

INTRODUCTION

On June 4, 1998, the Grand Jury returned a four-count indictment against Mr. CLIENT NAME that charged conspiracy to import opium, possession with intent to distribute opium, importation of opium, and importation of a controlled substance.

Mr. CLIENT NAME has been on pretrial release since 1998, and has met all the terms of that release in an exemplary fashion. He has made every court appearance and has never appeared before this Court on an allegation a pretrial release violation.

Mr. CLIENT NAME came to the United States as a political refugee when he was only five years old. His entire functional world is now circumscribed by the relatively small Mien community found in Sacramento, California. Since his arrival in the United States he has traveled abroad on one occasion; the trip to Laos that underlies the present conviction.

Mr. CLIENT NAME has no prior criminal convictions or, for that matter, any prior arrests.

Mr. CLIENT NAME lives with his elderly mother and father in Sacramento. His mother, who speaks little English, attended several days of the trial in a show of support for her son. Mr. CLIENT NAME's father is too ill to travel to San Francisco from Sacramento.

In addition to providing financial support, Mr. CLIENT NAME also supports his parents by shopping, running errands, and serving as a translator for the English-speaking world around them.

Trial on the four counts of the federal indictment began on Tuesday, January 25, 2000. On Tuesday, February 1, 2000, after a four-day trial, the jury returned a verdict of guilty on one or more of the four counts of the federal indictment.

DISCUSSION

I. Exceptional Reasons Support Mr. CLIENT NAME’s Release Pending Sentencing or Appeal

Exceptional circumstances support Mr. CLIENT NAME’s continued release, and this Court should permit him to remain on supervision until judgment and sentence is imposed.

A. Restrictions in 18 U.S.C. § 3143: Release Pending Sentencing or Appeal

The Bail Reform Act, 18 U.S.C. § 3141 et seq., provides for the release of a defendant pending sentencing or appeal. Section 3143 of that Act permits the release of a defendant pending sentencing if “the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c).” 18 U.S.C. § 3143(a).

Subsection (b) of section 3143 permits the release of a defendant pending appeal if there is clear and convincing evidence that there is no flight risk or danger to the community, and the appeal raises “a substantial question of law or fact likely to result in—(i) reversal; (ii) an order for new trial.” 18 U.S.C. § 3143(b)(1)(A), (B).

Section 3143 of the Bail Reform Act admittedly places restrictions upon the release of a defendant for certain types of offenses. In “presumption” cases, the judicial officer is directed to retain the defendant pending sentencing:

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C)¹ of subsection (f)(1) of section 3142 and is awaiting imposition of execution of sentence be detained

¹ Mr. CLIENT NAME has been convicted of a “presumption” offense covered in 18 U.S.C. § 3142(f)(1)(C); an offense proscribed by the Controlled Substances Act for which the maximum term of imprisonment is ten years or more. See 18 U.S.C. § 3142(f)(1)(C).

18 U.S.C. § 3143 (a)(2). There follows a description of two scenarios in which release is appropriate; neither of which apply in the present case. *See* 18 U.S.C. § 3143 (a)(2)(A)(i) and (ii).

Similarly, the statute directs the judicial officer to detain the defendant pending appeal in cases involving “presumption” offenses:

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C)² of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

18 U.S.C. § 3143(b)(2).

Thus, an initial review of the Bail Reform Act would seem to preclude Mr. CLIENT NAME’s release. Fortunately, in adopting the Act Congress anticipated unusual cases such as the one before the Court and authorized the pre-sentence or pre-appeal release of a defendant “for exceptional reasons.” 18 U.S.C. § 3145(c).

B. Section 3145 of the Bail Reform Act Permits the Release of Defendants Otherwise Precluded by Section 3143 for “Exceptional Reasons”

Title 18 Section 3145 of the Bail Reform Act permits release after conviction if there is a showing of “exceptional reasons:”

A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.

18 U.S.C. § 3145(c).

As an initial matter, it should be noted that the title of this section can be misleading.

² As described in the previous footnote, Mr. CLIENT NAME has been convicted of a “presumption” offense under 18 U.S.C. § 3142(f)(1)(C).

“Section 3145(c) is confusing because it is entitled ‘appeal from a release or detention order.’”

United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1991).

Despite the confusing title, courts that have considered the subsection have concluded that it provides the judicial officer in the first instance the power to release a defendant pending sentencing given exceptional reasons. “We conclude that the ‘exceptional reasons’ language of § 3145 may be applied by the judicial officer initially ordering such mandatory detention, despite its inclusion generally covering appeals.” *Id.*

In *United States v. Kinslow*, 105 F.3d 555 (10th Cir. 1997), the Tenth Circuit considered the application of Section 3145 for release pending sentencing. The defendant in *Kinslow* had been convicted of a “crime of violence;” one of the enumerated “presumption” offenses in 18 U.S.C. § 3142 (f)(1) that triggers the limitations of 18 U.S.C. § 3143.

The Tenth Circuit observed that release pending sentencing was still possible for the defendant, although precluded under 18 U.S.C. § 3143—“Release or detention of a defendant pending sentence or appeal:”

Alternatively, appellant could obtain release under 18 U.S.C. § 3145(c), by meeting the conditions of release set forth in 18 U.S.C. § 3143(a)(1) and by making a clear showing of exceptional reasons why his detention would not be appropriate. Appellant chose this route to attempt to obtain continued release pending sentencing. Under § 3143(a)(1), he was required to show, by clear and convincing evidence, that he was not “likely to flee or pose a danger to the safety of any other person or the community if released.” *Kinslow*, 105 F.3d at 557.

Mr. CLIENT NAME thus bears the burden of showing under 18 U.S.C. § 3145(c) that he meets the conditions of § 3143(a)(1) or (b)(1), and that there are exceptional reasons why his

detention would not be appropriate.

C. Mr. CLIENT NAME's Detention Would Not Be Appropriate

Mr. CLIENT NAME satisfies the dual requirements of 18 U.S.C. § 3145(c); he meets the conditions of 18 U.S.C. § 3143(a)(1), and exceptional reasons make his detention inappropriate.

1. Conditions of 18 U.S.C. § 3143(a)(1)

The first requirement of Section 3145 is that the defendant meet the conditions of the “Release . . . of a defendant pending sentencing” statute; 18 U.S.C. § 3143(a)(1) or (b)(1).

Title 18 Section 3143(a) permits the release of a defendant pending sentence upon meeting certain requirements by “clear and convincing evidence:”

[T]he judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence . . . be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c).

18 U.S.C. § 3143(a)(1).

In the roughly two years it has taken this case to proceed to trial, Mr. CLIENT NAME has demonstrated by clear and convincing evidence that he is unlikely to flee and that he poses no danger to any other person or to the community. Since he arrived in the United States at the age of five he has only made one international trip; the trip underlying the present offense. He has close ties to the Mien community in Sacramento, and extensive family ties in the area. Mr. CLIENT NAME has never missed—or been late for—a court appearance before this Court or a federal magistrate. A naturalized citizen of the United States, Mr. CLIENT NAME has surrendered his passport and now knows of no home outside of the Mien community in the Sacramento area.

He also poses no danger to any person or to the community. Mr. CLIENT NAME has no prior convictions, and no prior arrests. His conduct while on pretrial release has been exemplary, and the government can identify no potential dangers should he be released. Two years of proven compliance with the conditions of pretrial release demonstrate by clear and convincing evidence that he is neither a flight risk nor danger to the community.

2. Exceptional Reasons Make Mr. CLIENT NAME's Detention Inappropriate

A number of exceptional reasons make Mr. CLIENT NAME's detention pending sentencing inappropriate.

The first, and foremost reason is the complete reliance of Mr. CLIENT NAME's elderly and infirm parents upon their son's support. Mr. CLIENT NAME's parents are both Mien refugees from Laos, who fled to Thailand after the Mien suffered the ravages of the Vietnam conflict and the retribution of the Laotian communist regime.

Neither parent is fluent in English, and Mr. CLIENT NAME's father is too ill to make the trip to San Francisco from Sacramento. Mr. CLIENT NAME acts as a care giver to his parents, providing financial support and acting as an intermediary for the pair between the Mien and English worlds.

The family must ultimately make other provisions to care for these two elderly people. Mr. CLIENT NAME's continued release until sentencing will permit the family to transition into some other type of care giving environment. It will also permit Mr. CLIENT NAME to continue to work and to try to save enough funds to support his parents during his incarceration.

Other exceptional reasons make Mr. CLIENT NAME's detention pending sentencing

inappropriate. Mr. CLIENT NAME has no prior convictions, and indeed, no prior arrests. His extensive family obligations, his tenuous ability to negotiate the English-speaking world outside of the Mien community in Sacramento, and his outstanding performance while on pretrial release are each unique aspects of this case.

Finally, like co-defendant CODEFENDANT, Mr. CLIENT NAME will be seeking from this Court downward departures from the sentencing guideline range based on the unique circumstances of his life and family obligations. In addition, with no prior convictions, Mr. CLIENT NAME is an excellent candidate for boot camp or a minimum security facility. Successful self-surrender after sentencing would lower his security designation and help to ensure his placement in such a facility. In sum, Mr. CLIENT NAME has much to lose and little to gain by failing to maintain his exemplary performance on pretrial—or presentence—release. These considerable disincentives for flight are additional exceptional reasons that make Mr. CLIENT NAME’s detention pending sentencing unnecessary and inappropriate.

CONCLUSION

For the foregoing reasons, Mr. CLIENT NAME respectfully requests that the Court permit his continued release pending sentencing under 18 U.S.C. § 3145(c).