IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA — PLAINTIFF

vs. — Criminal No. 3:03-cr-120WS

PAUL S. MINOR, JOHN H. WHITFIELD, OLIVER E. DIAZ, JR., JENNIFER DIAZ, AND WALTER W. "WES" TEEL — DEFENDANTS

ORDER

Before the court is the motion of the defendant John H. Whitfield *pro se* for release pending the appeal of his conviction to the United States Court of Appeals for the Fifth Circuit **[Docket No. 755]**. The defendant informs the court that he believes that his attorney has been forced to abandon his case for medical reasons. The defendant further asserts that he should be released so that he may obtain new counsel and to pursue his appeal before the Fifth Circuit more efficiently.

Defendant submits this motion under the auspices of Title 18 U.S.C. § 3143(b)(1) and Rule 9 (b & c) of the Federal Rules of Appellate Procedure. At his jury trial, the defendant was adjudicated guilty of six counts of conspiracy; mail fraud/honest services fraud; and bribery involving federally funded programs, all in violation of Titles 18 U.S.C. §§ 371, 1341, 1346 and 666.

Title 18 U.S.C. § 3143(b)(1) provides in relevant part 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, shall 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."

Rule 9(c) of the Federal Rules of Appellate Procedure provides that, "[t]he court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c)."

The applicable provision in the instant case, Title 18 U.S.C. § 3143(b)(1), says that the defendant in this case *shall* be detained unless this court is able to find that the appeal raises a substantial question of law or fact. While § 3143(b)(1) also addresses danger to the community, prosecution of the appeal for purposes of delay, and the matter of flight risk, this court presently finds these matters to be of secondary concern. Moreover, defendant's contention that his attorney is suffering medical issues and the likelihood of better access to clerical assistance are not issues which drive the court's consideration of the requested release in this instance. This court, instead, looks to the true issue before the court, namely, whether the defendant has raised any substantial question of law or fact which would justify his release while appeal is pending.

A substantial question of law or fact is one that is not frivolous, which is novel, and which raises substantial doubt as to the outcome of its resolution. The defendant

is required to show that a contrary appellate ruling would more probably than not result in reversal, an order for a new trial, 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 duration of the appeal process. *United States v. Valera-Elizondo*, 761 F.2d 1020, 1022-25 (5th Cir. 1985).

In *United States v. Valera-Elizondo*, the Fifth Circuit addressed the correct interpretation of "raises a substantial question of law or fact likely to result in reversal or an order for a new trial." Focusing upon what "substantial question" means, the Fifth Circuit adopted the interpretation of § 3143(b)(2) announced by the United States Court of Appeals for the Third Circuit in *United States v. Miller*, 753 F .2d 19 (3d Cir. 1985), subject to its own additional observations and those made by the United States Court of Appeals for the Eleventh Circuit in *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985). *Valera-Elizondo*, 761 F.2d at 1025. The Fifth Circuit agreed with the *Miller* court that the proper interpretation of section 3143(b)(2) requires the making of two determinations by the court. *First*, the court must determine that the question raised on appeal is substantial, that is to say a question that is either novel, which has not been decided by controlling precedent, or which is fairly doubtful. *Secondly*, the court must determine whether that issue is sufficiently important to the merits that a contrary appellate ruling is likely to require reversal or a new trial. *Valera-Elizondo*, 761 F.2d at 1023 (citing Miller, 753 F.2d at 23).

The Fifth Circuit also agreed with the *Giancola* Court's observation "that 'substantial question' means that the issue presented must raise a substantial doubt (not merely a fair doubt) as to the outcome of its resolution." *Id.*

Finally, the Fifth Circuit held that "likely" as used in § 3143(b)(2) should be assigned "its ordinary meaning of 'more likely than not,' " *id.*, and explained that the statutory requirement that the defendant demonstrate that the substantial question, if determined favorably for him on appeal, would likely result in a reversal or an order for a new trial means "reversal or an order for new trial **on all counts on which imprisonment has been imposed**." *Id*. (citing *Giancola*, 754 F.2d at 901, and *Miller*, 753 F.2d at 24). *See also U.S. v. Skilling,* 2006 WL 3030721 (S.D.Tex. Oct 23, 2006), citing *Morison v. United States*, 486 U.S. 1306, 108 S.Ct. 1837, 100 L.Ed.2d 594 (1988)(Rehnquist, Circuit Justice) (denying bond application for appeal to Supreme Court because petitioner had "not shown that his appeal is 'likely to result in reversal' with respect to all the counts for which imprisonment was imposed"); and *United States v. Bilanzich*, 771 F.2d 292, 298 & n. 6 (7th Cir. 1985) (quoting United States v. Powell, 761 F.2d 1227, 1233 (8th Cir. 1985) ("The substantial question must be one that would result in reversal or a new trial on all counts for which the defendant has been sentenced to prison").

The defendant raises a dozen issues which he contends will offer the Appeals Court substantial questions of law to consider: (1), failure to instruct *quid pro quo*); (2), failure to reverse numerous critical evidentiary rulings; (3), failure to dismiss charges under Title 18 U.S.C. § 666; (4), failure to instruct the jury that criminal intent had to be

proved by the Government; (5), limiting cross examination of the witness Salloum; (6), allowing Government witnesses to testify as experts; (7), failure to dismiss the various indictments for prosecutorial misconduct; (8), allowing jury to take an unredacted copy of an indictment into deliberations; (9), failure to dismiss for selective political prosecution; (10), error in admitting a summary chart into evidence; (11), denial of several speedy trial motions; and (12), imposition of an unreasonable sentence.

In various pre-trial and post-trial motions, this court has denied the defendant's motions for dismissal, for judgment and for new trial on some of these issues, concluding that, viewed favorably to the Government, the evidence supported the verdict rendered. In light of what the defendant presents in support of his request to be released, this court must adhere to its previous rulings. Additionally, this court holds that the defendant has not demonstrated a substantial question of law or fact under the standard explained in *Valera-Elizondo*. Finally, this court is not persuaded that the defendant has submitted any substantial question of law which would result in reversal or a new trial on all counts for which the defendant has been sentenced to prison. Therefore, the motion of the defendant to be released pending appeal [**Docket No. 755**] is denied.

SO ORDERED, this the 13th day of July, 2009.

s/ HENRY T. WINGATE
CHIEF UNITED STATES DISTRICT JUDGE