INTRODUCTION

Defendant CLIENT NAME hereby requests that this Court release him under 18 U.S.C. § 3143 until appeal of this matter is decided. CLIENT NAME's appeal will involve substantial questions of fact and of law that likely will result in reversal of his conviction and a new trial or sentencing hearing. Additionally, CLIENT NAME is neither a flight risk nor someone who poses a danger to the community. This Court released him during his trial without any problems whatsoever. At the very least, there are conditions that reasonably assure this Court that he will not flee or pose a danger to the community.

BECAUSE CLIENT NAME MEETS THE THREE REQUIREMENTS SET OUT IN 18 U.S.C. § 3143(b), HE SHOULD BE RELEASED ON BAIL PENDING APPEAL

Under section 3143(b), an individual found guilty of an offense and sentenced to a term of imprisonment shall 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 time already served plus the expected duration of the appeal process.

Therefore, in order to prevail, the defendant must establish by clear and convincing evidence that he is not likely to flee, that he does not pose a danger to the safety of any individual or of the community, and that his appeal raises a substantial question of law or fact. The record clearly supports each of these contentions by CLIENT NAME.

18 U.S.C. § 3142(g) sets out the factors this Court should take into account in determining whether there are conditions that will reasonably assure that the defendant will appear when required and that the defendant will not pose a danger to the community:

> 1) the nature and circumstances of the offense charged;
> 2) the weight of the evidence;
> 3) the history and characteristics of the defendant, including the defendant's
> —character
> —physical and mental condition
> —family ties
> —employment
> —financial resources
> —length of residence in the community
> —community ties
> —past conduct
> —history relating to drug or alcohol abuse
> —criminal history
> —record of appearance at court proceedings
> —whether at the time of the current offense or arrest the defendant was on probation, parole or other release pending trial, sentencing, appeal or completion of a sentence; and
> 4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

Consideration of these factors compels the conclusion that CLIENT NAME should be released on bail.

I. CLIENT NAME IS NOT LIKELY TO FLEE

With regard to the likelihood of flight, several circumstances assure this Court that CLIENT NAME will make all required court appearances. CLIENT NAME has resided in the United States since 1961, 32 years in all.[1] He has been a naturalized citizen since 1965. For all his years in the United States, he has resided in the San Francisco Bay area. Additionally, he has resided for the past

[1] The facts related here were taken from the bail report submitted to this Court by Pretrial Services.

six years at his current address.

He has extremely strong family and community ties to this area. He married his wife, Carol CLIENT NAME, in 1982. He has two sons from a prior marriage, Michael and John, both of whom reside in Oregon. His wife and his two sons are willing to sign a release bond for a substantial amount. They also are willing to post their property as security for such a bond. In addition, CLIENT NAME's in-laws, the Stablefords, also are willing to sign a bond and to post property on his behalf. In fact, as this Court knows, the Stablefords posted property for CLIENT NAME's release during trial. CLIENT NAME did nothing to violate their trust.

CLIENT NAME has traveled outside this country, making trips to Holland in 1987 and 1993. He has in the past and is willing now to surrender his passport as a condition of release.

Pretrial Services concluded that CLIENT NAME "has strong familial ties to this area" and poses a "minimal flight risk" such that this Court "could fashion conditions to ensure his appearance." On these grounds, Pretrial Services recommended that CLIENT NAME be released on an unsecured bail bond in the amount of $100,000 cosigned by his wife and two sons.

Moreover, this Court, after finding that there are conditions that would reasonably assure that CLIENT NAME would make all his appearances and not be a danger, permitted CLIENT NAME's release during the trial on a $100,000 bond secured by real property. As conditions of his release, CLIENT NAME was required to report to Pretrial Services frequently (i.e., twice per month in person and thrice per week by telephone) and to relinquish his passport to this Court. *See* Order Setting Conditions Of Release And Appearance Bond (attached hereto as Exhibit A).

As this Court is aware, CLIENT NAME abided conscientiously by all release conditions until he was remanded back into custody at the time of his conviction.

Thus, in addition to the relevant circumstances that compel a finding that CLIENT NAME is not a flight risk, this Court also can rely on CLIENT NAME's exemplary conduct while out of custody. He has demonstrated his integrity and his willingness to submit to this Court's authority.

Finally, CLIENT NAME's conviction and sentence do not indicate another result. This Court sentenced him to 24 months in prison. Because he has served 6 months, he will be released in less than 18 months. There is no basis to believe that if released, he would flee from his domicile of 32 years and thereby face a felony conviction and substantially more prison time. Such a course would make of a man in his 50s a fugitive who could escape further imprisonment only by accepting a lifelong banishment from this country. CLIENT NAME's life is in this country—he will honor this Court's orders.

II. CLIENT NAME DOES NOT POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY

CLIENT NAME is not a danger to the community. He has no history whatsoever of criminal convictions or arrests. There is no record of any violent conduct at any time before his April 13, 1993 arrest. There is no record of any psychological or psychiatric disability nor any sort of drug or alcohol abuse.

He is a 56-year old man who asks that he be allowed release so that he may care for an ailing wife.

The government contends that at the time of his arrest, CLIENT NAME resisted the officers, threatening one officer and charging another officer. Whatever happened during his arrest clearly is aberrant behavior given CLIENT NAME's lifetime of non-violence. Pretrial Services agrees: they found that "there is nothing in this defendant's history to indicate he would pose a danger," apart

from the report of his resistance to the arresting officers at the time of his arrest. Moreover, CLIENT NAME's conduct while on release is clear proof that this incident was aberrant and not likely to be repeated if CLIENT NAME is released.

CLIENT NAME's history of legitimate employment and his substantial family ties further assure this Court that he will not pose a danger if released.

Accordingly, this Court should find that there is clear and convincing evidence that CLIENT NAME is neither a flight risk nor a danger.

III. THE APPEAL OF THIS MATTER RAISES SUBSTANTIAL QUESTIONS OF FACT AND LAW

CLIENT NAME's appeal will raise several substantial questions of fact and law related to his conviction and to his sentencing. Two of these issues are discussed in some detail below. One or more of these challenges to the judgment in this matter likely will result in reversal of that judgment and an order for a new trial or new sentencing hearing.

A. CLIENT NAME's Self-Representation Infringed His Constitutional Rights

1. To Be Valid, A Waiver Of The Right To Counsel At Trial Must Satisfy Several Stringent Requirements

Under the Sixth Amendment, a criminal defendant has the right to waive representation by counsel and to represent himself, as long as the waiver is knowing, intelligent and voluntary. *Faretta v. California*, 422 U.S. 806, 835 (1975). To represent himself, a defendant must "knowingly and intelligently forego the benefits traditionally associated with the right to counsel. Id.

The Ninth Circuit has set out a three-prong test that must be satisfied before a defendant's request to proceed pro se is properly granted. *United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990).

The first requirement is that the defendant's request to forego assistance of counsel be unequivocal. *Id.* at 714. In *Meeks v. Craven*, 482 F.2d 465, 467 (9th Cir. 1973), the defendant sought to proceed pro se but the trial court denied his request. On appeal, the Ninth Circuit found no error because the defendant's request to forego counsel was "equivocal":

An "unequivocal" demand to proceed pro se should be, at the very least, sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel. "I think I will" hardly meets the constitutional criteria for waiver of counsel. *Id*.

The second requirement is that the waiver of the right to counsel must be made "knowingly and intelligently." *Robinson*, 913 F.2d at 714. To satisfy this requirement, the defendant must be aware of (1) the nature of the charges against him; (2) the possible penalties upon conviction for such charges; and (3) "the dangers and disadvantages of self representation." *Id.* (quoting *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). The *Balough* court held that the "preferred procedure" is for the district court to discuss in open court with the defendant each of these three elements. *Balough*, 820 F.2d at 1488. Failure to follow this procedure will require reversal unless the record as a whole reveals that defendant's waiver of counsel was knowing and intelligent. *Id.*

Thus, in determining whether a defendant validly waived his right to counsel at trial, the court's inquiry into the reasons behind the defendant's request and the resulting colloquy between court and defendant are critical. In making such a determination, the appellate court "must focus on what the defendant understood, rather than on what the court said or understood." *Id.* at 1487-88. Moreover, the Ninth Circuit has held that

> [a] waiver of counsel cannot be knowing and intelligent unless the accused appreciates the possible consequences of mishandling these core functions and the lawyer's superior ability to perform them.

Id. at 1487 (quoting *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982).

The United Supreme Court has emphasized that when a defendant seeks to waive his right to counsel at trial, the court must engage in a "more searching or formal inquiry" than when waiver of counsel is requested at another stage of a prosecution. *Patterson v. Illinois*, 487 U.S. 285, 299. The Court has imposed "the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Id.* at 298. This is because of "the enormous importance and role that an attorney plays at a criminal trial." *Id.* Compared with self-representation at custodial questioning, the full "dangers and disadvantages of self-representation" are less obvious and more substantial at trial. *Id.* at 299.

Finally, the third requirement is that the decision is voluntary. *Robinson*, 913 F.2d at 715. The defendant's decision is not necessarily involuntary where the defendant is asked to choose between waiver of counsel and another course of action, as long as loss of that other course of action is not constitutionally offensive. *Id.* at 717. In *Robinson*, the defendant contended that he was forced to choose between limited access to legal materials and right to counsel. The court found nothing constitutionally offensive about this choice. *Id.*

2. CLIENT NAME Never Validly Waived His Right To Counsel At Trial

In the instant case, CLIENT NAME requested that he be allowed to represent himself at a hearing on May 11, 1993. *See* Reporter's Transcript for 5/11/93 Hearing (hereafter "RT") (attached hereto as Exhibit B). CLIENT NAME's request was equivocal. Additionally, he did not knowingly and intelligently waive his right to counsel. Finally, his "waiver" was not voluntary but rather the

result of a choice CLIENT NAME felt compelled to make, a choice that was constitutionally offensive.

a. CLIENT NAME's Request Was Equivocal

When the court first asked CLIENT NAME if he desired to waive his right to counsel, he answered "no":

> The Court: Is it your desire to give up your right to have an attorney.
> The Defendant: No. He just brought up that order from the Court that a financial affidavit would have to be —
> The Court: I'm not concerned about that.
> The Defendant: I am concerned.
> The Court: I am concerned about whether or not it is your desire to give up your right to have a lawyer and represent yourself in these proceedings.
> The Defendant: Yes, ma'am.
> The Court: And you do understand if you are unable to afford a lawyer the Court will appoint a lawyer to represent you without any cost to you?
> The Defendant: Yes.
> The Court: You understand that?
> The Defendant: I understand that, ma'am.
> The Court: Okay.
> The Defendant: The Public Defender suggested that I do not fill out the financial statement, and so I'm simply without that option.
> The Court: You're without that option?
> The Defendant: To fill out a financial affidavit.
> The Court: You're not without any option. Now, I'm giving you all those options back. All I want to know is what do you want to do?
> The Defendant: I want to present myself — represent myself.
> The Court: You want to represent yourself.
> The Defendant: Um-hum.
> The Court: Do you understand that you do have the option of filling out the financial statement and having the Court appoint a lawyer to represented [sic] you?
> The Defendant: Yes.

RT 9-11. This colloquy does not evidence an unequivocal request to waive counsel and proceed pro se.

Before this colloquy, the court acknowledged that CLIENT NAME had appeared before the

magistrate with retained counsel. RT 4. It was determined that at the time of the hearing CLIENT NAME no longer had counsel. *Id.* The court explained to CLIENT NAME that he had "an absolute right to have a lawyer represent [him]." RT 5. CLIENT NAME replied that he understood but that the Public Defender could not help him because "the policies of his office do not accept the kind of defense that [he is] planning." *Id.* And he further indicated with regard to other lawyers that "[t]hey will not accept this kind of defense, and that's why I'm left on my own." *Id.* He then told the court, "What I would like to say is that I will try to go and find some counsel if I can hereafter." RT 6.

Thus, at the time of his "request" to forego counsel, CLIENT NAME had previously sought and retained counsel for a short period of time, intended to seek counsel, and initially told the Court that he did not want to give up his right to counsel. Before being cut off by the court, CLIENT NAME suggested that he was waiving counsel because of some problem with filling out the financial affidavit required for court-appointed counsel. RT 10. In fact, he was waiving his right to counsel because of the Hobson's Choice he felt he must make: give up appointed counsel or provide confidential financial information that the government might be able to obtain and use against him. See Declaration Of CLIENT NAME (attached hereto as Exhibit C). Given these circumstances, CLIENT NAME's request to waive counsel and proceed to trial pro se cannot be deemed unequivocal.

b. CLIENT NAME's Waiver Never Knowingly And Intelligently Waived Counsel

During the court's inquiry, CLIENT NAME was advised of the charges against him and the possible penalties. The court also told CLIENT NAME that if he represented himself, he would be on his own with no assistance or advice from the court on how to try his case. RT 14. The court

asked whether he was familiar with the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. CLIENT NAME said he had little familiarity with both. The court then advised him that both sets of rules would govern the proceedings and that he would be expected to abide by such rules. RT 15.

The court further advised him:

> I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise for you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the Rules of Evidence. I would strongly urge you not to try to represent yourself.
>
> Buy — and one other thing I have to advise you since you are currently incarcerated, do you understand that you would have limited access to a law library? The Court — the Court has no control over — just by virtue of the fact that you are incarcerated?

RT 16.

This advisement was not sufficient. The only "dangers and disadvantages" cited by the court were lack of familiarity with the rules of procedure and evidence and possibly limited access to legal materials. The court never warned CLIENT NAME that if he represented himself, he would not be able to argue upon appeal ineffective assistance of counsel. *See United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989) ("If [the defendant] chooses to defend himself, he must be content with the quality of that defense."). The court never cited the advantages of having a lawyer who can hire and work with a trained investigator in obtaining favorable evidence or gathering material to impeach the government's evidence. Additionally, the court never explained the disadvantages of not having a lawyer through whom communications could be channeled, thereby avoiding the dangers of incriminating statements by one under prosecution. Finally, having learned of apparent conflicts between CLIENT NAME and counsel, the court never advised CLIENT NAME that advisory

counsel could be appointed to help him through the complexities and intricacies of the trial process.

The court's inquiry was neither "searching" nor "formal." Without greater advisement as to the dangers of self representation, CLIENT NAME's decision to forego counsel at trial certainly was not knowing, much less intelligent.

c. CLIENT NAME's Choice Was Not Voluntary

As is clear from his retention of counsel for bail proceedings and from his intention to find counsel at the time of the court's inquiry on May 11, 1993, CLIENT NAME wanted to be represented by an attorney. However, the circumstances of his refusal to seek appointed counsel indicate that he refused appointed counsel for fear of the consequences of filling out a financial affidavit.

In fact, the undersigned counsel appeared for CLIENT NAME on April 14, 1993. *See* CLIENT NAME Dec. At that time, CLIENT NAME could not afford to retain an attorney. *Id.* Counsel advised CLIENT NAME that the court would appoint counsel for him if he filled out a standard Criminal Justice Act financial affidavit and swore to the truth of his answers under oath. *Id.* CLIENT NAME reviewed the form and asked counsel if the submitted form would be accessible to the government. Counsel advised him that he could move the court to seal the affidavit but that the government might still succeed in gaining access to it. *Id.* As a result, CLIENT NAME decided to renew his efforts to retain counsel.[2]

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[2] The undersigned counsel advised CLIENT NAME on the basis of an unpublished memorandum disposition in the case of *United States v. Hitchcock*, No. 91-10400 (9th Cir. February 11, 1993). This memorandum subsequently was published as *United States v. Hitchcock*, 992 F.2d 236 (9th Cir. 1993). In *Greenslade*, the district court refused to appoint counsel for defendants without submission of financial affidavits and refused to prevent the government from using the information in such affidavits. The defendants appealed the decision and moved in the alternative for mandamus. The Ninth Circuit denied both the appeal and the

On April 19, 1993, a second attorney from the Federal Defender's Office again appeared specially on CLIENT NAME's behalf. *Id.* CLIENT NAME indicated to the court that he had not been successful in his effort to retain counsel and that he was still undecided about filling out the financial affidavit. A discussion about sealing the financial affidavit ensued. *Id.* The government attorney indicated that he would oppose any order to place the affidavit under seal. *Id.* On the same day, the government attorney filed a brief in opposition to the sealing of CLIENT NAME's affidavit. *See* Notice Of Government's Intention To Object To Sealing Defendant's Financial Affidavit (attached hereto as Exhibit D).

Fearing that his affidavit might be accessible to the government, CLIENT NAME resolved not to fill out an affidavit. *Id.* Subsequently he retained counsel for his bail hearing but discharged the attorney thereafter. During the court's May 11 inquiry, CLIENT NAME once again brought up the issue of the financial affidavit:

> The Defendant: No. He just brought up that order from the Court that a financial affidavit would have to be —
> The Court: I'm not concerned about that.
> The Defendant: I am concerned.

RT 10. CLIENT NAME never was able to retain counsel. Because he believed that he could not be

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writ of mandamus. In so doing, the court indicated that the law regarding the protection to be given a defendant's financial disclosures is unsettled:

> In short, the law requires protection but does not clearly determine the protection's timing or extent. . . . With the law unsettled as to timing and extent of the protection, denying blanket use immunity was not clearly erroneous under the third guideline, and we express no opinion whether it was error at all.

Id. at 239. Given these remarks, the undersigned counsel could give CLIENT NAME no firm assurance that any financial information disclosed would not fall into the government's hands much less that it could not be used against him.

represented by appointed counsel without taking a risk that his financial affidavit would be reviewed by the government, he chose to represent himself.

In *Robinson*, the choice facing the defendant forced him to give up unlimited access to legal materials, a benefit not guaranteed by the Constitution. *Robinson*, 913 F.2d at 717. In contrast, the choice forced upon CLIENT NAME required him to give up his Fifth Amendment right not to incriminate himself if he was to exercise his Sixth Amendment guarantee of representation. This Hobson's Choice offends the Constitution.

Accordingly, CLIENT NAME's decision to waive counsel and represent himself was not voluntary.

B. This Court Erred In Its Guideline Analysis Of Count Four

Count Four of the indictment charged CLIENT NAME with corrupt interference with the administration of the tax laws in violation of 26 U.S.C. § 7212(a). Upon conviction, this Court found that (1) the guidelines recommended for this offense, U.S.S.G. § 2A2.2 or 2A2.3, aggravated or minor assault, were not appropriate to the offense conduct; (2) in such a case, U.S.S.G. § 2X5.1 directs the court to apply the most analogous guideline; and (3) U.S.S.G. § 2J1.2(a), obstruction of justice, was the most analogous guideline. CLIENT NAME contended at sentencing and will contend on appeal that this determination clearly contravenes Ninth Circuit authority.

In *United States v. Hanson*, 2 F.3d 942, 944-45 (9th Cir. 1993), the sentencing court applied U.S.S.G. § 2T1.9, conspiracy to impair, impede or defeat tax, to the defendant's conviction for corrupt interference with the administration of the tax laws. 2 F.3d at 947. The defendant's offense conduct in Hanson was almost identical to the acts charged against CLIENT NAME: both defendants

falsely claimed a huge refund from the IRS and both targeted government officials with forms claiming that those officials owed debts to the defendants.

After reviewing the defendant's conduct, the Hanson court concluded that the appropriate guideline was U.S.S.G. § 2T1.5, fraudulent returns, statements, or other documents. The base offense level for this guideline is 6.

Because this Court failed to follow Hanson, its guideline calculation for Count Four was erroneous. Accordingly, CLIENT NAME's sentence should be vacated and the case remanded for resentencing.

CONCLUSION

For the foregoing reasons, defendant CLIENT NAME respectfully requests that this Court grant his motion for bail pending appeal.