NO. 07-60751

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL S. MINOR,

Defendant-Appellant.

On Appeal from the United States District Court for
the Southern District of Mississippi, Jackson Division
C.A. No. 3:03-CR-00120 (HTW)

MOTION OF DEFENDANT-APPELLANT PAUL S. MINOR FOR RELEASE PENDING APPEAL

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record for Defendant-Appellant Paul S. Minor certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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2. Defendant-Appellant: Paul S. Minor

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Respectfully submitted,

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Abbe David Lowell

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MOTION OF APPELLANT PAUL S. MINOR
FOR RELEASE PENDING APPEAL

Pursuant to 18 U.S.C. § 3143(b)(1), Federal Rules of Appellate Procedure 9(b)-(c) and Fifth Circuit Rule 9.2, Appellant Paul S. Minor files this motion seeking release pending appeal. This matter is of some urgency as Mr. Minor's wife of 40 years is suffering from cancer that has spread through her brain, into both lungs, and her spine. Her doctors do not expect her to live more than a few more months. (4/29/08 Ltr. from Dr. Ralph Vance (Ex. A).)[1] While Mr. Minor believes this Court will vacate his conviction and sentence once his appeal is heard, he and his wife fear that may come too late for them to spend their final days together. (6/17/08 Ltr. from Sandy Bezet (explaining Mrs. Minor is permanently disabled by cancer, requires full-time care and wants her husband to care for her) (Ex. B.).)

As the recently filed Merits Brief demonstrates, Mr. Minor's conviction was not only improper,[2] the very prosecution of his case was suspect. The media, Congress and even the Department of Justice ("DOJ") have raised issues of impropriety in this case. The flip side of Attorney General Alberto Gonzales' scandal surrounding the firing of U.S. Attorneys who would not bring criminal cases against Democrats has now come to

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[1] Since this letter was written, Mrs. Minor's medical condition has deteriorated. Her brain cancer did not respond to treatment, but expanded within the brain and metastasized to both lungs, her bones and spine. At this point, there may not be any further avenues of treatment for Mrs. Minor and she may choose simply to be medicated to control the pain.

[2] Mr. Minor was convicted of various charges, each of which are related to First Amendment-protected campaign contributions made to Mississippi political candidates: 2 counts of conspiracy, 2 counts of bribery, 7 counts of mail and wire fraud, and 1 count of racketeering. On September 7, 2007, Mr. Minor was sentenced to 132 months imprisonment, a $2.75 million fine, $1.5 million in restitution, and a special assessment of $1,100. United States v. Minor, No. 3:03CR120WS (S) (S.D. Miss. 2007) (9/7/07 Tr. at 451-54). Mr. Minor is incarcerated at the Federal Prison Camp in Pensacola, Florida.

light. Some U.S. Attorneys, and that appears to include Dunn Lampton who prosecuted this case, it seems were able to remove themselves from the list of U.S. Attorneys slated for firing by bringing cases, like this one, against prominent Democratic supporters. This U.S. Attorney pursued this case despite his many conflicts in doing so.[3] The press reports and other allegations of targeted political prosecutions and conflicts of interest have led to hearings before the Judiciary Committee of the United States House of Representatives and, more recently, have led to a joint investigation by DOJ's own Office of the Inspector General and Office of Professional Responsibility. (See 5/5/08 Ltr. from H. Jarrett to Rep. Conyers (Ex. C).)

Of those individuals the press and Congress and the DOJ's watchdog offices have identified as possible targets of improper targeting, Mr. Minor is the only person who is still incarcerated. The Judiciary Committee and DOJ's investigation have focused on the prosecutions of former Governor Don Siegelman, Georgia Thompson, Dr. Cyril Wecht, Justice Oliver Diaz and Mr. Minor. (Id.) The Eleventh Circuit recently ordered Governor Siegelman released from prison pending his appeal of the strikingly similar explicit *quid pro quo* and First Amendment protection issues involved in Mr. Minor's appeal.[4] Earlier, an outraged Seventh Circuit ordered Ms.

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[3] Mr. Minor opposed. Lampton when Lampton ran for Congress; Mr. Minor successfully brought suit against Lampton's family business seeking and receiving punitive damages; Mr. Minor advocated against the tort reform proposal advocated by Lampton; and Mr. Minor contributed to his former co-defendant, Justice Oliver Diaz's political campaign, against Justice Diaz's opponent and Mr. Lampton's friend, Keith Starrett.

[4] The substantial questions in Governor Siegelman's appeal involve, as here, underlying bribery-type honest services mail and wire fraud and federal bribery charges based upon campaign fundraising. Mr. Minor and Governor Siegelman's pending appeals raise "substantial questions" that are similar, including the fact that the Justice Department

Thompson released from the bench at oral argument. United States v. Thompson, 484 F.3d 877, 878 (7th Cir. 2007) (Easterbrook, C.J.). Dr. Wecht, was more fortunate, avoiding a conviction at his first trial. But as it has done with Mr. Minor and Justice Diaz, the government immediately sought to retry him. See Ex-Coroner Wecht Not A Criminal, Jurors Say, Pittsburg Tribune Rev. (Apr. 29, 2008). Justice Diaz, who was completely exonerated following his first trial with Mr. Minor, was again exonerated following a second trial for tax evasion. See Diaz Tax Ordeal Is Over, Biloxi Sun Herald at A1 (June 28, 2006).

Because his prosecution is fraught with so many issues and because his trial included so many errors, Mr. Minor asks that this Court free him pending his appeal. Similarly, as discussed below, Mr. Minor should be released pending appeal because an appropriately "reduced sentence" will result in "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. § 3143(b)(1)(B)(iv). In fact, Mr. Minor has been imprisoned for 21 months, a term of imprisonment that exceeds the time he would have served in a jail even if he had been validly convicted.

I. MR. MINOR'S RELEASE PENDING APPEAL IS WARRANTED

This Court has stated that release pending appeal is governed by the following test:

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prosecutors in both cases prevailed upon the lower courts to allow the convictions for federal bribery-type charges based upon campaign fundraising without requiring the government to prove an explicit *quid pro quo*. Moreover, in both instances the Justice Department prosecutors prevailed upon the lower courts to allow Mr. Minor and Governor Siegelman to be convicted for bribery-type charges on lesser standard of proof gratuity-type instructions to the jury, despite charging bribery.

> To obtain release pending appeal, a convicted defendant must establish four factors: (1) that he is not likely to flee or pose a danger to the safety of others; (2) that the appeal is not for purpose of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that the substantial question, if decided favorably to the defendant, is likely to result in reversal, in an order for a new trial, in a sentence without imprisonment, or in a sentence with reduced imprisonment.

United States v. Clark, 917 F.2d 177, 179-80 (5th Cir. 1990). Where these requirements are met, release is mandatory. 18 U.S.C. § 3143(b)(1)(B) ("shall order the release"). Mr. Minor's Motion satisfies all these factors.

The district court's order denying Mr. Minor's motion cannot be sustained because it failed to offer any explanation for its decision on the record. Fed. R. App. P. 9(a) ("The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case."); 9(b) (making Rule 9(a) applicable to decisions regarding release on appeal). Mr. Minor's counsel twice moved for release pending appeal before the district court, but both times the district court stated only that the motion was denied without explanation. The motion was first made orally at the September 7, 2007 hearing, but the district court's only response was "I'm going to deny that too. Next." (9/7/07 Tr. at 457 (Ex. D).) Mr. Minor then moved for release pending appeal through a written motion filed on September 14, 2007 (Ex. E), but the district court denied that motion in a written order dated November 28, 2007 that merely declared: "This motion is denied." (11/28/07 Order (Ex. F.).) Quite plainly, the district court made no effort to comply with Rule 9 and its orders cannot provide a basis for Mr. Minor's incarceration. See, e.g., United States v. Blasini-Lluberas, 144 F.3d 881 (1st

Cir. 1998) (remanding denial of motion because district court failed to state the reasons for its denial); United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997) ("[A] district court's reasons for its decision must be adequately explained; conclusory statements are insufficient.") (quoting United States v. Wheeler, 795 F.2d 839, 841 (9th Cir. 1993)).

A. Mr. Minor In Not A Flight Risk Or A Danger To The Community

The district court never has regarded Mr. Minor as a flight risk, but it did revoke Mr. Minor's pre-trial release finding him a danger to the community based on his abuse of alcohol. That danger has since been fully redressed. Mr. Minor successfully completed a residential alcohol rehabilitation program and, as a result of that and his incarceration, has been completely sober for more than two years. At the sentencing hearing John Owen, a certified addiction expert with more than 25 years experience who evaluated Mr. Minor following his completion of the rehabilitation program, testified that Mr. Minor's "prognosis is very good" and that his likelihood for remaining sober is "excellent." (8/2/07 Tr. at 77, 79.) There was no contrary evidence or finding.

Although Mr. Minor never had been in trouble with the law prior to the charges in this case, he had a long history of abusing alcohol. Mr. Minor gave up his deferment to enlist in the military in 1968, and served as an undercover intelligence officer behind enemy lines in Vietnam from July 1969 through July 1970. The sentencing record details that Mr. found himself in countless situations that most people would characterize as terrorizing, but he handled himself with valor and was awarded the Bronze Star for his heroism. Like many veterans, Mr. Minor had difficulty putting

the horrors that he witnessed in war out of his mind without alcohol. (See Mem. In Aid of Sentencing at 18-24 (Ex. G).)

While Mr. Minor abused alcohol in the years that followed, that did not prevent him from making many notable achievements from winning numerous verdicts for his clients to founding South Mississippi Legal Services. Even after his first trial, Mr. Minor personally assisted numerous people in evacuating the aftermath of Hurricane Katrina. (Id. at 32-39.)

The strain of the first trial led Mr. Minor to drink more, but the additional strains that entered his life became more than he could bear. Hurricane Katrina destroyed Mr. Minor's historic home, his father-in-law died, his mother's mind slipped farther into the abyss of Alzheimer's, he learned that his wife's breast cancer had metastasized to her brain and he was facing a retrial he knew could land him in jail for the rest of his life. Mr. Minor's doctors have attested that Mr. Minor developed post-traumatic stress disorder, and he coped with that by allowing himself to be consumed by alcoholism. (Id. at 47.)

Abuse of alcohol led Mr. Minor to be arrested for a DUI, which the district court appropriately addressed by ordering that Mr. Minor be detained at a well-respected residential alcohol program. (4/14/06 Order (Ex. H).) Mr. Minor completed that program successfully, and has not had a drop of alcohol since April 2006 – more than two years ago. Nevertheless, the district court ordered Mr. Minor detained on September 18, 2006, following a relatively minor violation of his conditions of release. (9/18/06 Order (Ex. I).) While subject to electronic monitoring and geographic limitations, Mr. Minor chased a dog he was walking that got away from him outside the allowed perimeter, causing the alarm on the monitor to activate. Although this was a violation of his conditions of release, it cannot seriously be

suggested that this minor breach posed a danger to the community or was indicative of an intent to flee. The district court was merely following through on a stern warning it previously had made to Mr. Minor that it would not look favorably upon any further infractions of the restrictions it had set.

The situation now has changed. Mr. Minor only posed a danger to the community through his alcoholism, but he received treatment, has been sober for more than two years, and does not pose a threat to anyone. Nor is there any reason to believe Mr. Minor would not abide by the conditions of release. The district court wanted to make clear to Mr. Minor that even technical violations of the conditions of release would land him in jail, and that jail would not be the sort of place Mr. Minor would like to be. This 21 months of incarceration Mr. Minor has since endured has been more than adequate to impress the hardships of prison upon Mr. Minor's mind, and for him to appreciate the importance of following any conditions of release meticulously. Given Mr. Minor's status as a first-time offender and otherwise sterling reputation, the Court should credit Mr. Minor with having learned this lesson.

B. Mr. Minor Has Raised Substantial Issues On Appeal That Are Likely To Lead Either To A Reversal Of His Conviction Or Resentencing

Mr. Minor's Merits Brief makes it very clear that there are substantial issues in his case beginning with his being improperly targeted, to religious discrimination in jury selection, to more than a dozen serious trial errors, and ending with sentencing Mr. Minor far in excess of what the Sentencing Guidelines recommend and based on socio-economic factors this Court has deemed unlawful. During the trial, the district court refused to abide by the evidence rulings and jury instructions the same judge applied in the earlier

2005 trial – a trial where the jury refused to convict Mr. Minor on a single count. Because those arguments are briefed so extensively in the Merits Brief, Mr. Minor fully incorporates them into this motion and will not repeat them here.

The substantial questions raised in detail in the Merits Brief include, but are not limited to: (1) the district court committed reversible error when it failed to properly instruct the jury on bribery, thereby permitting the jury to unconstitutionally convict Mr. Minor without there being an explicit *quid pro quo* agreement and for gratuity-type conduct that was neither charged in the indictment nor considered bribery under federal law; (2) the district court committed reversible error by refusing to allow Mr. Minor to rebut criminal intent by reversing numerous critical evidentiary rulings made by the same judge at the first trial as to the kinds of evidence that could be admitted and would be excluded at trial, and by failing to charge the jury on Mr. Minor's theory of the case; (3) the district court committed reversible error when it failed to dismiss the charges against Mr. Minor under 18 U.S.C. § 666 and improperly instructed the jury on the jurisdictional element of the offense; (4) the district court committed reversible error by excusing a prospective juror through religious discrimination; and (5) the district court committed reversible error when it imposed a sentence that was unreasonable and in violation of federal law.

When this Court can review the merits of the appeal and hopefully hear oral argument, it is likely to reverse the conviction and sentence on numerous grounds. Unlike the ruling this Court must make on the merits, in a motion for release context, Mr. Minor need only show that he has raised a "substantial question" – "'one of more substance than would be necessary to a finding that it was not frivolous.' 'It is a 'close' question or one that very

well could be decided the other way.'" United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985) (internal citations omitted). Mr. Minor is not required to "demonstrate a probability that the particular question will be decided in his favor, only that he has a substantial chance of prevailing." Id. at 1025 n.8. This "substantial issue" also must be one that "if decided favorably to the defendant, is likely to result in reversal, in an order for a new trial, in a sentence without imprisonment, or in a sentence with reduced imprisonment." Clark, 917 F.2d at 179.

Each of the issues Mr. Minor raised in his Merits Brief would require either reversal of the conviction or a substantial reduction in his sentence. Accordingly, the only real question under this prong of the test for release pending appeal is whether Mr. Minor has presented an issue that is at least "close." Mr. Minor's Merit Brief presents a case far stronger than one that is merely "close."

C. Mr. Minor Faces Being Incarcerated Longer Than This Court Would Permit

As Mr. Minor demonstrates in his Merits Brief, had the district court properly applied the Gratuity Guideline, Mr. Minor's advisory Guideline range would be 24-30 months. (Minor Br. at 99.) With the approximate 15% credit Mr. Minor would be entitled for good time, Mr. Minor's sentence would be reduced to 21.4 months to 25.5 months. See, e.g., 18 U.S.C. § 3624(b). In addition, Mr. Minor's alcoholism warrants his participation in the Bureau of Prison's Residential Drug and Alcohol Program, which could reduce his sentence by one year. See, e.g., 18 U.S.C. § 3621(e). Thus, the actual time served based upon a correctly-calculated Guideline sentencing range would be 11.4 months to 15.5 months. Under the recent Second Chance Act of 2007, Mr. Minor also would be able to spend the last year of

his confinement in a half-way house or under home confinement. 18 U.S.C. § 3624(c).

Because Mr. Minor already has served 21 months, he already would have been released had the district court that wrongfully convicted him at least calculated his Guideline sentencing range appropriately. Mr. Minor's continued incarceration pending appeal will only aggravate this injustice.[5] This fact should heavily influence the issuance of a release pending appeal because "few harms are more serious than depriving a man of his liberty, and nothing can truly make up for time wrongly spent in prison." Williams v. Haviland, 2005 U.S. Dist. Lexis 21066, at *3 (N.D. Ohio. Sept. 6, 2005); see 18 U.S.C. § 3143(b)(1)(B)(iv) (authorizing release pending appeal where a substantial question raised could "lead to 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").

II. THIS COURT SHOULD ORDER MR. MINOR'S RELEASE

Mr. Minor is mindful that while Rule 9(b) and Section 3143(b) vest this Court with the authority to order release pending appeal, courts of appeals typically defer to district courts in the first instance and where, as here, the district court has not explained its decision, will remand for such an explanation. But Mr. Minor also is mindful that litigation is time-consuming and of the fact that his wife's remaining time on this Earth is rapidly coming to an end. Because of the importance to him and his wife in having their family reunited before her passing, and because the justification for ordering his release is clear even in the absence of formal findings by the district

[5] Courts typically view the potential delay in the appellate process as adding an additional six months to a year. See, e.g., United States v. So, 2007 U.S. Dist. Lexis 51013, at *8 (D. N.H. July 18, 2007).

court, Mr. Minor asks that the Court itself impose conditions of release it deems appropriate. See also Clark, 917 F.2d at 179-80 (explaining that the Court is "obligated to independently asses the strength of [Appellant's] motion for release" even when the district court has made explicit findings). The issues in this appeal, the changes that have occurred since he has been sober, and his wife being near death, support his release on whatever conditions this Court deems appropriate.

Such a result is warranted by the fact that this Court's overarching duty is to ensure that justice is done. For Mr. Minor's wife, if Mr. Minor is not released until after he is vindicated on appeal, there is no remedy that will replace her ability to spend her last days with her husband. Likewise, there is no meaningful remedy for Mr. Minor if he is incarcerated longer than a just sentence would require. By contrast, if this Court later finds that Mr. Minor should be incarcerated, he can always be returned to jail to complete his sentence.

If the Court believes it best to review this motion only after an explanation is offered by the district court, we ask that the Court order that this motion be remanded to the district court for expedited hearings before a different judge. As Mr. Minor's Merits Brief demonstrates, Judge Wingate's sharp reversal of his own orders in the 2005 trial to Mr. Minor's detriment in the 2007 trial, his failure to conduct hearings or consider evidence or issue opinions he said he would issue, coupled with the animosity he showed Mr. Minor's counsel through repeated threats of sanctions, and to Mr. Minor through his drastic upward departures at sentencing and demand for immediate improper payment of more than $4 million in fines and restitution reveal some type of bias. (Minor Br. at Argument VI.) Whether real or imagined, this appearance of bias is widely acknowledged and has resulted in

numerous articles and even comments by Members of Congress in Congressional hearings questioning Judge Wingate's conduct at trial. (Id.) As much as Mr. Minor would like to move through the litigation process expeditiously, he cannot afford to do so before a judge who is or appears to be biased against him. Thus, he would have to seek Judge Wingate's recusal and potentially appeal a denial of that request, which would be time-consuming.

This Court obviously does not need to find that Judge Wingate actually is biased to order that a new judge be assigned on remand. As explained in the Merits Brief, this Court could assign a new judge on remand simply to avoid any appearance of impropriety or merely because it concludes that a fresh perspective is warranted. (Minor Br. at 118-19.)

CONCLUSION

For the foregoing reasons, with the urgencies that attend this unique case, Mr. Minor's Motion for Release pending Appeal should be granted.

DATED: July 1, 2008

Respectfully submitted,

_____

Abbe David Lowell
Counsel of Record for Defendant-Appellant, Paul S. Minor

CERTIFICATE OF SERVICE

This is to verify that true and correct copies of the attached document Defendant-Appellant Paul S. Minor's Motion for Release Pending Appeal was served by Federal Express on this 1st day of July, 2008 on counsel listed below:

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