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Attorney for Defendant
ARTUR AYVAZYAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ARTUR AYVAZYAN, Defendant.	Case NO. 20-CR-00579-SVW EX PARTE APPLICATION FOR RELEASE ON BAIL PENDING APPEAL (18 U.S.C. § 3143)

TO THE HONORABLE STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant Artur Ayvazyan, by and through his newly-retained appellate counsel Tarik S. Adlai, hereby respectfully applies for an Order allowing Mr. Ayvazyan to remain released on bond pending appeal, including a stay of his prison term and surrender date.

This application is made on the ground that Artur Ayvazyan poses no risk of flight or danger and that his newly-retained counsel has identified several potential appellate issues that are likely to result in reversal, an order for a new trial, or a reduced term of imprisonment less than the expected duration of the appellate process.

This application is based on the papers, pleadings and records on file in this case, the attached memorandum of points and authorities, declaration of counsel, and any other information or argument the Court may receive.

The Government's position is not known at this time.

Respectfully submitted,
Law Offices of Tarik S. Adlai

DATED: December 29, 2021.

/s/ *Tarik S. Adlai*
TARIK S. ADLAI, Esq.
Attorney for Defendant
Artur Ayvazyan

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INTRODUCTION

Artur Ayvazyan should allowed to remain released on bail pending appeal. He poses no risk of flight or danger. Even a cursory review of the record by appellate counsel reveals significant issues that are likely to result in reversal.

STATEMENT OF FACTS

Artur Ayvazyan was convicted of fraud, identity theft and money laundering arising out of his wife's and brother's scheme to submit fraudulent PPP loan applications for fictitious people and companies. Artur applied for a PPP loan and EIDL grants, through his wife, for Allstate Towing and Transport, a trucking business he had owned and operated for years. The applications submitted by his wife, however, contained material misstatements. It is undisputed that, unlike most all of the other applications processed by his wife and brother, Mr. Ayvazyan's applications were submitted in his own name and for his own pre-existing company. Artur Ayvazyan was nonetheless accused and convicted of participating in the fraudulent scheme orchestrated by his wife and brother.

Mr. Artur Ayvazyan is a naturalized citizen who moved to the United States when he was 8 years old. His parents divorced when he was 5. The massive destruction and displacement caused by the 1988 Armenian Earthquake prompted his single mother to move to America with her two children. Artur did not grow up with his father, did not know his father, and only learned of his father's death upon returning from his honeymoon.

Artur Ayvazyan is now a 41 year old man with two children of his own, as well as the two nephews and a niece he took into his home when his brother disappeared. He owned and operated a trucking business for the past 10 years which, if not thriving, at least generated enough income for him to survive. His only criminal point was for public intoxication 6 years ago for which he was placed on probation.

Mr. Ayvazyan was released on a $100,000 appearance bond the day after his November 5, 2020 arrest. He surrendered his U.S. Passport that same day. Dkt. 6. He has made all court appearances. When contacted by his brother's pretrial services officer to check on his sister-in-law, he went to their home to find his brother and wife missing. He brought his brother's three children back with him to his home. Thereafter, Mr. Ayvazyan showed up for sentencing, fully aware that the Government claimed he was in violation of the terms of his release, sought 21 years imprisonment, and that the probation officer calculated his guidelines range as 14 to 17½ years, and recommended a sentence of 16 years. In mid-November, the Court sentenced Artur Ayvazyan to 5 years imprisonment with a surrender date of January 3, 2022. The Court deferred entering judgment until December. C.R. 1198. Mr. Ayvazyan has not yet been designated to an institution but he has already paid the special assessments the Court imposed on him.

ARGUMENT

I. A Defendant Who Poses No Risk of Flight or Danger and Presents a Non-Frivolous Issue That, If Sustained Would Result in Reversal, Is Entitled to Bail on Appeal

A defendant is entitled to be released pending appeal on a showing that he "is not likely to flee or pose a danger to the safety of any other person or the community if released" 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." 18 U.S.C. § 3143(b).

The Ninth Circuit has repeatedly emphasized that instead of requiring an appellant to establish a likelihood of success, the "likely to result" in reversal standard describes "the *type of question* that must be presented." *United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003) (emphasis added); *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985).

For there to be a "substantial question," the prospective appellant need only show that the issue is "fairly debatable' or 'fairly doubtful.'" *Handy*, 761 F.2d at 1283. This standard simply requires "more substance than would be necessary to a finding that [the question] was not frivolous." *Id.*; *accord Garcia*, 340 F.3d at 1020 n.5.

In short, the defendant need only propose to raise "a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions." *Garcia*, 340 F.3d at 1013 n.5.

II. Mr. Artur Ayvazyan Poses No Risk of Flight or Danger

Mr. Artur Ayvazyan has a strong connection to the United States and to Los Angeles in particular. When he first came to the United States with his mother, the family moved to the Los Angeles area where he has lived ever since. He has lived in Encino, with his two young teenage daughters, both citizens, for over a decade and a half. He has been the most responsible caretaker for his aging and disabled mother for years, even though his older brother also lived only a short distance away from them. His wife, Tamara Dadyan, is also a United States citizen.

Mr. Artur Ayvazyan was released on an unsecured appearance bond over a year ago. He has attended all court hearings. He has never even showed up late.

In allowing Artur Ayvazyan to remain on bond not only after conviction, but also after sentencing, the Court has already manifested a clear finding that Mr. Artur Ayvazyan poses no risk of flight or danger to the community. Artur Ayvazyan has honored his promises to the Court.

Nor does he pose any risk of danger. The crime of conviction was a white collar fraud organized and orchestrated by others. The case involved no violence, physical injury, property damage or threats to inflict them. He was in the lowest criminal history category, with only one point for a public intoxication for which he was placed on probation. Furthermore, as someone over 40, Mr. Ayvazyan's likelihood of offending again is dramatically lower than the average offender. Defendants over the age of 40 exhibit markedly lower rates of recidivism in comparson to younger defendants. *See Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines,* at 12, 28 (2004), available at *http://www.ussc.gov/sites/default/files/pdf/-research-and-publications/research-publications/2004/200405-_Recidivism_Criminal_History.pdf* ("Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21 to 9.5% over 50).

III. The Record Reveals Several Fairly Debatable Appellate Issues That Could Result In Reversal[1]

A. The Court Likely Erred In Failing to Instruct on Multiple Conspiracies

"A defendant is entitled to have the jury instructed on his or her theory of defense, as long as that theory has support in the law and some foundation in the evidence." *United States v. Perdomo-Espana*, 522 F.3d 983, 986-87 (9th Cir. 2008). "Only slight evidence will create the factual issue necessary to get the defense to the jury, even though the evidence is weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Spentz*, 653 F.3d 815, 818 (9th Cir. 2011) (internal quotations omitted).

No different than any other theory of defense, "A defendant is entitled to a multiple conspiracies instruction [] if the defendant's theory of multiple conspiracies is supported by law and has some foundation in the evidence." *United States v. Anguiano*, 873 F.2d 1314, 1317 (9th Cir. 1989). Here, there was substantial foundation in the evidence that the Government was prosecuting two different conspiracies in a single conspiracy count.

The jury received evidence that Grigoryan, Paronyan, and the two Hayrapetyans had never had any contacts, connections or communications about PPP or EIDL loans with Terabelian, the two Ayvazyans or the two Dadyans. They effectively operated in two separate universes:

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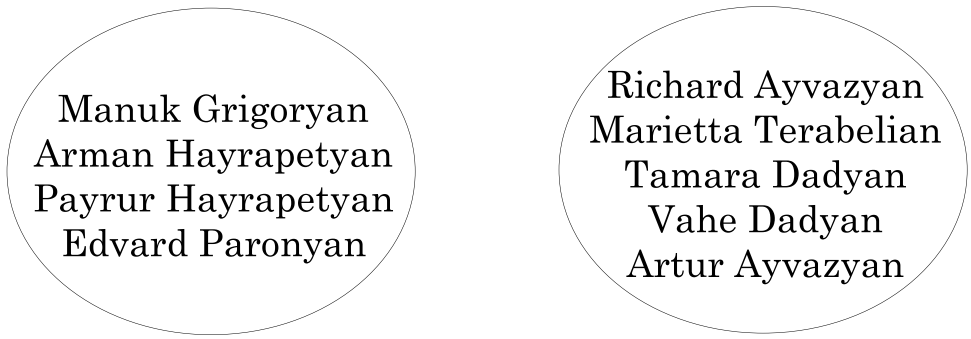
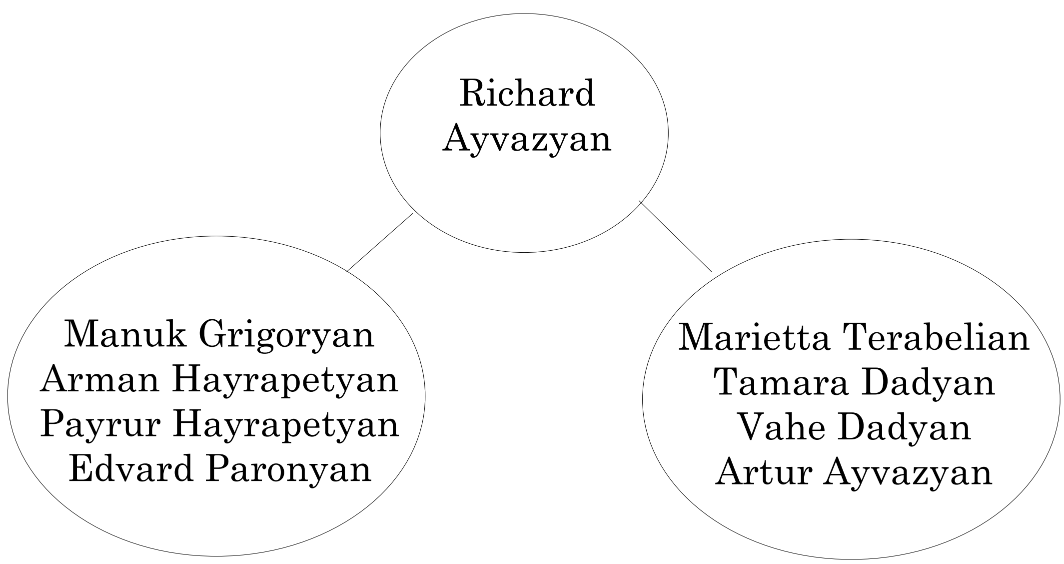
1. Identification of all the claims and full briefing must necessarily follow a thorough review of all of the many transcripts and the voluminous record in this case. In the district court, there were numerous significant motions and issues that could easily form the basis for appeal. The docket already contains over 1,200 entries.



Although there were text messages, telephone calls, and emails within and amongst Grigoryan, Paronyan, and the Hayrapetyans, as well as extensive communications between the Tamara Dadyan and Richard Ayvazyan and lesser amounts of relevant communications with the others, there was no cross-communication between the groups.

To the extent there was any cross-communication, insofar as he had social contacts with the latter, Richard Ayvazyan was the hub between Grigoryan and his brother's wife Tamara:



But there were no communications about the alleged fraudulent schemes between the two groups.

Although the Court recognized that there was sufficient evidence to permit the defense to argue the government did not prove a single conspiracy, the Court refused to instruct the jurors that the difference between one overarching conspiracy and two separate conspiracies was not merely proof of additional criminality, but was legally significant as reflecting a failure to prove the offense that was charged.

B. There Was Insufficient Evidence to Support the Conviction for Aggravated Identity Theft

Artur Ayvazyan was convicted of aggravated identity theft. 18 U.S.C. § 1028A(a)(1). The Supreme Court has clearly held that to sustain a conviction, this section "requires the Government to show that the defendant knew that the means of identification at issue belonged to another person." *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009).

The Government's principal evidence purportedly connecting Artur Ayvazyan to falsified identifications was seized from Dadyan's office in the family home. Not only did the Government present no evidence that Artur had exclusive access to Dadyan's office, but it did not even present evidence that Artur ever used Dadyan's office or stored items there. The only evidence at trial was that Artur did *not* use Dadyan's office, did *not* store papers in her office, and that the handwriting on the papers seized from Dadyan's office was *not* Artur's handwriting.[2] The Government's only other evidence was photographs found on phones seized from the house. But, again, the Government presented no evidence

2. Unsurprisingly, most of the handwriting on the papers seized from the family home was Dadyan's, not Artur's.

Artur had sole or exclusive control over those phones and the evidence the jury received was in fact to the contrary: that Dadyan had unfettered access to and frequently used other family members' phones, including Artur's (often explaining she had not kept her phone adequately charged).

The Government hypothesized that Richard Ayvazyan and Tamara Dadyan created "synthesized" identities from amalgamations of data. To sustain a conviction, the law requires that the defendant knew the identification pertained to a *real*, not merely synthetic, person.

The Government appears to have failed to prove that the fraudulent scheme employed the identities of actual, not synthetic, people, and that Artur *knew* that the identities of real people were involved.

If the evidence is found insufficient, the conviction will have to be reversed. *Burks v. United States*, 473 U.S. 1, 17-18 (1978)

C. Mr. Ayvazyan's Sentencing Guidelines Should Have Been Adjusted Downward for His Limited Role in the Offense

The Government consistently characterized Richard Ayvazyan and Tamara Dadyan as "the two leaders." R.T. 6/24/21, at 39, 42. Dadyan was a real estate agent with a home office. The Government presented evidence that Richard Ayvazyan and Tamara Dadyan's operation processed over 150 loans under the Paycheck Protection Program seeking, according to the Government, in excess of $21 million. Although seeking to saddle him with the full scope of the loans applied for by his wife and brother, the Government's only evidence was that Mr. Artur

Ayvazyan's trucking business, Allstate Towing and Transport, received a single PPP loan for $124,000 and a single EIDL for $150,000, or about 1.3% of the total proceeds from the fraudulent scheme.[3]

The Court ultimately concluded Mr. Artur Ayvazyan was responsible for $1.5 million to $3.5 million of the schemes' $21 million total intended losses but denied his request for a 3 point downward adjustment for mitigating or minor role in the offense. U.S.S.G. § 3B1.2.

The sentencing guidelines provide that the mitigating role adjustment will generally apply when a defendant is held "accountable for a loss amount . . . that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme." U.S.S.G. § 3B1.2, App. Note 3(A).

Although the Court credited the Government's theory that Artur Ayvazyan knew "what was in the house" and "the scope of the conspiracy," R.T. 11/15/21, at 13, 14, those only go to establish his criminal culpability, not his role in the offense. Conversely, however, the Court recognized that "his participation in this was markedly different than Richard Ayvazyan and Tamara Dadyan." R.T. 11/15/21, at 16. In fact, his participation was markedly different from everyone except Vahe Dadyan, who received the proceeds of only one loan, instead of two. There was no evidence Artur Ayvazyan communicated with *any* of the co-defendants about

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3. The Government also noted the existence of a $73,500 deposit but made no attempt to establish the source of the funds, let alone that it was from Dadayan, Richard Ayvazyan, or funds traced in any way to the federal goverment.

the fraudulent scheme or conspiracy. There was no evidence Mr. Artur Ayvazyan had any check-printing devices, check-printing software, or identification-creating devices or software. R.T. 11/15/21, at 22.

Apart from the Court's assumption that Artur Ayvazyan knew the "scope and structure," the Court failed to consider the remaining factors that the Sentencing Commission required courts to factor in when passing on the mitigating role adjustment including:

> (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
> (v) the degree to which the defendant stood to benefit from the criminal activity.

U.S.S.G. § 3B1.2, App. Note 3(C).

There was no evidence Mr. Artur Ayvazyan participated in planning or organizing. Indeed, the Court acknowledged "he wasn't an architect." R.T. 11/15/21, at 26. There was no evidence he influenced, let alone exercised, decision-making authority. There was no evidence of his participation in the commission besides authorizing Dadyan to apply for a loan (or perhaps two loans) on his behalf. As the Court also noted, Mr. Artur Ayvazyan's participation "may not have been critical." R.T. 11/15/21, at 26.

The Court's finding that "he helped perpetrate the fraud" and "he was involved" do not preclude the mitigating role adjustment. R.T. 11/15/21, at 26. The Sentencing Commission has made clear that even a defendant's "essential or indispensable role in the criminal activity is not determinative." U.S.S.G. § 3B1.2, App. Note 3(C). The adjustment is available "if he is substantially less culpable than the average participant." *Id.* Here, with the possible exception of Vahe Dadyan, the evidence suggests no one is less culpable than Artur Ayvazyan.

Over a decade ago, the Sentencing Commission deleted any commentary implying the downward adjustment should not be regularly and frequently applied, observing that prior language had "the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances." U.S.S.G. App. C, Amend. 755 (eff. Nov. 1, 2011).

The factors identified in App. Note 3(C) were added out of concern that the mitigating role adjustment was not being applied often enough. U.S.S.G. App. C, Amend. 794.

The Ninth Circuit made clear several years ago that, "Going forward, the assessment of a defendant's eligibility for a minor-role adjustment must include consideration of the factors identified by the Amendment, not merely the benchmarks established by our caselaw that pre-dates Amendment 794's effective date." *United States v. Diaz*, 884 F.3d 911, 916 (9th Cir. 2018). The Court's failure to properly apply the mitigating role adjustment is likely to result in a reversal for resentencing. *Diaz*, 884 F.3d at 918.

D. Failure to Address Defendant

After hearing argument from the attorneys, without addressing Mr. Ayvazyan or inviting him to address the Court, the Court imposed sentence. R.T. 11/15/21, at 22-23.

Rule 32 commands that "before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." FED. R. CRIM. P. 32(i)(4)(A)(ii).

The Court's failure to address Mr. Ayvazyan and failure to invite him to allocute is reversible. *Green v. United States*, 365 U.S. 301, 304 (1961).

CONCLUSION

Artur Ayvazyan poses no risk of flight or danger to the community and anticipates being able to raise any of several non-frivolous issues that, if sustained, would likely result in reversal. He should be allowed to be released on bail pending appeal.

Respectfully submitted,
Law Offices of Tarik S. Adlai

DATED: December 29, 2021.

/s/ *Tarik S. Adlai*
TARIK S. ADLAI, Esq.
Attorney for Defendant
Artur Ayvazyan

DECLARATION OF TARIK S. ADLAI

I, Tarik S. Adlai, declare:

1. I am an attorney, duly licensed and authorized to practice law before all courts of the State of California and am a member of the bar of this Court. I am counsel for Artur Ayvazyan, the defendant herein. The facts contained in this declaration are true based on the papers, pleadings, and records on file in this case, are personally known to be to be true, or I am informed and believe them to be true. If called as a witness, I could and would competently testify thereto.

2. The facts contained in the accompanying motion are true.

3. A true copy of the receipt for Mr. Ayvazyan's payment of his special assessments is attached hereto as Exhibit 1.

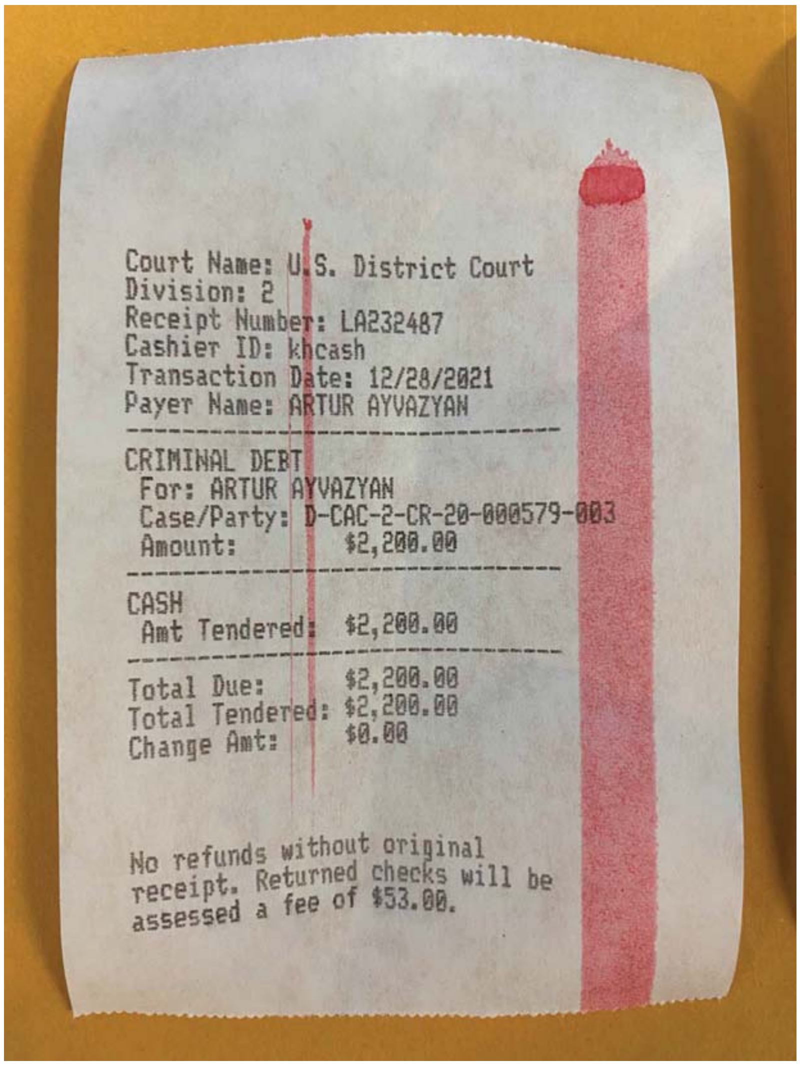
4. On December 29, 2021, I contacted AUSA Catherine Ahn who informed me that she will need to coordinate with other members of the Government's trial team, some of whom are on vacation over the holidays and at least one of whom is preparing for trial, before informing me of the Government's position.

I declare under penalty of perjury that the foregoing is true and that this declaration was executed this 29th day of December 2021, at Pasadena, California.

/s/ *Tarik S. Adlai*

TARIK S. ADLAI

EXHIBIT 1



Court Name: U.S. District Court
Division: 2
Receipt Number: LA232487
Cashier ID: khcash
Transaction Date: 12/28/2021
Payer Name: ARTUR AYVAZYAN

CRIMINAL DEBT
For: ARTUR AYVAZYAN
Case/Party: D-CAC-2-CR-20-000579-003
Amount: $2,200.00

CASH
Amt Tendered: $2,200.00

Total Due: $2,200.00
Total Tendered: $2,200.00
Change Amt: $0.00

No refunds without original receipt. Returned checks will be assessed a fee of $53.00.