UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-20290-CR-BLOOM(s)

UNITED STATES OF AMERICA

vs.

ERIC DEAN SHEPPARD

Defendant.
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UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

The United States of America, through the undersigned Assistant United States Attorney, hereby opposes the defendant's provisional motion for bond pending appeal, and in support thereof submits the following memorandum.

MEMORANDUM OF LAW

In anticipation that the defendant will appeal the sentence in this case, he is moving pursuant to 18 U.S.C. § 3143(b), for his continued release during the pendency of the appeal. Section 3143 was initially enacted in 1984, and "was intended to change the presumption [of release] so that the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (citing S. Rep. No. 225, 98th Cong., 1st Sess. At 26 (1983), *reprinted* in 1984 U.S. Code. Cong. & Ad. News 1, 29 (Supp. 9A)). Section 3143(b) provides that:

> (1) … 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) Aa 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), *as amended*.

A. The defendant must prove that he is not a flight risk by clear and convincing evidence.

Under the Bail Reform Act, it is the convicted defendant's burden to prove by clear and convincing evidence that he will not flee. The law recognizes that a conviction and a likely prison sentence is a significant incentive to flee. In the Presentence Investigation Report, the estimated guideline range is a prison term of 57 to 71 months, plus a mandatory two-year prison sentence. Under the government's estimated guideline range, the defendant is facing a prison term of 70 to 87 months, plus a mandatory two-year prison sentence. By either measure, the defendant is facing a lengthy prison sentence in the range of approximately seven to nine years that creates a real incentive to flee.

The defendant does not have minor children living at his home. He also has far more financial resources than most defendants convicted of federal crimes. The defendant has not yet spent any resources on an appeal, and the only guarantee to avoiding jailtime – at least in the short term – is to flee. While it is true that the government's main reason for opposing the defendant's motion is that he does not satisfy subpart (b), the defendant has to prove to this Court by clear and convincing evidence that he is not likely to flee.

B. The appeal does not raise a substantial question of law or fact likely to result in a reduced prison sentence that is shorter than the expected duration of an appeal.

The government agrees with the defendant insofar as answering the question of whether the appeal is made for the purpose of delay is answered in the remaining analysis of Section 3143(b). In *Giancola*, the Eleventh Circuit set forth a two-part approach to the substantial question issue: (i) whether the appeal raises a substantial question of law or fact, and (ii) whether the substantial question, if determined favorably to the defendant on appeal, is likely to result in a reversal, or an order for new trial, or would it result in a reduced prison sentence that is shorter in length than the duration of the appeal process. 754 F.2d at 901; 18 U.S.C. § 3243(b).

The Eleventh Circuit in *Giancola* provided guidance to determine what is a "substantial question," stating it "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." 754 F.2d at 901. Ultimately, "[w]hether a question is 'substantial' must be determined on a case-by-case basis." *Id.*[1]

The defendant has shown he has the financial resources to hire the lawyers who litigated *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). Those cases and their counsel, however, cannot change the facts of *this* case. This case is not *Dubin*; it is not *Ciminelli*; and it is

[1] The defendant cites this Court's decision in *United States v. White*, 2020 WL 4548226 (S.D. Fla. Aug. 6, 2020), where this Court granted a defendant's motion for bond pending the appeal. Crucially, the defendant omits the timing of that case – COVID-19 – and the fact that the defendant suffered from serious medical conditions, which had a real potential for turning his prison sentence into a "death sentence" if he contracted COVID-19. *Id.* at *1-*2. The extenuating circumstances of that case cannot be overlooked and simply do not apply here.

not *Takhalov*. Notwithstanding the "combined opinions" of the defendant's counsel, those beliefs or "opinions" are not relevant to the Court's analysis here. *See* Def. Mtn at 3.

The defendant has tried to shoehorn this case into the *Dubin*, *Ciminelli* and *Takhalov* molds by borrowing language from those cases divorced from their context and meaning. Just because there is new case law in an area of the law relating to the statute used in a conviction does not automatically create a "close" question or one that that very well could be decided the other way, so as to make it a "substantial question" under Section 3143(b) and the Eleventh Circuit.

The case of *United States v. Perholtz*, 836 F.2d 554 (D.C. Cir. 1987), is instructive here. In that case, the D.C. Circuit denied the defendants' motion for release pending their appeal from mail fraud convictions involving "an elaborate kickback scheme through which the defendants received unearned commissions from subcontractors of the [Small Business Administration] system." *Id.* at 558. While the appeal in *Perholtz* was pending, the Supreme Court issued *McNally v. United States*, 483 U.S. 350 (1987), a decision narrowing, or clarifying, the application of the mail fraud statute to exclude "intangible rights." *Id.* at 557. The D.C. Circuit expressly adopted the Eleventh Circuit's approach from *Giancola* to analyze the substantial question issue. *Id.* at 555-56. The Court analyzed the defendants' convictions in light of *McNally* and found that "the jury could not have found the defendants guilty [of mail fraud] on an intangible rights theory." *Id.* at 559. The Court concluded that the indictment alleged a scheme to defraud the SBA of a tangible loss, and that the evidence, the prosecutors' closing arguments, and the jury instructions all aligned with that theory, and thus "we do not find that [*McNally*] raises a close question or one that very well could be decided the other way." *Id.* at 560-61.

The D.C. Circuit's analysis in *Perholtz* applies to this case insofar as the defendant is using the existence of new case law in the areas of wire fraud and aggravated identity theft to claim that they raise substantial issues of law or fact. In actuality, the case law the defendant relies upon do not present "close" questions in this case.

(1) Wire Fraud

As the government set forth in its response to the defendant's Rule 29 motion (DE 214), the Supreme Court's *Ciminelli* decision has no application here. The "right-to-control" theory of wire fraud that was recognized in the Second Circuit was not suggested anywhere in the superseding indictment, the evidence at trial, the government's closing arguments, or the jury instructions in this case. Nothing in this case suggests that the defendant's scheme to defraud targeted anything but a traditional property interest, i.e., loan money. Thus, *Ciminelli* has nothing to do with the defendant's wire fraud convictions.

Likewise, the Eleventh Circuit's *Takhalov* decision has no application here. The defendant argues that "there is no wire fraud where, as here, the banks got everything they bargained for – namely, processing fees and the PPP interest rate," and thus, the defendant's "misrepresentations were not material to the bank's financial – i.e., property – interest in the transaction." Def. Mtn at 5.[2] The defendant's statement borrows *words* from *Takhalov*, but the facts of this case do not raise a *Takhalov* issue. In Takhalov, the defendants' scheme essentially unfolded in two parts and their deception was not directed at the financial transactions at issue.

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[2] The defendant mischaracterizes the government's arguments regarding the SBA. Def. Mtn at 5. The government has argued that the SBA had a property interest because it disbursed money to the defendant – directly in EIDLs and indirectly through loan forgiveness in the PPP context. Furthermore, *even* in its role as a guarantor, the SBA has been deemed to have a property interest. DE 214 at 6-8.

Thus, the Eleventh Circuit in *Takhalov* focused on the basic tenets of a fraud: whether, in a scheme to defraud, the defendant intended "to 'deprive [the victim] of something of value by trick, deceit' . . . ." 827 F.3d at 1313 (quoting *United States v. Bradley*, 644 F.3d 1213, 1240 (11th Cir. 2011)). The Court asked whether the *defendant's deception* was "about the nature of the bargain itself" such that he intended to defraud the victim. *Id.* at 1313-1314.

The defendant's lies here were made to the lenders and to the SBA, and the lies were about whether his businesses qualified for the loans (PPP and EIDL) that were the financial transactions at issue. The defendant's deception was intended to persuade the lenders and the SBA to make loans to the defendant's businesses that they would not have otherwise made. Of course his deception went to the nature of the bargain itself. *See United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022) (rejecting defendant's *Takhalov* argument challenging his bank fraud convictions as "plainly nonsensical," where the defendant lied about the true recipient of the loan, but argued that he made no misrepresentations "as to the requested loan amount or the terms of the agreement" and that he therefore did not lie about the nature of the bargain).[3] Applying *Takhalov* here, as well as *Watkins* – the Eleventh Circuit's application of *Takhalov* in a loan context – forecloses the argument that *Takhalov* presents a "close" question regarding the wire fraud convictions in this case.

(2) <u>Aggravated Identity Theft</u>

On the issue of aggravated identity theft, the Eleventh Circuit has interpreted and applied the *Dubin* decision in several cases. *See, e.g.*, *United States v. Gladden*, 78 F.4th 1232, 1245-46

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[3] The government cited *United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022) in its Notice of Supplemental Authority, DE 228.

(11th Cir. 2023). *Dubin* was an outlier; the facts represented an extreme application of the aggravated identity theft statute. Here, unlike in *Dubin*, the defendant actually used someone's identity to commit the fraud. At the crux of what made the defendant's conduct criminal here was the submission of false and fraudulent tax documents that were requested and required to support and process the loan applications. The defendant submitted income tax returns (with materially false information about his businesses, wages and revenues) claiming they had been prepared and signed by his accountant when they were actually fabricated and forged by the defendant. The post-*Dubin* cases, in the Eleventh Circuit and in the trial courts that have applied it with facts similar to this case, all support upholding the aggravated identity theft convictions in this case. This issue is not a "close" one and thus, it is not substantial under the Eleventh Circuit's *Giancola* decision.

C. The appeal will not result in a sentence that is less than the duration of the appeal unless the defendant prevails on all of the arguments he raises.

The defendant is challenging both the wire fraud and the aggravated identity theft convictions. If the defendant prevails on both fronts, his sentence will result in zero jail time. Of course, that is less time than the duration of any appeal. In *Dubin*, the defendant was only facing a 24-month sentence, whereas here, the estimated guideline ranges for the wire fraud convictions alone equate to approximately five to seven years in prison. Thus, even if the Court were to conclude that the aggravated identity theft convictions raise a close question under *Dubin*, which the government believes they do not, the defendant is facing a lengthy prison sentence on the wire fraud convictions alone.

The issue to be decided by the Court is discussed above; whether the defendant raises a "substantial question," that is, a "close" question on his appeal. If the Court decides that the defendant has not raised a substantial question under Section 3143(b), the Court need not undertake any further analysis. *See, e.g.*, *United States v. Buckhalter*, 2016 WL 116566880 (S.D. Fla. Feb. 5, 2016) (once court concluded that the defendant had not raised a substantial question, the court denied the motion for bond pending appeal); *United States v. Maxwell*, 2007 WL 9723395 (S.D. Fla. Apr. 13, 2007) (same). For the reasons discussed above, the Court should conclude that none of these issues rises to the level of a substantial question under Section 3143(b). Thus, the Court does not need to estimate the time that the case will be under appeal.

D. The defendant should not be allowed to remain on bond while the Eleventh Circuit decides this same issue.

The defendant requests, in the alternative, that he be allowed to remain on bond while he litigates this same bond issue before the Eleventh Circuit. For the same reasons set forth above, the Court should deny this request as well.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Aimee Jimenez
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