IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 08-4540

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FAYEZ DAMRA, aka ALEX DAMRA
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Ohio
Eastern Division

BRIEF OF PLAINTIFF-APPELLEE

Richard L. Stopper, Jr.
Rotatori, Bender Co., L.P.A.
800 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114
Phone: (216) 928-1010

Counsel for Defendant-Appellant

William J. Edwards
United States Attorney

By: James V. Moroney
Assistant United States Attorney
Executive Office for U.S. Attorney's
Room 2523, RFK Main Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Phone: (202) 616-2840
Fax: (202) 353-3349

Counsel for Plaintiff-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

I. FEDERAL CASES

II. **FEDERAL STATUTES**

II. **FEDERAL RULES**

III. **OTHER AUTHORITIES**

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-appellee, the United States of America, believes that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States agrees with defendant that this is an appeal from a final judgment entered in the United States District Court for the Northern District of Ohio, Eastern Division, on October 21, 2008, and amended on October 30, 2008. The United States further agrees that jurisdiction of this appeal is vested in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT DENIED THE DEFENDANT'S RIGHT OF COMPULSORY PROCESS FOLLOWING THE DEPORTATION OF A CODEFENDANT?

II. WHETHER THE DISTRICT COURT ERRED IN ADMITTING COCONSPIRATOR STATEMENTS UNDER THE HEARSAY EXCEPTION FOR SUCH STATEMENTS?

III. WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

IV. WHETHER THE DISTRICT COURT ERRED IN PERMITTING THE TESTIMONY OF WITNESS MIR ALI?

V. WHETHER THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT MUST WILLFULLY BE A MEMBER OF THE CONSPIRACY, THAT THE GOVERNMENT HAD THE BURDEN TO NEGATE DEFENDANT'S GOOD FAITH, THAT THE JURY HAD TO UNANIMOUSLY FIND BOTH AFFIRMATIVE ACTS ALLEGED IN COUNT 2 OCCURRED, AND FURTHER ERRED BY FAILING TO GIVE A STATUTE OF LIMITATIONS INSTRUCTION ON COUNT 2?

VI. WHETHER THE CONSPIRACY CONVICTION SHOULD BE VACATED FOR FAILURE TO STATE AN OFFENSE?

VII. WHETHER THERE WERE SENTENCING ERRORS IN THE DETERMINATION OF THE TAX LOSS, CALCULATING THE OFFENSE LEVEL, AND FAILING TO RULE ON DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT?

STATEMENT OF FACTS AND THE CASE

This appeal concerns the investigation and prosecution, in the Northern District of Ohio, Eastern Division, of Fayez Damra, also known as Alex Damra. He will be referred to herein as Alex Damra, or as the defendant. Alex Damra is a Palestinian who emigrated to the United States in 1984, and has resided in this country since that time. (R. 99: TR 723). Alex Damra was indicted on July 25, 2006, along with his brother, Fawaz Damra, who will be referred to herein as Fawaz, or Fawaz Damra. (R. 1: Indictment). Fawaz Damra was the Imam, or religious leader, of the Islamic Center of Cleveland; he was previously convicted in the Northern District of Ohio of naturalization fraud, and the facts, issues and result of that prosecution are reported in the opinion of this Court at United States v. Damrah, 412 F.3d 618 (6th Cir. 2005).

The Investigation

Gary Rasoletti, a special agent with the Criminal Investigation Division of the Internal Revenue Service for 27 years, was assigned to a financial investigation of Fawaz Damra in "late summer, early fall of 2004." (R. 98: TR 510-11). In reviewing Fawaz' tax returns over an approximate five-year period, SA Rasoletti noticed an unusual item: a Schedule C (tax form for net income/loss from a proprietorship-owned trade or business) for one year, reporting $100,000

as a consultant for a software company. (R. 98: TR 511-12). SA Rasoletti found that the $100,000 had been deposited by Fawaz into a stock brokerage account, and determined that the funds came from a company named Applied Innovation Management (hereinafter, AIM). (R. 98: TR 513). He also learned that AIM was a California company, and that Alex Damra was involved in the operation of AIM. (Id.).

SA Rasoletti then had a colleague take a grand jury subpoena seeking AIM records to Alex Damra, in Las Vegas, where Alex Damra was now operating. (Id.). (R. 98: TR 481-83). SA Ron Gesell, a special agent for IRS-CID for 16 years, served the subpoena on Alex Damra on October 7, 2004. (Id.). Alex Damra agreed to answer questions, even though SA Gesell did not plan to interview him and had limited knowledge about the case. (R. 98: TR 483-84).

In this interview, Alex Damra made a number of admissions: (1) he advised he founded AIM in 1993 with a partner named Robert Sparkman; (2) there were some 25 investors in AIM, who each invested $15,000 - $20,000, and the investors included his brother, Fawaz; (3) the investors, including Fawaz, were bought out in 1998-99, and were paid approximately three-to-four times their investments, and were paid by checks drawn on AIM's account at the Bank of America; (4) Alex moved AIM from Fremont, California, to Las Vegas, Nevada, in February,

2000; (5) over the period from 1999 to 2002, Alex sent approximately $25,000 to his father in Jerusalem, through personal checks to Fawaz, which Fawaz was to forward; (6) because Alex believed that Fawaz was skimming money from the checks intended for their father, Alex changed the method of delivery to cut out Fawaz and send the money directly through Western Union; (7) Alex did not like his brother Fawaz, and Alex described Fawaz to SA Gesell as a "coward and a loser," who was mentally unstable; and (8) in terms of payments of money to Fawaz, Alex never mentioned any consulting or contract services or payments with Fawaz, and noted that the only other payments to his brother involved some small loans in 1995, and $4,000 in October 2004 for dental work for Fawaz' children. (R. 98: TR 485-92).

After SA Gesell served the subpoena and interviewed Alex Damra, SA Rasoletti received a letter dated 11/05/2004 from an attorney acting for Alex Damra and AIM. (R. 98: TR 514-16; GX 41, Apx. 294). The letter attached several checks, which writer noted he got from his client, Alex Damra; the letter further advised that the money being paid represented gifts from Alex Damra to Fawaz, and "these gifts were accounted for by the corporation as compensation paid to Fayez Alex Damra for consultant services rendered to the company. No other corporate records referred to or mentioned either Fawaz Damra or Nesreen

Damra." (Id.). The checks attached did not include the $100,000 paid by AIM and Alex Damra to Fawaz and Nesreen Damra at the very end of the 1999 tax year, and instead conveyed a $6,000 check payable to Fawaz dated May 20, 2002, and a $4,500 check payable to Fawaz dated July 15, 2002. (Id.). (R. 98: TR 517-18).

Counsel for the United States next received a letter dated January 11, 2005, from Alex Damra; this letter attributed his involvement in this case to his "disgruntled brother Fawaz Damra," advised that "the money Fawaz received from me or the company is my own money that is intended for my sick father that I worship." (R. 98: TR 518-20; GX 40, Apx. 216). This faxed communication made no mention of any consulting income paid by Alex to Fawaz (and the latter's wife), and Alex again accused Fawaz of skimming and stealing from the money Alex was intending to send to his father. (Id.). Finally, Alex Damra offered to meet with the Assistant U.S. Attorney and/or the agent, "any time and as soon as possible" in Las Vegas or Cleveland. (Id.).

A second interview of Alex Damra was conducted on February 7, 2005, at the Federal Building in Cleveland, Ohio; SA Rasoletti was present (as was undersigned counsel for the United States). (R. 98: TR 520). SA Rasoletti began by advising Alex Damra of his rights; Damra signed the standard form

acknowledging his rights and expressing a willingness to be interviewed. (R. 98: TR 521). Alex Damra again made a number of admissions: (1) Fawaz Damra had invested between $20,000 and $40,000 in AIM; (2) Alex believed Fawaz had gotten the money by skimming from his mosque; (3) Fawaz was repaid his investment in 1999, receiving two-to-three times his investment; (4) Fawaz was a consultant for AIM, after Fawaz called Alex 1999 claiming that Fawaz had connections with Arab businessmen who might be interested in Alex' product; (5) Alex told Fawaz that Alex typically paid consultants 10-15% of what they brought in to AIM; (6) later in 1999, Fawaz called demanding that Alex pay $60,000 for Fawaz' work; Alex responded that he owed his brother nothing because he had not secured any business, and then hung up the phone; (7) ultimately, Alex paid Fawaz $100,000 after family from the West Bank called and "guilted him" into paying; (8) Alex described the $100,000 payment as a "divorce payment" to get Fawaz away from Alex and AIM; (9) after SA Rasoletti showed Alex the two $50,000 checks, one to Fawaz and one to Nesreen, Alex explained that he split the money that way because Fawaz had requested it; (10) Fawaz and Nesreen were a "package deal," and that she would respond to questions from possible customers if Fawaz was busy at the mosque; and (11) Alex admitted that he had deducted the

$100,000 on the AIM 1999 corporate return as a consulting expense. (R. 98: TR 522-27; GX 57-58, Apx. 298-99).

After the second Alex Damra interview, SA Rasoletti obtained pre-2000 AIM records from Alan David, Alex Damra's accountant in California; SA Rasoletti also obtained bank records, and various personal tax returns. (R. 98: TR 527). He then arranged a third interview of Alex Damra, which took place on April 21, 2005, in Las Vegas, Nevada, at Damra's office. (R. 98: TR 528). Alex was advised of his rights, acknowledged them, and agreed to be interviewed. (Id.). In the interview, he again made significant admissions: (1) as to payments of AIM funds to the Middle East, they were only to family members, and he had no business dealings there; (2) he acknowledged that Nader Damra was his brother, and that the AIM checks he sent to Nader were paid "because he [Alex] could afford to;" (3) as to the 1998 checks to Nader marked "business development," Alex marked those that way, and he knew Nader wanted to start a new business; (4) the 1999 checks to Nader were marked by Alex as consulting expenses, but they were for the same purpose as the 1998 checks; (5) Nader was not a consultant for AIM; (6) when confronted with the fact that no Form 1099s were issued, Alex said "I mishandled the money, there is abuse here;" (7) he admitted that the classification of the checks as consulting expenses was wrong; (8) SA Rasoletti

stated his investigative conclusions to Alex, advising that Alex had reported only $20,000 income personally in 1997 and 1998, and the only way to send all this money to family members was to take it out of AIM; Alex agreed with those conclusions; (9) Fawaz Damra was not qualified to be a consultant for AIM, Fawaz had not done "$5 worth of work for AIM," and Fawaz, Nesreen, and Nader were not employees of AIM; (10) he admitted "this is not right," and stated that he accepted responsibility for his actions; and (11) two checks that opened a personal account for Alex at Charles Schwab had been charged as consulting expenses, and that another check to Al Adhamieh General Trade for $32,000, was another payment to his brother Nader. (R. 98: TR 529-37; GX 51, 59-60, Apx. 297, 300-01).

In concluding his investigation, SA Rasoletti attempted to determine if there had been any repayments of AIM investors, including Fawaz, in 1998 or 1999, as claimed by Alex; he found no such repayments. (R. 98: TR 538-39, 603-05). SA Rasoletti also interviewed Mir Ali, the tax return preparer for Fawaz Damra, as to why Ali had prepared Fawaz' 1997 and 1998, and 2000 income tax returns but not the 1999 return. (R. 98: TR 514; GX 27, Apx. 199). SA Rasoletti also investigated the Schedule C expenses on Fawaz Damra's 1999 tax return, and

found no documentation or verification indicating that those expenses had been paid. (R. 98: TR 539-40).

The Indictment

Alex Damra and Fawaz Damra were indicted on July 25, 2006: the indictment charged Alex and Fawaz, together with others known and unknown to the grand jury, with conspiring to defraud the United States "for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service in the ascertainment, computation, assessment, and collection of the revenue: to wit, individual and corporate income taxes." (R. 1: Indictment). The object of the conspiracy was specified as the diversion of "AIM funds for personal purposes of the defendant, Fayez Damra, aka Alex Damra, and for payments to members of the Damra family, including the defendant, Fawaz Damra, in a manner to conceal and disguise the taxes owed by AIM and the recipients of the diverted funds." (Id.). Count 2 charged Alex Damra with corporate income tax evasion, in violation of 26 U.S.C. § 7201, and specified, in the conjunctive, two affirmative acts to evade and defeat 1999 corporate income tax owed by AIM: (1) the filing of a false and fraudulent Form 1120 for AIM, and (2) causing funds paid from AIM to Fawaz to be falsely reported as Schedule C gross receipts on the Form 1040 filed by Fawaz and his

wife for the year 1999. (R. 1: Indictment). In Count 3, Fawaz was charged with aiding and abetting the preparation and presentation of a Form 1040 for 1999 which was false and fraudulent as to material items.

Pretrial Proceedings

Defendants Alex and Fawaz Damra were arraigned on August 21, 2006. (R. 29: Arraignment). At the time of the arraignment, Fawaz Damra was in the custody of Immigration and Customs Enforcement (ICE) in Monroe, Michigan. (R. 29: TR 2-5). Fawaz was awaiting host country acceptance for his deportation. (Id.). When Fawaz was convicted in 2004 of naturalization fraud, his citizenship was revoked by operation of law. 8 U.S.C. § 1451(e). After his conviction was affirmed, and further appellate proceedings exhausted, ICE commenced a deportation case and took Fawaz Damra into custody. (R. 58: Pretrial, TR 12). In lieu of trial, on January 9, 2006, Fawaz stipulated to removal from the United States. (R. 29: TR 2-3; R. 43: Motion; R. 44: Response, at 2-3). On January 2, 2007, some five months after his indictment in the instant case, Fawaz Damra was deported to the West Bank, through Jordan. (R. 46: Order). Fawaz' counsel then filed a Motion to Dismiss the Indictment, with prejudice. (R. 43: Motion). The United States opposed the Motion, arguing that Fawaz Damra stipulated to his deportation, and that the dismissal with prejudice would confer on unwarranted

benefit, an adjudication on the merits without trial. (R. 44: Response). The trial court denied the Motion to Dismiss, and issued an arrest warrant, to provide for trial in the event Fawaz Damra re-entered the United States. (R. 46: Order).

At the arraignment, there was extensive discussion about setting bond for Fawaz Damra. (R. 29: TR 2-8, 13-20). As background for that discussion, as of August 21, 2006, Fawaz Damra had been in ICE custody for some nine months, awaiting approval of his host country (Israel) to transit through to the West Bank. Pursuant to I.N.S. v. St. Cyr, 533 U.S. 289 (2001), and subsequent other authorities, Fawaz had the right to file for habeas corpus relief after a period of continuous custody without being deported. If his ICE custody was interrupted, such as by U.S. Marshal's Service custody in a criminal case, his habeas rights would be vitiated, so an agreement was reached not to set bond in the criminal case, and return Fawaz to ICE custody in Monroe, Michigan. (R. 29: TR 18-20).

Before Fawaz was deported, he filed a Motion for Separate Trial, pursuant to Bruton v. United States, 391 U.S. 123 (1968). (R. 23: Motion). Fawaz argued that introduction of the admissions made by Alex Damra in his three interviews with government agents, as well as those contained in the January 11, 2005, letter to the prosecutor, would "implicate Defendant Fawaz Damra" and violate Fawaz' Sixth Amendment right of confrontation. (Id.). That Motion was not decided by

the trial court prior to Fawaz' deportation, but was not withdrawn. (R. 58: TR 20-3).

Considerable effort was made during pretrial proceedings to encourage Alex Damra to retain counsel. At arraignment, the U.S. Magistrate Judge advised the defendant "that is all the more reason why you need the assistance of competent counsel." (R. 29: TR 25). The Magistrate Judge said "I'm just telling you, I don't think you should be trying to do this on your own;" and "you certainly have the resources to engage a good attorney. Spend the money. Get a lawyer. Get it done right. Don't try to do it on your own." (R. 29: TR 25-7). At a status conference held on September 14, 2006, the defendant told the district court that he "could afford ten lawyers, but the case was "really a project" and "there is no money allocated for that budget." (R. 25: TR 14).

The court held a status conference on January 23, 2007, and Alex Damra announced that he had not retained counsel, and that he would be filing motions on his own behalf on the following day. (Minutes, 01/22/2007). At a status conference held February 13, 2007, and defendant told the court: "I have no intent any further to employ any attorney or any legal assistant to help me in this matter. So this very much has been a moot case as far as I am concerned, the legal representation." (R. 58: TR 5). Defendant announced his intention to represent

himself, stating "I made that decision, your Honor. It is a done deal." (R. 58: TR 5-9). Defendant then represented himself during the remainder of pretrial proceedings and through the trial.

The Trial

Trial commenced April 20, 2007. The United States called seven witnesses: Alan David (certified public accountant for AIM in California); Barbara Burrer (certified public accountant for Eigen Software, dba AIM, in Las Vegas, Nevada); Penny Moore (IRS official representative and custodian of records); Mir Ali (Fawaz Damra's tax return preparer for 1997, 1998, and 2000); Bernard Niehaus (Fawaz Damra's tax return preparer for 1999); SA Ron Gesell; and SA Gary Rasoletti.

At time of trial, Mir Ali was an elderly native of India, with a graduate degree in engineering, who had been involved in financial services and tax preparation since 1970. (R. 98: TR 370-71). He had appreciable hearing difficulties, and spoke swiftly in very accented English. (R. 97: TR 315-16, 323-24, 327, 348). He also, at times, had difficulty confining his answers to specific questions. (R. 97: TR 306-07; R. 97: TR 333-34). Despite challenges, Ali testified that for 1999, Fawaz Damra told him "I have a brother in California, he had income which he wants me to show part of his income," and that "you can

show I did computer work." (R. 97: TR 322-23). Fawaz further told Ali "to show" $50,000 for me, $50,000 to my wife." (Id.). Ali stated "he [Fawaz] wanted to report it, but he didn't know how. He [the brother] is in the high income bracket." (R. 97: TR 325). Damra wanted to split the $100,000 between him and his wife. (R. 97: TR 326). Based upon what Damra was asking him to do, Ali refused to complete Fawaz' 1999 return, after telling him "this cannot be." (R. 97: TR 327).

Ali told Fawaz "I don't want to do this. This is just playing around games." (R. 97: TR 333). Ali did not believe Fawaz was involved in a computer business because "he has four jobs. He teaches, and he's a full-time imam ... he doesn't have any receipts ... he says "[m]y brother give me the money," and "the tax bracket is very high." (R. 97: TR 333-34). When asked why after declining to prepare Fawaz' 1999 return, Ali had completed the 2000 tax return, Ali testified that there was no "nothing about the computer" on the 2000 return, and that relative to the 1999 return, Fawaz "knew that I knew it was just a fraud on his part, and he corrected himself." (R. 97: TR 336-37).

On May 1, 2007, Ali's direct examination was completed, and cross examination was begun but not concluded. (R. 97: TR 338, 358). Before testimony resumed, the following morning, the trial court announced various

adjustments regarding the continued cross examination of Mir Ali, which the court directed so that the jury could better receive the evidence, and to treat the defendant and the government fairly. (R. 98: TR 364-65). Accordingly, the trial judge moved in front of the witness, so she could appropriately signal when the witness should stop his answer. (Id.). The judge permitted the defendant to stand in front of the witness. (Id.). The judge also permitted SA Rasoletti, who was familiar with the witness through investigative interviews, grand jury, and pretrial interviews, to position himself near the witness to ensure (1) that the witness heard and understood the defendant's questions on cross examination, and (2) that the jury could hear and understand the witness' answers. (R. 98: TR 367-75).

When cross examination resumed, the witness adhered to the central tenets of his testimony: Fawaz did not say he earned $100,000 as a computer consultant, but that he wanted to report $100,000 received from his brother in California, who was in a higher tax bracket. (R. 98: TR 374-75, 386-87).

Bernard Niehaus testified that Fawaz Damra was referred to him in early April 2000, to prepare Fawaz' 1999 tax return. (R. 98: TR 458-60). Fawaz gave Niehaus the $100,000 gross receipts figure, which came from computer consulting, and Fawaz gave him the expenses deducted from the $100,000 on the Schedule C. (R. 98: TR 465-69). Niehaus gave the 1999 tax return, in final form,

to Fawaz on July 31, 2000. (R. 98: TR 469-73; GX 39, Apx. 240). Niehaus signed this return as preparer before handing to Fawaz Damra, and he identified his signature on the return as filed. (R. 98: TR 473-74; GX 39, Apx. 240; GX 27, Apx. 199).

Penny Moore, representing the Internal Revenue Service, testified that the 1999 income tax return of Fawaz and Nesreen Damra was mailed to the IRS Service Center on August 3, 2000, and received August 7, 2000. (R. 97: TR 294-95, 299; GX 27, Apx. 199). She explained that this tax return, bearing the signature of preparer Bernard Niehaus, was processed without the taxpayers' signatures in order to avoid triggering interest and penalties if the return was rejected. (R. 97: TR 297-98; GX 27, Apx. 199). Ms. Moore further said that a refund of $3,635 was paid on the processing of GX 27, and that the refund check was printed September 1, 2000, and then mailed to Fawaz and Nesreen Damra. (R. 97: TR 307-08; GX 27, Apx. 199).

The defendant testified as the sole witness in his case. He denied that Fawaz ever spoke to him "about any matter regarding to (sic) his taxes." (R. 99: TR 732). Fawaz had invested $25,000 in AIM in 1992-93, money that Alex thought came from a job as a cabdriver "before this mosque and mumbo-jumbo he got himself involved in." (R. 99: TR 734). Alex again accused Fawaz of

skimming up to 75% of what Alex was sending to his father through Fawaz. (R. 99: TR 738-39). He said his brother Nader Damra, an accountant, was trying "to help --- my testing of my quality assurance stuff," and Alex never got a straight answer on "where did the money go." (R. 99: TR 739-40). He identified the $250,000 AIM check (written on 12-30-1999) that was deducted as AIM consulting expense, as "my share of what profit I made out of the old Applied Innovation Management in California." (R. 99: TR 745; R. 97: TR 220-22; GX 61, Apx. 302).

On cross-examination, Damra admitted telling SA Rasoletti that his employee, Watt Baxley, who was also paid as a consultant, knew nothing about computers or software. (R. 99: TR 759-60). Alex denied making most of the admissions to which SA Gesell, and SA Rasoletti, had testified. (R. 99: TR 760-62, 764-67). Alex first denied speaking with Fawaz about how the $100,000 was to be paid. (R. 99: TR 762). Then he admitted that Fawaz had asked him for a payment for services in December 1999. ("he got paid in December, so the conversation must be fresh"). (R. 99: TR 762). As to splitting the checks between Fawaz and Nesreen, Fawaz asked him to do that, and he had written both checks and booked them to consulting expenses on AIM's books. (R. 99: TR 763).

Finally, he admitted that Fawaz was not qualified to be a consultant for AIM. (R. 99: TR 767-68).

The jury received the case in the morning on Friday, May 4, 2007, and returned verdicts of guilty on both counts of the indictment late that afternoon. (R. 100: TR 887, 895-96; R. 81: Verdict).

Post-trial Proceedings, Sentencing, the Appeal

After the return of guilty verdicts on May 4, 2007, the defendant hired counsel and filed a Motion for New Trial. (R. 88: Motion). The Motion presented two grounds, insufficiency of the evidence to Count 1 (largely premised on an attack on the credibility of Mir Ali), and the failure to instruct the jury on a defense of "good faith misunderstanding of the law" as to Count 2. (Id.). After the filing of this Motion, two additional lawyers entered appearances on behalf of defendant, Alex Damra. (R. 93: Notice). The district court denied the Motion for New Trial on October 25, 2007. (R. 103: Order).

On April 2, 2008, eleven months after the guilty verdicts and five months after denial of the timely-filed Motion for new Trial, defendant filed a Motion to Dismiss the Indictment and for Reconsideration of Order Denying Motion for New Trial. (R. 108: Motion). This Motion (1) sought dismissal of the Count 1 conspiracy on the premise of United States v. Minarik, 875 F.2d 1186 (6th Cir.

1989), (2) asserted various deficiencies in the district court's instructions to the jury (which are presented in this appeal), and (3) argued that Count 2, alleging corporate income tax evasion, was duplicitous. (Id.). The district court denied this Motion on September 12, 2008. (R. 114: Order).

Shortly before the court denied this latter Motion, counsel for Alex Damra withdrew. (R. 110: Motion; R. 115: Order). Thereafter, defendant represented himself, and the case came on for sentencing on October 21, 2008. (R. 117: Minutes). At the time of sentencing, defendant under the presentence investigative report (PSR) was at offense level 19, with no criminal history, for a sentencing range of 30-37 months. (PSR, third revision, October 15, 2008).

Discussion in the sentencing hearing initially related to the addition to the tax loss of $500,000 in additional improperly-deducted consulting expenses which was unknown to the government until after the trial, and evidence on this check had not been presented to the jury. (R. 118: TR 34-6) The court raised the impact of United States v. Booker, 543 U.S. 220 (2005), on the inclusion of the $500,000 in tax loss. (Id.). After hearing argument, the court ruled in favor of the defendant, and struck the $500,000 from the tax loss computation. (R. 118: TR 35-9). This reduced the defendant's offense level by one level.

The court next turned to the two-level enhancement for obstruction of justice, U.S.S.G. § 3C1.1, which had been included in the PSR. (R. 118: TR 41). After the parties argued, the court ruled in favor of the defendant, and removed the adjustment, lowering the offense level to 16, for a range of 21-27 months. (R. 118: TR 41-60). After that ruling, the government and the defendant allocuted. (R. 118: TR 61-82). The court then sentenced defendant at the lowest end of the guideline range, 21 months in custody, followed by three years of supervised release, a fine of $50,000 and restitution of $274,389. (R. 118: TR 83-7; R. 121: Amended Judgment).

Notice of appeal was timely filed. (R. 120: Notice).

SUMMARY OF THE ARGUMENT

Defendant Alex Damra was not deprived of any right of compulsory process with respect to the deportation of his brother, Fawaz Damra. Defendant cannot show that any testimony from his codefendant was available to him, or that said testimony would have been material and favorable to him. Moreover, defendant waived any claim of deprivation of compulsory process by failing to raise the issue in a timely manner.

The district court made the proper evidentiary findings, that the United States had proven by a preponderance of the evidence that the conspiracy charged in Count 1 existed, that defendant was a member of that conspiracy, and that the statements of the unavailable codefendant were made in furtherance of the conspiracy. The statements were properly admitted.

There was no manifest miscarriage of justice in denying defendant's motion for judgment of acquittal, and motion for new trial, based on the sufficiency of the evidence. The evidence was clearly sufficient to support the convictions.

The testimony of witness Mir Ali was relevant and credible, despite his hearing problems and accented speech. The district court properly exercised her authority under Fed. R. Evid. 611(a) to assist the jury in receiving Ali's testimony,

including permitting the case agent to assist in ensuring that the witness heard and understood defendant's questions on cross-examination.

The district court's instructions to the jury fairly and accurately stated the controlling law. Viewed as a whole, the instructions were not erroneous, and were certainly not misleading or confusing. There was no error in failing to instruct the jury that it must find that the defendant "willfully" joined the conspiracy: the court's instructions covered that issue. The court's willfulness instruction obviated any need for a good faith instruction. The court was not required to instruct the jury that it must unanimously find each of the affirmative acts of evasion in Count 2, as the general unanimity instruction was sufficient. There was no requirement that the jury receive an instruction on the statute of limitations, and the court's instructions addressed that issue.

The Count 1 conspiracy properly stated an offense of conspiracy to defraud the United States. United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989), has been strictly limited to its facts. There was no confusion in the government's theory of the case and the charges, the conduct charged represented violations of multiple criminal statutes, and defendant's duties under the tax laws in light of the charges were not merely technical.

The sentencing hearing conducted by the district court was reasonable, procedurally and substantively. The defendant was sentenced at one offense level higher (16) than the correct level (15) under the court's determination of tax loss. The defendant's other objections were addressed by the court, and rejected. The court did not err in denying loss reductions on those issues.

ARGUMENTS

I. THE DEFENDANT WAS NOT DEPRIVED OF ANY RIGHT OF COMPULSORY PROCESS WITH REGARD TO THE DEPORTATION OF HIS CODEFENDANT.

A. Standard of Review

A claim of denial of a constitutional right to compulsory process is reviewed de novo. United States v. Walls, No. 95-2373, unpublished, 1998 WL 552907 (6th Cir. Aug. 11, 1998).

B. Argument

In United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982), the Court observed that "more than the mere absence of testimony is necessary to establish a violation of the right of compulsory process. Under the Sixth Amendment to the U.S. Constitution, a defendant does not have the right to compel the testimony of any and all witnesses: it guarantees him compulsory process for obtaining *witnesses in his favor*." Id., citing U.S. Const., Am at 6 (emphasis added). A defendant must make "some plausible showing" of how a deported witness' testimony "would have been material and favorable to his defense." (Id.). The Court emphasized "the responsibility of the Executive Branch faithfully to execute the prompt deportation of illegal alien witnesses upon the Executive's good-faith

determination that they possess no evidence favorable to the defendant in a criminal prosecution." Valenzuela-Bernal, supra at 872.

In United States v. McLernon, 746 F.2d 1098 (6th Cir. 1984), this Court set forth a 3-part test for the determination that the government acted in good faith: (1) the testimony from the deported witness would not have been "both material and favorable to the defense;" (2) the government did not facilitate the prompt deportation of the illegal-alien witness; and (3) the witness' prompt deportation did not deprive the defendant and his attorney of "an opportunity to interview the witness to determine precisely what favorable evidence he might offer." McLernon, supra at 1121, citing Valenzuela-Bernal at 872-73.

The Sixth Amendment right of compulsory process can be waived. Tompsett v. State of Ohio, 146 F.2d 95, 98 (6th Cir. 1945); United States v. Theresius Filippi, 918 F.2d 244, 248 (1st Cir. 1990); Eaton v. United States, 437 F.2d 362, 363 (9th Cir. 1971).

It is absolute speculation that Alex Damra, even with a subpoena, could have obtained the testimony of his codefendant brother. Beyond that, the defendant could not have met any of the requirements of Valenzuela-Bernal and McLernon. Fawaz Damra was not an ordinary witness. He was a codefendant, with a Fifth Amendment right not to testify. Had Fawaz testified, he would have

been impeached with his conviction for naturalization fraud. Moreover, Fawaz Damra had a pending Motion for Separate Trial, filed some three weeks after the arraignment, which emphasized the incriminating impact of the three interviews Alex Damra gave to law enforcement agents. Fawaz certainly did not intend to go to trial with Alex.

The defendant cannot show that the testimony of his brother, even if obtained, would have been material and favorable to Alex's defense. The record was replete with evidence about the lack of any relationship and any communication between the two codefendants. In his opening statement, Alex said "I cannot call him anything other then my brother, but we haven't talked in years. ... And it's a divorce, never talked to the man after he got his money." (R. 96: TR 175). In his interviews with SA Rasoletti, and in his testimony, Alex called his brother a thief, a loser, coward, unqualified, and lazy. In spite of the relationship, had Fawaz testified, his evidence would not have been helpful: he would have had to admit (1) talking to Alex about the year-end payment of $100,000, and especially splitting that money between Fawaz and his wife Nesreen; (2) the lack of any evidence that he and his wife were consultants to AIM; and (3) that he devised the fraudulent list of Schedule C expenses used to lower the income tax on the $100,000. Finally the United States was not in

possession of statements or other evidence from Fawaz, that would have been exculpatory to Alex.

Alex Damra could not have shown that the United States "facilitated" the prompt deportation of his brother. ICE commenced its deportation case in late November 2005, and Fawaz was taken into custody and held without bond. In early 2006, Fawaz stipulated to removal from the United States, and remained in custody pending approval of his country of origin for his entry. The instant case was indicted on July 25, 2006, and Fawaz remained in ICE custody; he continued in that status through January 2, 2007, when Israel permitted his entry through Jordan.[1] In no sense did the United States "facilitate" any prompt deportation of Fawaz Damra, following the indictment.

As to the third and final factor under Valenzuela-Bernal and McLernon, Alex Damra could not have shown that he was deprived of an opportunity to interview his brother. Alex knew as early as the February 7, 2005, interview with

---

[1]Contrary to the insinuations of defendant's counsel, there were serious and imposing national security concerns with Fawaz' deportation, that led to a one-year delay in getting Israeli authority for the transit. With Fawaz' involvement in fundraising and recruiting for the Palestinian Islamic Jihad, there were safety and security concerns for the receiving Israeli agents, and the transporting ICE agents, that mandated an extremely-short window for the deportation, and little or no notice beyond those participating in the deportation decision; the U.S. Attorney's office certainly had no ability to stop the process.

SA Rasoletti, that the $100,000 transaction with Fawaz was at issue. Fawaz was out-of-custody during this time, until November 25, 2005, when ICE arrested him. Even after that, he was available through family members, and standard custodial visits. Even after deportation, Alex Damra could easily have sought through family members a Fed. R. Crim. P. 15 deposition of his brother, if his brother had any favorable evidence to offer on Alex's behalf.

On February 13, 2007, after the deportation of Fawaz Damra, Alex Damra addressed the Court:

> Now, if I need that person to be here, your Honor, do I need to file a motion for it ... If he is critical for Count 1, I have to question him ... How do I question him about an agreement if he is not here?

(R. 58: TR 24).

Despite defendant's comments, he never filed any motion seeking to compel the presence or testimony of his brother, and never made, nor attempted to make, the requisite 3-part showing under McLernon.

Defendant clearly understood how to file motions: he filed motions for a change of venue (R. 18: Motion), to reassign the case (R. 49: Motion), to submit materials by fax (R. 62: Motion), and objecting to the receipt of hearsay evidence (R. 72: Motion). He never permitted the Court the courtesy or opportunity to

decide whether Fawaz Damra was an essential witness for Alex Damra's defense, or that Fawaz' testimony was available, material, and favorable.

That defendant waived this issue is even more clear by his failure to raise the issue until he filed on 12/30/2008 a Supplemental Motion for Bond Pending Appeal. (R. 131: Supplemental Motion). No mention was made of any denial of compulsory process in defendant's Motion for New Trial, filed May 24, 2007 nor in defendant's Motion to Dismiss the Indictment and/or for Reconsideration of Order Denying Motion for New Trial, filed April 2, 2008. (R. 88, 108: Motions).

Aside from being utterly unable to demonstrate that Fawaz Damra's testimony was available to him, and would have been material and favorable to the defense, the defendant waived any claim of a violation of his rights.

II. THE DISTRICT COURT PROPERLY FOUND THAT THE CONSPIRACY ALLEGED IN COUNT 1 EXISTED, THAT THE DEFENDANT WAS A MEMBER OF THE CONSPIRACY, AND THAT THE STATEMENTS OF A CODEFENDANT NOT ON TRIAL WERE MADE IN FURTHERANCE OF THE CONSPIRACY, AND ACCORDINGLY PROPERLY ADMITTED COCONSPIRATOR STATEMENTS AT TRIAL.

A. Standard of Review

Admission of statements under Rule 801(d)(2)(E) is reviewed for clear error. United States v. Gessa, 971 F.2d 1257, 1260-61 (6th Cir. 1992).

B. Argument

The defendant asserts that the court erred in admitting, under Fed. R. Evid. 801(d)(2)(E), coconspirator statements made by unavailable codefendant Fawaz Damra to tax return preparer Mir Ali. In particular, defendant posits that there was no corroboration of the statements by independent evidence, and that the testimony of Mir Ali was "incoherent" and unreliable. The decision that particular statements meet the requirements under Fed. R. Evid. 801(d)(2)(E), is a factual determination governed by a clearly erroneous standard of review. Gessa, 971 F.2d at 1261, citing Mahoney v. United States, 831 F.2d 641, 645 (6th Cir. 1987). Those requirements include proof, by a preponderance of the evidence, that (1) the conspiracy existed, (2) that defendant was a member of the conspiracy, and (3) that the co-conspirator's statements were made in furtherance of the conspiracy. United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979).

The district court in this case made the appropriate findings, which were not clearly erroneous. The United States moved in limine to establish the admissibility of evidence of acts and statements of Fawaz Damra, as against Alex Damra. (R. 59: Trial Brief). The court ruled that subject to the procedures set forth in Vinson, supra, i.e., the government could present the evidence at trial. Vinson, 606 F.2d at 152-53. (R. 68: Order).

The United States put on its evidence at trial, and before the jury retired to deliberate, the court ruled:

> The Court has received that evidence. The Court hereby concludes that the prosecution has borne its burden of proof, and finds the unavailable co-conspirator evidence introduced to the jury admissible and available for presentation to the jury under that Rule 801(d)(2)(E). ... Accordingly, the Rule 801 evidence will be presented to the jury.

(R. 99: TR 791-92).

The United States responds to defendant's attack upon the credibility of Mir Ali in Argument IV, infra. The district court succinctly rejects defendant's contentions, finding that "Mir Ali credibly maintained the central thread of his testimony." (R. 103: Order, at 10). Defendant concedes that the court, in making its determinations, may consider the statements themselves. United States v. Young, 553 F.3d 1035, 1045 (6th Cir. 2009). Beyond that, though, there was clearly independent corroborative evidence of the statements: defendant's extensive admissions to SA Rasoletti: that defendant hired his brother as a "consultant," that the brother provided no clients, and did no work, but demanded payment late in 1999; that Fawaz requested the split of AIM funds, $50,000 apiece between him and his wife; and that Alex paid the money and deducted it as consulting expense on AIM's books and tax return. (R. 98: TR 524-27).

There was also corroboration of the statements of Fawaz Damra to Mir Ali, in defendant's own testimony that he paid the $100,000 to Fawaz and his wife because that's how Fawaz requested the money. (R. 99: TR 762-64). Also, Bernard Niehaus corroborated the Fawaz statements to Mir Ali, in that Niehaus stated that Fawaz told him the $100,000 was income from computer consulting, and that it was from someone he was related to, "out west." (R. 98: TR 462-63).

Defendant also attacks a premise of Mir Ali's testimony, that Fawaz was reporting funds from Alex because the latter was in a higher tax bracket; Alex had in 1999 $65,000 in wages, not much more than the $42,254 reported by Fawaz. (Brief, at 28-9; GX 6, Apx. 181; GX 27, Apx. 199). This is misleading: while Alex Damra for 1999 was reporting only $65,000, he was paying hundreds of thousands of dollars to family members, opening a personal brokerage account, and transferring funds to his new corporation. (GX 81, Apx. 303). Alex told SA Rasoletti that he had "amassed" between $7-800,00 in AIM, as of the year 2000. (R. 98: TR 523-24). In his own testimony, Alex told the jury "there's $250,000 right there. This is money that came from California, went into Eigen Software, the company I currently own. This is my share of what profit I made out of the old Applied Innovation Management in California. There was also another million dollars that got transferred, as well, into the business. I have another $150,000."

(R. 99: TR 745). There was no question, based upon the evidence, that Alex Damra had substantially more income, wealth, and resources than did Fawaz Damra.

III. THE EVIDENCE WAS CLEARLY SUFFICIENT TO SUPPORT THE CONVICTIONS, AND THE DISTRICT COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AND MOTION FOR NEW TRIAL.

A. Standard of Review

Failure to renew a motion for judgment of acquittal at the close of all evidence limits review of the sufficiency of the evidence to whether there has been a "manifest miscarriage of justice." United States v. Khalil, 279 F.3d 358 (6th Cir. 2002); United States v. Morrow, 977 F.2d 222 (6th Cir. 1992) (en banc).

B. Argument

The defendant asserts error in the denial of his motion for judgment of acquittal, and for new trial. It is assumed defendant refers to his Rule 29 motion articulated at the close of the United States' case. (R. 99: TR 715-16, 718-20). Defendant also challenged the sufficiency of the evidence on Count 1 in his Motion for New Trial. (R. 88: Motion). Review of the sufficiency of the evidence is limited by defendant's failure to renew his motion for judgment of acquittal after the close of all evidence. (R. 99: TR 792-93). Khalil, 279 F.3d at 368;

Morrow, 977 F.2d at 230. Failure to so renew operates as a waiver of a challenge to the sufficiency of the evidence absent a "manifest miscarriage of justice." (Id.). A manifest miscarriage of justice "exists only if the record is devoid of evidence pointing to guilt." United States v. Price, 134 F.3d 340, 350 (6th Cir. 1998).

The court found that "even discounting Mir Ali's testimony entirely, the remaining evidence is so substantial that it does not present the 'extraordinary circumstance' where the evidence 'preponderates heavily against the verdict/" (R. 103: Order, at 6). The evidence included the admissions made by the defendant in the February 7 and April 21, 2005, interviews with SA Rasoletti. The evidence also included the statements made by Fawaz to his tax return preparers, including Fawaz Damra's insistence on reporting the $100,000, as computer consulting income, to accord with Alex's deduction of those funds on the AIM 1999 corporate tax return as consulting expenses. Mir Ali testified that Fawaz was reporting the $100,000 on Fawaz' return, not because he earned the money, but because his brother in California was in a higher tax bracket and wanted to shift the income.

The jury also heard Alex Damra deny talking to Fawaz at year-end 1999, but then quickly admit that Alex paid the money as he did because "that's what Fawaz asked him to do." (R. 99: TR 762-63). Alex told SA Rasoletti that Fawaz

called him near the end of 1999 and asked for payment for his services, and Alex refused. (R. 98: TR 524-25). Alex then paid the money, not because Fawaz had earned it, or was qualified to be a computer consultant, but the Damra family "guilted him" into a payment which Alex made "to get Fawaz away from his business." (Id.). Finally, the jury was entitled to discredit Alex Damra's testimony, in denying that he made the cited admissions to the special agents, but also in the false story that his payment to Fawaz was a return on Fawaz' investment in AIM.

A conspiracy may be inferred from acts done with a common purpose, or from circumstantial evidence that can reasonably be interpreted as participation in a common plan. United States v. Barger, 931 F.2d 359, 369 (6th Cir. 1991). In other words, a defendant's agreement to participate in a conspiracy can be inferred from his actions. United States v. Hughes, 895 F.2d 1135, 1141 (6th Cir. 1990).

The evidence on Count 1 was clearly sufficient to fully support defendant's conviction.

IV. THE DISTRICT COURT PROPERLY ADMITTED THE TESTIMONY OF WITNESS MIR ALI, AND THE DISTRICT COURT APPROPRIATELY EXERCISED DISCRETION UNDER FED. R. EVID. 611(a).

A. Standard of Review

The admission of evidence by the trial court, including the testimony of witnesses, is reviewed for abuse of discretion. United States v. White, 492 F.3d 380, 398 (6th Cir. 2007). The trial court has considerable discretion under Fed. R. Evid. 611, and rulings thereunder will not be the basis for reversal of a criminal conviction unless the defendant's substantial rights are affected. United States v. Terry, 729 F.2d 1063, 1067 (6th Cir. 1984); Vinson, 606 F.2d at 152.

B. Argument

The defendant contends that the court erred in permitting the testimony of Mir Ali, which defendant claims was facilitated by "translation" of the testimony by a government agent, without compliance with Fed. R. Evid. 604, regarding interpreters. The United States responds that Mir Ali's testimony was admissible and helpful to the jury, in spite of language and speech difficulties, and that the district court properly exercised her authority under Fed. R. Evid. 611(a) in the accommodations made for this witness. Defendant's reliance on Fed. R. Evid. 604 is misplaced, as the witness was testifying in English, and SA Rasoletti was not "translating" testimony.

As has been observed, Mir Ali had hearing aid battery problems, and an accented speech pattern, both of which were apparent from the transcript of his

testimony and the court reporter's difficulty from time to time hearing the witness. Despite the challenges, the direct examination was concluded, and a substantial portion of cross-examination completed, without any special accommodations from the trial court. Only when Mir Ali was required to return the following morning, to complete cross-examination, did the court implement several measures:

> to accommodate these difficulties, including situating Mir Ali so that he might hear better and placing Special Agent Rasoletti nearby to, when necessary, repeat Alex Damra's questions during the defendant's cross-examination. (R. 98: TR 366-457). These arrangements were made for the jury, to facilitate the testimony of Mir Ali in light of Alex Damra's extraordinarily rapid speech pattern. (R. 103: Order, at 9-10).

SA Rasoletti, who was very familiar with the witness due to prior dealings during the investigation and pretrial proceedings, was permitted by the court to assist, from the standpoint of helping the witness understand the defendant's questions, and that the jury and the court reporter understood the witness' answers. The trial court later complimented the agent's accuracy in performing those tasks. (R. 103: Order, at 10). Defendant did not object to any of the accommodations set up by the district judge.

The trial court's accommodations for this witness represented a textbook example of the exercise of authority and discretion under Fed. R. Evid. 611(a). That Rule provides

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from hearsay or undue embarrassment.

A district judge has broad discretion in managing a docket, including trial procedure and the conduct of a trial. United States v. Gray, 105 F.3d 956, 964 (5th Cir. 1997), citing Sims v. ANR Freight System, Inc., 77 F.3d 846, 849 (5th Cir. 1996). This discretion extends to "commenting on the evidence, questioning witnesses to clarify facts or even elicit facts not yet presented, and moving along the trial by means of interruptions and the imposition of time limits on counsel." (Id.). Under Rule 611, "a trial judge has considerable discretion and a judge's rulings will not be the basis for reversal of a criminal conviction unless a defendant's substantial rights are affected." Terry, 729 F.2d at 1067, citing Vinson, 606 F.2d at 152.

The trial court's accommodations for Mir Ali were for the benefit of the jury, did not constitute an abuse of discretion, and did not affect the defendant's

substantial trial rights. (R. 103: Order, at 10-11). Moreover, despite the challenges faced by the court with this testimony, Mir Ali adhered to the essential facts and key points of his testimony: that Fawaz wanted to report $100,000 received from his brother in California, who was in a higher tax bracket, and that this money was not earned by Fawaz. The defendant clearly understood the consequences of Ali's testimony: "Sir, do you understand your statement when you told Fawaz in reference to that this money came from - he was doing it for his brother, who is in a higher tax bracket, what is the consequences and the damage to his brother?" (R. 98: TR 390).

It is all the more remarkable that Mir Ali's testimony was consistent in the face of the defendant's repeated attempts to re-phrase and re-characterize his testimony in follow-up questions. (R. 98: TR 386, 389, 391, 394-95).

Defendant argues that the use of SA Rasoletti as a "facilitator" was in violation of Fed. R. Evid. 604. While the court referred to SA Rasoletti as an interpreter, he was not translating from a foreign language. Ali was testifying in English. There was no foreign language for which SA Rasoletti needed to qualify and testify as an expert. Given the lack of any objection at trial, the court's approach is reviewed for plain error. United States v. Sandoval, 347 F.3d 627, 632 (7th Cir. 2003); United States v. Pluta, 176 F.3d 43, 51 (2d Cir. 1999).

As a final matter, there was no credibility issue regarding the case agent, SA Rasoletti. The trial court specifically noted that "a review of the transcript indicates Agent Rasoletti's high degree of fidelity in accurately reproducing the defendant's questions to Mir Ali." (R. 103: Order, at 10). Moreover, SA Rasoletti testified to the damaging admissions made by defendant in the February 7 and April 21, 2005 interviews. The defendant denied making most of those admissions. (R. 99: TR 761-68). The jury resolved any dispute as to credibility in finding the defendant guilty on both counts of the indictment.

V. THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY FAIRLY AND ADEQUATELY STATED THE CONTROLLING LAW, AND WERE NOT CONFUSING, MISLEADING, AND PREJUDICIAL; THERE WAS NO PLAIN ERROR IN FAILING TO INSTRUCT THE JURY AS SOUGHT BY DEFENDANT AFTER TRIAL.

A. Standard of Review

Where there was no objection to the instructions to the jury, review is limited to whether, taken as a whole, the instructions fairly and adequately stated the controlling law. United States v. Sheffey, 57 F.3d 1419, 1429 (6th Cir. 1995). A reviewing court may reverse only if, viewed as a whole, the instructions were confusing, misleading, and prejudicial. United States v. Clark, 988 F.2d 1459, 1468 (6th Cir. 1993).

B. Argument

Near the end of government's case-in-chief, the court, noting that the parties had had the jury charge "for a while," asked if there were objections; the defendant responded "[c]an I give my answers to you, Your Honor, in about 10, 15 minutes, after Mr. Moroney finish with the witness?" (R. 98: TR 541). The defendant never provided the court with any objections. After instructions were given to the jury, the court further inquired. "I just want to give you an opportunity to put anything you want to on the record regarding the charge up to this point. I always ask. Is there anything we forgot?" The defendant responded: "There's nothing for me, Your Honor." (R. 100: TR 879).

Given the defendant's failure to object to the charge, and, in fact, agreement to the charge, review is for plain error. United States v. Hatchett, 918 F.2d 631, 643 (6th Cir. 1990), Fed. R. Crim. P. 30(d). "This circuit has set a high standard for reversal of a conviction on the grounds of instruction." Sheffey, 57 F.3d at 1429.

As to his claims that the court erred in failing to provide certain instructions, the defendant must show that the omitted instructions did "seriously affect the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732 (1993). Reversal on a claim of omitted instructions is

permissible only if the charge fails to accurately reflect the law." United States v. Busacca, 863 F.2d 433, 435 (6th Cir. 1988).

The trial court's instructions accurately reflected the law, and were not in any sense confusing or misleading. None of defendant's instructions were required, and the failure to provide those instructions did not constitute plain error.

The defendant claims that the court's instructions were deficient in failing to instruct that the defendant must willfully be a member of the alleged conspiracy. Defendant first raised this claim in his second post-trial motion, which was filed 11 months after the verdicts. Under plain error review, conviction can be reversed on this ground "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." United States v. Harrod, 168 F.3d 887, 892 (6th Cir. 1999), quoting Beard v. Norwegian Carribean Lines, 900 F.2d 71, 72-73 (6th Cir. 1990).

The court's instructions included the provision "you must decide whether the government has proved that the defendant knowingly and voluntarily joined that agreement," and that the defendant "knew the conspiracy's main purpose, and that he voluntarily joined it." (R. 99: TR 812). The conspiracy instructions mirrored the Pattern Instructions of this Court. Sixth Circuit Pattern Instructions,

§3.01B Conspiracy to Defraud the United States - Basic Elements; § 3.03 Defendant's Connection to the Conspiracy. (R. 99: TR 810-15).

While adherence to the Pattern Instructions is not determinative, the extent to which instructions "mirror" the Pattern Instructions is an important factor in determining whether any particular instruction is misleading or erroneous. United States v. Blackwell, 459 F.3d 739, 765 (6th Cir. 2006).

The court's instructions herein matched those approved in United States v. Crossley, 224 F.3d 847, 856 (6th Cir. 2000), and United States v. Milligan, 17 F.3d 177, 182 (6th Cir. 1994). Moreover, this Court has approved instructions (identical to those in this case) regarding connection to the conspiracy, i.e., that the government must show that a defendant knew the object of the conspiracy and "voluntarily associated himself with it to further its objectives." United States v. Gibbs, 182 F.3d 408, 421 (6th Cir. 1999), quoting United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991). Finally, in United States v. Harris, 200 Fed. Appx. 472,**26 (6th Cir. 2006), the Court defined willfully as acting "voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness." Harris at 491, n 2. The court's charge herein matched those requirements in instructing the jury that the government had to

show that the defendant "knowingly and voluntarily joined the conspiracy" and that he "voluntarily joined it intending to help advance or achieve its goals."

The Court's instructions in this regard were neither erroneous, nor misleading and confusing.

The defendant also claims that the district court erred in failing to instruct that the government had the burden to negate defendant's good faith. Defendant raised a claim as to the failure to provide a "good faith misunderstanding of the law" instruction, in his timely-filed Motion for New Trial. (R.89: Motion). He renewed this claim in his second post-trial motion, filed in April 2008. (R. 108: Motion). This appeal "restates" defendant's position, now seeking an instruction that the government had to negate defendant's good faith. Because the court's instructions were not erroneous, and certainly not misleading, defendant's claim in this regard should be rejected.

The trial court gave a standard willfulness instruction, pursuant to United States v. Pomponio, 429 U.S. 10 (1976), in connection with Count 2. The jury was instructed that in order to obtain a conviction on Count 2, the government had to prove beyond a reasonable doubt that defendant acted "willfully," meaning "to act voluntarily and deliberately, and intending to violate a known legal duty." (R. 99: TR 816-17). The U.S. Supreme Court in Pomponio held: "the trial judge in the

instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary." Pomponio, 429 U.S. at 12-13.

With respect to the Count 1 conspiracy, there was no requirement to plead and prove any intent element of a specific substantive statute, and no requirement to prove that the conspirators were aware of the criminality of their objective. United States v. Khalife, 106 F.3d 1300, 1303 (6th Cir. 1997); United States v. Collins, 78 F.3d 1021, 1038 (6th Cir. 1996).

A jury's conclusion that a defendant acted "willfully" would necessarily negate any possibility of "good faith" in filing false tax returns. United States v. Tarwater, 308 F.3d 494, 510 (6th Cir. 2002); United States v. Sassak, 881 F.2d 276, 280 (6th Cir. 1989). An instruction on good faith is unnecessary when a willfulness instruction has been given. United States v. Ervasti, 201 F.3d 1029, 1041 (6th Cir. 2000). There is no need to give a good faith instruction, based upon Cheek v. United States, 498 U.S. 192 (1991), where a defendant was convicted under a criminal statute's "straightforward prohibition against making false, fictitious, or fraudulent statements to the government" in filing false federal tax returns. United States v. Hildebrandt, 961 F.2d 116, 119 (8th Cir. 1992).

Even had the defendant requested a "good faith misunderstanding of the law" defense instruction, it would not have been warranted on this trial record. He

argued that he was the victim of a political prosecution, only charged because of his notorious brother; that his brother and wife were consultants; that the $100,000 paid to Fawaz was actually a return of the latter's investment in AIM; that he had overpaid his taxes; and, among others, that he was sending money to his father in the Middle East. None of these defenses bear any relationship to a good faith misunderstanding of the law.

The defendant was not entitled to a good faith instruction, nor an instruction on the government's alleged duty to rebut non-existent good faith.

The defendant further asserts that the court's instructions were deficient in failing to instruct that, relative to Count 2, the jury must be unanimous on each of the two alleged affirmative attempts to evade or defeat corporate income tax. The court was not required to give any special unanimity instruction, and the jury was properly instructed that its verdict on Count 2 needed to be unanimous.

Count 2 alleged a willful attempt by Alex Damra to evade or defeat a large part of the corporate income tax, due and owing from AIM, for calendar year 1999; and further alleged that the defendant attempted to evade and defeat said tax by (a) filing and causing to be filed a false and fraudulent AIM corporate income tax return, on or about April 20, 2000, and (b) by causing funds paid to Fawaz Damra to be falsely reported as Schedule C gross receipts on the latters 1999

income tax return, filed on or about August 7, 2000. The two affirmative acts were plead in the conjunctive. The jury was told: "This is a criminal case, which requires a unanimous verdict. It's your duty as jurors ... to make every reasonable effort to reach unanimous agreement," and "[e]ither way, guilty or not guilty, your verdict must be unanimous." R. 100: Trial, TR 880-81). With respect to the verdict forms, those must reflect "your unanimous verdict." (R. 100: TR 883).

The trial court found that the "two affirmative acts enunciated in Count 2 were properly presented to the jury as collectively essential in the indictment itself, in the arguments and evidence presented to the jury, and in the jury instructions." (R. 114: Order, at 18).

In the instructions for Count 1, the court instructed:

> For you to return a guilty verdict on the conspiracy charge, the government must convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of advancing or helping the conspiracy after 25 July 2000.

(R, 100: Trial, TR 814).

Since overt act "q" referred to Fawaz Damra's 1999 tax return filed August 7, 2000 (and the final alleged overt act "r" was not argued by the United States), it is presumed that the jury followed the court's instructions, and found that this return was an act undertaken in furtherance of the conspiracy. See, e.g., Yates v. Evatt,

500 U.S. 391, 403 (1991); United States v. Sherlin, 67 F.3d 1208, 1215 (6th Cir. 1995).

Defendant cites United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988). The Court therein cited the "general rule developed in other circuits is that when an indictment count provides two or more factual bases ("distinct conceptual groupings" in Judge Wisdom's phrase) upon which a conviction could rest, only a general instruction on unanimity is necessary." Duncan, 850 F.2d at 1113-14. The Court listed three exceptions to the general rule: (1) the nature of evidence is exceptionally complex, (2) there is variance between the indictment and proof at trial, or (3) there is tangible indication of jury confusion. Id. (citations omitted). Duncan is clearly distinguishable from the instant case because Duncan involved pretrial motion practice on this issue, and because there was a question from the jury, during the second day of difficult deliberations, as to whether the jury must find both alleged instances of false expenses. Duncan, 850 F.2d at 1109-10. These factors are not present in this case.

In United States v. Hook, 781 F.2d 1166 (6th Cir. 1986), the defendant argued that because his evasion of payment and failure to file offenses involved conduct occurring before and after the applicable statute of limitations, the jury may therefore have based its verdict solely on facts which were outside the statute

of limitations. Hook, 781 F.2d at 1170-71. The court, noting the sparing use of the "plain error" doctrine where a jury instruction has not requested, found the "omission of statute of limitations instructions merely created a situation in which the jury could have convicted Hook while finding that the crimes occurred before November 16, 1977, a possibility we find too speculative to require reversal based on plain error."

Hook, 781 F.2d at 1173.

In this case, there was no requirement to provide a special unanimity instruction, and it is entirely speculative to assert that the jury did not follow the instructions and unanimously find that the Fawaz Damra 1999 return was an overt act in furtherance of the conspiracy, and an affirmative act in the evasion scheme.

The defendant contends that the court erred in failing to give a statute of limitations instruction with regard to Count 2 of the indictment. There was no plain error in failing to give a specific instruction, and the defendant failed to raise this issue with the trial court in time and in form to permit resolution prior to trial. In addition, the court's instructions addressed this issue, and therefore the instructions were neither erroneous nor misleading.

Alex Damra did express, on a number of occasions, his view that the statute of limitations had expired, as to both counts of the indictment. The statute of

limitations for tax offenses is six years. 26 U.S.C. § 6531. The statute is triggered by the last affirmative act of evasion in furtherance of the crime. United States v. Dandy, 998 F.2d 1344, 1355 (6th Cir. 1993). The indictment herein was returned on July 25, 2006. The filing by Fawaz Damra of a fraudulent 1999 tax return, with a Schedule C reporting $100,000 paid by Alex Damra as consulting income, with non-existent expenses claimed, was asserted as an overt act in furtherance of the conspiracy charged in Count 1, and as an affirmative act of evasion in Count 2. Trial evidence showed that Fawaz Damra's 1999 tax return was given to him in final form, for filing, by Bernard Niehaus on July 31, 2000; the return was mailed August 3, 2000; and it was received by the Internal Revenue Service on August 7, 2000. These acts were thus within the six-year statute of limitations.[2]

On November 27, 2006, Alex Damra advised the court: "I've been working on [a] motion to dismiss the case on the ground of statute of limitation." (R. 128: TR 6). He continued: "I only have one question for Mr. Moroney ... If there's a problem in the indictment because it's very obvious that one of them is completely - the statute of limitation has run out .... I don't want to keep filing motions if indeed it's out of statute ... We are supposed to file a motion ..." (R. 128: TR 7).

---

[2]The trial evidence further showed that a refund check of $3,635 was printed September 1, 2000, and mailed to the Damras thereafter. (R. 97: TR 307-08; GX 29, Apx. 235).

Counsel for the United States then explained the significance of the Fawaz Damra 1999 return to Count 2. (R. 128: TR 8).

On February 13, 2007, the defendant again raised the statute of limitations issue: "Your Honor, I want to make a last point: If I want to fight this on statute of limitation, in two seconds, this matter is over, but I don't want to do that. I want to have the jury hear this and try it." (R. 58: TR 24).

On April 23, 2007, the United States moved in limine to admit evidence of the acts and statements of Fawaz Damra, including his statements to Mir Ali and Bernard Niehaus, and his submission of his 1999 tax return. (R. 59: Trial Brief). On April 26, 2007, the court ruled that the government has made a requisite threshold showing that Fawaz' acts and statements were admissible. (R. 68).

The court then found:

> [t]he IRS Service Center's "receipt of Fawaz Damra's 1999 tax return on 7 August 2000 has implications for the statute of limitations in this matter. To the extent that Fawaz Damra's act of filing a tax return which falsely reported AIM corporate funds as personal consulting income was an act in furtherance of the conspiracy to defraud the United States (Count 1) and the AIM corporate tax evasion scheme (Count 2), then the six-year statute of limitations clock did not begin to run until 7 August 2000. Accordingly, the 25 July 2006 indictment against Alex Damra would be regarded as timely, pursuant to 26 U.S.C. § 6531."

(R. 68: Order, at 5).

The defendant never filed a motion seeking dismissal of the indictment on the grounds that the statute of limitations had expired. The court considered the issue in the context of the government's request to admit statements and acts of codefendant Fawaz Damra, and the court ruled those statements and acts admissible, with obvious implications for the statute of limitations. The defendant then asserted, in his opening statement, "the statute of limitations has expired." (R. 96: TR 169-70). The government objected, and the court, viewing the issue as a matter of law, ruled "[w]e've already dealt with that question, and you know we've dealt with that question." Id. The defendant professed not to be aware that the court had decided the issue, and the court responded: "[y]ou should be aware of it. But in any event, the statute of limitations is not in issue in this case." Id.

The court instructed the jury:

> There's a limit on how much time the government has to obtain an indictment, this is called statute of limitations. For you to return a guilty verdict on the conspiracy charge, the government must convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of advancing or helping the conspiracy after 25 July 2000.

(R. 100: TR 813-14).

Given that the defendant never properly presented the issue to the court for a pretrial ruling, on an alleged defect in the indictment, there was no error in

failing to give a jury an instruction on the statute of limitations. Moreover, since the court addressed the issue in its charge, the instructions were certainly not erroneous, and not misleading as to what the jury was required to find.

VI. COUNT 2 PROPERLY STATED A CONSPIRACY TO DEFRAUD THE UNITED STATES, AND THE DISTRICT COURT DID NOT ERR IN REFUSING TO VACATE THE CONVICTION AND DISMISS THAT COUNT OF THE INDICTMENT.

A. Standard of Review

The sufficiency of an indictment is reviewed de novo. United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999).

B. Argument

Defendant argues that the Count 1 conspiracy fails to state an offense, and should be dismissed, pursuant to Minarik, supra. The court rejected these contentions in denying defendant's second post-trial motion. (R. 114: Order). Predictably, defendant now attempts to fit the instant case into Minarik's constraints, and thereby avoid the clear pattern of case law since 1989 which strictly limits Minarik to its particular facts. Defendant argues that the instant case relates to a single statutory violation, tax evasion, and that the government's theory of the case and the charge was somehow confusing. Defendant is wrong on both points.

Khalife, 106 F.3d at 1306, states that "the Minarik requirement of mutual exclusivity [that a case must be charged only under the defraud clause, or the offense clause] is dicta, and ... we have subsequently confined Minarik to its facts." Khalife distinguished Minarik, which involved a narrow conspiracy to conceal proceeds of a real estate transaction to prevent a levy by the IRS, on three grounds: (1) in Minarik there was a "great deal of confusion resulting from the government's shifting theories of prosecution," (2) defendant's conduct in Minarik consisted of one limited act (which violated one specific statute, 26 U.S.C. § 7206(4)), and (3) the Minarik defendant's duties were "sufficiently technical to warrant more specific notice." Khalife, 106 F.3d at 1304.

In the instant case, despite defendant's attempt to manufacture confusion about the government's theory of the case, the United States' approach was consistent, clear and straightforward. The conspiracy charge was laid out over seven pages, with a defined "Object of the Conspiracy" and a clear "Manner and Means of the Conspiracy." (R. 1: Indictment). The government's case was presented in a consistent manner through opening statement, presentation of the evidence, and closing argument. The trial court found: "in this instance, the government maintained a consistent theory predicated on Count 1 of the indictment ... Any confusion [defendant] exhibited between the conspiracy and

evasion counts of the indictment against him were not reflected in either the government's theory of the case or the factual circumstances presented to the jury." (R. 114: Order, at 7).

Defendant's conduct went beyond corporate income tax evasion; his diversion of corporate funds for personal purposes, such as payments to family members, implicated not only personal income tax evasion, but also the filing of false personal tax returns (violations of 26 U.S.C. §§ 7201 and 7206(1)). Fawaz Damra submitted a false individual income tax return, in violation of 26 U.S.C. § 7206(2). There were false statements made to the agents in the case, including claims that payments made to Fawaz Damra were for return of his investment in AIM, and that payments were proper consulting expenses. There were myriad examples in the evidence of obstructive conduct, such as failure to document payments with Form 1099s; failure to account for overseas payments to non-U.S. citizens; and false entries in corporate books and records, treating family payments and personal diversions as consulting expenses. In all, the conduct involved violated multiple statutes. Use of the defraud clause is appropriate and warranted in such circumstances. United States v. Kraig, 99 F.3d 1362, 1367 (6th Cir. 1996); United States v. Sturman, 951 F.2d 1466, 1474 (6th Cir. 1992); United States v. Mohney, 949 F.2d 899, 903 (6th Cir. 1991).

Finally, unlike Minarik, 875 F.2d at 1195, the duties of the defendants herein were far from "technical and difficult to discern." This case went to the heart of the basic requirements of the federal income tax system, involving as it did the defendant's duties to keep accurate books and records, and file accurate tax returns with a properly determined tax liability.

The conspiracy charge in Count 1 was properly charged under the "defraud clause."

VII. THE DISTRICT COURT IMPOSED A REASONABLE SENTENCE, PROPERLY CONSIDERED DEFENDANT'S OBJECTIONS, AND ACCURATELY DETERMINED TAX LOSS WITH THE SOLE EXCEPTION BEING THAT DEFENDANT'S OFFENSE LEVEL UNDER U.S.S.G. § 2T4.1 WAS LEVEL 15, AND NOT LEVEL 16.

A. Standard of Review

When reviewing sentencing decisions, this Court reviews the district court's factual findings for clear error and its conclusions of law de novo. United States v. Hazelwood, 398 F.3d 792, 795 (6th Cir. 2005). The Court reviews the district court's sentencing determination, "under a deferential abuse-of-discretion standard," for reasonableness. United States v. Lalonde, 509 F.3d 750, 768-69 (6th Cir. 2007).

B. Argument

Reasonableness "contains both substantive and procedural components." Lalonde, 509 F.3d at 768-69. In this case, with the exception of an error of one level in the determination of offense level, discussed infra, the trial court's sentencing was eminently reasonable, in process and substance.

It is difficult to conceive of a sentencing process that could have been more respectful of a defendant's rights. Verdicts were rendered May 4, 2007, and sentencing was finally completed on October 21, 2008. The defendant engaged a lawyer, then added two more lawyers, then discharged all his lawyers, and represented himself in the conclusion of his sentencing. He filed two post-trial motions. The defendant filed an extensive Sentencing Memorandum, with numerous exhibits. (R. 101: Sentencing Memorandum; R. 102: Supplement; R. 105: Supplement). The presentence report was initially written June 15, 2007, then revised October 22, 2007, revised again on October 30, 2007, and for a third time on October 15, 2008. (PSR, 3d revision).

The trial court began the sentencing proceeding on October 29, 2007, and then adjourned to permit the defendant to submit additional materials and information on the calculation of tax loss. (R. 111: TR 24-29). Shortly thereafter, the court again adjourned the sentencing hearing in order to permit the defendant

to submit tax returns and financial materials. (R. 107: Order). The filing of defendant's second post-trial motion on April 2, 2008, resulted in a further adjournment. (Docket: 04/21/2008).

At the resumed sentencing hearing, the court raised an issue under United States v. Booker, 543 U.S. 220 (2005), as to the propriety of including in tax loss the $500,000 additional AIM check, written by defendant on December 30, 1999, deducted on AIM's books and records as consulting expense, and deposited by defendant into his new corporate account for Eigen Software. (R. 118: TR 33-7). This $500,000 was not discovered until after the trial. (R. 118: TR 10-12). The court decided this issue in favor of the defendant, and at the resumed sentencing hearing, re-calculated the tax loss to be $274,389.[3] (R. 118: TR 38-9).

[3]The United States maintains that on the facts of this case, with a scheme to divert corporate funds to personal purposes, the trial court should have included the additional $500,000, part of the same scheme, in tax loss even after Booker. This Court has held that sentencing courts may use judge-found facts, proved by a preponderance of the evidence, in setting an advisory Guidelines range - provided that the result does not exceed the statutory maximum authorized by the jury verdict. United States v. Coffee, 434 F.2d 887, 898 (6th Cir. 2006); United States v. Stone, 432 F.3d 651, 654-55 (6th Cir. 2005).

The re-calculated loss figure was taken from am earlier presentence report, and was composed of these figures:

$ 10,921	1998	AIM corporate tax loss
184,788	1999	AIM corporate tax loss
78,680	1999	Alex Damra individual income tax loss[4]
$274,389		

(PSR, October 22, 2008, ¶ 17). When the $500,000 was removed, the court returned to the $274,389 loss figure: in fact the $78,680 tax loss figure for the tax impact of diverted AIM funds to the personal use of Alex Damra, had been removed from the calculation. (R. 118: TR 26). The tax loss should therefore have been $195,709, and not the $274,389 ultimately used at the resumed sentencing hearing. Under U.S.S.G. § 2T4.1, the Tax Table for the November 1, 2000, Guidelines Manual, the resulting offense level should have been 15, with a range of 18-24 months.

The trial court's sentencing of 21 months is within the range under offense level 15, but it is acknowledged that the offense level determined at the sentencing

---

[4]In regard to the deletion of the $78,680 1999 personal tax loss for the defendant, the United States further maintains that it was appropriate to include both a corporate income tax deficiency, for the disallowed consulting expense deductions, and a personal tax deficiency for the use of personal purposes of funds diverted from a corporation. See, e.g., Davis v. United States, 226 F.2d 331 (6th Cir. 1955); Benes v. United States, 276 F.2d 99 (6th Cir. 1960); Hagaman v. C.I.R., 958 F.2d 684 (6th Cir. 1992); United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994).

was one level higher than that, and the court decided that sentencing at the lowest end of the range would "provide a fair punishment." (R. 118: TR 83).

With this single exception, the trial court's sentence was procedurally and substantively reasonable. The court considered all the defendant's materials and gave the defendant more than ample time to express his views and positions. The court thoroughly addressed the Section 3553(a) sentencing factors. (R. 118: TR 82-7).

The defendant raises two remaining issues with the trial court's sentencing determination. Defendant first argues that the inclusion of $250,000 (AIM ck. No. 10528, GX 61, Apx. 302) in the 1999 AIM tax loss was error, and that the court erred in failing to rule on defendant's objection to including this amount. The court did rule on defendant's objection, by rejecting any reduction in the loss for this item.

Defendant did address this issue in his Sentencing Memorandum, and the issue was discussed on October 29, 2007, and again at the resumed hearing on October 21, 2008. (R. 118: TR 41-3, 74-6). The United States stated its

opposition to any adjustment on this issue. (Id.)[5] The court then proceeded to sentence without making any adjustment, which was the correct determination.

Tax loss is defined in U.S.S.G. § 2T1.1(a), and the accompanying Application Notes; United States v. Daniel, 956 F.2d 540, 544 (6th Cir. 1992). Tax loss is referenced as the "criminal deficiency," under Application Note 2, which was identified in the testimony of SA Rasoletti, for 1999, as $184,788. (R. 98: TR 549; GX 81, Apx. 303). Even had the trial court determined that the $250,000, which had been fraudulently deducted as consulting expense, was in fact reported as income in 2000, tax loss is not reduced by any payment of tax subsequent to the commission of the offense (which was completed with the filing of Fawaz Damra's false 1999 tax return in August 2000). U.S.S.G. Manual, § 2T1.1, Application Note 5.

---

[5]The United States never agreed that the $250,000 AIM check was a mere "timing issue." First of all, there was never any investigative determination, or evidence, other than defendant's assertions, that the $750,000 reported as a capital gain on his 2000 individual return were the "same funds" taken from AIM at year end 1999 and deposited in his new Eigen Software account. Alan David testified that the $250,000 was deducted as "consulting expense," and also said if told that those funds represented AIM funds transferred to the new corporation, it would have been treated as a "dividend." (R. 97: TR 222-23). Defendant himself testified that this was his "profit" from AIM, along with additional sums of $1.0 million and $150,000. (R. 99: TR 729, 745). Barbara Burrer testified that defendant told her he moved all remaining AIM assets to his new corporation. (R. 97: TR 276). She also said assets transferred to the new Nevada corporation would have been treated as a liquidating distribution. (R. 97: TR 282).

The court noted: "the Court considered the arguments and found the $250,000 check properly included in the tax loss deficiency calculation as an improperly deducted corporate expense. The Court remains of the same mind ... Mr. Damra did not pay the corporate income tax on this improperly deducted expense." (R. 134: Order).

The defendant also contends that the district court erred in not ruling on defendant's objection that $18,239.15 paid by Fawaz Damra on his fraudulent 1999 income tax return should have further reduced the 1999 AIM corporate tax loss. Defendant is again mistaken, and the trial court considered this contention, and rejected it. Tax loss is determined for each offense, and the court properly determined the 1999 AIM corporate tax loss as $184,788. There should be no reduction for a payment by another taxpayer, on a personal return: as the court noted: "just as the amount of tax loss owed by Fawaz Damra is not attributed to Alex Damra, so also the tax paid by Fawaz Damra is not properly deducted from the tax loss deficiency calculated against Alex Damra." (R. 134: Order, at 11).

CONCLUSION

For all the reasons set forth above, the United States respectfully requests that this Court affirm the convictions of Fayez Damra, aka Alex Damra.

Respectfully submitted,

WILLIAM J. EDWARDS
United States Attorney

By: s/ *James V. Moroney*

James V. Moroney
Assistant United States Attorney
Executive Off. for U.S. Attorney's
Room 2523, RFK Main Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Phone: (202) 616-2840
Fax: (202) 353-3349

CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the foregoing contains 13,985 words according to the word count feature of WordPerfect X3 and complies with this Court's 14,000 word limitation for briefs.

s/ *James V. Moroney*
James V. Moroney
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2009, a copy of the foregoing was filed electronically. Notice of this filing will either be sent by operation of the Court's electronic filing system or a copy mailed by ordinary U.S. Mail to all counsel of record.

s/ *James V. Moroney*

James V. Moroney
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(b), the following filings from the district court's records are designated as relevant to this appeal:

RE #	DESCRIPTION OF ENTRY
1	Indictment
6	Report and Recommendation of Magistrate
	Memorandum of Opinion
11	Criminal Trial Order
18	Motion to Change Venue
23	Defendant Fawaz Damra's Motion for Separate Trials
25	Transcript of Status Conference Proceedings held on September 14, 2006
27	Order granting motion to continue
29	Transcript of Arraignment Proceedings as to Fayez Damra and Fawaz Damra held on August 21, 2006
32	Response by USA in opposition to motion for separate trials
41	Order granting Alex Damra until January 2, 2007, to obtain representation
42	Minutes of proceedings
43	Motion to Dismiss by Fawaz Damra
44	Response by USA in opposition to motion to dismiss by Fawaz Damra
45	Reply in support of motion to dismiss by Fawaz Damra
46	Order Denying Defendant's Motion to Dismiss
49	Motion to Reassign Case
58	Transcript of Pretrial/Discovery Conference proceedings of February 13, 2007

59	Trial Brief by the United States
62	Motion to Allow Defendant to Submit Materials by Fax
68	Order regarding admissibility of evidence of acts and statements of Fawaz Damra
72	Motion by Alex Damra Objection to Hearsay as Admissible Evidence
74	Order on Defendant's Objection to hearsay as to Fayez Damra
78	Order regarding evidence pursuant to Federal Rule of Evidence 801(d)(2)(e)
81	Verdict
82	Motion for Extension of Time to File Motion for Judgment of Acquittal and/or New Trial
88	Motion for New Trial by Alex Damra
89	Amended Motion for New Trial by Alex Damra
90	Response by USA in Opposition to Motion for New Trial
93	Notice of Appearance of Attorneys Bender and Broome
96	Transcript of Jury Trial Proceedings as to Alex Damra on April 30, 2007
97	Transcript of Jury Trial Proceedings as to Alex Damra on May 1, 2007
98	Transcript of Jury Trial Proceedings as to Alex Damra on May 2, 2007
99	Transcript of Jury Trial Proceedings as to Alex Damra on May 3, 2007
100	Transcript of Jury Trial Proceedings as to Alex Damra on May 4, 2007
101	Sentencing Memorandum by Alex Damra
102	Supplement to Sentencing Memorandum by Alex Damra
103	Order denying Motion for New Trial
105	Supplement to Sentencing Memorandum by Alex Damra
107	Order signed 8 November 2007

108	Motion to Dismiss the Indictment and/or for Reconsideration by Alex Damra
110	Motion for Bender, Broome and Vegh to Withdraw
111	Transcript of Sentencing Proceedings as to Alex Damra on October 29, 2007
114	Order Denying Defendant's Motion to Dismiss the Indictment
115	Order Granting Motion for Bender, Broome and Vegh to Withdraw
116	Judgment
117	Minutes of Sentencing held 10/21/2008
118	Transcript of Continued Sentencing Proceedings as to Alex Damra on October 21, 2008
120	Notice of Appeal
121	Amended Judgment
128	Transcript of Telephone Status Conference Proceedings held on November 27, 2006
131	Supplemental Motion for Bond Pending Appeal
132	Response by USA in Opposition to Supplemental Motion for Bond Pending Appeal
134	Order Denying Supplemental Motion for Release Pending Appeal
	Plaintiff's Trial Exhibits 6, 27, 29, 39, 40, 41, 51, 57, 58, 59, 60, 61, 73, and 81
	Presentence Report dated October 22, 2007
	Presentence Report dated October 30, 2007
	Presentence Report dated October 15, 2008