Nos. 14-5220, 14-5221, 14-5222

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL WALLI, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville,
Case No. 3:12-cr-00107-1, The Honorable Amul R. Thapar

EMERGENCY MOTION FOR EXPEDITED DETERMINATION OF IMMEDIATE RELEASE OR LIMITED REMAND TO DISTRICT COURT FOR SUCH DETERMINATION

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On May 8, 2015, this Court overturned Appellants-Defendants' sabotage convictions, vacated their sentences, and remanded Defendants' cases to the district court for resentencing. *United States v. Walli*, 14-5220, 14-5221, 14-5222, 2015 U.S. App. LEXIS 7620, at *20-21 (6th Cir. May 8, 2015). In doing so, the Court explained, "it appears that the guidelines ranges for [Defendants'] §1361 convictions on remand will be substantially less than their time already served in federal custody." *Id.* Despite this Court's recognition, Defendants cannot be resentenced until the mandate issues. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-52 (6th Cir. 1999). That will not occur for at least several weeks. Fed. R. App. P. 41 (issuance of mandate coincides with time for filing rehearing petition or date of petition denial); *see also* Fed. R. App. P. 40 (United States has 14 days to file rehearing petition). In the meantime, Defendants remain incarcerated.

Accordingly, Defendants request that the Court expeditiously issue an order either granting their release or, in the alternative, remanding the case to the district court to make a custody determination. In support thereof, Defendants state the following:

I. THE COURT SHOULD IMMEDIATELY RELEASE DEFENDANTS PURSUANT TO 18 U.S.C. § 3143(A).

On May 8, 2015, the Court reversed Defendants' convictions under 18 U.S.C. § 2155 and affirmed their convictions under 18 U.S.C. § 1361. Finding the § 2155 and § 1361 sentences "plainly interdependent," *Walli*, 2015 U.S. App. LEXIS 7620, at *20, the Court vacated the sentences and remanded for resentencing on the remaining § 1361 convictions. Release pending resentencing is warranted.

A. 18 U.S.C. § 3143(a) Applies to Defendants in This Case.

Though this Court has rarely had occasion to address the applicable standard for custody determinations pending resentencing, where it has, the Court has concluded that 18 U.S.C. § 3143(a) applies. *See, e.g.*, *United States v. Watkins*, 994 F.2d 1192, 1197 (6th Cir. 1993) ("We note also that, in light of Watkins's current release date--October 8, 1993--and in light of the possibility that the district court might resentence Watkins to a lesser term, the court may wish to consider entertaining a motion for release pending resentencing pursuant to Rule 46(c) and 18 U.S.C. § 3143(a)."), *superseded on other grounds by Sentencing Guidelines* U.S.S.G. § 2B1.1; *see also United States v. Hendrickson*, 08-20585, 2012 U.S. Dist. LEXIS

38807, at *1-3 (E.D. Mich. Mar. 22, 2012) (applying § 3143(a) in determining release pending resentencing).[1]

In a case procedurally similar to this one, another federal court applied § 3143(a)—rather than subsection (b)—in granting bail, finding that "[a] person whose sentence has been vacated is treated as a person who has not been sentenced" and therefore "for purposes of deciding whether to grant or continue bail, § 3143(a) applies." *United States v. Pfeiffer*, 886 F. Supp. 303, 305 (E.D.N.Y. 1995); *see also United States v. Maldonado*, 996 F.2d 598, 599 (2d Cir. 1993) ("[W]hen a sentence has been vacated, the defendant is placed in the same position as if he had never been sentenced.").

While the Seventh Circuit reached a different conclusion in *United States v. Holzer*, 848 F.2d 822, 824 (7th Cir. 1988), that case is inapposite.[2] There, the defendant had served just eighteen months of a vacated

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[1] In *Hendrickson*, the district court ultimately denied release pending resentencing because the defendant was unlikely to have served his entire sentence even after resentencing. 2012 U.S. Dist. LEXIS 38807, at *8 ("Defendant recognizes in his present motion that he likely has not yet served the entirety of the prison term that he faces at resentencing"). By contrast, the Defendants here will have served more than enough time under the remaining § 1361 convictions. *Walli*, 2015 U.S. App. LEXIS 7620, at *20.

[2] Defendants address the *Holzer* decision because, as the court noted in *Pfeiffer*, this was the only other published case addressing which subsection of 18 U.S.C. § 3143 should apply to a defendant awaiting resentencing after remand. *Pfeiffer*, 886 F. Supp. at 304.

concurrent *eighteen year* sentence when the district court granted bail pending resentencing pursuant to § 3143(a). *Id.*. The Seventh Circuit found that bail was not warranted, as any reduction in sentence would be "doubtless modest," and reversed the lower court's decision. *Id.* The Seventh Circuit further noted that it was not "within the realm of realistically foreseeable circumstances that [the district court] on remand will reduce [defendant's] sentence from eighteen years to eighteen months." *Id.*

By contrast, in reversing Defendants' § 2155 convictions, the Court vacated Defendants' sentences and remanded with an acknowledgement that in all likelihood they had already served their time under 18 U.S.C. § 1361. *Walli*, 2015 U.S. App. LEXIS 7620, at *20. This case is thus similar to *Pfeiffer*, where the court granted release pending resentencing pursuant to § 3143(a).

B. Defendants Qualify for Release Under § 3143(a).

As relevant here, under 18 U.S.C. § 3143(a)(2),[3] a defendant may be released pending sentencing if the Court finds a substantial likelihood that a motion for acquittal or new trial will be granted and there is clear and

[3] Section 3143(a)(2) is triggered because Defendants' convictions under § 1361 fall within the class of offenses set out in 18 U.S.C. § 2332b(g)(5)(B), which is cross-referenced in 18 U.S.C. § 3142(f)(1).

convincing evidence that the person is not likely to flee or pose a danger to any other person or the community. Those requirements are met here.

1. That Defendants Will Likely Serve No Additional Time Is The Functional Equivalent of a Substantial Likelihood of Prevailing on a Motion for Acquittal or New Trial.

The district court sentenced Messrs. Walli and Boertje-Obed to sixty-two months and Sister Rice to thirty-five months in prison with three years of supervised release. R. 334, Sentencing Hr'g Tr., Vol. 2, PD# 4483, 4488–89, 4505. Based on Defendants' Presentence Investigation Reports as well as the new guideline range calculated pursuant to U.S.S.G. § 2B1.1, the maximum guideline sentence Sister Megan will face is ten months, the guideline range for Mr. Obed-Boertje is between fifteen and twenty-one months, and Mr. Walli would be eligible for a sentencing range of twenty-one and twenty-seven months. As of the date of this motion, Defendants will have served over twenty-four months in prison. Factoring in the credit Defendants have earned pursuant to 18 U.S.C. § 3624(b)(1), this Court's conclusion is accurate: even employing the maximum guideline sentence

for each Defendant, they have to date already served their sentences and would be released upon resentencing.[4]

Although 18 U.S.C. § 3143(a)(2)(i) speaks in terms of the likelihood of prevailing on a motion for acquittal or new trial, the circumstances here fall within the contours of that provision. Section 3143(a)(2)(i) is designed, in part, to protect against instances in which a sentence yet to be imposed may not be a sentence of imprisonment, or may be a sentence for a shorter period of imprisonment than the interval between conviction and sentencing. *Holzer*, 848 F.2d at 824. In other words, it is intended to avoid subjecting defendants to periods of incarceration beyond that required. Clearly, if Defendants here have served all the time accounted for by their lesser convictions, then, like defendants released pursuant to § 3143(a)(2)(i), there will be no sentence for Defendants to serve. Accordingly, § 3143(a)(2)(i) is applicable and satisfied.

2. Defendants Are Not a Flight Risk or a Danger to the Community.

Defendants also satisfy the second statutory requirement for release because they are not a flight risk and pose no danger to any other person or the community. 18 U.S.C. § 3413(a)(2)(B). Below, the magistrate judge

[4] Factoring in "good time credit" at the time of release, an inmate who has earned "good time" is only required to serve approximately 85% of their sentence. 18 U.S.C. § 3624(b)(1).

released Defendants on their own recognizance pending trial on August and September of 2012, *see* R. 20, R. 21, R. 37, Orders Setting Conditions of Release, PD# 46–48, 49–51, 95–97, and they fully complied with the terms of their pretrial release. *See, e.g.*, R. 209, Order Granting Motion for Temporary Release from Custody, PD# 2153. Once convicted of sabotage under 18 U.S.C. § 2155, Defendants were remanded into custody and have been incarcerated since that time. R. 152, Minute Entry for Proceedings Held Before District Judge Amul R. Thapar, PD# 1149. That conviction has now been reversed, and Defendants are awaiting resentencing for their § 1361 convictions, during which they should be released.

Now, as before, Defendants pose no flight risk or danger to the community. Sister Rice, Mr. Walli and Mr. Boertje-Obed are non-violent, peace activists and part of a religious organization, Plowshares Now. R. 193, Trial Tr., Vol. 3, PD# 1879.

Sister Megan Rice is an 85-year-old Catholic nun who is incarcerated at Metropolitan Detention Center in Brooklyn, New York. She is suffering from a range of health problems, which, although not grave, have been causing her pain and discomfort for at least the past twelve months. She hopes for release so that she can seek medical attention to address these

problems. As a member of Sisters of the Holy Child Jesus, Sister Rice has a place to live when she is released.[5]

Greg Boertje-Obed is a 60-year-old father and husband, a house painter, and lives in Duluth, Minnesota. He and his wife Michelle Nar-Obed, as well as their daughter, are members of a Catholic Worker community in Duluth. He is currently incarcerated at the United States Penitentiary in Fort Leavenworth, Kansas, and his family is eager for him to come home.

Michael Walli is a 67-year-old retired Army Veteran. He is currently incarcerated at the Federal Correctional Institution, McKean in Pennsylvania, and has a home with the Dorothy Day Catholic Worker House in Washington, DC. His community there will welcome and support him upon his release.

Delaying Defendants' release while the Government considers whether to seek rehearing of this Court's decision is unnecessary and contrary to the purpose of the Bail Reform Act.

[5] Reentry information is corroborated by Defendants' Presentence Investigation Reports.

II. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND THE CUSTODY DETERMINATION TO THE DISTRICT COURT.

Until the mandate issues, this Court retains jurisdiction over the case. *Milliken*, 200 F.3d at 951-52 ("Although the issuance of the mandate is largely a formality, the court of appeals retains jurisdiction over the case until it issues, and the district court or agency whose order is being reviewed cannot proceed in the interim."). Defendants thus turn to this Court with their request for immediate release. In the event that this Court prefer not to make this determination or concludes jurisdiction is properly before the district court, Defendants ask that the Court issue an immediate remand to the district court to hold a bond hearing pursuant to 18 U.S.C. § 3143(a) and Rule 46 of the Federal Rules of Criminal Procedure.

Although the Government still has time to seek rehearing in this Court and the mandate has not issued, case law from the Sixth Circuit suggests that district courts may make bond and custody determinations even after a defendant appeals his or her conviction and sentence. *See, e.g.*, *United States v. Krzyske*, 857 F.2d 1089, 1091 (6th Cir. 1988) ("[T]he same statute which explicitly empowers the district court to impose conditions upon release pending appeal, implicitly empowers the court to make such adjustments in those conditions as circumstances may necessitate.") (internal

quotations omitted); *Jago v. United States District Court*, 570 F.2d 618, 619 (6th Cir. 1978) (finding that it was not improper for the district court to order release on bail of a state habeas corpus prisoner applicant while an appeal was pending in the Sixth Circuit); *United States v. Mikell*, No. 97-CR-81493, 2010 WL 148673, at *3 (E.D. Mich. Jan. 12, 2010) ("[T]he case law in this circuit indicates [that] the authority to revoke bond or change bond conditions during the pendency of the appeal remains with the district court, who is appropriately situated to conduct the fact-gathering necessary in evaluating whether any previous bond determination should be adjusted.").

For these reasons, if this Court concludes that the district court should make the custody determination, Defendants ask that the Court issue a limited remand for the purpose of doing so.

III. CONCLUSION

For the foregoing reasons, Defendants ask this Court to expeditiously issue an order either releasing them on their own recognizance while they await resentencing or, in the alternative, remanding for the district court to make a custody determination.

Respectfully submitted,

/s/ Thomas S. McConville

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on May 14, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas S. McConville

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