Case Nos. 11-1487, 11-1488, 11-1489, 11-1490, 11-1491 and 11-1492

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID A. BANKS (11-1487), KENDRICK BARNES (11-1488), DEMETRIUS K. HARPER a/k/a Ken Harper (11-1489), CLINTON A. STEWART a/k/a C. Alfred Stewart (11-1490), GARY L. WALKER (11-1491) and DAVID A. ZIRPOLO (11-1492),

Defendants-Appellants.

On appeal from the
United States District Court for the District of Colorado
Honorable Christine M. Arguello
D. Ct. No. 1:09-CR-00266-CMA

APPELLANTS' OPPOSED RENEWED MOTION FOR BOND PENDING APPEAL

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COME NOW, DAVID A. BANKS ("Banks"), KENDRICK BARNES ("Barnes"), DEMETRIUS K. HARPER ("Harper"), CLINTON A. STEWART ("Stewart"), GARY L. WALKER ("Walker") and DAVID A. ZIRPOLO ("Zirpolo") (collectively "Appellants") by and through their Attorneys, Mark J. Geragos and Gwendolyn Maurice Solomon, hereby renew their request that this Court grant them bond pending appeal pursuant to 18 U.S.C. § 3143(b) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the United States Constitution. Appellants are neither a flight risk nor do they pose any danger to the community. In addition, there are new facts and circumstances demonstrating that this case presents substantial appellate issues which satisfy the legal standard to grant Appellants bond pending appeal. In light of these new facts and circumstances, Appellants respectfully request that this matter be expedited.

Pursuant to 10th Circuit Rule 27.3(C), Counsel certifies that he has conferred with opposing counsel, James C. Murphy, prior to the filing of this motion and that he opposes the filing of this motion.

Relevant Procedural History

On August 08, 2005, the Denver Division of the Federal Bureau of Investigation (FBI) declined to conduct an investigation or seek criminal charges against defendants stating that the case would be best handled civilly. (Doc. 617, pp. 1921: 22-25; 1922; Vol. II, pp. 2881: 22-25; 2882). Upon seeking an

indictment, on February 06, 2007, the prosecution convened a federal grand jury and no indictment was returned. (Doc. 75; Vol. I, p. 95). On March 17, 2007, a second federal grand jury in the District of Colorado indicted Appellants, in various combinations, on one count of Conspiracy to Commit Mail Fraud and Wire Fraud in violation of 18 U.S.C. § 1349; fifteen counts of Mail Fraud in violation of 18 U.S.C. §§ 1341 and 2; and eight counts of Wire Fraud in violation of 18 U.S.C. §§ 1343 and 2. (Doc. 1.) The Appellants, in response to summonses (Docs. 3-7), appeared before United States Magistrate Boyd N. Boland for their initial appearances on June 23, 2009. (Doc. 15.) Judge Boland, pursuant to 18 U.S.C. §§ 3142(a)(1) and (b), released Appellants on personal recognizance bonds. (Docs. 22-26.)

Appellants remained on pretrial release until a jury found them guilty on October 20, 2011 of all counts in which they were charged in the indictment. (Doc. 476.) United States District Judge Christine M. Arguello remanded Appellants to the custody of the United States Marshals Service immediately after receiving the verdict, and directed Judge Boland to hold a hearing to determine whether Appellants should remain on release pending sentencing. (Doc. 478.) Judge Boland temporarily detained Appellants on October 20, 2011 (Docs. 482 and 486), but after a hearing regarding the aforementioned issue on November 18, 2011 (Doc. 563), Judge Boland, pursuant to 18 U.S.C. §3143(a)(1), ordered

Appellants released on secured bonds, each in the amount of $40,000.00 with conditions. (Docs. 571-575.)

Appellants remained on release until their sentencing hearings on July 23, 2012 (Walker and Barnes), July 27, 2012 (Banks, Harper, and Stewart) and July 30, 2012 (Zirpolo), during which Judge Arguello sentenced them, *inter alia*, to terms of imprisonment of 135 months (Banks), 135 months (Walker), 121 months (Harper), 121 months (Stewart), 121 months (Zirpolo), 87 months (Barnes), and again, immediately remanded them to the custody of the U.S.M.S. (Docs. 782, 797-800). Appellants moved the trial court to release them pending appeal on July 30, 2012 (Docs. 791-795); the trial court denied Appellants' motions on August 8, 2012 (Doc. 817) on the grounds that Appellants were a flight risk and that they "would be unable to raise a substantial question of law or fact on appeal likely to lead to any of the results listed in 3143(b)(1)(B) because the court had denied post-judgment relief on the issues defendants indicated they planned to raise on appeal." (Doc. 01018920491 at 4.)

Appellants then filed motions for bond pending appeal in this Court. (Docs. 01018903009 & 01018903327). This Court denied Appellants' motions on September 24, 2012 on the grounds that "the district court found that defendants had not demonstrated by clear and convincing evidence that they were not flight risks, and defendants have not shown that this finding was clearly erroneous."

(Doc. 01018920491 at 7.) On October 10, 2012, Appellants moved for reconsideration of the Order denying Appellants' release on bond pending appeal. (Docs. 01018930096 & 10009313.) On October 19, 2012, this Court denied the reconsideration motion. (Docs. 01018935598 & 10011955.)

Oral argument was originally requested by both sides and thereafter scheduled for May 7, 2013 and acknowledged by Appellants. However, on March 15, 2013, Appellants Barnes, Harper, Stewart, Walker, and Zirpolo filed a motion to waive oral argument and submit the case on the briefs pursuant to 10th Circuit Rule 34(A)(2). (Doc. 10053948.) On March 22, 2013, Appellant Banks also filed a motion to waive oral argument and submit the case on the briefs. (Doc. 10055975.) On March 18 and 22, 2013, the Court granted Appellants' motions to waive oral argument, ordered this matter submitted for disposition on the briefs, and excused counsel from attendance in Denver, Colorado on May 7, 2013. (Docs. 10054373 & 10056113.)

On July 31, 2013, while this appeal was pending, non-profit organization A Just Cause filed a civil complaint against Judge Arguello's court reporter alleging breach of contract for her failure to provide a copy of the entire trial transcript as requested and paid for by Plaintiff. Defendant thereafter removed the case to federal court and substituted the United States as a defendant in the action. Plaintiff amended the complaint twice and added a constitutional violation claim

pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) and a negligence claim.

On May 9, 2014, Judge Jackson granted Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) and dismissed the complaint with prejudice on legal grounds that do not affect Appellants' position on appeal.[1] Significantly, however, after investigating this matter, taking judicial notice of the records of the court, obtaining a copy from the Clerk's Office of the court reporter's original notes of the disputed bench conference, obtaining a print out of the unedited transcript of the bench conference, and obtaining a print out of the screen of the monitor of Judge Arguello's courtroom deputy showing what was displayed via the real-time feed as the bench conference occurred, Judge Jackson specifically found that "it is undisputed that Judge Arguello said something that does not appear in the transcript--either the unedited or the final version." (Doc. 01019253367 at 11-12.)

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[1] The court dismissed Plaintiffs' breach of contract claim because the court found that no contract was required to impose a duty upon the court reporter to provide stenography services for the proceedings. Doc. 39 at 13. The court dismissed Plaintiffs' *Bivens* claim because the court held that Ms. Martinez's "accidental failure to record the bench conference verbatim . . . was negligently procured and unintentional at best." *Id.* at 17. The court also held that Plaintiff A Just Cause lacked associational standing to pursue a *Bivens* claim. *Id.* at 17 n.4. The court dismissed Plaintiffs' negligence claim because the judge found no private right of action for damages where a court reporter does not hear and therefore does not record a statement during the course of trial. *Id.* at 22-23.

On May 21, 2014, pursuant to Federal Rule of Appellate Procedure 28(j), the government filed Judge Jackson's order dismissing the civil complaint as supplemental authority in this Court. (Doc. 10178006.) On May 22 and 28, 2014, Appellants responded to the supplemental authority filed by the United States on May 21, 2014, explaining the significance of Judge Jackson's factual findings. (Docs. 10178383 & 10179444).

Appellants have been incarcerated for nearly two years now while their appeal has been pending. For the reasons explained below, this Court should grant Appellants bond pending appeal, and upon consideration of the two years of confinement, release Appellants pending the appellant decision expeditiously.

Legal Standard

Title 18 of the United States Code, Section 3143 provides that a defendant shall be released on bail pending appeal if the 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" and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in [reversal or an order for new trial]." 18 U.S.C. § 3143(b).

The 10th Circuit has adopted a two-step analysis to determine what constitutes "a substantial question of law or fact" likely to result in reversal or an order for a new trial under 18 U.S.C. Section 3143(b)(2). *See United States v.*

Affleck, 765 F.2d 944, 952 (10th Cir. 1985). First, the court must decide that the appeal raises a substantial question of law or fact. *Id.* The court must then decide if the substantial question is determined favorably to the defendant on appeal, whether that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed. *Id.* at 952-53.

The 10th Circuit has also recognized that unlike section 3143(b)(1), section 3143(b)(2) does not require that the showing be made by "clear and convincing evidence;" rather, a defendant must only prove the section 3143(b)(2) criteria under the ordinary preponderance of evidence standard. *Id.* at 953 n.15.

Argument

New Facts Support Appellants' Argument that Their Fifth Amendment Right to Self-Incrimination Was Violated.[2]

The new factual findings by Judge Jackson demonstrate that this case presents substantial appellate issues which satisfy the legal standard to grant Appellants bond pending appeal.

The Court Reporters Act requires that all proceedings in criminal cases held in open court be recorded verbatim by shorthand or mechanical or electrical means. 28 U.S.C. § 753(b). This requirement applies to side-bar or bench conferences.

[2] With respect to the merits of Appellants' Speedy Trial and Fifth Amendment violations, Appellants incorporate by reference their previously-filed motions for bond pending appeal, and motions for reconsideration of the Order denying them bond pending appeal.

E.g., United States v. Winstead, 74 F.3d 1313, 1321 (D.C.Cir.1996); *Edwards v. United States*, 374 F.2d 24, 26 (10th Cir. 1966). The requirements of the Court Reporters Act are mandatory, and no request for recordation is required. *Edwards*, 374 F.2d at 26 n. 2.

The 10th Circuit has held that violation of this duty constitutes reversible error when "the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed" with regard to a challenged action. *United States v. Kelly*, 535 F.3d 1229, 1240 (10th Cir. 2008) (quoting *United States v. Haber*, 251 F.3d 881, 889 (10th Cir. 2001) (internal quotation marks and citation omitted)). For instance, in *Parrott v. United States*, 314 F.2d 46, 47 (10th Cir. 1963), the defendant appealed his conviction for conspiracy to rob a bank insured by a federal agency based on his claim that the trial court's statement in voir dire that three other charges of bank robbery were pending against defendant was prejudicial error. The 10th Circuit held that the unavailability of a full transcript because of the court reporter's failure to transcribe the voir dire examination as required by statute made it impossible to determine whether the statement was harmless and to be disregarded. *Id.* Thus, the Court reversed the conviction and remanded the matter for a new trial. *Id.*

The crux of this appeal is that Appellants were denied their Fifth Amendment right to self-incrimination when the trial judge, by statements made

during a bench conference, compelled one of the defendants to testify. Judge Jackson's Order provides significant support for this claim. Throughout his Order, Judge Jackson confirms that a portion of what Judge Arguello told defendants during the bench conference was not transcribed. For instance, Judge Jackson notes that "there is no dispute that something was said that does not appear in the transcript." (Doc. 01019253367 at 8.) Judge Jackson later adds: "As I have said, it is undisputed that Judge Arguello said something that does not appear in the transcript--either the unedited or the final version. I do not know what she said. The *Banks'* defendants and Judge Arguello's respective recollections of what was said are set out in the record of the criminal case, and the appellate court will determine what conclusions to draw." (*Id.* at 12.)

Here, like in *Parrott*, the unavailability of this critical portion of the transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed. Thus, the violation of the Court Reporters Act in this case constitutes reversible error. *See Parrott, supra*, 314 F.2d at 47.

Even Without the Transcript, the Circumstantial Evidence Is Sufficient to Create a Presumption of Compulsion.

The undisputed circumstantial evidence surrounding the missing portion of the transcript demonstrates that Appellant Kendrick Barnes was compelled to testify:

1. The judge was frustrated at the slow pace of witnesses and said "something"

to the defendants about the future of the trial. (Doc. 557 at 80).

2. Immediately following the bench conference at issue, the defendants caucused and then one of the defendants, Mr. Barnes, took the stand. (Doc 557 at 54).

3. No inquiry was made by the Court regarding Mr. Barnes' waiver of his 5th Amendment right against self-incrimination. (Doc. 557 at 54).

4. Shortly into Mr. Barnes' testimony, the Assistant United States Attorney wanted clarification that the defendants were going to testify in any event despite the problem producing witnesses, demonstrating that he, too, was concerned about the coercive nature of the trial court's comments at the bench conference. (Doc. 557 at 79).

5. Once the issue was raised by the government, the defendants' contemporaneous responses to the court demonstrate that each of the defendants had the same understanding of the judge's remarks--that if they didn't have a witness, one of them would have to testify in order to keep their defense case open. (*See*, e.g., Doc. 557 at 137; id. at 144).

6. Although the court denied making such a remark, she admitted that she did not recall her exact language: "I don't know what my exact phrasing was." (Doc. 557 at 108).

7. Mr. Banks asked to see a copy of the transcript of the bench conference before proceeding further, and the court advised that "the transcript would be provided at the end of the day." (Doc. 557a t 139).

8. On cross-examination of Mr. Barnes by the government, Mr. Walker objected and pleaded the 5th Amendment based on "being forced to testify". (Doc. 557 at 129).

9. When government cross-examination resumed, Mr. Barnes pled the 5th Amendment in response to every remaining question--all in the presence of the jury. (*See* Doc. 557 at 129-46.) Thus, the responses being prejudicial to all of the defendants.

10. Appellants moved the court for a mistrial on October 11, 2011 based on the 5th Amendment violation. (*See* Doc. 557 at 137).

11. Defendants requested a copy of the transcript that same day. (Doc. 557 at 138, 139, 149, 154, 155).

12. The court reporter has never through affidavit or testimony explained the absence of the pertinent entry. Nor has the court reporter or the U.S. Attorney ever provided an affidavit or testimony of what they recall being said by the Court nor was denying what the defendants claim was said by the court. The omissions by the U.S. Attorney are monumental and convey significant credence to the Appellants argument about the compulsion.

Based on the foregoing evidence which is unconverted, this Court may certainly conclude that the right against self-incrimination was indeed violated by Judge Arguello's statements during the October 11, 2011 bench conference.

At the very least, it cannot seriously be disputed that following the October 11, 2011 bench conference (since the reasonableness of their understanding cannot be determined without a complete transcript), the defendants believed that at least one of them was required to testify in order to have the defense remain open. Putting aside the reasonableness of such an understanding, a grave injustice has resulted due to Appellants' ***actual*** understanding of Judge Arguello's statements during trial. As Judge Jackson aptly noted during the pendency of the civil case:

> THE COURT: But if -- and I say if -- and only if it turns out that contrary to her recollection Judge Arguello expressed herself in a way that reasonably could be understood by a layperson as ordering them to testify, if such a thing had happened, wouldn't the justice of this case be to know that and then to deal with it?
>
> . . .
>
> THE COURT: I'm not expecting him to answer. But ultimately ***those***

> ***of us who work for the federal government and the Justice Department have a goal, and that is to achieve justice.***

Reporter's Transcript of January 10, 2014 Scheduling Conference at 17-18 (emphasis added).

Retired U.S. district judge and U.S. appeals court judge H. Lee Sarokin has also publicly recognized that the facts and circumstances in this case demonstrate at the very least that the defendants felt compelled to testify:

> Usually out of deference to the circuit court handling the matter, I would not comment. However, there is one aspect of the case that intrigues me, and since the matter has been pending for a considerable period while the defendants languish in prison, I thought some general airing might be appropriate.
> . . .
>
> Although the defendants vehemently proclaim their innocence, I do not have sufficient information to comment on their convictions. But I have no doubt that whether or not they felt compelled to testify depends exclusively on what the judge said to them at that precise moment. To suggest that the court's "exact language" is immaterial is ludicrous, particularly since the court and the defendants disagree as to what was said.
>
> Certainly no judge would direct a criminal defendant to testify against his or her own will, but it is conceivable that something was said that reasonably led them to that conclusion. The answer lies in the record, which apparently does not exist, for reasons that seem to be elusive.

Judge H. Lee Sarokin, *The Case of the Missing Transcript*, THE BLOG, May 5, 2014, *available at* http://www.huffingtonpost.com/judge-h-lee-sarokin/the-case-of-the-missing-transcipt_b_5267338.html.

Following the dismissal of the civil suit, Judge Sarokin again noted:

> Judge R. Brooke Jackson, in an incredibly detailed opinion considering the miniscule nature of the claim, but obviously sensitive to the charges asserted, made detailed factual findings. His opinion should serve in lieu of a remand for a hearing on this sole issue. Very significant to me is that following this exchange between the defendants and the Court, Mr. Barnes, one of the defendants took the stand, and shortly thereafter it was government counsel that expressed concern. He "asked the court to make it clear on the record that all parties 'had every reason to believe that Mr. Barnes intended to testify no matter what happened in this case...regardless of the fact that the defense otherwise ran out of witnesses this morning." Why would he bring it up, unless he was concerned that something had transpired which made that clarification necessary?
>
> . . .
>
> So in all fairness, my use of the phrase "missing transcript" is not accurate. The transcript is neither missing, altered or destroyed, but rather the critical conversation apparently was not recorded and was never included in the transcript for reasons unknown. But having now resolved the factual issue so clearly by an independent court, one cannot help but wonder wherein lies the delay? If there is no way to determine whether or not the 5th Amendment rights of the defendants were violated, does the Court of Appeals have any other choice but to either reverse and remand for a new trial or dismiss? The defendants languish in prison still asserting their innocence. They deserve a prompt answer to a simple question. Can this issue be resolved without the transcript of what the court said to the defendants?

Judge H. Lee Sarokin, *The Missing Transcript Case Becomes More Curious--Part II*, MEGAN'S LAW JOURNAL, June 4, 2014, *available at* http://meganslawjournal.com/2014/06/04/the-missing-transcript-case-becomes-more-curious-part-ii/.

Given that (1) the violation of the court reporter's duty makes it impossible

for the appellate court to determine precisely what was said, (2) the facts and circumstances demonstrate that the defendants felt compelled to testify, and (3) there is no competent evidence to rebut Appellants' claims of constitutional violations, there are substantial appellate issues which satisfy the legal standard to grant Appellants bond pending appeal.

The Evidence Is Clear and Convincing that Appellants Are Neither a Flight Risk nor a Danger to the Community.

No credible argument can be made that any of the Appellants are either a flight risk or a danger to the community. Appellants first learned the government was investigating them in 2004. However, they made their initial appearances in these cases voluntarily in 2009. From that time until their guilty verdicts in October 2011, they remained free on personal recognizance bonds, despite knowledge that they faced lengthy sentences. Even between conviction and sentencing, they were released on bond and complied with all terms and conditions of their release. They appeared at each other's sentencing hearings and none fled despite witnessing their co-defendants receive substantial sentences.

Furthermore, Appellants' cause has garnered national attention and a non-profit organization has spent a tremendous amount of time and resources aimed at achieving justice on behalf of Appellants in this case. In light of the significant community efforts on their behalf, Appellants have no intention to flee whatsoever. On the contrary, Appellants had every intention of paying their obligations

evidenced by their signing of personal guarantees. Appellants are determined to continue to challenge their convictions and clear their names.

In previously denying Appellants bond pending appeal, the Court recognized that "[t]he fact that [Appellants] remained free until sentencing and complied with their conditions of release is some evidence that they do not present a post-sentence flight risk, but it is not clear and convincing evidence because their incentive has changed--they have now received substantial sentences of imprisonment." (Doc. 01018920491 at 6-7.) However, the circumstances have changed significantly since then. To date, Appellants have served nearly two actual years of time in custody, which is a large fraction of their respective sentences, which range between 87 months and 135 months. When considered together with Appellants' significant familial and community ties, lack of criminal history, previous compliance with release conditions, and Appellants' well documented motivation to challenge their convictions and clear their names,[3] this change in circumstances is sufficient to support a finding by clear and convincing evidence that Appellants are not flight risks.

Appellants likewise do not pose any danger to the community nor do the offenses of which they were convicted carry any such presumption or suggestion.

[3] Appellants incorporate by reference their full arguments advanced in their previously-filed motions for bond pending appeal, and motions for reconsideration of the Order denying them bond pending appeal.

See 18 U.S.C. § 3142. Appellants were each convicted of one count of conspiracy to commit wire fraud and mail fraud, and various counts of wire fraud and mail fraud in violation of 18 U.S.C. § 1349, 18 U.S.C. §§ 1341 and 2, 18 U.S.C. §§ 1343 and 2. No court has previously found that Appellants would pose a danger to the community whatsoever.

Thus, it can be shown by clear and convincing evidence that Appellants are not likely to flee or pose a danger to the safety of any other person or the community if released on bond pending resolution of their appeal. *See id.* § 3143(b).

WHEREFORE, Appellants pray that this Honorable Court expeditiously grant them bond pending appeal, until an appellant decision is issued.

Dated this 28th day of June, 2014.

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CERTIFICATE OF ELECTRONIC SUBMISSION

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I further certify that the information on this form is true and correct to the best of my knowledge and belief that was formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2014, a true and correct reproduction of the

APPELLANTS' OPPOSED RENEWED MOTION

FOR BOND PENDING APPEAL

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