

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA

v.

**SHERRY PEEL JACKSON,
Defendant.**

CRIMINAL FILE NO.

1:07-CR-108-ODE-GGB

REPORT AND RECOMMENDATION

Defendant is charged with four counts of willful failure to file income tax returns for the years 2000 through 2003. Pending before the Court are Defendant's Motion for Bill of Particulars [Doc. 12], Preliminary Motion to Dismiss [Doc. 13], Motion to Dismiss for APA Violations [Doc. 14] and Defendant's Motion to Dismiss Information for "Bad Faith" Prosecution [Doc. 15]. For reasons discussed below, the undersigned **RECOMMENDS** that these motions be **DENIED**.

I. MOTION FOR BILL OF PARTICULARS AND PRELIMINARY MOTION TO DISMISS [Docs. 12 and 13]

The above referenced motions are premised on Defendant's allegation that the government has failed to sufficiently identify the provisions of "Title 26" and the "regulations" that it is relying on to prosecute her. These motions are extensions of the

arguments that Defendant makes in her Motion to Dismiss for APA Violations that is discussed below and should be denied for the reasons discussed with respect to that motion.

In addition, "[t]he purpose of a bill of particulars is to inform the defendant of the charge[s] against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985). The Information in this case sufficiently apprises the defendant of the charges against her. The Information provides the defendant with the essential facts to allow her to prepare her defense and not be surprised at trial, and is also specific enough to allow her to plead double jeopardy if prosecuted at a later time for the same or similar facts. Fed.R.Crim. P. 7(c)(1).

II. MOTION TO DISMISS FOR APA VIOLATIONS [Doc. 14]

A. Background

Defendant is charged with violations of 26 U.S.C. § 7203, which states, in pertinent part, that "[a]ny person required under this title to pay any . . . tax, or required by this title or by regulations made under authority thereof to make a return . . . who

willfully fails to pay such . . . tax, [or] make such return . . . shall . . . be guilty of a misdemeanor” To establish a violation of § 7203, the government must prove, among other things, that Defendant was required to file tax returns for the years 2000 through 2003. See, e.g., United States v. Buras, 633 F.2d 1356, 1358 (9th Cir. 1980). Defendant contends that she cannot be found guilty of failure to file tax returns because a duty to file has not been established by the Internal Revenue Code, or by regulations properly promulgated by the IRS under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*¹

Defendant’s argument focuses on the phrase “exemption amount,” which appears in § 6012 of the Internal Revenue Code. Section 6012 requires income tax returns to be filed by “[e]very individual having for the taxable year gross income which equals or exceeds the *exemption amount*” 26 U.S.C. § 6012(a)(1)(A) (emphasis added). The meaning of “exemption amount” is defined through a series of

¹The Administrative Procedure Act (“APA”) requires each agency to “separately state and currently publish in the Federal Register . . . substantive rules of general applicability adopted as authorized by law” 5 U.S.C. § 552(1)(D). The APA also specifies that “a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.” *Id.*

statutory cross references, beginning with § 151(d) of the Internal Revenue Code. See

26 U.S.C. § 6012(a)(1)(D)(ii). Section 151(d) states:

- (1) Except as otherwise provided in this subsection, the term '*exemption amount*' means \$2,000.

* * * *

- (4) (A) In the case of any taxable year beginning in a calendar year after 1989, the dollar amount contained in paragraph (1) shall be *increased* by an amount equal to –
 - (i) such dollar amount, multiplied by
 - (ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting 'calendar year 1988' for 'calendar year 1992' in subparagraph (B) thereof.

26 U.S.C. § 151(d)(emphasis added). With the appropriate substitution, § 1(f)(3) states that “the cost-of-living adjustment for any calendar year is the percentage (if any) by which – (A) the CPI for the preceding calendar year, exceeds (B) the CPI for the calendar year [1988].” 26 U.S.C. § 1(f)(3). Section 1(f) also states:

- (4) For purposes of paragraph (3), the CPI for any calendar year is the average *Consumer Price Index* as of the close of the 12-month period ending on August 31 of such calendar year.

- (5) For purposes of paragraph (4), the term “Consumer Price Index” means the last Consumer Price Index for all-urban consumers published by the Department of Labor. . . .

26 U.S.C. § 1(f)(emphasis added).

B. Discussion

Defendant’s legal arguments are difficult to discern. Some of her arguments appear to suggest that the statute under which she is charged, Title 26, U.S.C. § 7203, fails to give sufficient notice of the dollar amount that triggers the obligation to file an income tax return. Nevertheless, it is important to note that she is not arguing that § 7203 is unconstitutionally vague because it fails to give fair notice of what conduct is prohibited. Cf. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954)(“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”). Defendant’s initial brief makes no mention of the Constitution and her reply brief disavows any contention that the Internal Revenue Code is

unconstitutional. (Doc. 25 at 15). Indeed, such an argument would clearly fail. Every court to address such a claim has held that § 7203 is not unconstitutionally vague. See United States v. Pederson, 784 F.2d 1462, 1463-64 (9th Cir. 1986)(citing cases); United States v. Powell, 46 F.3d 1148, 1995 WL 37317, *4 (9th Cir. 1995) (Table).

Defendant is also not contending that she failed to act willfully because of a belief that she was not required to file an income tax return. Any such argument at this stage would be premature. In order to convict, the government must prove at trial that Defendant acted willfully, and she will be free to present a defense to the element of willfulness at trial. See Cheek v. United States, 498 U.S. 192, 203, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991).

Instead, Defendant is arguing, as the title of her motion states, that the indictment should be dismissed because the government failed to comply with the Administrative Procedure Act. More specifically, Defendant contends that nothing in the Internal Revenue Code, or the relevant tax regulations, “sets forth any specific amount that compels the making of an income tax return.” That amount appears only in the IRS instruction booklet accompanying Form 1040, which has not been

promulgated as a legislative rule under the Administrative Procedure Act (“APA”). (Doc. 14, Def. Brf. at 3-4).²

Defendant’s arguments are without merit. First, Defendant’s reliance on Hotch v. United States, 212 F.2d 280 (9th Cir. 1954), is misplaced. In that case the defendant was prosecuted and convicted for violating a regulation. His conviction was overturned because that regulation had not been properly published in the Federal Register pursuant to the APA. In contrast, the defendant here has been charged with violation of a statute enacted by Congress, not a regulation. Further, as the government points out in its brief, the holding in Hotch has been superseded by statute. See United States v. Mowat, 582 F.2d 1194, 1201 (9th Cir. 1978)(holding that “since defendants had actual notice of the instruction, they could be prosecuted even though the instruction had not been published in the Federal Register.”).

In addition, the specific amount that triggers the requirement of filing an income tax return can be calculated without reference to any regulation. The necessary

²In fact, the pertinent regulation (which has not been updated since the phrase “exemption amount” was substituted for a specific number in the statute) states that “an income tax return must be filed by every individual for each taxable year . . . beginning after December 31, 1972, during which he receives \$750 or more of gross income” 26 C.F.R. § 1.6012-1(a)(1). The government, however, does not rely on this out-dated regulation, and neither will the Court.

instructions for calculation of that number (although circuitous) are contained within the statute. “It is the tax code itself, without reference to regulations, that imposes the duty to file a tax return.” United States v. Hicks, 947 F.2d 1356, 1360 (9th Cir. 1991)(affirming conviction for failure to file tax returns although IRS Form 1040 had not been promulgated as a rule under the APA). The booklet accompanying Form 1040 merely facilitates application of the statute by making the specified calculation on behalf of citizens. Cf. United States v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990)(rejecting a similar argument as “a sizable leap of logic. . . . [The defendants] were not convicted of ‘failure to submit Form 1040’ They were convicted of evading income tax altogether. The statutes themselves require the payment of the tax and the filing of a return.”). Cf. United States v. Nelson, 221 F.3d 1206 (11th Cir. 2000)(upholding a conviction for a firearms “straw purchase” where the applicable statute required provision of information regarding the purchaser’s identity, but the form used to gather that information was the only document specifically stating that the individual completing the form “must be buying the firearm for himself or herself or as a gift”).

Defendant makes an additional argument regarding the Consumer Price Index (“CPI”), which is incorporated into the statute by reference. According to Defendant,

“[t]he method of determining the ‘exemption amount’ ultimately falls upon the U.S. Department of Labor (‘DOL’) and its calculation of the consumer price index,” and, for this reason, the CPI must be “duly promulgated as a regulation.” (Doc. 25 at 2-3). To the extent that Defendant intends to argue that reference to the CPI in the statute is itself a violation of the APA, she is incorrect. Congress is not prohibited from using the CPI as an inflation adjuster to define which non-filers are exempt from the application of the statute.³ As long as a defendant receives fair notice of the conduct that is proscribed, a criminal statute may incorporate by reference standards of conduct (or define an exemption) from a source other than a regulation published in the Federal Register.⁴ See United States v. Iverson, 162 F.3d 1015, 1021 (9th Cir. 1998) (holding that a statute was not unconstitutionally vague merely because it incorporated other

³Obviously, the requirements of the APA do not apply to acts of Congress. See 5 U.S.C. § 551(1)(a); cf. Hicks, 947 F.2d at 1359 (finding that the Paperwork Reduction Act applies only to agencies, not to Congress).

⁴Defendant’s argument appears to be that any words or numbers that are incorporated from an outside source into a federal criminal law in order to define proscribed (or exempted) conduct must be published in the Federal Register. This argument, carried to its logical conclusion, would prohibit federal prosecutions for violations of posted speed limits or signs in national parks unless those speed limits or signs were published in the Federal Register. Such a result is surely not required. See 26 C.F.R. §§ 1.3, 4.21 (making it a misdemeanor to violate posted speed limits in national parks).

provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions). As the government points out, the use and incorporation of the CPI in federal statutes is widespread. (Doc. 24 at 6, n.2). The Court is aware of no authority that requires the CPI to be published in the Federal Register.⁵

For all of the above reasons, Defendant’s Motion to Dismiss for APA Violations should be denied.

III. MOTION TO DISMISS INFORMATION FOR “BAD FAITH” PROSECUTION [Doc. 15]

Defendant also moves to dismiss the charges against her on the grounds that the Government was motivated by a desire to “punish her for exercising her constitutional rights” under the First Amendment, specifically for her participation in an organization known as “We The People Foundation” (hereinafter “We The People”). (Doc. 15 at 1). We The People has petitioned the IRS and other government agencies concerning

⁵Defendant’s arguments also overlook the fact that only individuals “*adversely affected*” by “a matter required to be published in the Federal Register and not so published” are protected by the APA. 5 U.S.C. § 552(a)(1)(emphasis added). The CPI is used in the tax code to *benefit* taxpayers by *increasing* the exemption amount. See 26 U.S.C. § 151(d)(4)(A). Alaniz v. Office of Personnel Management, 728 F.2d 1460 (Fed. Cir. 1984), and Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980), on which Defendant partially relies, considered changes that were detrimental to the plaintiffs.

the federal income tax on numerous occasions. (See Doc. 15, Decl. of Sherry Peel Jackson). Among other things, Defendant asserts:

In the spring of 2004, the We The People Foundation announced that it and its members would be filing a “right to petition” lawsuit against officials and agencies of the federal government, including the IRS, in July, 2004. On July 19, 2004, the We The People Foundation and several hundred of its members assembled in Washington, D.C., for a demonstration and the filing of that lawsuit. On July 19, this lawsuit with Jackson as a named plaintiff was filed in the U.S. district court for the District of Columbia in Washington, D.C.

(Doc. 15 at 3).⁶ Defendant alleges that in “clear response” to this lawsuit, on July 23, 2004, IRS Special Agent Wesley Cooper applied for a search warrant to search her home and executed the warrant several days later. (Doc. 15 at 4).

The Government has broad discretion in deciding whom to prosecute. Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). As a result, a presumption of regularity applies to those decisions. United States v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Nonetheless, “[s]electivity in the enforcement of criminal laws is, of course, subject to constitutional

⁶The United States Court of Appeals for the District of Columbia Circuit recently affirmed the district court’s dismissal of this lawsuit. We The People Foundation, Inc. v. United States, 485 F.3d 140 (D.C. Cir. 2007).

constraints.” United States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

To establish a prima facie case of an improperly selective prosecution, Defendant must prove (1) that others similarly situated to herself have not been prosecuted for the same conduct, and (2) that the Government has intentionally singled her out for prosecution on the basis of an arbitrary and invidious criterion, such as the desire to prevent her exercise of constitutional rights or political beliefs. United States v. Johnson 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Tibbetts, 646 F.2d 193, 195 (5th Cir. Unit A May 1981)(requiring a defendant claiming that he was selectively prosecuted after vocally opposing the tax laws to show similarly situated individuals who were not prosecuted).⁷

Defendant has failed to establish a prima facie case. First, she has not shown, or even alleged, that the Government declined to prosecute other individuals that it knows (or has probable cause to believe) have not filed income tax returns. Second, Defendant has not shown that she has been singled out because of exercise of her

⁷In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981)(*en banc*), the Court of Appeals for the Eleventh Circuit adopted as binding precedent all of the decisions handed down by the former Fifth Circuit prior to October 1, 1981.

constitutional rights. The Government's response demonstrates that the IRS's criminal investigation of Defendant began well before the filing of the lawsuit by We The People. (See Doc. 23, Ex. A, Affidavit in Support of Application for Search Warrant).

Defendant points to a September 16, 2003, press conference, at which she claims Terry Lemmons, a senior spokesperson for the IRS, stated that the petitions submitted by We The People would be answered through enforcement actions. Her only evidence of Mr. Lemmons' purported statement is a quotation from the complaint in the lawsuit filed by We The People. (Doc. 15 at 3). The Government states that Defendant has likely mischaracterized Mr. Lemmons' statement; it quotes a *New York Times* article with a different (and more benign) version of the purported comments. (Doc. 23 at 13, n.1). Defendant has not sufficiently authenticated her version of Mr. Lemons' statement for the Court to give it any weight or credence.

Moreover, even if the IRS was more likely to take enforcement actions against individuals involved with the petitions of We the People, or was influenced to take action against Defendant because of her prominent participation in the activities and lawsuit of We The People, the Government's conduct would not be unlawful. We the People advocates that the Internal Revenue Code is unconstitutional, (see Doc. 15, Jackson Decl., Ex. 1 ¶ 72; Doc. 23, Ex. A), and, according to a recent decision,

encourages the public to violate the tax laws, United States. v. Schulz, ___ F.Supp.2d ___, 2007 WL 2286410 (N.D.N.Y. August 09, 2007)(*slip op.*). The Constitution does not prohibit the Government from focusing on those most vocal in their opposition of tax laws, as the Government has “a valid interest in punishing violators who flagrantly and vocally break the law.” United States v. Rice, 659 F.2d 524, 527 (5th Cir. Unit A Oct. 1981); Tibbetts, 646 F.2d at 195; United States v. Greene, 697 F.2d 1229, 1234 (5th Cir. 1983). “The fact that tax protesters are vigorously prosecuted for violation of the tax laws demonstrates nothing more than a legitimate interest in punishing flagrant violators and deterring violations by others.” United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978); accord United States v. Vance, 730 F.2d 736, 738 (11th Cir. 1984).

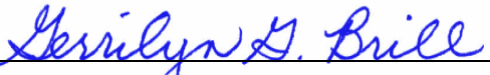
In sum, Defendant has failed to show that others similarly situated have not been prosecuted for willful failure to file tax returns, or that the prosecution had an improper motive.

IV. CONCLUSION

For the foregoing reasons, the undersigned magistrate judge **RECOMMENDS** that Defendant's Motion for Bill of Particulars [Doc. 12], Defendant's Preliminary Motion to Dismiss [Doc. 13], Defendant's Motion to Dismiss for APA Violations [Doc. 14] and Defendant's Motion to Dismiss Information for "Bad Faith" Prosecution [Doc. 15] all be **DENIED**.

There are no pending matters before the magistrate judge, and the undersigned is aware of no problems relating to the scheduling of this case for trial. It is therefore **ORDERED AND ADJUDGED** that this action be, and the same is hereby, declared **READY FOR TRIAL**.

IT IS SO ORDERED AND RECOMMENDED this 12th day of September, 2007.



GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

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