UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**4:12-CR-00087-RAS-KPJ**
	)	
v.	)	
	)	
XXXX XXXX, JR.,	)	
	)	
Defendant.	)	
	)	

APPLICATION FOR RELEASE PENDING RULING ON APPEAL BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Defendant, XXXX XXXX, Jr., hereby applies to this Court for release pending a ruling on his appeal filed in the United States Court of Appeals for the Fifth Circuit. He is scheduled to report for service of his sixty month sentence on September 15, 2017.

I. DISCUSSION

The authority for release pending appeal is found in 18 U.S.C. § 3143(b). In order to qualify for release under 18 U.S.C. § 3143(b), a convicted defendant must demonstrate:

> (1) By clear and convincing evidence that he 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 purposes of delay;

> (3) That the appeal raises a substantial question of law or fact that if determined favorably to the defendant on appeal, will likely result in a reduced sentence to a term of imprisonment less than the...expected duration of the appeal process.

See United States v. Valera-Elizondo, 761 F.2d 1020, 1025 (5th Cir. 1985).

A. Likelihood to Flee and Danger to the Community

The first prong of the three pronged test is easily met and, in fact, *the Court has already concluded that Mr. XXXX has met this prong*. Mr. XXXX turned himself in following his indictment in this case. He has been on pretrial release for more than five years since his voluntary surrender in or about May 2012. He was released following his conviction and has been found by the Court to be a good candidate to self report to begin the service of his sentence both of which required the Court to make a finding by clear and convincing evidence that he was not likely to flee or pose a danger to the safety of any other person or the community. *See* 18 U.S.C. § 3143(a).

Indeed, Mr. XXXX appeared at sentencing despite facing a recommended sentence of a very significant prison term as set out in the Presentence Report. Finally, Mr. XXXX was not charged nor convicted of a violent offense and poses no danger to any person or the community.

B. Mr. XXXX's Appeal is Not for the Purpose of Delay

The undersigned counsel certifies that Mr. XXXX's appeal is not for the purpose of delay. Indeed, with due respect to this Court, Undersigned Counsel feels

very strongly that Mr. XXXX's conviction could be reversed on appeal and a judgment of acquittal entered. As this Court is well aware, it takes approximately eighteen months to prosecute an appeal. It would be a travesty for Mr. XXXX to serve eighteen months in prison, especially given his brother's Stage 4 cancer diagnosis, only to have his conviction reversed on appeal.

C. Substantial Question of Law Likely to Result in a Term of Imprisonment Less Than the Expended Duration of the Appeal Process

The third prong of § 3143(b) at first blush appears to put this Court in the unenviable position of passing judgment on its own decisions. However, the congressional intent of § 3143(b) has been elucidated more clearly by the appellate courts. Section 3143(b)(1)(B) does *no*t require the district court to predict whether its decision will be reversed at the appellate level. In fact, the Fifth Circuit has made clear that release on appeal is *not* conditioned on a district court's finding that it committed error. *United States v. Valera-Elizondo*, 761 F.2d at 1024. Conditioning bail pending appeal on a finding of reversible error would effectively render the statute moot because such errors are properly dealt with in post-trial motions. *Id*. Indeed, the Fifth Circuit quoted from a Third Circuit decision in *United States v. Miller*, 753 F.2d 19 (3d Cir.1985):

> ....[W]e are unwilling to attribute to Congress the cynicism that would underlie the provision were it to be read as requiring the district court to determine the likelihood of its own error. A district judge who, on

> reflection, concludes that s/he erred may rectify that error when ruling on post-trial motions. Judges do not knowingly leave substantial errors uncorrected, or deliberately misconstrue applicable precedent. Thus, it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.

United States v. Valera-Elizondo, 761 F.2d at 1024, *citing, Miller*, 753 F.2d at 23.

Instead, the Fifth Circuit has explained that an issue presents a substantial question of law or fact if the issue raises a "substantial doubt (not merely a fair doubt) as to the outcome of its resolution." *Id.* Put more succinctly, the Fifth Circuit has concluded that, **a "substantial question" is a "close question, or one that very well could be decided the other way."** *Id* (emphasis added), *citing United States v. Giancola*, 754 F.2d 898, 901 (11th Cir.1985).[1] A defendant "does not have to show that it is likely or probable that he or she will prevail on the issue on appeal." *Powell*, 761 F.2d at 1234.

Among other issues on appeal, Mr. XXXX will argue:

> **The Simple Act of Allegedly Singing a Document in the Eastern District of Texas that was Prepared in the Northern District of Texas to be Submitted to a Government Agency Located in the District of Colorado is Insufficient to Confer Venue in the Eastern District of Texas.[2]**

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[1]*See also, United States v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985) (*en banc*), *cert. denied*, 106 S.Ct. 1947.

[2]There is no question that the URLA that the government argues contained the false statement in this case was prepared by Uniq Finance which was located in the Northern District of Texas. Likewise, the only evidence adduced at trial is that the title company would have sent copies of the closing documents to American Home Key located in the Northern District of Texas who then would have sent the documents to FHA/HUD in the District of Colorado.

1. The *Majority* of Precedent Supports Mr. XXXX's Argument on Appeal.

Significantly, for purposes of deciding this motion, Mr. XXXX's argument on appeal will be supported by the majority of existing precedent.

In *United States v. Katzoff*, 268 F.Supp. 2d 493 (E.D. Pa. 2003), the defendant was charged with submitting a false statement to the Resolution Trust Corporation (RTC). As noted by the Court:

> It is undisputed that the personal financial statement signed by defendant was notarized on January 21, 1993 in Ambler, Montgomery County within the Eastern District of Pennsylvania. The statement had originally been prepared for Chemical Bank, not the RTC. Neither party contests the fact that the RTC received the financial statement at its office in Atlanta, Georgia sometime thereafter. However, at the oral argument on the motion to dismiss, the Government conceded that it has no direct proof of the location from which the statement was transmitted to the RTC. It has no direct evidence, for example, that the statement was mailed from this district. At most, the Government will be able to show that receipt by the RTC's Atlanta office was not by hand delivery and that officials at the RTC in Atlanta had correspondence and telephone discussions with defendant related to their negotiations when he was in the Eastern District of Pennsylvania.

Id. at 495. The government argued that, because the alleged false statement was "prepared and notarized" in the Eastern District of Pennsylvania, it would be able to establish venue in that district at trial. *Id*. at 496. The Court analyzed the government's argument under 18 U.S.C. § 3237(a) which applies to an offense begun in one district and completed in another and rejected the government's argument:

> For this purpose, a false statement is not made unless it is communicated

> by mailing or in some other way. A person who simply prepares and executes it in Montgomery County, Pennsylvania, without doing more in this district, cannot be said to have begun here an offense under §1014, any more than a person can be said to have commenced a bank robbery in the district where he prepared the note which he later passed to the teller during the hold-up of a bank in a different district. We hold that the mere preparation and execution of a false statement in this district is insufficient as a matter of law to establish proper venue under the Constitution or § 3237(a) for a violation of § 1014.

Id. at 498.

In *United States v. Mischlich*, 310 F.Supp. 669 (D. NJ. 1970), the defendant was charged with submitting a false statement to the Small Business Administration (SBA). The government, again relying upon 18 U.S.C. § 3237(a), argued that false statements prepared in the District of New Jersey and carried into the Eastern District of Pennsylvania, where they were filed, with the SBA was sufficient to confer venue in the District of New Jersey. *Id*. at 671. The Court rejected the government's argument:

> This construction of section 3237(a), if accepted, would do violence to Art. III, § 2 of the Constitution and the Sixth Amendment which provide that the trial of all crimes, except impeachments, shall be held in the states where the crimes were committed. Since the only criminal act which was proved occurred in Pennsylvania, it alone had venue under the terms of the Constitution. Multiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act'. *Travis v. United States, supra*, 364 U.S. at 636, 81 S.Ct. 358. The crime here involved falls in neither of these categories.

Id.

In *Reass v. United States*, 99 F.2d 752 (4th Cir. 1938), the defendant was

charged with submitting false statements to the Federal Home Loan Bank Board (FHLB). The false statements were "prepared, filled out, and signed" in the District of West Virginia and then taken in person by the defendant to Pittsburgh where they were presented to the Pittsburgh FHLB office. *Id*. at 753. The United States Court of Appeals for the Fourth Circuit concluded that venue was not proper in the District of West Virginia:

> [T]he statute condemns the making of a false statement for the purpose of influencing the bank. The mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place. It follows that the acts performed by the defendant in Wheeling, although preparatory to the commission of the crime, were no part of the crime itself. That took place entirely in Pittsburg [sic.] where the writing previously prepared was presented to the bank.

Id. at 755.

Here, the crime alleged was submitting a material false statement *to* FHA/HUD much like the crimes in the above cases were submitting false statements *to* the RTC, the SBA, or the FHLB. As noted by the Fourth Circuit in *Reass*, it is only when the false statement is "communicated to the lending bank that the crime takes place." *Id*. at 755. It is undisputed in this case that the URLA was mailed from American Home Key in the Northern District of Texas to FHA/HUD in the District of Colorado. Certainly, venue would be proper in the District of Colorado. Arguably, venue would be proper in the Northern District of Texas where the URLA was prepared and from

where it was mailed. Nevertheless, based upon the cases cited above, venue is not proper in the Eastern District of Texas.

2. This Court Adopted the *Minority* Position in Mr. XXXX's Case

In denying Mr. XXXX's Motion for a Judgment of Acquittal on these grounds following the close of the evidence, the Court indicated it was relying upon *United States v. Rosen*, 365 F.Supp. 2d 1126 (S.D. Cal. 2005) and the "general venue statute" (18 U.S.C. § 3237). *See* Transcript 1/27/17 at 49-50. In doing so, it certainly adopted a minority position.

Rosen gives some very limited support to this Court's ruling. Nevertheless, in order to reach that ruling, *Rosen* had to explicitly distinguish *Reass* and *Katzoff*. *Rosen*, 365 F.Supp. 2d at 1135. The judge in *Rosen* noted that *Reass* and *Katzoff* involved a "false bank loan application, not a report-such as those involved here-that the law requires be made and filed." *Id*. ("No one is required to apply for a loan.") Significantly, Mr. XXXX's case essentially involved a false bank loan application and, thus, is much closer to the facts involved in *Reass* and *Katzoff* than *Rosen.*

Next, *Katzoff* and *Mischlich* both explicitly rejected this Court's application of the "general venue" (18 U.S.C. § 3237) statute to similar facts.[3]

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[3] *Katzoff*, 268 F.Supp. 2d at 498 ("We hold that the mere preparation and execution of a false statement in this district is insufficient as a matter of law to establish proper venue under the Constitution or § 3237(a) for a violation of § 1014."); *Mischlich*, 310 F.Supp. at 671 (Crime of making false representations of material fact in matter within jurisdiction of Small Business

3. At the Very Least, this Issue is a "Close Question, or One that Very Well Could Be Decided the Other Way."

Again, the question raised in this motion is *not* whether this Court's resolution of this issue was right or wrong and Mr. XXXX does not even have to show that he "will prevail on the issue on appeal." *Powell*, 761 F.2d at 1234. The question is simply whether this issue presents a "close question, or one that very well could be decided the other way." *United States v. Valera-Elizondo*, 761 F.2d at 1024.

As noted above, three courts (*Katzoff*, *Mischlich* and *Reass*) have decided this issue in a way *contrary* to the decision by this Court. Moreover, two of those courts (*Katzoff* and *Mischlich*) explicitly *rejected* the application of the "general venue" statute which was relied upon by this Court in rejecting Mr. XXXX's argument. Finally, the one court that was relied upon by this Court (*Rosen*) explicitly acknowledged that its reasoning did not necessarily apply to cases involving false loan documents.

In sum, not only is this issue open to debate among reasoned jurists, this Court's resolution of the issue is contrary to most, if not all, applicable precedent. Thus, clearly the issue is one that could be decided the other way because it has already been decided the other way by three courts.

Administration does not involve "distinct parts" or "a continuously moving act" so as to be within contemplation of multiple venue statute providing that any offense against United States begun in one district and completed or committed in more than one district may be prosecuted in any district in which such offense was begun, continued or completed.).

II. CONCLUSION

Just one month ago, this Court determined by clear and convincing evidence that Mr. XXXX was not likely to flee or pose a danger to the safety of any other person or the community in order to allow him to self report. *See* 18 U.S.C. § 3143(a).

As indicated above, Mr. XXXX believes he has a substantial issue on appeal and Undersigned Counsel can certainly represent to the Court that this appeal is not being taken for purposes of delay. Moreover, it would be a travesty for Mr. XXXX to be imprisoned during the pendency of this appeal, especially given his brother's Stage 4 cancer diagnosis, only to have his conviction reversed on appeal.

Finally, as discussed above, one of the issues that will be raised by Mr. XXXX on appeal is certainly one that satisfies the "substantial question" prong of 18 U.S.C. § 3143(b) because it presents a question that could be decided a different way than was decided by this Court. Indeed, this Court's position has little, if any, precedential support whereas Mr. XXXX's position has at least three cases to support it.

In sum, Mr. XXXX has met all the prongs of 18 U.S.C. § 3143(b) and is entitled to release pending the resolution of his appeal by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ F. Clinton Broden
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CERTIFICATE OF CONFERENCE

I, F. Clinton Broden, certify that I conferred with Camelia Lopez, the Assistant United States Attorney assigned to the case and it was determined that the government takes no position.

/s/ F. Clinton Broden
F. Clinton Broden

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 14, 2017, I caused the foregoing document to be served by the electronic case filing system (ECF) on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden

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Plaintiff,	)	**4:12-CR-00087-RAS-KPJ**
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v.	)	
	)	
XXXX XXXX, XXXX,	)	
	)	
Defendant.	)	
	)	

ORDER

Defendant XXXX XXXX XXX's Application for Release Pending Ruling on Appeal by the United States Court of Appeals for the Fifth Circuit, is this ____ day of August, 2017 GRANTED.