

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED STATES OF AMERICA,)	
)	
Appellee,)	
)	
v.)	No. 21-cr-0660 (RBW)
)	
DANIEL MICHAEL MORRISSEY,)	
)	
Appellant.)	
)	

DEFENDANT’S MOTION FOR RELEASE PENDING APPEAL

Defendant-Appellant Daniel Michael Morrissey respectfully moves this Court, pursuant to 18 U.S.C. §§ 3141(b) and 3143(b) for a motion for release pending appeal, and for stay of execution of his sentence under Federal Rule of Criminal Procedure 38. Mr. Morrissey’s request for release is based on his claim on appeal that this Court erroneously sentenced him above the statutory maximum for his offense by sentencing him to both imprisonment and probation for the single petty offense to which he pleaded guilty. Counsel for the government has indicated that it does not oppose this motion.

The Court need not resolve the merits of Mr. Morrissey’s claim in order to release him pending his appeal. This Court need only find that his appellate claim

raises a “substantial question of law.” Mr. Morrissey respectfully submits that the appeal does raise such a question for the reasons stated below.

Background

On November 8, 2021, the government filed a four-count Information against Mr. Morrissey charging him with Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1) (Count One); Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count Two); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Three); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Four). On November 9, 2021, Mr. Morrissey made his initial appearance by video conference and was ordered released on his personal recognizance, a status in which he has remained throughout this case.

On February 23, 2022, Mr. Morrissey pleaded guilty to Count Four of the Information pursuant to a written plea agreement. According to the statement of facts proffered in conjunction with his guilty plea, on January 6, 2021, Mr. Morrissey entered the U.S. Capitol building through a Rotunda door. He proceeded to the Statuary Hall and then entered the Will Rogers Hallway before protesting at the House Main Door. He exited the Capitol approximately 28 minutes after entering.

Mr. Morrissey admitted to willfully and knowingly entering the U.S. Capitol building knowing that he did not have permission to do so and while inside, he willfully and knowingly paraded, demonstrated, or picketed.

On August 16, 2022, the Court sentenced Mr. Morrissey to 45 days of imprisonment followed by 36 months of probation. The government dismissed the remaining counts. The Court allowed Mr. Morrissey to remain on bond pending a date to be set by the Bureau of Prisons for his self-surrender. The Court subsequently extended the date for Mr. Morrissey to self-surrender to November 28, 2022.

Grounds for Release Pending Appeal

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

Mr. Morrissey has demonstrated by clear and convincing evidence that he will not flee or pose a danger to the community by virtue of his complete compliance with the pretrial release conditions that have been in place since the outset of this case. As the Court is aware, Mr. Morrissey lives in Georgetown, Texas, where he cares for his elderly mother and is being monitored by the Pretrial Services Office of the Western District of Texas. Undersigned counsel has confirmed through Mr. Morrissey's Pretrial Services Agency Officer that, as of the date of this motion, Mr. Morrissey remains in compliance with his conditions of release.

Mr. Morrissey submits that because this appeal is not for purposes of delay and because he presents no issue of dangerousness or potential flight, the only question is whether his appeal raises a "substantial question of law" that, if decided in his favor, would be likely to result in reversal, or a sentence that does not include a term of imprisonment, or a term of imprisonment that is less than the expected duration of the appeal process.

A "substantial question" within the meaning of § 3143(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)). This standard does not require that the Court find that Mr. Morrissey's appeal establishes a likelihood of reversal before it may grant him release pending appeal. *See Bayko*, 774 F.2d at 522-23. Rather, the Court must "evaluate the difficulty of 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 or one that "very well *could* be" decided in the defendant's favor.

In this case, Mr. Morrissey respectfully submits that the question he wishes to raise on appeal is a substantial one. Mr. Morrissey intends to challenge whether his sentence exceeds the statutory maximum for a single petty offense insofar as it includes a term of imprisonment in addition to term of probation. Indeed, this Court and others have ordered briefing and issued rulings addressing this very issue, thereby indicating its substantial nature. *See United States v. Smith*, No. 21-cr-290, ECF No. 44 (D.D.C. Mar. 24, 2022) (Walton, J.) (imposing split sentence for single petty-offense conviction after briefing); *United States v. Caplinger*, 2022 WL 2045373 (D.D.C. June 7, 2022) (Friedman, J.) (holding that probation and imprisonment can be imposed for single petty offense); (*United States v. Getsinger*, No. 21-cr-607, ECF No. 62 (D.D.C. Aug. 2, 2022) (Sullivan, J.) (imposing split sentence for single petty-offense conviction)); *United States v. Revlett*, No. 21-cr-

281, ECF No. 46 (D.D.C. July 7, 2022) (Boasberg, J.) (same); *United States v. Entrekin*, No. 21-cr-686, ECF No. 34 (D.D.C. May 6, 2022) (Pan, J.) (same); *United States v. Meteer*, No. 21-cr-630, ECF No. 37 (D.D.C. April 22, 2022) (Nichols, J.) (same); *see also United States v. Sarko*, No. 21-cr-591, 2022 WL 1288435, at *1 n.2 (D.D.C. Apr. 29, 2022) (Kollar-Kotelly, J.) (reversing prior ruling in *United States v. Spencer*, No. 21-cr-147, ECF No. 70 (D.D.C. Jan. 19, 2022), that imprisonment and probation could not be imposed for single petty offense).

Notwithstanding these various rulings, Mr. Morrissey submits that under the plain text of 18 U.S.C. § 3551(b), a court is authorized to impose imprisonment “or” probation for a single count of conviction, but not both.¹ Section 3551(b) lists in the disjunctive three different types of sentences—a term of probation, a fine, and a term of imprisonment—and then provides that “a sentence to pay a fine may be imposed

¹ Section 3551 provides, in relevant part:

(b) Individuals.--An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

- (1) a term of probation as authorized by subchapter B;
- (2) a fine as authorized by subchapter C; *or*
- (3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

in addition to any other sentence.” The fact that the statute specifies that only one type of sentence—a sentence to pay a fine—can be imposed in addition to a sentence of probation or a sentence of imprisonment underscores that the other two types of sentences—probation and imprisonment—are mutually exclusive. The statute under which Mr. Morrissey was sentenced, 40 U.S.C. § 5104(e)(2)(G), does not separately provide an exception to § 3551’s limitation.

Consistent with § 3551, 18 U.S.C. § 3561(a)(3) further reflects that a defendant cannot be sentenced to probation in three circumstances, specifically, where: (1) “the offense is a Class A or Class B felony and the defendant is an individual,” which is not applicable here; (2) the offense of conviction is one for which the Code expressly excludes probation, which is also not applicable here; or (3) if “the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.” The natural reading of subsection (a)(3) is that probation is prohibited where imprisonment is imposed “at the same time” for the “same” offense, or for a “different offense that is not a petty offense.” Thus, probation is not permitted for a single offense for which the defendant is sentenced to imprisonment at the same time, such as here.

Although Mr. Morrissey acknowledges that judges in this district have disagreed that a straightforward reading §§ 3551 and 3561 establishes that his

current sentence is unlawful, he urges this Court to acknowledge that this issue is one of first impression in the Circuit, and maintains that it is a substantial one. Indeed, this very issue is pending before in the Court of Appeals in *United States v. Little*, No. 22-3018, where the Statement of the Issue is: “Do federal sentencing statutes permit the imposition of a dual sentence – imprisonment *and* probation – for a single petty offense?” See Brief for Defendant-Appellant in *Little*, No. 22-3018. Oral argument was held in *Little* on November 2, 2022, and a decision in that case inevitably will impact Mr. Morrissey’s appeal. In particular, if *Little* holds that probation and imprisonment cannot be imposed for a single petty offense, then Mr. Morrissey’s sentence will necessarily be unlawful. If Mr. Morrissey is not permitted remain on bond pending appeal, he will have already served the imprisonment portion of his sentence without the possibility of receiving sentence of probation alone. He thereby will be irreparably harmed. The government will not suffer a commensurate harm if Mr. Morrissey is permitted to remain on bond pending the outcome of his appeal and, in fact, does not oppose Mr. Morrissey’s release pending that outcome.

Conclusion

For these reasons and any others the Court deems just and proper, Mr. Morrissey asks that the Court grant this motion and order Mr. Morrissey's release pending resolution of his appeal as well as a stay of the execution of his sentence.

Respectfully submitted,

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