UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
DAVID a. BANKS;
KENDRICK BARNES;
DEMETRIUS K. HARPER, a/k/a Ken Harper;
CLINTON A. STEWART, a/k/a C. Alfred Stewart;
GARY L. WALKER;
DAVID A. ZIRPOLO; and DAVID A. BANKS,

Defendants - Appellants.

Nos. 11-1487, 11-1488, 11-1489, 11-1490, 11-1491 & 11-1492
(D.C. No. 1:09-CR-00266-CMA)

APPELLANTS JOINT MOTION FOR RECONSIDERATION OF DENIAL FOR RELEASE ON BOND PENDING APPEAL

COMES NOW, Appellants Kendrick Barnes, Demetrius K. Harper, Clinton A. Stewart, Gary L. Walker and David A. Zirpolo, by and through their attorneys, Gwendolyn M. Solomon and Joshua Sabert Lowther and Appellant David A. Banks, by and through his attorney, Charles H. Torres joining in, hereby request this Honorable Court reconsider its Order regarding Release of Defendants on Bond Pending Appeal, and, states as follows,

Counsel certifies that she has conferred with opposing counsel, Matthew Kirsch, prior to the filing of this motion and he opposes the filing of this motion.

1. The Defendants were convicted of a count of conspiracy to commit wire fraud and mail fraud and various counts of wire fraud and mail fraud pursuant to 18 U.S.C. § 1349, 18 U.S.C. §§ 1341 and 2, 18 U.S.C. §§ 1343 and 2. Sentencing hearings were on July 23, 2012 for Walker and Barnes, July 27, 2012 for Harper and Stewart and July 30, 2012 for Zirpolo, during which the District Court sentenced them, inter alia, to terms of imprisonment of 135 months (Walker), eighty-seven months (Barnes), 121 months (Harper), 121 months (Stewart), 121 months (Zirpolo).

On August 24, 2012, the Harper Defendants filed a Joint Motion for Release for Bond Pending Appeal and Defendant Banks joined the motion on August 27, 2012. The government filed its Response on September 10, 2012. The Motions were denied September 24, 2012. The Court's opinion was primarily based upon the district court's assertions that there remain monies "*several million dollars*" unaccounted for to the staffing companies. (emphasis added), Joint App'x, Vol. II at 436. The district court issued its reasoning without any factual support and there is no evidence in the record that confirms such statement. Throughout the record and proceedings it has been maintained that the total loss is $5,018,959.66 jointly and severally. No unaccounted funds or assets exist. The Defendants are not a flight risk and do not pose a danger to the community. Defendants request this Court reconsider the release of bond pending appeal.

2. In review of a Motion for Bond Pending Appeal the Court considers the following factors,

> "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 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,
> 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."
>
> 18 U.S.C. 3143(b)(1)(A); 18 U.S.C. 3143(b)(1)(B).

3. "Under the clearly erroneous standard, the trial court will not be reversed unless its findings were without factual support in the record, or if after reviewing all the evidence, the appellate court is left with the definite and firm conviction that a mistake has been made." *United States v. Mains*, 33 F.3d 1222, 1227 (10th Cir. 1994); *United States v. Butler*, 966 F.2d 559, 562 (10th Cir. 1992); *United States v. Beaulieu*, 900 F.2d 1537, 1540 (10th Cir.1990). The court stated that the loss exceeded $5 million dollars, "according to the court, "*several million dollars*," Joint App'x, Vol. II at 436) (emphasis added). The government does not provide any evidence in the record of accounting to confirm such statement nor mentioned it to the jury. The district court's statement that there were unaccounted for millions of dollars is unsubstantiated with no factual support or evidence in the record and is clearly erroneous. Throughout the record and

proceedings it has been maintained that the total loss is $5,018,959.66 divisible amongst the six defendants. [Exhibit 1: Docs 782, 797, 798, 799, 800, 801; Exhibit. 903]. Defendants request, in review of the facts and evidence and clear error, that they be granted the relief of release pending appeal.

4. While the Court mentions that the Defendants have not provided any recordation, the government does not provide any numbers of what they assert was unaccounted for. The government had an auditor, Dana Chamberlin with the U.S. Attorney's Office, Denver, CO. and former financial analyst that testified during the trial and accounted for the monies (loss) owed to the staffing agencies which included the distributions of wages and salaries to the Defendants and the contractors. (Exhibit 2: Doc 612, Transcript (Tr.), October 05, 2011, pp. 1421: 19-20, 25; 1422:1, 6-7). Ms. Chamberlin created a spreadsheet of the timeline with each staffing company and the period that staffing agencies agreed to payroll the contractors. *Id*. at 1423:19-22, 25; 1424:1-3; *see also*, Exhibit 900. The monies were not only paid to the Defendants but also the contractors and there were 30% to 40% margins built into the $5 million dollar amounts invoiced to IRP from the staffing companies.

Ms. Chamberlin's testimony,

> "Q. So, using this methodology that you've described, do you have -- you came up with a total of the difference between the outstanding invoices and the payments that were received for these 42 companies?
> A. Yes.
> Q. What was that amount?
> A. $5,018,959.66."

(Exhibit 2: Doc. 612, Tr. October 05, 2011, pp. 1465: 23-25; 1466: 1-4).

Quoted by AUSA Mathew Kirsch,

> "a typical arrangement with a temporary, a standard temporary agency or a standard staffing company. The staffing company provides employees to its client company. Those employees work at the client company. The client company approves time cards for those employees and sends them back to the staffing company. The staffing company then pays wages to its employees, and it invoices the client company for those wages, plus the profit that the staffing company is going to make."
>
> (Exhibit 2: Doc 608, Tr. September 27, 2011, p. 5: 8-17.)
>
> "The employees go to work at the client company. The client company, just like in a standard situation, then submits approved time cards back to the staffing company. Based on those time cards, the staffing company does two things; one, it pays wages to the employees. And, number two, it invoices the client company for those wages, ***plus its mark up***."(emphasis added)."
>
> *Id.* at p. 6: 6-12.

5. According to the government, the Defendants did not get rich from the income received. "The evidence isn't going to show you in this case that the defendants got fabulously wealthy." *Id*. at p. 15: 14-15.

The Court cited Defendant Harper's sentencing statement in its Order and it seems to have misconstrued.

> Defendant Harper's statement, "One of the things, as well, [government counsel] says, is he doesn't know where the money is. What you are failing to see, again, is the mark-up is included in that 5 million. So there might be 30 to 40 percent as a typical standard in a staffing and payrolling system to do a mark-up. So that $5 million, everyone saying we don't know where it went. A lot of that was profit that they are not accounting for. So, in essence, you take that out, then you start getting to real numbers."
>
> Joint App'x, Vol. II at 472-73.

The essence of the statement affirms the AUSA's statement above, that the $5 million dollar loss includes a markup of 30% - 40% that is the typical standard in a staffing and payrolling system. The actual salaries received by the Defendants and contractors that remained after deduction of the mark up is provided in the Summary of Minimum Payments to the Defendants. [Exhibit 902].

6. The Summary of Minimum Payments to Defendants from October 2002 through February 2005 created by Ms. Chamberlin are as follows, David Banks $172,102.53, Demetrius Harper $183,363.99, Gary Walker $141,407.64, Clint Stewart $67,010.00$, David Zirpolo $66,923.76 and Ken Barnes $243,846.71. *Id*. The sources of the amounts are from Defendants personal bank records, payroll records provided by the staffing agencies and bank records from IRP, DKH and Leading Team. (Exhibit 2: Doc 612, Tr. October 05, 2011, p. 1457: 5-8); [Exhibits 902, 903, 904, 905, 906 and 907, attached.] The loss is accounted for in the summary chart that provides that amounts paid from the staffing agencies to its employees and the amounts invoiced to IRP. [Exhibit 902]. No other outstanding funds or assets exist.

7. The Court compares Defendants with Madoff and Bailey and there is no such comparison. In *Madoff*, "The district court found that in light of the defendant's age (70) and the length of a potential sentence (150 years), he has an incentive to flee, and that *because he has the means to do so*, he presents a risk of flight, and therefore should not be released. (emphasis added). *United States v. Madoff*, 316 F. 58, 59 (2d Cir. 2009). There is a wide variance in *Madoff* versus the Defendants, approximately an $18 billion dollar loss, his age, length of potential imprisonment and Madoff had a residence abroad.

The Defendants had a $5 million dollar loss, age (younger), terms of imprisonment 10 times less and do not own property or other assets nor have the financial means to flee. In *Bailey*, Bailey was facing forty years for a drug charge and carrying a firearm in relation to drug trafficking, pled guilty to a lesser sentence of five years. *U.S. v. Bailey*, 759 F.Supp. 685, 686 (D.Colo. 1991). Later, Bailey appealed the denial of his motion to withdraw his guilty plea. *Id*. Defendants have maintained their innocence, filed an appeal, there was no involvement of weapons or drug related or violent crime(s).

8. The trial court relied upon *Bailey* that upon imposition of sentence that there is a heightened risk of flight. *Id*. at 687. For the purpose of rebutting detention presumption, "clear and convincing evidence" is defined as more than preponderance of evidence, but less than beyond reasonable doubt. *United States v. Strong*, 775 F.2d 504, 508 (3rd Cir. 1985); see also *United States v. Mustakeem*, 759 F.Supp. 1172, 1177-78 n. 7 (W.D. Pa.1991) ("Clear and convincing evidence means something more than a preponderance of the evidence and something less than beyond a reasonable doubt"). Pursuant to 18 U.S.C. 3142(a)(1)(b) and (c), from investigation through the inception and close of trial and sentencing, while on bond, the Defendants have been in complete compliance to the restricted and special conditions of bond. Early on the Defendants surrendered all of their passports. [Exhibit 3: Docs 586, 587, 588, 589, 590, 591]. The Defendants do not have any prior criminal history. The Defendants have strong family support and ties to the community. Defendants were remanded into custody October 20, 2011 for forty-two days and released on or about December 01, 2012. Family, friends and church members posted secured bonds ranging from $40,000.00 to $80,000.00. [Exhibit 4: Docs 593, 595,

597, 599, 601, 603]. Upon release, defendants were on the strictest conditions set forth in probation, stipulated to special conditions and complied with them all. [Exhibit 5: Docs 582, 584, 585, 592, 594, 596, 598, 600, 602, 604, 623 and 644]. The Defendants had plenty of opportunity to flee after release from incarceration in December 2011 through August 2012 facing sentencing with the knowledge of the possible length of sentencing of up to 135 months but did not and chose not do so. During re-entry to the community, Defendants did not participate in any unlawful activities and there was no harm, danger or threat to the community. Despite consideration to the Defendants argument for release pending appeal, the recommendations by probation, the district court already had pre-determined to remand defendants into custody prior to each sentencing hearing. The Defendants are committed to their family, friends and church and are dedicated to prove their innocence. The Defendants are not a flight risk, have no means or intentions to flee. The Defendants are willing to adhere to all restrictions imposed as deemed necessary while awaiting the appellant decision. The Defendants request release pending appeal.

9. With the evidence accounting for all of the monies received by the defendants and losses accounted for, Defendants request the Government articulate what assets are accounted for and what assets are not accounted for. Thus, if the Government cannot account for some of the loss then how does it arrive a $5 million dollars? The appellate court cannot perform accurate analysis for flight risk without evaluating this information.

WHEREFORE, Defendants pray that this Honorable Court reconsider the denial for request of bond pending appeal taking into consideration the aforementioned statements and evidence and grant release pending appeal.

This 10th day of October, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2012, I have filed electronically the within and foregoing **APPELLANTS JOINT MOTION FOR RECONSIDERATION OF DENIAL FOR RELEASE ON BOND PENDING APPEAL** with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF Appellate system, which will automatically generate a Notice of Docket Activity N.D.A. D.A. to the following:

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