IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA	)	CRIM. ACTION NO. 5:01CR30051
	)	
v.	)	
	)	MEMORANDUM OPINION
GORDON FRANKLIN SPROUSE, II	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant Gordon Sprouse's April 22, 2002 "Motion for Release Pending Appeal." For the reasons stated herein, said motion shall be denied.

I.

Gordon Sprouse was indicted on June 6, 2001 on a two-count Indictment alleging that the defendant set fire on two separate occasions to timber and underbrush in the George Washington National Forest in violation of 18 U.S.C. §1855. On January 8, 2002, the defendant was found guilty by a jury of his peers of the charges in both counts of the Indictment. On March 27, 2002, this court sentenced the defendant to 49 months and 48 months imprisonment, on counts one and two respectively, to be served consecutively. Thereafter, the defendant appealed his conviction to the United States Court of Appeals for the Fourth Circuit. Pursuant to 18 U.S.C. § 3143 (b), Mr. Sprouse has filed a motion for release pending appeal.

II.

The question of whether a convicted defendant is entitled to be released on bail pending appeal rests in the sound discretion of the trial court. *See, e.g.*, *United States v. Quicksey*, 371

F.Supp. 561 (S.D.W.Va. 1974); *United States v. Miller*, 753 F.2d 19 (3rd Cir. 1985). The circumstances under which a defendant who has been found guilty and been sentenced can be released pending an appeal are defined in the Bail Reform Act at 18 U.S.C. § 3143 (b). To support release pending appeal, Section 3143(b) states that a court must find:

(1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;
(2) that the appeal is not for the purpose of delay;
(3) that the appeal raises a substantial question of law or fact; and
(4) that if the substantial question is resolved in the defendant's favor upon appeal, the decision is likely to result in reversal or an order for a new trial.

(West 2002); *see also*, *U.S. v. Ruffin*, 779 F.Supp. 385, 385 (E.D.Va. 1991), *aff'd*, 974 F.2d 1333 (4th Cir. 1992) (reiterating the factors to be considered). In enacting section 3143 (b) as part of the Bail Reform Act, Congress expressly reversed prior law which had favored release pending appeal. *United States v. Jacob*, 767 F.2d 505, 508 (8th Cir. 1985).

A defendant bears the burden of showing "by clear and convincing evidence" that he meets each requirement of the statute: *to wit*, that he is unlikely to flee, to pose a danger to a person or community, and that his appeal poses "a substantial question of law or fact likely to result in reversal of the sentence imposed." *Ruffin*, 779 F.Supp. at 386; *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991); *Jacob*, 767 F.2d at 507. Here, release of the defendant may pose significant danger to others. As was made clear by the testimony of numerous witnesses at trial, the fires the defendant has been found guilty of setting posed a substantial risk to responding firefighters. In addition, but for the successful intervention of firefighters, the fires may have spread to more populated areas, thus endangering the lives and property of others.

Furthermore, the defendant offers little evidence of the *substantiality* of the questions of law

on which he bases his appeal, namely, (1) "the introduction of 'other crimes' evidence by the government despite the Court's pretrial ruling that the government would be limited to evidence of the two fires charged in the indictment;" and (2) "the exclusion by the Court of the timed videotape recording made by Mr. Sprouse's investigator to demonstrate that it would have taken him at least three minutes to drive from the surveillance post to the point of origin of the Hite Hollow Road fire on May 14, 2001, light the fire, and return to the surveillance post." (Mot. for Release at 2-3.) The Fourth Circuit has adopted the definition first announced in *United States v. Giancola* of a "substantial question," which is:

> a "close" question or one that very well could be decided the other way. Further, there are no blanket categories for what questions do or do not constitute "substantial" ones. Whether a question is "substantial" must be determined on a case-by-case basis.

754 F.2d 898, 901 (11th Cir. 1985) (cited in *Steinhorn*, 927 F.2d at 196). With regard to the defendant's first basis for appeal, this court strictly limited reference to fires not charged in the indictment to that necessary to explain the government's impetus for investigating the defendant. As this court stated in its December 21, 2001 Memorandum Opinion, such limited reference is permissible under Fed. R. Evid. 404(b) if it is "(1) relevant to an issue other than character, (2) necessary, and (3) reliable," *United States v. Aramony*, 88 F.3d 1369, 1377 (4th Cir. 1996), conditions that are all met in the instant case. Even if the reference at trial to uncharged fires could be considered a "substantial question," it is not clear that, if decided in the defendant's favor upon appeal, reversal or an order for a new trial would result, as the government presented substantial evidence against the defendant, including taped and written confessions.

The defendant's second basis for appeal also fails to present a "substantial question" of law

or fact. At trial, this court excluded videotaped recreations of the events at issue produced by both the defendant and government on the basis that such tapes could not adequately re-create the conditions present at the fires, and thus were likely to mislead the jury. In addition, as with the defendant's first appeal point, even if the Court of Appeals were to find that introduction of the videotaped re-creation should have been permitted, it is unlikely that its use would effectively controvert the substantial amount of evidence weighing in the government's favor. In fact, in his April 25, 2002 "Motion to Permit Expert to Examine Tape-Recording of Gordon F. Sprouse's Confession," the defendant himself suggests that, absent a finding that the defendant's tape-recorded confession was illicitly altered, an appeal is futile. Specifically, counsel for the defendant asks the court to permit his expert to review the taped confession "to prevent the Sprouse family from sacrificing their remaining property to pursue Mr. Sprouse's claim of innocence to the bitter end if there is no basis for Mr. Sprouse's claim." (Mot. to Examine ¶ 3.) In other words, Sprouse's chances of avoiding conviction depend almost entirely on the rather unlikely finding, in this court's opinion, that the taped confession was doctored.

III.

Sprouse states in bald and conclusory terms--which the court is not obligated to accept--that his appeal poses substantial questions of law or fact. Because the defendant falls well short of his burden to demonstrate by *clear and convincing* evidence that the appeal presents any question likely to be resolved in his favor, and because the defendant may pose a danger to his community, the court will deny the defendant's motion for release.

An appropriate order this day shall issue.

ENTERED: _____
Senior United States District Judge

_____
Date

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v.	)	ORDER
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GORDON FRANKLIN SPROUSE,	)	
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Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Upon consideration of defendant's April 22, 2002 "Motion for Release Pending Appeal," it is hereby

ADJUDGED, ORDERED and DECREED

that, for the reasons stated in the accompanying Memorandum Opinion, the defendant's "Motion for Release Pending Appeal"shall be, and it hereby is, DENIED.

The Clerk of the Court is hereby directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date