

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS**

UNITED STATES OF AMERICA)
)
v.)
)
MICHAEL A. MAGGIO)

**No. 4:15CR00001-1 BSM
18 U.S.C § 666 (a)(1)(B)**

MOTION FOR RELEASE PENDING APPEAL

COMES NOW the Defendant, Michael A. Maggio, by his attorneys, and moves this Court for his release during his pending appeal to the Eighth Circuit Court of Appeals.

On March 24, 2016, the Honorable Judge Brian Miller, Chief U. S. District Judge for the Eastern District of Arkansas, having accepted the Defendant’s plea of guilty on December 9, 2015 of Court 1 of the indictment, 18 U.S.C § 666(a)(1)(B), Bribery Concerning Federal Programs Receiving Federal Funds, sentenced the Defendant to 120 month’s imprisonment, two years supervised release, no fine, no restitution, and a \$100 special penalty assessment.

While Mr. Maggio respects that this Honorable Court was placed in a difficult position due to the late hour of the request and the unique question of law before it, Mr. Maggio believes that his appeal to United States Court of Appeals for the Eighth Circuit has a high chance of success due to lack of jurisdiction under the charge of federal program bribery as sought by the Government.

Mr. Maggio pleaded guilty to this offense without the benefit of raising the issues presented in his *Motion to Withdraw Plea of Guilty and Dismiss Information*. As raised in oral arguments on February 26, 2016 there is no evidence of any federal funds or quid pro quo arrangement brought by the government in all the time that this case has been pending. Also, no other Defendant has been charged.

Mr. Maggio requests that he be released pending his appeal filed on March 18, 2016 to the Eighth Circuit Court of Appeals because it is proper to allow his release in this circumstance. Justice will not be denied the Government should his appeal fail. But should his appeal succeed denial of his request would work a severe injustice on Mr. Maggio. If the appeal is unsuccessful, the Government has been inconvenienced for a few months. During his release, Mr. Maggio will continue to be supervised but will remain productive as the breadwinner of his family. If the appeal is unsuccessful, Mr. Maggio will begin his sentence.

According to 18 U.S.C § 3143 (b) Release or Detention Pending Appeal by the Defendant states:

(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) 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 under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title,

The case before the Court is an unusual one as it is an issue of first impression in this Circuit. Because Mr. Maggio will be appealing the denial of his *Motion to Withdraw Plea of Guilty and Dismiss Information*, raised on a substantial question of law, subsection (b) of the statute, which governs release pending appeal, should be applied.

The statute controls the standard for release pending appeal.

[A] convicted defendant must establish four factors: (1) that he is not likely to flee or pose a danger to the safety of others; (2) that the appeal is not for purpose of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that the substantial question, if decided favorably to the defendant, is likely to result in

reversal, in an order for a new trial, in a sentence without imprisonment, or in a sentence with reduced imprisonment.

U.S. v. Clark, 917 F.2d 177, 179 (5th Cir. 1990); See also, *United States v. Powell*, 761 F. 2d 1227 (8th Cir. 1985).

As to the first prong, Mr. Maggio is neither a flight risk nor a risk to the community. He has resided in the Conway, Arkansas area for the past 30+ years where he has raised five children. He and his wife have 8 adult children. The District Court previously allowed him to travel prior to trial with his family in Mississippi and Florida and employment in other states. He has always returned and followed the orders of the Court.

Mr. Maggio does not pose a danger to anyone and has no history of violence or behavior that would make him likely to pose a risk of harm to the community. His chosen profession of the practice of law is no longer available to him. If he were a mechanic, Mr. Maggio would simply take up where he left off and continue being a mechanic. He has no such luxury as an attorney.

Secondly, Mr. Maggio meets prongs (2) and (4) as delineated above. The appeal is not for the purposes of delay, but brought because it raises an important issue regarding jurisdiction of this action in the Eighth Circuit. The issues presented could potentially require a Supreme Court decision to resolve a circuit split.

This jurisdictional question is the linchpin in this appeal and is an issue of first impression for the Eighth Circuit. A decision in Mr. Maggio's favor would result in a reversal of his conviction, an order for a new trial or perhaps a substantial reduction in his sentence.

In examining what constitutes a "substantial question," the oft-repeated language is that it must be "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." See, *U.S. v. Miller*, 753 F.2d 19, 23 (3rd Cir. 1985) (adopted by the Fifth Circuit in *U.S. v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985)). See also, *United States v. Powell*, 761 F. 2d 1227 (8th Cir. 1985).

As the Eleventh Circuit has put it, "a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous," such as "one that very well *could be* decided the other way." See, *U.S. v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)." *Emphasis added*. "[T]here are no blanket categories for what questions do or do not constitute 'substantial' ones as courts will have to determine this "on a case-by-case basis." *Id.*

We have to remember that the standard here does not require Mr. Maggio to *concretely* establish that the lower court was in error nor is he required to show that the Appellate Courts will agree with him in every instance. Instead, the arguments

raised by the Defendant must be such that such issues *could be* decided in the defendant's favor. See, *Giancola* at 898.

The issues in Mr. Maggio's forthcoming appeal are substantial. The Supreme Court has granted certiorari on three cases in which the constitutionality of the honest services fraud statute. It is likely the Supreme Court would do the same for the issues presented in Mr. Maggio's appeal since the facts are similar. See, *Skilling v. U.S.*, Supreme Court No. 08-1394; See also, *Black v. U.S.*, Supreme Court No. 08-876; See also, *Weyhrauch v. U.S.*, Supreme Court No. 08-1196.

The simple fact that the Supreme Court is considering multiple cases on similar issues seems to hold that this is a "substantial question" and one of substance. And we should note that the Supreme Court decisions on similar issues that are being appealed are being reviewed more narrowly.

Even if this Court is confident that the Appellate Courts will affirm its rulings release and/or bond pending appeal is still warranted. That is so because to grant release and/or bond pending appeal this Court need only acknowledge that while it may have no doubt its reasoning is correct, there are no cases upholding convictions on comparable facts. This alone satisfies the standard for bond pending appeal. See, *United States v. Powell*, 761 F. 2d 1227 (8th Cir. 1985).

To grant Mr. Maggio a release or bond pending appeal this Court need not question its own legal decisions. The Courts of Appeals uniformly and

emphatically agree that the District Court need not find that the Defendant is *likely* to succeed in order to grant release. *Id.*

This was the conclusion arrived at by the Third Circuit in *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985) where the Court states that “The statutory language . . . cannot be read as meaning . . . that the District Court must conclude that its own order is likely to be reversed.”

The Eleventh Circuit in *United States v. Giancola*, 754 F.2d 898, 900 (11th Cir. 1985) held that the District Court had erred in ruling that it could not grant release unless “it finds that its own rulings are likely to be reversed on appeal.” The Fourth Circuit in *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) also adopted *Giancola*’s definition of “substantial question.”

All this Court need find is that Mr. Maggio’s appeal presents a substantial question of law or fact upon which reasonable jurists could in good faith disagree. *Id.* This standard is not onerous and is routinely satisfied by Defendants in comparable cases raising questions about new applications of broad federal laws.

If the Eighth Circuit finds for Mr. Maggio’s position it is very likely he will be released from prison. If the Eighth Circuit does not find the statute inapplicable, Mr. Maggio will file a Petition for Writ of Certiorari to the Supreme Court which is likely since the Eighth Circuit will be a split on the issue since a

highly important jurisdictional question will exist. For these reasons he should be allowed release during his pending appeal.

CONCLUSION

Mr. Maggio should be released pending his appeal to the Eighth Circuit Court of Appeals because he meets all requirements under Federal law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Hensley, Jr., certify that the forgoing instrument was filed with the Clerk of the Court using the CM/ECF system, which should send notification of all parties of record this 19th day of April 2016.

/s/ James E. Hensley, Jr.