

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

UNITED STATES OF AMERICA

vs.

Case No. 2:20-cr-114-JES-MRM

CASEY DAVID CROWTHER

**APPELLANT CROWTHER'S CORRECTED MOTION
FOR RELEASE PENDING APPEAL¹**

**TIME SENSITIVE - DEFENDANT REQUIRED TO SURRENDER
FOR SERVICE OF SENTENCE JULY 30, 2021**

Casey David Crowther (Crowther), the Defendant-Appellant herein, by his undersigned appellate counsel, William Mallory Kent, hereby moves for his release on conditions pending appeal, pursuant to Title 18, U.S.C. § 3143(b)(1).

FACTS AND PROCEDURAL HISTORY

Crowther proceeded to trial on counts one, two, three and four of a second superseding indictment charging Crowther in count one with bank fraud in violation of 18 U.S. C. § 1344 and in count two with false statement to a financial institution in violation of 18 U.S.C. § 1014. Counts three and four charged money laundering in violation of 18 U.S.C. § 1957 (deriving from the conduct in counts one and two,

¹ Pursuant to the Local Rule, counsel has requested the position of the Government on this motion and Assistant United States Attorney Trent Reichling has responded that the Government opposes this request.

all of which derived from an Small Business Administration (SBA) loan). Prior to trial Crowther pled guilty to counts five and six, which charged bank fraud and false statements in connection with an unrelated residential mortgage loan.² Crowther was convicted of all counts and sentenced by this court to a total term of imprisonment of 37 months concurrent on all counts. A copy of the judgment is annexed hereto as Exhibit A.

Crowther had been released on conditions during the pendency of the indictment and the Court allowed Crowther to remain free on conditions after the verdict and sentencing with a self-surrender date of July 30, 2021.

Crowther made a motion for judgment of acquittal at the close of the evidence and filed a written motion for new trial after the verdict (Doc. 140), both of which motions were denied by this Court. (Doc. 169-2) A copy of the Defendant's Renewed Motion for Judgment of Acquittal or Alternatively for New Trial is annexed hereto as Exhibit B.

Crowther retained appellate counsel and filed a timely notice of appeal. By this motion Crowther is requesting the Court permit Crowther to remain free on conditions of release pending the appeal.

² Count seven of the second superseding indictment was dismissed on motion of the Government.

RELEASE PENDING APPEAL

Release pending appeal by the defendant is governed by 18 U.S.C. § 3143(b)(1), which provides, in pertinent part:

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

18 U.S.C. § 3143(b)(1).

THIS APPEAL PRESENTS A SUBSTANTIAL QUESTION OF LAW

In *United States v. Giancola*, 754 F.2d 898, 900-01 (11th Cir. 1985), the United States Court of Appeals for the Eleventh Circuit adopted the interpretation of this portion of the statute previously made the Third Circuit in *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985). The Eleventh Circuit observed that in *Miller*, the Third Circuit had held that the proper interpretation of the “substantial question” provision was that it required “first, that the appeal raise a substantial question of law or fact, and second, that ‘if that substantial question is determined favorably to the 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.’” *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23-24).

The Eleventh Circuit observed that the Third Circuit had interpreted “the likely to result in reversal” language as going to the significance of the substantial issue to the ultimate disposition of the appeal. *Giancola*, 754 F.2d at 900 (citing *Miller*, 753 F.2d at 23). The Eleventh Circuit agreed with the Third Circuit that “[a] court may find that reversal or a new trial is ‘likely’ only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.” *Id.*; see also *United States v. Hicks*, 611 F. Supp. 497, 499 (S.D. Fla. 1985)

(“Thus, in determining whether there is a substantial question, a court must keep in mind that it is not being asked to reverse its position on issues decided at trial, nor is it being asked to grant a new trial. It must decide only that a significant issue exists that merits appellate review and that the issue is critical enough to the defendant’s conviction that a contrary appellate ruling would warrant a reversal.” (citing *Giancola* and *Miller*)).

SUBSTANTIAL QUESTION TO BE PRESENTED ON APPEAL

Whether the Court Erred in Denying Crowther’s Renewed Motion for Judgment of Acquittal or Alternatively for a New Trial?

This appeal presents a question of first impression in this and every other Circuit, in essence, whether the Government can sufficiently prove legal falsity under the bank fraud and bank false statement statutes when the loan was governed by the Paycheck Protection Program (PPP) of the CARES Act and the governing law was in constant flux, ambiguous or conflicting. No Circuit Court of Appeal has addressed criminal liability under the PPP. Crowther’s case will be a test case for fundamental economic and legal principles. Crowther incorporates by reference herein the arguments made in the Renewed Motion for Judgment of Acquittal or Alternatively for New Trial (Doc. 140) annexed hereto as Exhibit B.

NO RISK OF FLIGHT OR DANGER TO THE COMMUNITY

Crowther has been released on conditions since his first appearance and was allowed to remain free on conditions of release after the verdict and after sentencing with a self surrender date of July 30, 2021. Crowther therefore clearly does not pose a risk of flight or danger to the community.

CONCLUSION

Crowther submits that his appeal raises a substantial legal question. Crowther is not required to establish that the ultimate result on appeal will be reversal on this issue. Instead, this Court need do no more than decide that within the meaning of 18 U.S.C. § 3143(b), the issue which Crowther will raise on appeal is sufficiently substantial to satisfy the requirements of the statute, i.e., that is “one of more substance than would be necessary to a finding that it was not frivolous. It is a “close” question or one that very well could be decided the other way.” *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985). Such is the question of first impression in this case.

Although Crowther pled guilty to counts five and six and was sentenced to a concurrent 37 months imprisonment on those two counts, were the appeal of counts one through four successful, it would mandate a resentencing of counts five and six, and as to those counts, standing alone, the guideline range would have been 0-6

months in Zone A, qualifying Crowther for the equivalent of a probationary sentence. Therefore his conviction by guilty plea as to counts five and six does not foreclose release on appeal.

Accordingly, Crowther respectfully requests this Honorable Court order Crowther be released on conditions pending the resolution of his appeal.

Respectfully submitted,

KENT & McFARLAND
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CERTIFICATE OF SERVICE

I certify that on July 14, 2021, I caused a true and correct copy of Crowther's Motion for Release Pending Appeal to be served via CM/ECF upon all counsel of record.

s/ William Mallory Kent

William Mallory Kent