UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
________________________________/

SHEPPARD'S PROVISIONAL MOTION FOR RELEASE PENDING APPEAL, OR IN THE ALTERNATIVE, FOR SELF-SURRENDER

Should the Court deny his motions for judgment of acquittal or a new trial, ECF# 204, #205, defendant Eric Dean Sheppard respectfully requests this Court to permit his continued release pending resolution of a timely-filed appeal. Sheppard meets the statutory criteria, as he has proven by clear and convincing evidence that he is not likely to flee or pose a danger to the community. His appeal is not intended to delay but instead raises substantial questions, as evidenced by the Court's careful consideration of his pending motions.

In the alternative, Sheppard requests that this Court allow him to self-surrender to a designated Bureau of Prisons ("BOP") facility at least seven (7) days after the Eleventh Circuit decides a timely-filed motion for release pending appeal, or seven (7) days after he is designated by the BOP, whichever is later.

I. THIS COURT SHOULD ALLOW RELEASE PENDING THE RESOLUTION OF A TIMELY-FILED APPEAL

Section 3143(b)(1) and (2) require this Court to release a defendant on bond pending appeal if four conditions are met: (1) the defendant is not a flight risk or danger to the community; (2) the appeal is not for the purpose of delay; and (3) the appeal raises a substantial question of law or fact that (4) is likely to result in reversal or a more favorable sentence. 18 U.S.C. § 3143(b); *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985).[1]

A. Sheppard Has Proved That He Is Not A Flight Risk Or Danger To The Community

Without objection from the government, Magistrate Judge Reid first granted Sheppard's release on bond pending trial in July 2022. ECF#6, #14. After trial, this Court allowed Sheppard's pre-trial conditions. ECF#191. Throughout, Sheppard has been released on bond and has always adhered to all conditions of release.

Sheppard has strong family ties within the district, including his immediate family who depend on his presence, provide a significant incentive for him to remain compliant. Sheppard has substantial community and business interests in the area, as evidenced by the numerous letters of support that undersigned has collected and

[1] Section 3143(b) applies only after a sentence is imposed. Sheppard files this motion now, before the Court has adjudicated his post-trial motions and imposed a sentence, so that the motion is fully briefed and ripe for disposition before sentencing (if any). If the Court denies Sheppard's post-trial motions, he intends to file a timely notice of appeal. *See* 18 U.S.C. § 3143(b).

will submit in anticipation of the sentencing hearing. Sheppard is a cancer survivor, requiring ongoing medical care and regular appointments with his long-time physicians, further binding him to the area. He has invested substantial resources to retain trial and appellate counsel, including lawyers who litigated the key cases that will be addressed in his appeal—*Dubin v. United States*, 599 U.S. 110 (2023), *Ciminelli v .United States*, 598 U.S. 306 (2023), and *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016)—an appeal that he would forfeit if he were to flee.

Indeed, the government does not seriously dispute that Sheppard has made a showing 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." 18 U.S.C. § 3143(b)(1)(A). *See* Rule 88.9(a) statement of undersigned, *post* at page 8.

B. Sheppard's Appeal Is Not For The Purpose Of Delay[2]

As demonstrated in Sheppard's post-trial briefing, Sheppard has strong arguments that his convictions for aggravated identity theft and wire fraud are invalid. The manifest purpose of Sheppard's appeal will be to secure acquittal under cases like *Dubin*, *Ciminelli*, and *Takhalov*. Even if not convinced that Sheppard's arguments will ultimately prevail in the Eleventh Circuit, the government is hard-pressed to question the bona fides of counsels' combined opinions that the issues are

[2] Courts often consider the second and third factors together: if an appeal raises a substantial question, it almost certainly is not for the purpose of delay. *See, e.g.*, *White*, 2020 WL 4548226, at *4.

substantial. Given the robust legal discourse during the hour-long, April 8, 2024 oral argument before this Court, undersigned submits that "at least one member of the appellate screening panel [will also believe[] that [Sheppard's] appeal merit[s] considering oral argument before rendering a decision," suggesting that the appeal presents a "`close' question" that is not a waste of the court's time. *See, e.g., United States v. White*, No. 18-CR-60174-BB, 2020 WL 4548226, at *4 (S.D. Fla. Aug. 6, 2020) (Bloom, J.).

C. Sheppard's Appeal Will Raise Substantial Questions Of Law

There is a substantial question whether Sheppard's aggravated identity theft convictions survive *Dubin*, which holds that the use of another person's identity must be "at the crux" of what makes the underlying conduct fraudulent. 599 U.S. at 131-32. The Eleventh Circuit will be faced with competing interpretations of the statute: The government's exceedingly broad interpretation versus Sheppard's narrower (correct) one. The government has argued that the misuse of Cupersmith's identifying information was sufficient because it "lent credibility" to Sheppard's alleged fraud. But whether lending credibility meets *Dubin*'s "at the crux" test "very well could be decided the other way." *Giancola*, 754 F.2d at 901.

There is also a substantial question as to the viability of Sheppard's wire fraud convictions. The government alleged that Sheppard defrauded the lending banks by misrepresenting his businesses' eligibility to receive PPP loans. But under

Takhalov, there is no wire fraud where, as here, the banks got everything they bargained for—namely, processing fees and the PPP interest rate—because Sheppard's misrepresentations were not material to the bank's financial—i.e., property—interest in the transaction. Indeed, at the post-trial hearing, the government conceded that the banks would have made the same loans on the same terms to another borrower if they had not lent to Sheppard, confirming that Sheppard's misrepresentations were not material to the banks' property interest in the loans. [Hrg. Tr. 52-54.] And as to the SBA, the loan guarantees were not the object of Sheppard's fraud (the object was loan proceeds, not a guarantee); nor did Sheppard *obtain* the guarantees from the SBA. The government can scarcely contend that its position is free from doubt when its position seems to conflict squarely with appellate precedent.

D. If Successful, Sheppard's Appeal Will Reduce Or Eliminate His Sentence

The last factor asks whether the substantial question is "likely to result in (i) reversal or (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." 18 U.S.C. § 3143(b)(3)(B). Importantly, that factor does *not* require this Court make a prediction about whether it "likely" made an error. *Giancola*, 754 F.2d at 900. Rather, this factor requires this Court to assess the likely "prejudicial effect" of the asserted error. *Id.* (quotations omitted). That is, the Court "must assume that the substantial question presented will go the other way on appeal and then assess the impact of such assumed error on the conviction" and sentence. *United States v. Powell*, 761 F.2d 1227, 1234 (8th Cir. 1985); *see also Giancola*, 754 F.2d at 900 (explaining that courts consider at the second step whether "if 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"). If the asserted error is harmless or not preserved, the appeal is unlikely to change the defendant's sentence and this factor will not be satisfied. *Giancola*, 754 F.2d at 900. But if the defendant's argument *is* likely to change the defendant's sentence—because, if accepted, it will result in "reversal," "a new trial," no imprisonment, or a reduced sentence that is less than expected duration of an appeal—then this factor is satisfied. 18 U.S.C. § 3143(b)(1)(B).

The reason for this test is straightforward. If there is no chance the defendant's sentence would be different if he won on appeal, there is no reason for him not to begin serving his sentence. But if there is a likelihood that the sentence would be materially shorter if the defendant wins, there is a risk of irreparable harm: the defendant might serve more time in prison while the appeal is pending than he is ultimately required to serve.

Dubin illustrates these stakes. Defendant Dubin was sentenced in 2019 to two years in prison for aggravated identity theft. *See United States v. Dubin*, No. 1:17-CR-227-2 (W.D. Tex.), ECF No. 271 (Judgment). The district court granted Dubin's motion for bond pending appeal [*id.*, ECF No. 306 at 47, 87], and Dubin's aggravated identity theft conviction was ultimately reversed by the Supreme Court four years later. If Dubin had been imprisoned pending appeal, he would have served the full mandatory-minimum sentence for a crime the Supreme Court held he did not commit, *Dubin*, 599 U.S. at 132.

The stakes here are no less significant. Given the time it can take for Sheppard's appeal to run its course—*e.g.*, 42 months in the *Takhalov* case[3]—Sheppard could serve his entire sentence before his appeal is decided. If Sheppard prevails in all his arguments on appeal, he should serve no time. Even if only successful challenging the convictions for Aggravated Identity Theft, 18 U.S.C. § 1028A, he would avert the two-year mandatory *consecutive* sentence. And if successful challenging just the government's fraud loss theory advanced in the Presentence Investigation Report, *see* Sheppard's Sentencing Memorandum, ECF#236-1, his advisory guideline sentence would be "reduced … to a term of

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[3] In *Takhalov*, it took 19 months just from the date that the Court "determined that oral argument [would] be necessary," 11 Cir. No. 13-12385-C at ECF#100 (04/02/2015), until the mandate issued finally reversing the convictions. *Id.* at ECF#153 (11/03/2016).

imprisonment less than … the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iv).

II. IN THE ALTERNATIVE, THIS COURT SHOULD ALLOW SHEPPARD TO SELF-SURRENDER

In the alternative, Sheppard requests that this Court allow him to self-surrender to a designated Bureau of Prisons ("BOP") facility seven (7) days after the Eleventh Circuit decides a timely-filed motion for release pending appeal, or seven (7) days after he is designated by the BOP, whichever is later. With respect to release pending self-surrender, the only question is whether Sheppard is a flight risk or a danger to the community. He is not.

Pursuant to Rule 88.9(a), undersigned conferred with government counsel who advised by email that they oppose the motion because they "don't think [Sheppard] satisfies the statute, ***mainly subsection B***," (emphasis added), *i.e.,* "that the appeal is not for the purpose of delay and raises a substantial question of law or fact …." *See* 18 U.S.C. § 3143(b)(1)(B). Thus, the government does not seriously contend that Sheppard is a flight risk, much less a danger to the community. Even if Sheppard had no viable appeal, therefore, allowing a self-surrender would be appropriate. The government suffers no prejudice—actually saves resources—when a defendant like Sheppard surrenders at his own expense directly to the facility to which he is designated: No need for the already-crowded pretrial detention facility in Downtown (FDC-Miami) to temporarily house a sentenced prisoner and no financial expense to the U.S. Marshal to transport the prisoner to a potentially far-away location. Of course, Sheppard has demonstrated that his appeal is viable, so his ask is a modest one: that he be granted the opportunity to petition the Eleventh Circuit for continued release pending appeal before he need surrender.

Respectfully submitted,

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