**No. 17-12466**

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,**
*Plaintiff-Appellee,*

v.

**CLIFFORD ERIC LUNDGREN,**
*Defendant-Appellant.*

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Appeal from the United States District Court
for the Southern District of Florida
Criminal Case No. 9:16-cr-80090-DTKH-2

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-1(b)**

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**DEFENDANT-APPELLANT, CLIFFORD ERIC LUNDGREN'S EMERGENCY MOTION FOR CONTINUED RELEASE PENDING APPEAL**

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Hugo A. Rodriguez, Esq.
1210 Washington Avenue
Miami Beach, FL 33139
Tel: 305-373-1200
Email: hugolaw@aol.com

Counsel for Appellant

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 11th Cir. R. 26.1-1, Appellant, Clifford Eric Lundgren, provides the following list of interested persons:

Barnes, Antonio J.

Cohen, Jacob Alain

Dell Inc. (DVMT)

Ferrer, Wifredo A.

Garcia, Rolando

Golder, Randee J.

Greenberg, Benjamin G.

Lundgren, Clifford Eric

Microsoft Corporation (MSFT)

Morris, Lothrop

Reinhart, Bruce E.

Rodriguez, Hugo A.

Sanchez, Lily Ann

Schlessinger, Stephen

Smachetti, Emily M.

Wolff, Robert J.

# **11TH Cir. R. 27-1 Certificate**

Defendant-Appellant, Clifford Eric Lundgren, asks this Court to reverse the district court's Memorandum Opinion and Order Denying Defendant's Motion for Release Pending Appeal [DE 154 in *United States of America v.* Lundgren, No. 16-80090-CR-Hurley]. A copy of the Memorandum Opinion is attached as Exhibit 1.

Pursuant to 11th Cir. R. 27-1(b), Mr. Lundgren certifies that his motion for continued release pending appeal is an emergency motion requiring relief because "the motion will be moot unless a ruling is obtained within seven days" and this motion "is being filed with seven days of the district court order…sought to be reviewed."

On May 23, 2017, the district court sentenced Mr. Lundgren to a 15 month term of imprisonment. On May 30, 2017, Mr. Lundgren timely filed a Notice of Appeal to appeal the district court's sentence [DE 140]. On July 7, 2017, Mr. Lundgren filed a motion pursuant to 18 U.S.C. § 3143(b) to continue his release pending appeal [DE 151]. On July 10, 2017, the district court entered a paperless order denying Appellant's motion for release pending appeal [DE 153]. On July 11, 2017, the district court issued a Memorandum Opinion and Order Denying Defendant's Motion for Release Pending Appeal [DE 154].

Mr. Lundgren has been free on bond since he was arraigned, but he is required to self-surrender to the Federal Detention Center in Sheridan, Oregon on

July 14, 2017. Thus, it is imperative that an order granting Mr. Lundgren's release pending appeal be entered on or before July 13, 2017 at 5:00 p.m. to avoid the irreparable injury that would flow from subjecting him to imprisonment beginning on July 14, 2017.

Before filing this motion, counsel for Mr. Lundgren notified counsel for the United States of America of the motion by email and also emailed them a service copy of the motion.

## RELIEF REQUESTED

Mr. Lundgren asks this Court pursuant to FED. R. APP. P. 9(b) and 11th Cir. R. 27-1(b), to reverse the district court's decision denying his motion for continued release pending appeal and allow him to remain free on bond pending the resolution of his appeal of his sentence to the 11th Circuit Court of Appeals.

## STANDARD OF REVIEW

A party seeking a stay pending review must show that he is likely to prevail on the merits; the prospect of irreparable injury to the moving party if relief is withheld; the possibility of harm to other parties if relief is granted; and the public interest. *See* 11th Cir. R. 27-1(b); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

## BACKGROUND

On February 28, 2017, Mr. Lundgren pled guilty to one count of conspiring to traffic in counterfeit goods under 18 U.S.C. § 2320(a)(1) and one count of criminal copyright infringement under 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. §§ 2319(a) and (b)(1). After voluntarily admitting his guilt without a trial, Mr. Lundgren surrendered to the Government all the property subject to forfeiture under 18 U.S.C. § 2323. On May 23, 2017, pursuant to 18 U.S.C. § 3553, the district court considered the United States Sentencing Guidelines (the "Guidelines") and, primarily based on its calculation of the infringement amount, determined the appropriate guideline range for Mr. Lundgren's offense was a Level of 21. After considering the factors listed in 18 U.S.C. § 3553, the district court imposed a non-guideline sentence of incarceration for a period of 15 months.

### I. DEFENDANT TIMELY FILED HIS NOTICE OF APPEAL AND HAS ENGAGED APPELLATE COUNSEL

On May 30, 2017, Mr. Lundgren timely filed his Notice of Appeal from the district court's sentence [DE 140]. He has perfected the appellate record by requesting the trial and sentencing transcripts [DE 143]. Those transcripts were filed with the district court on June 22, 2017 [DE 145-148]. Mr. Lundgren has also retained the undersigned appellate counsel to prosecute his appeal.

## II. RELEASE PENDING APPEAL

Pursuant to 18 U.S.C. §§ 3143(b)(1)(A) and (B)(ii) and (iii), a person sentenced to imprisonment who has filed an appeal shall be detained unless he demonstrates by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and in addition demonstrates that his appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in a sentence that does not include a term of imprisonment or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected during of the appeal process.

An appeal in the 11th Circuit can take from 18 to 24 months. Mr. Lundgren will have served his 15-month sentence, prior to a final resolution before the 11th Circuit. Even if the Court continues to impose a sentence of incarceration, any reduction in Mr. Lundgren's sentence will be less than the expected duration of the appeal process. 18 U.S.C. § 3143 (b)(1)(B)(iii).

## III. THE DISTRICT COURT RECOGNIZED THAT MR. LUNDGREN IS NOT LIKELY TO FLEE AND POSES NO DANGER TO OTHERS OR TO THE COMMUNITY

The statute governing release pending appeal, 18 U.S.C. § 3143(b)(1), authorizes post-trial release on bail pending appeal if the court finds by clear and convincing evidence that the defendant is not likely to free or pose a danger to the

safety of any other person or to the community if he is released. The district court implicitly made this required finding by permitting Mr. Lundgren to self-surrender on July 14, 2017. *United States v. Farran*, 611 F.Supp. 602, 605 (S.D.Tex. 1985). Furthermore, as presented during sentencing and as documents in the Pre-Sentence Investigation Report prove, Mr. Lundgren is a valued member of the community and has never been involved in any violent activities.

## IV. THE APPEAL IS TAKEN IN GOOD FAITH AND IS NOT FOR THE PURPOSE OF DELAY

Substantial issues of fact were raised and decided during Mr. Lundgren's sentencing hearing regarding the calculation of the infringement amount used to determine Mr. Lundgren's sentence. As the district court recognized at the time, the infringement amount was important because it "***effectively drives the guidelines***." Sentencing Tr. Day 1 [DE 145] at 210:9-12 (emphasis added). This issue warrants plenary review by this Court after briefing and oral argument. If Mr. Lundgren is required to begin to serve a 15-month term of imprisonment on July 14, 2017, it is likely that all or a substantial portion of his prison term will be served before this Court can review the briefs, hear oral argument, and render its judgment. If the appeal of his sentence is successful and his sentence is reduced, Mr. Lundgren will have been irreparably harmed.

## V. THE APPEAL WILL PRESENT "CLOSE" QUESTIONS OF LAW THAT COULD BE DECIDED "EITHER WAY"

In *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985), the Eleventh Circuit approved the construction given to § 3143(b)(1)(B) by the Third Circuit in *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985). The Third Circuit held that the statutory requirement for release pending appeal is that the legal issue to be raised on appeal is either novel, has not been decided by controlling precedent, or is fairly doubtful. 753 F.2d at 23. In the 11th Circuit, a "substantial question" is "a 'close' question or one that very well could be decided the other way." 754 F.2d at 901. The district court accepted this controlling authority, but found that Mr. Lundgren did not raise a substantial question because he made "substantially the same arguments pertaining to the appropriate loss calculations he made at the time of sentencing." ECF No. 154, at 4. That Mr. Lundgren made substantially the same arguments twice in the district court does not mean he has not raised "close" questions or that this Court cannot very well decide the questions he has raised the other way. Despite citing the correct legal standard, the district court did ***not*** make the requisite finding to deny the motion.

The dispute regarding the value of the products Mr. Lundgren plead guilty to infringing is a "substantial question" that very well could be decided in Mr. Lundgren's favor. For example, in *United States v. Newmark*, 2008 U.S. Dist. LEXIS 58207 (E.D. Pa. July 30, 2008), the district court accepted that an appellate

court could reject its loss calculation, which could lead to a shorter sentence under the Guidelines. Mr. Lundgren cited *Newmark* in moving to extend his release in the district court. The district court acknowledged that its calculation of the infringement amount effectively drove the guideline range. *See* [DE 145] at 210:9-12.

The district court did not address the substance of the *Newmark* decision in denying Mr. Lundgren's motion to extend his release, holding only that he did "not support his current arguments regarding alleged sentencing miscalculations with relevant, controlling case law." ECF No. 154 at 4. While *Newmark* is not controlling, it certainly supports Mr. Lundgren's argument that the district court's calculation of the infringement value of the products he pled guilty to infringing raises a "substantial question" that very well could be decided by this Court in Mr. Lundgren's favor.

There does not appear to be any controlling authority in the 11th Circuit on this precise question. The absence of controlling authority does not mean that Mr. Lundgren has not raised a substantial question under *Giancola*. To the contrary, the absence of any contrary 11th Circuit precedent increases the likelihood that this Court will adopt the reasoning in *Newmark* and, as applied to the unique facts in this case, determine that the district court in fact miscalculated the guideline range for Mr. Lundgren's offense.

The sentencing range for Mr. Lundgren's offence is computed under the Guidelines. The district court recognized that its guideline computation was, in turn, driven by its determination of the infringement amount. *See* [DE 145] at 210:9-12. Thus, Mr. Lundgren challenge to the district court's determination of the infringement amount will, if accepted by this Court, undoubtedly affect the guideline computation. Regardless of the length of the sentence ultimately imposed, a sentence is appealable whenever an incorrect Guideline calculation has been made. For example, in *United States v. Fuente-Kolbenschlag*, 878 F.2d 1377, 1379 (11th Cir. 1989), this Court held that a sentence was appealable to correct an error in the Guideline computation even though the guideline ranges advocated by each of the parties overlapped.

## VI. IN APPLYING THE SENTENCING GUIDELINES, THE COURT IMPROPERLY CALCULATED THE INFRINGEMENT AMOUNT

Under the Guidelines, 18 U.S.C. Appx. § 2B5.3, the court is required to determine the infringement amount at the sentencing hearing. Pursuant to the Application Note to Section 2B5.3 of the Guidelines, the district court was required to determine the infringement amount "based upon the retail value of the infringed item, multiplied by the number of infringing items."[1] 18 U.S.C. § 2B5.3

[1] As defined in the Guidelines, "'[i]nfringing items' are distinguishable from 'infringed items.' Infringed items are the legitimate items that are infringed upon by the infringing item." *United States v. Lozano*, 490 F.3d 1317, 1320, n.3 (11th Cir. 2007) (citing 18 U.S.C. Appx. § 2B5.3 Note 1).

Note 2(A)(i).[2] Importantly, the district court noted that the infringed item in this case was the ***Microsoft software***, not the reinstallation discs: "Remember, now, we are ***not*** talking about the disc, the reinstallation disc, that is just the means of installing the software. The item that has been . . . infringed ***is the Microsoft software***. [DE 145] at 217:15-19 (emphasis added).[3]

Mr. Lundgren pled guilty to and was convicted of crimes relating to infringed copies of Microsoft software. He was ***not*** charged with, he did ***not*** plead to, and he was ***not*** convicted of any crime relating to Microsoft licenses or product keys. The software, the license, and the product key are separate and unique items. Thus, a critical factual determination for the district court to make at the sentencing hearing was the retail value of the Microsoft software ***without a valid license and most importantly without a proper product key***. The district court appears to have accepted this argument in its Memorandum Opinion.

As the district court noted, where, as here, the defendant disputes the retail value of the infringed item, the Government bears the burden of persuasion on value. The Government expressly acknowledged its burden of persuasion. [DE 145] at 6:7-11. On appeal, Mr. Lundgren will argue that the Government failed to

[2] There was no dispute that the infringing software was a digital or electronic reproduction of the original Microsoft software and appeared identical or substantially equivalent to the original Microsoft software to a reasonably informed purchaser.

[3] The Government agreed that Windows software was the infringed item: "Now, the infringed item we believe was infringed was the Microsoft operating system software, called the software image contained on the Dell installation disc." [DE 145] Day 1 at 195:20-22.

meet its burden of persuasion to prove the retail value of the infringed item (*i.e.*, the Microsoft software itself). Indeed, the Government offered ***no evidence*** of the retail value of the Windows software without a license and, in particular, without product key. The only evidence the Government offered was of the retail value of reinstallation discs including the software that were sold to licensed remanufacturers ***together with a valid software license and a proper product key***. That is, the Government only offered proof of the retail value of something ***entirely different*** than what Mr. Lundgren was convicted of infringing. As for the Microsoft software alone, without a license and a product key, the Government's only valuation witness, Jonathan McGloin, admitted he ***did not know the retail value*** of the software alone, without the license and product key, during the relevant 2011-2012 time period. *See* [DE 145] at 132:25-133:7 (witness did not know what, if anything, Dell charged for reinstallation disc sold without license and product key).

The district court recognized the difference between an installation disc and the software on it. *See* [DE 145] at 217:15-19. However, the district court appears to have been confused by the Government's evidence as to the difference between software with a license and product key versus software without a license or product key. Most importantly, without the product key, the software was of little or no value. Again, as the Government's valuation witness admitted, an operating

system installed from software without a valid product key had only limited functionality and for only a short period of time. *See* [DE 145] at 115:17-116:6 (admitting that the operating system was ***not*** fully functional); 115:8-1 & 130:17-131:2 (admitting that operating system worked for ***only 30 days***). Until the product key was entered, the software was merely a "trial" or "demo" version of the Windows operating system.

In *Lozano*, this Court held that the "[r]etail value 'of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.'" 490 F.3d 1317, 1320 n.4 (11th Cir. 2007) (quoting U.S.C. Appx. § 2B5.3 at Note 2(C)). Here, the Government offered no evidence of the retail value of software that installed only a partially-functional operating system for just 30 days – the only thing which Mr. Lundgren was convicted of infringing. Certainly, the Government offered no evidence at the sentencing hearing of the retail price at which a copy of Windows software was sold without a license or product key – if one was ever sold that way. To the contrary, Mr. Lundgren offered Exhibit 1 to his Sentencing Memorandum, showing twelve current and historic sites providing free downloads of the Microsoft software without a license or product key. Mr. Lundgren's valuation witness, Glen Weadock, also testified that copies of the exact same Windows software that Mr. Lundgren was convicted of infringing, without a license or product key, were readily available ***for free*** in 2011 and 2012. [DE 145]

at 168:10-19. Mr. Weadock's testimony was uncontradicted; indeed, the Government's valuation witness conceded that original equipment manufacturers were permitted to and did give away free copies of the Windows software without a license or product key. [DE 145] at 132:5-10; 145:3-8.[4] At most, the infringing product – the temporary software with certain features disabled – had only nominal convenience value, and certainly not anything like the retail value of the full-featured, permanent version sold with a license and a product key.

The Government provided no proof of the price at which the Microsoft software was sold in any market without a license or product key. Indeed, the Court had no proof that Windows software was ever sold in any market at any price without a license or product key. Thus, the Court had no basis to determine the retail value of the infringed item, *i.e.*, the Microsoft software without a license or product key. With no proof of the retail value of the infringed item, the Court was left to assume that the Windows software without a license and product key had the exact same retail value as an installation disc with Windows software, a license, and a product key sold to refurbishers. In concluding that the infringement value of the software was $25 – the price charged to refurbishers for an installation disc with copy of the Windows software together with a license and a product key – the Court apparently did so. The Court was forced to make this unwarranted

[4] Mr. McGloin conceded that the distribution of free Windows software had no economic impact on Microsoft. *See* [DE 145] Day 1 at 132:11-13.

and unjustified assumption because the Government provided no evidence of the retail value of the software itself, without a license or a product key.

In denying Mr. Lundgren's motion to extend his release, the district court noted Mr. Lundgren's argument that the Government "offered no evidence on the retail value of [the Microsoft] software sold without a license or product key." [DE 154, at 3]. The district court did not thereafter cite any evidence offered by the Government on the retail value of the software without a license or product key, nor did it cite to any other factual basis to support its calculation of the infringement amount of $700,000 (which was the supposed value of the software ***plus*** a license and new product key). The district court did not make any finding that the supposed value of the software ***with*** a license and new product key was the same as the retail value of the infringed item – *i.e.*, the software ***without*** the license or product key – much less that it was a suitable proxy for the retail value of the infringed item. Instead, the district court began and ended its analysis of Mr. Lundgren's motion with the observation that he made substantially the same arguments unsuccessfully before.

The district court's analysis of Mr. Lundgren's motion was simply that it got the question right the first time, so Mr. Lundgren cannot possibly prevail in this Court and thus has not raised a substantial question on appeal. However, that is not the correct standard governing the motion to extend. *See Giancola*, 754 F.2d at 901

("substantial question" is "a 'close' question or one that very well could be decided the other way"). To the contrary, Mr. Lundgren's motion clearly raises a substantial question on the district court's computation of the infringement amount in the absence of any evidence of the retail value of the Microsoft software without a license or product key.

Because the Government failed to prove any retail value for the infringed item, the Court should not have added 14 points to the Offense Level Computation for the Special Offense Characteristic, which was based on an infringement amount of $700,000 (or $25 multiplied by the 28,000 disc copies).[5] The 14-point Special Offense Characteristic upward adjustment should only have been a 4-point adjustment. After the 2-point downward adjustment for Mr. Lundgren's acceptance of responsibility, the Total Offense Level should have been 10, not 21 as calculated by the district court.

In the absence of any evidence from the Government on the retail value of the infringed item, Mr. Lundgren is likely to prevail on the merits of his appeal. *See* 11th Cir. R. 27-1(b)(2)(i). If this emergency motion is not granted, Mr. Lundgren will become incarcerated and will, in all likelihood, serve his entire sentence before the appeal can be briefed, heard, and decided in this Court. Thus,

[5] At most, because the offense involved the manufacture or importation of infringing items, the offense level would be adjusted to 12 under 18 U.S.C. Appx. § 2B5.3(b)(3)(A) before any adjustment for acceptance of responsibility.

there is near certainty that Mr. Lundgren will be irreparably harmed if the relief is withheld. *See* 11th Cir. R. 27-1(b)(2)(ii). By allowing Mr. Lundgren to self-surrender, the district court implicitly found that he is unlikely to flee and is not a danger to others. *See Farran*, 611 F.Supp. at 605. In addition, the Government will not be harmed if Mr. Lundgren's incarceration is delayed until this appeal is denied. *See* 11th Cir. R. 27-1(b)(2)(iii). Finally, the public interest will be served if Mr. Lundgren is allowed to remain free while his appeal is pending. As noted in the Pre-Sentence Investigation Report, he is a valued member of the community and has never been involved in any violent activities. Mr. Lundgren's company is presently involved in advanced battery research that will substantially improve the performance of hybrid automobiles. *See* https://www.digitaltrends.com/cars/itap-recycled-bmw-ev-news-video-specs-range/; *see also* 11th Cir. R. 27-1(b)(2)(iv).

For these reasons, the appeal raises a substantial question of the district court's calculation of the Total Offense Level for Mr. Lundgren's conviction and, therefore, the sentence imposed by the district court.

## VII. CONCLUSION

Mr. Lundgren respectfully asks that this Court grant his emergency motion, reverse the district court's Memorandum Opinion, and allow him to remain on bond pending the resolution of his appeal before the 11th Circuit.

Dated: July 11, 2017

Respectfully submitted,

/s/ Hugo Rodriguez

Hugo A. Rodriguez, Esq.
1210 Washington Avenue
Miami Beach, FL 33139
Tel: 305-373-1200
Email: hugolaw@aol.com

## CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

Appellant's Emergency Motion for Continued Release Pending Appeal complies with the type-volume limitation and typeface requirements of FRAP 32(a) because it is no more than twenty (20) pages in length and has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point font size and Times New Roman type style.

Dated: July 11, 2017

/s/ Hugo Rodriguez
Hugo Rodriguez

**CERTIFICATE OF SERVICE**

I hereby certify that on July 11, 2017, I electronically filed the foregoing Appellant's Emergency Motion for Continued Release Pending Appeal and any exhibits in support with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ Hugo Rodriguez
Hugo Rodriguez