

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

VS.

Case No. 5:06-CR-50064

HOLLIS WAYNE FINCHER

DEFENDANT

**DEFENDANT'S BRIEF**  
**IN SUPPORT OF APPLICATION FOR BAIL ON APPEAL**  
**AND TO SELF SURRENDER TO THE BUREAU OF PRISONS**

At the conclusion of Defendant's sentencing hearing on June 22, 2007, the Court requested briefs concerning Defendant's request to permit him to self surrender to the Bureau of Prisons and his application for bail pending his direct appeal from the conviction and sentence in this action. Defendant, Hollis Wayne Fincher, by and through his counsel, Shannon L. Blatt, submits the following:

Rule 46, Fed. Rules Cr. Proc., entitled "Release from Custody; Supervising Detention," governs the issue of a defendant's release before trial, during trial, and pending sentencing or appeal. Rule 46(c) provides:

"(c) Pending Sentencing or Appeal. The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant."

18 U.S.C. § 3143(b) states the following:

"(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; 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.”

Pursuant to these provisions, a defendant who wishes to be released on bail must first show that the question presented on appeal is “substantial” in the sense that it is a close question or one that could go either way, and he must show that such question is so integral to the merits of the conviction that it is more probable than not that a reversal or new trial will occur if the question is decided in his favor. *U. S. v. Powell*, 761 F.2d 1227 (8<sup>th</sup> Cir. 1985). The Court in *Powell* further held that to show that a question presented on appeal is “substantial,” it is not sufficient to show simply that reasonable judges could differ or that the issue is fairly debatable or not frivolous, but a defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal. A court must keep in mind that it is not being asked to reverse its

position on issues decided at trial, nor is it being asked to grant a new trial; it must decide only that a significant issue existed that merits appellate review, and that the issue is critical enough to the defendant's conviction that a contrary ruling would warrant a reversal. *U. S. v. Hicks*, 611 F.Supp. 497 (S.D.Fla. 1985).

In the present case, the evidence supports a finding that Mr. Fincher is not likely to flee - - he has longstanding family and other ties to his community - - and that he does not pose a danger to the safety of any other person or the community if released. The Court should also consider that the Government has stated no objection to Mr. Fincher's application for bail pending appeal.

The determinative question, then, is whether Mr. Fincher's appeal raises a substantial question of law or fact likely to result in a reversal, new trial, or a reduced sentence. The Court's attention is directed to two key issues at sentencing which present such "substantial" issues to permit the Court to release Mr. Fincher pending his direct appeal.

The first issue concerns the number of firearms for which Mr. Fincher was held accountable under U.S.S.G. §2K2.1(b)(1)(C). Under the Offense Level Computations, Paragraph 47 of Mr. Fincher's Pre-Sentence Investigation Report stated that "the number of firearms seized by officers that are attributable to Fincher are 45," and that a six (6) level increase of the base offense level is appropriate pursuant to §2K2.1(b)(1)(C). Mr. Fincher objected to any increase of the base offense level as there was insufficient proof to support the conclusion that Mr. Fincher was "accountable for" all of the firearms located at the headquarters building, and only 17

firearms were located at his residence. He also objected on the basis that the evidence failed to show that all of these firearms were “unlawfully possessed” by Mr. Fincher as required by §2K2.1(b)(1)(C), Application Note 5.

The second issue concerns Mr. Fincher’s role in the offense. Paragraph 49 of the Pre-Sentence Investigation Report stated that Mr. Fincher is subject to a four (4) level increase for his role as an “organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. Mr. Fincher objected to the four (4) level increase as it was not proven at trial that he was an organizer or leader of any criminal activity involving five (5) or more participants, or which was otherwise extensive. Mr. Fincher’s objection was overruled by the Court.

Both of these objections were overruled by the Court. If the Court’s rulings concerning these objections are overruled on appeal, it would result in lowering Mr. Fincher’s Adjusted Offense Level by ten (10) levels. His Adjusted Offense Level would be 18, instead of 28, and the applicable range of imprisonment would fall from 78-97 months to 27-33 months. These are “substantial” issues which merit appellate review, and the issues are critical enough to the conviction and sentence that a contrary ruling would warrant a reversal and a substantially reduced sentence. Mr. Fincher also intends to raise other constitutional issues (concerning the Second Amendment) on appeal and, if successful on these issues, they would go to the heart of his conviction and would require reversal. Mr. Fincher submits that his circumstances meet the

requirements of 18 U.S.C. § 3143(b), and he respectfully requests that he be permitted to bail pending the outcome of his direct appeal.

Respectfully submitted,

/s/ Shannon L. Blatt  
SHANNON L. BLATT, Bar No. 98116  
Attorney for Defendant  
P.O. Box 1825  
Fort Smith, AR 72902-1825  
(479) 785-0123  
(479) 785-4518  
SBSblatt@aol.com

CERTIFICATE OF SERVICE

I, hereby certify that on June 25, 2007, I presented the foregoing to the Clerk of the Court for filing and uploading to CM/ECF System which will send notification of such filing to the following: Ms. Wendy Johnson, Assistant U.S. Attorney.

/s/ Shannon L. Blatt  
Shannon L. Blatt, Bar No. 98116  
Attorney for Defendant  
P.O. Box 1825  
Fort Smith, AR 72902-1825  
(479) 785-0123  
(479) 785-4518 FAX  
SBSblatt@aol.com