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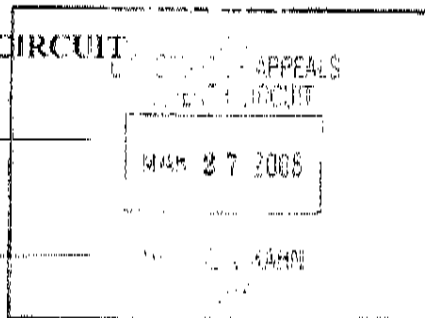
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

07-13163-B



UNITED STATES OF AMERICA,

Plaintiff-Appellee-
Cross-Appellant,

versus

DON EUGENE SIEGELMAN,
RICHARD SCRUSHY,

Defendants-Appellants-
Cross-Appellees.

On Appeal from the United States District Court for the
Middle District of Alabama

BEFORE: BLACK and MARCUS, Circuit Judges.

BY THE COURT:

This matter is now before the Court on Appellant Siegelman's "Motion for Review of the District Court's January 2, 2008 Opinion Denying Release Pending Appeal, and Motion for Release Pending Appeal by this Court."

We have had occasion to consider this motion, in varying forms, twice before.

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Siegelman first moved this Court for release pending appeal on August 10, 2007. On September 27, 2007, we remanded on a limited basis Siegelman's motion, with instructions to the district court to consider and dispose of the motion expeditiously and to enter an order explaining the reasons for its ruling. Following the district court's order of October 4, 2007, denying Siegelman's motion, Siegelman again moved this Court for release pending appeal. Because of the complexity of the issues raised by the motion, on November 7, 2007, this Court again remanded Siegelman's motion, for the limited purpose of having the district court provide a more detailed explanation of its decision. On January 2, 2008, the district court issued an order detailing its rationale for denying Siegelman's motion. Siegelman has again renewed his motion for release pending appeal, and the matter is now properly before us.

Under 18 U.S.C. § 3143(b)(1), a defendant may be released from prison pending appeal only if the court finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released; the appeal is not for purpose of delay; and the appeal raises a substantial question of law or fact likely to result in reversal, an order for a new trial of all counts on which imprisonment has been imposed, 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. See 18 U.S.C. § 3143(b)(1)(A) and (B); see also United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985).

While cautioning that a lack of controlling precedent is not enough to render a legal issue "substantial," this Court has explained that, for purposes of Section 3143(b), "a 'substantial question' 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." Giancola, 754 F.2d at 901. We emphasized that Section 3143(b)'s "substantial question" does not mean that a court may grant bail only if it finds that its own rulings are likely to be reversed on appeal. "We . . . are unwilling to attribute to Congress the intention to deny bail pending appeal unless a district court judge found that he or she had committed error but was obstinately unwilling to grant a new trial or other relief to correct that error." Id. at 900. Plainly, a defendant who is sentenced to a term of imprisonment has the burden of showing that he is entitled to release pending appeal. Id. at 901.

The district court found -- and the government does not contest -- that Siegelman has presented sufficient evidence to establish that he is not likely to flee or pose a danger to the safety of others, and that the appeal is not for purpose of delay. Accordingly, the essential question before us today is whether Siegelman has satisfied his burden of establishing that his appeal raises substantial questions of law

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or fact likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed. See 18 U.S.C. § 3143(b)(1)(B).

In reviewing the district court's denial of Siegelman's motion, we examine the district court's factual determinations for clear error. See United States v. Abuhamra, 389 F.3d 309, 317 (2d Cir. 2004). However, we review de novo any legal questions, including whether the defendant raises a substantial question. See United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985).

After thorough review of this complex and protracted record, we conclude that Siegelman has satisfied the criteria set out in the statute, and has specifically met his burden of showing that his appeal raises substantial questions of law or fact, as required by 18 U.S.C. § 3143(b)(1)(A) and (B). We therefore GRANT the renewed motion to release Siegelman on bond pending disposition of his appeal. Siegelman shall be released on the same terms and conditions as those governing his release pending sentencing.

Siegelman's January 2, 2008 "Motion for Immediate Release . . ." is DENIED AS MOOT.