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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF GUAM**

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 EDER J. CORTEZ-ZELAYA,

15 Defendant.

Case No. 1:14-cr-00009-2_

Ninth Circuit Case No.
17-10192

**APPLICATION FOR BAIL
PENDING APPEAL**

17 Defendant Eder Cortez-Zelaya, by and through his counsel of record, Deputy
18 Federal Public Defender Brianna Mircheff, applies to this Honorable Court for bail
19 pending appeal. This application is based on 18 U.S.C. § 3143(b), the attached
20 Memorandum of Points and Authorities, all files and records in this case, and any
21 further evidence as may be adduced at the hearing on this application.

22 The government opposes this request.

23 Respectfully submitted,

24 AMY M. KARLIN
25 Interim Federal Public Defender

26 DATED: March 21, 2020

27 By */s/ Brianna Fuller Mircheff*

28 **BRIANNA FULLER MIRCHEFF**
Deputy Federal Public Defender

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Mr. Cortez-Zelaya was convicted four drug-related counts after trial. His appeal
3 is currently pending, but the government has already conceded that Mr. Cortez-Zelaya
4 should receive a new trial on Count One, the most serious count in the indictment.
5 Based on this concession, he satisfies the first requirement for bail pending appeal. 18
6 U.S.C. 3143(b)(1)(B)(ii). Moreover, by demonstrating perfect compliance with the
7 conditions of supervision for eight months, including getting himself from Nevada to
8 Guam for trial, he has proved that he is neither a flight risk nor a danger. Accordingly,
9 Mr. Cortez-Zelaya should be released on bond pending appeal, on the conditions under
10 which he was previously released.

11 **I. ANALYSIS**

12 **A. Standard for Bail Pending Appeal**

13 An individual convicted of a federal offense merits bail pending appeal if there is
14 “clear and convincing evidence that the person is not likely to flee or pose a danger to
15 the safety of any other person or the community if released” and if “the appeal is not
16 for the purpose of delay and raises a substantial question of law or fact likely to result
17 []in reversal, []an order for a new trial, []a sentence that does not include a term of
18 imprisonment, or []a reduced sentence to a term of imprisonment less than the total of
19 the time already served plus the expected duration of the appeal process.” 18 U.S.C. §
20 3143(b); *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003); *United States v.*
21 *Handy*, 761 F.2d 1279, 1279-80 (9th Cir. 1985).

22 To satisfy the “substantial question” standard, Mr. Cortez-Zelaya need not show
23 his appellate issues are likely to result in a reversal, new trial, or shorter sentence.
24 Rather, “‘substantial’ defines the level of merit required in the question presented and
25 ‘likely to result in reversal or an order for a new trial’ defines the type of question that
26 must be presented.” *Handy*, 761 F.2d at 1280. “An issue is substantial if it is ‘fairly
27 debatable’ or ‘fairly doubtful,’ that is, ‘of more substance than would be necessary to a
28 finding that it was not frivolous.’” *Garcia*, 340 F.3d at 1021 n.5 (quoting *Handy*, 761

1 F.2d at 1283).

2 “The second part of the requirement—that the question be likely to result in
3 reversal, a new trial, a non-prison sentence, or a sentence reduced to less than the time
4 that would be served by the end of the appeal process—concerns only the type of
5 question that meets the requirement; it does not involve assessing the likelihood that a
6 reversal will occur in the particular case.” *Garcia*, 340 F.3d at 1021 n.5 (quoting
7 *Handy*, 761 F.2d at 1280).

8 Thus, the question is not whether Mr. Cortez-Zelaya’s claims will ultimately be
9 successful, but only whether his appeal presents non-frivolous issues that would result
10 in an order for a new trial if he is ultimately successful.

11 Defendants convicted of an offense for which the maximum sentence is life
12 imprisonment face one additional requirement: that it be “clearly shown that there are
13 exceptional reasons why detention would not be appropriate.” 18 U.S.C. §§ 3143(b)(2),
14 3142(f)(1)(B), 3145(c). *Garcia*, 340 F.3d at 1015. A wide range of factors may be
15 considered in determining whether there are exceptional reasons why incarceration
16 before a conviction and sentence are final is inappropriate. *Id.* at 1018-19. These
17 include, for example, whether the defendant led an exemplary life prior to her offense
18 and would likely to continue to contribute to society significantly if allowed to remain
19 free on bail; the length of the prison term; any factors that would render prison
20 unusually harsh for a particular defendant; the nature of the defendant’s arguments on
21 appeal; and any factors that would render the defendant’s flight or danger to the
22 community exceptionally unlikely. *Id.* at 1019-21. In addition, cases in which
23 incarceration would impose risks to a defendant physical well-being may constitute
24 exceptional circumstances warranting bail pending appeal. *Id.* at 1019-20; *see also*
25 *United States v. Wetselaar*, 2017 WL 6514650 (9th Cir. 2017) (finding, over
26 government objection, exceptional reasons for bail pending appeal based to defendant’s
27 illness).

28 Mr. Cortez-Zelaya satisfies these standards.

1 **B. Mr. Cortez-Zelaya’s Appeal Raises Non-Frivolous Questions That,**
2 **Would Likely Result In A New Trial.**

3 First, Mr. Cortez-Zelaya can demonstrate that his appeal presents a substantial
4 question that is likely to result in an order for a new trial. The government, in its
5 answering brief, *conceded* that a new trial was required on Count One. Government’s
6 Answering Brief, *United States v. Cortez-Zelaya*, 17-10192, at 14 (9th Cir. 2019)
7 (“Answering Br.”).¹ This, plus the fact that the Ninth Circuit already granted a new trial
8 to Mr. Cortez-Zelaya’s co-defendant, Francisco Arias, *United States v. Arias*, 784 F.
9 App’x 485, 488 (9th Cir. Aug. 7, 2019), establishes that Mr. Cortez-Zelaya’s appeal
10 involves a substantial question of law that is likely to result in an order for a new trial
11 on the heaviest count.

12 He also raised substantial questions to his other counts of conviction. He
13 challenged, and the government conceded, that Count Two should be remanded for
14 entry of a judgment of acquittal. Answering Br. at 15-16. The Ninth Circuit accepted a
15 similar concession in Mr. Cortez-Zelaya’s co-defendant’s case. *Arias*, 784 F. App’x at
16 488.

17 Mr. Cortez-Zelaya challenged the sufficiency and jury instructions as to the only
18 other counts, the Travel Act counts. *See* Opening Brief, at 31-39. The government
19 conceded that the instruction was erroneous, and only challenged whether the error was
20 harmless. Answering Br. at 20. And the government did not contest that the prosecutor,
21 during closing argument, misstated the law as to those convictions--again, it only
22 contested its harmlessness. Answering Br. at 23.

23 There are strong arguments that the error as to the Travel Act counts are not
24 harmless. First, there is a substantial, non-frivolous argument that the evidence as to
25

26 ¹ The government also conceded in its Brief that the conviction for Count Two
27 should be vacated, and that a new sentencing proceeding is required based on guideline
28 calculation error.

1 Count Five is insufficient. The Travel Act requires, as an element, a subsequent overt
2 act that occurs after the mailing in the case; but here, the government proved no act
3 undertaken after the mailing alleged in Count Five. Opening Br. at 33-37. There is also
4 a non-frivolous argument that the erroneous jury instruction and prosecutorial argument
5 prejudiced Mr. Cortez-Zelaya. Opening Br. at 37-39.

6 The standard must drive the decision. The Court need only deem these arguments
7 non-frivolous in order to find that Mr. Cortez-Zelaya has satisfied this standard.
8 *Garcia*, 340 F.3d at 1021 n.5. All of these are non-frivolous questions that, if decided
9 in Mr. Cortez-Zelaya's favor, would result in a new trial. He satisfies the standard for
10 bail pending appeal.

11 **C. Mr. Cortez-Zelaya's Release Would Not Endanger the**
12 **Community, Nor Does He Present a Risk of Non-Appearance.**

13 Moreover, Mr. Cortez-Zelaya does not present a flight risk or a danger. He was
14 released on a personal recognizance bond on March 20, 2014, *see* Exh. A, and
15 remained on bond until November 6, 2014, when he was convicted after trial.² During
16 that period, he lived in Las Vegas but made arrangements to appear via
17 videoconference for pretrial motions, and appeared in Guam for trial as well. He is a
18 United States citizen who surrendered his passport when he was released on bond. *See*
19 Exh. A; PSR at 3. As this Court noted at the time of the hearing, the Probation Officer
20 confirmed that he was "abiding by all the rules, both in . . . Las Vegas, and Guam." *See*
21 Transcript (11/6/14), Dkt. # 641, at 28. He is serving his sentence in California, and can
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23

24 ² At the time the Court detained him, the Court found that Mr. Cortez-Zelaya's
25 convictions put him within the scope of 18 U.S.C. § 3143(a)(2), and found no
26 substantial likelihood that a motion for new trial would be granted. Mr. Cortez-Zelaya's
27 case now falls under 18 U.S.C. § 3143(b), but even so, the government's concession
28 now makes it likely that a new trial will be granted.

1 easily return to his family in Nevada.³ He has shown this Court that he is not a flight
2 risk or a danger if allowed to remain on release pending appeal.

3 **D. Mr. Cortez-Zelaya Has Demonstrated Exceptional Reasons That**
4 **His Continued Incarceration Is Not Appropriate.**

5 There are three exceptional reasons that Mr. Cortez-Zelaya’s continued
6 incarceration is not appropriate. The first is the unusual circumstances of the
7 government’s concessions in this case. Mr. Cortez-Zelaya is only subject to this
8 heightened standard because Count One has a statutory maximum of life. But the
9 government has already conceded that the conviction on Count One must be vacated.
10 That is an unusual and extraordinary circumstance that warrants Mr. Cortez-Zelaya’s
11 release on bond. *Garcia*, 340 F.3d at 1020 (“When there appears to be an unusually
12 strong chance that the defendant will succeed in obtaining a reversal of his conviction
13 on appeal he may be able to demonstrate exceptional reasons for delaying the
14 commencement of his sentence.”).

15 Second Mr. Cortez-Zelaya led an “exemplary life” prior to his current offense,
16 and could, if released, continue to contribute to society if permitted to remain on bond.
17 Mr. Cortez-Zelaya has no prior criminal history, not so much as an arrest. (PSR ¶¶ 97-
18 99.) He was working and supporting his family until he was remanded into custody.
19 (PSR ¶ 114.) He would continue to do so if he were released on bond. These factors
20 “militate in favor of finding exceptional reasons.” *Garcia*, 340 F.3d at 1019.

21 The third unusual circumstance is the risk to Mr. Cortez-Zelaya if he remains
22 incarcerated. Even as the BOP does what it can to prevent the spread of COVID-19
23 through the facilities, it appears inevitable that the virus will spread throughout the
24 prisons--and that if it does, the situation will quickly turn dire. *See* Federal prison
25 workers say conflicting orders on coronavirus response is putting lives at risk, CBS
26

27 ³ Mr. Cortez-Zelaya is in FCI Lompoc, which is about a seven hour drive from
28 Las Vegas.

1 News (Mar. 19, 2020), [https://www.cbsnews.com/news/coronavirus-prison-federal-](https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19)
2 [employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19](https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19); Danielle Ivory,
3 “We Are Not a Hospital: A Prison Braces for the Coronavirus,” N.Y. Times, March 17,
4 2020, <https://tinyurl.com/se7emva>. The BOP’s protocol has no allowance for testing.
5 *See* BOP Implementing Modified Operations, *available*
6 https://www.bop.gov/coronavirus/covid19_status.jsp. While the BOP (as of today)
7 reports no positive cases of COVID-19, it’s unclear “what that means if people are not
8 being tested.” *In the Matter of the Extradition of Manrique*, 2020 WL 1307109, at *1
9 (N.D. Cal. Mar. 19, 2020). Meanwhile the BOP is continuing to transfer inmates
10 between facilities using a temperature check. *See* BOP Implementing Modified
11 Operations. Again, given that symptoms don’t begin to appear for weeks, this, too,
12 means that the BOP is playing “a game of catchup.” *Manrique*, 2020 WL 1307109, at
13 *1.

14 Voices in Congress are calling on the Department of Justice to “do all they can to
15 release as many people as possible who are currently behind bars and at risk of getting
16 sick.” *See* Exh. B. Medical professionals behind bars are sounding the alarm as well.
17 Craig McCarthy, “Top Rikers Doctor: Coronavirus ‘Storm is Coming,’” N.Y. Post
18 (Mar. 19, 2020) (“[W]e cannot change the fundamental nature of jail. We cannot
19 socially distance dozens of elderly men living in a dorm, sharing a bathroom. Think of
20 a cruise ship recklessly boarding more passengers each day. . . .Please let as many out
21 as you possibly can.”). While Mr. Cortez-Zelaya has no particular health concerns that
22 put him in the CDC’s most vulnerable band of people, at the moment 38% percent of
23 hospitalizations are adults under the age of 54. Pam Belluck, “Younger Adults Make
24 Up Big Portions of Coronavirus Hospitalizations,” N.Y. Times (Mar. 18, 2020).

25 The Court can consider these fact in deciding whether or not to grant bond.
26 *United States v. Dante Stephens*, 15-CR-95(AJN), ---F.Supp.3d---, 2020 WL 1295155
27 (S.D.N.Y. Mar. 19, 2020). And, in fact, health risks can satisfy the exceptional
28 circumstances standard. *See Garcia*, 340 F.3d at 1020 (“Nor do we foreclose the

1 possibility of finding exceptional circumstances in a case in which incarceration would
2 impose exceptional risks on a defendant involving his physical or mental well-being-
3 risks that might arise as a result of the nature of his crime or even as a result of his
4 possessing certain physical, psychological, or other characteristics.”).

5 “These are extraordinary times.” *In the Matter of the Extradition of Manrique*,
6 2020 WL 1307109 (N.D. Cal. 2020). They are certainly an “exceptional circumstance”
7 that warrants release in this case.

8 **II. CONCLUSION**

9 Mr. Cortez-Zelaya satisfies the standard for bail pending appeal under 18 U.S.C.
10 § 3143 and should be released. He has established that his appeal presents a substantial,
11 non-frivolous question that would result in an order for a new trial. He has established
12 that his release does not pose a danger to the community and that he is not a risk of
13 flight, and that exceptional reasons support his release. That is all he must do.

14 For the foregoing reasons, counsel requests that the Court issue an order
15 releasing Mr. Cortez-Zelaya on bond under the terms and conditions previously
16 imposed.

17 Respectfully submitted,

18 AMY M. KARLIN
19 Interim Federal Public Defender

20 DATED: March 21, 2020

By /s/ Brianna Fuller Mircheff

21 BRIANNA FULLER MIRCHEFF
22 Deputy Federal Public Defender
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