

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

<b>PATRICK TOUSSAINT,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 03-00927</b>
	:	
<b>EDWARD KLEM, et al.,</b>	:	
<b>Defendants</b>	:	

**MEMORANDUM**

**STENGEL, J.**

**May 17, 2005**

Mr. Patrick Toussaint, a convicted state prisoner currently incarcerated at SCI - Mahanoy, seeks reconsideration of an Order denying bail pending his appeal. For the following reasons, I will deny reconsideration.

**BACKGROUND**

After a trial in Philadelphia's Court of Common Pleas, a jury convicted Mr. Toussaint of kidnapping, involuntary deviate sexual intercourse, and three counts of rape. This stemmed from two separate incidents during blizzards in the winter of 1996. Judge Keough sentenced him to an aggregate term of seven to twenty years' imprisonment.

Following his state court appeals, Mr. Toussaint filed a petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254 on October 24, 2002. The late Judge Kelly referred the case to Magistrate Judge Scuderi who filed a Report & Recommendation on August 26, 2003, recommending that the petition be denied because Mr. Toussaint's claims were procedurally defaulted or otherwise without merit. Mr. Toussaint filed objections as was his right. On March 31, 2004, Judge Kelly overruled the objections and approved and adopted Judge Scuderi's recommendation.

Two weeks later, Mr. Toussaint appealed this decision to the Third Circuit Court of Appeals. On December 21, 2004, the Third Circuit denied his request for a certificate of appealability. However, a month later, Mr. Toussaint filed a motion for bail pending the Third Circuit's decision. On February 4, 2005, Judge Kelly dismissed the motion with prejudice, citing the Third Circuit's decision which left no matter before the court. Two weeks later, Mr. Toussaint appealed Judge Kelly's dismissal to the Third Circuit.

On March 3, 2005, Mr. Toussaint filed a "motion to reinstate bail application pending appeal, previously filed." Upon the death of Judge Kelly, the case was re-assigned to me, and I denied the motion as meritless on April 11, 2005. On the following day, probably in response to the reassignment and certainly without having received the denial Order, Mr. Toussaint filed a motion "for reconsideration of motion for bail pending an active appeal." On April 14, 2005, I denied that motion for reconsideration. Mr. Toussaint then sent a letter addressed to me.

## **DISCUSSION**

In his correspondence, Mr. Toussaint complains that my Order denying bail should have included some written statement of reasons for the denial. For this proposition, he cites numerous cases, rules of appellate procedure, and even the Bail Reform Act which he says require a court to do more than just deny a motion. He further claims that his incarceration is illegal because he received a final deportation order in November 1999, and has remained in prison for six years contrary to the Supreme Court of the United States.

Something that Mr. Toussaint fails to mention in the correspondence is that he is serving a legitimate state sentence for the rapes of two women, and thus bail is out of the question. His reliance on the cases and rules he cites is misplaced. These cases and rules refer to federal

appellate procedures and describe the availability of bail for a federal defendant who has appealed his conviction to the Courts of Appeals, and require the district court to make certain findings. For example, he cites Title 18 U.S.C. § 3143(b) of the Bail Reform Act which describes the court's procedures for determining release or detention pending appeal by a federal defendant. This section clearly does not pertain to Mr. Toussaint:

(1) Except as provided in paragraph (2), 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.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(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) 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).

Mr. Toussaint also cites Rule 9 of the Federal Rules of Appellate Procedure which addresses the release of a convicted defendant in a criminal case pending appeal. A review of this Rule reveals that it also does not pertain to Mr. Toussaint:

(a) Release Before Judgment of Conviction:

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) Release After Judgment of Conviction:

A party entitled to do so 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. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) Criteria for Release:

The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

Federal Rule of Appellate Procedure 9.

Mr. Toussaint is a convicted state prisoner serving a valid sentence at the State Correctional Institution at Mahonoy City. He brought a federal *habeas* petition pursuant to 28

U.S.C. § 2254. Judge Kelly denied that petition. Mr. Toussaint then appealed to the Third Circuit which affirmed the denial. Any provisions of the federal system for bail pending appeal are reserved for federally-charged defendants, and do not pertain to state prisoners in Mr. Toussaint's situation.

Finally, Mr. Toussaint's claim that as an alien with a final Order of deportation he should not be held pending deportation must also fail. Certainly, that is the law for aliens who have been awaiting deportation in prison for an inordinate amount of time. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (Title 8 U.S.C. § 1231(a)(6) authorizes the continued detention of aliens beyond the mandated 90-day removal period, but only for as long as "reasonably necessary" to effectuate removal from the country). However, Mr. Toussaint is not such an alien. Instead, he received the final Order of deportation based on his state convictions for which he is currently serving time. Once his debt to society is paid through the expiration of his sentence, he will be removed pursuant to his final Order of deportation. *See* 8 U.S.C. § 1231 (a)(4)(A) (the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal); *see also Odalia Perez v. Immigration & Naturalization Service, United States Department of Justice*, 979 F.2d 299 (3d Cir. 1992) (Title 8 U.S.C. § 1252 (h) precluded appellant's deportation prior to her release from confinement).

In conclusion, bail pending an appeal is not available to Mr. Toussaint. He is serving a valid state sentence. Upon expiration of that sentence, the final Order of deportation may be addressed.

An appropriate Order follows.

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<b>Plaintiff</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	<b>NO. 03-00927</b>
	<b>:</b>	
<b>EDWARD KLEM, et al.,</b>	<b>:</b>	
<b>Defendants</b>	<b>:</b>	

**ORDER**

**STENGEL, J.**

**AND NOW**, this 17th day of May, 2005, upon consideration of Plaintiff's correspondence with the court, liberally construed as a motion for reconsideration of my April 14, 2005 Order denying bail pending appeal (Document #32), **IT IS HEREBY ORDERED** that the motion for reconsideration is **DENIED**.

**BY THE COURT:**

/s/ Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.