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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DOUGLAS JAY,

11 Petitioner,

12 v.

13 UNITED STATES OF AMERICA,

14 Respondent.

CASE NO. C11-1851 MJP

ORDER ON EMERGENCY
APPLICATION FOR ORDER OF
RELEASE

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16 The Court, having received and reviewed:

- 17 1. Plaintiff's Emergency Application for Order of Release Pending Consideration of
18 Habeas Petition (Dkt. No. 3)
- 19 2. Government's Opposition to Petitioner's Emergency Application for Order of
20 Release (Dkt. No. 7)
- 21 3. Petitioner's Reply to Government's Opposition to Petitioner's Emergency
22 Application for Order of Release (Dkt. No. 8)

23 and all attached declarations and exhibits, makes the following ruling:

24 IT IS ORDERED that Petitioner's application is DENIED.

1 **Background**

2 Petitioner was sentenced by this Court on April 1, 2011, following his guilty plea to
3 Count One of an information charging him with engaging in a fraudulent scheme to substitute
4 lower quality coho salmon for higher quality Chinook salmon. CR10-262MJP, Dkt. No. 24.
5 This Court imposed a term of incarceration of twelve months and one day. Id. Mr. Jay
6 petitioned this Court to delay his reporting date to October 17, 2011. Over the Government’s
7 reservations, this Court granted the request, extended his reporting date, and modified his
8 Appearance Bond in accordance with the government’s requested financial conditions. Id., Dkt.
9 No. 27.

10 On October 7, 2011, Petitioner filed a second motion seeking a further delay of his
11 reporting date (Id., Dkt. No. 30) on the grounds that he had retained new counsel and was
12 preparing a § 2255 motion to vacate, set aside or modify his sentence. That motion was denied
13 on October 14, 2011 (Id., Dkt. No. 32), and Petitioner reported to the Bureau of Prisons on
14 October 17, 2011.

15 **Discussion**

16 Petitioner has indeed filed a § 2255 motion seeking to vacate his sentence on the grounds
17 that he was denied effective assistance of counsel. He contends that his prior counsel’s failure
18 resulted in this Court calculating the advisory guideline based on an inflated value for the fish
19 which he sold and thus imposing an unfair sentence. Dkt. No. 1.

20 Petitioner initially sought release pursuant to the Bail Reform Act, 18 U.S.C. § 3143(b)
21 and Federal Rules of Appellate Procedure (FRAP) 9 and 23. Dkt. No. 3, Mtn, p. 1. The Bail
22 Reform Act does not apply to federal prisoners seeking post-conviction relief. U.S. v. Mett, 41
23 F.3d 1281, 1282 (9th Cir. 1995). The Ninth Circuit also made clear in that case that “... Fed. R.
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1 App. P. 23 governs the issue of the release or detention of a prisoner, state or federal, who is
2 collaterally attacking his or her criminal conviction. 9th Cir. R. 23-1. In the habeas context, this
3 court has reserved bail for ‘extraordinary cases involving special circumstances or a high
4 probability of success.’” Id. (citations omitted).

5 Examining Petitioner’s case through the lens of FRAP 23 and Mett, the Court concludes
6 that his matter offers neither special circumstances nor a high probability of success.

7 Exceptional circumstances may exist where (1) petitioner’s health is seriously deteriorating
8 while incarcerated, (2) there is an extraordinary delay in processing a petition and (3) petitioner’s
9 sentence would be completed before meaningful collateral review could be undertaken. Mett, 41
10 F.3d at 1282; Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968). Petitioner argues that he
11 qualifies under the third element – that his sentence will likely be completed before his petition is
12 resolved on its merits. Petitioner cites no statistics on case resolution to support his claim, and
13 the Court is of the contrary opinion – that this matter will in fact be concluded prior to the
14 expiration of Petitioner’s incarceration.¹

15 On the issue of whether the petition has a “high probability of success,” the Court has no
16 opinion on the merits of Petitioner’s ineffective assistance claim. Assuming *arguendo* that he
17 were to prevail on that claim, the Court is of the opinion that even success on the merits of his
18 claims would not result in a reduction in Petitioner’s sentence. As the Government has
19 demonstrated, even if Petitioner were to succeed in demonstrating that the value of the fish was
20 one-half of the figure utilized in calculating his sentence, it would at most reduce him to a 14-
21 level enhancement and a corresponding total adjusted offense level of 19. This would yield an

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23 ¹ In any event, Petitioner merely seeks to have his sentence reduced, not vacated. As will become
24 apparent in the “probability of success” analysis, the Court is of the opinion that even if he were to prevail on the
merits of his ineffective assistance claim, the probability of that determination resulting in a lower sentence is itself
extremely low.

1 advisory guideline range of 30 to 37 months, still considerably in excess of the sentence which
2 the Court originally imposed.

3 Again, even assuming that Petitioner could establish the unconstitutional deficiency of
4 his prior counsel's performance, he must establish prejudice arising from that deficiency; i.e.,
5 that "there is a reasonable probability" that "but for counsel's unprofessional errors, the result of
6 the proceeding would be different." Strickland v. Washington, 466 U.S. 668, 689 (1984). The
7 Court does not find that Petitioner's legal theory carries a reasonable probability of producing a
8 different result than he has already achieved. On that basis, the Court is neither compelled nor
9 inclined to grant his request for release pending resolution of § 2255 motion.

10 Petitioner's application for an order of release pending consideration of his habeas
11 petition is DENIED.

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13 The clerk is ordered to provide copies of this order to all counsel.

14 Dated November 21, 2011.

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18 Marsha J. Pechman
19 United States District Judge