

THE HONORABLE JOHN W. SEDWICK

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VICTOR HEINZ KOHRING,

Defendant.

No. CR07-00055-JWS

DEFENDANT'S MOTION FOR  
RELEASE PENDING APPEAL

COMES NOW the Defendant, Victor H. Kohring, by and through his undersigned counsel, and moves this Court for an Order of Release Pending Appeal pursuant to 18 U.S.C. §§ 3143(b) releasing Mr. Kohring on the same terms and conditions under which he was released pending trial and sentencing. The appeal in this case is not taken for the purposes of delay and the appeal raises substantial questions of law or fact likely to result in reversal or a new trial. In addition, Mr. Kohring does not pose a danger to any other person or the community and he is not a flight risk. Release pending appeal is therefore appropriate, as is a stay of any fine or restitution imposed, pursuant to Federal Rule of Criminal Procedure 38. This motion is based on the files and records heretofore entered in this cause and the following memorandum of authorities in support of this motion.

**I. INTRODUCTION**

On November 1, 2007, after an eight day trial, the jury convicted Mr. Kohring on three of the four counts alleged: Count One- Conspiracy to Commit Extortion under Color of Official Right and Bribery, in violation of 18 U.S.C. § 371; Count Three- Attempted Interference with Commerce by Extortion under Color of Official Right, in violation of 18 U.S.C. § 1951(a); and Count Four- Bribery Concerning Programs

1 Receiving Federal Funds, in violation of 18 U.S.C. §§ 666(a)(1)(B) and (2). None of  
2 these offenses triggers the rebuttable presumption against release as codified in 18 U.S.C.  
3 § 3142(f)(1).

4 Since his initial arraignment on May 5, 2007, Mr. Kohring has remained on his  
5 own recognizance pending trial. The Court permitted the same following the  
6 government's issuance of its First Superseding Indictment. Mr. Kohring is again on his  
7 own recognizance pending sentencing scheduled for May 8, 2008.

## 8 II. APPLICABLE LAW

9 The authority for release pending appeal is found in 18 U.S.C. § 3143(b)(1),  
10 which states that in order to qualify for release, a convicted defendant must demonstrate:

11 (A) by clear and convincing evidence that he is not likely to flee or pose a danger  
12 to the safety of any other person or the community if released; and

13 (B) that the appeal is not for purposes of delay and raises a substantial question of  
14 law or fact likely to result in

15 (i) reversal, (ii) an order for new trial, (iii) a sentence that does not  
16 include a period of imprisonment, or (iv) a reduced sentence to a term  
17 of imprisonment less than the total of the time already served plus the  
18 expected duration of the appeals process.

19 See 18 U.S.C. § 3143(b)(1); United States v. Garcia, 340 F.3d 1013, 1015 (9th Cir.  
20 2003).

21 While the requirements of § 3143(b) at first blush appear to put the district court  
22 in the unenviable position of passing judgment on its own decisions to deny motions for  
23 mistrial or motions for a new trial, this is not the case. Section 3143(b) does not require  
24 the district court to predict whether its decisions will be reversed at the appellate level, a  
task well beyond the expertise of even the most scholarly judicial officer. Rather, the  
district court need merely find that the defendant is neither a flight risk nor a danger to  
the community; the appeal is not for purposes of delay; and the issue presented raises a  
substantial issue of law or fact likely to precipitate a different disposition on appeal.

As Mr. Kohring was not convicted of a crime enumerated in 18 U.S.C. §§  
3142(f)(1)(A), (B), or (C), he must only meet the standard conditions for release found in  
18 U.S.C. § 3143(b) listed above. See 18 U.S.C. § 3143(b)(2); Garcia, 340 F.3d at 1015.  
Mr. Kohring therefore meets all of the prerequisites for release pending appeal.

1           **A. Mr. Kohring is neither a Flight Risk nor a Danger to the Community**

2           Given that the Court permitted Mr. Kohring's release pending both trial and  
3 sentencing, Mr. Kohring has already established that he is neither a flight risk nor a  
4 danger to the community. See Dkts. 11, 13, 14, 15, 87, and 141. There is thus no  
5 concern that Mr. Kohring is likely to flee or pose a danger to the safety of any other  
6 person or the community if released, as the Court already acknowledged. Similarly, the  
7 appeal from this case is clearly not for the purposes of delay, but rather presents several  
substantial questions, any of which, if determined in Mr. Kohring's favor, is likely to  
result in reversal, new trial, or a different sentence.

8           **B. Mr. Kohring's Appeal is Meritorious and not for Purposes of Delay**

9           Mr. Kohring's appeal will raise several issues of law and fact likely to result in  
10 reversal, new trial, or a different sentence. See 18 U.S.C. 3143(b)(1)(B). These issues  
11 include, especially: 1) the improper search of Mr. Kohring's legislative offices in  
12 violation of the rule of Bumper v. North Carolina, 391 U.S. 543 (1968); 2) the failure of  
13 the Court to grant Mr. Kohring's Motion for Change of Venue due to the proliferation of  
14 prejudicial media which saturated the local community and tainted the jury pool; 3) the  
15 Court's failure to even grant a hearing on Mr. Kohring's Motion to Dismiss due to  
16 violation of the attorney-client relationship; 4) the Court's denial of Mr. Kohring's offer  
17 of proof to present habit evidence pursuant to Federal Rule of Evidence 406; 5) the errors  
18 in the jury instructions; 6) the fact that during Mr. Kohring's jury trial, the court  
19 conducted a closed hearing without adhering to the strict procedures mandated by Waller  
20 v. Georgia, 467 U.S. 39, 45 (1984) (holding that denial of the right to public trial is  
structural error demanding automatic reversal); and 7) the court's failure to grant Mr.  
Kohring's Motion for New Trial pursuant to 28 U.S.C. § 455(a) on account of the  
longstanding animosity between Mr. Kohring and Deborah Sedwick, wife of the  
presiding judge.

21           First, the Court denied several defense motions which will be subjects of appellate  
22 review. The Court denied Mr. Kohring's: Motion to Suppress in violation of the Fourth  
23 Amendment, dkt. 32; Motion to Change Venue, dkt. 36; Motion to Dismiss for violation  
24 with the attorney-client relationship, dkt. 98; oral motion during trial to present habit  
evidence; Motion for New Trial under the appearance of fairness doctrine, dkt. 155; and

1 Motion for Permission for Counsel to Interview a Trial Juror to ascertain precisely which  
2 conduct the trial jury deemed as criminal, dkt. 177.

3 In addition, as the Court noted in its Order denying Mr. Kohring's Motion for  
4 Permission for Counsel to Interview a Trial Juror, "[t]o the extent that the motion is  
5 premised on error in the jury instructions, that is a matter which Mr. Kohring would have  
6 to pursue on appeal." Dkt. 179. As the jury could have found Mr. Kohring guilty based  
7 on any singular allegation, the instructions are unclear as to precisely which conduct the  
8 jury deemed criminal. See United States v. Lyons, 472 F.3d 1055, 1068 (2007) (requiring  
9 a specific unanimity instruction when it appears that there is a "genuine possibility of jury  
10 confusion or that a conviction may occur as the result of different jurors concluding that  
11 the defendant committed different acts") (quoting United States v. Kim, 196 F.3d 1079,  
12 1082 (9th Cir. 1999)). If, for example, Mr. Kohring is guilty only of accepting one  
13 \$1,000 gratuity, the sentencing implications are dramatically different than if the jury  
14 found that Mr. Kohring accepted numerous bribes totaling almost \$30,000. See U.S.S.G.  
15 §§ 2C1.1(b)(1)-(2) and 2B1.1. The instructions are therefore overly ambiguous and may  
16 result in sentencing for conduct the jury did not find criminal.

17 Next, closed courtrooms violate the right to public trial and result in structural  
18 error necessitating automatic reversal. Given that the court conducted a closed hearing in  
19 the middle of Mr. Kohring's jury trial without following the constitutionally mandated  
20 procedures, Mr. Kohring should receive a new trial. See Dtk. 113 and 123. The Court  
21 apparently granted the government's Sealed Motion *in limine* to Exclude Evidence  
22 Concerning Other Individuals' Conduct and to Exclude Evidence and Argument  
23 Regarding Selective Prosecution without giving Mr. Kohring his meaningful due process  
24 opportunity to respond. The court thereby limited the scope of the defense's cross  
examination of government informant Bill Allen, whose credibility was one of the most  
important factors at trial. This closed hearing and the subsequent restriction on Mr.  
Kohring's ability to fully exercise his constitutional right to confront Bill Allen and  
impeach his credibility is a grievous error amenable to remedy on appeal.

Lastly, and perhaps most importantly, despite the fact that 28 U.S.C. § 455(a)  
contains no time limit (as opposed to 28 U.S.C. § 144), the Court nevertheless deemed  
Mr. Kohring's Motion for New Trial under the appearance of fairness doctrine as

1 untimely. The court then ostensibly proceeded to assess the merits, yet nonetheless found  
2 that a reasonable person would not think something was amiss when: 1) Deborah  
3 Sedwick, the presiding judge's wife, and the defendant had a sufficiently contentious  
4 legislative relationship to warrant front page coverage in both the Anchorage Daily News  
5 and the Juneau Empire; 2) Ms. Sedwick attended the closing arguments; 3) the presiding  
6 judge lives literally across the street from star government informant Bill Allen; and 4)  
7 the presiding judge attended high school with the government's other primary informant,  
8 Rick Smith. This concatenation of factors would lead almost any reasonable person to  
9 the conclusion there is an appearance of unfairness so that this issue alone presents a  
10 substantial question of fact or law remediable solely by reversal or new trial.

11 The issues listed above are merely a non-exclusive listing of issues posing  
12 "substantial questions" under 18 U.S.C. § 3143(b). Each of these issues would, if  
13 resolved in Mr. Kohring's favor on appeal, result in reversal of his conviction and/ or  
14 new trial. Mr. Kohring's appeal is therefore not for purposes of delay and raises  
15 substantial questions of law or fact likely to result in a different disposition on appeal.

16 **C. Mr. Kohring's Appeal Raises Substantial Questions of Law or Fact  
17 Likely to Result in a Different Disposition on Appeal**

18 In the Ninth Circuit, an issue is substantial if it is "fairly debatable" or "fairly  
19 doubtful"; that is, if the issue is "of more substance than would be necessary to a finding  
20 that it was not frivolous." Garcia, 340 F.3d at 1021 n.5 (citing United States v. Handy,  
21 761 F.2d 1279, 1280-83 (9th Cir. 1985)); see United States v. Smith, 793 F.2d 85, 89 (3d  
22 Cir. 1986); accord Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). "Substantial,"  
23 therefore, merely "defines the level of merit required in the question raised on appeal,"  
24 not the likelihood of prevailing on the merits in appeal. Handy, 761 F.2d at 1280.

25 In like manner, the requirement that the "substantial" question must be likely to  
26 result in reversal, new trial, a non-prison sentence, or a sentence reduced to less than the  
27 time that would be served by the end of the appellate process, concerns only the *type of*  
28 *question* presented- the requirement "does not involve assessing the likelihood that a  
29 reversal will occur in the particular case." Garcia, 340 F.3d at 1021 n.5 (italics in  
30 original) (citing Handy, 761 F.2d at 1280). As the court in Garcia summarized:

31 The defendant, in other words, need not, under Handy, present an appeal  
32 that will likely be successful, only a non-frivolous issue that, if decided in

1 the defendant's favor, would likely result in reversal or could satisfy one of  
2 the other conditions. Because under § 3143(b)(1)(B) a defendant need not  
3 show a likelihood of success on appeal, a defendant who *does* show such  
4 likelihood goes well beyond the threshold requirement.

5 Id. (italics in original). Thus, in order to qualify for release pending appeal, a defendant  
6 merely has to raise a non-frivolous issue on appeal which, if resolved in his favor, would  
7 result in reversal, new trial, or a different sentence.

8 In this case, Mr. Kohring has multiple assignments of error on appeal, any one of  
9 which, if successful, will result in the relief mandated as a prerequisite for release  
10 pending appeal. Mr. Kohring is neither a flight risk nor a danger to the community and  
11 his appeal is not for purposes of delay, but rather presents many substantial questions of  
12 law and/ or fact requesting the relief enumerated in the statute- reversal, new trial, or  
13 different sentencing. See 18 U.S.C. § 3143(b)(1)(B)(i)-(iv). As Mr. Kohring therefore  
14 satisfies all the conditions for release pending appeal, the Court should permit Mr.  
15 Kohring to remain on the same bond pending appeal and at the same time stay any fine or  
16 restitution imposed, pursuant to Fed. R. Crim. P. 38.

### 13 III. CONCLUSION

14 WHEREFORE, for the reasons set forth above, Mr. Kohring respectfully requests  
15 that the Court enter the tendered order allowing him to remain on his same bond pending  
16 appeal and stay any fine or restitution imposed.

17  
18 RESPECTFULLY SUBMITTED this 7th day of May, 2008.

19 s/ John Henry Browne  
20 JOHN HENRY BROWNE, WSBA #4677  
21 Attorney for Defendant  
22 821 Second Avenue, Suite 2100  
23 Seattle, Washington 98104  
24 206-388-0777 fax: 206-388-0780  
e-mail: johnhenry@jhblawyer.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 7, 2008, I electronically filed Defendant Victor Heinz Kohring's Motion for Release Pending Appeal with the clerk of the court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendant and the government.

Dated this 7th day of May, 2008.

s/ Lisa A. Earnest  
\_\_\_\_\_  
Lisa A. Earnest, Paralegal  
JOHN HENRY BROWNE, #4677  
Counsel for the Defense  
821 Second Avenue, Suite 2100  
Seattle, Washington 98104  
Phone: 206-388-0777  
Fax: 206-388-0780  
Email: lisa@jhblawyer.com