

Tentative Minute Order re Denial of Bail

On December 17, 2007, the Court denied petitioner Neko K. Defterios' ("Defterios") petition for habeas corpus to set aside his conviction pursuant to plea pursuant to 18 U.S.C. § 2255. (Case No. SACR 01-127 JVS, Docket No. 193.) Defterios argued that he had been denied his right to effective assistance of counsel, and that intervening changes in his health mitigated against incarceration. The Court disagreed with both claims.

Defterios now seeks bail pending his appeal of the Court's denial of habeas corpus to the Ninth Circuit. Case law makes plain that the decision to release a prisoner seeking review of a ruling on his collateral attack is governed by Rule 23 of the Federal Rules of Appellate Procedure. Marino v. Vasquez, 812 F.2d 449, 508 (9th Cir. 1987). Rule 23 provides:

b) Detention or Release Pending Review of Decision Not to Release. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

- (1) detained in the custody from which release is sought;
- (2) detained in other appropriate custody; or
- (3) released on personal recognizance, with or without surety.

(Fed. R. App. Proc. 23; emphasis supplied.) In order to invoke this power, a prisoner must "make a showing of exceptional circumstances . . . or a demonstration of a clear case on the merits of the habeas petition." Pfaff v. Wells, 648 F.2d 689, 693 (10th Cir. 1981). In the Ninth Circuit, the merits test is "a high probability of success" on appeal. United States v. Mett, 41 F.3d 1281, 1282 (9th

Cir. 1994) (internal quotation marks deleted).

The Court does not believe that Defterios has a high probability of prevailing on the merits. In denying Defterios' ineffective assistance of counsel claim, the Court followed the Ninth Circuit case of United States v. Zazzara, 626 F.2d 135, 138 (9th Cir. 1980). (Judgment and Order re Section 2255 Motion, p. 3.) Zazzara follows the majority rule in the Courts of Appeals in holding that the constitutional right to effective assistance does not attach prior to indictment, a point conceded by Defterios in his reply brief on the petition. (Reply on 2255 Motion, pp. 2-3.) In its decision, the Court acknowledged the Third Circuit case of Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-93 (3d Cir. 1999), and pointed out why the facts here fell well outside the facts of Matteo. (Judgment and Order re Section 2255 Motion, p. 4, n.2.)

For the merits test, Defterios advances the standard of whether the issue raises a "substantial question," citing United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). Putting aside the fact that the standard derives from a different context, the statute governing bail on appeal from a conviction, 18 U.S.C. § 3143(b), Defterios cannot meet it. Given the weight of authority following a bright line for determining when the constitutional right to counsel attaches, the issue is not "one of more substance than would be necessary to a finding that it was not frivolous." (Id. at 1283; internal quotation marks deleted.) Moreover, it falls well short of a "clear case on the merits" with a high probability of success. Pfaff, 648 F.2d at 693; Mett, 41 F.3d at 1282.

The Court does not believe that the state of Defterios' health warrants bail pending appeal. Defterios' health may have declined since the time of his original sentencing, but with two days of evidentiary hearings, the Court had the benefit of a complete and current assessment of his health. The Court found that the Bureau of Prison's could meet his medical needs. (Judgment and Order re Section 2255 Motion, pp. 5-6.) There is no merit to this claim, and as the Court ruled on the 2255 Motion, relief even if warranted on the facts is not available under Section 2255. (Id.)

Defterios also points to the delay between his sentencing in 2002 and his current surrender date in January 2008. The Government appealed the first sentencing, and Defterios appealed the resentencing in 2005. After remand

affirming the 24 month sentence, Defterios brought his Section 2255 Motion, and prior to and subsequent to the Motion, he has sought continued delays of his surrender. While the Court does not fault Defterios for exercising his rights, his actions have figured significantly in the delay.¹

Finally, Defterios argues that if he is successful, he may gain no benefit from the appeal because of the likely length of time for the Ninth Circuit to rule. That is true with respect to virtually all shorter sentences which a district court imposes. The factor necessary to invoke this rationale—a likelihood of prevailing on the appeal—is not present here.

The Motion for bail pending appeal is denied.

¹The delay, however caused, would have more significance, if the Court had found that the Bureau of Prisons could not meet Defterios' medical needs, but it reached the opposite conclusion.