

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA :  
 :  
 v. :  
 :  
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MOTION FOR RELEASE PENDING APPEAL

Introduction

The Defendant hereby moves for an order setting conditions of release pending his appeal<sup>1</sup> of his sentence, pursuant to 18 U.S.C. § 3143. The Defendant submits that he satisfies all the criteria necessary for such release.

Factual Background

The Defendant has been in continuous custody since his arrest in [REDACTED] in early May, 2000. Throughout the proceedings before this Court, and indeed until very recently, the Defendant was in state custody pending resolution of charges in [REDACTED]. Those charges have now been resolved, the Defendant has completed service of his state sentence, and he has been released to federal custody for service of the remainder<sup>2</sup> of his federal sentence.

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<sup>1</sup> The Defendant gave notice of appeal on January 18, 2001.

<sup>2</sup> The Defendant's 22-month federal sentence is concurrent with the sentence he received in Surry County. Given his initial arrest in early May of 2000, and the standard BOP credit for good behavior, it would appear that the Defendant

### Law and Argument

Title 18, U.S.C., Section 3143(b)(1) provides that, "the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal" not be detained if the judicial officer finds that the Defendant meets certain criteria set forth in 3143(b)(1)(A) and (B). First, the Defendant 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." 18 U.S.C. § 3143(b)(1)(A). Once this is established, the Defendant must only show that his appeal "is not for the purpose of delay and raises a substantial question of law ... likely to result in ... a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3142(b)(1)(B)(iv). The Defendant submits that he satisfies all of these criteria.

Section 3143(b)(1)(A): The Defendant is not likely to flee and poses no danger to any person or the community.

The circumstances of the Defendant's case clearly warrant concern on the part of the Court with respect to this issue. However, the Defendant and his former wife are no longer in the

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will complete the service of his federal sentence in late November, or early December, of 2001.

midst of a divorce, and the Defendant no longer has the same legal access to his son as he had in August 1999. While the Defendant obviously hopes to regain visitation and/or custody rights at some time in the future, the volatile and tempting combination of conditions present in 1999 no longer exists. Moreover, the Defendant submits that he has, in essence, learned his lesson with regard to relations with his son and former wife.

The Defendant also has strong ties to the local community. His father, who is in increasingly poor health, as well as his older brother and sister, all reside in northwest North Carolina. His mother and stepfather live nearby in Bassett, Virginia. The strength of these ties, and the continued support the Defendant enjoys from these family members, was clearly evident at sentencing in this case.

Section 3143(b)(1)(B): The Defendant's appeal is not for the purpose of delay and raises a substantial question of law.

The sole issue the Defendant intends to raise on appeal is the upward departure under U.S.S.G. § 5K2.9, p.s. Such departures are properly reviewable with respect to both basis and extent. Koon v. United States, 518 U.S. 81 (1996); United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996). Absent that departure, the Defendant faced a maximum of 16 months imprisonment. Thus, a favorable decision from the Fourth Circuit

could result in a term of imprisonment less than the total time the Defendant will serve during the expected duration of the appeal process. Moreover, if the Defendant's appeal is successful, the Court will also have the authority to utilize alternatives to imprisonment. U.S.S.G. § 5C1.1(d). However, continued incarceration will deny the Defendant the possible benefit of such alternatives.

For all these reasons, the Defendant hereby moves for an order that he be released, subject such terms and conditions as the Court deems appropriate, pending his appeal.

Respectfully submitted this the \_\_\_\_\_ day of February, 2004.

LOUIS C. ALLEN III  
Federal Public Defender

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ERIC D. PLACKE  
Assistant Federal Public Defender  
Arkansas State Bar No. [REDACTED]  
North Carolina State Bar No. [REDACTED]  
101 South Elm Street, Suite 210  
Greensboro, NC 27401  
(336) 333-5455

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was served upon Mr. L. Patrick Auld, Assistant United States Attorney for the Middle District of North Carolina, 101 South Edgeworth Street, Suite 400, Greensboro, North Carolina, 27401, by hand delivery.

This the \_\_\_\_\_ day of February, 2004.

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ERIC D. PLACKE  
Assistant Federal Public Defender