2019-10873

United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,

v.

RAYMOND F. WILLIAMS,

Appellant.

EMERGENCY MOTION FOR RELEASE PENDING APPEAL WITH REPORT DATE OF April 3, 2019

The Honorable Judge Leslie Abrams Gardner, Presiding
U.S. District Court, Middle District of Georgia (Macon)
Case No. 5:17-CR-0029

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COMES NOW the Defendant-Appellant, Mr. Raymond Williams ("Mr. Williams"), who respectfully moves this Court, pursuant to Fed. R. App. P. 9(b) and 18 U.S.C. §§ 3143(b) and 3145(c), to grant his release on bond pending appeal of his criminal conviction and sentence. In support, Mr. Williams states:

STATEMENT OF THE CASE

1. The District Court sentenced Mr. Williams to a term of 60 months plus three-years supervised released following a plea. (D.E. # 104).

2. On March 11, 2019, Mr. Williams filed a Notice of Appeal with the District Court, indicating his intent to appeal his sentence to the United States Court of Appeals for the Eleventh Circuit. (D.E. # 112).

3. On March 21, 2019, Mr. Williams also filed a Motion for Bond Pending Appeal in Case No. 5:17-CR-0029. (D.E. #119).

4. On April 1, 2019, the District Court denied Mr. Williams' request for bond pending appeal. (D.E. #121). Mr. Williams now files the instant motion in this Court, requesting for him to remain at liberty during the pendency of the appeal.

5. At the time of the Sentencing, Mr. Williams did not have an official turn in date for prison or report date for prison. Rather, Mr. Williams was sent a letter by the U.S. Marshall indicating his report date of April 3, 2019.

6. Mr. Williams has not filed his initial brief before the appellate court.

However, he requests that this Court treat the instant motion as an emergency as he was only provided a very short time period to report to prison.

ARUGMENT

7. Under the Bail Reform Act of 1984, codified at 18 U.S.C. § 3143, a Court "shall order the release" and grant the Defendant an Appeal Bond if the following four elements[1] are met by clear and convincing evidence: (1) the Defendant poses no risk of flight and no danger to the community if released; (2) the appeal is not a delay tactic; (3) but rather, the appeal raises a substantial question of law or fact; (4) and, "that if *that* substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (citing 18 U.S.C. § 3143) (emphasis added).

8. As the Eleventh Circuit frames the question in *Giancola*, which is the leading case on this issue, the fourth element is a two-stage analysis.[2] The first stage asks the District Court to review whether there is "a substantial question of law or fact" at all. *See id.* The second component, assuming there were a substantial question found in the first component, asks whether this

[1] While the District Courts vary in breaking down the elements into four versus two categories, the plain language in *Giancola* approaches the analysis with four elements.

[2] The conditional language in the first independent clause in the fourth element indicates the fourth element has two stages/conditions to be satisfied.

substantial question is going to be material enough to result in an reversal on appeal. So the inquiry whether there is a "substantial question" is *not* whether the District Judge thinks his own judgment was *error*. The standard is less onerous than that. To interpret 18 U.S.C. § 3143 as requiring a District Judge to find his own ruling error injudiciously interprets Congressional intent, as the Eleventh Circuit reasoned in *Giancola*. 754 F.2d at 900 ("We, too, are unwilling to attribute to Congress the intention to deny bail pending appeal unless a district court judge found that he or she had committed error but was obstinately unwilling to grant a new trial or other relief to correct that error.")[3]

9. The standard governing this Motion is more lenient than simply whether there was *error* in the proceedings below. The standard in our Circuit for a "substantial question of law or fact" is only whether any issues presented by Mr. Williams' appeal are a "close question or one that very well could be decided the other way"—not whether there is error. *Id*. at 900–01.

10. For example, when there is no controlling law on a given question or when there is a novel legal issue, that constitutes a "substantial question of law

[3] In this excerpt, the Eleventh Circuit is explaining that it would not make sense for Congress to have made the standard of review on an Appeal Bond identical to the standard on a motion for a new trial (whether there was error) since the same District Judge will be reviewing both motions; if the standard were the same, the District Judge would very rarely think his own opinion was error. Under such a tautological standard, Appeal Bonds would probably never be granted at all. Since this statutory interpretation would render 18 U.S.C. § 3143 superfluous for all practical purposes, this interpretation cannot actually represent Congressional intent. *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("…the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous.")

or fact" in this Circuit. *Giancola,* 754 F.2d at 900; *see also, e.g. United States v. McCoy*, No. 1:07-CR-18 WLS, 2013 WL 5372813, at *1 (M.D. Ga. Sept. 24, 2013) (reasoning that where the parties could not identify controlling precedent, there was a substantial question). The Third Circuit's definition also provides helpful context. In *Giancola* the Eleventh Circuit approvingly cited the Third Circuit's definition for a "substantial question of law or fact," explaining that the Third Circuit "defined a substantial question as one which is either novel, has not been decided by controlling precedent, or is fairly doubtful." *Giancola*, 754 F.2d at 900 (citing *United States v. Miller*, 753 F.2d 19, (3rd Cir. 1985)).

11. While the standard is a lower threshold than whether there was error, the Eleventh Circuit has noted the standard is higher than simply whether the appeal is "not frivolous." *Giancola*, 754 F.2d at 901. And, ultimately, the determination is to be made on a "case-by-case basis." *Id.*

12. To summarize the substantial question element, the standard for a substantial question requires the court to first ask if a legal issue was a close call or could have gone the other way. An example of a "close call" issue would be if there was not controlling case law. The Defendant doesn't need to prove there was outright error, although, the Defendant does need to prove the issues on appeal are more credible than simply not frivolous. The standard is somewhere in between these two. Next, if the court finds this first substantial question inquiry is satisfied, then the second analysis is whether the substantial question is important

and material enough to result in a reversal or a new trial.

13. Finally, the Defendant has the burden to prove all four elements up to a clear and convincing standard. *Giancola,* 754 F.2d at 901 (citing legislative history and drawing contrasts with Bail Reform Act of 1966's opposite presumption).

14. In this case, clear and convincing evidence proves Mr. Williams meets all four elements under 18 U.S.C. § 3143.

15. The first element is dispositive in Mr. Williams' favor: there is absolutely no evidence that Mr. Williams, who is a 71 year-old man accused of a non-violent crime, is a flight risk or that he poses a danger to the community's safety. As the Eleventh Circuit has observed, a Defendant's strong community ties, previous stringent compliance with bond conditions, and prompt attendance at the District Court hearings all favor finding the first element is satisfied. *United States v. Fernandez,* 905 F.2d 350, 354 (11th Cir. 1990).

16. In Mr. Williams' case, the District Court's decision to release him on his own recognizance with an unsecured appearance bond prior to trial (D.E. # 9) was an explicit finding that Williams was not likely to flee or pose a danger to the community.

17. And furthermore, the original Conditions of Release required Mr. Williams to simply to maintain employment and not carry a passport. He has never violated any of these original Conditions of Release. With regard to these

original Conditions of Release, facts that show these Conditions of Release for Mr. Williams, the Court and the community have included:

a. Mr. Williams is a self-made man and entrepreneur, and now a father and grandfather. In 1980 he started his first company, moving to Ohio in order to pursue a painting business.

b. Later, he started another company, Blast N Vac, which used abrasive materials to clean surfaces and monuments.

c. Mr. Williams is the sole provider for his family. He needs to remain at liberty in order to pay the Court-ordered restitution and to continue providing for his family.

d. Mr. Williams intends to remain locally during the pendency of the appeal. Although, he will continue to travel for work related issues.

e. Mr. Williams has no criminal record, and certainly not a record demonstrating a propensity to endanger the community's safety. The one and only prior charge was a traffic violation. The prior reckless driving indicated on his PSR is a non-criminal violation and Mr. Williams intends to challenge that designation on appeal.

f. During the pendency of the trial proceedings, Mr. Williams has been at liberty without any problems; Williams has remained at liberty since June 23, 2017 with no violations of his bond.

15. Following sentencing, Mr. Williams was allowed to remain on the

original Conditions of Release (D.E. # 9). Putting all of these facts together, Mr. Williams' community ties, previous compliance with the bond conditions while at trial, and prompt attendance at all District Court hearings strongly support that the first element is satisfied. *United States v. Fernandez*, 905 F.2d 350, 354 (11th Cir. 1990). There is simply no evidence that Mr. Williams—who only has a traffic offense on his record—will flee or that he will endanger anyone in the community.

16. On the second element, Mr. Williams' appeal is very clearly not a dilatory tactic since the appeal raises squarely meritorious claims. Just the opposite, the appeal brings serious challenges to the District Court's final judgment and sentence. As initial evidence thereto, Mr. Williams has retained appellate counsel (D.E. # 115) and Mr. Williams has timely filed a Notice of Appeal. (D.E. # 117). But the claims' substance, even on their face, evinces that they are serious.

17. The legal merits supporting Williams' claims are discussed in detail below; but to summarize them, the following claims are not dilatory but are facially meritorious: (1) that the Judgment plainly contradicts the Plea Agreement's apportionment of pecuniary responsibility, shifting the liability assigned to Williams from the Plea Agreement's 30% to the Sentencing Order's 50%; (2) that the Sentencing Order's restitution requirement clearly violated the plain terms in the Plea Agreement, deviating in Mr. Williams' assignment of responsibility by

$1,7500,000; (3) that the court-ordered fines violate the Plea Agreement; (4) that the District Court's Presentence Investigation Report wrongly found a prior traffic violation added to Mr. Williams' criminal history range; (5) that since Mr. Williams' co-defendants—government officials who allegedly took bribes—received little to no jail time, there is an unjust sentencing disparity relative to Williams' five year sentence; (6) and finally, the sixth substantial question Mr. Williams contends, is that the government officials Williams bribed were not "high-ranking," therefore the Special Offense additions to Williams' sentence for bribing a "high-ranking" official do not apply.[4]

18. Overall, these are serious claims, that, if resolved in Williams' favor, will certainly result in a more lenient sentence that doesn't include imprisonment. For these reasons, the appeal is very clearly not a delay tactic, and this element should be dispositively adjudicated in Mr. Williams' favor.

19. On the third and fourth elements, whether Mr. Williams' appeal raises a significant issue of law or fact, the standard is well-satisfied by Williams' claims. The first stage in the analysis is whether there was a legal issue that was a

[4] In addition, Mr. Williams received no credit against loss according to §2B1.1(E)(ii), stating: "In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing." In this case, Mr. Williams pledged a note to the Government as part of his re-payment for the loss amount. He was not provided credit for the actual market value of the note, which is in the millions.

close call or that could have gone the other way—not whether there was error, but, more than whether an issue on appeal is non-frivolous. *See Giancola* 754 F.2d at 900–01.

20. Although there are no reported cases from this Court, in recent unreported cases where this Court found there was *not* a significant question, the issues, just on their face, were not litigated seriously on appeal. *United States v. Wall*, No. 4:16-CR-18 CDL-MSH, 2016 WL 4055646, at *1 (M.D. Ga. July 26, 2016) (denying appeal bond where appellant failed to even file an appellate brief); *United States v. Metz*, No. 1:12-CR-22 WLS, 2014 WL 351922, at *2 (M.D. Ga. Jan. 31, 2014) (denying appeal bond where appellate counsel only raised single issue disputing adequacy of evidence for jury conviction); *United States v. Jenkins*, No. 1:11-CR-27 WLS, 2013 WL 4504644, at *3 (M.D. Ga. Aug. 22, 2013) and *United States v. Hurley*, No. 1:12-CR-15 WLS, 2013 WL 4432172, at *3 (M.D. Ga. Aug. 16, 2013) (both denying appeal bond where appellate counsel only contended insufficiency of the evidence). In coming to these determinations, this Court examines the substantive case law behind the claims on appeal. *See id.* And since Williams brings substantial claims under the pertinent case law, his claims are significant questions of law or—at the very least—close calls. The separate grounds in Williams' meritorious appeal and the underlying law are now addressed in turn.

21. The first substantial question of law on appeal is Williams'

contention that the Sentencing Order plainly contradicts the apportionment of pecuniary responsibility, shifting Williams' liability from the Plea Agreement's 30% to 50%. This radical departure from the Plea Agreement is a substantial question of law that could have well-gone the other way.

22. The plea deal was a Rule 11 Plea Agreement that included sentencing provisions and stipulated facts between the parties. (D.E. # 61).

23. According to the Plea Agreement, Mr. Williams was penalized thirty percent (30%) of the interest in USTAE. The Agreement further stipulates the Government is to receive only 30% of the monthly payments pursuant to a note between UST and U.S. Technology, Media, Inc. (D.E. # 61 at 5–6).

24. However, according to the Judgment entered by this Court, Mr. Williams is responsible for fifty percent (50%) of the interest in USTAE on a monthly basis. (D.E. # 104, and D.E. 110, at 25–26).

25. In this regard, the District Court violated the 30% stipulation set forth in the Plea Agreement stating:

> Payments of the fine is to begin immediately. Monthly payments shall be the greatest of either $50,000 or 50 percent of gross monthly payments received by U.S. Technology Aerospace Engineering Corporation from the promissory note between U.S. Technology Corporation and U.S. Technology Media Incorporated. (D.E. 110, pp. 25–26).

26. Therefore, the District Court violated the terms of the Plea Agreement by increasing the net amount of payments from 30% to 50%.

27. No evidence in the record remotely suggests Mr. Williams agreed to the 50% figure. For example, following sentencing Mr. Williams filed a motion to re-open sentencing or amend the sentencing, alleging error on the part of the District Court. (D.E. # 101). In Mr. Williams' motion to re-open he alleges the following:

> Further, that there is a Promissory Note between Defendant US Technology Corporation and US Technology Media, Inc., dated March 31, 2015, whereon the agreement, that all the Defendants would assign 30% of the monthly payments on this note to pay the total fines and restitution. (Docket No. 61) The 30% would allow the remaining percentage from the note to be used to clean up various sites with contaminated materials. (D.E. # 101 at 1).

28. Mr. Williams was not made aware that the District Court would increase this amount, as he stated:

> Further, the Courts stated that 50% rather than 30% of the monthly payments on the above referenced note be assigned to the government and that Mr. Williams pay $100,000.00 within a week after sentencing. (*Id*).

29. Despite this clear irregularity, the District Court denied Mr. Williams' motion to amend to correct the illegal sentence. (D.E. # 103).

30. Even though the Plea Agreement states the District Judge reserves the right to determine the amount of the sentence and fines, (D.E. # 61 at ¶¶ C–E), the specific allocation of payment in the note was not in the nature of Defendant's sentence, rather, this allocation decision determined the exact *manner* through which the debts owed in the sentence were to be satisfied.

31. The total fines and restitution in both the final sentence and the Plea Agreement were clearly $4,100,000, in total, apportioned between the three Defendants ("Plea Agreement," D.E. # 4 at 7); ("Judgements," D.E. # 104, 106, and 108). That amount and each Defendant's allocative obligations to pay it were probably within the District Court's discretion over a Rule 11 Plea.

32. But the specific property interest exchanges through which these debts were to be satisfied, here, the assignment of revenue owed in a note, was a matter only between the parties to the Plea Agreement: the District Court didn't have the authority to change an agreement between the parties. To counsel's knowledge there is no direct precedent on this specific sentencing issue in our Circuit. And as such, this is a novel and therefore substantial question of law which will be subject to reversal on appeal. *Giancola*, 754 F.2d at 900 (citing *United States v. Miller*, 753 F.2d 19, (3rd Cir. 1985).

33. The second substantial question that will be raised on appeal, as Williams also raised in his Motion to Amend or Correct Sentence, is that the Restitution sum is improper.

34. According to the Court's Judgment, Mr. Williams is responsible for over $2.6 million in restitution payments. However, under the terms of his Plea Agreement he was only responsible for $850,000. The Plea Agreement expressly states: USTAE and Mr. Williams will pay restitution "jointly and severally" to the U.S. Department of Defense in the amount of $850,000.00 (D.E. # 61 at 4). Mr.

Williams contends that his sentence as to restitution is illegal, arguing:

> However, counsel has reviewed docket entries 95, 96 and 97 in this case and it is not clear that the $870,000.00 in restitution is the total amount of the restitution. A review of the minutes show that it appears each defendant, US Technology Aerospace Engineering Corporation, US Technology Corporation and Raymond Williams, has to pay restitution of $870,000.00, which would be a total of $2,610,000.00, which is far greater than the restitution found by the Court in this case. (D.E. 101, pp. 4).

35. This unexplained factual discrepancy is a substantial and unresolved question, that, if resolved in Defendant's favor on appeal, would require reversal of the District Court's sentence. *See Giancola*, 754 F.2d at 900.

36. The third substantial question that Mr. Williams will appeal is that, according to the District Court's Judgment and Sentence, Mr. Williams must pay $100,000 in fines, immediately following sentencing, or no later than March 25, 2019.

37. Mr. Williams entered the Plea Agreement and made an assignment to the United States Department of Defense for all proceeds from USTAE. Therefore, the immediate payment of the $100,000 is not only now impossible for Mr. Williams to meet, but it has already been accounted for by assignment of the note to the U.S. Government.

38. This clear violation of the Plea Agreement presents a substantial question of law that, if reversed on appeal, will dramatically alter the substantial

fines Williams faces.

39. The fourth substantial question Williams will raise on appeal is that he was issued an unjustified two-point Criminal History increase based on a falsely-alleged DUI from another jurisdiction. Mr. Williams maintains this violates his rights under the Plea Agreement, and that the additional points were improperly added under 4A1.2.

40. The Presentence Investigation Report computed Mr. Williams' criminal history as a total score of three points placing Williams into Category II. (D.E. # 82 at ¶ 57). But Mr. Williams objected to and will appeal this categorization by the Presentence Report.

41. Mr. Williams had only one prior incident on his record: a traffic offense for reckless driving. The District Court's decision to construe this reckless driving offense as a DUI, when the judgment was very clearly for reckless driving, has no merit.

42. If Williams' contentions are proven on appeal, his Criminal History category will be reduced to I which will ultimately result in a substantially lowered sentence. As such, this oversight presents a substantial question of law.

43. The fifth substantial question Mr. Williams contends is his unjust sentencing disparity relative to his co-defendants Mr. Toth, and Mr. Reynolds.

Since Mr. Williams and his co-conspirators are similarly situated but received radically different sentences, there is a substantial question whether the District Court properly complied with the Sentencing Guidelines.

44. Federal Judges must consider and apply all seven factors in 18 U.S.C. § 3553 when issuing sentencing orders. Under subsection (a)(6) of that subtitle, a Judge must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See also United States v. Booker*, 543 U.S. 220, 261 (2005) (stating that § 3553(a) "…remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.")

45. It is very well-established law that Judges cannot issue widely disparate sentences for similarly situated Co-Defendants like Mr. Williams and Toth and Reynolds. As the Eleventh Circuit has stated, "…the need to avoid unwarranted sentencing disparity also *requires* the court to consider other similarly situated defendants—criminal defendants in other cases who were convicted of similar crimes." *United States v. McQueen*, 727 F.3d 1144, 1160 (11th Cir. 2013) (internal citations omitted) (emphasis added); *United States v. Pugh*, 515 F.3d 1179, 1203 (11th Cir. 2008) (holding "unwarranted disparities" in probation sentences across similar cases was unreasonable).

46. In this case, Mr. Williams' co-defendant Mr. Toth only received Supervised Probation for the exact same alleged violations. (D.E. # 82 at ¶¶ 9, 12). Toth received zero time behind bars pursuant to an agreement that granted him pretrial diversion. (D.E. # 82 at ¶ 9). Mr. Reynolds received a much lower sentence as well. *Id.* This sentencing disparity represented an unwarranted departure as Mr. Williams was sentenced to five years in prison.

47. The unwarranted sentencing disparity for Williams relative to his Co-defendants indicates the District Court failed to duly consider the U.S.C. § 3553 factors that bar sentencing disparities without adequate justification. Ultimately, this issue presents a substantial question of law that—if reversed on appeal—will result in reduced jail time, or, Mr. Williams' full release.

48. And lastly, the sixth substantial question of law that Mr. Williams will raise on appeal is that Mr. Williams did not bribe a "high-ranking" government official, as the Presentence Investigation Report found. The Presentence Investigation Report determined that the Cundiff, the DOD official Williams allegedly bribed, was a "public official in a high-level decision-making or sensitive position." (D.E. # 82 at ¶ 42). The Court reasoned that because Cundiff had the authority to decide who got the DOD contracts, that alone made him "high-level." *Id.* This led to a four point increase on the offense level. *Id.*

49. The Eleventh Circuit has explained that "The public official in a

high-level decision-making or sensitive position enhancement, § 2C1.1(b)(3), generally speaking, applies to public servants with direct authority to make important governmental decisions.") *United States v. Merker*, 334 F. App'x 953, 967 (11th Cir. 2009). However, the exact contours of what this language means is far from apparent.

50. In this case, there is a genuinely substantial question of law on whether Williams was actually high-ranking enough to trigger the four point enhancement. This question is an ambiguous determination that leaves room for serious doubt. Since the enhancement added four points to Williams' offense level, if the matter were reversed on appeal Williams will receive a sentence that includes no imprisonment.

51. In conclusion, the four elements of § 3143 as explained in *Giancola* are clearly met in this case: there is no evidence Mr. Williams is a flight risk or a danger to the community's safety; nor is Mr. Williams' appeal a delay tactic; rather, Mr. Williams will bring at least six serious claims on appeal that raise substantial questions of law and fact; and, if these claims are resolved in Williams' favor, they will result in a lower sentence. Therefore the appeal bond should be granted.

52. **WHEREFORE**, Since Williams has clearly and convincingly met all of the § 3143 elements for an appeal bond, this Honorable Court should grant

his release pending determination of his appeal.

CERTIFICATE OF CONSULTATION

I HEREBY CERTIFY that on this 21st day of March 2019, I contacted opposing counsel to ascertain if they object to this emergency filing. As of this date I do not know if there is an objection to this motion.

Dated: March 21, 2019

Respectfully submitted,

/s/ Robert L. Sirianni, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March 2019, I filed the foregoing with the Clerk of the Court and served opposing counsel with a copy through the CM/ECF system to mikki.schieber@usdoj.gov.

/s/ Robert L. Sirianni, Jr.
Robert L. Sirianni, Jr.