UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **CYNTHIA BALLENGER, and CHRISTOPHER PRICE,** **Defendants.**	**Case No. 1:21-cr-00719 (JEB)**

DEFENDANTS' REPLY TO ORDER OF THE COURT REGARDING RELEASE PENDING APPEAL

This memorandum contains four sections. First, the provide a section on certain procedural background. See pp. 1-3. Second, the provide a long section arguing the Court has authority under "exceptional reasons" under 18 U.S.C, 3145(c). See pp 3-16. Third, as directed by the Court, the Prices provide a section discussing the scope of the "exceptional reasons" approach as it may potentially relate to the instant case and how findings of exceptional reasons might relate to findings under the substantial questions provision of 3143(b). See pp 16 -20. Fourth, the Prices provide a section on rulings requested by the Prices which include some discussion the rulings previously under a motion for release pending appeal filed on November 12, 2023 [ECF-152 restated as a stay, see ECF 153]; rulings under the "exceptional reasons" provisions along with reasons and rationale; certain other rulings. See pp. 20-25.

I. Certain Procedural Background

As the court knows, a key issue on the table is the current date that Cynthia Ballenger (Price) must report for detention. Currently, she is scheduled to report to Hazelton Federal

Corrections Institution on January 2, 2024. As a procedural note, the Court of Appeals for the District of Columbia suspended the prior briefing schedule for the Prices pending further order of the Court of Appeals.

The Prices filed their prior motion for release pending appeal on November 12, 2023 [ECF 152] including based, in part, on "substantial question" grounds under 18 U.S.C. § 3143(b). Defense Counsel had also indicated, by email days prior, the intent to file the motion. The government had two weeks from filing to respond and did not do so.

In that the November 12th motion the Price stated:

> Defendant-Appellants reserve that there may be other grounds for a motion under Rule 38 or other authority connect to the cancer and care for cancer of Christopher Price. Defendant-Appellants note the Courts hearing set for December 1, 2023 and request that the Defense provide reports from the doctors on that matter.

At the time the Prices filed the motion for release pending appeal on "substantial question" grounds, the Prices had not received reports from the health care providers. Moreover, the Court had asked for the medical reports to be closer to December 1, 2023. The Prices filed a notice of supplemental information on November 26, 2023, that included 1) a joint letter/report dated November 17, 2023 signed by Jodi Gerber, Clinical Oncology Social Worker and Dr. Gagnon, Director or Radiation Oncology; 2) a letter/report sent by email to Defense Counsel on November 21, 2023 by Dr. Gagnon; 3) a letter from Sarah Raamsland who Chris Price now sees at the Frederick Health Hospital in the pastoral and spiritual care department; 4) an order dated November 11, 2023 from Dr. Bonita J. Krempel-Portier, Doctor of Osteopathy for physical therapy treatment for 2 sessions a week for 6 weeks with a follow-up visit set after that. [ECF 154, 154-1, 154-2, 154-3, and 154-4] The need for physical therapy is to treat cervical and

lumbar strain and left should strain that arises from a recent motor vehicle collision. See also, Defendant's Notice of Supplemental Information: The Role of Stress and Impact on Caregivers [ECF 156]

Effectively, through colloquy with the court on December 1, 2023, the Prices requested relief and release pending appeal based on the medical situation, medical stress, the role of Cynthia Ballenger as primary caregiver and caregiving needs, the short time frames of sentences and reporting, and the unusually harsh impact on the Prices. The Prices agreed with the court initial thoughts that "exceptional reasons" authority existed and, effectively, asked for relief under "exceptional reasons" grounds along with any other authority that could provide relief. This is all in addition the "substantial question" motion of November 12, 2023.

The court requested the government to respond to the potential applicability and scope of "exceptional reasons" authority and potential relationship to certain factors by December 8, 2023 and the Prices to reply by December 15, 2023. A hearing on all motions was set for December 18, 2023.

II. The Exceptional Reasons Provision in 18 USC 3145(c) or Exceptional Reasons Authority Under Article III, Are Available to the Court to Provide Relief for the Prices

18 U.S.C. §§ 3142, 3143, and 3145 provide discretionary authority or, at least, do not preclude Article III judicial authority, for an "exceptional reasons" approach to keep the Prices out of prison during appeal for the reasons the Prices have provided at the last status hearing of December 1, 2023. In their response to the court, the government provides a perfunctory review of the language of 18 U.S.C. §§ 3143 and 3145 (c) [ECF 157]. The government review neither identifies nor compares the strength of different interpretations of language and structure of all provisions of law mentioned and referred to. Nor does the government review the important

cross-references in 18 U.S.C. §§ 3143(a)(1) and 3143(b)(1)(A) refer to the terms in §§ 3142(b) and (c).

A sentence at issue in § 3145 (c) is:

> A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

A. **"Conditions of Release" is a Narrower and More Specific Term Than Meeting Both of the Findings Under 18 U.S.C. § 3143(b)(1)(A) and (B)**

The government argument is that the "exceptional reasons" finding under 18 U.S.C. § 3145(c), is only enough to drop a defendant-appellant at the gate of a "substantial question" inquiry under 18 U.S.C. § 3143(b)(1)(B). According to the government, to obtain any relief the defendant-appellant must also satisfy 18 U.S.C. §3143(b)(1)(B) (substantial question), even if there are "exceptional reasons" and full satisfaction of findings regarding the effectiveness of conditions of release to flight risk and public safety as also required.

To the extent the defense has reviewed case law, the defendants in several cases did claim they met 18 U.S.C. § 3143(b)(1)(B)(substantial question) and were in the higher criminal category of crimes referred to under 18 U.S.C. §§ 3143(a)(2) and (b)(2). Many other cases are pre-sentence detention cases. To the extent the Prices are not in the higher crime category and pending appeal, the Price's argument is, to defense counsel's knowledge, of first impression. The Prices argue parties can satisfy "exceptional reasons" under 18 U.S.C. § 3145(c) to obtain relief without also satisfying 18 U.S.C. § 3143(b)(1)(B) (substantial question). It is an alternate route to relief and the government's argument is unsupported by text and in use of the terms

"conditions of relief under sections 3143(a)(1) or (b)(1)". These latter sections also have important cross-references to 18 U.S.C. § 3142 that render the governments reading unsupported.

The Prices here perform a textual and structural analysis which is more fulsome than the government's cursory analysis. The language "conditions of release set forth in section 3143(a)(1) and 3143 (b)(1)" is a different, more specific, and narrower term than a full requirement that both findings under both 18 U.S.C. § 3143(b)(1)(A) (flight risk and public safety) and 18 U.S.C. §3143(b)(1)(B) (substantial question) must be satisfied for purposes of "exceptional reasons" relief. Congress neither used the term "findings" nor "requirements" in 18 U.S.C. §3145(c) and instead used the specific terms "conditions of release under 3143(a)(1) or 3143(b)(1)".

18 U.S.C. §§ 3143(a)(1) and 3143(b)(1) have constructs that are bunched together somewhat differently. The ONLY language that can be described as including "conditions of release" or referring to such conditions in 18 U.S.C. § 3143(a)(1) is that:

> …. the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person if released under section 3142(b) or (c).

In § 3143(b) the groupings are bit different. Almost identically, under § 3143(b)(1)(A), the judicial officer must find:

> (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 3142 (b) or (c) of this title

Importantly, the same language and same text reference is to "if released under 3142(b) or (c)". This is so, even though 18 U.S.C. § 3142 is styled release or detention pending trial.

18 U.S.C. §§ 3142(b) and (c) both refer to "conditions". 18 U.S.C. § 3142(a)(2), for example, provides that a person can be "…released on a condition or combination of conditions under subsection (c) of this section." 18 U.S.C. § 3142(c) is titled "release on conditions" and contains a determination by the judicial officer to assure appearance of the person and that the person will not endanger the safety of any other person or the community. There is a long list of potential conditions. § 3142(c)(1)(A)(xiv) uses the terms "satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." § 3142(f)(detention hearing) states:

> The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community….

See *United States v. Salerno*, 481 U.S. 739, 750 (1987)("...the Government must convince a neutral decisionmaker by clear and convincing evidence that no condition of release can reasonably assure…")

§ 3142(g)(factors to be considered) is explicit:

> The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person in the community…. (emphasis added)

See United States v. Munchel, 991 F.3d 1273, 1281 (D.C. Cir. 2021)("…potential compliance is relevant to the ultimate determination of "whether there are conditions of release that will reasonably assure…"). §3142(h) cross refers to §§3142(b) and (c). §§ 3143(a)(1) and 3143(b)(2)(A) also cross refer to §§ 3142(b) and (c). Under 3142(h)(contents of release order):

In a release order issued under subsection (b) or (c) of this section, the judicial officer shall-

(1) Include a written statement that sets forth all the conditions to which the release is subject…..

(2) Advise the person of—

(A) The penalties for violating a condition of release … (emphasis added)

The language of § 3145(c) also uses the terms "….released, under appropriate conditions…". § 3145(a) also refers to "a motion for revocation of the order or amendment of the conditions of release." *See United States v. Sagastume-Galicia*, Criminal Action No. 20-40 (BAH) (D.D.C. Apr. 22, 2020) at 3. § 3146(a)(1) describes an offense for whoever "fails to appear before a court as required by conditions of release." In the Federal Rules of Criminal Procedures 40 (a) (ii) there is a provision for "violating conditions of release set in another district."

The Prices textual construction is overwhelming regarding the meaning of "conditions of release" which has been the common parlance in the Supreme Court and D.C. Circuit and cases for many, many years. The government makes no attempt to address that the term "condition of release" has common meaning which is not the meaning the government claims.

"Conditions of release" are not, as discussed further below, findings concerning "substantial questions" in an appeal. The general rule of construction is when Congress uses a term it is not surplusage and is consistent with meaning provided under the related provisions. In § 3145(c) Congress did not say meet the "requirements" or "findings" of §§ 3143(a)(1) and 3143(b)(1) but, instead used the term "conditions of release" which has clear definition under § 3142. On an analysis of text and structure, the government's reading is unsupported and the

Prices reading that the exceptional reasons authority is an additional rout to relief and not a rout that just takes one to the doorstep of §3143(b)(1)(B)(substantial question) is fully supported.

B. 18 U.S.C. §§ 3143(a)(2) and 3143(b)(1)(B) Concerning Potential Success in Court are Different in Kind and Not Inquiries Into "Conditions of Release" As that Term Is Defined In 18 U.S.C. §§ 3142-3146

The standard concerning the potential for success in of future judicial action with respect to pre-sentence detention lies in § 3143(a)(2)(A) for a subset of criminal categories. These findings are treated differently, at least for purposes of the text of §3145(c), in that they are not in any way referred to as a necessary finding and not referred to as "conditions of release". The potential for success of future judicial action is also different in kind from "conditions for release" as described in the related sections. Importantly, the required findings under §3143(a)(2)(A) also has no reference to § 3142(b) or (c) and no reference related to a term "condition". In § 3143(a)(2)(A) the language is "substantial likelihood that a motion for acquittal or new trial will be granted." Congress clearly did not require this finding under 3145(c), and the government does not dispute this.

In § 3143 (b)(1)(B), the language is a "substantial question of law or fact likely to result in…" These statements involve findings regarding the type of question on appeal. The findings under § 3143(a)(2)(A) regarding motions for acquittal or a new trial and § 3143(b)(1)(B) can depend on issues that are procedural, substantive, involve whether evidence supports legal standards, or address many potential errors. In the case of appeals, the issues can relate to either convictions and/or sentencing issues. The resolution of legal issues and the process to resolve legal issues do not easily fit under a construct of "conditions of release". Note also that the references to flight risk or public safety under §§ 3143(a)(1), 3143(a)(2)(B) and 3143 (b)(1)(A) requires "clear and convincing evidence" while the findings under § 3143(a)(2)(i) and §

3413(b)(1) do not. This emphasizes the focus of the Congressional concern regarding detention versus release.

As discussed further below, findings related to substantial questions issues can be a component of an "exceptional reasons" finding. However, neither "exceptional reasons" finding nor "exceptional reasons" relief is bound by the "substantial questions" requirements.

Also, with respect to the term "purpose of delay" under § 3143(b)(1)(B) the Prices assume courts will not find "exceptional reasons" where the appeal is for the purpose of delay or other situations that are not in good faith and not meritorious.

C. Congress Wanted Actual Relief Where There Are "Exceptional Reasons" Consistent with Effective Flight Risk and Public Safety "Conditions of Release"

The Prices now turn to the operational impact of the government's argument that the findings under § 3143(b)(1)(B) (substantial question) must be nonetheless be satisfied even if there is a separate "exceptional reason." The operational outcome of the government interpretation is the same as the Price interpretation with respect to 3143(a) and pre-sentencing detention. If there are exceptional reasons a defendant must nonetheless satisfy the "condition of release" as defined in 3143(a)(1) which is, effectively, the same language the Prices argue is "conditions of release." The Prices articulate that for pre-sentencing, the flight risk and public safety finding (conditions of release) + "exceptional reasons" provide court discretion for actual relief.

The difference in interpretation between the government and the Prices only arises regarding release pending appeal. The government interpretation is that the purpose of the "exceptional reasons" provision in the context of appeals is to place people covered by the criminal categories of 3143(b)(2) on a level playing field with criminal categories not described

in 3143(b)(2). Under the government's interpretation people under any criminal categories would always face the further and final obstacle of § 3143(b)(1)(B) in order to get ANY relief regardless of ANY "exceptional reasons".

"Exceptional reasons" suggest Congress want to make sure that courts have discretion to address exceptional circumstances. Continued application of § 3143(b)(1)(B) as an additional obstacle would likely mean that those circumstances are not addressed in many situations. Exceptional reasons might also involve emergency situations, yet the government requires defendants to put together a brief regarding the "substantial questions" issues which may be very technical. Moreover, the "substantial question" issues can be of a fundamentally different nature than the exceptional reasons rationale.

D. Any Restriction of "Exceptional Reasons" to the § 3143(b)(2) Categories Is Inadvertent and Denying the Prices the Same Rout to Relief As The Higher Crime Category Is Not a Rational Reading of the Statute

The Prices turn to the lead in language in the sentence that the "exceptional reasons" construct may only apply to people in the higher crime categories with respect to appeals. The Prices agree it would be odd and inappropriate for Congress to give people under the criminal categories described as connected under § 3143(b)(2) a route to relief through the exceptional reasons approach and not give that same route to relief to the Prices. The Prices argue the limitation under § 3145(c)(exceptional reasons) to the category of criminal conduct under 3143(b)(2)(higher criminal categories) is inadvertent. The issue in question does not arise with respect to pre-sentencing release under 3143(a), simply because of how that provision is drafted and operates. Congressional drafters did not fully observe the distinctions in how language was bunched under § 3143(b) for the release pending appeal category.

The Prices should have an opportunity at both the substantial question approach and the exceptional reasons approach. If people under a higher category of crime have a rout to the relief Due Process and any reasonable interpretation of the statute would not deny the Prices the same right.

E. The "Exceptional Reasons" Construct Is Consistent with Article III Authority and Protects the Individual Circumstances of Defendants and Constitutional Rights —Which Are Fundamental and Constitutional Judicial Roles

Here the Prices assert the asymmetry of the Constitution and rules of interpretation in two fundamental ways. First, Defendants have rights, including under the First, Fourth, Fifth and Sixth Amendment, and the prohibition against Ex post facto laws. The Prices have asserted these points in the instant case and argued the court's broad and novel interpretation of disruptive conduct is inconsistent with several of rules of construction. These rights do not apply to the government and the government cannot assert them here if the court takes a defendant-friendly construction.

The its rule 29 opinion, the court cited to *Maslenjak v. United States*, 582 U.S. 335, 351 (2017) in support of alleged authority for Courts to arrive at legal constructs not inherent in statutory language or to help fill in gaps. Defendants strongly disagree with any argument that *Maslenjak* allows courts to fill in gaps in a manner that harms defendants in defining a crime. *Maslenjak* is a case where the Supreme Court adopts a narrowing construction that favors criminal defendants and protects legal immigration status. *Maslenjak* offers no support for constructs that are unfriendly to criminal defendants or broaden the universe of criminal liability. However, here *Maslenjak* is an example of the Supreme Court looking out for defendants so there is discretionary authority to prevent unduly harsh consequences.

Asymmetry for defendants is present throughout other elements of criminal law. The Court has held that "two critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham,* 450 U.S. at 29, 101 S.Ct. at 964 (footnotes omitted).

A different but related fundamental asymmetry arises with respect to roles under Separation of Powers and the roles of Article I and Article III. Article III section 2 states [t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution. The judicial power is, in part, about application of law to individual cases. This is not the power to create law nor fill in significant gaps in statutory articulation against defendants in criminal matter. However, the legislative power cannot micromanage application and refined questions of case management in individual cases.

The Supreme Courts approach to the sentencing guidelines is instructive. The court had an enormous range of options available at sentencing. After *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts must exercise their discretion to impose sentences that are "reasonable" when viewed in light of the purposes of federal sentencing -- retribution, deterrence, incapacitation and rehabilitation. The Supreme Court states "[o]ur remedial opinion in *Booker* invalidated two offending provisions in the [Sentencing Reform Act of 1984] , see *id.,* at 245, 125 S.Ct.738 (invalidating 18 U.S.C. §§ 3553(b)(1), 3742(e), 3742(e)), and instructed the district courts to treat the Guidelines as "effectively advisory," 543 U.S. at 245. *Pepper v. U.S.*, 562 U.S. 476, 489-490 (2011).

The Supreme Court in *Booker* reserves judicial power and requires that power must address individual circumstances considering factors. The Supreme Court rejected a formulaic,

straight-jacket for sentencing. The Prices argue a similar Constitutional framework applies here. Article III courts must have some room for individual determinations to address the circumstances of individual cases including where there are "exceptional reasons".

The Article III role in general also involves an appeal process protecting Constitutional rights. These rights do not derive from Article I legislation. The legislature can limit the jurisdiction of federal courts, other than the Supreme Court, but cannot limit the judicial power to undermine proper judicial review of these rights.

Where a court has jurisdiction, basic Article III judicial power was not and, likely, could not be, entirely extinguished by the Bail Reform Act of 1984 or the Mandatory Detention Act of 1990. As discussed further below, the judicial role in directly administering the system is important. At the very least, there is Article I/Article III Constitutional tension if the legislative restrictions are too tight.

The relationship of Article I roles and Article III roles further supports a construction that §3145(c) (exceptional reasons) authority should be read as available to provide relief to the Prices. In the alternative, the Prices believe the court can cite to an "exceptional reasons" approach as consistent with the Congressional approach under § 3145(c), even if not directly described by § 3145(c).

F. The Record in the Instant Case Matters

During sentencing of the Prices, the court had every authority, for example, to apply home detention or probation. If defendants were going to be thrown into an abyss by moving on from sentencing, the government should not have opposed the defendants request for continuance on and the court should have granted it. A motion for continuance was filed on

September 20, 2023 [ECF 129] the day after Christopher Price met with Dr. Gagnon and heard the devasting news that his prostate cancer and moved to lymph nodes.

The government argued in its opposition [ECF 30] that the news on September 19, 2023 was the "same reason" that the defense had been concerned about in August 2023. The government argued the Probation Office does not need to update to "provide the Court with the same information."

Defense counsel has knowledge by taking care of his mother during various stages of cancer. As mentioned in the sentencing report Christopher Price knows his circumstances and what happens as well when his sister died of ovarian cancer. Many people understand the difference of a Stage IV diagnosis that the prostate cancer has moved to lymph nodes versus not having that diagnosis. This was specifically written in the letter of Dr. Gagnon which was attached to the Prices request for continuance. The government has some responsibility to at least try to understand the significance.

Defense counsel specifically stated a continuance was in the interests of justice so that the Defense could consider the dramatic new circumstance that Christopher Price's prostate cancer was found to move to lymph nodes. This would mean consideration of different defense recommendations and arguments in sentencing. This would require more gathering of facts and talking with professionals. The delay would allow the defendants to experience and consider the recurrence of cancer, the treatment, the side effects, the operation of the small business, and the supervision of a then 18-year old son living at the home of the Prices during this time. The defense wanted to United States Probation Office (USPO) to incorporate this significant new health and medical information into a revised or supplemented report and sentencing

recommendations. Yes, that might take some time. These are misdemeanor charges and now the Prices face unduly harsh circumstances.

Without a continuance, the Prices timely filed their sentencing memorandum [ECF 131 and 133] on September 22, 2023, only 3 days following the news from Dr. Gagnon. There was no reasonable opportunity for the defense to put together the research and outreach regarding the dramatic development.

The Prices are in the hands of the district court regarding the process at this point. The court had a concern for the cancer situation, a concern for the Prices, had some understanding of some important residual authority. At the sentencing hearing, the court set further process for this set of issues. Among other things, the court explicitly reserved questions on the relationship of when Cynthia Ballenger might serve time relative to Christopher Price serving time and how those might go forward.

The court's review on December 1, 2023 and ongoing efforts to address the current situation are all part of Article III authority. These efforts are fully consistent with §§ 3142, 3143 and 3145 and not extinguished by any provision therein. Judicial process and the relationship of that process to real-life situations frequently defy boundaries set for other goals. In the instant case, there has been fundamental and evolving new information which affect release status and potential detention for the Prices. No other institution is in the same position to implement the process the court has proceeded on. The legislature cannot manage or implement cases. The Bureau of Prisons cannot manage this situation.

The Prices can apply to the Court of Appeals under rule 9(b) for release pending appeal. There may be other mechanisms. For example, under rule 12.1 of the Federal Rules of Appellate Procedure, the court of appeals could provide a remand after an indicative ruling by the district

court on a motion for relief that is barred by a pending appeal. Such a remand could be based on a motion to reconsider sentencing based on new information and other concerns. However, there is no time or reason for complexity. The court can now provide relief under the circumstance of the instant case based on at multiple sources of authority and grounds.

III. The Scope of "Exceptional Reasons" and Relationship to § 3143(b)(1)(B)

A. "Exceptional Reasons" Does Not Have Significant Statutory Limitations Other Than the Term "Exceptional" And the Requirement for Effective Conditions of Release Under Flight Risk/Public Safety Findings

United States v. Garcia, 340 F.3d 1013, (9th Cir. 2003) is a case cited by the government and it has an extensive discussion which summarizes:

> As these cases indicate, a wide range of factors may bear upon the analysis. By adopting the term "exceptional reasons," and nothing more, Congress placed broad discretion in the district court to consider all the particular circumstances of the case before it and draw upon its broad "experience with the mainsprings of human conduct." [citing *Mozes v. Mozes,* 239 F.3d 1067, 1073 (9th Cir. 2001)] (internal quotation marks omitted). *Id.* at 1018

Garcia mentions a number of cases including *United States v. Charger,* 918 F. Supp 301, 303-304 (D.S.D. 1996) (finding exceptional reasons where young first-time offender was in need of guidance available to him at his father's home and was participating in out-patient alcohol treatment, such that to imprison him "would be counterproductive. . . . [and] would harm defendant and the interests of society").

Garcia offers discussion involving medical issues:

> The district court might also consider circumstances that would render the hardships of prison unusually harsh for a particular defendant. Chief among such circumstances is a sufficiently serious illness or injury. A severely ill or injured defendant might have

> exceptional reasons even if the requisite medical treatment is available in prison. District judges may consider such factors as the desirability of maintaining an uninterrupted course of treatment while a defendant remains in the care of a particular physician who is providing individual medical supervision to the patient. Although a defendant may ultimately be forced to serve a prison sentence regardless of his health, it may be unreasonable to force him to begin his sentence prior to the resolution of his appeal. *Garcia* at 1019-1020.

Garcia further states "…if the district court finds that the defendant led an exemplary life prior to his offense and would be likely to continue to contribute to society significantly if allowed to remain free on bail, these factors would militate in favor of finding exceptional reasons. *Id*. at 1019.

B. Some Case Law Shows Overlap at Least that Substantial Question Issues Can Help Provide Part of the Basis Under "Exceptional Reasons"

The case law the defense has reviewed involving "exceptional reasons" all starts with defendants who are in the higher criminal category. Some case law at least uses the "substantial question" issues as a part basis for "exceptional reasons". *U.S. v. DiSomma*, 951 F.2d 494, 497-498 (2d Cir. 1991) stating that "an unusual legal or factual question can be sufficient . . . [or, o]n the other hand, a merely substantial question may be sufficient, in the presence of one or more remarkable and uncommon factors," and affirming order of release where defendant "mount[ed] a direct and substantial challenge on appeal to the factual underpinnings of the element of violence upon which his sole conviction st[oo]d or f[e]ll" and where there was no risk of flight or danger to the community). Garcia states: [t]he nature of the defendant's arguments on appeal may also be considered by the district court in determining whether exceptional reasons exist. *Garcia* at 1020.

C. Short Prison Sentences Can Be Issues to Consider At Least Under "Exceptional Reasons"

Garcia speaks to short prison sentences as an example of "exceptional reasons":

> First, the length of the sentence may be a proxy for the seriousness of the crime. Second, the primary purpose of the Mandatory Detention Act — to incapacitate violent people — is only weakly implicated where the sentence imposed is very short, because regardless of whether the defendant is released pending appeal, he will soon be free. Third, in such circumstance, the defendant could be forced to serve most or all of his sentence before his appeal has been decided. Incarcerating such a defendant immediately upon conviction could substantially diminish the benefit he would ordinarily receive from an appeal. *See United States v. McManus,* 651 F. Supp 382, 384 (D.Md. 1987) ("There seems little point to an appeal if the defendant will serve his time before a decision is rendered."). *Garcia* at 1019.

The Prices here add several points. First, the Prices note the statistics. In the current federal prison population less than 2.1% have sentences 1 year or less. *See* Attachment 1. The percentage of sentences at 4 months would be substantially smaller. Inmates with short prison sentences are exceptional at any given time in the federal prison population. The minimal nature of the offenses also represents a very small percentage of the prison population offense types. *See* Attachment 2. The concerns of the 1984 Bail Reform Act and the 1990 Mandatory Detention Act were certainly not potential detainees like the Prices.

Moreover, the mandatory appeal provisions including under the federal Rules of Appellate Procedure should meaningfully make a difference. Removing the incentive for appeal

by making it not possible to have that appeal relieve prison sentences is antithetical the fundamental purposes of the appeal procedures. The expectation of § 3143(b)(1)(B) is that the Prices can have a meaningfully appeal. In fact, § 3143(b)(2) is a hierarchy making release pending appeal less likely for certain category of higher categories and longer sentences. An interpretation effectively taking away appeal for smaller prison sentences goes in the opposite direction.

D. The "Substantial Question" Inquiry Is One Part of Multiple Steps

In part to explain the relationship of §3143(b)(1)(B) to an "exceptional reasons" approach and to address brief statements from the court at the December 1, 2023 hearing, it is important to observe the steps and related inquires under § 3143(b)(1)(B). The D.C. Circuit, and, basically, the other circuits agree on a four-step structure under § 3143(b)(1). Here the Prices paraphrase the steps. Consistent with the decisions, defendants-appellants must show:

(1) under § 3413(b)(1)(A), by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released under §3142(b) or (c);

(2) under § 3413(b)(1)(B) that the appeal is not for purpose of delay;

(3) under § 3413 (b)(1) (B) that the appeal raises a substantial question of law or fact; and

(4) under § 3413(b)(1)(B) that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in [the list of impacts under § 3143(b)(1)(B) (i), (ii), (iii) or (iv)]

Note that the "clear and convincing evidence" standard only applies to step 1 and not the other steps.

Note, if there is a "substantial question", then a court must further inquire regarding certain possible results, based on assumption that the court of appeals rules in favor of the defendant. Importantly, the term "likely" is not a part of identifying a "substantial question". In the D.C. Circuit, a "substantial question" within the meaning of § 3143(b)(1)(B) 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)). The Prices focus on the standard "one that very well could be decided the other way" which seems a lower standard than "a close question". The languages accounts for potential differences in judicial thinking by using the term "could be decided". The *Bayko* court and other courts reject a "Catch-22" interpretation stating further stating: "we reject the construction which would make bail contingent upon a finding by the district court that it is likely to be reversed.".

U.S. v. Quinn, 416 F. Supp. 2d 133 (D.D.C. 2006) is an example where, the Judge Bates rejected defendant's arguments with respect to defendant's motion for judgement of acquittal, but Judge Bates found defendant-appellant met the *Perholtz* standard noting:

> Here, defendant satisfies that test. In circumstances such as this — where a defendant challenges the Court's ruling on a novel question of law and provides a rationale for a contrary interpretation that is supported by arguably applicable legal authority — the Court cannot say that the question for appeal is insubstantial or not susceptible to a different answer.

III. Rulings Requested by the Prices

A. The Prices Request Findings Under the Motion for Release Pending Appeal of November 12, 2023

By virtue of the motion for release pending appeal the Prices request the necessary finding and rulings. First, the Prices request the required findings and ruling under § 3143(b)(1)(A) as argued in the November 12, Motion for Release Pending Appeal [ECF 152] at 3-4. The Prices add here that the Price had zero levels for prior criminal record under the sentencing guidelines. As discussed below, this finding will also be necessary for an "exceptional reasons" Second, the Prices request the required finding and ruling under § 3143(b)(1)(B) that the appeal is for not for the purpose of delay. The first finding is required and the second finding useful for an "exceptional reason" finding.

For the "purpose of delay" point, the Prices have raised specific issues through the process and preserved their rights to appeal. The Prices have obtained the necessary transcripts without any delay and have filed the necessary papers. The Prices are raising meritorious arguments including in the motion for release pending appeal that should be the subject of appellate review.

The Prices do not anticipate the above two findings should be difficult for the court.

Third, the Prices request the court make the required findings and rules regarding "substantial questions" as described in the motion for release pending appeal. Here the Prices want to make a few observations. First, the motion filed under § 3413(1)(B) is not one previously filed. The motion articulates issues differently that prior motions and under a different legal standard. The Price's ask the court to focus on whether the question is "one that could very well be decided the other way". "Close" is an option under *Perholtz*, but not really the lowest standard among the two options. The Prices need only meet the lowest standard.

There is substantial space between "likely to be reversed" and "one that could very well be decided the other way." As an example, several fundamental arguments were already decided the other way by Judge McFadden. See motion for release {ECF 152] at 17-18.

The Prices further ask the court to review and make findings regarding the "results in" analysis under § 3143(B)(1)(B) that follows a substantial question determination. Even if the court does not make an affirmative substantial question determination the Prices request a "results in" determination where it

is reasonable simple to do so. Some courts have particularly identified their concern over the a "substantial question" while conceding if a question was substantial with would meet the "results in" standard of the next step.

Here, for several arguments, convictions would simply be reversed. Reversal likely occurs on Count 1 if the government fails to show the evidence and legal interpretations support a restricted area under 18 U.S.C. § 1752 (c). *See* Motion for Release [ECF 152] at 4-13. For Count 2 and 3, if the court's interpretation of "disruptive conduct" is overturned or there is insufficient evidence. *See* Motion for Release [ECF 152] at 13-24. Similarly, under Count 4, reversal likely occurs if the court of appeals sides with the Prices that there must be "demonstrative conduct". *See* Motion for Release [ECF 152] at 14, 18, 20. The Prices also Reversal on counts 2-4 is also likely if the "joined the mob" construct is not found to be the proper legal standard since the Prices were charged as individuals. Reversal on Count 2 likely occurs if the court of appeals rejects the "single raindrop" theory the court adopts for the "in fact" causation test. *See* Motion for Release [ECF 152] at 24-33.

A new trial for all counts or dismissal likely occurs if court of appeals sides with the Prices that court erred in failed to dismiss the Superseding Information for violating certain rules of criminal procedure and the Fifth and Sixth amendment. *See* Motion for Release [ECF 152] at 33-34. A new trial or reversal occurs, if the Appeals court agrees that the Facebook search warrant and operation was a sham under the Fourth Amendment. *See* Motion for Release [ECF 152] at 35-39. Defendants are not arguing about a single message, defendants are arguing all Facebook information, and at least that of the messenger service, would be excluded.

A substantial change in the convictions, for example, by reversing Counts 2 on any grounds would change the sentencing guidelines levels for each defendant would likely mean a

remand to consider sentencing in light, of any surviving conviction. Moreover, any new sentencing would consider the situation of the Prices at the time of the new sentencing.

B. The Prices Request Findings and Rulings Under an Exceptional Reasons Approach as Discussed and Requested at the Hearing on December 1, 2023 and Further Discussed in The Instant Memorandum

The Prices request an "exceptional reasons" finding and ruling based primarily on multiple sets of points. The Prices recommend that the authority for the "exceptional reasons" ruling should be stated as under the authority of § 3415(c) but also, in the alternative, under §§ 3142, 3143, and 3145 in the sense that reserve Article III authority is consistent with § 3415(c) and the 1984 Bail Reform Act and 1990 Mandatory Detention Act. It is necessary to identify the findings under § 3143(b)(1)(A) as connected. Some positive findings under some or all of § 3143(b)(1)(B), even if other findings do not fully meet the court's mark maybe helpful in the context of "exceptional reasons." The issues the Prices seek appeal on are exceptional and important. The discretionary authority of "exceptional reasons" is supported when there is a good case in total —which there is. The term "reason" includes that the Prices are in good faith and the ruling is "reasonable."

The most important set of exceptional reasons for the Prices under the current circumstances concerns the medical status, medical stress, side effects, potential for more treatment, current health care provider situation, current health care provider routines, and role of Cynthia Price as primary caregiver and person with a clear and important role in the care team and in support at a difficult time for both Christopher Price and Cynthia Ballenger (Price). Beyond the Stage IV cancer, the side effects, treatments for the cancer and recover, Christopher Prices is also under treatment from an auto accident which has created strain and the need for physical therapy. Not providing relief would be unduly harsh on both Cynthia Ballenger (Price)

and Christopher Price, well beyond any need for punishment considered in the original sentencing over misdemeanors. Moreover, the only issue for now is delay in prison and not any change in sentencing.

The second set of exceptional reasons concerns the short prison sentences and the appeal itself. The entire structure of mandatory criminal appeals and the § 3143(b)(1) mechanism loses substantial meaning and impact if the Prices cannot obtain appeal before serving their prison sentences. It is hard to see why, under the Fifth Amendment, and any reasonable approach, that the Prices should get less rights to effectively address a full prison sentence than people with longer sentences. Again, this logic is best tied with a positive and meritorious appeal. The Prices believe the arguments the Prices are raising are important to themselves and others, meritorious, and should have meaningful appellate review.

The Prices have presented evidence that short prison stay people are a very small portion of the federal prison population at any one time. It would not be surprising if the short stay population contained more parties under a settlement such that there would be no appeal. The circumstances are exceptional in terms of percent totals.

C. The Prices Request Delaying the Reporting Date to Allow for the Court of Appeals to Consider a Motion under Federal Rule of Appellate Procedure 9(b), If Necessary

If the court does not provide for release pending appeal for either Cynthia Ballenger or Christopher Price, the Prices request that the Court delay the reporting dates to prison so that the Prices have a meaningful opportunity to file a motion to the Court of Appeals under Federal Rule of Appellate Procedure and to receive a determination from the Court of Appeals.

Such a filing might provide relief, if there is time for such a motion and decision. While the local rules do not specify, the D.C. Circuit Handbook states:

> The defendant must apply first to the district court for release. If the district court denies the application, or imposes conditions of release, the defendant may then move the Court for release or for modification of the conditions.

Accordingly, the opportunity to file has been a function of the current process.

D. The Prices Request the Courts Assistance, Recommendation or Use of Any Other Authority Such that the Prices Are Not Forced to Serve Time in a Prison That Houses Prisoners Designated for Medium Security or Higher Security

The Prices have expressed strong concern that Cynthia Ballenger has been designated to report to FCI Hazelton and the Prices provided a notice of supplemental information regarding those concerns [ECF 155, 155-1, and 155-2] at the hearing of December 1, 2023. This included specific concerns about Hazelton FCI. The Prices ask for a recommendation or any other action to help the Prices go to a minimum-security facility. As mentioned in the notice the Prices can point to locations for Cynthia Ballenger. See also attachment 3 showing there about 50% of prisoners are located at a facility under medium security. The Prices continue to try and seek information from the Bureau of Prisons concerning the reasons for the designation for Cynthia Ballenger and remain unsuccessful.

Dated: December 12, 2023

Respectfully submitted,

/s/ Nandan Kenkeremath

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