FILED IN CHAMBERS
U.S.D.C. Atlanta

AUG 0 3 2006

JAMES N. HATTEN, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL ACTION NO. 1:04-CR-0424-RWS
WILLIAM C. CAMPBELL,	:	
Defendant.	:	

ORDER

On May 10, 2006, the jury returned a verdict finding Defendant William C. Campbell ("Defendant") guilty of three counts of tax evasion, and acquitting him on charges that he violated RICO and committed several acts of bribery. Shortly thereafter, the Court conducted a sentencing hearing in which it sentenced Defendant to thirty months in custody based upon its consideration of the Sentencing Guidelines and the factors set out in 18 U.S.C. § 3553.

Defendant has now filed a Motion for Bond Pending Appeal [377]. For the reasons that follow, that motion is denied.

Discussion

In order to be entitled to bond pending appeal, a defendant must show, *inter alia*, that his appeal "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)(1). A substantial question involves more than a non-frivolous objection. See United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985). Rather, a defendant must demonstrate "a 'close' question or one that very well could be decided the other way." Id. Because Defendant has failed to show the existence of such a question here, his motion must be denied.

Defendant's arguments in support of bond are, for all practical purposes, two-fold. First, he contends that this Court committed necessarily reversible error in disqualifying one of his selected counsel, Craig Gillen, in violation of his Sixth Amendment rights. Second, he argues that this Court committed myriad errors in arriving at his sentence. The Court addresses both below.

I. Disqualification of Counsel

Defendant urges that this Court's disqualification of Mr. Gillen as co-counsel creates a "substantial question" within the meaning of § 3143(b), entitling him to an appeal bond. In support of this assertion, Defendant relies

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heavily on the United States Supreme Court's recent decision in United States v. Gonzalez-Lopez, – U.S. –, 126 S. Ct. 2557, – L. Ed. 2d – (2006). There, the Court concluded that the erroneous disqualification of defense counsel establishes a Sixth Amendment violation, and demands reversal, even absent a specific showing of resultant prejudice. That is, it held that the Sixth Amendment violation is "complete" upon the ill-founded decision to deny a defendant counsel of his choice, and that no further harm need be shown to entitle an accused to relief.

The problem with Defendant's argument is that the Gonzalez-Lopez Court only clarified the consequences of a court's errant deprivation of selected defense counsel. The Court did not disturb its precedents concerning whether the decision was errant in the first instance. Indeed, Justice Scalia, writing for the majority, made plain:

> Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them . . . . [A] defendant [may not] insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See Wheat [v. United States, 486 U.S.

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> 153, 159-60, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)]. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, [cit.], and against the demands of its calendar, [cit.]. The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat, supra, at 160, 108 S. Ct. 1692.

126 S. Ct. at 2565-66. It was only because the Government in Gonzalez-Lopez had *conceded* that the trial court's refusal to permit the defendant his counsel of choice was erroneous that reversal became the unavoidable conclusion to the appeal. Id. at 2566.

Here, the Government has made no such concession. What is more, this Court carefully considered the Supreme Court's prior precedents, and those of its sister courts, in ruling that disqualification of Mr. Gillen and his firm was justified notwithstanding the rights afforded Defendant by the Sixth Amendment. (See Apr. 15, 2005 Order [107].) Reviewing its prior decision and the authorities cited therein, this Court concludes that its refusal to permit Mr. Gillen and his firm to represent Defendant in this matter fits comfortably within existing precedent, and does not present a "substantial question" for

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purposes of appeal.

Defendant's argument to the contrary is unconvincing. He takes issue with this Court's observation that Defendant would continue to be represented by Mr. Steve Sadow, whom the Court characterized as "another skilled and highly regarded attorney." (See Reply Br. [383] at 7; Apr. 15, 2005 Order [107] at 12.) Defendant insists that this latter observation illustrates a misplaced reliance on the absence of prejudice owing to Mr. Gillen's disqualification, pointing out the Supreme Court's recent admonition that "the quality of the representation [a defendant] receives" is immaterial to the existence *vel non* of a Sixth Amendment violation. See Gonzalez-Lopez, 126 S. Ct. at 2563. The Court is unpersuaded.

The Court's favorable views respecting Mr. Sadow–and, indeed, its broader discussion of how disqualifying co-counsel (versus lead counsel) seemed to implicate less severely those constitutional concerns furthered by the Sixth Amendment–were not the only, nor the determinative, basis for its holding. The Court simply took the opportunity to state that Defendant was being left with a skilled attorney, and that Mr. Gillen's disqualification did not altogether deprive Defendant of the counsel of his choice. While the Court

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considered those matters, they were not essential to its holding.

Ultimately, it was the paramount concern over the "need to ensure that criminal trials are conducted in such a way as to engender confidence of the public in the criminal justice system" that led the Court to reach the decision it did. (See Apr. 15, 2005 Order [107] at 10.) This Court appreciated the profound "appearance of unfairness that would emanate from permitting defense counsel to proceed notwithstanding his law partner's previous, substantial representation of a key witness against the Defendant"–a witness, moreover, who adamantly and repeatedly objected to such representation. (See id. at 11, 13-14.) Disqualification necessarily followed from this finding, and, even putting Mr. Sadow's abilities and the role Mr. Gillen was asked to fulfill aside, the Court would reach precisely the same conclusion again.

Simply put, the validity of the Court's basis for disqualifying Mr. Gillen remains undisturbed after Gonzalez-Lopez. See 126 S. Ct. at 2566 ("The court has . . . an 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.' ") (quoting Wheat, 486 U.S. at 160). Because the appearance of unfairness that would have resulted from Mr. Gillen's

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representation of Defendant was alone sufficient to compel his disqualification, the Court perceives no substantial question for appeal.

II. Sentencing Matters

Defendant also insists that bond is appropriate because of numerous perceived errors related to the calculation of his sentence. The arguments he raises, however, are not ones with which this Court is unfamiliar. Each was presented, carefully considered, and ultimately, rejected by the Court in its June 15, 2006 Sentencing Order [368]. Having reviewed the evidence and its prior Order, this Court finds no "close" questions *vis-a-vis* any of Defendant's objections. Because his contentions (other than those related to the amount of the tax loss) were addressed at some length in the Court's June 15, 2006 Order, moreover, they will not be belabored here.[1]

Further, insofar as Defendant continues to contest the amount of the loss occasioned by his tax evasion, the Court perceives little if any room for a successful appeal. As an initial matter, and as Defendant's own objections make clear, each amount he now challenges was supported by *some* evidence in

[1] The reader is invited to consider the Court's Sentencing Order [368] at pages 8-21.

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the record. While Defendant insists that credibility issues and uncertainties surrounding certain values should have prompted the Court to exclude particular items from its calculation, he fails to appreciate that these were factual determinations for the Court to make, and that the Federal Sentencing Guidelines direct the Court to come to only " 'a *reasonable estimate* [of tax loss] based on the available facts.' " See United States v. Ross, 147 Fed. Appx. 936, 941 (11th Cir. 2005) (citing U.S.S.G. § 2T1.1, comment; emphasis supplied); see also Unites States v. Frederick, 242 F.3d 368, 2001 WL 10364, at *4 (2d Cir. Dec. 28, 2000) ("[A] sentencing court need not calculate loss with certainty or precision. [Cit.] It may rely on estimates and averages to reach a reasonable calculation.") (unpublished table decision; internal quotations omitted). Each of the values included in the calculation of tax loss were, in the view of this Court, supported by a preponderance of the evidence. The absence of absolute certainty does not lay the foundation for a "substantial question" on appeal.

In any event, even to the extent that one or more of the sums included by the Court in its calculation were open to legitimate debate, Defendant faces the additional hurdle of having to prove that any problematic discrepancy had

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some effect on his sentence. This would be a highly remarkable feat–a possibility that this Court finds to exist only well beyond the realm of "substantial questions" likely to affect Defendant's sentence.

This Court, guided by factors identified in 18 U.S.C. § 3553, sentenced Defendant to thirty months in prison–a sentence at the bottom-most range of the Sentencing Guidelines for his offense level and criminal history. For the Circuit to find that offense level incorrect based on a miscalculated tax loss, it would have to determine that at least $22,774.39 of the loss was attributed to Defendant in "clear error" (bringing Defendant beneath the $40,000 tax loss threshold). United States v. Patti, 337 F.3d 1317, 1323 (11th Cir. 2003).[2] To find this, the Circuit would have to credit virtually all of Defendant's eight challenges to the Court's calculation, which, in the aggregate, call into question only $25,941.78 in tax loss. Not only is this a highly unlikely outcome, but, if successful, Defendant would only accomplish a one-level reduction in his offense level (taking it from 19 to 18). The custody guideline range for an

[2] The Court omits from its discussion Defendant's alleged receipt of $20,000 from his mother. The Court was plainly free to reject that factual assertion, especially in light of Defendant's failure to show that the gifts at issue were made at times relevant to this litigation.

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offense level of 18 is twenty-seven to thirty-three months. Any alteration to his offense level, therefore, would leave Defendant's sentence in the exact center of the guideline range. Even were the Federal Sentencing Guidelines still mandatory, this reality would leave Defendant without a "substantial question" likely to result in the reduction of his sentence on appeal. Under the current, post-Booker paradigm,[3] and because this Court's principal concern in arriving at Defendant's sentence was the factors identified in § 3553, that likelihood is eliminated altogether. To be clear, even if Defendant had been assigned an offense level of 18, this Court's sentence, predicated on the principles embodied in § 3553, would have been precisely the same.

For all the foregoing reasons, Defendant has not shown the existence of a substantial question likely to result in reversal, a new trial, or a reduction in his sentence. 18 U.S.C. § 3143(b)(1). His Motion for Appeal Bond [377] is, accordingly, **DENIED**.

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[3] United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

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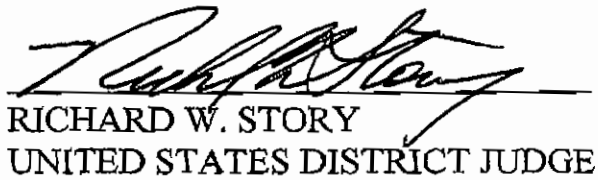
SO ORDERED this 3rd day of August, 2006.



RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

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