

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee)
v.) No. 06-10448
RACHEL McELHINNEY,)
Defendant-Appellant)

APPELLEE'S RESPONSE TO APPELLANT'S
RENEWED MOTION FOR BAIL PENDING
APPEAL

The United States of America, appellee in the above-captioned case, by and through its counsel, and for the following reasons, hereby opposes appellant's renewed motion for bail pending appeal.

STATEMENT OF THE CASE

1. On September 9, 2005, following a jury trial in the United States District Court for the District of Arizona, defendant Rachel McElhinney was convicted of four counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203, for the tax years 1998 through 2001. On June 28, 2006, the District Court sentenced defendant to 16 months' incarceration. Defendant moved for bail pending appeal, and the District Court denied the motion on August 14, 2006. On September 8, 2006, defendant submitted an "Emergency Motion Under Circuit Rule 27-3, For Bail Pending Appeal And For Stay Of Sentence Pending Decision On The Motion For Bail," which was filed by this Court on September 11, 2006. On October 4, 2006, this Court denied defendant's first motion for bail pending appeal. On April 16, 2007, this case was argued and submitted to the Court. On May 9, 2007, defendant filed a renewed motion for bail pending appeal.

2. Defendant was one of five persons associated with Innovative Financial Consultants (IFC) who were convicted of tax crimes in connection with the promotion of a tax evasion scheme utilizing abusive trusts called "pure trust organizations." IFC, a consulting company based in Tempe, Arizona, advanced its scheme through several avenues, including domestic and offshore seminars, a promotional website, and an interactive telephone conference line. Defendant McElhinney was a consultant for IFC. Also convicted were Dennis Poseley and Patricia Ensign, co-founders of IFC; David Trepas, another consultant for IFC; and Keith Priest, who acted as a "trustee" for IFC. From 1996 through early 2003, the defendants received \$4.7 million dollars in fees from their sale of 2,000 "pure trusts." The defendants falsely told their customers that a taxpayer could lawfully avoid income taxes by placing his income and assets into either an "onshore" or "offshore" trust package. IFC's trusts enabled customers to retain the use, control, and dominion of any income and assets they placed into their respective trusts, while making it difficult for the IRS to track the true ownership of assets or income assigned to the "trusts" or deposited into trust bank accounts. The evidence revealed that the defendants charged IFC customers \$10,500 for the offshore trust package and \$4,154 for the onshore trust package. IFC was a prominent vendor with an entity called the Institute of Global Prosperity (IGP). At offshore seminars hosted by IGP, codefendant Dennis Poseley promoted IFC's trust schemes to thousands of people.

The defendants were also convicted of willful failure to file tax returns reporting the substantial amount of gross income they received from the sale of their trust schemes. The evidence at trial demonstrated that defendant McElhinney had income of \$30,800 in 1998, \$34,693 in 1999, \$78,849 in 2000, and \$35,648 in

2001 -- a total of approximately \$179,000 -- from IFC, but failed to file a tax return for any of those years. (G.Exs. 8, 379, 446; D.C.Tr. 39-40.) Defendant was convicted of four counts of willfully failing to file income tax returns for the years 1998 through 2001. 1/

BAIL STATUS OF DEFENDANT

Defendant McElhinney is currently serving her term of incarceration.

ARGUMENT

I. Law - Bail Pending Appeal

The Bail Reform Act of 1984 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 the defendant is not likely to flee or pose a danger to the safety of any other person, and the appeal is not for the purpose 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 a term of 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. 18 U.S.C. 3143(b); *United States v. Handy*, 761 F.2d 1279, 1280-83 (9th Cir. 1985). “A ‘substantial question’ is one that is fairly debatable or fairly doubtful; it is one of more substance than would be necessary to a finding that it was not frivolous.” *United States v. Montoya*, 908

1/ Codefendant Dennis Poseley was convicted of five counts of willful failure to file tax returns for the 1997-2001 tax years. Codefendant David Trepas was convicted of four counts of willful failure to file tax returns, for 1998-2001. Codefendant Keith Priest was convicted of two counts of willful failure to file tax returns for the 2000 and 2001 tax years. And codefendant Patricia Ensign was convicted of two counts of willful failure to file tax returns for 2000 and 2001.

F.2d 450, 451 (9th Cir. 1990) (citations omitted); *see also Handy*, 761 F.2d at 1281-82.

By enacting the Bail Reform Act of 1984, Congress intended to make it considerably more difficult than it had been under prior law for a defendant to be released on bail pending appeal. *United States v. Handy*, 761 F.2d at 1283. Under the Act, there is a presumption against release pending appeal and in favor of detention. *United States v. Vance*, 851 F.2d 166, 168-69 (6th Cir. 1988). Upon conviction, the burden shifts to the defendant to show by clear and convincing evidence that release is warranted. *See Montoya*, 908 F.2d at 451. "In reviewing a district court's denial of release pending appeal [this Court] consider[s] the district court's legal determinations *de novo*." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). This Court reviews the district court's underlying factual findings for clear error. *Id.*

II. *Defendant is Not Entitled to Bail Pending Appeal*

In her Renewed Motion for Bail Pending Appeal, defendant addresses a single issue (Mot. at 1-2): "whether there is a law which sets forth the threshold requirement for the filing of a federal income tax return." Defendant's argument fails to present a substantial question.

Noting that the Internal Revenue Code (26 U.S.C. 151) calculates the tax return filing thresholds with reference to the Consumer Price Index, defendant argues that no "law" establishes a minimum filing requirement. (Mot. 1-2.) Defendant's argument is devoid of merit.

Defendant was convicted of four counts of willful failure to file a return, in violation of 26 U.S.C. 7203. Section 7203 provides, in pertinent part, that "[a]ny person required under this title . . . to make a return . . . , who willfully fails to . . .

make such return . . . shall, in addition to other penalties, be fined not more than \$25,000 . . . or imprisoned not more than 1 year, or both." 26 U.S.C. 7203. To establish the offense of willful failure to file a return, the government is required to prove (1) that the defendant was required to file a return, (2) that the defendant failed to file a return, and (3) that the failure to file a return was willful.

Defendant challenges us to calculate the threshold amount for a sample year. We will do that now. The initial place to start in determining whether an individual is required to file a return is Section 6012, entitled "Persons Required to Make Returns of Income." Section 6012(a)(1)(A) specifies the amount of gross income requiring the filing of a return with reference to either the "exemption amount" or the exemption amount and the applicable "standard deduction."

The exemption amount is determined under Section 151. The initial place to start in determining the exemption amount is § 151(d)(1), which states that "the term 'exemption amount' means \$2,000." Section 151(d)(4) provides for an inflation adjustment by which "the dollar amount contained in paragraph (1)" is increased.

The inflation adjustment is calculated by taking the § 151(d)(1) "dollar amount" and multiplying it by a cost-of-living adjustment determined under § 1(f)(3). 26 U.S.C. 151(d)(4)(A). The base year for the § 151 adjustment is 1988 instead of the base year identified in § 1(f)(3), 1992. 26 U.S.C. 151(d)(4)(A)(ii). Substituting 1988 as the base year, § 1(f)(3) provides that the cost-of-living adjustment for the exemption amount is the percentage by which "(A) the CPI for the preceding calendar year exceeds (B) the CPI for calendar year" 1988. Sections 1(f)(4) and 1(f)(5) provide that the term "CPI" refers to the average of the Consumer Price Index for all-urban consumers "as of the close of the 12-month period

ending on August 31 of such calendar year." 2/ Thus, the CPI figure used for the base year, 1988, is the sum of the monthly CPIs for September 1987 through August 1988, divided by twelve. 26 U.S.C. 1(f)(4); 1(f)(5). Using 2003 as an example of an applicable tax year, the CPI average for tax year 2003 is the sum of the monthly CPIs for September 2001 through August 2002. (Note: the CPI figure used for a particular tax year is the average CPI ending August of the preceding year. 26 U.S.C. 1(f)(3)(A).) In the determination of the exemption amount, the resulting increased amount is rounded down to a multiple of \$50. 26 U.S.C. 1(f)(6)(A).

The calculations for the standard deduction applicable to single individuals are similar. The standard deduction is determined under 26 U.S.C. 63. For prosecution years 1998-2001, the unadjusted standard deduction was \$3,000. 26 U.S.C. 63(c) (1998). 3/ With respect to the inflation adjustment, the CPI base year for the standard deduction is 1987. 26 U.S.C. 63(c)(4)(B). The CPI figure for 1987 is the sum of the monthly CPIs for September 1986 through August 1987, divided by twelve. Again using 2003 as an example of an applicable tax year, the CPI average for tax year 2003 is the sum of the monthly CPIs for September 2001 through August 2002. 26 U.S.C. 1(f)(3)(A).

The Consumer Price Index (CPI) is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. Each month, the Bureau of Labor Statistics (BLS), which is part of

2/ The Bureau of Labor Statistics of the U.S. Department of Labor refers to this index as the CPI-U.

3/ For tax years 2003-2004, the post-CPI adjusted standard deduction for married filing jointly was double the post-CPI adjusted standard deduction for single filers (to remove the "marriage penalty"). 26 U.S.C. 63(b)(2)(A) (2004).

the Department of Labor, releases thousands of detailed CPI numbers to the media. Information on the CPI is available from BLS electronically, through subscriptions to publications, and via telephone and fax through automated recordings. Access to both current and historical CPI data can be found, among other places, on the BLS's website. *See* http://www.bls.gov/cpi/cpifaq.htm#Question_1. Using the BLS's website, *see* <http://data.bls.gov/cgi-bin/surveymost?cu>, government counsel obtained the pertinent figures of the CPI, which are stated below:

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1986	109.6	109.3	108.8	108.6	108.9	109.5	109.5	109.7	110.2	110.3	110.4	110.5
1987	111.2	111.6	112.1	112.7	113.1	113.5	113.8	114.4	115.0	115.3	115.4	115.4
1988	115.7	116.0	116.5	117.1	117.5	118.0	118.5	119.0	119.8	120.2	120.3	120.5
1989	121.1	121.6	122.3	123.1	123.8	124.1	124.4	124.6	125.0	125.6	125.9	126.1
1990	127.4	128.0	128.7	128.9	129.2	129.9	130.4	131.6	132.7	133.5	133.8	133.8
1991	134.6	134.8	135.0	135.2	135.6	136.0	136.2	136.6	137.2	137.4	137.8	137.9
1992	138.1	138.6	139.3	139.5	139.7	140.2	140.5	140.9	141.3	141.8	142.0	141.9
1993	142.6	143.1	143.6	144.0	144.2	144.4	144.4	144.8	145.1	145.7	145.8	145.8
1994	146.2	146.7	147.2	147.4	147.5	148.0	148.4	149.0	149.4	149.5	149.7	149.7
1995	150.3	150.9	151.4	151.9	152.2	152.5	152.5	152.9	153.2	153.7	153.6	153.5
1996	154.4	154.9	155.7	156.3	156.6	156.7	157.0	157.3	157.8	158.3	158.6	158.6
1997	159.1	159.6	160.0	160.2	160.1	160.3	160.5	160.8	161.2	161.6	161.5	161.3
1998	161.6	161.9	162.2	162.5	162.8	163.0	163.2	163.4	163.6	164.0	164.0	163.9
1999	164.3	164.5	165.0	166.2	166.2	166.2	166.7	167.1	167.9	168.2	168.3	168.3
2000	168.8	169.8	171.2	171.3	171.5	172.4	172.8	172.8	173.7	174.0	174.1	174.0
2001	175.1	175.8	176.2	176.9	177.7	178.0	177.5	177.5	178.3	177.7	177.4	176.7
2002	177.1	177.8	178.8	179.8	179.8	179.9	180.1	180.7	181.0	181.3	181.3	180.9
2003	181.7	183.1	184.2	183.8	183.5	183.7	183.9	184.6	185.2	185.0	184.5	184.3
2004	185.2	186.2	187.4	188.0	189.1	189.7	189.4	189.5	189.9	190.9	191.0	190.3

Using 2003 as an example of an applicable tax year, the CPI average for tax year 2003 is the sum of the monthly CPIs for September 2001 through August 2002, divided by twelve. That results in the following calculation: $178.3 + 177.7 + 177.4 + 176.7 + 177.1 + 177.8 + 178.8 + 179.8 + 179.8 + 179.9 + 180.1 + 180.7 = 2144.1 / 12 = 178.675$.

The base year CPI index for the Section 151 exemption, as noted, is 1988. The CPI figure for 1988 is the sum of the monthly CPIs for September 1987

through August 1988, divided by twelve. The calculation is as follows: $115.0 + 115.3 + 115.4 + 115.4 + 115.7 + 116.0 + 116.5 + 117.1 + 117.5 + 118.0 + 118.5 + 119.0 = 1399.4 / 12 = 116.616$.

The adjusted exemption for tax year 2003 is calculated as follows: $\$2,000 \times (178.675 / 116.616) = \$3,064$. Rounding that figure down to a multiple of \$50 results in an exemption for 2003 in the amount of \$3,050. That figure matches the 2003 exemption figure published by the IRS. *See, e.g.*, Rev. Proc. 2002-70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns).

The base year CPI for the Section 63 standard deduction, as noted, is 1987. The CPI figure for 1987 is the sum of the monthly CPIs for September 1986 through August 1987, divided by twelve. The calculation is as follows: $110.2 + 110.3 + 110.4 + 110.5 + 111.2 + 111.6 + 112.1 + 112.7 + 113.1 + 113.5 + 113.8 + 114.4 = 1343.8 / 12 = 111.983$.

Continuing with our using tax year 2003 as an example, the CPI-adjusted standard deduction is calculated by first calculating the standard deduction for single filers. 4/ The unadjusted standard deduction for single filers is \$3,000, which is inflation adjusted by the following calculation: $\$3,000 \times (178.675 / 111.983) = \$4,786$. Rounding that figure down to a multiple of \$50 results in \$4,750, which is the 2003 standard deduction for single filers. This matches the 2003 standard deduction figure published by the IRS. *See, e.g.*, Rev. Proc. 2002-

4/ As noted above, tax year 2003 was the first year in which the standard deduction for the married-filing-jointly status was double the standard deduction for single filers.

70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns). 5/

Under single status, a return is required to be filed by an individual if the gross income of that individual equals or exceeds the exemption amount added to the standard deduction. The 2003 exemption amount is \$3,050 and the standard deduction is \$4,750, resulting in a filing threshold for a single individual of \$7,800 for 2003. That figure matches the threshold published by the IRS. *See, e.g.*, News Release, FS-2004-01, 2004 WL 25277 (gross income thresholds for 2003 returns). 6/

An individual need not, of course, personally perform these calculations each year in order to ascertain the filing threshold and the applicable standard deduction and exemption amounts. The IRS, in addition to providing these figures in the tax return instructions, also publishes these figures in Revenue Procedures and news releases: [7/]

5/ Doubling that figure results in \$9,500, which matches the 2003 joint return standard deduction figure published by the IRS. *See, e.g.*, Rev. Proc. 2002-70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns).

6/ Under joint return filing status, a return is required to be filed if the couple's combined gross income equals or exceeds the sum of twice the exemption amount plus the basic standard deduction applicable to a joint return. 26 U.S.C. 6012(a)(1)(A)(iv). Twice the 2003 exemption amount (\$3,050) plus the 2003 joint return standard deduction (\$9,500), equals \$15,600, which matches the threshold published by the IRS. *See, e.g.*, News Release, FS-2004-01, 2004 WL 25277 (gross income thresholds for 2003 returns).

7/ See Rev. Proc. 98-61, 1998-2 C.B. 811, 1998 WL 869311 (cost-of-living adjustments for 1999 returns); Rev. Proc. 99-42, 1999-2 C.B. 568, 1999 WL 99370 (cost-of-living adjustments for 2000 returns); Rev. Proc. 2001-13, 2001-1 C.B. 337, 2000 WL 1874251 (cost-of-living adjustments for 2001 returns); Rev. Proc. 2001-59, 2001-2 C.B. 623, 2001 WL 1558775 (cost-of-living adjustments for 2002 returns); Rev. Proc. 2002-70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns); Rev. Proc. 2003-85, 2003-2 C.B.

Single Filing Threshold

1998	\$6,900
1999	\$7,050
2000	\$7,200
2001	\$7,450
2002	\$7,700
2003	\$7,800

The government's evidence at trial established that defendant earned gross income exceeding \$30,800 in 1998, \$34,693 in 1999, \$78,849 in 2000, and \$35,648 in 2001. (G.Exs. 8, 379, 446; D.C.Tr. 39-40.) Those gross income amounts exceeded by multiples the applicable filing thresholds. Even if a challenge based on the difficulty of computing the thresholds was available to an individual whose gross income was close to the threshold, defendant is not such a person. *Cf. United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (“If there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns.”). Thus, the government amply established that defendant was required to file a return.

Defendant argued in her reply brief that the IRS tax form instructions do not have the force of law. We never argued that they did. Although it is the government's position that the publication of the filing threshold amounts in the Form 1040 instruction booklet (and many other places) is relevant to whether a failure to

1184, 1184 WL 22718036 (cost-of-living adjustments for 2004); FS-2000-02, 2000 WL 15078 (gross income thresholds for 1999 returns); FS-2001-02, 2001 WL 7389 (gross income thresholds for 2000 returns); FS-2002-01, 2002 WL 8049 (gross income thresholds for 2001 returns); FS-2003-02, 2003 WL 23545 (gross income thresholds for 2002 returns); FS-2004-01, 2004 WL 25277 (gross income thresholds for 2003 returns); FS-2005-01, 2005 WL 11575 (gross income thresholds for 2004 returns).

file a return is an intentional violation of a known legal duty, it is not the government's position that the legal duty itself is imposed by the Form 1040 instruction booklet. As discussed above, the legal duty to file a return is imposed by Internal Revenue Code Section 6012, which references Code Section 63, Code Section 151, and the Consumer Price Index.

Defendant argues that Section 6012 does not impose a legal duty to file a tax return because it references and incorporates the Consumer Price Index, which does not "appear[] in either the Internal Revenue Code or the relevant tax regulations." ^{8/} But a statute providing the basis for a criminal prosecution may incorporate other provisions by reference. *See United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998) (where a defendant challenged on vagueness grounds a state statute and a municipal code that incorporated federal standards by reference, the court held that "[a] statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions"). In this case, a reasonable person of ordinary intelligence, if he did not want to avail himself of the IRS documents and

^{8/} The scope of defendant's argument is breathtaking. The use and incorporation of the Consumer Price Index as an inflation adjuster is wide-spread in the United States Code. If the United States Code's use and incorporation of the Consumer Price Index were infirm, as defendant asserts, such an infirmity would negatively affect not only the area of tax law, but food stamps (7 U.S.C. 2014(g)(2)), military housing leases (10 U.S.C. 2828), bankruptcy law (11 U.S.C. 101), banking law (12 U.S.C. 1422), the Federal Trade Commission (15 U.S.C. 720n), the National Park Service fees (16 U.S.C. 460-d), copyright fees (17 U.S.C. 119), student loans (20 U.S.C. 1087-2), the Food, Drug and Cosmetic Act (21 U.S.C. 379g), emergency care for Native Americans (25 U.S.C. 1621a), drug benefits for Veterans (38 U.S.C. 8126), postal rates (39 U.S.C. 3622), as well as Medicare (42 U.S.C. 1395ww(h)(3)) and social security (42 U.S.C. 415(I)). *See also* 1 Guide to Employment Law and Regulation, §9:3 (1997 Ed.) ("the government uses the CPI to determine increases in Social Security benefits, to adjust tax deductions and credits, and to determine pension amounts for veterans, civil-service employees and military retirees"). As indicated above, there is no infirmity.

notices publishing the applicable filing thresholds, could have consulted the Consumer Price Index and made the necessary calculations to determine the gross income level at which he was required to file a return.

Defendant also complains that § 1(f)(5) states that “[f]or purposes of the preceding sentence, [defining the ‘Consumer Price Index’ as ‘the last Consumer Price Index for all-urban consumers’] the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.” Defendant argues that the most consistent CPI cannot be determined. But it is apparent that Congress was simply providing for the possibility that the Bureau of Labor Statistics might discontinue publication of the all-urban index. That eventuality has not happened. Therefore, there is no need to choose a most consistent index, and defendant’s argument is irrelevant.

At all events, even if the incorporation of the Consumer Price Index by reference were infirm, the result would not be a negation of the legal obligation to file a tax return. Rather, under such a scenario, the CPI adjustments would be severed and the Section 6012 filing thresholds would be calculated without the CPI adjustments, for it is without question that it would be the intent of Congress that the filing threshold be calculated without a CPI adjustment as opposed to there being no filing requirement at all. *Cf. United States v. Booker*, 543 U.S. 220, 245 (2005) (severance and excision of statutory section would further Congressional intent). That would result in return-filing thresholds lower than the CPI adjusted figures. Thus, even if this Court were to hold that the Tax Code’s

incorporation of the Consumer Price Index was infirm, such a holding would not require that defendant's convictions under 26 U.S.C. 7203 be vacated. 9/

To summarize, Internal Revenue Code Section 6012 imposed on defendant the legal duty to file returns for tax years 1998, 1999, 2000, and 2001. That legal duty was not negated by the Tax Code's incorporation by reference of the Consumer Price Index.

CONCLUSION

For the foregoing reasons, defendant's Renewed Motion For Bail Pending Appeal should be denied.

Respectfully submitted,

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Dated: This 15th day of May, 2007.

9/ Such a ruling would, however, wreak havoc on the lives of many millions of law abiding Americans. (See note 8.)

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing appellee's response to appellant's motion for bail pending appeal has been made on counsel for appellant on this 15th day of May, 2007 by mailing one copy in an envelope properly addressed as follows:

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