

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT UMBACH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR BOND
PENDING THE APPEAL OF THE DENIAL OF HIS MOTION FOR APPEAL
BOND (TIME SENSITIVE)

VANITA GUPTA
Principal Deputy Assistant
Attorney General

THOMAS E. CHANDLER
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9035

United States v. Robert Umbach, Case No. 16-15278-GG

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the United States hereby certifies that the appellant's certificate of interested persons attached to his Motion for Bond Pending the Appeal of the Denial of His Motion for Appeal Bond dated August 4, 2016, is complete.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Date: August 10, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15278-GG

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT UMBACH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR BOND
PENDING THE APPEAL OF THE DENIAL OF HIS MOTION FOR APPEAL
BOND (TIME SENSITIVE)

The United States respectfully submits this response to defendant Robert Umbach's "Motion for Bond Pending the Appeal of the Denial of His Motion for Appeal Bond," filed in this court on August 4, 2016. This Court should dismiss this appeal as improperly taken under Federal Rule of Appellate Procedure 9(b). Under Rule 9(b), when a defendant has "already filed a notice of appeal from the judgment of conviction," the proper procedure for seeking review of a district court's denial of an appeal bond motion is to file a motion for bond pending appeal in the pending appeal of the underlying conviction, rather than initiating an entirely

separate appeal. Fed. R. App. P. 9(b). To the extent Mr. Umbach seeks, in his August 4 motion, to remain out of custody while this Court considers a properly filed motion for bond pending appeal, the United States did not oppose that request in the district court and would not do so here.

BACKGROUND

1. Following a jury trial, defendant Robert Umbach was convicted on June 10, 2015, of one count of lying to the FBI with the intent to hinder a federal investigation, in violation of 18 U.S.C. 1512(b)(3). Doc. 166. On March 15, 2016, the district court sentenced Mr. Umbach to 15 months incarceration followed by two years of supervised release. Doc. 267. The district court ordered Mr. Umbach to voluntarily surrender for service of his sentence at a time and place designated by the Probation or Pretrial Services Office. Doc. 267.

2. On March 30, 2016, Mr. Umbach filed in the district court a motion for bond pending appeal pursuant to 18 U.S.C. 3143(b). Doc. 273. That same day, Mr. Umbach also filed a motion to stay the order that he voluntarily surrender pending the district court's consideration of his motion for bond pending appeal. Doc. 274.

3. On April 5, 2016, the district court granted Mr. Umbach's motion to stay his voluntary surrender pending resolution of the appeal bond motion, and ordered

the government to respond to Mr. Umbach's motion for an appeal bond within seven days. Doc. 275.

4. On April 7, 2016, Mr. Umbach filed a notice of appeal of his conviction and sentence. Doc. 278. This Court docketed Mr. Umbach's appeal on April 13, 2016 (No. 16-11588-GG). Doc. 289.

5. On April 11, 2016, the United States filed an opposition to Mr. Umbach's motion for bond pending appeal. Doc. 285. The United States agreed that Mr. Umbach posed no flight risk and that his appeal was not for purposes of delay, but argued that the bond motion should be denied under 18 U.S.C. 3143(b)(1)(B) because Mr. Umbach's appeal did not raise a substantial question of law or fact that was likely to result in a reversal or reduced sentence. Doc. 285, at 2-7. Mr. Umbach filed a reply to the government's response on April 20, 2016. Doc. 292.

6. On July 28, 2016, the district court denied Mr. Umbach's motion for an appeal bond, agreeing with the government that Mr. Umbach's claims did not "raise[] a substantial issue of fact or law" that he was likely to win on appeal. Doc. 321, at 2.

7. The following day, on July 29, 2016, Mr. Umbach sought review of the district court's denial of his motion for appeal bond in this Court. But rather than filing a motion for bond pending appeal in his previously docketed direct appeal (No. 16-11588-GG), Mr. Umbach filed a separate notice of appeal from the district

court's denial of his bond motion. Doc. 322. This Court docketed that appeal on August 4, 2016, under a separate appeal number, 16-15278-GG. Doc. 326.

8. On August 2, 2016, Mr. Umbach filed in the district court a new motion to stay his voluntary surrender so that he could remain out of custody pending this Court's ruling on his appeal of his bond motion. Doc. 324. That same day, the district court directed the government to respond to the motion to stay voluntary surrender by August 5, 2016. Doc. 325. On August 5, 2016, the United States filed a response indicating that, while the United States maintains that Mr. Umbach is not entitled to an appeal bond for the reasons stated in the district court's order, the United States would defer to the court as to whether a limited stay of his voluntary surrender would be appropriate pending the Eleventh Circuit's consideration of whether Mr. Umbach is entitled to an appeal bond. Doc. 327.

9. Meanwhile, on August 4, 2016, Mr. Umbach filed *in this Court*, in Appeal No. 16-15278-GG, the motion before the Court here: a time-sensitive "Motion for Bond Pending the Appeal of the Denial of His Motion for Appeal Bond" (August 4 motion). This motion effectively asks this Court for the same relief Mr. Umbach sought from the district court in his August 2, 2016, motion to stay his voluntary surrender (Doc. 324)—namely, to permit Mr. Umbach to remain out of custody pending this Court's decision on whether he is entitled to a bond pending the appeal of his conviction and sentence.

10. On August 8, 2016, although this Court has not issued a briefing schedule, Mr. Umbach filed a merits brief and appendix in support of his appeal of the district court's denial of his bond pending appeal (No. 16-15278-GG).

11. Because counsel for the United States had not yet entered an appearance in Mr. Umbach's second appeal (No. 16-15278-GG), no attorney from the United States received an ECF notice of Mr. Umbach's August 4 or August 8 filings in this Court. Nevertheless, undersigned counsel—who is assigned to Mr. Umbach's original appeal from his conviction and sentence (No. 16-11588-GG)—checked the docket in No. 16-15278-GG on August 8 and learned that Mr. Umbach had submitted the abovementioned filings. Undersigned counsel immediately called the Eleventh Circuit Clerk's Office to clarify the unusual procedural posture of these cases and ascertain what, if anything, the United States was required to do. It was on this call that counsel learned that this Court had ordered the United States to respond to Mr. Umbach's August 4 motion by close-of-business August 10, 2016, although that order is not reflected in the docket for No. 16-15278-GG.

DISCUSSION

Mr. Umbach's July 29, 2016, appeal from the denial of his bond motion (No. 16-15278-GG) was improperly taken under Federal Rule of Appellate Procedure 9(b) and should therefore be dismissed.

Rule 9(b), which governs release after a judgment of conviction, provides that a defendant “may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, *or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction.*” Fed. R. App. P. 9(b) (emphasis added). Here, Mr. Umbach had filed a notice of appeal from the judgment of conviction on April 7, 2016. Doc. 278. Accordingly, the proper procedure for Mr. Umbach to seek review of the district court’s July 28, 2016, denial of his appeal bond motion was to file a motion for bond pending appeal in his existing appeal from his conviction (No. 16-11588-GG), as his co-appellant did,¹ rather than to file a new appeal. See Fed. R. App. P. 9(b), advisory committee note (noting that when “the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction,” at such point “there is obviously no need for a separate appeal from the order of the district court respecting release,” as the “court of appeals or a judge thereof has power to effect release on motion as an incident to the pending appeal”); see also Doc. 327 n.1 (United States articulating

¹ On August 8, 2016, Mr. Umbach’s co-appellant, Christopher Kines, filed a motion for bond pending appeal under Rule 9(b) in this Court, in appeal number 16-11588-GG (*i.e.*, the original appeal from his conviction).

this interpretation of Rule 9(b) in its August 5 response to Mr. Umbach's August 2 motion to stay his voluntary surrender in the district court).

In light of the clear language of Rule 9(b), the United States respectfully submits that this Court should dismiss Mr. Umbach's July 29, 2016, appeal from the denial of his bond motion (No. 16-15278-GG) and instruct Mr. Umbach to file a motion for bond pending appeal in the pending appeal from the judgment of conviction (No. 16-11588-GG). The United States will respond to the merits of any such motion within the timeframe dictated by Federal Rule of Appellate Procedure 27(a)(3)(A), or as this Court directs. To the extent the Court construes Mr. Umbach's August 4 motion as seeking to temporarily stay the order that he voluntarily surrender so that he may remain out of custody pending this Court's resolution of his motion for bond pending appeal (once properly filed), the United States did not oppose that request in its August 5 filing in the district court and would likewise not oppose this Court ordering such a temporary stay.

CONCLUSION

For the foregoing reasons, this Court should dismiss Mr. Umbach's appeal in No. 16-15278-GG and direct Mr. Umbach, pursuant to Rule 9(b), to file his motion for bond pending appeal in the pending appeal from his judgment of conviction (No. 16-11588-GG).

Respectfully submitted,

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Christine A. Monta
THOMAS E. CHANDLER
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9035

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically filed the foregoing UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR BOND PENDING THE APPEAL OF THE DENIAL OF HIS MOTION FOR APPEAL BOND (TIME SENSITIVE) with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and will be served using the Appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney