

Outside Counsel

Expert Analysis

Bail Pending Appeal In the Second Circuit

The right to appeal in a criminal case is fundamental to our justice system. But in many white-collar criminal cases, where a defendant has been convicted and sentenced to a relatively limited term of incarceration, the right to appeal is rendered meaningless unless the defense obtains bail pending appeal. Absent bail, in other words, the defendant may well end up serving all or most of his sentence before the challenge has even been heard.

Consider, for instance, the recent prosecution of Mahmoud Reza Banki, who was indicted in the U.S. District Court for the Southern District of New York in 2010 for violating the Iranian trade embargo by accepting a series of money transfers from family members in Iran. At trial Banki argued, among other things, that money for personal use did not constitute a violation. Banki was convicted and sentenced to 33 months' imprisonment.

The district judge, citing Banki's ties to Iran, denied bail pending appeal, despite the presence of some novel and complex questions relating to the interpretation of the applicable embargo regulations. Banki chose not to appeal the ruling and started his prison term. In October 2011, the U.S. Court of Appeals for the Second Circuit vacated Banki's embargo conviction, ruling that the family remittances were permissible. It was a Pyrrhic victory, however, because by then Banki had already served 20 months behind bars, arguably for a crime he did not commit.

EVAN T. BARR is a partner in the New York office of *Stephens & Johnson* and a former assistant U.S. attorney in the Southern District of New York. MICHELLE L. LEVIN is an associate with the firm.



By
**Evan T.
Barr**



And
**Michelle L.
Levin**

This article will explore the legal framework relating to bail pending appeal and the strategies defense counsel should consider in seeking such relief in white collar criminal cases.

Where a defendant has been sentenced to a relatively limited term of incarceration, the right to appeal is rendered meaningless unless the defense obtains bail pending appeal.

The Applicable Law

Pretrial, the issue of whether a defendant should be released on bail is generally predicated upon the crime he or she is alleged to have committed, the defendant's criminal history, and the presence or absence of stable roots in the community. Title 18, U.S. Code, Section 3142(a), the applicable provision of the Bail Reform Act of 1984, requires that the judicial officer setting bail impose the most lenient conditions that will reasonably assure the appearance of the defendant for trial and protect the public or specific individuals.

Of course, the rules change dramatically once a defendant has been found guilty of

a crime. Rule 46(c) of the Federal Rules of Criminal Procedure, which incorporates Title 18, U.S. Code, Section 3143(b) by reference, governs the determination of whether a defendant may be released pending sentencing or appeal, and if so, under what conditions. Section 3143(b) currently provides, in relevant part, that the court shall order the defendant released if: (1) the defendant demonstrates by clear and convincing evidence that he poses no risk of flight or danger to any other person or to the community; and (2) the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal; an order for 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.

The prior federal bail statute, enacted in 1966, contained a presumption in favor of release after conviction. Specifically, under the earlier law, the prosecution had the burden to prove that the defendant's appeal was "frivolous" or taken for delay, and the defendant had to show that he was neither a flight risk nor a danger to the community. Courts typically held that bail should be denied only as a last resort,¹ sometimes even in cases where the defendant posed a potential danger to the community.²

The 1984 Bail Reform Act dramatically shifted the burden of proof entirely to the defendant, both on the issue of flight or safety risk, and on the need to establish that the appeal involves a "substantial question" of law or fact likely to result in reversal or new trial. Unfortunately, the statute itself did not provide any definition of "substantial question" nor did the legislative history offer much guidance.

Predictably, in the immediate aftermath of the passage of the new law, the circuits differed over exactly what would be needed to render a

question “substantial.” The U.S. Court of Appeals for the Ninth Circuit, for instance, defined a “substantial question” as one that was “fairly debatable.”³ The U.S. Court of Appeals for the Eleventh Circuit required a “close question or one that very well could be decided the other way.”⁴ The U.S. Court of Appeals for the Third Circuit interpreted a “substantial” question as one that is either novel, has not been decided by controlling precedent, or that is fairly doubtful.⁵

‘Substantial Question’

In *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985), the Second Circuit first addressed the issue, which had attracted significant attention following the enactment of the Bail Reform Act, as to whether the “substantial question” language might be taken to condition post-conviction release upon a district court’s finding that its own judgment is likely to be reversed on appeal. Rejecting that notion, the court noted:

To define “substantial” questions as those “likely to result in reversal or an order for a new trial” not only renders superfluous the word “substantial”—since an insubstantial question will hardly result in reversal—but presumes that district courts will consciously leave “substantial” errors uncorrected.

Instead, the Second Circuit held that the language “must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal.” In other words, the law only requires the presence of a “substantial question” that, if resolved in the appellant’s favor, likely would result in reversal. Turning to the definition of “substantial,” the Second Circuit found some merit (and little to distinguish) in each of its sister circuits’ interpretations but ultimately expressed a preference for the “close question” formulation adopted by the Eleventh Circuit. In short, under the Second Circuit’s ruling, the defense must show a question that is more than merely non-frivolous, but need not rise to the level of establishing likelihood of success.⁶

Strategic Considerations

There are a few important strategic issues that defense counsel should consider when preparing a motion for bail pending appeal.

First, many district judges unfortunately still misconstrue bail pending appeal as tantamount to an acknowledgement of error in the conduct of the trial or sentencing proceeding.

Accordingly, defense counsel should endeavor to address this issue up front by emphasizing the applicable legal standard set forth above and making clear that merely identifying the existence of a “substantial” question is by no means intended to signify that the judgment of conviction ultimately will or should be dismissed.

Second, in situations where the client faces a relatively limited prison term, creating a real risk that the duration of the expected appeal could exceed the sentence, defense counsel may want to alert the district court judge to recent statistical information relating to the median time for disposition of criminal appeals which, at least as of one recent study, was around 18.7 months.⁷ Conversely, counsel may consider reminding the court that the jail sentence itself is likely to be shortened on account of time off for good behavior and early release into community confinement centers. Bear in mind, however, that these reminders could backfire with a district judge who may feel he or she has already been sufficiently lenient in connection with the sentencing itself and is therefore reluctant to grant the additional benefit of allowing the defendant to remain free for yet another year or more.

Third, where bail pending appeal has been denied by the district court, defense counsel must then decide whether it is worth seeking relief from the court of appeals. With a surrender date looming, most clients quite understandably want defense counsel to do everything humanly possible to forestall having to report to a federal correctional facility.

But the decision to appeal a denial of bail should not be made automatically, as there are serious downside risks. A defendant seeking bond pending appeal necessarily must provide the court with a condensed preview of his or her two or three best issues, often on an expedited schedule. In the event the bail application is denied, there is a very real risk that a subsequent appellate merits panel will pre-judge the issues for appeal based on the denial by their circuit brethren of a motion which may have been drafted in a matter of weeks, without the benefit of rigorous legal research and detailed analysis of the trial record. Thus, defendants who are willing to wait and take their “best shot” in front of the merits panel ultimately may stand a better chance of being vindicated on appeal, even while they also face the harrowing prospect of paying a debt to society that they never owed.

.....●●.....

1. See *United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1979) (stating that under prior law, bail pending appeal “was the rule, not the exception”).

2. See *Sellers v. United States*, 89 S.Ct. 36, 38 (1968) (Black, Circuit Justice) (must be “kind of danger that so jeopardizes the public” that it can only be prevented by incarceration).

3. *United States v. Handy*, 753 F.2d 1487 (9th Cir. 1985).

4. *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985).

5. *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985).

6. The court went on to explain that assuming a “substantial question” exists, the district court then must consider whether that question is “so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.”

7. See U.S. Court of Appeals for the Second Circuit, 2008 Annual Report at 6, Fig. 2 available at <http://www.ca2.uscourts.gov/Reports/08/Statistics.pdf>.