on which he claims to have relied, but need not permit the physical introduction of the documents. *Nash*, 175 F.3d at 436; *United States v. Gaumer*, 972 F.2d 723, 724 (6th Cir. 1999). In this case, defendant did read an excerpt from 26 U.S.C. 3401 into the record during cross-examination. (4 Tr. 628.)

Defendant had a full and fair opportunity to explain his claimed beliefs regarding income taxes to the jury, as well as the bases for the beliefs. He testified that he had done extensive research involving provisions of the United States Constitution, case law, statutes, and congressional hearings, and described the conclusions he reached based on that research. (4 Tr. 614-625.) He testified that as a result of his own research and consultations with others, he believed his conduct to be lawful. (4 Tr. 624-626.) Defendant was not hindered in making his case to the jury, and his testimony regarding his beliefs -- including discussions of the legal materials on which he claimed to have relied -- was the best evidence of his subjective state of mind. *See United States v. Mann*, 884 F.2d 532, 538 (10th Cir. 1989) ("[Defendant's] testimony regarding his views was more probative than publications representing the source or articulation of those beliefs.").

This claim of error fails to raise a substantial issue and does not provide a basis for release pending appeal.

3. *The Admission of Forms W-2 and Other Documents Did Not Violate the Confrontation Clause*

Defendant asserts that the district court erred in admitting various documents, not specifically enumerated but including Forms W-2, IRS and Michigan Department of Treasury correspondence, federal court decisions, and defendant's personnel records. Defendant contends that these documents contained hearsay statements indicating that defendant's earnings from his employment at Personnel Management constituted "wages." (Memo. at 20.) Defendant admits that the documents were admissible as public records or business records but claims, citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that the admission of these documents nonetheless violated defendant's Sixth Amendment right to

confront his accusers, in which group defendant includes "anyone who claims that his earnings are 'wages' under section 3401." (Memo. at 20.)

Defendant's position is devoid of merit. First, the admission of the documents did not violate the Sixth Amendment, because the Confrontation Clause applies only to testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 823 (2006). Business records are non-testimonial. *Crawford*, 541 U.S. at 56; *United States v. Baker*, 458 F.3d 513, 519 (6th Cir. 2006) (postal service records). Likewise, public records are non-testimonial. *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006); *United States v. Ballesteros-Selinger*, 454 F.3d 973, 974 (9th Cir. 2006). Defendant's reliance on *Melendez-Diaz* as support for a contrary conclusion is misplaced. There, the Supreme Court stated: "Business and public records are generally admissible absent confrontation . . . because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial." 129 S. Ct. 2527, 2539-2540 (2009); *see also id*. at 2538 ("Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status.").

Defendant does not identify with specificity the documents he claims were erroneously admitted, but refers generally to records of the IRS, the State of Michigan, and Personnel Management. The ordinary records of the IRS and the State of Michigan Department of Treasury that were introduced at trial as business and public records met the requirements of Federal Rule of Evidence 803(6) and (8) and were non-testimonial. They were created, not for the purpose of, or in anticipation of, litigation, but in the course of the regular business of those

agencies, which includes the assessment and collection of income taxes. Likewise, the personnel records of Personnel Management, created and maintained in the course of their business in order to manage payroll and human resource issues, were not testimonial, and defendant fails to provide any compelling explanation to the contrary. Thus, the admission of the records of which defendant appears to complain did not violate the Confrontation Clause.

Moreover, the records were not admitted for the truth of any assertions that the pay defendant received constituted wages. Defendant ignores the limiting instructions the court gave when the evidence at issue was introduced. The court cautioned the jury during the testimony of IRS employee Paul Crowley regarding IRS records:

> I have now received into evidence these exhibits . . . which contain the conclusion that remuneration which Peter Hendrickson received from Personnel Management, Inc. constituted wages to Mr. Hendrickson.
>
> This evidence has been admitted only for the purpose of establishing that the IRS was of the view that -- I'm sorry. That the Internal Revenue Service was of the view that Personnel Management, Inc.'s payments to Mr. Hendrickson constituted wages and that this view was communicated to Mr. Hendrickson.
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> This evidence is not offered for the purpose of establishing the fact that Mr. Hendrickson received wages from Personnel Management, Inc. And I instruct you that you cannot consider this evidence for any purpose other than the limited purpose for which I have admitted the evidence.

(2 Tr. 267-268.) The court gave a similar, lengthy, instruction following the testimony of Personnel Management employees Kimberley Halbrook, Warren Rose, and Larry Bodoh. (3 Tr. 436-437.)

Defendant claims (Memo. at 23) that these instructions did not satisfy the requirements of *Melendez-Diaz*. But he offers no support for this bare assertion,

which is flatly contradicted by the decision's recognition that records of the type at issue do not violate the right to confrontation (see p. 10, *supra*). In any event, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). The district court made clear that the records at issue were admitted as evidence that defendant had notice that the IRS believed the remuneration he received from Personnel Management qualified as "wages" and was taxable income. This notice was relevant to whether defendant acted will-fully, which was an essential element of the crime charged. Juries are presumed to follow limiting instructions from the court. *United States v. Ford*, 872 F.2d 1231, 1239 (6th Cir. 1989).

Thus, defendant's confrontation claim fails to raise a substantial issue and does not provide a basis for release pending appeal.

4. *The Government Presented Sufficient Evidence that Defendant's Filings Were False as to a Material Matter*

Defendant contends that the government presented no direct evidence that the documents he submitted to the IRS were false as to a material matter. (Memo. at 26.) As a preliminary matter, defendant cites no case, and the government is aware of no case, requiring that the government introduce direct evidence of any element of the offense. Indeed, this Court has held that the "government may meet its burden through circumstantial evidence alone." *United States v. Salgado*, 250 F.3d 438, 446 (6th Cir. 2001).

A defendant claiming insufficiency of the evidence bears a heavy burden. *United States v. Maliszewski*, 161 F.3d 992, 1005 (6th Cir. 1998). A conviction will be overturned only if, "after viewing the evidence in the light most favorable

to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). This Court should consider both circumstantial and direct evidence and draw all available inferences and resolve all issues of credibility in favor of the jury's verdict. *United States v. Rayborn*, 495 F.3d 328, 337-338 (6th Cir. 2007); *United States v. Wade*, 318 F.3d 698, 701 (6th Cir. 2003). The Court "may not reweigh the evidence, reevaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005).

The district court considered this issue and found that "there was ample evidence at trial from which the jury could permissibly have concluded that Defendant's claims of zero 'wages' were false." Op. & Order at 3-4 (R. 97). It was undisputed that defendant received remuneration from Personnel Management for his work there. The company generated Forms W-2 for tax years 2000 to 2006 reporting the amount of that remuneration. (2 Tr. 345-347.) Larry Bodoh, comptroller of Personnel Management, described defendant as an employee of the company. (2 Tr. 370-371.) Warren Rose, the vice-president of Personnel Management, described defendant as an employee of the company. (2 Tr. 399.) Defendant himself described his job duties and testified that he held a managerial position at the company. (4 Tr. 509.) The jury could reasonably conclude that defendant was an employee of Personnel Management and that the remuneration he received from that company in exchange for his services qualified as wages subject to taxation. Therefore, any tax form he submitted claiming zero wages would be false.

Defendant's claim that this evidence was insufficient boils down to a disagreement with the court's definitions of "wages," "employer," and "employee" (see pp.4-5, *supra*). Defendant's beliefs regarding the meaning of these terms (a belief not shared by this Court or any other) is not a basis for finding that the evidence at trial was insufficient.

Defendant's assertion that there was insufficient evidence that the false statements on his tax returns and other documents were material likewise fails. The court instructed the jury that it had to find that the false statements were material. (5 Tr. 788.) False statements submitted to the IRS are "material" if "they make it more difficult for the IRS to verify defendant's tax returns." *United States v. Barrow*, 118 F.3d 482, 493-494 (6th Cir. 1997). In a prosecution under 26 U.S.C. 7206(1), "any failure to report income is material." *United States v. Tarwater*, 308 F.3d 494, 505 (6th Cir. 2002). Defendant defines a material item as one necessary to determine the proper tax due. (Memo. at 26.) A reasonable jury could find that an accurate statement of defendant's wages was necessary to compute his tax liability, and defendant's submission of inaccurate wage information could impede the IRS in its efforts to verify his tax returns.

Materiality "'is to be measured objectively by a statement's potential rather than by its actual impact' on the IRS's verification efforts." *United States v. Fawaz*, 881 F.2d 259, 263 (6th Cir. 1989) (quoting *United States v. Romanow*, 509 F.2d 26, 28 (1st Cir. 1975)). The question is not whether the IRS was actually baffled in its efforts to verify defendant's tax returns and correctly assess his tax liability, but whether filing documents falsely reporting that defendant earned no

wages could have impeded the IRS's ability to accurately ascertain his tax obligations.

Defendant admitted that the IRS issued refunds for tax years 2002 and 2003 based on his assertion that he earned no wages in those years. (4 Tr. 543-544.) The government had to commence a civil action against defendant to recover those erroneous refunds. (4 Tr. 545-548.) From this, the jury could reasonably conclude that defendant's misstatements of his wages were material. Defendant filed tax returns and other documents claiming that he earned no wages for the purpose of obtaining a refund of the amounts withheld from his wages by his employer. Furthermore, the jurors were entitled to use their common sense and experience to conclude that misstating one's income on a tax return or other form would make it more difficult for the IRS to correctly assess and verify the person's tax liability.

In sum, defendant's challenge to the sufficiency of the evidence fails to raise a substantial issue and does not provide a basis for release pending appeal.

CONCLUSION

For these reasons, defendant's request for bail pending appeal should be denied.

Respectfully submitted,

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Date: June 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system on June 25, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Katie Bagley
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