UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 2:24-CR-00192-1**

KISHA SUTTON

GOVERNMENT'S RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

Comes now the United States of America, by Jonathan T. Storage, Assistant United States Attorney for the Southern District of West Virginia, and respectfully submits its response in opposition to the defendant's motion for release pending appeal (ECF No. 417). For the reasons stated herein, the government requests that the Court deny the motion.

I. BACKGROUND

On July 15, 2025, a federal jury found the defendant guilty of aiding and abetting bank fraud and aiding and abetting money laundering. ECF No. 327. The convictions stemmed from the defendant's lead role in a COVID-19 relief program scheme where the defendant applied for fraudulent Paycheck Protection Program loans on behalf of others in exchange for kickback payments. The defendant's scheme resulted in the convictions of numerous co-defendants.

According to the final Presentence Investigation Report, the defendant's Sentencing Guidelines range is 30-37 months of incarceration. She is scheduled to be sentenced on December 11, 2025.

With her motion, the defendant seeks reprieve from a punishment not yet imposed.

II. LEGAL STANDARD

"Defendants ordinarily begin serving their sentences as soon as they are handed down by a district court, regardless of any appeal." United States v. Jordan, 952 F.3d 160, 172 (4th Cir. 2020).

"[T]he 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 [that certain conditions exist.]" 18 U.S.C. § 3143(b).

"The authority of a district court to release a defendant following his conviction and prior to imposition or execution of sentence is governed by 18 U.S.C.A. § 3143." United States v. Goossens, 84 F.3d 697, 702 (4th Cir. 1996). "Generally speaking, an individual must be detained following conviction unless a 'judicial officer finds 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.'" Id. at 702.

Moreover, the Court must determine that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to 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. 18 U.S.C. § 3143(b)(B).

In applying § 3143(b), "the court must make two inquiries after finding that the appeal is not taken for the purpose of delay. First, whether the question presented on appeal is a 'substantial' one. Second, if decided in favor of the accused, whether the substantial question is important enough to warrant reversal or a new trial on all counts for which the district court imprisoned the defendant." United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991).

The Fourth Circuit has adopted "the definition of 'substantial question' first proposed by the Eleventh Circuit in United States v. Giancola, 754 F.2d 898 (11th Cir. 1985). That court defined a 'substantial question' as: a 'close' question or one that very well could be decided the other way. Further, there are no blanket categories for what questions do or do not constitute 'substantial' ones. Whether a question is 'substantial' must be determined on a case-by-case basis." Id. at 196.

"As the statute makes clear, under § 3143(b)(1)(A), defendant bears the burden of establishing, by clear and convincing evidence, that she is not likely to flee and does not pose a safety danger if released. Because the statute is in the conjunctive, however, the defendant must also satisfy the criteria set forth in § 3143(b)(1)(B)." United States v. McComber, No. CR ELH-21-036, 2024 WL 4664630, at *4 (D. Md. Nov. 4, 2024).

III. DISCUSSION

The Court should deny the defendant's motion because (A) the motion is premature and (B) the defendant has not clearly and convincingly established that a substantial question of law or fact is at issue that will change the outcome of the case.

A. The motion should be denied as premature.

Because the defendant has not been sentenced, there is no present basis for her motion. The motion is premature and should be denied.

B. The defendant has failed to meet her burden under 18 U.S.C. § 3143(b).

At the outset, the government does not challenge the defendant's arguments that she is not a risk of flight and is not a danger to herself or others. Additionally, the government does not contend that the defendant's appeal is intended to delay. The government's position is that the defendant has failed to show, clearly and convincingly, that there is a substantial question of law or fact and that will alter the outcome of the case.

i. The defendant's venue challenge does not raise a substantial question of law or fact.

The defendant was charged and convicted of aiding and abetting bank fraud and money laundering. From the start of this case, the defendant has argued that, because all of her offense conduct occurred in New Jersey, venue is appropriate only in New Jersey, regardless of what she did to contribute to the offense <u>or</u> what her co-defendant, residing in West Virginia, did to commit the offense.[1] But her arguments are incompatible with the law.

As an "aider and abettor" of bank fraud and money laundering, the defendant is answerable for her crimes in the Southern District of West Virginia. "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2. To convict a defendant of being an aider and abettor, the government must show that the defendant's conduct amounted to counseling, assisting, or facilitating the commission of a federal crime. <u>See</u> <u>United States v. Honeycutt</u>, 311 F.2d 660, 662 (4th Cir. 1962). "An

[1] Following the return of the Second Superseding Indictment, the defendant's co-defendant in this case is Shamiese Wright. ECF No. 245.

aider and abettor may be prosecuted in the district in which the principal acted in furtherance of the substantive crime." United States v. Kibler, 667 F.2d 452, 455 (4th Cir. 1982); see also United States v. Kilpatrick, 458 F.2d 864, 868 (7th Cir. 1972) (recognizing that 18 U.S.C. § 2 "has been construed to permit the prosecution of an aider and abettor not only in the district in which he committed the accessorial acts but also in the district where the substantive crime was committed.").

The evidence produced at trail established beyond a reasonable doubt that the defendant schemed with others in West Virginia to carry out the fraud and money laundering. Accordingly, the defendant was properly prosecuted in this district pursuant to the charge of "aiding and abetting" the underlying criminal conduct.[2]

ii. The defendant's challenge regarding the bank fraud knowledge element does not raise a substantial question of law or fact.

In her motion, in one sentence only, the defendant states, "Additionally, the Government failed to meet its burden of proof as to proving Ms. Sutton knew she was defrauding a 'financial institution' as defined by law." ECF No. 417 at 2. The defendant misstates the law.

[2] The government has submitted briefing in this case arguing that the defendant was also subject to prosecution in this district in her own right as a principal, whether she stepped foot in West Virginia or not. See, e.g., ECF No. 284.

The government does not have to show that the defendant knew the intricate legal nuances of what entities are "financial institutions" under the law.

As the Court observed during the trial, whether an entity is a "financial institution" is context specific, and the term can have different meanings for different criminal conduct. See 18 U.S.C. § 20 (defining "financial institution" for general purposes under Title 18); compare with 18 U.S.C. § 1956(c)(6) (referencing a modified definition of "financial institution" in Title 31 for the purposes of money laundering).

In the context of this case, the financial institution was a mortgage lending business. The defendant argues that because she did not know that the entity met the legal definition of a financial institution under the law, she cannot be held liable. But let's take, for example, a more common bank fraud case – one where the financial institution is FDIC insured. Under the defendant's theory, no defendant could be convicted of bank fraud unless they knew – and the government cold prove it - that the bank was FDIC insured. But the United States Supreme Court has ruled that knowledge of the law's "niceties" is not required to sustain a bank fraud conviction.

In Shaw v. United States, the United States Supreme Court considered the knowledge element for a bank fraud charge under 18

U.S.C. § 1344(1). "Shaw obtained the identifying numbers of a Bank of America account belonging to a bank customer, Stanley Hsu. Shaw used those numbers (and other related information) to transfer funds from Hsu's account to other accounts at other institutions from which Shaw could obtain (and eventually did obtain) Hsu's funds. Shaw was convicted of violating the first clause of the statute, namely, the prohibition against 'defraud[ing] a financial institution.' The Ninth Circuit affirmed his conviction." Shaw v. United States, 580 U.S. 63, 65 (2016).

The crux of Shaw's appellate argument was that his scheme was "designed" to obtain only "a bank customer's property," not "a bank's own property." Id. at 66. The Supreme Court stated, "The basic flaw in this argument lies in the fact that the bank, too, had property rights in Hsu's bank account. When a customer deposits funds, the bank ordinarily becomes the owner of the funds and consequently has the right to use the funds as a source of loans that help the bank earn profits." Id. at 66. The Supreme Court determined that banks are akin to a baliee of depositors' money. Id. at 66. "Hence, for purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution.'" Id. at 67.

Similar to the defendant's argument in this case, Shaw argued that he did not know that the bank had a property interest in Hsu's bank account and, thus, he could not have "intended to cheat the bank of its property." Id. at 68. The Supreme Court was unconvinced: "These facts are sufficient to show that Shaw knew he was entering into a scheme to defraud the bank even if he was not aware of the niceties of bank-related property law. To require more, i.e., to require actual knowledge of those bank-related property-law niceties, would free (or convict) equally culpable defendants depending upon their property-law expertise—an arbitrary result. We have found no case from this Court requiring legal knowledge of the kind Shaw suggests he lacked." Id. at 68 (emphasis added).

Thus, the law does not require the government to prove that the defendant knew the ins-and-outs of what establishes a financial institution for the purposes of the bank fraud statute; instead, the law requires a showing that the defendant knowingly engaged in a scheme to defraud and that a financial institution was defrauded because of the scheme. The government has sufficiently shown this, and the defendant has not raised any substantial question of law or fact on the issue.

IV. CONCLUSION

The Court should deny as premature the defendant's motion (ECF No. 417). Alternatively, the Court should rule that the defendant has failed to meet her high burden (the clear and convincing standard) to deviate from the law's default position of requiring a defendant to begin her term of imprisonment (if imposed), notwithstanding a pending appeal. Accordingly, the motion should also be denied on substantive grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "GOVERNMENT'S RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL" has been electronically filed and service has been made on opposing counsel by virtue of electronic mail this the 1st day of December, 2025, to:

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