Nos. 10-2487, 10-3580

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

SHOLOM RUBASHKIN,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Iowa

MOTION FOR RELEASE PENDING APPEAL

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INTRODUCTION

On June 15, 2011, the Court (Chief Judge Riley, Circuit Judges Murphy and Smith) heard oral argument in this appeal. It appears from the argument that there is a "substantial question of law," as that term has been defined in this Circuit, that could result in reversal and an order for a new trial. *United States v. Powell*, 761 F.2d 1227 (8th Cir. 1985) (en banc). The Appellant is currently in custody and has now been serving his sentence since return of the jury verdict, in addition to 76 days served pretrial. This Motion is being submitted pursuant to Rules 8(c) and 9 of the Federal Rules of Appellate Procedure and Rule 38 of the Federal Rules of Criminal Procedure to stay further service of his sentence and to release him subject to conditions that will guarantee his presence to continue service of his sentence should this Court not reverse and grant a new trial.

Mr. Rubashkin, is a native-born American who has a wife and ten children. He moved to Postville, Iowa, in 1991, when he became vice president of Agriprocessors, a kosher beef and poultry slaughtering plant that his father Aaron Rubashkin had established. Since Mr. Rubashkin's surrender for imprisonment in Otisville, New York, his family has lived in the New York area.

Mr. Rubashkin anticipated ever since the May 2008 immigration raid on that he would be accused in a federal indictment. He received the first of two "target letters" in May 2008. His attorneys met and corresponded repeatedly with the

federal prosecutors while Mr. Rubashkin remained in Postville awaiting the criminal charges that the prosecutors said they were intending to bring. Various employees of Agriprocessors were indicted in the months following the raid. Mr. Rubashkin made no attempt to flee notwithstanding the very public nature of the investigation in which he was targeted and the indictments of Agriprocessors employees. He even traveled to Canada to visit a sick friend and returned to Postville while the filing of formal charges and an arrest were imminent.

Before the May 2008 raid, Mr. Rubashkin had an absolutely clean record, and there is no reason to believe that he would flout the law or attempt to flee from it. In response to the charges filed against him he has always asserted his innocence and declared that he is confident of ultimate vindication after a fair legal process.

After his initial arrest on an immigration charge on October 30, 2008, Mr. Rubashkin was released on a one-million-dollar bond. One day after indictment on the immigration offense, he was again arrested with extensive publicity on bank fraud charges. The Magistrate Judge ordered him detained because he is Jewish and could flee to Israel, which has a "Law of Return" that, according to prosecutors, would make extradition difficult or impossible. The District Court reversed that decision after 76 days of imprisonment. Mr. Rubashkin thereafter complied with all conditions of his release. Indeed, on one occasion when his

electronic bracelet came loose, it was Mr. Rubashkin who notified the authorities of this fact and had it corrected.

Mr. Rubashkin has been ardently supported in his defense by significant segments of the Orthodox Jewish community. Many visited him before his trial and many attended the court proceedings. Relatives, former employees, and friends are certain enough that he will be remaining in the United States and will not flee that they have offered to post their homes, totaling approximately 8 million dollars in equity, as security for his presence in court. The Orthodox Jewish community has even offered valuable and sacred Torah Scrolls as security. Mr. Rubashkin proposed every conceivable restraint that could be imagined short of imprisonment – including not only electronic monitoring but also a 24-hour armed guard around his home – if he had been permitted to live at home pending sentencing. Living at home – even under conditions that are identical to home imprisonment -- would enable him to follow the strict rules of Orthodox Jewish observance and assist his wife and family, including an autistic son and children aged 11, 9, and 7.

We recognize that the burden imposed by federal law on an accused who has been found guilty and is appealing his sentence is substantial. Section 3143(b) of Title 18 mandates that he must establish "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 if released under section 3142(b) or (c)" and that the appeal "is not for

the purpose of delay and raises a substantial question of law or fact likely to result" in reversal or in an order for a new trial.

No one claims that Mr. Rubashkin poses any danger to the safety of any other person or the community if he is released from prison pending disposition of his appeal. The District Judge denied Mr. Rubashkin's request for release pending sentencing on grounds "that Defendant poses a flight risk." The District Judge did not explain why she rejected the very significant conditions that would "assure the appearance" of Mr. Rubashkin – including the most drastic condition of a 24-hour personal armed guard around Mr. Rubashkin's residence.

The conditions of release proposed by Mr. Rubashkin's trial counsel guaranteed that Mr. Rubashkin could not flee. The combination of a personal 24-hour guard and an electronic bracelet, together with financial guarantees totaling 8 million dollars, and the assurances of a significant community in the United States confirm what has been obvious throughout the proceedings involving Mr. Rubashkin – that he has no intention of fleeing, that he is contesting in the courts of the United States the charges made against him, and that he will accept the result of that battle after a fair proceeding. In a high-profile New York case following the arrest of a French citizen who was removed from an airplane as it was about to depart, an accused who is a much more serious "flight risk" was

released on bail conditions comparable to those proposed by Mr. Rubashkin's trial counsel.

Substantial questions have been raised in Mr. Rubashkin's appeal to this Court. If he prevails on either of the first two questions, a new trial will be granted. These issues satisfy the statutory standard in 18 U.S.C. § 3143(b)(1)(B).

STATEMENT

The factual history of this case is recited at pages 1-19 of Appellant's Principal Brief. The legal issues raised on appeal that could result in a reversal and a new trial appear at pages 27-48 of Appellant's Principal Brief and pages 4-18 of Appellant's Reply Brief (Point I) and at pages 48-67 of Appellant's Principal Brief and pages 19-28 of Appellant's Reply Brief (Point II).

On November 18, 2009, following the jury's verdict of guilty on 86 counts, the District Court held an evidentiary hearing on the prosecution's "Request for Detention." A full transcript of the hearing is attached as Exhibit 1. On November 20, 2009, Judge Reade granted the prosecution's motion and detained Mr. Rubashkin pending sentencing (Exhibit 2). She summarized the evidence presented at the hearing, which included (1) testimony of the United States Probation Officer who testified that Mr. Rubashkin had complied without fail with all terms of release and had "alerted her immediately" when his monitoring ankle bracelet had "become dislodged from his ankle . . . to allow for its expedient repair," (2)

testimony of Mr. Rubashkin about his religious obligation to comply with the court's rulings and his teaching in Postville during his pretrial release, (3) evidence of extraordinary support from the Orthodox Jewish community, including "over one thousand letters and e-mails of support written by members of his community who vouch for [Mr. Rubashkin's] willingness to cooperate with the law" and offers from 43 individuals willing to pledge the equity in their homes for his bail, and (4) testimony from a rabbi who heads his legal defense committee that Mr. Rubashkin is now so visible in the Jewish community that "there is nowhere Defendant could hide." Exhibit 2, pp. 3-4.

Mr. Rubashkin's counsel also presented a report from Global Security Services that is prepared to provide 24-hour armed guard surveillance at Mr. Rubashkin's expense. Exhibit 3. This proposal had been presented at the earlier January 2009 detention hearing, but the District Judge had found such additional safeguard to be unnecessary at that time.

Judge Reade acknowledged in her Order (1) "the overwhelming support that Defendant's community has provided during the trial and the instant proceeding," (2) "that Defendant took great pains to comply with the terms of his pretrial release," and (3) "that Defendant has shown he is committed to his family and to his community."

Nonetheless, the District Court found that the prosecution's evidence for detention is "compelling" because of Mr. Rubashkin's "actions prior to and during the pendency of the instant action" and his "powerful incentive to flee due to the jury's return of the Verdicts." She ordered that he be detained pending sentencing. Exhibit 2, p. 5 [Dkt. No. 748].

On December 23, 2009, appellate counsel applied to this Court for release pending sentencing. *United States v. Rubashkin*, No. 09-3939. This Court denied release pending sentencing on January 8, 2010. Exhibit 4. The Supreme Court denied certiorari on March 30, 2010. Exhibit 5.

Appellant was sentenced on June 22, 2010. Exhibit 6. Following sentencing, an oral motion was made to the District Court for bail pending appeal. That motion was denied. Exhibit 7 [Dkt. No. 928].

ARGUMENT

Sholom Rubashkin was found guilty of participating in conduct that misrepresented to his single lender the true value of security on which he could take draws pursuant to his business loan. By June 16, 2011, he will have spent 76 days in prison prior to trial and 575 days following his trial – for a total of 651 days. We now request that this Court order his release pending disposition of this appeal on all or some of the conditions of release proposed by his trial counsel.

The Bail Reform Act of 1984 authorizes imprisonment of a defendant who is not a danger to the community prior to decision on an appeal that raises substantial questions of law only if there are no conditions of release that provide adequate assurance that such a defendant will appear as required. The Act shifts the burden of proof after a defendant's trial to assure that the defendant will serve his sentence if the conviction is affirmed. Mr. Rubashkin's conduct from and after the immigration raid of May 12, 2008, demonstrates that he is not a "flight risk" and the conditions of release proposed by his trial counsel guarantee his continued presence in the United States.

Mr. Rubashkin's continuing incarceration works a tremendous hardship on him and his family. He and his wife, Leah, have ten children, of whom three are under the age of 12. A fourth, a teenager who was particularly close to Mr. Rubashkin, is severely autistic and requires continuous care. That child's condition has worsened materially as a result of Mr. Rubashkin's absence.

Incarceration of Mr. Rubashkin in prison rather than effective arrest at his home also imposes severe hardship because of the stringent demands of the religious observance of Orthodox Judaism that severely limit one's diet and prescribe prayer and other rituals. Mr. Rubashkin's practice of his faith is significantly hampered by his incarceration. He is one of only a handful of Orthodox Jewish prisoners at any security level in the Bureau of Prisons. Due to

the length of his sentence, he is required to be incarcerated in a medium security facility that simply cannot effectively accommodate the practice of his faith.

We have deferred the submission of this application until oral argument of this appeal – a juncture when this Court can see that there are very substantial reasons to challenge the fairness of the trial. Not only should the trial judge have recused herself and fully notified trial counsel of her participation in preparations for the raid, but the admission of prejudicial evidence of immigration-law violations tainted the jury's verdict.

I.

THE PROPOSED CONDITIONS OF RELEASE VIRTUALLY GUARANTEE, AS PRESCRIBED IN SECTION 3143(b)(1)(A), THAT MR. RUBASHKIN IS "NOT LIKELY TO FLEE"

The District Judge granted the prosecution's motion to imprison Mr. Rubashkin pending sentencing because she found that he "poses a flight risk" and his evidence to the contrary did not "rise to the 'clear and convincing' level necessary to show that he is 'not likely to flee [. . .] if released under [§] 3142(b) or (c).'" Exhibit 2, p. 5. This finding was clearly erroneous. And even assuming *arguendo* that Mr. Rubashkin is a "flight risk," the proposed conditions of release are more than adequate to assure his presence by a "clear and convincing standard."

A. The District Court's "Flight Risk" Finding Does Not Preclude Bail Pending Appeal.

In *United States v. Maull*, 773 F.2d 1479, 1486-1488 (8th Cir. 1985), this Court, sitting *en banc*, articulated the standards that govern applications for release on bail under the Bail Reform Act. The Court's majority opinion distinguished between the factors (a) that relate "to the individual characteristics of the defendant and the nature and seriousness of the danger to any person or the community that would be posed by the person's release" and (b) those that relate to "the analysis of the conditions of release of section 3142(c)(2)(A)-(N)." The former, said this Court, "involve primarily factual issues" that this Court must review under a "clearly erroneous" standard whereas the latter "involve legal or judgmental assessments which are based on factual findings" that are "independently reviewed." The "conditions of release" proposed to the District Court and again to this Court – which are "independently reviewed" here – would assure Mr. Rubashkin's presence as required, and this Court should accordingly release Mr. Rubashkin pending disposition of this appeal on the same conditions that governed his release pending trial or on additional conditions.

The obligation of a District Court and a Court of Appeals to impose "the least restrictive further condition, or combination of conditions, that will reasonably assure the appearance of the person as required" is explicitly prescribed

in Section 3142(c)(1)(B). And Section 3143(b)(1)(A), which governs release pending appeal, incorporates Section 3142(c). This Court held in *United States v. Welsand*, 993 F.2d 1366 (8th Cir. 1993), that a District Court considering whether to release a defendant pending sentencing under Section 3143(a) should consider the sufficiency of the conditions specified in Section 3142(c)(1)(B), which include "any other condition that is reasonably necessary." *See also United States v. Spilotro*, 786 F.2d 808 (8th Cir. 1986); *United States v. Orta*, 760 F.2d 887, 891-892 (8th Cir. 1985) (*en banc*) (judicial officer has duty to determine conditions that will "reasonably assure" appearance); *United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990) (electronic bracelet and posting home as security sufficient to reasonably assure presence of narcotics defendant who was a flight risk).

A court may not, therefore, deny release pending sentencing or pending appeal simply on a finding that the defendant is a "flight risk." Even assuming *arguendo* that the defendant is a "flight risk," the Court must consider whether any condition or conditions would achieve the result contemplated by Section 3142(c) – to "assure the appearance of the person as required."

B. The 24-Hour-Guard, Electronic Monitoring, Forfeiture of Valued Religious Scrolls, and Several Million Dollars in Property Posted by Individuals Will Guarantee Mr. Rubashkin's Appearance.

Given his meticulous – indeed, religious – adherence to the conditions of release heretofore imposed, the conditions of release that governed Mr. Rubashkin's release pending his trial are demonstrably adequate to assure his presence while his appeal is being decided. No specific reason has been stated by the prosecution for concluding that these conditions are now inadequate, and the District Court never addressed the sufficiency of these conditions.

(1) 24-Hour Armed Guard – Global Security Services of Davenport, Iowa, submitted a letter proposal for an armed guard to be stationed 24 hours a day at Mr. Rubashkin's home, where a camera system would also cover the exterior of the house. Exhibit 3. A comparable service could be provided in the New York area. Mr. Rubashkin would be arrested and held by the armed guard if he ever tried to leave his home without prior authorization. Payment for the service would be made far enough in advance that the service could not lapse without ample advance notice to the prosecution.

(2) Forfeiture of Valued Torah Scrolls – Torah scrolls have been offered as security by six rabbis. This is an extraordinary sign of confidence by the community in Mr. Rubashkin's promise to appear as required.

(3) Millions of Dollars in Friends' Property – Family, friends, and associates are ready to provide their homes as security for Mr. Rubashkin's appearance. Exhibit 8.

(4) Electronic Monitoring – Mr. Rubashkin would wear an ankle bracelet and be electronically monitored, as he was during his pre-trial release.

II.

THE DISTRICT COURT'S FINDING THAT MR. RUBASHKIN WAS A "FLIGHT RISK" WAS CLEARLY ERRONEOUS

The record made in two detention hearings established that Mr. Rubashkin had been a long-time resident of Postville with a large family that lived there with him for many years. He founded Jewish institutions in Postville and had strong ties to the community. He never tried to flee from any legal difficulty. Compare *United States v. Kisling*, 334 F.3d 734 (8th Cir. 2003) ("Kisling had attenuated community ties and a history of fleeing his legal troubles"); *United States v. Jacob*, 767 F.2d 505, 508 (8th Cir. 1985). He had no history of engaging in any violent conduct. Compare *United States v. Orta*, 760 F.2d 887, 889 n. 7 (8th Cir. 1985).

The District Judge actually made many findings that support the conclusion that Mr. Rubashkin is **not** a flight risk. Her general statement criticizing "[d]efendant's actions prior to and during the pendency of the instant action" failed to find any ***specific*** fact that would support the conclusion that there is any real danger that Mr. Rubashkin is planning to flee or can flee. The alleged assistance he gave to two individuals who left the United States and traveled to Israel was explained by Mr. Rubashkin at the detention hearing (Exhibit 1, pp. 29-34).

Moreover, this evidence – basically double hearsay – did not reflect in any way on whether Mr. Rubashkin himself was a "flight risk." In addition to the extraordinary shame he would bring to his community and his supporters if he would flee, his attachment to his family (and his autistic son, see Exhibit 1, pp. 26-28) are significant ties that will keep him at his home. And he was, according to his Probation Officer's testimony (Exhibit 1, pp. 4-7), exceedingly scrupulous in adhering to every minutia of his pre-trial release. He even alerted her when his electronic bracelet malfunctioned!

The grounds that have justified findings in reported cases that defendants are "flight risks" involve either (a) ties to a foreign country (*e.g.*, *United States v. Abad*, 350 F.3d 793, 799 (8th Cir. 2003) (foreign citizen with no children); *United States v. Jamal*, 326 F. Supp. 2d 1006 (D. Ariz. 2003) ("concrete, ongoing, business interests in Lebanon and the Middle East" and minimal assets in the United States); *United States v. Ruiz-Corral*, 338 F. Supp. 2d 1195, 1198 (D. Colo. 2004) ("significant family ties to Mexico")); *United States v. Vergara*, 612 F. Supp. 2d 36 (D.D.C. 2009) ("not a United States citizen, has extensive foreign ties"), or (b) a history of flouting the law or of avoiding arrest (*e.g.*, *United States v. Braiske*, 2009 WL 3616246 (N.D. Iowa Nov. 22009); *United States v. Scales*, 344 F. Supp. 2d 213, 216 (D. Me. 2004) ("history of violating State-imposed conditions of release or defaulting on appearance requirements")). We have found

no reported case in which a defendant who, like Sholom Rubashkin, had no ties to a foreign country and had no history of evading the law was held to be a "flight risk" and detained pending sentencing.

On the other hand, courts have released defendants over government objection on far more aggravated circumstances and greater likelihood of flight than is presented by the record of this case. And the conditions of release in these other reported cases have been equal to, or less extreme, than was proposed by Mr. Rubashkin. *See, e.g., United States v. Madoff*, 586 F. Supp. 2d 240 (S.D.N.Y. 2009); *United States v. Dreier*, 596 F. Supp. 2d 831 (S.D.N.Y. 2009); *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962 (E.D. Wis. 2008); *United States v. Demmler*, 523 F. Supp. 2d 677 (S.D. Ohio 2007).

A recent highly publicized case illustrates the inequity in imprisoning Mr. Rubashkin on the ground that he is a "flight risk." The same "flight risk" assertion was made in the New York State prosecution of the head of the International Monetary Fund, Dominique Strauss-Kahn, who was arrested and will stand trial on attempted rape charges. Unlike Mr. Rubashkin, Mr. Strauss-Kahn (a) is a citizen of a foreign country and not a citizen of the United States, (b) has no permanent residence in the United States, (c) was apprehended on an airplane as he was leaving the United States, and (d) could not be successfully extradited because France, where he is a citizen, does not extradite French citizens to the United

States. Nonetheless, Mr. Strauss-Kahn's release on bail with a 24-hour guard, electronic monitoring, a one-million-dollar cash bail, and a five-million-dollar bond was ordered. See Exhibit 9. These conditions are comparable to those offered by Mr. Rubashkin and the community that supports him.

If the "flight risk" concern regarding Mr. Strauss-Kahn was not sufficient to justify his continued imprisonment, Mr. Rubashkin, who is a United States citizen only, resides with his family in the United States, was not apprehended while leaving the United States, and could be extradited from a foreign country (including Israel) should surely be released on the same conditions.

III.

THE FIRST ISSUE RAISED ON APPEAL "RAISES A SUBSTANTIAL QUESTION OF LAW . . . LIKELY TO RESULT IN . . . AN ORDER FOR A NEW TRIAL"

Appellant's briefs in this Court raised two issues that would warrant reversal and the grant of a new trial. The oral argument of this appeal held on June 15, 2011, did not reach the second of these issues, but the discussion of the first issue demonstrates that it is a "close" question or "one that could very well go either way." *United States v. Powell*, 761 F.2d 1227, 1230 (8th Cir. 1985) (en banc). This is the definition of "substantial question of law . . . likely to result in reversal or an order for a new trial" (the language of Section 3143(b)(1)(B)) that was provided in *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985), and has been followed in

nearly all Circuits, including this one. See cases cited in *United States v. Maher*, 10 F. Supp. 2d 594, 596 (W.D. Va. 1998). Applying this standard, Mr. Rubashkin meets the criteria for release on bail pending this Court's disposition of his appeal.

CONCLUSION

For the foregoing reasons, this Court should order the release, on appropriate conditions, of Mr. Rubashkin pending disposition of his appeal.

Respectfully submitted,

Dated: June 16, 2011

s/Nathan Lewin

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CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on June 16, 2011.

By: s/ Nathan Lewin
NATHAN LEWIN

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