

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA)	
)	
v.)	CR. NO. 05-394 (RBW)
)	
I. LEWIS LIBBY,)	
also known as "Scooter Libby,")	
Defendant.)	

I. LEWIS LIBBY’S MOTION FOR RELEASE PENDING APPEAL

I. Lewis Libby, through his counsel, hereby respectfully moves this Court for release pending appeal pursuant to 18 U.S.C. § 3143. On June 5, 2007 Mr. Libby was sentenced to a term of 30 months imprisonment, plus the maximum fine and two years of supervised release. He intends to file a notice of appeal after entry of the Court’s written judgment.

At the sentencing hearing, the government agreed with the defense that Mr. Libby does not represent a flight risk or a danger to the community, and the Court concurred. Nonetheless, the government took the position that Mr. Libby is not entitled to release under § 3143 because none of the issues he plans to raise on appeal qualify as substantial. The government is wrong. While the Court may be firmly convinced that all of its decisions are correct, we respectfully submit that the Court’s own opinions and rulings show why the standard for release pending appeal is easily satisfied in Mr. Libby’s case.

ARGUMENT

I. SECTION 3143 DOES NOT REQUIRE A DEFENDANT TO CONVINCING THE COURT THAT IT COMMITTED ERROR; A CLOSE QUESTION IS ENOUGH

Pursuant to 18 U.S.C. § 3143(b), a defendant is entitled to release pending appeal when two conditions are present. First, the Court must find by clear and convincing evidence that the defendant is not likely to flee and does not pose a danger to public safety. § 3143(b)(1)(A).¹ Second, the Court must find by a preponderance of the evidence that “(1) [the defendant] is appealing for purposes other than delay, (2) the appeal ‘raises a substantial question of law or fact,’ and (3) a favorable appellate ruling on that substantial question would likely result in a reversal, an order for a new trial,” or a reduced sentence. *United States v. Quimm*, 416 F. Supp. 2d 133, 135 (D.D.C. 2006) (quoting § 3143(b)(1)(B)). When these two requirements are satisfied, “the sentencing court ‘shall order the release of the person’ pending resolution of the appeal.” *Id.* (quoting § 3143(b)(1)(B)) (emphasis added). That is, bail pending appeal is mandatory, not discretionary.

Importantly, a decision to grant release pending appeal does *not* require a finding by the district court that it erred, or that reversal is the probable outcome on appeal. As the Third Circuit has explained,

Judges do not knowingly leave substantial errors uncorrected, or deliberately misconstrue applicable precedent. Thus, it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.

¹ Because the Court has already found, with no objection by the government, that this requirement is satisfied, we do not address it here.

For a similar reason, the phrase “*likely* to result in reversal or an order for a new trial” cannot reasonably be construed to require the district court to predict the probability of reversal.

United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985). Accordingly, the “substantial question” standard “does not require the district court to find that it committed reversible error,” *United States v. Pollard*, 778 F.2d 1177, 1181-82 (6th Cir. 1985), or even that the “defendant has shown a likelihood of success on the merits of the appeal,” *Quinn*, 416 F. Supp. 2d at 136 (citing *United States v. Rittweger*, No. 02-CR-0122, 2005 WL 3200901, at *4 (S.D.N.Y. Nov. 30, 2005) (“By finding that there is a substantial issue for appeal for defendants . . . , the Court does not find that the issue will ultimately succeed or that it has merit.”)).

Rather, as the D.C. Circuit has made clear, § 3143(b) simply requires the district court to find that a single one of the defendant’s issues on appeal presents “a ‘close’ question or one that very well could be decided the other way.” *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (citing cases from the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits). Thus, in *Quinn*, the court granted the defendant’s motion because the question for appeal found “some support in [the relevant] body of law” and the court could not conclude that the question was “insubstantial or not susceptible to a different answer.” 416 F. Supp. 2d at 136.

A recent opinion from a court in this district, *United States v. Safavian*, No. 05-CR-0370, 2006 WL 3378479 (D.D.C. Nov. 16, 2006), is also instructive on the application of § 3143(b). In that case, the Court granted release pending appeal in an obstruction and false statements case even though it was quite skeptical about the defendant’s appeal issues. Judge Friedman explained, “Although the Court is confident

in its decisions and unpersuaded by the defendant's arguments, it is also aware that some of the issues he has raised (though certainly not all) . . . present close questions of law that could be decided in another way." *Id.* at *1. In reaching this conclusion, Judge Friedman noted that some of the defendant's appeal issues were "without precedent in [the D.C.] Circuit." *Id.*

As *Safavian* illustrates, a substantial question is present where there is a dearth of precedent or conflicting legal authorities pertinent to the defendant's appellate issues, or "where a defendant challenges the Court's ruling on a novel question of law and provides a rationale for a contrary interpretation that is supported by arguably applicable legal authority," *Quinn*, 416 F. Supp. 2d at 136.

Those circumstances are clearly present in Mr. Libby's case.

II. MR. LIBBY WILL PRESENT SUBSTANTIAL ISSUES ON APPEAL

As in *Quinn*, "there has been no suggestion that [Mr. Libby's] appeal is merely a dilatory tactic, and so the only dispute is the extent to which the appeal 'raises a substantial question of law that is likely to result in . . . reversal [or] an order for new trial.'" 416 F. Supp. 2d at 135 (quoting § 3143(b)(1)(B)). Mr. Libby's pre-trial and trial motions, combined with defense objections preserved in the record, present a number of close questions that are more than sufficient to satisfy the requirements of § 3143(b). In considering and deciding those questions, this Court has published several lengthy and significant opinions. We respectfully submit the Court did not do so because the questions presented were easy ones, or ones as to which precedent in this Circuit clearly dictated the answer. However confident this Court may be in the correctness of the

decisions reached, the difficulty of the issues — as evidenced by the Court’s own lengthy writings — warrants release pending appellate review.

We discuss below certain of the issues that Mr. Libby intends to present to the Court of Appeals. Each of the issues, if resolved favorably to Mr. Libby, would lead to reversal of the conviction or a new trial.

A. Whether The Exercise Of Authority By The Special Counsel Violated The Constitution And Federal Statutes Is A Substantial Question

The question whether the appointment of Patrick Fitzgerald as Special Counsel satisfied the Appointments Clause of the Constitution, art. II, § 2, cl. 2, is a close one. The Court of Appeals could easily reach the opposite conclusion from this Court.

To answer that question (and a closely related statutory question), this Court wrote a 31-page opinion (20 pages in the Federal Supplement). *See United States v. Libby*, 429 F. Supp. 2d 27 (D.D.C. 2006). In that opinion, the Court recognized that though Mr. Fitzgerald has been appointed by the President and confirmed by the Senate as a U.S. Attorney, he could not be given duties that would qualify him as a “principal officer” absent a separate appointment. *See id.* at 43 n.15. The Court recognized that whether the duties given to Mr. Fitzgerald as Special Counsel qualify him as a principal or an inferior officer under *Edmond v. United States*, 520 U.S. 651 (1997), is a “difficult question because the Special Counsel’s work is conducted largely without direction and supervision.” *Libby*, 429 F. Supp. 2d at 45. The Court further recognized that “there appears to be some tension between” *Edmond* and the earlier case of *Morrison v. Olson*, 487 U.S. 654 (1988), on which the Court ultimately relied in upholding the appointment. 429 F. Supp. 2d at 37.

What is more, the Court noted that the parties’ “differing conclusions” on the validity of the appointment “result more from each [party’s] interpretation of the scope of the Special Counsel’s authority than the cases on which they rely.” *Id.* at 38. The Court then engaged in its own interpretation of the scope of that authority, but indicated that the task was not particularly straightforward and that its own research did not “reveal[] any case law that clearly addresses th[e] point.” *Id.* at 39.

Under this Court’s own analysis, if the Court of Appeals resolves the tension between *Morrison* and *Edmond* in a different manner than did this Court, *or* if the Court of Appeals construes the Special Counsel’s authority differently than did this Court, it is likely to reverse this Court’s decision and order dismissal of the indictment.²

The Court of Appeals — which has never addressed the “tension” between *Edmond* and *Morrison* — could well conclude, as have some commentators,³ that the generally applicable constitutional test for inferior-officer status is not the multi-factor, *ad hoc* balancing test applied in *Morrison*, but rather the clear test more recently set forth by the Court in *Edmond*, 520 U.S. at 663: “‘inferior officers’ are officers whose work is

² Such a ruling would not, contrary to the Court’s concern, immunize high-level administration officials from future investigation and prosecution. Indeed, the *Department’s own regulations* provide for the appointment of a special counsel who *is* subject to supervision and direction by the Attorney General. *See* 28 C.F.R. Part 600. Those regulations give a special counsel a degree of independence appropriate where high-ranking executive officials are under investigation, *see* §§ 600.6, 600.7(b) — without wholly abdicating the Department’s supervisory obligation. The government has never satisfactorily explained why the Acting Attorney General saw fit expressly to exempt Mr. Fitzgerald from those regulations.

³ *E.g.*, Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 811 (1999); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 Colum. L. Rev. 1103 (1998).

directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”

The Court of Appeals could well agree with Justice Souter, moreover, that “[h]aving a superior officer is necessary for inferior officer status, but not sufficient to establish it,” without something more. *Id.* at 667 (opinion concurring in the judgment). *But cf. Libby*, 429 F. Supp. 2d at 37 (relying on cases that stand for the exact opposite proposition, *i.e.*, that supervision by a superior officer is sufficient but not necessary for inferior-officer status).

Finally, because Mr. Fitzgerald was explicitly relieved from *any* “supervision or control of any officer of the Department,” Letter from James Comey, Deputy Attorney General, to Patrick Fitzgerald, U.S. Attorney (Dec. 30, 2003), the Court of Appeals could well conclude that the Special Counsel is not an inferior officer under *Edmond*.

In sum, we respectfully submit that this Court’s prior finding that there is a tension between *Edmond* and *Morrison* and its conclusion that the application of *Edmond* to the Special Counsel is a “difficult question” is a recognition that the Appointments Clause issue is “close” and “very well could be decided the other way” by the appellate court. *Perholtz, supra*, 836 F.2d at 555. Because such a decision would lead to dismissal of the indictment, the requirement of § 3143(b)(1)(B) is satisfied by this issue alone.

B. Mr. Libby’s Memory Defense Issues Present Substantial Questions

Throughout these proceedings, the Court and the parties wrestled with a series of novel issues arising from Mr. Libby’s central defense that any errors in his statements to the FBI or grand jury were the result of confusion, mistake, or faulty memory rather than deliberate deception. These “memory defense” issues included, for example, Mr. Libby’s

request to present expert testimony concerning memory; the adequacy of the government's substitutions for relevant and admissible classified information under CIPA § 6(c); and the Court's exclusion of the government's statement admitting relevant facts as well as much of the CIA briefers' testimony following Mr. Libby's decision not to testify. The Court addressed these issues at length in three published opinions.

These memory issues go to the heart of Mr. Libby's defense. In a case where questions of memory were so important, and where the jury deliberated for nine days on a five-count indictment against a single defendant, we respectfully submit that if the appellate court reaches a contrary conclusion on any one of these issues, a new trial on all counts will be required.

1. Expert testimony on memory

Mr. Libby proffered the testimony of Dr. Robert Bjork on relevant findings from scientific research on human memory. The Court found Dr. Bjork "eminently qualified to testify on the subject of memory and perception." *United States v. Libby*, 461 F. Supp. 2d 3, 8 n.6 (D.D.C. 2006). It acknowledged that "today . . . the science of memory is well established and accepted in the scientific community, and the subject of Dr. Bjork's testimony has been well tested and subjected to peer review." *Id.* And it predicted (accurately) that "the memory and recollection of the principal players will undoubtedly play a substantial role in the assessment of the defendant's culpability in the upcoming trial." *Id.* at 5. Nonetheless, the Court excluded Dr. Bjork's testimony under Fed. R. Evid. 702 on the ground that Mr. Libby failed to establish that the testimony would be helpful to the jury, and under Rule 403 because of concerns about delay, waste of time, and jury confusion. *See id.* at 18-19.

Though this Court ultimately decided to exclude Dr. Bjork’s testimony, it recognized that “[t]here is no clear case authority, or absolute rule, on when an expert should be permitted to testify on issues regarding memory and perception.” *Id.* at 9. That dearth of relevant precedent is sufficient to satisfy § 3143(b). Faced with this novel issue, the Court of Appeals could well conclude that this Court’s refusal to allow the proffered testimony — particularly in a case where issues of memory and its reliability were so fundamental — was incorrect.

On appeal, the defense expects to argue that the Court’s decision was contrary to the Federal Rules’ “general approach of relaxing the traditional barriers to ‘opinion’ testimony,” *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 588 (1993) (citation and internal quotation marks omitted), and gave insufficient weight to Rule 702’s presumption in favor of admitting expert testimony, *Weinstein’s Federal Evidence* § 702.02[1] (2d ed. 2006) (citing cases); *see* Fed. R. Evid. 702, advisory committee’s note to 2000 Amendments (noting that the exclusion of expert testimony is “the exception rather than the rule”).⁴ Consistent with these well-established principles, the Court of Appeals could well conclude that, contrary to this Court’s decision, the Federal Rules did not require Mr. Libby to demonstrate that most prospective jurors do not understand the subject of the proffered testimony — a standard that would require the exclusion of much evidence now routinely admitted, including (for example) testimony that the prosecution offers every day from gang experts, drug distribution experts, and others.⁵

⁴ *See also, e.g., United States v. Douglas*, 482 F.3d 591, 600 (D.C. Cir. 2007) (noting that “Rule 403 tilts, as do the rules as a whole, toward the admission of evidence in close cases”) (quotation omitted).

⁵ *See, e.g., United States v. Martinez*, 476 F.3d 961, 967 (D.C. Cir. 2007) (expert on drug trafficking routes); *United States v. Padilla*, 387 F.3d 1087, 1094 (9th Cir. 2004) (gang

Likewise, the appellate court might well reject this Court's conclusion that cross-examination and jury instructions provided an adequate substitute for Dr. Bjork's testimony. *See* 461 F. Supp. 2d at 15-16.⁶ It could recognize that, in fact, cross-examination had no ability whatsoever to explain how *Mr. Libby's* memory could have failed, which was the central purpose for introducing Dr. Bjork's testimony in the first place. *See, e.g.*, Reply of I. Lewis Libby in Support of his Motion to Admit Expert Testimony under Fed. R. Evid. 702 (Sept. 15, 2006) (Dkt. 142). Moreover, the appellate court might well determine, as the Third Circuit has, that even skillful cross-examination is largely ineffectual when it comes to exposing the flaws in the recollection of a confident witness (*e.g.*, Tim Russert or Ari Fleischer, two of the witnesses most important to the government's case). *See United States v. Downing*, 753 F.2d 1224, 1230 n.6 (3d Cir. 1985) (where witnesses are confident in their memories, "cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness's recollection of an event").

Finally, the Court of Appeals, like other courts, might find that jury instructions are an unsatisfactory substitute for reliable expert testimony on questions of human memory and perception, especially where, as here, the instructions merely list certain

expert); *United States v. Young*, 745 F.2d 733, 761 (2d Cir. 1984) (heroin distribution expert); *see also, e.g., United States v. Hadley*, 918 F.2d 848, 852-53 (9th Cir. 1990) (child sexual abuse accommodation expert); *United States v. Alonso*, 48 F.3d 1536, 1540 (9th Cir. 1995) (expert in surveillance and counter surveillance practices used by drug dealers); *United States v. Anderson*, 851 F.2d 384, 392 (D.C. Cir. 1988) (expert on the lifestyle of pimps and their relationship with prostitutes); *United States v. Peralta*, 941 F.2d 1003, 1009 (9th Cir. 1991) ("Stockholm syndrome" expert); *United States v. Glover*, 265 F.3d 337, 343-44 (6th Cir. 2001) (vehicle parts expert); *United States v. McPhilomy*, 270 F.3d 1302, 1312-14 (10th Cir. 2001) (expert in quality, quantity, and value of stone).

⁶ Mr. Libby objected to the adequacy of the Court's memory instruction and will likely argue that issue on appeal as well.

factors for the jury to consider in assessing memory without explaining their significance.⁷ *See, e.g., United States v. Sullivan*, 246 F. Supp. 2d 696, 699 (E.D. Ky. 2003) (introducing such information “for the first time in the jury instructions, without providing the jury any information about how those factors affect the [eyewitness] identification process, is likely to be more confusing than helpful”).

In a case where the determination of guilt or innocence turned on whether Mr. Libby could have forgotten, the appellate court could easily conclude that it was a mistake to ask the jury to try to answer that fundamental question without the benefit of relevant and reliable scientific evidence. The jurors themselves apparently thought so. *See Denis Collins, My 15 Minutes, All Because of Scooter*, *The Washington Post*, Mar. 11, 2007, at B1 (noting that eight days into the deliberations one juror asked, “[i]f this trial is all about memory, why haven’t we heard from any memory experts? . . . *I’d like to know what’s possible to forget*”) (emphasis added) (attached hereto as Exh. A).

At a minimum, the admissibility of Dr. Bjork’s testimony presents a “close” question, one “that very well could be decided the other way.” *Perholtz*, 836 F.2d at 555.

2. Substitutions under CIPA § 6(c)

Following lengthy proceedings under CIPA § 6(a), the Court found most of Mr. Libby’s proposed classified evidence relevant and admissible. *United States v. Libby*,

⁷ Here, the memory instruction the Court ultimately adopted failed to explain several well-established but likely counter-intuitive findings of memory science that were highly relevant to Mr. Libby’s defense, and about which Dr. Bjork could have reliably testified. These include (among several others) that a person’s confidence in his memory bears at most a weak correlation to the accuracy of that memory; that, through the phenomenon of memory conjunction error, it is normal for a person to accurately remember the contents of a conversation but inaccurately recall the person with whom he had that conversation; and that a person who hears a conversation is less likely to recall the substance of the conversation accurately than a person who both hears and observes a conversation.

467 F. Supp. 2d 1 (D.D.C. 2006). The Court then held a series of hearings under CIPA § 6(c) to determine whether the government’s proposed substitutions afforded Mr. Libby “substantially the same ability to make his defense” as the classified information itself. The hearings produced a series of oral rulings, some rejecting the government’s proposed substitutions and some accepting those substitutions, often over Mr. Libby’s objection. The Court resolved the final, crucial substitution issues in the government’s favor in a published opinion. *United States v. Libby*, 467 F. Supp. 2d 20 (D.D.C. 2006).

The adequacy of the government’s substitutions under CIPA § 6(c) presents a substantial question on appeal. As the Court acknowledged, “[t]here is no existing written case authority describing the lens through which a Court should look to determine whether a proposed substitution ‘will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.’” *Id.* at 25-26 (quoting CIPA § 6(c)). The Court described the CIPA § 6(c) process as a “tedious and complex expedition” through terrain “largely uncharted by written precedent.” *Id.* at 40. Given the complexity and novelty of the issues with which the parties and the Court grappled under § 6(c), and the significance of those issues to the defense, they clearly present “close” questions or ones that “very well could be decided the other way.”

