IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	**CASE NO. 1:06CR367**
	:	
Plaintiff,	:	**JUDGE LESLEY WELLS**
	:	
v.	:	
	:	**DEFENDANT'S MOTION FOR**
FAYEZ DAMRA, aka ALEX DAMRA,	:	**RELEASE ON BOND**
	:	**PENDING APPEAL (WITH**
Defendant.	:	**REQUEST FOR EXPEDITED RULING)**

Now comes defendant, Alex Damra, by and through counsel, and, pursuant to 18 U.S.C. §3143(b) and Federal Rule of Criminal Procedure 38(b), moves this Honorable Court for an order permitting Mr. Damra to remain free on his current bond pending appeal of the conviction and sentence in the above-captioned case. Mr. Damra has received a date to report of November 25, 2008. (See Surrender Order, attached hereto). Accordingly, Mr. Damra requests an expedited ruling on this motion. Alternatively, should the Court wish to have a hearing on the motion for bond, Mr. Damra requests that the Court continue his release on bond pending appeal until such a hearing can be scheduled and conducted.

A memorandum in support of this Motion is attached hereto and incorporated herein.

Respectfully submitted,

s/Richard L. Stoper, Jr.

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR RELEASE ON BOND PENDING APPEAL (WITH REQUEST FOR EXPEDITED RULING)

INTRODUCTION

On July 25, 2006, Fayez Damra, also known as Alex Damra, was indicted on two counts, one of conspiracy to defraud the United States pursuant to 18 U.S.C. § 371 and one of tax evasion pursuant to 26 U.S.C. § 7201. On August 21, 2006, Mr. Damra was arraigned and released on a $100,000 unsecured bond. (R.4).

Trial commenced on April 30, 2007 and continued on May 1, 2, 3, and 4. On May 4, 2007, Alex Damra was found guilty on both counts. (R.81). That same day, Mr. Damra's bond was increased to $500,000. (R.84).

On May 24, 2007, through counsel, Alex Damra filed a motion for new trial. (R.88). On October 25, 2007, Alex Damra's motion for new trial was denied. (R. 103). On April 2, 2008, Mr. Damra, through counsel, filed a Motion to Dismiss the Indictment and/or for Reconsideration of Order Denying Motion for New Trial. (R. 108). On September 12, 2008, the Court denied the Motion to Dismiss and for Reconsideration. (R.114).

On August 18, 2008, Mr. Damra's counsel moved to withdraw (R.110), and, on September 17, 2008, the Court granted the motion. (R.115).

On October 21, 2008, the Court completed the sentencing hearing of Mr. Damra, and, entered judgment sentencing Mr. Damra to twenty-one (21) months of incarceration, three years of supervised release, a fine of $50,000, restitution of $274,389, and special assessment of $200. (R.116). Mr. Damra was permitted to self-report. ***Mr. Damra paid all of the financial obligations required by his sentence that very day***.

On October 29, 2008, Mr. Damra filed a notice of appeal. (R.120).

SUMMARY OF ARGUMENT

Mr. Damra requests bond pending appeal of his conviction and sentence. Mr. Damra is not likely to flee and poses no danger to the safety of any other person or the community if permitting to remain free on bond pending appeal. In addition, the appeal of Mr. Damra's conviction and sentence will not be for delay, but will be for the purpose of obtaining a swift review of these proceedings. The issues raised on appeal will raise substantial questions of law or fact likely to result in reversal, an order for a new trial, or a sentence with a reduced term of imprisonment less than the expected duration of the appeal process. Accordingly, bond pending appeal should be granted.

ARGUMENT

STANDARDS FOR BOND PENDING APPEAL.

18 U.S.C. § 3143(b)(1) provides in pertinent part:

> [T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . ., be detained unless the judicial officer finds--
>
> > (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under Section 3142(b) or (c) of this title; and
> >
> > (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in--
> >
> > > (I) reversal,
> > > (ii) an order for a new trial,
> > > (Iii) a sentence that does not include a term of imprisonment, or
> > > (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

> The Sixth Circuit Court of Appeals has construed 18 U.S.C. § 3143(b) to require
>
> a district court to make two findings before granting bail pending appeal. First, a district court must find that the convicted person will not flee or pose a danger to the community if the court grants bail. Second, the district court must find that the "appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial."

United States v. Pollard, 778 F.2d 1177, 1181 (6th Cir. 1985).

Bond is particularly appropriate in this case because it is likely that Mr. Damra may serve his entire sentence before his appeal is resolved, thereby effectively depriving Mr. Damra of the value of his appeal. Statistics from the U.S. Courts indicate that in 2007, the average length of time between the filing of the notice of appeal in a criminal case and final disposition of the appeal in the Sixth Circuit was 15.2 months. (2007 Annual Report of the Director, Appendix Table B4A, http://www.uscourts.gov/judbus2007/appendices/B04ASep07.pdf). Should Mr. Damra receive a reduction for good conduct time, he would only serve 17 to 18 months of the 21 month sentence imposed by the Court. Accordingly, the fact that Mr. Damra will have served virtually his entire sentence before his appeal is decided weighs in favor of granting Mr. Damra release pending appeal.

Application of this two-part standard set forth in Pollard further demonstrates that Mr. Damra is eligible for release on bond pending appeal.

A. MR. DAMRA IS NOT LIKELY TO FLEE OR POSE A DANGER TO PERSONS IN THE COMMUNITY.

Under Section 3143, a defendant should not be detained pending his appeal if he shows "by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community." United States v. Vance, 851 F.2d 166 (6th Cir. 1988), cert. denied, 488 U.S. 893 (1988). "'In ascertaining whether to detain or release a defendant, the judicial officer is directed by the statute to consider the available information concerning several

factors, including; (1) the nature and seriousness of the offense charged; (2) the weight of evidence against the defendant; (3) the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug or alcohol abuse, and criminal history; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.'" Id. at 169-70 (citation omitted). See also 18 U.S.C. § 3142(g). Analysis of these factors requires the conclusion that Mr. Damra is well-suited for release on bond pending appeal.

Risk of flight. Mr. Damra has been under investigation for several years now, but has appeared for all proceedings in this matter. Mr. Damra's compliance is all that more extraordinary because for most of the case he proceeded pro se, without counsel to remind him of his obligations. As the Court observed to Mr. Damra at his sentencing, "[y]ou kept all your court appearances, you have been in compliance pretty much with the terms and conditions of pretrial release." (Tr. (10/21/08) at 87). Accordingly, the risk of flight is very low.

Community Ties. Mr. Damra has resided in the United States for 24 years, since 1984. (PSI (10/22/07) at ¶42). Mr. Damra has resided in Henderson, Nevada since 2000, where he has a home. (Id.). Mr. Damra obtained a bachelor of engineering degree in 1987 from Purdue University, and later, a masters degree. (Id. at ¶49). As the Court observed at the sentencing hearing, Mr. Damra has equity in real estate of $2.3 million. (Tr. (10/21/08) at 64). Accordingly, Mr. Damra has significant interests in the community.

Business and Financial Resources. Mr. Damra formed a very successful business whose customers included AT&T, Sprint, Citibank, Prudential Insurance Company, Canon, Kodak, the U.S. Department of Forestry and the U.S. Fish and Wildlife Division. (PSI

(10/22/07) at ¶51). At one point, Mr. Damra's business had more than $2.5 million in revenue. (Id.).

At sentencing, Mr. Damra advised the Court that if his conviction is "reversed, I would like to start my business, and it will be way bigger than what I have." (Tr. (10/21/08) at 82). The Court observed:

> Well, you've been in this country since 1984, and you've done a lot of remarkable things in this country. And you have been able to have some very fine relationships with the federal government and other entities in the country, and then you've also had this difficulty that resulted in your being convicted of two tax counts.

(Tr. (10/21/08) at 82-83). Accordingly, if permitted to remain on bond pending appeal, Mr. Damra is self-sufficient and will be an asset and not a financial drain on his community.

History of Drug /Alcohol Abuse. Mr. Damra has no history of drug or alcohol abuse that would justify denying release, as evidenced by the Court's comment at sentencing that imposing drug testing on Mr. Damra as a condition of supervised release would be "silly." (Tr. (10/21/08) at 86).

Prior Criminal History and Nature of the Offense. As the Court noted at sentencing, Mr. Damra has no prior criminal record and the convictions in this case were not for a crime of violence. (Id. at 72).

Risk to the Community. Mr. Damra's good behavior while on release during the past more than two years is evidence that he is not a risk to the community. In addition, at sentencing, the Court found that "I don't think you are a danger to the community in any sense . . . ." (Id. at 87).

While Mr. Damra has been convicted of an undeniably serious offense, it was not an offense of violence. Mr. Damra abided by the terms of his release in this case. Mr. Damra's

compliance with the terms of bond in this case, in conjunction with the factors reviewed above, demonstrate his capability of fully abiding with the requirements that the Court may set for his release pending appeal.

As noted above, Mr. Damra has been under investigation for several years, yet he never fled. Based on the foregoing factors, this Court should conclude that Mr. Damra will not pose a risk of flight or of danger to the community, if he is released on bond pending appeal. Accordingly, Mr. Damra should be permitted to remain on release on his existing bond.

B. MR. DAMRA'S APPEAL RAISES SUBSTANTIAL QUESTIONS OF LAW REGARDING HIS CONVICTION AND SENTENCE, IS NOT MADE FOR PURPOSES OF DELAY, AND IS LIKELY TO RESULT IN REVERSAL AND REMAND OF THE CONVICTION AND/OR SENTENCE.

In determining a defendant's eligibility for appeal bond, "the statute does not require the district court to find that it committed reversible error." United States v. Pollard, 778 F.2d at 1181-1182. Rather, "an appeal raises a substantial question when the appeal presents a 'close question or one that could go either way' and that the question 'is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor.'" Id. at 1182.

Mr. Damra intends to raise on appeal several of the issues presented by Mr. Damra's post-trial motions. The Court's denial of Mr. Damra's post-trial motions does not require the Court to deny Mr. Damra release pending appeal. Even if the Court disagrees with Mr. Damra regarding the ultimate merits of the issues he plans to raise on appeal, the issues raise substantial questions regarding both Mr. Damra's conviction and render it appropriate for the Court to grant bond pending appeal.

The issues which Mr. Damra intends to present on appeal and which he believes are

substantial include:

1. **Count 1 fails to allege an offense pursuant to 18 U.S.C. §371.** In denying Mr. Damra's motion to dismiss the indictment, the Court distinguished the Sixth Circuit's decision in United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989), which held that conspiracies to commit specific offenses should be charged under the offense clause, and not the defraud clause of 18 U.S.C. §371. Minarik has never been overruled, although it has been distinguished by the Sixth Circuit in a series of cases cited by this Court. This Court is not required to find that it committed reversible error. Application of Minarik to this case is a substantial question, particularly in light of the fact that the offense which should have been the subject of a proper Count 1 offense clause charge was charged in Count 2.

2. **The jury was not charged that it was required to find that Mr. Damra willfully entered the alleged conspiracy in Count 1**. Unambiguous Sixth Circuit authority requires that the government prove that the defendant ***willfully*** entered into the conspiracy. United States v. Beverly, 369 F.3d 516, 532 (6th Cir.), cert. denied, 543 U.S. 910 (2004). The Court denied Mr. Damra's post-trial motion, finding that instructions that Mr. Damra "knowingly and voluntarily joined the conspiracy," and that "he knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals," satisfied the conspiracy charge's scienter requirement. This is a substantial question for appeal, given that current Sixth Circuit authority explicitly requires a finding of willfulness.

3. **The jury was not given a good faith instruction.** The Court declined to vacate the convictions on the ground, among others, that Mr. Damra never argued that he misunderstood the law and acted in good faith. This is not determinative of the issue and also not borne out by the facts. An explanation to the jury that a defendant who acts in good faith

cannot act willfully is part of the definition of the intent required for violation of the statute. Good faith is subsumed within the definition of the required intent to violate the statute and is not an affirmative defense on which the defendant bears any burden.

The requirement of a good faith instruction in a tax case is established in Cheek v. United States, 498 U.S. 192 (1991). The failure to give an instruction including the government's burden to negate the defendant's good faith leaves the jury with evidence relating to the defendant's good faith, but no road map regarding how that evidence should be considered in the context of the charges. Failing to instruct the jury how to assess good faith evidence is akin to forbidding the jury to consider such evidence, and "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Id. at 203.

Mr. Damra's assertions that his brother and sister in law were consultants raise issues regarding the proper taxation of those payments and Mr. Damra's good faith regarding the reporting of those payments. Mr. Damra's claim that a payment was a return on an investment also raises questions regarding the proper tax treatment of that payment and Mr. Damra's good faith in the manner in which that payment was treated for tax purposes. Mr. Damra's assertion that he thought that he had in fact overpaid his taxes raises the issue of good faith. A determination by the Court that Mr. Damra did not act in good faith and that these assertions could not be made in good faith takes the issue away from the jury and violates Mr. Damra's constitutional right to a jury trial. At a minimum, this issue could go either way, and, if decided in Mr. Damra's favor would require reversal of his convictions.

4. **The jury was not instructed that it must find both of the affirmative acts alleged in Count 2 in order to convict Mr. Damra.** Count 2 alleged two affirmative acts of

evasion. Count 2 alleged that from April 20, 2000 through August 7, 2000, Alex Damra attempted to evade the taxes owing by AIM for the calendar year 1999 in the amount of $184,788

> (a) by filing and causing to be filed a false and fraudulent Form 1120 for AIM for 1999 which falsely deducted as business expense funds paid to himself and family members, ***and*** (b) by causing a portion of those funds paid to his brother, Fawaz Damra (not a defendant in this Count) to be falsely reported as Schedule C gross receipts on the Form 1040 filed jointly by Fawaz Damra and his wife for the year 1999 . . . .

(Indictment at ¶7 (emphasis added)). The jury was required to find both in order to convict Mr. Damra, but was not instructed that finding both acts was required. The jury was not told the consequences of finding either (a) or (b), but not both. Accordingly, there is a substantial issue for appeal regarding whether the jury should have been instructed regarding its obligation to find that the government had proven both affirmative acts beyond a reasonable doubt.

5. **The jury was not instructed that it had to be unanimous in its finding regarding the two separate acts alleged in support of Count 2.** The jury was not instructed that it needed to reach a unanimous verdict on both subparts (a) and (b) of Count 2. The Sixth Circuit has held that, in tax cases, specific jury unanimity is required when distinct affirmative acts are elements of the offense. This is particularly true in this case when the statute of limitations defense depends upon which affirmative act the jury reached unanimous agreement. In United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988), the Sixth Circuit vacated the conviction on the ground that the jury should have given an instruction that the jury needed to be unanimous in regard to which statement the jury found to be false. "When distinct proof is required to establish distinct affirmative acts as elements of an offense, specific unanimity is necessary." Id. at 1113. "When there is a reasonable possibility that a jury has relied on an

'unconstitutional understanding of the law' in reaching a guilty verdict, that verdict must be set aside." Id. at 1114.

Based on the indictment and the jury instructions, some jurors may have found that the evidence supported (a) and some of the jurors may have found the evidence supported (b). Unanimity is required and no specific instruction on unanimity was given. Accordingly, there is a substantial issue for appeal regarding whether the jurors should have been instructed that they needed to find unanimously that defendant Damra had committed both of the affirmative acts alleged in Count 2.

6. **The conviction on Count 2 should be reversed because no instruction was given on the statute of limitations, and the first affirmative act was time-barred.** The jury was not instructed that the two separate acts alleged in support of Count 2 must be within the statute of limitations. No statute of limitations instruction was given on Count 2. A statute of limitations instruction was warranted. For example, item (a), the filing of AIM's 1999 Form 1120 tax return occurred in April, 2000. The indictment was not filed until July 25, 2006, ***more than six years later***, and, on its face outside the period of the statute of limitations. The indictment alleged that the conspiracy allegedly began on April 20, 2000. Six years from that date would be before the indictment was filed, and, accordingly, if April 20, 2000 controlled, Count 2 was time-barred. The government needed to prove that the alleged conspiracy continued until July 25, 2000 or later. This is a factual issue that should have been submitted to the jury. Accordingly, there is a substantial issue for appeal regarding whether an instruction regarding the statute of limitations was required on Count 2.

7. **The Court erred in permitting a government agent to serve as a "translator" for a witness who could not hear, for whom English was a second language, and whose**

testimony was confusing and unreliable, and whose testimony should not have been presented to the jury. The testimony of a key government witness, Mir Ali, the tax preparer for defendant's brother, was incomprehensible given the witness's inability to hear as well as the fact that English was not his native language. As the Court recognized, "the transcript bears witness to some difficulty predicated on hearing loss and language differences." (R.103, Order at 9). On May 1, 2007, during Ali's first day of testimony, he could not answer the simplest of questions from the government, and his answers were rambling and non-responsive. The Court adjourned for the day instructing Mr. Ali to obtain new batteries for his hearing aid. In an unprecedented action which assisted the government in procuring from Mr. Ali the testimony it sought, the Court permitted IRS Special Agent Rasoletti to act as a quasi-interpreter for Mr. Ali, thereby facilitating the production of unreliable evidence prejudicial to Mr. Damra. Given the extraordinary circumstances of the case and the nature of its participants, this is a substantial issue for appeal.

8. **The evidence was insufficient**. The convictions were premised on Mir Ali's "testimony," described above. Such testimony was insufficient to sustain the verdict in this case. The government was attempting to procure testimony, in English, from Ali, whose native language was Pakistani, regarding his conversations with Fawaz Damra, whose native language was Arabic. The resulting transcript is insufficient to support the convictions. Likewise, Mr. Damra's contested admissions regarding his conversations with the IRS agent are insufficient to support the convictions. Mr. Damra requested that a reporter be permitted during at least one such conversation and such was denied. The Court has recognized that English is Mr. Damra's third language and that his speech is difficult to follow. Given that the convictions were based on evidence that was the subject of significant dispute concerning issues of comprehension, the

verdict was against the weight of the evidence. This is a substantial issue for appeal.

Substantial issues exist which are likely to result in a vacation of the convictions. In addition, if Mr. Damra is denied bond pending appeal, he is likely to have served his entire sentence before his appeal is decided, thereby effectively depriving him of the value of his appeal. Accordingly, bond pending appeal should be granted.

CONCLUSION

For the reasons set forth more fully above, the Court is urged to grant Mr. Damra's request for release on bond pending appeal.

Respectfully submitted,

s/Richard L. Stoper, Jr.

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CERTIFICATE OF SERVICE

This is to certify that on this 14th day of November, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties. Parties may access this filing through the Court's system.

/s/ Richard L. Stoper, Jr.
RICHARD L. STOPER, JR.

An Attorney for Defendant Alex Damra