EXPEDITED REVIEW REQUESTED
for Release from Incarceration, Including Pursuant to Rule 8(a)(2)(D)
for Interim Ruling by a Single Judge

DISTRICT OF COLUMBIA
COURT OF APPEALS

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ELENA RUTH SASSOWER,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

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No. 04-CM-760

Motion for Procedural Order Pursuant to Rule 27(b)(1), for Clarification of this Court's July 29, 2004 Order, and Other Relief

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the incarcerated *pro se* criminal appellant whose entitlement to a stay and release pending appeal has yet to be the subject of findings by this or any other court (D.C. Code 23-1325(c),(d), D.C. Code 23-1324(b)) – or even a denial with reasons addressed to the facts and law of this unprecedented case (this Court's Rule 9).[1]

2. As recognized by Judge Schwelb in Collins v. U.S., 596 A2d 489, 504 (1991)[2]

> "loss of liberty pending appeal represents...the quintessential irreparable injury. If the conviction is reversed, [the criminal defendant] can never get back the time he spent under lock and key. ....if a conviction is ultimately reversed, the defendant's victory is more illusory than real if he has already served his sentence. To a wrongfully convicted and incarcerated individual, the right to appeal under such circumstances may understandably seem little more than a hollow mockery" (at fn. 13).

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[1] *See* resubmitted reargument motion ¶¶5, 33, 34, supporting background affidavit, ¶42.

[2] Dissenting on other grounds from the decision of his fellow panelists, Judges Ferren and Steadman.

3. This affidavit is submitted in support of a motion for the following relief:

(a) a procedural order pursuant to this Court's Rule 27(b)(1) "to exceed the page limits" and exempt from requirements as to "number of copies" so as to permit the filing of my freedom-winning July 16th motion for reargument and other relief, as resubmitted on August 12th with its accompanying background affidavit in further support of the motion and for my release from incarceration under this Court's Rule 9;

(b) clarification as to whether this Court's July 29th order (per Terry, Steadman, King) bars me and those acting on my behalf from telephoning the Clerk's office with non-substantive, procedural inquiries and, likewise, bars written requests except by "properly filed pleadings" and, if so, the basis therefore and whether the Court has so barred *pro se* litigants and lawyers in other cases, let alone where the *pro se* litigant is a non-lawyer criminal defendant who is incarcerated.

(c) clarification as to whether the Clerk's office docket of this case is proper and in conformity with Rule 45(b)(1) in failing to record the receipt/filing of my July 16th and August 12th reargument motion, their rejection for filing by the Clerk's office, the reasons therefore, and information as to the mailed return of the motions;

(d) such other and further relief as may be just and proper, including disclosure by the Court of its knowledge of the improper and severely prejudicial conduct of its Clerk's office and discharge of its mandatory supervision and disciplinary responsibilities, beginning with investigation into the Clerk's office's placing before the Court my motion for a stay and release pending appeal on July 7th - the same day as it received the U.S. Attorney's opposition papers – and whether same was before or after receiving telephone inquiries on my behalf as to the time parameters for my reply thereto.

4. Pursuant to Rule 27(b)(3), the Court's determination of motions for procedural orders, including by its Clerk, is expected to be expeditious. So as not to further delay the Court's findings as to the "clear and convincing evidence" of my entitlement to release pending appeal presented by my resubmitted reargument motion, I request that determination of the procedural first branch of this motion not be held

pending decision of the substantive subsequent branches, which plainly cannot be by its Clerk.

5. Rule 27(b)(4) requires that I "attempt to secure the consent of each party" before filing a motion for a procedural order and that I so-identify the response "at the beginning of the motion." On Friday, August 13th, my attorney-mother, acting at my request, telephoned Assistant U.S. Attorney John R. Fisher, to whose attention a copy of my resubmitted reargument motion and supporting background affidavit had been hand-delivered the previous day. She reported to me that Mr. Fisher confirmed receipt of both documents and consented to the length of their presentations.

6. Additionally, and based on the Court's Notice that "New certificate of service is required when submitting a returned pleading" (Exhibit "O-2")[3] -- possibly implying that I am required to serve the U.S. Attorney with another copy of my resubmitted reargument motion and background affidavit – my mother asked Mr. Fisher whether he would consent to waiving such duplicative service as my incarceration makes it extremely difficult for me to make copies, let alone copies beyond those absolutely necessary. She told me that Mr. Fisher also consented.

7. For further expedition, a copy of this motion has been personally served on the U.S. Attorney's office, to Mr. Fisher's attention (see also Rule 25(c)(2)).

8. A Table of Contents follows:

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[3] Sequence of exhibits continues from my resubmitted reargument motion (Exhibits "A"-"C") and supporting background affidavit (Exhibits "H"-"M").

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BACKGROUND FACTS TO THIS MOTION

9. The "clear and convincing evidence" of my entitlement to a stay and release pending appeal is presented by my July 16th motion for reargument and other relief and, in particular, by its Exhibits "C"-"F". The prejudicial and improper conduct of the Clerk's office with respect to that freedom-winning motion – and the reasonable questions as to the Court's knowledge thereof culminating in the July 29th order (Exhibit "O-4") – are particularized by my August 12th supporting background affidavit and for release under this Court's Rule 9, "Release or Detention in a Criminal Case."

10. On Thursday, August 12th, that decisive motion with its accompanying affidavit were hand-delivered to the Clerk's office. At the top of the first page of each – to emphasize that what was at issue was release from incarceration – were the words:

> "Expedited Review Requested for Release from Incarceration including Pursuant to Rule 8(a)(2)(D) for Interim Ruling by a Single Judge".

Such words were repeated by my transmitting cover memo (Exhibit "N-1").

11. That same day, August 12th, the Court's Information Center Supervisor, Ruth Gantt, whose prejudicial and improper conduct with respect to my originally-submitted July 16th reargument motion is detailed at ¶¶22-30 of my background affidavit, purported to return to me the "Motion and Affidavit" "[b]ased on careful review" of those documents. Her unsigned Return Notice form (Exhibit "O-2") gave as the "reason(s)" that they "Did no[t] comply with Rule 27" and specified:

> "Insufficient number of copies and pleading is in excess of page limitation."

An accompanying "For Your Information" memo from Ms. Gantt., also unsigned (Exhibit "O-3"), likewise purported that the "pleadings" were being returned for "Non-compliance with D.C. Court of Appeals Rules" relating to "page limitation and insufficient amount of copies."

12. In fact, Ms. Gantt's Return of Notice and memo, which I received by mail the following day, August 13th, did not return to me my resubmitted reargument motion. It alone was missing from the large envelope (Exhibit "O-1") containing every other document hand-delivered on my behalf to the Court the previous day. These were, in addition to my original transmittal covermemo and separate written request to the Clerk's office (Exhibits "N-1", "N-2"): (a) my original supporting background affidavit; and (b) copies of the three record documents before Judge Holeman sufficient in and of themselves in establishing that his sentence was "without basis in the record" [4], *to wit*, (1)

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[4] *See* resubmitted reargument motion, ¶16; background affidavit, ¶¶10, 38.

D.C. Court Services' May 28th Presentence Report; (2) the U.S. Attorney's June 1st Memorandum in Aid of Sentencing; and (3) my June 28th Affidavit Commenting upon and Correcting the Presentence Report and in Opposition to the Memorandum in Aid of Sentencing.

13. Not until Wednesday, August 18th, did the motion arrive by mail in a second envelope (Exhibit "P-1"), together with duplicates of Ms. Gantt's Return Notice and memo, as well as a docket sheet of this case (Exhibits "P-2"-"P-4"). There was no explanation as to why the motion had not been included in the first envelope, as it should have been, or why, if the second envelope was in fact mailed on the same August 12th day as the first, it would not have arrived on the same following day, August 13th, rather than five days later.[5] The result was to delay me in securing additional copies from this original motion and in arranging redelivery to the Court.

14. Enclosed in the first envelope (Exhibit "O-1") – and reflected by Ms. Gantt's Return Notice (Exhibit "O-2") – was a copy of the Court's rules. Also enclosed – though not reflected by her Notice – was a copy of this Court's July 29th order (Exhibit "O-4"). Presumably, this was to remind me of its ordering that:

> "appellant is hereby directed that she must comply with the rules of this court and may interact with this court only through properly filed pleadings that conform with the rules of this court and are properly served on the appropriate United States Attorney listed on this order. Requests made by telephone, whether made by appellant or persons on behalf of appellant, will not be entertained."

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[5] A possible telltale sign that the second envelope was mailed later is that its enclosed duplicate of the Return Notice (Exhibits "P-1", "P-2") appears to be a subsequent copy as it has an image of a staple at its upper left corner not found in the Return Notice sent in the first envelope (Exhibits "O-1", "O-2").

15. The Court's rules, however, are unclear and ambiguous – a fact identified by paragraph 3 of my reargument motion and expanded on by my background affidavit as follows:

> "There are a plethora of procedural, non-substantive questions whose answers are not contained in the Court's rules of which are otherwise confusing. If it is the Court's directive, by its July 29th order, that requests for procedural, non-substantive information cannot be made by telephone to its Clerk's office, but must be presented to the Court by 'pleadings' served on the U.S Attorney, the Court should set that forth." (at ¶35).

16. In compliance with this Court's July 29th order (Exhibit "O-4"), no telephone inquires were made on my behalf to verify non-substantive, procedural requirements for the resubmission of my reargument motion and my accompanying background affidavit with its Rule 9 request – as would have been done otherwise. The result was the Clerk's office's rejection of the motion for filing – notwithstanding my reasonable good faith belief that I was in compliance with applicable rules and that, to the extent I was not, they would be waived by any fair and impartial tribunal so as to expeditiously address the "clear and convincing evidence" of my entitlement to release from incarceration pending appeal.

MY REASONABLE, GOOD FAITH BELIEF AS TO MY COMPLIANCE WITH RULE 27 AND THAT ANY FAIR AND IMPARTIAL TRIBUNAL WOULD WAIVE ANY NON-COMPLIANCE BY REASON OF MY INCARCERATION AND IN THE INTEREST OF JUSTICE

17. In pertinent part, Rule 27(d)(2), entitled "Page Limits", states:

> "A motion....must not exceed 20 pages exclusive of accompanying documents authorized by Rule 27(a)(3)(B) unless the court permits or directs otherwise....."

The Court's permission is not qualified by any words as "upon the making of a motion for a procedural order." From this, it is reasonably inferred that the Court, on its own

initiative, may permit a motion of more than 20 pages based on circumstances known to it in the interest of justice – as most definitively at bar by my incarceration where, additionally, the supposedly too-lengthy motion is to secure my release.

18. As to the "accompanying documents authorized by Rule 27(a)(3)(B)" -- which Rule 27(d)(2) expressly exempts from the 20 page limit – these are specified by Rule 27(a)(3)(B) to include:

> "Any affidavit or other paper necessary to support a motion – served and filed with the motion."

Thus, my handwritten 18-page background affidavit in further support of my resubmitted reargument motion, served and filed with it on August 12th, is an exempt "accompanying document." This would seem to be impliedly recognized by Ms. Gantt's vague and imprecise Return Notice (Exhibit "O-2") which uses the singular in stating "pleading is in excess of page limitation."

By the same token, also exempt, are my other three "accompanying documents to my motion, *to wit*, D.C. Court Services' May 28th Presentence Report, the U.S. Attorney's June 1st Memorandum in Aid of Sentencing, and my June 28th Affidavit responding to each.

19. As to my handwritten 47-page resubmitted motion for reargument and other relief, Rule 27(d)(2) as to "Page Limits" is directly preceded by Rule 27(d)(1)(D), entitled "Page size, line spacing, margins, and font size". It states:

> "The document must be on 8-1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long must be indented and single-spaced. Headings and footnotes may be single-spaced. The font size, including footnotes, must be 12-point or larger, preferably in Times New Roman or Courier New typeface. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there."

This juxtaposition of rules reasonably suggests that page limits are predicated on normal and customary conditions where a party has a sufficient supply of paper, let alone of 8-1/2 by 11 inch dimensions, and either a typewriter or computer. These are not conditions that necessarily prevail in jail – and certainly not conditions that have prevailed for me, including as to a sufficient supply of writing paper.

20. The Clerk's office and Ms. Gantt may be presumed to know that had I the use of a computer to generate text in 12-point Times New Roman, my resubmitted argument would not be the 47-pages that it is handwritten. Based on my own rough word count, comparing those handwritten pages to the typewritten pages of my April 6th mandamus petition done to the specifications of Rule 27(d)(1)(D), I believe that the 47 handwritten pages would shrink down to between 25-30 pages typewritten. Conspicuously, Ms. Gantt's Return Notice (Exhibit "O-2") does not identify how many of my handwritten pages would equate to 20 typed pages.

21. In any event, whether counted as 47 handwritten pages or 25-30 typed pages, such is a perfectly reasonable length for a motion having six substantive branches of relief. These branches could plainly be reformatted as separate motions, each entitled to 20 pages, for a cumulative total of 120 pages. As it is, none of the six sections of my motion corresponding to each of its six branches is more than 13 pages – which is the length of the first and most important section, reargument, reconsideration, and renewal of the Court's July 7th order (per Steadman, Reid, Nebeker) (Exhibit "A") denying my motion for a stay and release pending appeal – without reasons and without affording me

an opportunity to reply to the U.S. Attorney's palpably deceitful opposition papers, as was my entitlement under Rule 27(a)(5)[6].

22. The Court was obviously free to stop reading my resubmitted reargument motion after 20 pages – and it is the first 20 pages, encompassing my Exhibits "C"–"G", which suffice to establish my entitlement to release pending appeal by "clear and convincing evidence."

23. No purpose would be served by the Court's denial of this consented-to motion for a procedural order "to exceed the page limits" with respect to my resubmitted reargument motion as I would thereupon reformat its six branches into at least four separate motions:

> (a) joining the first and second braches into a motion for reargument, reconsideration, and renewal and for sanctions against the U.S. Attorney;
>
> (b) joining the third, fourth, and fifth braches into a motion for disclosure by, and disqualifications of, this Court's judges and for removal/transfer of this case to the U.S. Court of Appeals for the District of Columbia;
>
> (c) presenting the first specific alternative relief of the sixth branch as a motion to vacate Judge Holeman's 6-month sentence of incarceration and reinstate his originally-announced 92-day sentence;
>
> (d) presenting the second specific alternative relief of the sixth branch as a motion to defer the date for my perfecting the appeal to 90 days from the date of my release from incarceration.

Such denial would then further substantiate my reconstituted motion for disqualification of the Court's judges and for removal/transfer – as no fair and impartial tribunal would put me to such a needless burden and countenance any further delay in adjudicating, with findings, my right to release.

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[6] The Clerk's office's misconduct with respect to the July 7th order is highlighted by the fourth branch of this motion. *See* ¶36 *infra*.

24. As to "Number of Copies" covered by Rule 27(d)(3), it states:

> "An original and 3 copies must be filed unless en banc consideration is requested; then an original and 9 copies must be filed."

Missing from such rule is the number of copies required when – as here – a request is made pursuant to Rule 8(a)(2)(D) "for consideration and interim ruling" by "a single judge of the court."

25. Presumably, a single judge needs only a single copy – and the same circumstances of incarceration as warrant expedited review would warrant the Court's availing itself of its own high-speed copier to make in a matter of minutes and at nominal cost, such single copy from the original as is necessary.

Plainly, if I were released pursuant to an interim ruling by a single judge, I would be easily able, upon my release, to furnish the additional two copies to the three judge panel.

26. Insofar as Rule 27(d)(3) does not altogether exempt incarcerated persons from requirements as to copies, it is out-of-touch with reality and needs to be revised so as not to put "justice" out of reach to incarcerated persons without access to copying facilities. Such rule revision could include a provision for assessing the incarcerated person with the reasonable costs of the Court's making copies for him. Even if it does not, however, the Court has here expended more taxpayer dollars in postage in returning my motion papers (Exhibits "K-2", "L-1", "O-1", "P-1") than it would have in copying.

Needless to say, the couple of dollars the Clerk's office would have expended in copying are a miniscule sum against the tens of thousands of taxpayer dollars being profligately wasted by my premature and unwarranted incarceration.

CLARIFICATION AS TO WHETHER THIS COURT'S JULY 29th ORDER BARS ME AND OTHERS ON MY BEHALF FROM TELEPHONING THE CLERK'S OFFICE WITH PROCEDURAL, NON-SUBSTANTIVE INQUIRIES AND, LIKEWISE, BARS WRITTEN REQUESTS EXCEPT BY "PROPERLY FILED PLEADINGS."

27. The only reason for this motion for a procedural order – delaying adjudication of my entitlement to release from incarceration, burdening me, as well as wasting court resources – is this Court's July 29th order (Exhibit "O-4"). Such was interpreted by me as precluding telephone inquiries of the Clerk's office as to the Court's unclear and ambiguous procedural rules – with the result that what might have been clarified prophylactically in a minute's phone conversation is now a cumbersome several weeks process.

28. The Clerk's office has similarly interpreted the July 29th order. On Friday, August 13th, following notification from George McDermott, my "courier"[7], as to the Clerk's office's reluctance to receive my resubmitted reargument motion and background affidavit (Exhibit "N-1"), I asked my mother to telephone the Clerk's office and request that if the papers were being rejected for filing that they not be returned as I would promptly forward a motion for a procedural order. After leaving two voice messages for Ms. Gantt, neither returned then or thereafter, my mother spoke to Deputy Clerk Pat Brown. My mother stated that Ms. Brown was extremely hostile and, before hanging up the phone on her, cited to the Court's July 29th order as precluding my mother from calling the Clerk's office[8].

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[7] So-described by the docket entry for August 12th (Exhibit "P-4"). Mr. McDermott is a patriotic guardian angel, vigilantly safeguarding my rights and the public's rights in this important case.

[8] The operative language of the order appears *verbatim* on the docket sheet (Exhibit "P-4").

29. It may well be that the Clerk's office is also interpreting the July 29th order as requiring me to proceed by "properly filed pleadings." Thus, it also ignored my written request, delivered with my resubmitted reargument motion, that "during the period of my incarceration" it "send duplicates of all orders and correspondences to my attorney-mother" (Exhibit "N-2"). The written request was returned to me in the same envelope as enclosed a copy of the July 29th order, as well as Ms. Gantt's Return Notice and memo (Exhibits "O"), neither of which were sent to my mother.

30. As highlighted by paragraphs 33-37 of my background affidavit, there is no basis for the Court's totally unwieldy due process-less directive in its July 29th order. If it is the Court's intention that I and those acting on my behalf be barred from telephoning the Clerk's office with non-substantive, procedural inquiries and must make written requests of the Clerk's office by "properly filed pleadings," such should be stated directly, with the basis thereafter and precedent for the same. As set forth by my background affidavit:

> "...I do not for a minute believe that attorneys or *pro se* litigants in other cases are so directed. If I am being invidiously treated – and the Court should make disclosure thereof – this would be further grounds for removal/transfer to the U.S. Court of Appeals for the District of Columbia." (¶36).

31. The consequence of such order was foreseeable, if not intended – to impede, if not destroy, my substantive rights by depriving me of rightful access to non-substantive, procedural information by which those substantive rights might be vindicated.

CLARIFICATION AS TO WHETHER THE CLERK'S OFFICE DOCKET IN THIS CASE IS PROPER AND IN CONFORMITY WITH RULE 45(b)(1), WHICH ITSELF SHOULD BE CLARIFIED

32. In addition to the improper and severely prejudicial conduct of the Clerk's office, as chronicled by my reargument motion (¶¶3-4), background affidavit (¶¶19-32), and the recitation hereinabove set forth, it now appears that the Clerk's office is creating a false record of the case by its docket.

33. In the same envelope as returned to me my resubmitted reargument motion, a docket sheet of the case was enclosed (Exhibit "P-4"). Aside from the bizarre characterization of the July 19th joint motion as "COUNSEL'S MOTION TO WITHDRAW FOR BUSINESS REASONS" – thereby concealing that the reason reflected by the 1-1/2 page motion was the Court's Rule 42 which had automatically transformed my legal advisor into my counsel in disregard of his intent and my consent – is the omission of any notation of the Court's receipt of my reargument motion for filing, both as originally mailed to it on July 16th and as resubmitted on August 12th, the Clerk's office's rejection of each for filing, the reasons therefore, and information as to the mailed return of these motions.

34. As I believe that such omissions have been – and are – not only prejudicial, but improper, the Court should clarify the matter. Indeed, if these omissions are consistent with Rule 45(b)(1) as to the "Clerk's Duties" with respect to "the Docket", Rule 45(b)(1) should be amended to make explicit that motions and other appropriate documents which a party or his attorney files will not be noted on the case docket if rejected by the Clerk's office, as likewise the Clerk's office's rejection notices and other correspondence relating thereto.

SUCH OTHER AND FURTHER RELIEF, INCLUDING DISCLOSURE BY THE COURT OF ITS KNOWLEDGE OF THE IMPROPER AND SEVERELY PREJUDICIAL CONDUCT OF ITS CLERK'S OFFICE AND DISCHARGE OF ITS MANDATORY SUPERVISORY AND DISCIPLINARY RESPONSIBILITIES WITH RESPECT THERETO

35. To the extent – properly disclosed – that the Clerk's office's improper and prejudicial conduct is unknown to the Court and not the product of its direction, the Court's duty is to now discharge its mandatory supervisory and disciplinary responsibilities.

36. High on the list for investigation – and disclosure – are the circumstances surrounding the Clerk's office's placing my motion for a stay and release pending appeal before the Court on July 7th – the very day it received the U.S. Attorney's opposition papers (Exhibit "P-4"). This includes whether same was before or after receiving telephone inquiries on my behalf as to the time parameters for my reply.[9] Such would go far in explaining the Clerk's office's refusal to thereafter identify the time parameters for my moving to reargue the Court's July 7th order and subsequent misfeasance with respect to the reargument motion[10], which, wittingly, or not, this Court condoned and facilitated by the due process-less directive in its July 29th order.

Elena Ruth Sassower

Sworn to before me this
24th day of August 2004

Andrea Hargrove
Notary Public, District of Columbia
My Commission Expires 07-31-20

[9] *See* ¶8 of my reargument motion

[10] *See* ¶¶3-4 of my reargument motion; ¶¶19-32 of my background affidavit

TABLE OF EXHIBITS