IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. THOMAS W. HIRD, Defendant.	4:19CR3038 GOVERNMENT RESPONSE TO DEFENDANT'S SENTENCING BRIEF

COMES NOW, Plaintiff, the United States of America, and provides this brief in response to Defendant's sentencing brief. On June 28, 2021, the Defendant Tom Hird, filed a sentencing brief in which he makes several objections to the Revised Presentence Investigation Report ("RPSR"). *See* Filing No. 179. Mr. Hird additionally accuses the undersigned of failing to provide material information to the Court. The Government now provides this brief in response arguing that Mr. Hird's objections and accusations are without merit.

Based upon the sentencing briefs filed to date, the Government anticipates at least an hour will be required for the sentencing hearing in this matter. Although the Government intends to rely on the evidence as presented at trial, the Government further requests the ability to call Special Agent Kim Taylor to testify concerning any new matters that the Defendant may raise during the course of the sentencing hearing.

Background

Government relies on the facts and evidence as presented during the seven-day trial of this matter and as additionally outlined in the RPSR. Having presided over the trail, this Court is certainly familiar with most of the facts of this case. "[A] sentencing judge who also presided over the trial, as in this case, may base his factual findings on the trial record and is not required to hold

an evidentiary hearing prior to sentencing." *United States v. Escobar*, 909 F.3d 228, 241 (8th Cir. 2018) (quoting *United States v. Maggard*, 156 F.3d 843, 848 (8th Cir. 1998). This principle is consistent with Fed. R. Crim. P. 32(c), which provides that the sentencing court may base it's sentence from information found "on the record[.]" Moreover, 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information" a sentencing court may consider "concerning the [defendant's] background, character, and conduct … for the purpose of imposing an appropriate sentence." § 3661.

Law and Argument

I. The Government's statement regarding Vu Le remains true and shows Mrs. Hird has a support system outside of Mr. Hird.

Within his brief, Mr. Hird suggests the undersigned of intentionally omitting information from the Court regarding his stepson, Vu Le's whereabouts. Filing No. 179 pp. 2-3. According to records provided by Mr. Hird, Vu Le travelled to Vietnam in 2020. Id. pp. 7-10. Contrary to Mr. Hird's assertions, it is not part of the undersigned's daily duties to monitor United States State Department activities or the comings and goings of people in and out of the country. Nor does the undersigned have independent access to State Department information and records as Mr. Hird alleges. In order to receive that information, the undersigned would have to contact individuals within the United States Department of Homeland Security or State Department. Nevertheless, the Government's statement within its previous brief that "Vu Le, who goes by the name Tony, has lived with the Hirds in Kearney for years and manages the salon along with the couple[,]" remains true and is supported by the evidence provided at trial.[1] *See* Filing No. 178 p. 4. Even if Vu Le is

[1] Vu Le and his management of the nail salon was discussed during the testimony of both Mr. Hird and Special Agent Kim Taylor at trial. It additionally should be noted that Mr. Hird indicated within his brief that his stepson was present when agents went to the house in 2017 to interview Mrs. Hird. Filing No. 179 p. 1. If necessary, Special Agent Kim Taylor can testify at sentencing regarding the interview of Vu Le

not currently in the United States, he is a United States citizen, as evidenced by the passport included in Mr. Hird's brief. *See* Filing No. 179. As a United States Citizen, he has the ability to travel back to the United States and care for his mother and manage the nail salon, if needed. Mr. Hird's argument that the undersigned is attempting to deceive the Court, or suggesting that in the alternative, the undersigned is "inept and incompetent," is without merit.

II. The Tax Loss calculated within the RPSR is accurate.

Mr. Hird argues within his brief that the tax loss amount calculated within the RPSR is inaccurate. Filing No. 179 pp. 3-4. More specifically, he argues that tax loss total should not include the tax loss amounts for the years of which he was acquitted of charges. Id. He further argues that SA Taylor's calculations which provided the totals for the tax loss amount are inaccurate. Mr. Hird's objections to the tax loss amount should similarly be overruled as the tax loss among has been proven by a preponderance of the evidence.

a. This Court can and should include the tax loss for years Defendant was acquitted as relevant conduct.

The sentencing guidelines require the sentencing court to consider all the Defendant's relevant conduct in determining the applicable guideline range. *United States v. Amason*, 318 Fed. Appx. 442, 443 (8th Cir. 2009) (citing U.S.S.G. § 1B.13; *United States v. Okai*, 454 F.3d 848, 852 (8th Cir. 2006)). The Supreme Court has explained that "different standards of proof . . . govern at trial and sentencing" thus enabling the sentencing court to find a fact by a preponderance of the evidence that the jury may not have found beyond a reasonable doubt. *United States v. Watts*, 519 U.S. 148, 155 (1997); *see also Amason*, 318 Fed. Appx. at 443 (explaining the sentencing court is to "consider all the defendant's relevant conduct, provided by a preponderance of the evidence, in

which was part of the investigation in this case which discussed his long-term residency in the United States.

determining the advisory guideline range."); *United States v. Grier*, 475 F.3d 556, 562 (3d Cir. 2007) (relying on *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000)). Based on this notion, the District Court can and should include criminal conduct that the defendant was acquitted of within its relevant conduct findings when that conduct is supported by a preponderance of the evidence—this includes relevant conduct that affects the tax loss amount. *See United States v. Rankin*, 929 F.3d 399, 407 (6th Cir. 2019) (reasoning that District courts may consider relevant acquitted criminal conduct for tax loss amount in sentencing if the court 'finds facts supporting that conduct by a preponderance of the evidence,'"); *United States v. Jinwright*, 683 F.3d 471, 484 (4th Cir. 2012) (calculating tax loss to include criminal conduct the defendant was acquitted of); *United States v. Bolton*, 908 F.3d 75, 95-96 (5th Cir. 2018) (same); *United States v. Stegman*, 873 F.3d 1215, 1236-1237 (10th Cir. 2017) (same).

The tax loss calculated for a tax fraud case is critical to sentencing as it supplies the base offense level for the guideline calculation. *See* U.S.S.G. 2T1.1 and 2T4.1 For a fraudulent or false return matter, like this case, tax loss is "the total amount of loss that was the object of the offense." U.S.S.G. § 2T1.1(c)(1). Application Note 2 to Guideline Section 2T1.1 specifically outlines conduct that the sentencing court should consider when determining the total tax loss. This application note states:

> In determining the total tax loss attributable to the offense (*see* §1B1.3(a)(2)), *all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan* unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (A) there is a *continuing pattern of violations of the tax laws by the defendant*; (B) the defendant *uses a consistent method to evade or camouflage income*, *e.g.*, backdating documents or using off-shore accounts; (C) the violations involve the same or a related series of transactions; (D) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (E) *the violation*

> *in each instance involves a failure to report or an understatement of a specific source of income*, *e.g.*, interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.

2T1.1 application n.2 (emphasis added).

Even though Mr. Hird was acquitted of the charges concerning tax years 2012 and 2013, his conduct in tax years 2012 and 2013 should still be considered when determining the tax loss amount because it was part of the same course of conduct and showed his common scheme and plan. *See* § 2T1.1 application n.2. Pursuant to the evidence presented at trial, Mr. Hird was engaged in a continuing pattern of hiding income from his nail salon business, in fact, the evidence presented at trial indicated that Mr. Hird began this pattern in at least the year 2009—well before the year 2012. Mr. Hird used a consistent method from 2009 until 2017 to "camouflage income" by having nail salon customers write checks as payable to him personally instead of the business and by encouraging customers to pay by check or cash and then exchanging those cash and check payments for large-denomination bills that he would not deposit into the business bank account. Each year 2009 until 2017 he failed to fully report and understated his cash and check income for the nail salon—even when pressed by his tax preparer about his figures. While Mr. Hird may have been acquitted of the charges concerning tax years 2012 and 2013, his conduct in those years have been shown to be relevant conduct by a preponderance of the evidence presented at trial through the testimony of more than 30 customer witnesses, 4 bank witnesses, his tax preparer Patricia Eurek, and Special Agent Kim Taylor along with the documentary exhibits admitted at trial.

Based upon this evidence when examined in the light of application note 2, Mr. Hird's conduct in 2012 and 2013 should be considered by this Court in calculating the total loss amount under the guidelines. The applicable tax loss in this case is the tax loss from the counts of

conviction plus the loss stemming from the acquitted conduct, which totals $134,989 as indicated in the RPSR. Mr. Hird's objection to the loss amount on this ground should be overruled.

b. The tax loss calculation within the RPSR is accurate.

Regarding Mr. Hird's claim of the inaccuracy of the calculations, the Government incorporates by reference the trial testimony of SA Kim Taylor and IRS Revenue Agent Christopher Thompson as well as all the admitted trial exhibits which were used by SA Taylor to calculate the total tax loss[2] and asserts that based on this evidence, the tax loss calculation is accurate and has been proven. The Government notes that Mr. Hird makes no actual argument regarding the inaccuracy of the calculations nor does he point to any evidence indicating how the calculations are incorrect, he merely makes a conclusory argument that because he was acquitted of Counts 1 and 2, the jury must have concluded that "agent Taylors [sic] assessments were clearly inaccurate." Filing No. 179 pp. 3-4.

i. Trial Testimony and exhibits prove the tax loss calculation provided in the RPSR is accurate.

During the trial, SA Kim Taylor and IRS Revenue Agent Christopher Thompson both provided lengthy testimony regarding the unreported income calculations in this case. SA Taylor testified about method she used to make her calculations and why she used that method in this case. SA Taylor then testified regarding how she methodically went through each and everyone of Mr. Hird's bank account records, creating summary spreadsheets to assist in her calculations and how she additionally went through all of the bank records regarding the cash exchange activity and what she did with that information. She testified about how she interviewed a number of

[2] These exhibits include all the bank account evidence and cash exchange activity evidence which are Government Trial Exhibits 1-13; SA Taylor's Summary Spreadsheets for all of the accounts and bank activity which are Government Trial Exhibits 60-71; SA Taylor's Appendix Summaries which are Government Trial Exhibits 73-79; and Mr. Hird's Certified Tax Returns for the years charged which are Government Trial Exhibits 27, 33, 39, 45, and 51.

witnesses, who also testified at trial, to confirm that checks Mr. Hird cashed were business income. She testified how on multiple occasions, she provided Mr. Hird the benefit of the doubt in the calculations to avoid double-counting of income. SA Taylor then testified regarding how all this information came together to ultimately end in the unreported income for each of the years in question as provided in Government trial exhibit 79.

IRS Revenue Agent Christopher Thompson additionally testified regarding underreported income amount. Mr. Thompson confirmed the appropriateness of the calculation method used by SA Taylor due to the specific facts of this case. He testified that he reviewed SA Taylor's summary spreadsheets and appendices which were admitted at trial. And he testified that based on the information he reviewed and the trial testimony and evidence he had seen presented earlier during the trial, SA Taylor's sums were accurate based on his training and experience as a Revenue Agent for the IRS.

Government Trial exhibit Number 79 as admitted at trial, ends with line 8 which states the "Unreported Gross Receipts." This version of SA Taylor's "Appendix A" was edited before its submission to the Jury by redacting lines 9-17 which show SA's calculations ending in the "total tax due and owing" or the total tax loss.[3] Sentencing Exhibit 1, attached hereto, shows lines 9-17 and indicates how SA Taylor used other figures provided in trial exhibits 73-78 to arrive at the total tax due and owing. Based on all this evidence, the tax loss amount contained within the RPSR, is accurate and is $134,989 as indicated within sentencing exhibit 1. This results in a base offense level of 16 as it is more than $100,000 but less than $250,000. *See* U.S.S.G 2T4.1.

[3] This appendix was redacted by the Government prior to its submission to the jury to omit information, specifically the lines which concerned "tax loss," which could have made a premature suggestion of guilt and had little relevancy to guilt as tax loss is not a necessary element to the crimes charged.

ii. The tax loss amount listed in the RPSR is already lower than what it should otherwise be according to the guidelines.

The Government additionally notes that the calculation provided by SA Taylor as the total loss amount is actually less than what it would be if it were calculated strictly according to the sentencing guidelines, meaning the figure of $134,989 is in Mr. Hird's favor. Section 2T1.1 of the sentencing guidelines instruct that for the purposes of calculating the tax loss "[i]f the offense involved filing a tax return in which the gross income was underreported, the tax loss shall be treated as equal to 28% of the underreported gross income[.]" § 2T1.1(c)(1)(A). As SA Taylor testified at trial, she calculated the underreported gross income for the relevant years as follows:

2012	**2013**	**2014**	**2015**	**2016**
$110,152.62	$94,466.49	$93,956.89	$97,186.94	$124,343.94

See Trial Exhibit 79. Together these amounts equal $520,106.88 which is the total underreported gross income for the relevant years. Accordingly, if we determined the total loss amount as indicated by Section 2T1.1(c)(1)(A), it would be 28% of this total amount which is $145,629.926. This total loss calculation is higher than what is represented in the RPSR. RPSR ¶¶ 16, and 18. Nevertheless, both $134,989 and $145,629.926 are more than $100,000 but less than $250,000 and would result in a base offense level of 16. *See* U.S.S.G 2T4.1. And as further stated within the application note 1, "[i]n some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts." 2T1.1 application n.1

Based on all the above, the $134,989 is a "reasonable estimate" of the total loss calculation in this case. Accordingly, the total loss amount in the RPSR is accurate and results in a base offense level of 16 pursuant to the sentencing guidelines. Mr. Hird's objection to the loss amount within the RPSR should be overruled.

III. The Obstruction of Justice Enhancement applies in this case.

Mr. Hird objects to the inclusion of the two-level Obstruction of Justice Enhancement. *See* Filing No. 179. The Government believes that the obstruction of justice enhancement is clearly supported by the evidence in this case, particularly the evidence adduced at trial. Mr. Hird's objection should be overruled. Mr. Hird obstructed justice in several ways, he provided false testimony during the trial and much of which was contradicted by evidence presented by the Government. He also suborned perjury of his wife who testified regarding many of the same things at trial which were shown to be untrue. Throughout the pretrial proceedings of this matter, Mr. Hird provided false statements in filings to the Court which if believed, had the ability to affect he Court's rulings. Finally, Mr. Hird who represented himself pro se, repeatedly tried to violate the Court's Order on a Motion in Limine during trial.

Section 3C1.1 provides for a two-level increase if the defendant "willfully obstructed or ... attempted to obstruct . . . the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction," so long as "the obstructive conduct related to . . . the defendant's offense of conviction and any relevant conduct." Application Note 4 to Section 3C1.1 includes a non-exhaustive list of conduct that is covered under the enhancement including "committing, suborning, or attempting to suborn perjury," and "providing materially false information to a judge or magistrate judge." § 3C1.1 application n.4(B), and (F).

a. Obstruction of Justice Enhancement should be applied because Mr. Hird committed perjury.

When applying the obstruction of justice enhancement based on a defendant having committed perjury, this Court's findings should encompass "all of the factual predicates for a finding of perjury." *Id.* (quoting *United States v. Dunnigan*, 507 U.S. 87, 95, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993)). The crime of perjury under has five elements, which are as follows:

> One, the defendant testified under oath;
> Two, the testimony was false;
> Three, at the time he testified, the defendant knew such testimony was false;
> Four, the defendant voluntarily and intentionally gave such testimony; and
> Five, the false testimony was material.

See Model Crim. Jury Instr. 8th Cir. § 6.18.1621 (2017). Section 3C1.1 defines "Material" to mean any "evidence, fact, statement, or information that, if believed, would end to influence or affect the issue under determination." § 3C1.1 application n.6.

Mr. Hird testified under oath that the check and cash business receipts that he exchanged at the bank for large bills were used to purchase the supplies for the business including large cash purchases for the business such as equipment. He indicated that these cash expenditures were not reported on his taxes—meaning these payments would have netted out. These statements were firmly contradicted by the evidence. First, Mr. Hird had previously been asked in July of 2017 by SA Taylor how the business paid for their supplies. As she testified at trial, Mr. Hird told her in response that his stepson Tony (Vu Le) did the supply ordering and paid using a debit card. The bank records for the business bank account reflected that Mr. Hird would write checks drawn on the business bank account to reimburse himself, Mrs. Hird, or other employees for "cash supplies." *See* Government trial exhibit 67B-67B6. These same exhibits also showed that many supplies expenses would have been debited from the business bank account or that Mr. Hird would write checks to supply companies to pay for supplies. *See* id. Meaning, these expenses would have been included in his tax figures which were based on the business bank account. In addition, Mr. Hird's tax preparer, Patricia Eurek testified at trial. Through Ms. Eurek, copies of the tax figures and documents Mr. Hird would send Ms. Eurek for the preparation of his taxes were admitted at trial. Mr. Hird's tax figures as he provided them to Ms. Eurek included a figure labeled "supplies" which

was a large figure that increased each year. *See, e.g.*, Trial Exhibit 28 at p. 30; 40 at p. 35; 52 at p. 27. For tax year 2012, Mr. Hird even included an expense on the figures for large equipment he had purchased for the salon. *See* Trial exhibit 28 at p. 30. In addition, Ms. Eurek testified that for tax year 2015, Mr. Hird called her during the preparation of his taxes and informed her that he had found additional cash expenses. Mrs. Eurek asked him in response if he had any additional cash receipts to report due to these extra expenses and Mr. Hird responded in the negative. This conversation was documented by Mrs. Eurek and admitted at trial. Trial exhibit 46 at p. 36. Mr. Hird's statements regarding the cash expenses were material because if believed by the jury, they could have negated the element of willfulness that was necessary to a finding of guilt on the crimes charged.

Mr. Hird also testified at trial that the small bills of currency he was bringing into the bank each week to exchange were not payments from the nail salon business, but were repayments of numerous personal loans and microloans made by the Hird's throughout the years. When Mrs. Hird testified at trial, she indicated the same information. Through their joint testimony, the Hirds indicated that the small bills being exchanged at the bank were not cash payments to the nail salon, but were the repayments and churning of personal loans and microloans. However, when Mr. Hird was interviewed by SA Taylor, she asked him if he had made any personal loans. He responded that he made one loan in the amount of around $100,000 to a friend, but he would not provide a name. This information he provided to SA Taylor was then supported in the investigation by the discovery of a single wire transfer from Mr. Hirds' account to a trust account in the amount of $100,000. *See* Trial Exhibit 66B1. Each customer witness who testified at trial testified that Mr. Hird had never loaned them any money and that none of the cash or check payments they made to him were for the repayment of loans.

The Hirds' sworn explanation regarding these cash amounts is rendered unbelievable by other circumstantial evidence in the case. First, even if the Hirds had made *some* small personal loans throughout the years, it could not have been enough to generate the amount of cash Mr. Hird was consistently bringing into the bank each week. Nearly every single week of the year from 2010 until mid-2017, Mr. Hird was bringing in between $600 to $3,600 in small bills to exchange for large bills. *See* Trial Exhibits 62A1-62A9. It defies logic to conclude that the alleged micro-loans would generate that much money in repayments every week for eight years, as Mr. and Mrs. Hird testified.[4] It also does not make sense why these cash exchanges would suddenly stop occurring after Mr. Hird was interviewed by the IRS in July of 2019 if they were truly legitimate funds from personal loans. It also does not make sense why Mr. Hird would lie to SA Taylor during her interview both about personal loans he had extended *and* about making cash exchanges at the bank, which he explicitly told her he only did occasionally. Finally, aside from their personal testimony, there was no evidence submitted at trial to support the Hirds' statements regarding the existence and repayment of these personal loans during the years in question.[5] The conclusion to be reached after all the Government's evidence is that these alleged loans/repayments either did not exist or they did not generate weekly-cash repayments to the extent that the Hirds testified.

Mr. Hird's false testimony, as well as that of his wife, constitutes perjury in violation of 18 U.S.C. § 1621. Mr. Hird's actions in providing false testimony as well as his suborning the false testimony of his wife, each warrant an enhancement for obstruction of justice under USSG § 3C1.1.

[4] For the years charged (2012-2016), Mr. Hird exchanged cash in the following amounts each year (respectively): $85,880, $73,490.04, $81,942.53, $109,535, and $103,833.00. Trial Exhibits 62A4 – 62A8.

[5] Mr. Hird argues that his and his wife's testimony is proven through the testimony of a third witness who provided trial testimony that the Hirds had loaned him money which he was paying back. However as that third individual testified, he did not meet the Hirds until late 2016, meaning none of the money that Mr. Hird had exchanged at the bank in the years in question of 2012-2016 could be attributed to this person.

b. Mr. Hird provided materially false information to the Court in pretrial proceedings.

As described in the Government's previous brief, filing no. 178, Mr. Hird also provided materially false information in filings before the magistrate judge and district judge in pretrial proceedings.

Mr. Hird filed multiple motions to dismiss during the pretrial stages of this case. *See* Filing No. 27 and 28. Among the things that he alleged within his motions, was that he had "never made, or subscribed to make, or file any Form 1040 Individual Income Tax Return, or any other Income Tax Return, for the IRS." Filing Nos. 27, 28. Each of Mr. Hird's filings in which he made this declaration was professedly made "under penalty of perjury" and each was signed by a notary public prior to filing. Filing No. 27 at p. 4; Filing No. 28 at p. 4. These statements within his motions to dismiss were material. Mr. Hird was charged with five violations of "filing false tax returns" in violation of Title 26, United States Code, Section 7206(1). If Mr. Hird's statement in his motions were believed at face value that he had never filed a tax return, it would certainly affect the ruling on any motion to dismiss the Government's charges. Obstruction is warranted based on these facts. § 3C1.1 application n.4(F).

c. Mr. Hird deliberately tried to violate a Court order during trial.

While not explicitly listed in the non-exhaustive list of obstructive conduct under application note 4, the Government argues that the Defendant's repeated attempts to violate the Court's order on the motion in limine should qualify for the two-level obstruction of justice enhancement. Mr. Hird represented himself pro se during the seven-day jury trial. As argued in the Government's previous brief, Mr. Hird attempted to violate the order during nearly every stage of the trial despite warnings from the Court and sustained objections by the Government. Mr. Hird's continued complaints about the Court's order, which extending to even his most recent

filing, *see* filing no. 179, show that his actions were not unknowing or mistaken, they were obstructive conduct meant to violate the Court's order and to put information before the jury that the Court had explicitly forbidden from being presented. The Government relies on its previous brief which further discusses Mr. Hird's attempts to violate the Court's order.

Conclusion

For all the reasons mentioned above, it is the Government's position that Mr. Hird's sentencing objections should be overruled by this Court.

Respectfully submitted,

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