No. 05-20319

In the United States Court of Appeals
for the Fifth Circuit

United States of America,
Appellee

v.

James A. Brown, Daniel Bayly, Robert S. Furst, William R. Fuhs,
Appellants

On Appeal from the United States District Court
for the Southern District of Texas

Opposition of the United States to the Renewed Applications of James A. Brown, Daniel Bayly, and Robert S. Furst for Release on Conditions Pending Appeal

Pursuant to Fifth Circuit Rule 9, the United States of America, appellee in the above-captioned matter, hereby opposes the renewed applications of defendants James Brown, Daniel Bayly, and Robert Furst (collectively, the "defendants") for release on conditions pending appeal. In support of this opposition, the government, through the undersigned counsel, states as follows:

In November 2004, following a six-week trial, a jury found Brown, Bayly, and Furst—along with co-defendant William Fuhs—guilty of wire fraud, conspiracy to commit wire fraud, and conspiracy to falsify the books and records of Enron

Corporation (Counts One, Two, and Three). Additionally, Brown was convicted of perjuring himself before the grand jury and obstructing the grand jury's investigation (Counts Four and Five). Brown, Bayly, and Furst were sentenced to prison terms of 46 months, 30 months, and 37 months, respectively. At sentencing, each of the defendants moved the district court for release pending appeal pursuant to 18 U.S.C. § 3143(b), raising several of the claims included in their appellate briefs. Brown Sent. Tr. 54; Bayly Sent. Tr. 73-77; Furst Sent. Tr. 54-57. The government opposed their motions and the district court denied their requests, holding that none of their claims constituted a substantial question likely to result in reversal or a new trial. Brown Sent. Tr. 54-55; Bayly Sent. Tr. 77-78; Furst Sent. Tr. 59-60. Shortly after sentencing, each of the defendants moved this Court for release on conditions pending appeal. The government again opposed their motions. On May 31, 2005, Judge Stewart denied Brown's and Bayly's motions for release. On July 12, 2005, a panel of this Court (Wiener, Benavides, and Stewart, JJ.) denied Brown's and Bayly's motions for reconsideration, as well as Furst's motion for release, holding as the district court did that the defendants had not "shown that [their] appeal presents an issue that raises 'a substantial doubt (not merely a fair doubt) as to the outcome of its resolution.' " 7/12/05 Order 2 (quoting *United States* v. *Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985)).

Though this Court has already denied their applications for release pending appeal, the defendants now renew their requests, primarily on grounds that the Court's recent release of their co-defendant Fuhs "evidence[s]" that the issues *they* have raised on appeal "present substantial questions within the meaning of 18 U.S.C. § 3143(b)." Brown Mot. 1; *see* Bayly Mot. 1-2; Furst Mot. 1-2. Contrary to the defendants' belief, Fuhs's release does not justify theirs.

Fuhs's bail papers, merits briefs, and oral argument were all but exclusively focused on two claims that are—as he has repeatedly emphasized, *e.g.*, Fuhs Br. 2; Fuhs's Renewed Application for Release 2—entirely unique to him. To summarize, Fuhs claimed that: (1) even assuming *arguendo* that he knew of an oral guarantee that "Enron or an affiliate" would buy the barges at issue for a predetermined price by a predetermined deadline, the government's evidence was insufficient to show his knowledge that Enron planned to account improperly for that transaction, such that reversal was required for lack of *mens rea*; and (2) the government engaged in prejudicial misconduct by (a) "repudiating" a trial stipulation between the prosecution and Fuhs, and (b) offering improper rebuttal evidence against Fuhs.

Brown, Bayly, and Furst did not invoke either of Fuhs's two claims in their initial bail papers or in their briefs. They could not possibly invoke Fuhs's misconduct claim because the stipulation, as well as the government's rebuttal

evidence, related solely to Fuhs. And though each of the defendants raised a sufficiency claim, none was remotely similar to Fuhs's *mens rea* claim. Brown argued that the government's evidence was insufficient because it allegedly showed that he opposed the barge deal and believed in any event that the deal had been fully vetted and approved by Merrill Lynch counsel. *See, e.g.*, Brown Br. 27-34. The sufficiency arguments of Bayly and Furst were founded almost exclusively on the contention that the government had failed to demonstrate even the existence of a guarantee. *See, e.g.*, Bayly Br. 24-37; Furst Br. 57-60. None of these defendants could colorably claim, as Fuhs did, that even if there was an oral guarantee and even if they knew of it, they did not know that Enron planned to account improperly for the barge deal: the government's evidence showed that they were each *told* on the Trinkle call that the guarantee could not be reduced to writing because, if it were, Enron would not get the "gain" accounting treatment that it wanted (and there would then be no reason to carry on with deal at all).[*] *See, e.g.*, Gov't Br. 19-22, 64-69, 88-91,

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[*] Fuhs has repeatedly distinguished himself from the other defendants—in his pleadings and at oral argument—by emphasizing that he was not on the Trinkle call. *See, e.g.*, Fuhs Br. 26 ("Critically important, Fuhs was absent from two key phone calls (the 'Tina Trinkle call' and the 'Fastow call'), which the prosecution argued established [*mens rea*] for his Merrill co-defendants[.]"); Fuhs's Application for Release 9-10 ("It was undisputed that Fuhs did not participate in any of the few conversations that the government argued established [*mens rea*] on the part of his Merrill Lynch co-defendants.").

95, 97-98 & n.44.

In short, even if this Court in releasing Fuhs has concluded that one or both of the claims that he has briefed presents a "substantial" question within the meaning of Section 3143(b), that would not entitle the other defendants to release pending appeal. Nor do the claims that Brown, Bayly, and Furst raise in their own pleadings justify their release; for the reasons already stated in the government's previous bail papers, in its brief, and at oral argument, none of those claims raises "a substantial doubt (not merely a fair doubt) as to the outcome of its resolution." *Valera-Elizondo*, 761 F.2d at 1024.

* * *

Accordingly, and again for the reasons stated in the government's other pleadings and at oral argument, the renewed applications of James Brown, Daniel Bayly, and Robert Furst for release on conditions pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing Opposition of the United States to the Renewed Applications of James A. Brown, Daniel Bayly, and Robert S. Furst for Release on Conditions Pending Appeal was this day delivered by facsimile and overnight mail to the Clerk of the Court. Likewise, counsel certifies that the foregoing Opposition was this day delivered by electronic mail and overnight mail to counsel for the appellants at the following addresses:

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