

on May 9, 1996. Trial began on June 9, 1997. On June 5, 1997, just days before trial, Defendant Mayo filed a motion for a continuance of the trial and a motion for a severance from his co-defendants on the basis of his newly diagnosed prostate cancer. This Court promptly held a hearing on June 6, 2000 and, on the day of jury selection, this Court granted Defendant Mayo's motion for a continuance and severed him from the remaining defendants.

After a new trial date was set, Defendant Mayo decided to plead guilty. This Court originally scheduled a change of plea hearing for January 31, 1998, and later granted continuances of said hearing due to Defendant's illness, his inability to retain counsel, and his indecision as to whether he wished to proceed to trial or plead guilty.

Finally, on April 17, 1998, Defendant Mayo pled guilty to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371; twenty-seven counts of wire fraud, in violation of 18 U.S.C. § 1343; and twelve counts of unlawful monetary transactions, in violation of 18 U.S.C. § 1957. Sentencing was originally scheduled for August 5, 1998. For various reasons, the sentencing was rescheduled nine times over a period of eighteen months.

On January 12, 2000, this Court held the first of two hearings to determine an appropriate sentence for Defendant. Defendant withdrew his objections to the factual findings and guidelines applications in the presentence report, and this Court

found that the guideline range was 51 to 63 months imprisonment. The Court heard argument regarding the Government's motion for downward departure pursuant to United States Sentencing Guideline § 5K1.1. The Court also heard statements from the Defendant, Defense counsel, and the Government regarding Defendant's motion for downward departure based on health. In a motion filed the day before the hearing, Defendant had moved for downward departure pursuant to U.S.S.G § § 5H1.4 and 5K2.0 based on Defendant's prostate cancer.

At the January 12, 2000 hearing, the Court noted that the record as to Defendant's health was undeveloped and therefore insufficient to support a downward departure. Moreover, the Court noted that Defendant had not complied with the Probation Office in disclosing his financial information. The Court continued the sentencing for one week, to give the Defendant an opportunity to submit more recent medical and financial records to the Court and the Government.

On January 19, 2000, the Court held a second sentencing hearing. The Court acknowledged receipt of Defendant's supplemental memorandum which contained additional medical records, and the Government's supplemental letter from the Bureau of Prisons. The Court heard argument from Defense counsel and the Government regarding Defendant's motion for downward departure based on health.

Before imposing sentence, the Court granted the Government's motion for downward departure for substantial assistance pursuant

to § 5K.1. and denied the Defendant's motion for downward departure based on health, pursuant to §§ 5H1.4 and 5K2.0. The Court sentenced Defendant to 14 months incarceration followed by three years supervised release. In addition, the Court ordered payment of \$300,000 restitution and \$2,000 special assessment. The Court ordered Defendant Mayo to surrender for service of sentence at 2 p.m. on February 2, 2000.

Defendant Mayo filed a notice of appeal on January 28, 2000. On the morning of February 2, 2000, the Court received, via fax, a copy of Defendant's "Motion for Release Pending Appeal."

Legal Standard

The issue of bail pending appeal is addressed in 18 U.S.C. § 3143(b). Section 3143(b) provides in relevant part:

... the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained unless the judicial officer finds-- (A) 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) of this title; and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (i) reversal; (ii) an order for a new trial; (iii) a sentence that does not include a term of imprisonment, or (iv) 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...

The Third Circuit has provided guidance in applying this statute. See United States v. Miller, 753 F.2d 19, (3d Cir. 1985). Under Section 3143(b), the defendant seeking bail bears the burden of showing: (1) by clear and convincing evidence that

he is not likely to flee or pose a threat or danger to the safety of any other person or the community if released; (2) that his appeal is not for purpose of delay; (3) that his appeal raises a substantial question of law or fact; and (4) that if the substantial question is determined favorably to him on appeal, the decision will likely result in reversal or an order for a new trial as to all counts on which imprisonment has been imposed. Id. at 24. As the statute makes clear, the Court need not determine whether a defendant's appeal raises a substantial question of law or fact if the defendant has not shown by clear and convincing evidence that he is not likely to flee or pose a danger to the community.

In determining whether a defendant's appeal raises a substantial question of law or fact for purposes of Section 3143(b), the District Court need not predict the likelihood of its rulings being reversed on appeal. Id. at 23. The District Court need only consider whether a defendant raises an issue on appeal which is "debatable among jurists," or "adequate to deserve encouragement to proceed further." United States v. Smith, 793 F.2d 85, 90 (3d Cir. 1986).

In his motion for bail pending appeal, Defendant states:

The appellate issue is whether the trial court abused its discretion in denying Mayo's motions pursuant to U.S.S.B. [sic] 5H1.4 and 5K2.0. Mayo will contend on appeal that the trial court rushed to judgment, and failed to provide Mayo a fair opportunity to make a record on his present health condition, and the medical necessity mandating the continuity of his treatment and study at Memorial Sloan-Kettering Cancer Center.

Mayo contends that "the fact-finding process of the court was inadequate and unfair to Mayo." Thus, Defendant's sole issue for appeal is this Court's denial of Defendant's motion for downward departure, pursuant to §§ 5H1.4 and 5K2.0, based on Defendant's prostate cancer.

Findings

Defendant has not requested a hearing on this motion, and the Court has determined that a hearing is not necessary to make findings on this motion. Notwithstanding the statute's explicit provision that it is Defendant's burden to provide clear and convincing evidence that he is not likely to flee or pose a danger to the community, this Defendant has provided no evidence that he is unlikely to flee. See 18 U.S.C. § 3143(b)(A).

Moreover, this Court cannot find "that the appeal is not for the purpose of delay." See 18 U.S.C. § 3143(b)(B). As the Court has previously stated, this case has a long history of significant delay. Defendant Mayo was indicted on May 9, 1996. He pled guilty almost twenty-three months later. In the interim, Mayo changed attorneys three times, changed his mind about whether to plead guilty or go to trial, and began treatment for prostate cancer. Because Defendant Mayo's sentencing was continued nine times, another nineteen months elapsed between his change of plea and his sentencing. Of course, the Court must share some responsibility for allowing the case to proceed at such a pace. However, viewed against the long history of delay at each stage of the criminal proceedings, Defendant's lone

statement in his motion that “[t]his appeal is not for the purpose of delay” is insufficient for this Court to make a finding under Section 3143(b)(B).

Most importantly, the Court finds that Defendant’s appeal does not raise a substantial question of law or fact, as required by Section 3143(b). On January 12, 2000, after hearing argument on Defendant’s motion for downward departure based on health, the Court granted the Defendant an opportunity to supplement the record regarding his health, and continued the hearing for another week.

At the January 19, 2000 hearing, after reviewing all of the submissions of the parties, and listening to argument, the Court made specific findings of fact with respect to the Defendant’s medical history and recent medical records. The Court noted that Defendant Mayo was diagnosed with prostate cancer in May of 1997. Shortly after that time, the Court severed Defendant Mayo from his co-defendants, so that he could seek treatment for his condition. In June of 1997, Mr. Mayo was counseled about his treatment options, which included surgery, radiation therapy in conjunction with hormones, and radiation therapy alone. Mr. Mayo chose the combined hormonal and radiation therapy.

Mr. Mayo began hormonal therapy in August of 1997. In addition, Mr. Mayo underwent radiation treatments daily for an eight week period, from November 3, 1997 through January 8, 1998. By March of 1998, Defendant Mayo had discontinued his hormonal therapy. On April 17, 1998, Defendant Mayo pled guilty to all

counts of the indictment.

The Court noted that in December of 1998, Defendant became part of a nutrition study at Memorial Sloan-Kettering Cancer center. The Court reviewed letters dated April 2, 1999 and November 1, 1999, by Nutrition Research Manager Lianne Latkany, M.S., R.D., stating that Defendant Mayo is on an individualized diet that is low-fat, high fiber, high fruit and high vegetable. The study and his clinical status require him to be monitored by follow-up visits and blood tests every six months for 18 months.

The Court acknowledged a six month report by attending physician Dr. Moshe Shike, dated May 12, 1999, noting that Defendant Mayo and his wife have been "very happy" with his treatment, and that they felt "very satisfied and feel they have some control and they can manage the diet." At that time, Defendant Mayo also reported that he was working 12 hours per day.

The Court noted that Defendant Mayo was apparently examined at Memorial Sloan-Kettering for a twelve month report in December of 1999 but that Defense counsel had not provided a physician's report or physician's notes or any analysis of the examination. Defense counsel advised that Defendant Mayo's treating physician, Dr. Shike, was unwilling to testify as to Defendant Mayo's present condition.

Moreover, the Court reviewed a letter from Dr. Newton Kendig, M.D., the Medical Director of the Federal Bureau of Prisons. Dr. Kendig stated that the BOP "does continue the

treatment regimes many inmates arrive on." After reviewing Defendant Mayo's medical records, Dr. Kendig stated that "the Bureau has the physician staff, expert community consultant staff and facilities to care for Mr. Mayo's medical and prescriptive needs."

Based on the evidence submitted, this Court denied Defendant's motion for downward departure. The Court specifically found that Defendant's prostate cancer was not, at that time, an "extraordinary physical impairment," necessary for a § 5H1.4 departure. In addition, the Court specifically found that Defendant's prostate cancer was not, at that time, a "mitigating circumstance" as contemplated by § 5K2.0. Finally, even if the Court had found Defendant Mayo's condition sufficiently extraordinary under § 5H1.4 or a mitigating circumstance under § 5K2.0, this Court specifically declined to exercise discretion to depart further downward.

While Defendant had clearly been receiving treatment for prostate cancer since 1997, this Court found that his current medical and physical condition did not support a finding that he has an "extraordinary physical impairment." Recent medical records submitted stated that Defendant Mayo had been working twelve hours a day. Notwithstanding Defense counsel's emphasis on Defendant Mayo's participation in the Memorial Sloan Kettering nutrition study, the evidence showed that Mr. Mayo did not actually receive prepared food from the Memorial Sloan-Kettering program, nor did he have daily, weekly, or even monthly visits.

The record showed that Defendant Mayo managed the diet by himself, and had blood tests or examinations every few months. Although Defendant had the burden of demonstrating the grounds for departure under the guidelines, Defense counsel specifically stated that Defendant Mayo's present physician was unwilling to provide testimony.

Moreover, the Court stated its belief that the Bureau of Prisons can adequately treat Defendant Mayo during his period of incarceration. The Court recommended that the BOP incarcerate the Defendant at an institution which can provide treatment for his cancer and enable him to continue with his present diet for a few months until the results could be completed in the Memorial Sloan-Kettering study, which is studying the effect of diet in the treatment of prostate cancer.

Having reviewed the record, the Court has determined that it has been more than patient with Defendant Mayo. The Court recessed the sentencing hearing for an additional week for the express purpose of supplementing the record with medical testimony and financial information. While Defense counsel's statements at sentencing and in pleadings make references to incarceration as a "death sentence" and a "life or death issue," the record contains no medical testimony that incarceration will place Defendant's life at risk. The Court is not insensitive to the challenges of any cancerous condition. However, there is no evidence that Defendant Mayo's condition is currently

deteriorating or will deteriorate in prison.

This Court considered the evidence presented and exercised discretion in sentencing Defendant Mayo to 14 months incarceration. "A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." United States v. Koon, 518 U.S. 81, 98 (1996). Moreover, the Third Circuit has recently stated: "We have repeatedly held that [a Circuit Court] lacks jurisdiction to hear a challenge to a District Court's ruling on a motion pursuant to section 5K2.0 of the Sentencing Guidelines if the District Court rested such a ruling on an exercise of discretion." United States v. Santiago, 1999 WL 1332336 at *1 (3d Cir). This Court does not believe the Defendant raises an issue which is "debatable among jurists," or "adequate to deserve encouragement to proceed further." United States v. Smith, 793 F.2d 85, 90 (3d Cir. 1986). The Defendant's motion for release pending appeal will be denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :
 :
 V. :
 :
LOUIS M. MAYO :

CRIMINAL NO. 96-202-03

ORDER

AND NOW, this 3rd day of February, 2000; Defendant having filed a "Motion for Release Pending Appeal;" the Government having opposed the motion; for the reasons stated in the Memorandum filed on this date;

IT IS ORDERED: Defendant's Motion for Release Pending Appeal is **DENIED**.

RAYMOND J. BRODERICK, J.