

[INSERT NAME}
Attorney at Law
[ADDRESS LINE 1]
[ADDRESS LINE 2]
State Bar No. 000000
Tel: (831) 000-0000

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff/Respondent,)
)
vs.)
)
[INSERT NAME],)
)
Defendant/Appellant.)
_____)

No. CR 00-000000

DEFENDANT'S [INSERT NAME]
NOTICE OF MOTION FOR
RELEASE PENDING APPEAL;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION

DATE:

TIME:

COURT:

TO: Plaintiff and to its attorneys of record, herein:

PLEASE TAKE NOTICE that on October ____, 2007, at 9:00 a.m., or as soon as the matter may be heard, in Courtroom 15 of the above-entitled court located at _____, San Francisco, California, defendant [NAME OF DEFENDANT] will move this Court for an order for release pending appeal, pursuant to Title 18 U.S.C. section 3143(b).

Good cause exists for this request as set forth in the accompanying declarations of attorney [INSERT NAME]. The attached declarations and exhibits establish that the court used an incorrect method to calculate the defendant's sentence resulting in a sentence that is six months longer than it should have been and a substantial likelihood that the defendant's sentence will be reduced on appeal. Further, it is likely that given the delay in processing the case through

the Ninth Circuit that the defendant will have served out his sentence before the Ninth Circuit has a chance to consider his meritorious sentencing claim. Finally, [NAME] does not pose a flight risk nor a danger to others.

This motion is based upon this notice, on the accompanying declarations of [INSERT NAME], the attached exhibits, the papers, records and file herein, and such evidence and/or argument as may be presented at the hearing of the motion.

DATED: [DATE]

LAW OFFICES OF [INSERT NAME]

By: _____

[INSERT NAME]

Attorneys for Defendant

[DEFENDANT]

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
EXTEND DATE SET FORTH IN ORDER OF SURRENDER OR FOR RELEASE
PENDING APPEAL**

I.

FACTS

Defendant [NAME] was convicted for smuggling Eurasian Eagle Owl eggs into the United States which should have been declared. On August 24, 2007, the defendant voluntarily surrendered himself to federal authorities and is currently serving a prison term in the federal correctional institution in Big Spring, Texas. [INSERT NAME] is a falconer and is in a highly specialized profession. His clients include oil and petro-chemical refineries where he is required to abate pest birds.

The defendant made two trips to Austria where he obtained Eurasian Eagle Owl eggs from a breeder, [INSERT NAME]. On the first trip he acquired three eggs and on the

second nine. The breeder, [INSERT NAME], was downsizing his Eagle Owl business because there was a surplus of Eagle Owls in Europe. He was selling his eggs for between \$5 and \$25 an egg, and ended up giving the eggs to Diaz. A live Eagle Owl in Europe would sell for an average of \$345. The birds were worth a great deal more (about \$2,500 a bird) in the United States do to the fact that the CITES treaty prohibited their importation for other than limited purposes.

[INSERT NAME]'s trips corresponded with the Christian and Greek Orthodox Easter holidays and he stored the eggs in an Easter basket on the plane to avoid suspicion. Of the 12 eggs that Diaz brought into the United States, three hatched and produced Eagle Owls which were later confiscated by Agents of the USFWS.

According to the defense expert [INSERT NAME], upon whose testimony the court relied in determining the value of the eggs, [DEFENDANT] did exceptionally well in getting any of his eggs to hatch. [INSERT NAME], who had never raised Eagle Owls, testified that under ideal conditions (i.e., eggs initially naturally incubated by parents then artificially in an incubator) he could expect a 70 to 80% fertility rate of his Saker Falcon eggs and a 60 to 70% hatch rate of the fertile eggs. This would mean that between 42 and 56% of the eggs would produce live birds. This roughly corresponded to the 50% hatch rate reported by the Austrian breeder [INSERT NAME] to Austrian customs agents for his Eagle Owl eggs.

In calculating the value of the twelve eggs the defendant had at U.S. customs, the judge erroneously assumed all of the eggs [DEFENDANT] acquired in Austria were fertile and simply multiplied the 60 to 70% hatch rate times the U.S. value (\$2,500) to come up with figures of \$18,000 or \$21,000 as the value of the eggs. Additionally, the court took U.S. values for the birds that might have hatched under ideal conditions instead of Austrian values for the birds if the eggs had been left in Austria. For reasons explained in the declarations, it was erroneous to take U.S. values for the birds that did not hatch.

Defendant requests an order of release pending the appeal, as set forth in 18 U.S.C. section 3143. Under 18 U.S.C. 3143, the court should grant bail when the appeal raises a substantial issue of law or fact and would result in "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."

There is a substantial likelihood that defendant's sentence will be reduced on appeal, as discussed in detail, in an expert declaration by [INSERT NAME] and as set forth in the declaration of [INSERT NAME].

II.

LEGAL ARGUMENT

A. THE COURT HAS DISCRETION TO ORDER A RELEASE PENDING APPEAL:

Title 18 U.S.C. section 3143 provides in pertinent part:

"(b) Release or detention pending appeal by the defendant.

(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 [18 USCS § 3142(b) or (c)]; 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 [18 USCS § 3142(b) or (c)], 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."

In United States v Hart 779 F.2d 575 (1985 10th Cir.), contemporaneously with the filing of the notice of appeal, defendant sought release pending disposition of the appeal. By affidavit, counsel for defendant stated that the district court explicitly declined to hear or rule on the pending application for release pending appeal. Apparently, it was the district court's view that the bail application was a matter to be considered by the Court of Appeals. On appeal, the Court of Appeals held that a district court was not free under any circumstances to disregard an application for release pending appeal. The court held that there are a myriad of situations in which such an application should be denied, but the district court was required to act on the application and state in writing the reasons for the action taken. Accordingly, the court partially remanded the case to the district court for prompt consideration of defendant's application for release pending appeal. The Court stated:

"First, Fed. R. App. P. 9(b) clearly states that "application for release after judgment of conviction shall be made in the first instance in the district court."

That rule sets out only two options for the district court when such a motion is filed -- the court can refuse release pending appeal or order release on conditions. . . . The mandatory language in § 3141 makes it clear, however, that a district court must act on an application for release pending appeal when made."

It is requested that the Court rule on defendant's motion for release pending appeal and grant the motion.

B. DEFENDANT IS NOT LIKELY TO FLEE OR POSE A DANGER TO THE COMMUNITY:

The facts herein indicate that defendant [DEFENDANT] is neither a flight risk nor does he pose a danger to the community. [DEFENDANT] is a U.S. citizen. He posted a \$250,000 bond and his parents refinanced their townhouse to pay for the bond. [DEFENDANT'S] family ties are in the United States and his fiancée is a U.S. citizen. [DEFENDANT] appeared for all court hearings. He voluntarily surrendered himself to the federal authorities and is currently serving his sentence at Big Sprin, Texas. [DEFENDANT'S] business is falconry, for the purpose of bird abatement, so his business ties are to the United States. He is not a violent individual and

has never been convicted of a violent offense. His motion for bail pending appeal should be granted.

C. DEFENDANT'S' APPEAL RAISES A SUBSTANTIAL QUESTION OF LAW AND FACT MERITING BAIL PENDING AN APPEAL:

In United States v Tyler (2004, DC Me) 324 F Supp 2d 69, the court granted defendant a stay of sentence pending appeal, where the defendant challenged the application of a two-level sentence enhancement for abuse of position of trust and use of special skill, USSG § 3B1.3, which raised defendant's sentence range under the Guidelines from 0-6 months to 6-12 months, and the Government did not appear to dispute that defendant was not likely to flee or pose a danger to safety of any other person or community if released. The facts are similar here where the defendant requests bail to avoid unnecessary incarceration.

In United States v Garcia, 340 F.3d 1013, (2003, 9th Cir.), the Court discussed at footnote 5, the requirement set forth in 18 U.S.C. § 3143(b)(1)(B):

At first glance, it might appear that a strong appeal is a threshold requirement under 18 U.S.C. § 3143(b)(1)(B), and that to consider this factor an "exceptional reason" under § 3145(c) would introduce a redundancy. However, the relevance of the § 3143(b)(1)(B) requirement must be considered in the light of our court's interpretation of that requirement. United States v. Handy, 761 F.2d 1279, 1280-83 (9th Cir. 1985); see United States v. Smith, 793 F.2d 85, 89 (3d Cir. 1986). In Handy we held that an issue is substantial if it is "fairly debatable" or "fairly doubtful," that is, "of more substance than would be necessary to a finding that it was not frivolous." Handy, 761 F.2d at 1283 (internal quotations marks and citations omitted). The second part of the requirement -- that the question be likely to result in reversal, a new trial, a non-prison sentence, or a sentence reduced to less than the time that would be served by the end of the appeal process -- concerns only the type of question that meets the requirement; it does not involve assessing the likelihood that a reversal will occur in the particular case. Id. at 1280. (When Handy was decided, the provision did not state that the requirement

could be filled by a likelihood of reduction to a non-prison sentence or a sentence less than the time that would be served by the end of the appeal process. See *id.* at 1280 (citing 18 U.S.C. § 3143(b) (1982)). The amendments to the statute since then affect neither the analysis of Handy nor our analysis today.) The defendant, in other words, need not, under Handy, present an appeal that will likely be successful, only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions. Because under § 3143(b)(1)(B) a defendant need not show a likelihood of success on appeal, a defendant who does show such likelihood goes well beyond the threshold requirement. There is therefore no redundancy in considering likelihood of success as a factor in determining whether there are exceptional reasons justifying release under § 3145(c).

As set forth in the accompanying declarations of [INSERT NAME], the calculation of the sentence is flawed. Under any of the possible calculations of the value of eggs and birds, the result is less than \$10,000. An amount less than \$10,000 results in a two level increase rather than the four level increase imposed by the court. USSG, 2B1.1. The defendant's sentence should have been 15 months instead of 21 months. USSG Sentencing Table, CH. 5, PT. A. Since this is a novel issue, it is urged that there is a possibility of a substantially reduced sentence, and defendant should be released upon completion of the term he would have served if appropriately sentenced. Additionally, it does not appear that plaintiff is contending that defendant is either likely to flee or pose a danger to the safety of any other person or community. In that situation, it is submitted that defendant's motion should be granted.

CONCLUSION

Based upon the foregoing, defendant [DEFENDANT] respectfully requests that the Court grant his motion for release him pending his appeal and enter an order thereon.

DATED: [DATE]

Respectfully Submitted,

[INSERT NAME]

By: _____

[INSERT NAME]

Attorneys for Defendant

[DEFENDANT]