

**Case Nos. 11-1488, 11-1489, 11-1490, 11-1491, 11-1492**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENDRICK BARNES (11-1488), DEMETRIUS K. HARPER a/k/a Ken Harper (11-1489), CLINTON A. STEWART a/k/a C. Alfred Stewart (11-1490), GARY L. WALKER (11-1491) and DAVID A. ZIRPOLO (11-1492),

Defendants-Appellants.

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On appeal from the  
United States District Court for the District of Colorado  
Honorable Christine M. Arguello  
D. Ct. No. 1:09-CR-00266-CMA

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**JOINT MOTION FOR RELEASE PENDING APPEAL**

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COME NOW KENDRICK BARNES (“Barnes”), DEMETRIUS K. HARPER a/k/a Ken Harper (“Harper”), CLINTON A. STEWART a/k/a C. Alfred Stewart (“Stewart”), GARY L. WALKER (“Walker”) and DAVID A. ZIRPOLO (“Zirpolo”), defendants-appellants (collectively “Appellants”) in the above-referenced cases, by and through Joshua Sabert Lowther, Esq. and Gwendolyn Maurice Solomon, Esq., their attorneys of record,<sup>1</sup> pursuant to Fed. R. App. P. 9(b) and 10th Cir. R. 9, and hereby respectfully move this Honorable Court to release them pending appeal. In support of this motion, Appellants state the following:

### **I. Relevant Procedural History**

A federal grand jury in the District of Colorado indicted Appellants and David A. Banks (“Banks”)<sup>2</sup> on June 9, 2009, in various combinations,

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<sup>1</sup> Undersigned counsel are aware that an attorney’s representation of more than one defendant before a trial court or more than one appellant before an appellate court in a single criminal case is not a common occurrence, and an attorney should not undertake such representation until after careful consideration of the ethical and constitutional issues in the same. In this case, Appellants retained Gwendolyn Maurice Solomon, Esq. immediately after they were convicted at trial on October 20, 2011 (Doc. 508) for the purposes of her representing them at sentencing and on appeal. The trial court, pursuant to Fed. R. Crim. P. 44(c), held an inquiry regarding Ms. Solomon’s joint representation of Appellants (Doc. 559) and ultimately determined that such representation was permissible. (Doc. 653.) Ms. Solomon elected to undertake such representation only after her having confirmed that no actual conflict had arisen among the Appellants at trial (or at any other time) and her obtaining written waivers of any potential conflict of interest from them. The Appellants retained Joshua Sabert Lowther, Esq. on February 23, 2012 (Doc. 671) to assist Ms. Solomon in her aforementioned representation of them, and Mr. Lowther agreed to do so only after his confirming the absence of any actual (and the improbability of any potential) conflict among Appellants, evidenced by a written waiver of the same from them.

<sup>2</sup> Banks is the Appellants’ co-defendant in *United States of America v. David A. Banks, et al.*, No. 1:09-CR-00266 (D. Colo. June 6, 2009) and the appellant in *United States of America v. David A. Banks*, No. 11-1487 (10th Cir. August 3, 2012).

on one count of Conspiracy to Commit Mail Fraud and Wire Fraud in violation of 18 U.S.C. § 1349; fifteen counts of Mail Fraud in violation of 18 U.S.C. §§ 1341 and 2; and eight counts of Wire Fraud in violation of 18 U.S.C. §§ 1343 and 2. (Doc. 1.)<sup>3</sup> The Appellants, in response to summonses (Docs. 3-7), appeared before United States Magistrate Boyd N. Boland (“Judge Boland”) for their initial appearances on June 23, 2009 (Doc. 15). Judge Boland, pursuant to 18 U.S.C. §§ 3142(a)(1) and (b), released Appellants on personal recognizance bonds. (Docs. 22-26.)

Appellants remained on pretrial release until a jury found them guilty on October 20, 2011 of all counts in which they were charged in the indictment. (Doc. 476.) United States District Judge Christine M. Arguello (“Judge Arguello”) remanded Appellants to the custody of the United States Marshals Service (“U.S.M.S.”) immediately after her receiving the verdict, and directed Judge Boland to hold a hearing to determine whether Appellants should remain on release pending sentencing. (Doc. 478.) Judge Boland temporarily detained Appellants on October 20, 2011 (Docs. 482 and 486), but after a hearing regarding the aforementioned issue

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<sup>3</sup> Appellants and Banks were charged with Conspiracy to Commit Mail Fraud and Wire Fraud. Additionally, Barnes was charged with eight counts of Mail Fraud; Harper was charged with eight counts of Mail Fraud and six counts of Wire Fraud; Stewart was charged with six counts of Mail Fraud; and Zirpolo was charged with eleven counts of Mail Fraud and two counts of Wire Fraud.

on November 18, 2011 (Doc. 563), Judge Boland, pursuant to 18 U.S.C. §3143(a)(1), ordered Appellants released on secured bonds, each in the amount of \$40,000.00 with conditions (Docs. 571-575).

Appellants remained on release until their sentencing hearings on July 23, 2012 (Walker and Barnes), July 27, 2012 (Harper and Stewart) and July 30, 2012 (Zirpolo), during which Judge Arguello sentenced them, *inter alia*, to terms of imprisonment of 135 months (Walker), eighty-seven months (Barnes), 121 months (Harper), 121 months (Stewart), 121 months (Zirpolo) and again, immediately remanded them to the custody of the U.S.M.S. (Docs. 782, 797-800). Appellants moved the trial court to release them pending appeal on July 30, 2012 (Docs. 791-795); the United States of America (“Government”) filed its response in opposition on August 3, 2012 (Doc. 802); and the trial court denied Appellants’ motions on August 8, 2012 (Doc. 817).

## **II. Grounds and Relief Sought**

Appellants, pursuant to 10th Cir. R. 9.2(A), will file a memorandum in support of this motion.

## **III. Disclosure of Opponent’s Position**

The Government opposes this motion.

#### **IV. Conclusion**

Based on the assertions and submissions contained in the memorandum of law that will be filed contemporaneously with and in support of this motion, Appellants pray that this Court release them pending appeal.

This, the 24th day of August, 2012.

Respectfully submitted,

**s/ Joshua Sabert Lowther, Esq.**

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## CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I have filed electronically the within and foregoing JOINT MOTION FOR RELEASE PENDING APPEAL with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF Appellate system, which will automatically generate a Notice of Docket Activity ("N.D.A."), and thereafter send such N.D.A. to the following:

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