March 28, 2013
Isaacs
motionpendingappeal

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA)) Plaintiff/Appellee,)) vs.)) IRA ISAACS,)) Defendant/Appellant))	Ninth Circuit No. 13-50036 Central District of California No. CR 07-732 GHK

MOTION FOR ORDER ALLOWING DEFENDANT/APPELLANT IRA ISAACS TO REMAIN FREE ON BAIL PENDING APPEAL

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Defendant and Appellant Ira Isaacs respectfully moves this Court for an order permitting him to remain free pending appeal in this obscenity case. This motion is filed pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. Defendant Isaacs is currently free pursuant to a stay issued by the District Court. The District Court on March 22, 2013 ordered Isaacs to surrender to the United States Marshal within one week, i.e., by March 29, 2013. Isaacs understands that by virtue of Ninth Circuit Rule 9-1.2(e) Isaacs will be permitted to remain free automatically pending disposition of the pending motion.

On February 20, 2013 this Court by Goodwin and Murguia, Circuit Judges, denied his

prior motion without prejudice to its renewal following the presentation of a properly filed bail motion with the District Court.

Subsequent to this Court's order of February 20, 2013, Isaacs did promptly and properly file a written motion with the District Court, which stayed the surrender date and then on March 22, 2013, denied the motion on its merits. However, the District Court gave Isaacs seven days to surrender. This stay has allowed Isaacs to refile his motion with this Court and to remain free pending the resolution of this motion by this Court.

Defendant Isaacs is attaching to this motion a copy of the underlying judgment, which sentenced Isaacs to four years in federal prison for distribution of obscene matter and is also attaching to this motion a copy of the District Court Order of March 22, 2013, denying his motion to be permitted to remain free pending appeal.

If this Court should deny the present motion this Court is respectfully requested to set a new surrender date because neither the Federal Rules of Appellate Procedure nor the Circuit Rules cover the situation where a surrender date by the District Court is superceded by the automatic stay by Circuit Rule 9-1.2(e). Of course, Isaacs respectfully requests that this Court act positively on this pending motion so that there will be no need to set a new surrender date.[1]

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[1] It would be helpful to practitioners in this area (to say nothing of defendants who must surrender) for this Court to fill a gap in the rules regarding the expiration of surrender dates while a bail motion has not yet been acted upon by the Circuit. When this Court denied without prejudice Isaacs earlier bail motion on February 20, 2013, the February 19, 2013 surrender date expired and it was unclear what Isaacs' obligation was since he could not surrender on February 19, 2013, the date having come and gone. Not wishing to incur the wrath of the judicial system, Isaacs was on his way to the Marshal's office to surrender

This motion pursuant to Rule 9(b) for permission to remain free on his current bond pending the outcome of the appeal is based upon the record (which has not been completed) and is based primarily upon the order of the District Court of March 22, 2013, copy attached.

All parties and the District Court agree that the issue regarding Isaacs' release pending appeal is governed by Title 18, United States Code, Section 3143(b). The first portion of Section 3143 (b) relates to likelihood of flight and danger to the safety of other persons or the community. The Government did not contend at all that Isaacs was a threat to flee and the District Court found in his favor that he is not a danger to the safety of any other person or to the community.

Thus, the issue for the District Court and now for this Court on appeal is whether the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial." The District Court did not find that the appeal was for the purpose of delay. Thus, this motion will address the question of whether the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

Respectfully submitted,

"s/Roger Jon Diamond"
Attorney for Defendant & Appellant
Ira Isaacs (Court Appointed)

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on February 21, 2013, when the District Court acted upon his emergency application for a stay and granted a further stay until his motion could be filed with the District Court. Isaacs did not know exactly when he was to surrender after this Court made its ruling on February 20, 2013 since the District Court surrender date had expired on February 19, 2013. To show good faith Isaacs was on his way to surrender when the District Court granted a further stay.

MEMORANDUM OF POINTS AND AUTHORITIES

I INTRODUCTION

Defendant and Appellant Ira Isaacs was involved with and was convicted of distribution of adult pornography (obscenity). No contention was made that this case in any way involves child pornography.

Isaacs was indicted in August of 2007 and appeared voluntarily in response to a letter and summons. After the completion of his third trial he was found guilty by a jury of distribution of obscene films. The jury found Isaacs guilty on April 27, 2012, but Isaacs was not sentenced until January 16, 2013. He received a four year sentence but is still currently free pending his timely appeal. He intends to raise at least four substantive appellate issues.

II STATEMENT OF FACTS

The Court file, docket, and pleadings reveal that Isaacs was indicted in August of 2007. He was sent a summons which requested his appearance in the District Court and he voluntarily appeared in response to the summons and was released upon a $10,000 unsecured appearance bond. The case was initially assigned to the Honorable George King of this District Court but later the case was reassigned to Ninth Circuit Judge Alex Kozinski, who presided over pretrial proceedings including a Daubert hearing to determine whether Isaacs could testify as an expert with respect to the artistic nature of the movies. Judge Kozinski conducted the Daubert hearing with respect to Isaacs as well as with respect to a proposed psychiatrist, Dr. Nair. On May 6, 2008 Ninth Circuit Chief Judge Alex Kozinski, the author of the prior Ninth Circuit decision in the Daubert case, conducted a Daubert

hearing where Isaacs testified. JudgeKozinski determined that Isaacs could testify as an art expert regarding the movies alleged to be obscene by the Government. See docket entries 59, 60, and 61 of the District Court contained in the District Court docket sheet, a copy of which is attached hereto . Judge Kozinski determined that under the Daubert v. Merrell Dow,509 U.S. 579 (1993) Isaacs could testify as an art expert.

The jury trial before Judge Kozinski began on June 9, 2008, the same day the Los Angeles Times ran a feature front page story that the obscenity trial was beginning. After the jury was selected and opening statements made by both sides and after some testimony and the showing of some of the movies, the Los Angeles Times broke a story regarding an alleged pornographic web site maintained by Judge Kozinski. For the details and background regarding this matter please see In Re Complaint of Judicial Misconduct, 575 F.3d 289 (3rd Cir. 2009). At page 280 of the Third Circuit decision it is noted that Judge Kozinski declared a mistrial and recused himself.

Subsequently, the case was reassigned to Judge King who entertained a defense motion to dismiss on double jeopardy grounds. That motion was denied and the Ninth Circuit affirmed, U.S. v. Isaacs, 359 Fd. Appx. 875 (9th Cir. 2010), cert.den. 130 S.Ct. 1359 (2010).

Prior to the second trial before Judge King, Judge King conducted a Daubert hearing regarding the proposed artistic testimony by Isaacs. The Court ruled that Isaacs would not be able to testify as an expert. The Court cited a District Court decision but there was and is no Ninth Circuit or U.S. Supreme Court right on point. Because the defense ran out of money

Dr. Nair was not called as a witness. He had been ready to testify at the first trial in front of Judge Kozinski. He was available and on call when Judge Kozinski declared the mistrial over the objection of the defense.

The second trial proceeded before Judge King. Defendant Isaacs testified but not as an expert. Dr. Nair did not testify. He would have testified as an expert and did testify at a Daubert hearing in front of Judge Kozinski.

The second trial resulted in a hung jury and a declaration of mistrial.

The third trial resulted in guilty verdicts on April 27, 2012.

Isaacs has mentioned the ruling by Judge Kozinski not because Isaacs is contending that it was error for Judge King to disregard Judge Kozinski's ruling on the Daubert motion, where Judge Kozinski ruled in favor of the defense that Isaacs could testify as an expert on the art issues presented by the case, but rather to demonstrate that the appeal "raises a substantial question of law or fact likely to result in an order for a new trial. Isaacs understands that Judge King took the position that nothing Judge Kozinski did would be binding on Judge King . In other words, the applicable Circuit Court precedent seems to stand for the proposition that when a District Judge is recused that all of his rulings must be vacated and deemed never to have been made. This apparently gives the new District Court Judge the opportunity to revisit whatever issues were resolved by his or her predecessor. While Isaacs respectfully disagrees with this line of authority allowing the superceding judge to disregard all rulings of the prior judge who has been recused, on the issue of whether substantial questions of law or fact are raised a motions panel that does not

necessarily have the time and luxury that the full merits panel would have should be able to peek at prior rulings by the recused judge to see whether or not there are arguable issues likely to result in reversal or an order for a new trial. In other words, this motions panel does not have the time or luxury of analyzing this case in depth and does not have the luxury of reviewing final transcripts. Final transcripts have not been made.

It may appear that a quick first glance of this case does not allow a distinction to be made between the rejection of Judge Kozinski's rulings on the one hand and whether there are issues on appeal . The two concepts are not the same. That a very fine and respected jurist (especially a member of the Ninth Circuit and indeed the Chief Judge of the Ninth Circuit) has ruled one way and the current District Court Judge whose judgment is now being reviewed came to the opposite conclusion does not bear on the question of which judge is ultimately going to be vindicated. Isaacs understands that ultimately the correctness of Judge King's rulings will depend upon an independent review of what Judge King did without comparing his rulings to Judge Kozinski's rulings. However, on the initial issue of whether the appeal raises a substantial question of law or fact Judge Kozinski's decision to allow Isaacs to testify as an expert cannot be ignored. It is part of the history in this case and is some indication that Judge King might well have erred in denying Isaacs the opportunity to testify as an art expert with respect to the movies in question.

Judge King conducted another Daubert hearing prior to the second trial. In this Daubert ruling, Judge King acknowledged that there was no Ninth Circuit case right on point. Judge King felt that a District Court decision from the District of Columbia was

"informative." Specifically, Judge King referred to United States v. Stagliano, 729 F.Supp.2d 222 (D.D.C. 2010) on the issue of whether a professor of film studies could testify as an expert. Judge King concluded his ruling by stating that Isaacs could "not testify as an expert about the alleged artistic value of the videos."

In any event, the second trial proceeded before Judge King and that trial resulted in a hung jury. The ruling by Judge King regarding Isaacs' proposed expert testimony carried over into the third trial. Moreover, although Judge King had initially stated that Isaacs could testify as a lay witness about his films, the reality is that Judge King greatly limited the testimony of Isaacs at the third trial. Moreover, the lay witness testimony was only admitted with respect to movies that Isaacs made and not with respect to other movies for which he was also on trial. Therefore, his lay witness testimony, although unnecessarily restricted, could not have in any event helped him with respect to the movies which he did not make.

Isaacs is at a disadvantage with respect to his current motion in that the record has still not been prepared and he does not have access to the actual trial transcripts.

In the third trial not only did the District Court greatly restrict Isaacs' testimony, the District Court as reflected in the opinion of the District Court below also restricted Isaacs' attorney's closing argument. Counsel recalls being admonished during closing argument but counsel's memory and the District Court's Order of March 22, 2013 do not coincide. Accordingly, we will have to wait for the actual record.

In any event, in addition to the Daubert issue and issues regarding the restriction of defense testimony and closing argument, there was a separate matter of some note regarding

the jury instruction.

The prosecution and defense agreed on a particular jury instruction regarding prurient interest. Defense counsel quoted the particular jury instruction in question. The jury instruction appeared to suggest and require that all three criteria for prurient interest must be found by the jury in order to convict.

During jury deliberations at the end of trial number three the jury asked whether all three criteria had to be met for the jury to convict.

The defense objected to the Court redefining prurience. The District Court then changed the instruction to read in the disjunctive. The defense relied upon the initial instruction and did not want it to be changed.

III ARGUMENT

A. SINCE THE DISTRICT COURT PROPERLY CONCLUDED THAT ISSACS WAS NOT A DANGER TO THE COMMUNITY AND IS NOT A DANGER TO THE COMMUNITY AND SINCE THE GOVERNMENT DID NOT EVEN CONTEST THE ISSUES OF FLIGHT, WE ARE LEFT WITH THE LEGAL ISSUE REGARDING THE ARGUABLE MERITS OF THE APPEAL

As the District Court below noted, Isaacs must establish that his appeal "raises a substantial question of law or fact likely to result in reversal, [or] a new trial. . . ." The District Court further noted that Isaacs must show that his appeal presents a "substantial question."

The District Court below also noted that Isaacs in addition must show that the question, if decided in his favor, is the type of question that is likely to result in an order for a new trial.

The District Court below erroneously minimized the importance of the four issues presented. The issues to be presented on appeal by Isaacs are not trivial or insignificant. They relate to the ability of the defendant to present expert testimony on the issue of obscenity. They relate to the defendant's ability to testify on his own behalf. They relate to the ability of his attorney to present a coherent closing argument without interruption by the District Court and without improper limitation. Finally, Isaacs intends to present on appeal the issues of the definition of an essential element of the obscenity standard and whether the Court can change the definition after closing argument and instructions. These are major issues going to likelihood of reversal.

The right of a defendant to testify on his own behalf is crucial. That this case deals with the fundamental right of freedom of speech further highlights the importance of the issues presented. Because of the extreme importance of the First Amendment to our way of life and to our democracy, more care must be given to making sure that the First Amendment interests involved in freedom of speech cases are preserved. Because of the importance of the First Amendment our Supreme Court has crafted special rules that apply to First Amendment cases. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974) where the Supreme Court ruled that appellate courts must independently examine the materials in question to determine whether they are obscene or whether they are protected by the First Amendment. In Stanley v. Georgia, 394 U.S. 557 (1969) the United States Supreme Court held that the possession of obscenity in private cannot be the subject of criminal prosecution. That is not true for things such as drugs and other contraband. The Supreme Court in Roaden v, Kentucky, 413 U.S. 496 (1973) held

that a police officer could not seize allegedly obscene movies without a warrant. Again, the Supreme Court will not allow in many cases ordinary procedural rules to be applied in criminal cases involving obscenity.

Therefore, the issues to be presented on appeal in this case should be examined through the prism of the First Amendment .

The presence of the First Amendment interests in this case require more scrutiny than might otherwise be the case in the typical criminal proceeding. For example, even in general closing argument is important. See Herring v. New York, 422 U.S. 853 (1975). Closing argument is a fundamental right that must be afforded all defendants in criminal cases, especially obscenity cases. Here, the interference by the Court with Isaacs' attorney's closing argument should result in reversal.

We now proceed to examine the four issues to be presented on appeal.[2]

B. THE DAUBERT ISSUE IS A SERIOUS ISSUE GOING TO THE MERITS WHICH, IF RESOLVED IN FAVOR OF ISSACS, SHOULD RESULT IN A REVERSAL OF HIS CONVICTION

The District Court responded to this argument by stating that Isaacs missed the mark in his bail motion. The District Court minimizes the importance of the argument by suggesting that the decision of a district court to exclude expert testimony is committed to its broad discretion and only reviewed for abuse of discretion. The District Court cites United States v.

[2] Since the record on appeal has not yet been completed defense counsel is at a disadvantage with respect to other possible appellate issues. The four discussed by Isaacs in his motion filed with the District Court are the ones that come to mind more readily than perhaps others buried in the record.

Redlightening, 624 F.3d 1090 1110 (9th Cir. 2010).

The Ninth Circuit in U.S. v. Redlightening discussed the landmark case dealing with admissibility of expert testimony, Daubert v. Merrell Dow Pharmaceuticals, Inc,., 509 U.S. 579, 113 S.Ct. 2786 125L.Ed.2d 469 (1993). In citing the Redlightening case, the District Court in this case forgot that Defendant Isaacs himself was to be the person testifying as the expert, not some third party. The Ninth Circuit stated , 624 F.3d at 1111 with respect to the defendant in that case :

> ". . . If Redlightening wanted to dispute this, he could have testified himself on that score. . . ."

Here, it was Defendant Isaacs who wanted to testify, not some third party witness. Likewise, the Ninth Circuit pointed out in the Redlightening case that the defendant himself could have testified.

The District Court below at making its "Daubert" ruling initially, must have felt that Isaacs' testimony would be helpful because the Court compromised and purported to allow some "lay testimony." Unfortunately, not only was Isaacs barred from testifying as an expert on art, at the third trial leading to the conviction the District Court, obviously concerned about the hung jury in the second trial, where Isaacs was permitted more leeway, unnecessarily cut Isaacs off with respect to his attempt even to express an opinion with respect to lay testimony. At one point in the third trial the District Court made a sarcastic remark by referring to Isaacs as "Professor Isaacs" and obviously not wanting Isaacs to testify as he did in the second trial, which resulted in a hung jury. The District Court was obviously determined to avoid a mistrial in the third go around.

The District Court below gave no weight to the fact that it was Chief Judge Alex Kozinski who made his initial ruling prior to the first trial that Isaacs did qualify as an expert under the Daubert case. What is especially significant is that Chief Judge Kozinski was extremely familiar with the Daubert case since it was Judge Kozinski who himself who wrote the Ninth Circuit opinion in the Daubert case. See Daubert v. Merrill Dow Pharmaceuticals, Inc. , 951 F.2d 1128 (9th Cir. 1991).

Isaacs did not refer to the prior ruling by Judge Kozinski favoring Isaacs with respect to his right to testify as an expert regarding the artistic nature of the movies to support his argument that Isaacs should be able to testify as an expert. Defendant Isaacs understands that Judge King wanted to wipe the slate clean with respect to all prior rulings by Judge Kozinski. That is, Judge King wanted to start over and redecide all issues previously decided by Judge Kozinski. In that respect Judge King might be correct because there is some suggestion in Circuit precedent that the granting of a recusal motion places the parties back in square one, thereby eliminating all prior pretrial rulings. In this respect Isaacs wants to make it abundantly clear to this Honorable Court that he is not arguing that Judge Kozinski set a precedent that was binding on Judge King. Rather, the purpose in referring to the prior ruling by Judge Kozinski is to let this Court know that we are dealing with a serious issue to which there may not be a definitive case right on point. To some extent a bail motion for an appeal is similar to a motion for preliminary injunction. That is, the court is necessarily asked to make a ruling without a complete record. Moreover, to some extent the statutory standard for granting or denying release on appeal is similar to what a District Court considers in deciding whether to grant or deny a

preliminary injunction or what the Ninth Circuit considers in deciding whether to grant or deny a stay pending appeal. This Honorable Ninth Circuit usually does not have the complete record when dealing with bail motions pending appeal and other procedural matters requiring some haste. Obviously appellate courts have more time and the luxury of extensive consideration when dealing with the merits of an appeal. At this stage of the proceedings this Court is faced only with the task of determining whether the issues to be presented on appeal are serious and significant. If they are then the resolution of the issues in favor of the defense is likely to result in a reversal. To this extent, Judge Kozinski's opinion on the Daubert issue is instructive on the issue of whether the appeal in general presents a serious issue. That another judge (especially the Chief Judge of the Ninth Circuit sitting as a trial judge) has expressed one view on a major subject is some indication that the issue is not frivolous and that it substantial. Again, Isaacs is not necessarily arguing that Judge Kozinski had it right and that Judge King had it wrong but is arguing that the issue is substantial and significant. Specifically, Isaacs is respectfully submitting that the view of Judge Kozinski cannot be ignored on the issue of whether the appeal presents substantial legal issues to be resolved.

It will be clear when the appeal is argued on its merits that Judge King abused his discretion and improperly denied Isaacs the opportunity to discuss the artistic nature of the movies as an expert on the movies.

The subject of art is extremely subjective and it would assist the jury in at least hearing from someone who knows something about art.

The District Court cites U.S. v. Alvarez, 358 F.3d 1194 1205 (9th Cir. 2004) but the case

is not on point. It merely stands for the general proposition that District Courts have wide discretion in deciding whether evidence should be admitted. In the Alvarez case the District Court allowed Government evidence to be admitted. The Alvarez case did not deal with the exclusion of proposed expert testimony.

As stated earlier it should not be Isaacs' burden now to demonstrate conclusively that he will win the appeal on the Daubert issue. It is only necessary for Isaacs to demonstrate that the issue is significant and important and if decided in favor of Isaacs should result in a reversal of his conviction. The whole trial was based on whether the movies had serious artistic merit (and possibly serious psychological merit)[3].

C. THE DISTRICT COURT UNNECESSARILY AND IMPROPERLY RESTRICTED THE TESTIMONY OF ISAACS REGARDING THE MOVIES HE PRODUCED

A comparison of Isaacs testimony at the second trial with his testimony at the third trial will clearly demonstrate the change in attitude by Judge King towards Isaacs "lay" testimony. Fearing another hung jury, the District Court obviously conscientiously cut down Isaacs' testimony regarding the movies. If the District Court did not want Isaacs to testify as an expert

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[3] The psychiatric and psychological aspect of the case was made more difficult because of the tremendous expense involved in trying this case three times. The defense had retained Dr. Nair to testify as an expert. See Opinion by District Judge King denying the prior motion to dismiss based upon double jeopardy grounds, U.S. v. Isaacs, 2008 WL 4346780 (D.Cal. 2008), affirmed by Ninth Circuit, 2009 WL 5125761 where District Judge King denied Isaacs pretrial motion to dismiss on double jeopardy grounds. The transcript of the proceedings before Judge Kozinski was presented to Judge King and is part of the record in the prior appeal. It clearly refers to the defense desire to call Dr. Nair as a psychological expert. He was not called although he was scheduled to appear in the trial before Judge Kozinksi.

it clearly should have given him more leeway to testify as the producer and director of the movie in question. The defense will rely upon its recollection of the testimony and comments of the judge. There was a sarcastic remark about "Professor Isaacs." There were other times the District Court interfered with and improperly restricted his testimony. Unfortunately, the defense will have to await the complete preparation of the transcript.

As the defendant himself Isaacs should have been permitted to comment on the artistic nature of the movies to the jury to help the jury understand what the intent and motivation were. All of this was critical to the evaluation of prurient appeal and artistic nature of the movies.

The District Court below forgot that the Daubert case dealt with the admissibility of expert scientific evidence. In our case we are not dealing with scientific evidence but rather evidence dealing with artistic merit. By definition artistic merit is not subject to scientific analysis.

D. THE DISTRICT COURT ERRED IN CHANGING THE DEFINITION OF PRURIENCE AFTER THE JURY WAS PREVIOUSLY INSTRUCTED AND AFTER CLOSING ARGUMENT

The District Court acknowledges in its decision below that the Government and the defense agreed on jury instruction number 29 that "an appeal to 'prurient' interest is an appeal to a morbid, degrading, and unhealthy interest in sex, as distinguished from a mere candid interest in sex." Obviously the defense relied upon that instruction during closing argument. The defense attorney quoted the jury instruction. It clearly contains the word "and," not the word "or."

After closing argument and after instructions, the jury submitted a question to the Court

regarding the meaning of the instruction. The jury was obviously concerned about the matter and had already heard the defense quote the instruction.

Over the defense objection, the Court essentially changed the instruction and implicitly challenged the credibility of the defense attorney who read the instruction the way it was originally given. The Court's response to the jury question undermined the defense attorney's reading of the instruction as given.

Isaacs will assert on appeal that the initial jury instruction given by the Court was the correct one and even if technically incorrect since the case had already been argued and more importantly since the Government agreed to the instruction there was no harm in simply repeating the instruction and requiring the jury to find all three elements present for the prurience standard to be met.

The District Court below states that defense counsel never specifically argued the point nor did he emphasize to the jury that it must find the movies met all three descriptive terms. There was no reason to emphasize the point since the jury instruction, as read by the Court and as read by defense counsel was straight forward. The District Court states that the defense counsel did not rely upon the conjunctive reading of the relevant jury instruction. To the contrary, not only did the defense counsel rely upon the conjunctive reading of the relevant jury instruction, he read that instruction to the jury. While the District Court below states that it simply clarified the instruction the reality is the District Court changed the instruction. The Court changed an instruction that the Government had approved and which the defense attorney read to the jury.

The District Court claims support for the changing of the prurience definition from two Ninth Circuit decisions, U.S. v. Polykoff, 816 F.2d 1326 (9th Cir. 1987) and U.S. v. Ripplinger, 868 F.2d 1043 (9th Cir. 1989). However, they are not on point. They involve civil suits challenging the constitutionality of Arizona's obscenity statute. The Ninth Circuit referred to an Arizona state court jury instruction in deciding whether the statute was overbroad in violation of the First Amendment. Neither Ninth Circuit case involved habeas review of the Arizona state court obscenity conviction.

The jury instruction included more adjectives than the instruction given in this case, which referred to prurience being an appeal to a "morbid, degrading, and unhealthy interest in sex. . .."

The jury question during the Bartanen trial asked whether "all" of the adjectives in the instruction (which included "unwholesome," and "shameful") applied . The trial judge said no. They were in the alternative. The words "unwholesome" and "shameful" were in addition to the words "morbid, degrading and unhealthy." With more words there may be a greater necessity to limit the jury's task. With fewer words, such as the instant case, it was not a difficult task to require that the jury find the existence of all the terms. Simply stated, the cases cited by the District Court were not federal obscenity criminal cases. They are not on point.

Accordingly, in addition to being contrary to law the response to the jury question undermined the closing argument. Closing argument is fundamental in criminal cases. See Herring v. New York, 422 U.S. 853 (1975). This error by the Court in redefining prurient appeal compounded the problem already created by the Court interrupting defense counsel

during his closing argument on other points. The District Court contends that a reading of the rough draft transcript does not reveal any Court interruption of defense counsel but defense counsel recalls it differently and hopefully the completed transcript will reveal the comments made by the Court to defense counsel during closing argument. In particular, defense counsel recalls the Court admonishing defense counsel at side bar that no client is worth a particular argument or that Isaacs himself was not worth it. Defense counsel anxiously awaits the completion and preparation of the official transcript in this case. Unfortunately, the transcript was not ready by the time of the deadline for the filing of this motion.

E. NO MATTER WHICH WAY THIS COURT RULES ON THE PENDING MOTION, THIS COURT SHOULD CLARIFY FOR THE BENEFIT OF DEFENDANTS AND CRIMINAL DEFENSE ATTORNEYS IN GENERAL AS TO WHAT THE DEADLINE IS FOR SURRENDERING WHEN A MOTION IS FILED WITH THE NINTH CIRCUIT BY A DEFENDANT WHO IS NOT IN CUSTODY

The rules of Appellate Procedure and the local rules of the Ninth Circuit generally provide that when a defendant is not yet in custody (because his surrender date has not yet arrived) the filing of a motion for bail pending appeal automatically stays the surrender date. What is absent from the rules is the method by which the new surrender date is set. In this very case when this Court denied without prejudice the first motion because this Court wanted Defendant to go back to the District Court the initial surrender date of February 19, 2013 had come and gone. The motion was still pending before this Court after the initial surrender date , which was automatically stayed by the Circuit Rule.

Fortunately for the Defendant his counsel had just filed an application for an emergency stay, which the District Court granted 30 minutes before the Defendant was to

turn himself in at the U.S. Marshal's Office. The better practice would be for this Court to set a new surrender date when the initial surrender date set by the District Court expires while the bail motion is still pending. There is no rule that governs the situation to be followed.

Naturally, Defendant respectfully requests this Court to grant Defendant's request that he be permitted to remain free on the same personal surety bond previously posted by him . A published decision by this Court on the general question of the new surrender date would be appreciated by the criminal defense bar and probably by prosecutors and district judges also. To be precise, this Court should answer the question as to when a defendant whose surrender date has come and gone while the motion is currently pending before the Ninth Circuit should the defendant surrender. Absent a fixed date defendants in this situation are forced to scramble with last second stay applications. Here, the District Court initially gave the Defendant 30 days to surrender after denying his oral motion for bail made at the time of sentencing. In this case when the oral motion was denied by the District Court the District Court then advised the defense to seek further relief by filing a written motion with the District Court or by filing a motion with the Ninth Circuit. The defense selected one of those two options and filed his written motion with this Court. As previously stated, the surrender date of February 19, 2013 came and went before this Court denied the motion without prejudice to its being properly filed in the District Court . Defendant promptly filed a motion with the District Court but believing there was only perhaps one day left to surrender the Defendant did not provide the normal 28 days written notice. Before

the District Court could act on the motion (for which there was no motion date), the District Court acted upon the prior application for emergency stay. That application was granted on condition Defendant file a proper motion. Worried that the motion he did file was not "proper" because it did not have a hearing date , Defendant then filed a corrected motion setting a hearing date for April 1, 2013 . The District Court then struck the second motion as being unnecessary and agreed to rule on the first motion even though no date had been set for the hearing on the motion. The District Court subsequently determined to decide the bail motion without a hearing upon receipt of the Government's response and a reply. That led to the District Court order of March 22, 2013 which is now on review by this motion.

Even if this Court should grant Defendant's current motion (which Defendant obviously hopes this Court does) this Court should render an opinion regarding the surrender date in a case where the bail motion is pending after the initial surrender date expires.

IV CONCLUSION

Defendant Ira Isaacs has been free on the surety bond since he was originally indicted and surrendered in 2007. He has made every Court appearance expected of him and is not a flight risk and is not danger to the community. The District Court waited from April 2012 until January 2013 to sentence the Defendant. The delay was not caused by anything done by the Defendant. There does not appear to be any emergency or urgency and it would be appropriate for the Defendant to remain free pending the outcome of his appeal. Defendant respectfully submits that he has demonstrated that his appeal will present substantial legal questions which, if decided in his favor, are the type of questions that are "likely to result in

reversal or an order for a new trial." As stated earlier, that the Chief Judge of the Ninth Circuit already ruled in favor of Isaacs with respect to the Daubert issue is some indication that the question presented on the issue of the Daubert hearing is substantial.

Defendant Isaacs has already presented and filed with this Court certain pleadings and documents additional copies of which should not be required. Defendant Isaacs respectfully asks this Court to take judicial notice of its own file in this matter.

Finally, if this Court should deny this motion Defendant asks this Court to extend the stay until the Bureau of Prisons designates the prison. The Government will save money by allowing Defendant to travel to the appropriate prison rather than having the Marshal feed the Defendant and they fly him to his prison.

Respectfully submitted,

"s/Roger Jon Diamond"
Attorney for Defendant & Appellant
Ira Isaacs