UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Plaintiff-Appellee;	
v.	**Crim. No. 02-484-02 (TFH)** **(Appeal No. 03-3126)**
Xxxxxxxx Xxxxxxxx Xxxxxxxx	
Defendant-Appellant.	

DEFENDANT Xxxxxxxx Xxxxxxxx Xxxxxxxx'S MOTION FOR RELEASE PENDING APPEAL ON SEPTEMBER 23, 2004 (AND, IF NECESSARY, FOR A HEARING ON SEPTEMBER 22, 2004) AND INCORPORATED MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF

Defendant Xxxxxxxx Xxxxxxxx Xxxxxxxx (Michael Xxxxxxxx), through undersigned counsel, hereby moves pursuant to 18 U.S.C. § 3141(b) and § 3143(b) for release pending appeal on September 23, 2004.

Mr. Xxxxxxxx is currently incarcerated at FCI Elkton, having served 15 ½ months of a 30-month sentence. This request for release is based on his claim on appeal that two of his sentence enhancements were imposed in violation of the Sixth Amendment in light of the Supreme Court's recent decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), such that his correct guideline range should have been 10-16 months. This Court need not resolve the merits of this Blakely claim in order to release Mr. Xxxxxxxx pending his appeal of that claim. This Court need only find that his legal claim to a guideline range of 10-16 months raises a "substantial question of law," which it clearly

does given the fact that courts all over the country have accepted such a claim and that the Supreme Court has decided that the claim is worthy of its review. Under § 3143(b)(1), therefore, Michael Xxxxxxxx is entitled to have his "detention terminated at the expiration of the likely reduced sentence." Here, assuxxxxxxxx he were to receive the top of the 10-16 month range, undersigned counsel has been informed by records personnel at FCI Elkton that a hypothetical sentence computation on a 16-month sentence would call for Michael Xxxxxxxx's release on September 23, 2004.

The government's response to this motion is due on or before September 21, 2004. Therefore, if this Court determines that a hearing on this motion is necessary, Michael Xxxxxxxx requests that such hearing take place on or before September 22, 2004.

Procedural History

On December 6, 2002, a grand jury returned an indictment charging Michael Xxxxxxxx and his brother, Chi Fai Xxxxxxxx (David Xxxxxxxx), with one count of conspiracy to commit immigration offenses in violation of 18 U.S.C. § 371. Michael Xxxxxxxx was arrested on December 31, 2003, and had an initial appearance in the United States District Court in Maryland before being transferred to this jurisdiction for arraignment on January 3, 2003. Judge Lamberth released Michael Xxxxxxxx to the Heightened Supervision Program on a property bond on April 14, 2003. On May 6, 2003, Judge Lamberth extended Michael Xxxxxxxx's

evening curfew to accommodate his work schedule. On May 7, 2003, the government brought a superseding indictment, adding additional transactions and a forfeiture allegation to the conspiracy charge and adding two witness tampering counts against Michael Xxxxxxxx's co-defendant.

Trial commenced before this Court on July 8, 2003. On July 25, 2003, the jury returned guilty verdicts as to both defendants on the conspiracy count but acquitted David Xxxxxxxx of the witness tampering charges. After the verdict, this Court ruled that it would continue the defendants on the same release status, finding by clear and convincing evidence that they did not present a risk of flight. Specifically, as to Michael Xxxxxxxx, the Court found:

> He has family in this vicinity, his children, his wife, that again he would put at risk by leaving at this time when he's facing a sentence of approximately three years, if that. Again, I don't see that someone will throw all that away because of a three year sentence and flee to China. So I'm going to continue the bond, find by clear and convincing evidence I do not think he is likely to flee.

(7/25/03:31).

Michael Xxxxxxxx's PSR calculated his offense level as 19, based on a base offense level of 12 under U.S.S.G. § 2L1.1(a)(2), plus 3 levels under § 2L1.1(b)(2)(A) because the offense involved between 6 and 24 unlawful aliens, plus 4 levels for "organizer or leader" under § 3B1.1(a). Michael Xxxxxxxx submitted objections to both of these enhancements. (Docket Item 67). The PSR assigned Michael Xxxxxxxx 3 criminal history points: 1 point for the probationary sentence he received in Maryland on July 21,

2000, and 2 points for being under that sentence of probation at the time of the instant offense. Mr. Xxxxxxxx submitted an objection to

his Criminal History Category on the ground that he "was not on probation at the time of the instant offense." (Docket Item 67).

At the sentencing on October 17, 2003, the Court ruled 1) that it could not find by a preponderance that Michael Xxxxxxxx's offense involved 6 or more aliens (10/17/03:34-35); 2) that Mr. Xxxxxxxx was an organizer/leader of criminal activity involving 5 or more people (10/17/03:35-36); 3) that he was not entitled to a reduction for acceptance of responsibility despite his attempt to accept a wired plea (10/17/03:36-38); and 4) that, despite the fact that Michael Xxxxxxxx had not committed any overt acts after being placed on probation, it was reasonably foreseeable to him that his brother would do so and that Michael Xxxxxxxx's relevant conduct was therefore ongoing during his probation (10/17/03:30-34). These factual findings resulted in an offense level of 16 (base of 12 plus 4 for role as organizer/leader and a Criminal History Category of II (1 point for probationary sentence plus 2 points for committing offense while on probation), for a guideline range of 24-30 months. The Court sentenced him to 30 months. A timely notice of appeal was filed.

After the sentencing, the government did not contest Michael Xxxxxxxx's request for voluntary self-surrender (10/17/03:81), and the Court allowed him to remain free on the existing release conditions pending his self-reporting to a facility to be designated by BOP (10/17/03:56-57). Thereafter, this Court granted Michael Xxxxxxxx's request that his curfew be suspended over the weekend of October 24, 2003, through October 26, 2003,

in order that he could visit with his family in West Virginia before reporting to serve his sentence. (Docket Item 76). On November 10, 2003, he reported as ordered to FCI Elkton, where he remains today, having served, with good time, 15 ½ months in prison (10 months at FCI Elkton, 3 ½ months of jail credit, and 2 months of good time credit). See BOP Sentence Computation Sheet dated September 10, 2004 (attached).

On June 24, 2004, the Supreme Court decided Blakely and on August 2, 2004, the Supreme Court granted certiorari in United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105. In light of these developments, Michael Xxxxxxxx now has an excellent appellate claim that, contrary to Circuit law at the time of sentencing, the 4-point leader enhancement and the 2-point enhancement for committing the offense while on probation -- both of which were based on judicial factfinding -- were imposed in violation of the Sixth Amendment. Without those enhancements, Michael Xxxxxxxx's guideline range would be 10-16 months. Assuxxxxxxxx he were to receive the top of the range as he did at the original sentencing, his sentence would expire on September 23, 2004.

Grounds for Release Pending Appeal

Under 18 U.S.C. § 3143(b)(1), a court shall order release pending appeal if it finds (emphasis added):

> (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 . . . ; 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.

In the last circumstance, "the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence." § 3143(b)(1).

Because the appeal is not for purposes of delay and Michael Xxxxxxxx presents no issue of dangerousness or potential flight,[1] the only question is whether his appeal raises a "substantial question of law" within the meaning of § 3143(b). A "substantial question" is "'a close question or one that very well could be decided the other way.'" United States v. Perholtz, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (quoting United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985)). This standard does not require that the Court find that it is likely to be reversed before it may grant release pending appeal. See Bayko, 774 F.2d at 522-23. Rather, the Court is to "evaluate the difficulty of

[1] This Court having concluded after the guilty verdict that Michael Xxxxxxxx was unlikely to flee since he was facing only about 3 years in jail, and Michael Xxxxxxxx having self-reported to serve a 30-month sentence, there is no likelihood he would flee now that he has only about one year left to serve even if his original sentence is ultimately affirmed.

the question" on appeal, United States v. Shoffner, 791 F.2d 586, 589 (7th Cir. 1986), and grant release pending appeal if it determines that the question is a close one that very well be decided in the defendant's favor.

First, the Sixth Amendment argument against applying sentencing enhancements absent factfindings by the jury was fully preserved. David Xxxxxxxx's attorney consistently argued that, under Apprendi v. New Jersey, 530 U.S. 466 (2000), a defendant cannot be held responsible for sentencing purposes for acts not found by the jury and such objections were equally preserved by Michael Xxxxxxxx in light of this Court's ruling that Michael Xxxxxxxx's attorney would be treated as adopting all of the objections of David Xxxxxxxx's attorney unless he affirmatively opted out. (7/8/03:11). Specifically, at the time the jury instructions were submitted, the defense objected that "under Apprendi [the government's verdict form is] inadequate" in that it did not specify which overt act or acts each defendant was unanimously found to have committed and therefore did not provide for "the requisite findings with regard to individualized culpability with regard to the charged acts." (7/24/03:5-6). At sentencing, the objection was made that "[t]he Federal Sentencing Guidelines as presently promulgated by the Sentencing Commission are patently unconstitutional" and specific objection was made to application of the relevant conduct and aggravating role provisions, citing Apprendi and the Sixth Amendment. (David Xxxxxxxx's Sentencing Memorandum (Docket Item 61) at 1-3). The

government responded to these "broad legal objections to the U.S.S.G., particularly to the use of uncharged, acquitted, and/or relevant conduct to form the basis of sentencing adjustments" simply by noting that the defense memorandum had "cite[d] binding authority upholding the constitutionality of such usage." (Govt's Sentencing Memorandum (Docket Item 63) at 5 n.3). The court noted at sentencing that, given existing law, the constitutionality of the challenged guidelines provisions "is not open for debate at this time." (10/17/03:82).

Everything has now changed in light of Blakely and the Supreme Court's decision to grant review in Booker and Fanfan. While the constitutionality of the sentence enhancements applied to Michael Xxxxxxxx in this case may not have been debatable under circuit law at the time of sentencing, it is highly debatable now. If the Supreme Court decides that the reasoning of Blakely applies equally to the federal sentencing guidelines -- clearly "a close question or one that very well could be decided" in Mr. Xxxxxxxx's favor, Perholtz, 836 F.2d at 555[2] --

[2] In addition to the Seventh Circuit in Booker, 375 F.3d 508 (7th Cir. 2004), and the district court in Fanfan, the Ninth Circuit and several lower courts have held that the reasoning of Blakely prohibits federal sentencing enhancements based upon judicial fact-finding. See United States v. Ameline, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004). Even courts upholding the constitutionality of the federal guidelines for the present have recognized that the Supreme Court may soon hold otherwise. See United States v. Koch, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) (en banc) (7-5 majority recognizing, "It may well be that the trajectory of Apprendi, Ring and Blakely will end with a nullification of the Guidelines"); United States v. Pineiro, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004) (concluding that federal guidelines might survive Blakely and that lower courts should apply them until the Supreme Court strikes them down).

both the 4 "leader" points and the 2 points for committing this offense while on probation would be invalid. In both cases, the enhancements were based on facts found by this Court by a preponderance of the evidence, rather than by the jury beyond a reasonable doubt.

As to the 4 "leader" points, Michael Xxxxxxxx "denie[d] ever being a leader or organizer of the criminal activities regarding the instant offense" (Receipt and Acknowledgment of PSR (Docket Item 67)). The government argued that, as a matter of fact, he was co-leader with his brother, even though his brother took a greater role. (10/17/03:21-23). This Court found, as a matter of fact based on the evidence that it heard at trial, that Michael Xxxxxxxx had been a "leader/organizer":

> [W]hile he may have played a smaller role, and he did obviously through the evidence, he followed his brother's orders and sort of worked for his brother, he also did his own direct involvement in five, together with his brother in five of these fraudulent petitions.
>
> Secondly, he was obviously the organizer, leader of those on his own, as well as assisting and working with [David]. And as the government argues, I think it's fair that there also is obviously beneficiaries involved, there's middlemen involved, there's many more than just five involved. And he helped organize those, and I think he's on a level of the organizer, not a level of just a supporter who would get a three level increase.
>
> But a four level one is appropriate to the Court because of his work as the principal in several of these petitions, as well as assisting his brother in the others.

(10/17/03:36). These factfindings were entirely the Court's, the jurors having never been asked to make any finding as to what role Michael Xxxxxxxx had played in the conspiracy they convicted

him of joining or what specific act or acts they were convinced beyond a reasonable doubt he had taken. If Blakely's reasoning applies to the federal sentencing guidelines, this 4-point "leader" enhancement is clearly invalid.

Likewise, the 2-level enhancement for committing this offense while on probation was clearly based on judicial factfinding on an issue the jury was never asked to address, specifically, when did Michael Xxxxxxxx's "relevant conduct" end? Mr. Xxxxxxxx argued that he was no longer in the conspiracy at the time he was put on probation in July 2000. The government argued that, even though it had no evidence that Michael Xxxxxxxx committed any acts in furtherance of the conspiracy after 1998, he did not as a matter of fact affirmatively withdraw from it and therefore was in it until it ended on December 31, 2002. (10/17/03:14-16). The Court questioned "how a defendant is supposed to prove he withdrew from the conspiracy at a sentencing level hearing other than showing he didn't take any acts after he was placed on probation that contributed to the conspiracy." (10/17/03:16). Analyzing the issue in terms of relevant conduct -- "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" (§ 1B1.3(a)(1)(B)) -- the Court determined that "I have to determine the scope of the criminal activity the particular defendant agreed to jointly undertake, and I should make specific findings as to the scope and foreseeability of others' conduct." (10/17/03:31-32). The court then found as fact:

> I think . . . that it was clearly foreseeable that Michael Xxxxxxxx, who worked with his brother on a daily basis, basically, who was associated with him and who was engaged with him, by the jury's findings, in the commission of a conspiracy to smuggle aliens into this country illegally, or assist them in coxxxxxxxx into this country, and who on his own did the same actions and was obviously in league with Mr. David Xxxxxxxx, it certainly was foreseeable to him that Mr. David Xxxxxxxx was continuing, did continue to perform acts in furtherance of this conspiracy to smuggle aliens after he was placed on probation. There's no affirmative evidence that he withdrew from the conspiracy, that he ever told his brother, because he was on probation he didn't want to get involved any more, or that he moved away from him or took some other stops to disassociate himself with this activity. There were still found at his house at the time of his arrest documentation relating to the fraudulent visa petitions.

(10/17/03:33-34).

Again, these preponderance factfindings were based entirely on the Court's evaluation of the evidence it heard at trial. The jury never made any findings as to the duration of Michael Xxxxxxxx's participation in the conspiracy, if or when he withdrew, the scope of the jointly undertaken activity, or what actions of his brother were foreseeable to him. To the contrary, the jury was specifically told, "You may find that there was a single conspiracy despite the fact that there were changes in either personnel, for instance, by the termination, withdrawal, or additions of new members, or activities, or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy for the purposes charged in the indictment." (9/24/03:83). Under the jury instructions (Docket Item 55) and verdict form (Docket Item 53), all the jury found was that the conspiratorial agreement charged in the

indictment existed, that Michael Xxxxxxxx at some point intentionally joined in that agreement, and that one of the conspirators committed one overt act. (9/24/03:77-81) (Court instructing on three elements of conspiracy). The Court's finding that Michael Xxxxxxxx's "relevant conduct" extended past July 21, 2000, obviously went well beyond those jury findings.

For these reasons, Michael Xxxxxxxx has a very strong Blakely challenge to these enhancements, which together increased his guideline range from 10-16 months to 24-30 months. Because the Sixth Amendment claim was fully preserved for appeal, it will be reviewed under the most generous standard of review and, if Blakely's reasoning is ultimately held to apply to the federal guidelines, the burden will be on the government to prove that the error in applying these enhancements was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Given the contested nature of these enhancements, it is extremely unlikely that the Court of Appeals, or this Court, would be willing to engage in the speculation necessary to find beyond a reasonable doubt that the jurors would have found beyond a reasonable doubt the same facts that this Court found by a preponderance of the evidence.

Even if a plain error standard were to apply, Michael Xxxxxxxx's Blakely claim is more than a "substantial question of law" within the meaning of § 3143(b). "Plainness" is determined as of the time the appellate court decides the appeal, Johnson v. United States, 520 U.S. 461, 467-68 (1997), by which time Booker

and Fanfan will have been decided and the merits of the Blakely claim will be clear one way or the other. Therefore, if Michael Xxxxxxxx's claim is correct, it will, at the time the appeal is decided, necessarily be "plainly" correct. Likewise, given the contested nature of the findings at issue, Michael Xxxxxxxx will have no difficulty establishing prejudice even if a plain error standard applies. Compare Johnson, 520 U.S. at 469-70 (no plain error where evidence of omitted element was "overwhelxxxxxxxx" and the element had been "essentially uncontroverted").

Again, this Court need not resolve the issues pending before the Supreme Court in Booker and Fanfan in order to release Mr. Xxxxxxxx pending his appeal of those issues. This Court need only find that his legal claim to a guideline range of 10-16 months is a "substantial" one, which it clearly is given the number of courts that have accepted such a claim and the Supreme Court's conclusion that the claim is worthy of its review.

Undersigned counsel has explained to Mr. Xxxxxxxx that, if he is released pending appeal and then ultimately loses his appeal, he will have to return to prison to serve the second half of his 30-month sentence. Understanding that risk, he has informed counsel that he wishes to be released pending appeal.

According to BOP, Michael Xxxxxxxx will have served a 16-month sentence as of September 23, 2004. Having been served by hand today, the government's response to this motion is due on September 21, 2004. Therefore, Michael Xxxxxxxx requests that, if

this Court determines that a hearing on this motion is necessary, such hearing be held on or before September 22, 2004.

WHEREFORE, defendant Michael Xxxxxxxx respectfully requests that this Court grant this motion and issue the attached proposed Order requiring his release on September 23, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2004, one copy of the foregoing was served by hand on AUSA Jeanne M. Hauch and one copy of the foregoing was served by hand on AUSA John R. Fisher at the Office of the United States Attorney, 555 4th Street, N.W., Washington, D.C. 20530 (Rooms 11909 and 8104). In addition, counsel for co-defendant Chi Fai Xxxxxxxx, Jonathan P. Willmott, was served via e-mail.

Lisa B. Wright

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