

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	Docket No.. 04-10531
Plaintiff-Appellee,)	
)	(N.D.Tex. Docket No.
v.)	4::03-CR-188A)
)	
RICHARD M. SIMKANIN,)	
)	
Defendant-Appellant.)	
_____)	

**MOTION OF JEFFREY A. DICKSTEIN FOR LEAVE
TO FILE AN *AMICUS* BRIEF**

Comes now Jeffrey A. Dickstein, and moves this court for an order allowing him to file an *amicus curiae* brief in the above captioned matter. In support of his motion, Dickstein makes the following showing:

1. Dickstein is a criminal defense attorney whose interest in the case is purely academic.
2. Defendant Simkanin was charged by grand jury indictment with violating federal tax laws, all of which crimes required the government to prove willfulness.
3. Simkanin was incarcerated pre-trial.
4. During the first trial, government witnesses testified that Simkanin believed the law did not require him to take certain actions, which testimony constitutes a defense to the willfulness element of the crimes charged,
5. During the first trial, the government requested, and the court gave, a good fatih jury instruction.
6. The jury could not agree on a verdict, the court declared a mistrial, and Simkanin was tried again.

7. The court stated it had made a few “mistakes” during the first trial, and proceeded to correct those mistakes by not allowing into evidence testimony and exhibits admitted during the first trial; not giving a good faith instruction at the government’s request, and by directing a verdict upon receipt of a question from the jury. These are issues addressed in Simkanin’s Appellate Brief.

8. Notwithstanding the above, the government witnesses still testified that Simkanin believed he was not required by the law to perform the acts he was charged with violating.

9. Simkanin was convicted after the directed verdict, and remains incarcerated.

10. Even when this court reverses Simkanin’s conviction, Simkanin will remain incarcerated and tried yet a third time, despite evidence from the Government’s witnesses negating the element of willfulness.

11. Dickstein wants to brief the issue of the propriety, under the facts of this case, of trying Simkanin yet a third time. As it now stands, upon reversal, the case will be remanded to the trial court for retrial. Dickstein asserts the proper disposition is to remand to the trial court with directions to dismiss the case because retrial is barred under the Double Jeopardy provisions of the Fifth Amendment.

12. There is a conflict in the decisions of the United States Supreme Court as to whether a defendant can be tried again after an error free trial in which the government fails to muster sufficient evidence to obtain a conviction. *Compare Richardson v. U.S.*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) (“This rule accords recognition to society’s interest in giving the prosecution one complete opportunity to convict those who have violated its laws.”) *with Swisher v. Brady*, 438 U.S. 204, 98 S. Ct. 2699, 57 L. Ed. 2d 705 (1978), (“a central

purpose of the double jeopardy prohibition against successive trials is to bar the prosecution from another opportunity to supply evidence that it failed to muster in the first proceeding.”).

13. The precise facts in this case make it a very appropriate case to seek resolution of this long standing conflict. The ultimate decision will affect retrials nation wide.

14. The *amicus* brief addresses only one issue, and that issue was not addressed in Simkanin’s Appellate Brief.

15. This motion is being made more than seven days after the filing of the opening brief. However, the Government’s brief, originally due February 4, 2005, is now due on or before March 4, 2005, giving the government sufficient time to respond.

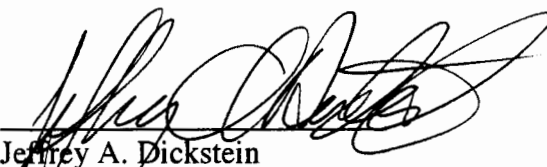
16. On February 9, 2005, Dickstein contacted Appellant’s attorney, Peter Goldberger, who consented to the filing of the *amicus* brief.

17. On February 9, 2005, Movant contacted Appellee’s Attorney, Robert Lyons, who did not consent to the filing of the *amicus* brief.

17. Dickstein’s proposed *amicus* brief is being submitted concurrently with this motion.

WHEREFORE, Dickstein seeks leave of court to file an *amicus* brief.

Dated: February 10, 2005


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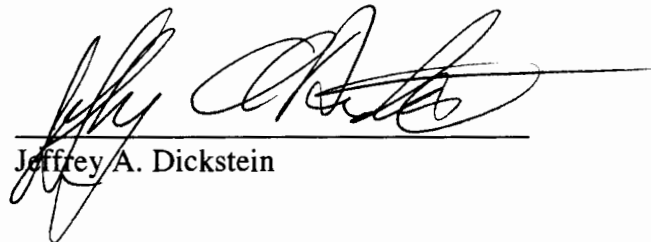
CERTIFICATE OF SERVICE

On February 10, 2005, I served a copy of the foregoing document and a copy of the proposed amicus brief on each of parties, by first class mail, postage prepaid, addressed to:

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