IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

23-10005

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CRAIG PINKNEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RELEASE PENDING APEAL

A jury convicted Defendant-Appellant Craig Pinkney for attacking a compliant inmate who posed no threat to anyone, conspiring to obstruct the investigation into the beating, and obstructing the investigation by submitting a false report. He was immediately detained and later sentenced to 60 months' imprisonment. Six months later, Pinkney seeks to be released from prison pending his appeal, without having first filed a motion for release in the district court. This Court should deny Pinkney's motion.

BACKGROUND

Defendant-Appellant Craig Pinkney is a former correctional officer who worked at a state jail in Hawaii. Pinkney, along with two co-defendants, "severe[ly] beat[] an unarmed man who didn't defend himself or otherwise try to fight or hit back, * * * result[ing] in severe injuries, including a broken nose, a broken jaw, broken right eye socket, and multiple abrasions and blackened eyes." Doc. 470, at 6.[1] After the beating, Pinkney engaged in an obstruction scheme during which he "threatened physical harm to others * * * if [he] were [to be] convicted." Doc. 470, at 8.

A grand jury charged Pinkney with one count of violating 18 U.S.C. 242, 2 (Deprivation of Rights Under Color of Law, Aiding and Abetting), one count of violating 18 U.S.C. 371 (Conspiracy to Obstruct Justice), and one count of violating 18 U.S.C. 1519 (Obstruction by False Report). See Doc. 1, at 2-9. A jury found Pinkney guilty on all counts. See Doc. 449, at 1-2.

After the jury reached its verdict, Pinkney asked the district court to allow him to remain out of prison pending sentencing. See Doc. 442-1, at 144. The court denied that request. See Doc. 442-1, at 144-145. The court instructed

[1] Citations to "Doc. __" refer to the district court docket number; "App. Doc. __" refers to this Court's docket number; and "Att. __" refers to an exhibit attached to this response.

Pinkney that if he "believe[d] that there is a basis for the court to order presentence release," he should "file the appropriate motion and point the court * * * to the appropriate law." See Doc. 442-1, at 145. Pinkney did not appeal this ruling.

Two weeks later, Pinkney filed a motion in the district court seeking release pending sentencing. See Doc. 358. The court heard arguments from the parties—including the government's argument that Pinkney was a danger to the community—and denied the bulk of Pinkney's motion. See Doc. 469, at 10. The court did allow Pinkney to be released to the custody of his attorney and U.S. Probation and Pretrial Services for two hours with an unsecured bond of $50,000, so that he could sign documents that would ensure the care of his child. See Doc. 469, at 9-10. Pinkney did not appeal this ruling.

In January 2023, the district court sentenced Pinkney to 60 months' imprisonment and three years' supervised release. See Doc. 449, at 3. That sentence was based in part on Pinkney's "significant arrest history for violent behavior," which "indicate[d] to the court that it'd be difficult for [him] for rehabilitation and reentering our community without risk of harm to others." Doc. 470, at 8.

On January 17, 2023, Pinkney filed a timely notice of appeal from the judgment. See Doc. 455. Pinkney has never filed a motion in the district court seeking release pending appeal.

Pinkney's opening brief originally was due April 18, 2023. On April 5, 2023, Pinkney filed an unopposed motion in this Court seeking a four-and-a-half-month extension to file his opening brief. See App. Doc. 10. This Court granted that motion, and Pinkney's opening brief is now due in one month, on September 1, 2023. See App. Doc. 11.

On July 21, 2023, six months after he was sentenced and detained, Pinkney filed a two-page motion for release pending appeal in this Court. Despite the instruction that "counsel are to make every attempt to contact opposing counsel before filing any motion," Pinkney did not do so.[2] 9th Cir. R. 27-1 advisory committee's note 5.

DISCUSSION

This Court should deny Pinkney's motion. Pursuant to Federal Rule of Appellate Procedure 9(b), this Court may "review * * * a district-court order regarding release after judgment of conviction." Here, there is no district court order to review because Pinkney never sought release pending appeal in the district

[2] On July 5, 2023, lead government attorney Noah Bokat-Lindell emailed Pinkney's attorney Harlan Kimura to inform Mr. Kimura that Mr. Bokat-Lindell would be "out of the country and without access to my work email or work phone from the evening of Monday, July 17 until Sunday, July 30." Att. 1. Mr. Bokat-Lindell informed Mr. Kimura that if Mr. Kimura "need[ed] to contact [the government] about or seek consent for anything," to email government co-counsel Tovah R. Calderon. Att. 1. Mr. Kimura did not email Ms. Calderon, or any other government counsel appearing in this case.

court. Additionally, Pinkney's motion fails to comply with various court rules, including the requirement that it "state with particularity * * * the legal argument necessary to support it." Fed. R. App. P. 27(a)(2)(A). Accordingly, Pinkney's motion is both improper and deficient, and this Court should deny it.

A. Pinkney's Motion Should Be Denied Because He Did Not First Seek Release Pending Appeal From The District Court

This Court should deny Pinkney's motion because he did not first seek release pending appeal in the district court. See Fed. R. App. P. 9(b) ("A party entitled to do so *may obtain review of a district-court order* regarding release after a judgment of conviction." (emphasis added)). "In reviewing a district court's denial of release pending appeal [this Court] consider[s] the district court's legal determinations de novo" and the "underlying factual determinations for clear error." *United States* v. *Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). Here, Pinkney failed to seek release pending appeal from the district court; there is therefore no denial—let alone any legal or factual determinations—for this Court to review.

For this reason alone, this Court should deny Pinkney's motion. See *United States* v. *Hochevar*, 214 F.3d 342, 342-344 (2d Cir. 2000). In *Hochevar*, the defendant did not petition the district court to allow his continued release pending appeal. *Id.* at 342. Rather, shortly before he was due to surrender for imprisonment, he filed a motion in the court of appeals seeking continued release.

Ibid. Relying on the language, history, and application of Federal Rule of Appellate Procedure 9(b), the Second Circuit concluded that it was "ill-equipped" to decide in the first instance whether the defendant should be released. *Id.* at 342-344. Rule 9(b)'s text "focuses squarely on 'review of a district-court order.'" *Id.* at 343. Such language "clearly assumes that the trial court previously had issued such an order." *Lofton* v. *United States*, 926 A.2d 1104, 1105 (D.C.C.A. 2007). The Advisory Committee notes further make clear that Rule 9(b) "*applies to review of a district court's decision*," such that moving for the first time in the court of appeals is contrary to the Rule. *Hochevar*, 214 F.3d at 343 (quoting Fed. R. App. P. 9 advisory committee note to 1994 amendment); see also *United States* v. *Scruggs*, No. 3:09-CR-2-GHD, 2012 WL 5923194, at *2 (N.D. Miss. Nov. 26, 2012) ("The Advisory Committee Notes accompanying Rule 9 concerning its 1967 adoption make clear that 'the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court.'").

"Further, given the findings that must be made in order to warrant release," the district court is generally best suited to rule on this motion first. *Hochevar*, 214 F.3d at 344. To decide whether to release a defendant pending appeal, a court must determine whether he is likely to flee or endanger anyone; what his intention was in filing his appeal; whether his appeal raises a substantial question; the

likelihood that his appeal will result in reversal; and, where, as here, the defendant has committed a crime of violence, whether there are any exceptional reasons why detention is inappropriate. 18 U.S.C. 3143(b)(1), 3145(c). "The district court's familiarity with the full record will enable it * * * to undertake a searching and informed evaluation of all the circumstances of the case [relevant to release pending appeal], a process that an appellate court would ordinarily be unable to undertake until after the appeal is completed." *Garcia*, 340 F.4d at 1021; cf. *United States* v. *Wheeler*, 795 F.2d 839, 841 (9th Cir. 1986) (concluding that even when motion *was* first made in district court, remanding to district court to provide an explanation of its findings rather than make findings of its own).[3]

This Court should rule as the *Hochevar* court did. Pinkney has not given the district court the opportunity to consider a motion for release pending appeal, and he has therefore not given this Court the findings of fact (to which this Court would defer absent clear error) or conclusions of law that it could review on appeal.[4] "Without specific findings, [this Court] cannot effectively and efficiently

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[3] The fact that Pinkney filed a notice of appeal does not divest the district court of jurisdiction to hear a motion for release pending appeal. See *Pratti* v. *United States*, 350 F.2d 290, 291 (9th Cir. 1965); *United States* v. *Meyers*, 95 F.3d 1475, 1488 n.6 (10th Cir. 1996); Fed. R. Crim. P. 46(c) advisory committee note to 1972 Amendment.

[4] While Pinkney did ask the district court to release him in other contexts (immediately after conviction, and once later pending sentencing), those requests are governed by a different standard than a request for release pending appeal.

review a bail motion decision." *Wheeler*, 795 F.2d at 841. Pinkney should not be allowed to circumvent the district court's review, and this Court should deny his motion. Cf. *United States* v. *Zhang*, 55 F.4th 141, 147 (2d Cir. 2022) (explaining that a defendant's "direct filing of a motion for bail in this Court cannot serve as an end-run around his decision not to appeal the district court's initial bail decision").

B. In The Alternative, Pinkney's Motion Should Be Denied Because It Is Procedurally And Substantively Deficient

Even if this Court were inclined to entertain Pinkney's motion, it should deny it because it fails to comply with applicable rules. First, a motion "seeking substantive relief must include a copy of the trial court's opinion * * * as a separate exhibit." Fed. R. App. P. 27(a)(2)(B)(iii); see also 9th Cir. R. 9-1.2 ("A motion for bail pending appeal or for revocation of bail pending appeal, made in this Court, shall be accompanied by the district court's bail order, and, if the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court."). Second, motions should "inform the Court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position." 9th Cir. R. 27-1 advisory committee's note 5. Most importantly, "[a] motion must state with particularity

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Compare 18 U.S.C. 3143(a)(2) (Release or detention pending sentence), with 18 U.S.C. 3143(b)(1) (Release or detention pending appeal by the defendant). The district court's denial of those previous requests may explain why Pinkney chose not to ask the district court for release pending appeal.

the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. App. P. 27(a)(2)(A). And, finally, to ensure that "all legal arguments be contained in the body of the motion," Fed. R. App. P. 27(a) advisory committee's note to 1998 amendment, any accompanying "affidavit must contain only factual information, not legal argument," Fed. R. App. P. 27(a)(2)(B)(ii).

Pinkney's motion violates each of these rules. First, Pinkney's motion does not include the district court's bail order, as required by Rule 27(a)(2)(B)(iii) and Circuit Rule 9-1.2. That is because, as discussed above, Pinkney never sought release pending appeal from the district court. See pp. 2-4, *supra*. Pinkney's motion also fails to inform this Court of opposing counsel's position, as required by Circuit Advisory Committee Note 5 to Rule 27-1. Indeed, as previously noted, the government did not hear from Pinkney's counsel before this motion was filed. See p. 4 n.2, *supra*. Finally, and most importantly, Pinkney's two-page motion contains no legal argument in support of its request, as required by Rule 27(a)(2)(B)(ii). The "motion" merely asserts, without analysis, that Pinkney satisfies the elements required for release pending appeal, listing the governing statutes and rules, and referring the Court to the attached declaration of counsel and exhibits. See App. Doc. 12, at 1-2. It is only within the attached declaration that there is anything that even approaches Rule 27's substantive requirement of clearly stated grounds and supporting legal argument. See App. Doc. 12, at 3-9.

Because Rule 27 requires all legal arguments to be "contained in the body of the motion," Fed. R. App. P. 27(a)(2) advisory committee's note to 1998 amendments, this is also deficient.

Even if this Court were to overlook these procedural errors, the declaration is insufficient to support Pinkney's motion. To succeed on his motion, Pinkney must show by clear and convincing evidence that (1) he is not likely to flee or pose a danger to anyone; and that the appeal (2) is not for the purpose of delay; (3) raises a substantial question of law or fact; and (4) will likely result in reversal, order for a new trial, or a sentence that would not require continued imprisonment. See 18 U.S.C. 3143(b). Additionally, because Pinkney committed a crime of violence when he attacked an unarmed, complaint inmate, he must also "clearly show[] that there are exceptional reasons" why detention is inappropriate. 18 U.S.C. 3145(c).

With respect to the first element, the declaration states only that Pinkney's good behavior on pretrial release demonstrates that he is not likely to flee or pose a danger to anyone. See App. Doc. 12, at 8. To start, and as explained above, this Court—which has not had the opportunity to hear evidence about Pinkney's past or instant violent behavior (see Doc. 470, at 6-8)—is not well-suited to decide these facts in the first instance. Further, the declaration fails to explain why the district

court's rejection of this argument, made in both his oral and written motions for release pending sentencing, was clearly erroneous.

With respect to the third and fourth elements and the requirement that he show "exceptional reasons," the declaration merely lists various district court actions taken in connection with Pinkney's severance motions and his co-defendant's *Garrity* questionnaire that Pinkney believes were made in error, without offering any legal analysis or supporting citations. App. Doc. 12, at 8-9.[5] This is insufficient to meet his burden. See, *e.g.*, *United States* v. *Montoya*, 908 F.2d 450, 450-451 (9th Cir. 1990) (denying motion where party failed to provide the basis for his belief that district court erred); *Vasquez-De Martinez* v. *Garland*, 34 F.4th 412, 414 (5th Cir. 2022) (denying motion in part for failure to comport with Rule 27 because "nowhere in the two-short pages that Counsel says 'support' his motion does Counsel cite *any* law on our authority to grant [his motion], let alone how to evaluate it"). Moreover, this Court should not be forced to adjudicate the merits of Pinkney's appeal without the benefit of complete briefing. Pinkney's merits brief is now due in one month, and the United States will have an opportunity to better understand his arguments and respond to them at that time.

[5] Of note, Pinkney's trial counsel Gary Singh made no objection to the district court's handling of his co-defendant's *Garrity* Questionnaire during trial. See App. Doc. 12, at 37-38, 70-72.

CONCLUSION

For the foregoing reasons, this Court should deny the motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this response:

(1) complies with the length limits permitted by Federal Rule of Appellate Procedure 27(d)(2), Ninth Circuit Rule 9-1, and Ninth Circuit Rule 27-1(1)(d) because the response contains 2619 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

s/ Janea L. Lamar
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Date: July 31, 2023