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

REPLY BY DEFENDANT/APPELLANT IRA ISAACS TO GOVERNMENT'S RESPONSE TO MOTION FOR BAIL ON APPEAL

I INTRODUCTION

On March 28, 2013, while the Defendant/Appellant Ira Isaacs ("Isaacs") was free on the stay issued by the District Court Isaacs filed his motion for order allowing him to remain free on bail pending appeal. Isaacs was hampered by the fact that the record on appeal had not yet been prepared by the time the motion was filed.

On April 3, 2013 the Government filed its response but only discussed the issue of likelihood of success on appeal and did not further contest the issue of flight or the issue of danger to the community. The only issue remaining, therefore, is whether Isaacs has presented substantial appellate questions which, if resolved in his favor, would likely result in reversal of his conviction and/or the granting of a new trial. Pursuant to Rule 27(a)(4) of the Federal Rules of Appellate Procedure Isaacs herewith tenders his Reply.

II DISCUSSION

Isaacs is mindful of Rule 27(a)(4) that states that a Reply must not present matters that do not relate to the response. Thus, Isaacs will restrict this to the Government's response. The Government did not discuss in its response danger to the community or likelihood of flight.

With respect to the appellate issues Isaacs respectfully reminds this Honorable Court that he did not seek an extension of time in his case with respect to the transcripts. It was Court Reporter Mary Riordan Rickey's motion for an extension of time to file transcripts that was granted. Deputy Clerk Teresa A. Haugen filed an order on March 19, 2013 extending the time in which to file the transcripts to April 30, 2013. The District Court apparently has access to some rough draft of the transcript. All Isaacs can do (through his attorney) is try to remember exactly what was said during the trial. Notwithstanding the absence of the official reporter's transcript, the District Court's findings do not substantially diverge from the Statement of Facts contained in the motion or in the Government's response. The District Court does acknowledge in its order denying the bail motion pending appeal that the Court did interrupt defense counsel's closing argument . The District Court states that it did so only when the Government objected. Isaacs recalls a comment made by the District Court that even in the absence of an objection the District Court has an obligation to make sure the rules are followed and the law is not misstated. The District Court's opinion below is not clear as to whether the Court only restricted closing argument regarding therapeutic value of the movies when the Government objected.

Even assuming arguendo that the District Court only interfered with closing argument when the Government objected, Isaacs respectfully submits that the Government should not have objected when it did so. Closing argument gives the defense the opportunity to raise important arguments with the jury. As the Supreme Court said in Herring v. New York, 422 U.S. 853 (1975) closing argument is fundamental in a criminal trial. Constant objections by the Government only serve to interfere with Defendant's fundamental right and breakup the continuity of the defense argument. An objection by the Government to a closing argument that misstates the facts is one matter. Here, there were no misstatements of fact because there was no dispute as to what the facts were in this case. Indeed, the defense stipulated to all of the facts. There was no need for all of the witnesses who testified for the Government. Absent a misstatement as to what the facts were in the trial the Government should not be interfering with closing argument. Neither should the Court interfere with closing argument. After all, the jury was already told by instructions what the law was and could be instructed again.

The Government did not really argue that the defense misstated facts. Rather, the Government complained about references to countries beheading citizens for blasphemy. That is a matter of common knowledge. The argument of the defense in this case included the concept of political debate and artistic debate. The defense wanted to emphasize the serious political and artistic value to movies that generate debate and controversy. That is politically healthy.

Both the Government and the Court basically put a straight jacket on the defense.

The defense thought it almost obvious that x-rated or adult movies may have certain therapeutic value which is something that is serious. The Government was always free to argue to the contrary. The facts that are self evident do not need additional witnesses . There is no question but that closing argument was unnecessarily and improperly restricted. The continuity was destroyed.

It is a shame that the transcripts are not ready for this Court to consider along with the bail motion. It is not the Defendant's fault that the transcripts have yet to be prepared.

With respect to the problem with the change in the jury instruction , the defense did not discuss the issue at length because the Government never argued that the three adjectives regarding prurient appeal could be considered separately in the disjunctive. Because the Government never made the argument that it now makes in its opposition there was no need for the defense to emphasize the issue during closing argument. The defense relied upon the instruction as given by the Court. The instruction clearly states:

> "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." ("Emphasis added).

The Government states that all the Court did was clarify this instruction but the Court did not clarify it. The Court changed it and this change occurred after argument. Because the instruction was changed after argument the defense had no opportunity to revisit the issue.

Obviously we are at a state where the record is not one hundred percent clear. The real question is whether it is fundamentally fair for the Government to request that Mr.

Isaacs start serving a lengthy prison sentence before the record is developed and before the appeal is argued . Defendant Isaacs respectfully submits that if the record is clear that an appellant is not a flight risk, is not a danger to the community, and his appeal is not filed for purposes of delay, that on complicated legal issues the Court should not hesitate to allow the defendant to remain free until the appeal can be resolved. This is especially so in a case like this where through no fault of the defense the case has been on-going for many years and where there has been three trials. The motions panel does not always fully comprehend all of the subtle nuances of some of the arguments that are being made and will be made at the time the appeal is presented to the merits panel. In this particular case on February 20, 2013 Circuit Judges Goodwin and Murgia were on the motions panel. The motion was denied without prejudice to its being refiled.

On February 14, 2000 the two circuit member motions panel denied a bail motion on appeal in the case of United States v. LaPage, 231 F.3d 488 (9th Cir. 2000). Circuit Judge Goodwin was on the motions panel. Like the current Isaacs case, U.S. v. LaPage , was tried three times. LaPage appealed his conviction after his third jury trial. The sentence in the LaPage case was not lengthy . Mr. LaPage received a 15 month sentence for allegedly submitting false copies of tax returns to obtain the refinancing of his house. Mr. LaPage was neither a flight risk nor a danger to the community. The only issue was likelihood of success on appeal yet his bail motion was denied and he served time in prison until the merits panel reversed his conviction based upon the same grounds urged by defendant LaPage for bail on appeal. On November 2, 2000 the Ninth Circuit reversed Mr. LaPage's

conviction, U.S. v LaPage, 231 F.3d 488 (9th Cir. 2000).[1] The defense mentions U.S. Roger LaPage simply to demonstrate that the motions panel does not always get it right. Defendant Isaacs respectfully submits that a motions panel, when not dealing with likelihood of flight or dangerousness to the community or even to the taking of an appeal for delay, should not go out of its way to put people in prison when there is absolutely no need for that.

Indeed, in this particular case the Government itself should have shown some wisdom in not generating all this additional work just to try to put some harmless guy in jail for no reason. The Government unnecessarily bullied Ninth Circuit Chief Judge Kozinski without showing any wisdom or judgment. The first trial should have been the only trial in this case. Here, the Government should have simply refrained from seeking to have Mr. Isaacs remanded into custody. Why should the taxpayers of the United States have to spend money housing Mr. Isaacs while he waits for his appeal to be resolved. Realizing the ridiculous position that it has taken in this case the Government unnecessarily tries to stir up prejudice against Isaacs by referring to an alleged brief incident regarding the post verdict sale of a movie. The Government knows full well that it has forfeited all of the movies. There was no absolutely no reason for the Government even to mention the alleged post verdict sale. Defendant Isaacs has been out of the adult movie business for quite sometime

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[1] The case is a little strange because Circuit Judge Rymer filed a dissenting opinion that did not get published until over a year later, on November 26, 2001. See U.S. v. LaPage, dissenting opinion at 271 F.3d 909 (9th Cir. 2001). The point of this is simply to demonstrate that the motions panel does not always get it right and in the case of Mr. LaPage he was forced to spend some time in prison in a case where his conviction was overturned. Eventually the Government dismissed the indictment without forcing LaPage to go through a fourth trial.

as the Government well knows. Defendant Isaacs has already suggested that he remain on supervision as he has been for all these years.

Historically obscenity law has been very difficult to follow and apply . In United States v. Pinkus , the Government was ably represented by then Assistant United States Attorney George H. King, now a District Court judge and the Presiding Judge in this case. Presumably through his eloquence then Assistant U.S. Attorney King was able to convince this Court to affirm an obscenity conviction, U.S. v. Pinkus, 551 F.2d 1155 (9th Cir. 1977). However, the United States Supreme Court in an opinion by Chief Justice Burger, reversed the Ninth Circuit in Pinkus v. United States, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978). Obviously this was a case where then Assistant U.S. Attorney King was convinced of the correctness of the Government's position and likewise this Honorable Ninth Circuit Court of Appeals was obviously confident that the conviction was properly upheld because this Court upheld the conviction. Notwithstanding the foregoing, the U.S. Supreme Court reversed.

The motions panel of this Honorable Court should do the right thing and allow Mr. Isaacs to remain free while his appeal is being pursued. Allowing Mr. Isaacs to remain free on bail pending appeal will breathe some life into the liberty with which this country has traditionally been associated . It is not good public relations for the United States to be one of the top countries when it comes to the amount of people in custody. We are now a long way into the sequestration period of budgetary constraints. This case has cost everyone a lot of money. The Government should have exercised some restraint and wisdom in this

matter . There is no reason for the Government to take such a hard nosed position unless politics is at play here. Indeed, as the first trial revealed, the obscenity unit pursuing Isaacs was set up under Attorney General Alberto Gonzales. The unit no longer exists. This may very well be the last obscenity case being pursued in this country. There is no reason for the Government to try to save face and get Mr. Isaacs in custody while his appeal has not yet been completed.

III CONCLUSION

For the foregoing reasons and for the reasons expressed in the motion, Defendant and Appellant Ira Isaacs respectfully asks this Honorable Court to allow him to remain free until his appeal is finally resolved. Politics has no place in our criminal justice system.

Respectfully submitted,

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

9th Circuit Case Number(s) 13-50036

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