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Release Pending Appeal: A Narrow Definition of "Substantial Question" Under the Bail Reform Act of 1984

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RELEASE PENDING APPEAL: A NARROW DEFINITION OF "SUBSTANTIAL QUESTION" UNDER THE BAIL REFORM ACT OF 1984

INTRODUCTION

A new federal Bail Reform Act (BRA or Act)[1] was enacted in 1984.[2] By toughening the standards for granting bail, the new BRA reflects a dramatic shift from the previous policy of favoring release. The BRA changed the requirements for allowing bail pending disposition of an appeal from a criminal conviction. The new Act requires a convicted defendant who has been sentenced to a term of imprisonment to demonstrate, among other things, that his appeal involves a "substantial question of law or fact likely to result in reversal or an order for a new trial."[3] Controversy has erupted in the federal courts over how much merit is required for a question to be substantial in this context. Some circuits have defined "substantial" as "fairly debatable."[4] Others reject that definition and instead require a "close question" in the defendant's appeal.[5]

Some courts have suggested that the two definitions do not significantly differ.[6] Real distinctions do exist, however. Those courts adopt-

1. Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202-210, 98 Stat. 1976, 1976-87 (codified at 18 U.S.C.A. §§ 3141-3150 (West 1985)).

2. The Bail Reform Act of 1984 was enacted as Title II of the Comprehensive Crime Control Act of 1984. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 1976-87 (codified at scattered sections of U.S.C.). The Act became effective on October 12, 1984. *Id.* at 2199.

3. *See* 18 U.S.C.A. § 3143(b)(2) (West 1985). The new criteria for release pending appeal have been expressly incorporated into the Federal Rules of Appellate Procedure which provide that the "decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3143." Fed. R. App. P. 9(c). The Federal Rules of Criminal Procedure have also incorporated the new law. *See* Fed. R. Crim. P. 46(c).

Section 3143 treats release pending sentencing and release pending appeal differently. *Compare* 18 U.S.C.A. § 3143(a) (West 1985) ("Release or detention pending sentence") *with id.* § 3143(b) ("Release or detention pending appeal by the defendant"). Also treated separately is release pending review of an appeal by the government. *See id.* § 3143(c). In such a situation, the applicant's release is determined by the more liberal standards used for pretrial defendants. *See id.*; 3A C. Wright, Federal Practice and Procedure § 767, at 20 (Supp. 1985). This Note limits its discussion to bail pending appeal of a criminal conviction and sentence. A release in such a situation "runs until the final termination of the proceedings in all courts." 3A C. Wright, *supra*, § 767, at 140 (2d ed. 1982).

4. *See* United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). Some courts have defined "substantial question" as "fairly doubtful." *See, e.g.*, United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985); United States v. DiMauro, 614 F. Supp. 461, 465 (D. Me. 1985). According to *Handy*, which post-dates *Miller*, the two definitions are interchangeable. *See Handy*, 761 F.2d at 1283.

5. *See, e.g.*, United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); United States v. Molt, 758 F.2d 1198, 1200 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1231-32 (8th Cir. 1985) (en banc); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam).

6. *See* United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 106 S. Ct.

ing the close question definition apply a more stringent standard for judging the merit of the appeal.[7] Determining which definition better comports with legislative purpose is essential if the goals of the Act are to be executed faithfully. Furthermore, courts need an appropriate and workable guideline for applying the new standard.[8] Guidelines are especially important to district courts deciding motions for release[9] because reviewing courts give great deference to these initial determinations on appeal.[10]

This Note examines the standard for defining a "substantial question." Part I traces the history of the conflicting interests in the context of bail pending appeal and the priorities that these interests have taken in the constantly changing law. Part II discusses the language of the BRA of 1984 and the recent interpretations of section 3143(b) on bail pending appeal. Finally, Part III examines congressional intent in enacting the new BRA, differentiates between the two interpretations of "substantial question," and determines that "close question" implies a stricter standard than "fairly debatable." This Note concludes that the "close question" standard should be applied in determining substantiality of the question in order to satisfy congressional intent.

I. Relevant History of Bail Reform and the Standards for Bail Pending Appeal

The historical meaning of bail in the criminal context is security deposited with a court to ensure a defendant's future appearance before

533 (1985); United States v. Hicks, 611 F. Supp. 497, 500 n.3 (S.D. Fla. 1985) (mem.). The court in *Randell*, however, stated a preference for the close question definition. *See Randell*, 761 F.2d at 125.

7. See *infra* Part III.B.

8. In the past courts have been given wide discretion in deciding bail cases. *See* United States v. Iacullo, 225 F.2d 458, 459 (7th Cir. 1955) (quoting Williamson v. United States, 184 F.2d 280, 281 (Jackson, Circuit Justice 1950)). However, since the Bail Reform Act of 1966, Pub. L. No. 89-465, §§ 2-6, 80 Stat. 214-217 (codified at 18 U.S.C. §§ 3146-3152 (1982)), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203, 98 Stat. 1976, 1976, the courts' discretion is effectively limited to considerations of the risk of the defendant's flight and the risk that he will endanger the community. *See* United States v. Provenzano, 605 F.2d 85, 93 (3d Cir. 1979).

9. *See* Fed. R. App. P. 9(b) (applications for bail pending appeal "shall be made in the first instance in the district court").

10. *See* Harris v. United States, 404 U.S. 1232, 1232 (Douglas, Circuit Justice 1971); United States v. Blyther, 407 F.2d 1279, 1280 (D.C. Cir.) (per curiam), *cert. denied*, 394 U.S. 953 (1969); Carbo v. United States, 302 F.2d 456, 457 (9th Cir. 1962) (per curiam). Of course, the federal appellate courts must make independent determinations of bail issues. 18 U.S.C.A. § 3141(b) (West 1985); *see Harris*, 404 U.S. at 1232; Sellers v. United States, 89 S. Ct. 36, 37-38 (Black, Circuit Justice 1968); Leigh v. United States, 82 S. Ct. 994, 995 (Warren, Circuit Justice 1962); United States v. Provenzano, 605 F.2d 85, 92-93 (3d Cir. 1979); *see also* United States v. Affleck, 765 F.2d 944, 954 (10th Cir. 1985) (considerable deference should be given for substantiality of questions of fact, but independent consideration of questions of law can be made by court of appeals).

that court.[11] The bail system still provides a means of preventing the accused or convicted defendant from fleeing the court's constructive custody.[12] This Note focuses on whether a convicted defendant will be permitted conditional release from confinement at all.[13]

Throughout the history of bail pending appeal, the judiciary and the legislature have had to balance the competing interests of the defendant and society.[14] The defendant's interests in being released on bail include freedom pending judicial review,[15] a desire to prepare one's case efficiently,[16] and avoidance of the potential hardships of prison.[17] The societal interests in denying bail to one convicted of a crime include preventing the defendant from fleeing the court's custody,[18] protecting the community from potential danger,[19] and avoiding delay in punishment.[20] The bail bond system, together with the imposition of other specific conditions of a defendant's release, was intended as one compromise of these conflicting interests.[21] The standards for granting and denying release have changed over the years, reflecting shifts in the weight that Congress accords these conflicting interests. A consideration of the changing balance is essential to an understanding of the current trend in release.

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11. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951); Lay & De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 Wm. Mitchell L. Rev. 929, 931 (1985).

12. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951). This concept applies to bail in both the pretrial and the appeal phases of a criminal case. *See* Garvey v. United States, 292 F. 591, 593 (2d Cir. 1923).

13. The BRA refers to "release" rather than "bail," *see* 18 U.S.C.A. §§ 3141-3150 (West 1985), in order to differentiate between a money bond and the granting of release subject to certain conditions, one of which is the deposit. Powers, *Detention Under the Federal Bail Reform Act of 1984*, 21 Crim. L. Bull. 413, 414 (1985). For the purposes of the Note, however, the terms "bail" and "release" are used interchangeably.

14. *See* United States v. Austin, 614 F. Supp. 1208, 1212 (D.N.M. 1985); United States v. Delaney, 8 F. Supp. 224, 225 (D.N.J. 1934). The conflict is one between two incompatible principles. A convicted person should not have to be imprisoned if he might later be declared innocent. At the same time, there should be no undue delay between a crime and its punishment. *See Austin*, 614 F. Supp. at 1212; *Delaney*, 8 F. Supp. at 225.

15. *See* Bandy v. United States, 81 S. Ct. 197, 197 (Douglas, Circuit Justice 1960); Lay & De La Hunt, *supra* note 11, at 949-50.

16. Stack v. Boyle, 342 U.S. 1, 4 (1951); Heikkinen v. United States, 208 F.2d 738, 742 (7th Cir. 1953); Lay & De La Hunt, *supra* note 11, at 950. *But see* United States v. Austin, 614 F. Supp. 1208, 1212 n.13 (D.N.M. 1985) (defendant's utility in assisting counsel in preparing case largely disappears after conviction).

17. *See* Lay & De La Hunt, *supra* note 11, at 950.

18. *See* United States v. Provenzano, 605 F.2d 85, 90 (3d Cir. 1979). See *supra* notes 11-12 and accompanying text.

19. *See* United States v. Provenzano, 605 F.2d 85, 90 (3d Cir. 1979); S. Rep. No. 225, 98th Cong., 1st Sess. 3, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3185.

20. *See* United States v. Delaney, 8 F. Supp. 224, 225 (D.N.J. 1934).

21. *Id.* ("Bail or qualified freedom was devised to meet these conflicting interests of society and the individual.").

A. *Early Development of the Standards of Release*

The standards applied in cases of bail pending appeal have always been more stringent than those employed in determining pretrial release.[22] This is largely because the presumption of the defendant's innocence disappears after conviction and sentencing.[23]

The first statute to address the issue of bail pending appeal was enacted in 1866.[24] In 1891, the Supreme Court promulgated Rule 36(2)[25] for federal courts, which provided that for writs of error, the Justice or judge presiding over the case "shall have power, . . . to admit the accused to bail in such amount as may be fixed."[26] In *Hudson v. Parker*[27] the Court held that the rule recognized a person's right to bail "until he has been finally adjudged guilty in the court of last resort[,] . . . not only after arrest and before trial, but after conviction and pending a writ of error."[28]

Following *Hudson*, various interpretations of the rule emerged.[29] For example, one court held that bail would not be granted if the appeal was brought solely for the purpose of delay,[30] while another court deemed bail proper "as best effects exact justice between the government and the defendant. . . ."[31] Courts held that a presumptive right to bail pending appeal existed absent exceptional circumstances.[32] By 1926, a well set-

22. *See* United States v. Austin, 614 F. Supp. 1208, 1212 n.13 (D.N.M. 1985); United States v. Miranda, 442 F. Supp. 786, 789 (S.D. Fla. 1977). *Compare* 18 U.S.C.A. § 3142(c) (West 1985) (judicial officer shall order pretrial release of defendant subject to any necessary conditions to prevent flight or danger to community) *with id.* § 3143(b) (judicial officer shall not order release pending appeal unless there is clear and convincing evidence that defendant will not flee nor pose danger to community and provided defendant presents substantial question on an appeal not brought for delay).

23. United States v. Austin, 614 F. Supp. 1208, 1212 n.13 (D.N.M. 1985); *see* United States v. Miranda, 442 F. Supp. 786, 792 (S.D. Fla. 1977); 3A C. Wright, *supra* note 3, § 767, at 120. Release on bail has been routinely granted to pretrial defendants in order to give meaning to the initial presumption of innocence. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951). See *infra* notes 109-11 and accompanying text.

24. *See* Act of July 13, 1866, ch. 184, § 69, 14 Stat. 172-73. This statute left the issue of bail pending appeal to the discretion of the appropriate state courts, because there were no writs of error from one federal court to another in criminal cases at that time. *See* Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 112 (1977). However, at common law, determining bail pending appeal rested within judicial discretion. *Id.* at 112 n.503.

25. Sup. Ct. R. 36(2), 139 U.S. 706 (1891).

26. *Id.* This Rule was set forth after the establishment of the Circuit Courts of Appeals that same year. *See* Sup. Ct. R. 36(1), 139 U.S. 706 (1891).

27. 156 U.S. 277 (1895).

28. *Id.* at 285.

29. The Rule itself contained no requirement that the question on appeal have some degree of merit, but the courts infused this idea into their interpretations. 3A C. Wright, *supra* note 3, § 767, at 127 n.20.

30. *See* McKnight v. United States, 113 F. 451, 453 (6th Cir. 1902).

31. *Ex parte* Harlan, 180 F. 119, 135 (5th Cir. 1909), *aff'd*, 218 U.S. 442 (1910).

32. *See, e.g.*, Jones v. United States, 12 F.2d 708, 709 (4th Cir. 1926) ("[t]here may be unusual cases . . . that would warrant the court to hesitate in granting bail; but these are exceptional cases"); Rossi v. United States, 11 F.2d 264, 265 (8th Cir. 1926) ("[t]here are

tled criterion for granting bail was that the defendant's appeal could not be frivolous.[33] While this new guideline placed the burden of demonstrating frivolousness on the government,[34] it marked the first step toward making a meritorious appeal a prerequisite for release.[35]

By 1934 the liberal attitude underlying the test had faded.[36] In that year, the Supreme Court amended Rule VI of the Rules of Criminal Appeal[37] to state: "Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court."[38] In applying the substantial question test, the courts defined "substantial" as "fairly debatable"[39] or "fairly doubtful."[40] The leading cases also considered substantial those questions that were new or novel[41] or that "present[ed] unique facts not plainly covered by the controlling precedents."[42] In addition, these courts included any "important questions concerning the scope and meaning of decisions of the Supreme Court,"[43] or that were in conflict among the circuits.[44] The opinion in *Herzog v. United States*[45] also included questions for which there was "a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail."[46] When the

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rare cases in which bail may properly be denied"); McKnight v. United States, 113 F. 451, 453 (6th Cir. 1902) (if appearance can be assured by requiring bail money, "there is no excuse for refusing or denying such relief").

33. *See* Duker, *supra* note 24, at 115. A leading case establishing this standard for reviewing bail issues was United States v. Motlow, 10 F.2d 657 (Butler, Circuit Justice 1926). Justice Butler stated that "if [the writs of error were] taken in good faith, on grounds not frivolous but fairly debatable . . . then petitioners should be admitted to bail." *Id.* at 662.

34. *See* Duker, *supra* note 24, at 115.

35. Note, *Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach*, 57 Tex. L. Rev. 275, 278 (1979) [hereinafter cited as *Bail Pending Appeal*].

36. *See id.* at 277.

37. *See* Crim. App. R. VI, 292 U.S. 663 (1934).

38. *Id.* at 664.

39. *See, e.g.*, D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950); United States v. Barbeau, 92 F. Supp. 196, 202 (D. Alaska 1950), *aff'd*, 193 F.2d 945 (9th Cir. 1951), *cert. denied*, 343 U.S. 968 (1952); Warring v. United States, 16 F.R.D. 524, 526 (D. Md. 1954); United States v. Goo, 10 F.R.D. 337, 338 (D. Hawaii 1950).

40. *See* Williamson v. United States, 184 F.2d 280, 281-82 n.4 (Jackson, Circuit Justice 1950) ("question should be substantial in the sense of fairly doubtful").

41. *See* Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955); D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950).

42. D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950); *see* United States v. Glazer, 14 F.R.D. 86, 88 (E.D. Mo. 1952), *appeal dismissed per curiam*, 205 F.2d 421 (8th Cir. 1953).

43. D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950); United States v. Glazer, 14 F.R.D. 86, 88 (E.D. Mo. 1952), *appeal dismissed*, 205 F.2d 421 (8th Cir. 1953).

44. *See* Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955).

45. 75 S. Ct. 349 (Douglas, Circuit Justice 1955).

46. *Id.* at 351. This criterion, according to Justice Douglas, considered the soundness of the errors alleged by the defendant on appeal. *See id*; *see also* United States v. Iacullo,

identical rule was reenacted in 1946 as Federal Rule of Criminal Procedure 46(a)(2),[47] the courts interpreted it to mandate placing the burden of proof on the applicant rather than on the government.[48]

In light of a renewed public and governmental concern for the criminal defendant's rights,[49] a 1956 Amendment to the Rules of Criminal Procedure[50] allowed for release pending appeal "unless it appears that the appeal is frivolous or taken for delay."[51] This amendment greatly liberalized the basis for granting bail.[52] Courts interpreted the new rule as returning to the government the burden of proving that the defendant had not met the minimum requirements for release.[53] Furthermore, it was held that the standard "expresses a general attitude . . . [that] the risk of incarceration for a conviction that may be upset is normally to be guarded against by allowing bail unless the appeal is so baseless as to deserve to be condemned as 'frivolous' or is sought as a device for mere delay."[54] Thus, a denial of release was proper in only the most exceptional cases.[55]

B. *The Bail Reform Act of 1966*

The Bail Reform Act of 1966[56] manifested a continuing concern for

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225 F.2d 458, 459 (7th Cir. 1955) (agreeing with the observation in *Herzog*, but distinguishing on the facts).

47. Fed. R. Crim. P. 46(a)(2) (1946), *reprinted in* 1946 U.S. Code Cong. Serv. 2275, 2296-97 (amended 1956).

48. *See* United States v. Delaney, 8 F. Supp. 224, 227 (D.N.J. 1934), *rev'd on other grounds*, 77 F.2d 916 (3d Cir. 1935); *Bail Pending Appeal*, *supra* note 35, at 278. The Rule read in part:

> Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice.

Fed. R. Crim. P. 46(a)(2) (1946), *reprinted in* 1946 U.S. Code Cong. & Ad. News 2275, 2296-97 (amended 1956).

49. *Bail Pending Appeal*, *supra* note 35, at 278.

50. Fed. R. Crim. P. 46(a)(2), 350 U.S. 1021 (1956).

51. *Id.* This new standard completely supplanted the requirement of a "substantial question." *See id.*

52. United States v. Allied Stevedoring Corp., 76 S. Ct. 1068, 1069 (Frankfurter, Circuit Justice 1956); Ward v. United States, 76 S. Ct. 1063, 1064-65 (Frankfurter, Circuit Justice 1956); *see* Leary v. United States, 431 F.2d 85, 88-89 (5th Cir. 1970); United States v. Piper, 227 F. Supp. 735, 741 (N.D. Tex.), *aff'd per curiam*, 338 F.2d 1005 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

53. *See* Binion v. United States, 352 U.S. 1028, 1029 (1957) (per curiam); Ward v. United States, 76 S. Ct. 1063, 1065 (Frankfurter, Circuit Justice 1956); United States v. Piper, 227 F. Supp. 735, 741 (N.D. Tex.), *aff'd per curiam*, 338 F.2d 1005 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965); *Bail Pending Appeal*, *supra* note 35, at 278. Although the government had the burden of proving lack of merit in the appeal, it was, of course, the defendant's responsibility to identify the questions in the first place. *See* Bowman v. United States, 85 S. Ct. 232, 232 (Douglas, Circuit Justice 1964).

54. Ward v. United States, 76 S. Ct. 1063, 1065 (Frankfurter, Circuit Justice 1956).

55. *See* Rhodes v. United States, 275 F.2d 78, 82 (4th Cir. 1960).

56. Bail Reform Act of 1966, Pub. L. No. 89-465, §§ 2-6, 80 Stat. 214-17 (codified at

the rights of criminal defendants.[57] Under the Act, the rule for bail pending appeal maintained the minimal requirements that the claim in the defendant's appeal not be frivolous nor taken for delay.[58] Congress added, however, that the defendant could also be detained if a risk of flight or if danger to the community existed.[59] The government had the burden of proving that the defendant's appeal was frivolous, but the defendant had the burden of proving that he was neither a flight risk nor a danger to society.[60] If the government failed to show that the defendant should be detained, the statute required that the defendant be treated the

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18 U.S.C. §§ 3146-3152 (1982)), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203, 98 Stat. 1976, 1976.

57. The House Report accompanying the 1966 legislation focused on considerations of fairness to the defendant:

> The purpose of [the Act] is to revise existing bail procedures in the courts of the United States . . . in order to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

H.R. Rep. No. 1541, 89th Cong., 2d Sess. 15, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2293, 2295.

In the past several years, the money bond system of bail has been attacked as unjust to poor defendants. *See* Carbone, *Seeing Through The Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 518 (1983); Harris, *The Vested Interests of the Judge: Commentary on Flemming's Theory of Bail*, 1983 Am. Bar. Found. Res. J. 490, 493-94; Lay & De La Hunt, *supra* note 11, at 931. The BRA of 1966 sought to remedy these inequities by deemphasizing money bonds and providing instead for other, more flexible conditions of release. S. Rep. No. 225, *supra* note 19, at 5, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3187-88 (discussing Final Report of the Attorney General's Task Force on Violent Crime, Aug. 17, 1981, at 50-51). For a list of the current conditions that can be placed on a release order, see 18 U.S.C.A. § 3142(c) (West 1985).

58. *See* BRA of 1966, 18 U.S.C. § 3148 (1982) (repealed 1984).

59. *See id.* Actually, the 1966 Act merely codified the factors that the courts had considered previously. 3A C. Wright, *supra* note 3, § 767, at 131, 134; *see, e.g.*, United States v. Galante, 308 F.2d 63, 64 (2d Cir. 1962) (defendant who had previously been a fugitive and who had made frequent business and social trips outside U.S. was denied bail pending appeal). Thus, the BRA of 1966 made little change in the liberal standards practiced under prior law. 3A C. Wright, *supra* note 3, § 767, at 123.

According to the BRA of 1966, the possibility of flight or danger was not automatic cause for detention. Release was to be ordered unless the judge reasonably believed that "no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." BRA of 1966, 18 U.S.C. § 3148 (1982) (repealed 1984). Thus, there was an obligation to impose conditions on the defendant's release, where feasible, to prevent flight or danger, rather than to deny release entirely. *See* United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979); United States v. Harrison, 405 F.2d 355, 357 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 974 (1969).

60. 3A C. Wright, *supra* note 3, § 767, at 124 n.9; *see* United States v. Valera-Elizondo, 761 F.2d 1020, 1023 (5th Cir. 1985); United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979).

Originally, the full burden had been on the government. *See* 3A C. Wright, *supra* note 3, § 767, at 126; Leary v. United States, 431 F.2d 85, 89 (5th Cir. 1970). In 1972, however, Rule 9(c) was added to the Federal Rules of Appellate Procedure and provided that "[the] decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3148. The burden of establishing that the defendant will not flee or pose a

same as a pretrial bail applicant.[61]

The judicial interpretations of "frivolous" illustrate the liberality of the standard. One court defined an appeal as frivolous "only if the applicant can make no rational argument on the law or facts in support of his claim for relief."[62] Other courts, relying on the dictionary definition, considered an issue frivolous only where it presented "no reasonable possibility of reversal, the word meaning of little weight or importance, not worth notice, slight."[63] For the most part, courts agreed that bail should be denied only as a last resort,[64] even where the defendant posed a potential danger to the community.[65] The courts continued to resolve all doubts in favor of the defendant.[66] Thus, the BRA of 1966 mandated a strong, albeit rebuttable, presumption in favor of bail.[67]

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danger to any other person or to the community rests with the *defendant*." Fed. R. App. P. 9(c) (1972) (amended 1984) (emphasis added).

The Advisory Committee Note to that 1972 amendment added that the burden of establishing that the appeal is frivolous or taken for delay still rested with the government. *See* Fed. R. App. P. 9(c) advisory committee note (1972). The 1972 Amendment to Rule 46 of the Federal Rules of Criminal Procedure state that the burden of proving no risk of flight or danger to the community rests with the defendant, but is silent on proof of a meritorious question. *See* Fed. R. Crim. P. 46(c) (amended 1984).

61. *See* BRA of 1966, 18 U.S.C. § 3148 (1982) (repealed 1984); *see also* United States v. Provenzano, 605 F.2d 85, 90 (3d Cir. 1979) (if the factors were found in defendant's favor court must order release according to § 3146 for pretrial defendants); 3A C. Wright, *supra* note 3, § 767, at 124-25 (the same conditions of release may be imposed and the same factors taken into consideration in setting conditions).

62. Blair v. California, 340 F.2d 741, 742 (9th Cir. 1965) (quoted in Dillingham v. Wainwright, 422 F. Supp. 259, 261 (S.D. Fla. 1976)), *aff'd*, 555 F.2d 1389 (5th Cir. 1977).

63. United States v. Piper, 227 F. Supp. 735, 740 (N.D. Tex.), *aff'd per curiam*, 338 F.2d 1005 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965); United States v. Esters, 161 F. Supp. 203, 206 (W.D. Ark. 1958) (quoting Webster's Unabridged Dictionary).

64. *See* Government of V.I. v. Leycock, 678 F.2d 467, 469 (3d Cir. 1982) (quoting United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979)); *see also* United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (stating that under prior law, bail pending appeal "was the rule, not the exception"); Banks v. United States, 414 F.2d 1150, 1153 (D.C. Cir. 1969) (alternatives to denying bail should be found); 3A C. Wright, *supra* note 3, § 767, at 128-29 (in most cases, release pending appeal should not be denied solely on the ground that the appeal is frivolous).

65. *See* Sellers v. United States, 89 S. Ct. 36, 38 (Black, Circuit Justice 1968) (must be "kind of danger that so jeopardizes the public" that it can only be prevented by incarceration); United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979) ("danger to the community posed by the defendant must be of such dimension that only his incarceration can protect against it").

66. *See Bail Pending Appeal*, *supra* note 35, at 280; *see, e.g.*, United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979); United States v. Piper, 227 F. Supp. 735, 741 (N.D. Tex.), *aff'd per curiam*, 338 F.2d 1005 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

67. *See* S. Rep. No. 225, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3209; H.R. Rep. No. 1541, *supra* note 57, at 15, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2293, 2305.

II. THE BAIL REFORM ACT OF 1984 AND THE CONTROVERSY OVER THE CURRENT STANDARD FOR RELEASE

The 1984 amendment on bail pending appeal, section 3143(b),[68] dramatically changed the requirements for release.[69] The interpretations that have emerged vary among the circuits[70] and complicate the courts' attempts to develop a practical standard for applying the new law.

A. *The Language of Section 3143(b)*

Although considerations of flight, danger to the community, and unnecessary delay remain intact,[71] Congress has replaced "[not] frivolous" with "substantial question of law or fact likely to result in reversal or an order for a new trial."[72] In addition, the law no longer requires that bail be granted unless certain requirements are satisfied. Instead, release is to be *denied* unless there is an "*affirmative* finding that the chance for reversal is substantial."[73] The burden of proof is now indisputably on the defendant.[74]

The primary goal of Congress in departing from the previous, more

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68. 18 U.S.C.A. § 3143(b) (West 1985).

69. Section 3143(b) reads in full:

> (b) Release or detention pending appeal by the defendant.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—
>
> (1) 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 pursuant to section 3142(b) or (c); and
>
> (2) 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 a new trial.
>
> If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

Id.

70. See *infra* Part II.B.

71. *See* 18 U.S.C.A. § 3143(b)(1) (West 1985).

72. *See id.* § 3143(b)(2).

73. S. Rep. No. 225, *supra* note 19, at 27, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3210 (emphasis added).

74. *See* Fed. R. App. P. 9(c). The 1984 Act does not change Federal Rule of Appellate Procedure 9(c)'s placement of the burden of proof for flight and danger on the defendant. *See id.* See *supra* note 60 and accompanying text.

However, § 109 of the new BRA expressly reverses the rule stated in the advisory note to the old Rule 9(c) that the burden of showing lack of merit or purposeful delay rests with the government. *See* S. Rep. No. 225, *supra* note 19, at 27, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3210 n.86. Thus, the burden of showing that his appeal is not taken for delay and "raises a substantial question of law or fact likely to result in reversal or an order for a new trial" is now explicitly on the defendant. *See* United States v. Affleck, 765 F.2d 944, 953 (10th Cir. 1985) (en banc); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 106 S. Ct. 533 (1985); United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc); United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam).

liberal approach was to create a presumption against release,[75] and thus reduce the availability of bail.[76]

B. *The Application of Section 3143(b)*

The Third Circuit, in *United States v. Miller*,[77] devised a four part test for the requirements of release.[78] According to *Miller*, a person shall be detained unless: 1) the convicted defendant is not likely to flee[79] nor pose any danger to another or to the community[80] while released; 2) the appeal is not for the purpose of delay;[81] and 3) the appeal raises a substantial question of law or fact that, 4) if determined favorably to the defendant on appeal, would be likely to result in reversal or an order for a new trial.[82] This last factor means that the question on appeal must be

75. *See* S. Rep. No. 225, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3209; United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam); United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985).

76. *See* United States v. Valera-Elizondo, 761 F.2d 1020, 1024-25 (5th Cir. 1985); United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam).

77. 753 F.2d 19 (3d Cir. 1985).

78. *See id.* at 23-24.

79. *See id.* at 24. For an example of a court's analysis of the flight potential for a particular defendant, see United States v. DiMauro, 614 F. Supp. 461, 463-65 (D. Me. 1985). In *DiMauro*, the defendant averred that he was a long-time resident of the area, that he had ties to the area because of a wife and son, and that he had employment in the area at that time. *Id.* at 464. The court found that even if these factors were true, they were outweighed by evidence that the defendant lacked personal character and was socially irresponsible, and thus, if granted release, the defendant would be a potential fugitive of the court. *See id.* at 464-65.

80. *See Miller*, 753 F.2d at 24. Safety to the community was an overriding concern of Congress in enacting the entire Bail Reform Act. *See* S. Rep. No. 225, *supra* note 19, at 3, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3185. Thus, danger to the community became a prime consideration. *See id., reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3185; Kastenmeier & Beier, *Bail Reform Revisited*, 32 Fed. B. News & J. 82, 82 (Feb. 1985).

It has been recognized that the danger need not be a physical danger. United States v. Provenzano, 605 F.2d 85, 95 (3d Cir. 1979); United States v. Miranda, 442 F. Supp. 786, 792 (S.D. Fla. 1977); 3A. C. Wright, *supra* note 3, § 767, at 137. The defendant's propensity to commit crime may alone suffice. *See Provenzano*, 605 F.2d at 95; *Miranda*, 442 F. Supp. at 795 (potential for drug trafficking can be sole reason for denial of release after conviction). Even the possibility of pecuniary harm has been held to be cause for detention. *See* United States v. Moss, 522 F. Supp. 1033, 1035 (E.D. Pa. 1981) (participation in widespread check-cashing scheme while on parole is sufficient cause for detention), *aff'd mem.*, 688 F.2d 826 (1982); United States v. Parr, 399 F. Supp. 883, 888 (W.D. Tex. 1975) (pecuniary harm caused by misappropriation of public assets is sufficient danger to deny release).

81. *See Miller*, 753 F.2d at 24. Little case law expands on the meaning of "for the purposes of delay." However, at least one district court simply assumed that where a substantial question was found, the defendant was pursuing the appeal "not for delay but in order to obtain a reversal of her conviction." United States v. Hicks, 611 F. Supp. 497, 498 n.1 (S.D. Fla. 1985) (mem.). Similarly, Professor Wright commented that, although the two requirements are stated separately, "it is difficult to conceive of a nonfrivolous appeal that could be . . . characterized" as taken for purposes of delay. 3A C. Wright, *supra* note 3, § 767, at 131.

82. *See Miller*, 753 F.2d at 23-24.

so "integral to the merits of the conviction" that it would warrant a change in the lower court's decision.[83] Thus, courts have developed an objective two tiered approach to section 3143(b)(2): "substantial question" defines the level of merit required in the question, and "likely to result in reversal or an order for a new trial" defines the type of question that must be brought on appeal.[84] Virtually all of the circuit courts addressing the issue agree with this analysis.[85]

Inevitably, situations arise in which a court must determine whether a substantial question exists on appeal.[86] Thus, to consider properly a re-

83. *Id.*; *accord* United States v. Affleck, 765 F.2d 944, 953 (10th Cir. 1985) (en banc); United States v. DeMauro, 614 F. Supp. 4561, 466 (D. Me. 1985). A question could have substantial merit, yet be considered "harmless, to have no prejudicial effect, or to have been insufficiently preserved," and thus not likely to change the decision below. *Miller*, 753 F.2d at 23; *see* United States v. Bayko, 774 F.2d 516, 522-23 (1st Cir. 1985); *Affleck*, 765 F.2d at 953; United States v. Powell, 761 F.2d 1227, 1231 (8th Cir. 1985) (en banc); United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam).

Release should also be denied where an error may have been harmful, but would not result in reversal of *all* counts for which the defendant has been sentenced to imprisonment. *See Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 24); *Ex parte* Cohen, 191 F.2d 300, 300 (9th Cir. 1951).

84. *See* United States v. Handy, 761 F.2d 1279, 1280 (9th Cir. 1985) (explaining United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985)).

The phrase "substantial question likely to result in reversal" created much confusion in the courts. District courts were subjectively interpreting the words of the statute as requiring them to determine whether or not they are likely to be reversed on appeal. Lay & De La Hunt, *supra* note 11, at 947; *see, e.g.*, United States v. Valera-Elizondo, 761 F.2d 1020, 1021 (5th Cir. 1985); *Miller*, 753 F.2d at 22, 23. In adopting the objective two tiered analysis, the Third Circuit rejected that interpetation. *See Miller*, 753 F.2d at 22-23. First, the court stated that if the phrase were not read in this objective fashion, the word substantial would be rendered superfluous. *See id.* at 23. As the *Handy* court noted, "[a] statute should be construed so as to avoid making any word superfluous." *Handy*, 761 F.2d at 1280; *accord* United States v. Powell, 761 F.2d 1227, 1233 (8th Cir. 1985) (en banc). Second, the court reasoned that Congress could not have been so cynical as to require district courts to predict the likelihood of their own error. *See Miller*, 753 F.2d at 23. First, judges do not purposefully leave errors uncorrected. *Id.* Moreover, such a requirement would make a "mockery" of Fed. R. App. P. 9(b) which requires bail applications to be made first in the district courts. *Handy*, 761 F.2d at 1281.

85. *See, e.g.*, United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985); United States v. Affleck, 765 F.2d 944, 952-53 (10th Cir. 1985) (en banc); United States v. Handy, 761 F.2d 1279, 1280 (9th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1230-31 (8th Cir. 1985) (en banc); United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 106 S. Ct. 533 (1985); United States v. Giancola, 754 F.2d 898, 900-01 (11th Cir. 1985) (per curiam). Recently, district courts have also followed this approach. *See, e.g.*, United States v. DiMauro, 614 F. Supp. 461, 465-66 (D. Me. 1985); United States v. Andrade, 605 F. Supp. 1497, 1498 (D. Minn. 1985); United States v. Colletta, 602 F. Supp. 1322, 1329 (E.D. Pa.), *aff'd mem.*, 770 F.2d 1076 (3d Cir. 1985).

For arguments against the *Miller* analysis, see United States v. Affleck, 765 F.2d 944, 954-55 (10th Cir. 1985) (McKay, J., dissenting); United States v. Giangrosso, 763 F.2d 849, 850-51 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1239 (8th Cir. 1985) (Gibson, J., dissenting); United States v. Austin, 614 F. Supp. 1208, 1219-20 (D.N.M. 1985).

86. *See, e.g.*, United States v. Hicks, 611 F. Supp. 497, 498 (S.D. Fla. 1985) (mem.) (government does not contend that defendant will flee or pose danger, but only that no substantial question exists); United States v. Caldwell, 605 F. Supp. 260, 261 (N.D. Ga.)

quest for bail, courts must be aware of precisely how much merit is required for a question to be substantial. The substantiality requirement has been defined differently among the federal courts.

Some courts—most notably the Third Circuit in *Miller* and the Ninth Circuit in *United States v. Handy*[87]—have defined "substantial" as fairly debatable[88] or fairly doubtful.[89] This restates the definition adopted by courts with respect to the earlier use of "substantial question."[90] To remain even more faithful to that earlier judicial interpretation, these modern courts include as substantial those questions that are new or novel,[91] that present unique facts not controlled by precedents,[92] that involve the "scope and meaning of decisions of the Supreme Court,"[93] and even those that are acceptable by any different school of thought, philosophy or the like.[94]

The Eleventh Circuit in *United States v. Giancola*[95] was the first circuit court to adopt the *Miller* analysis but to reject the accompanying definition of "substantial."[96] The *Giancola* court espoused a more narrow definition. The court held that a substantial question must be a "close" question or one "that very well could be decided the other way."[97] The purpose of the *Giancola* definition was to limit the granting of bail by restricting the scope of the *Miller/Handy* standard.[98]

III. THE PREFERABLE DEFINITION OF "SUBSTANTIAL QUESTION"

A. *The Congressional Intent Behind the 1984 Act*

The basic purpose of the BRA of 1984 was to discard the less restric-

(court found no threat of flight nor danger to community), *aff'd*, 776 F.2d 989 (11th Cir. 1985); United States v. Kenney, 603 F. Supp. 936, 939-40 (D. Me. 1985) (court chose to address substantial question issue even after finding defendant failed to demonstrate unlikelihood of flight or danger); United States v. Hall, 603 F. Supp. 333, 335 (N.D. Ill. 1985) (court chose to address substantial question issue without reaching issues of flight and danger).

87. 761 F.2d 1279 (9th Cir. 1985).

88. *See id.* at 1283; United States v. Hicks, 611 F. Supp. 497, 500 (S.D. Fla. 1985) (mem.) (quoting D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950)).

89. *See* United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985). See *supra* note 4.

90. See *supra* notes 38-40 and accompanying text.

91. *See* United States v. Handy, 761 F.2d 1279, 1281 (9th Cir. 1985) (quoting D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950)); United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985).

92. *See* United States v. Handy, 761 F.2d 1279, 1281 (9th Cir. 1985) (quoting D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950)); United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985).

93. *See* United States v. Handy, 761 F.2d 1279, 1281 (9th Cir. 1985) (quoting D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950)).

94. *See* United States v. Handy, 761 F.2d 1279, 1281 (9th Cir. 1985).

95. 754 F.2d 898 (11th Cir. 1985) (per curiam).

96. *See id.* at 901.

97. *Id.*

98. *See id.* at 900-01.

tive position of the 1966 BRA, which no longer satisfied the perceived needs of the criminal justice system.[99] With respect to bail pending appeal, the intention was not to eliminate release entirely,[100] but to reduce the number of cases in which release would be available.[101] The Senate report accompanying the 1984 legislation stated that the new presumption was to be against granting bail pending appeal.[102]

Commentators have attributed the shift in Congress' attitude toward bail to mounting demands from the public to be protected from dangerous criminals.[103] Apparently alarmed at the high recidivism rate of defendants out on bail,[104] the public expressed a desire for more restrictive bail laws.[105] Congress justified the need for stricter bail laws by attributing the high crime rate in part to defendants released on bail.[106] In response to the public outcry, Congress decidedly tipped the balance between the interests of the defendant and those of society in favor of society's interests.[107]

Congress emphasized the need to restrict post-conviction bail because of "the basic principle that a conviction is presumed to be correct."[108]

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99. *See* S. Rep. No. 225, *supra* note 19, at 3, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3185-86; Speech by James I.K. Knapp, Dep. Ass't Att'y Gen., before the Nat'l Conf. of the Nat'l Ass'n of Pretrial Servs. Agencies, at 1-2 (Oct. 7, 1985) (available in the files of the *Fordham Law Review*).

100. United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam); United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985). However, at least one commentator believes that release pending appeal will, in practice, be eliminated because of the defendant's difficult burden of proving negatives and because of the reluctance of trial judges "to view appeals as meritorious—let alone substantial. . . ." *See* Kastenmeier & Beier, *supra* note 80, at 83.

101. United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam).

102. *See* S. Rep. No. 255, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3209. See *supra* note 75 and accompanying text.

103. Powers, *supra* note 13, at 420. Congress attempted to address these concerns several times since 1969, but early endeavors at federal bills failed. *See* Lay & De La Hunt, *supra* note 11, at 934. *See generally* Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423 (1980) (in favor of modifying bail reform to attack growing crime problem). Congress did, however, introduce in 1970 a new bail law for the District of Columbia that became a model for the federal Act of 1984. *See* Pub. L. No. 91-358, § 210, 84 Stat. 473, 642-50 (1970) (codified at D.C. Code Ann. § 23-1325(c) (1981)).

104. *See* Powers, *supra* note 13, at 420. One study, done several years ago, revealed that approximately 15% of defendants released pending appeal are arrested again. This rate is even higher than the rate for defendants released pretrial. *See* Note, *Prevention Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. Rev. 300, 326-27 (1971).

105. *See* Kastenmeier & Beier, *supra* note 80, at 82.

106. *See* S. Rep. No. 225, *supra* note 19, at 3, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3185; Lay & De La Hunt, *supra* note 11, at 937.

107. Lay & De La Hunt, *supra* note 11, at 953; Powers, *supra* note 13, at 420.

108. S. Rep. No. 225, *supra* note 19, at 27, *reprinted in* 1984 U.S. Code Cong. & Ad. News, 3182, 3210; *see also* H.R. Rep. No. 907, 91st Cong., 2d Sess. 186-87 (1970) (same principle used in establishing stricter requirements for bail pending appeal in District of Columbia). Thus, a presumption of guilt has replaced the presumption of innocence. *But see* United States v. Affleck, 765 F.2d 944, 955 (10th Cir. 1985) (McKay, J., dissenting) (denying bail to class of individuals not finally adjudged guilty is unconstitutional).

Consequently, Congress saw "no reason to favor release pending imposition of sentence or appeal."[109] This presumption of guilt is justified because it is consistent with the sentencing judge's initial determination that the defendant belongs in prison.[110] The presumption of guilt is also justified by the relatively low rate of reversal of district court convictions each year.[111] Furthermore, letting convicted defendants out on bail despite the presumption of guilt may destroy any remaining deterrent effect for future offenders.[112] This is especially germane to bail pending appeal because long delays often separate sentencing and appellate review.[113] In addition, at the post-conviction stage, defendants face certain prison sentences and thus may be more likely to flee regardless of bail bonds or other release conditions.[114] Finally, permitting bail too freely in spite of this presumption might encourage frivolous and time-wasting appeals.[115]

The legislative history of the 1984 Act gives little guidance on what is meant by "substantial question."[116] When combined with the express changes in statutory language, however, the legislative history supports the contention that Congress intended to restrict instances of bail by in-

109. S. Rep. No. 225, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3209; *see* H.R. Rep. No. 907, *supra* note 108, at 186.

110. *See* H.R. Rep. No. 907, *supra* note 108, at 187; *accord* United States v. Handy, 761 F.2d 1279, 1284 (9th Cir. 1985) (Farris, J., dissenting); United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985).

111. H.R. Rep. No. 907, *supra* note 108, at 186-87; *see* United States v. Greenberg, 772 F.2d 340, 341 (7th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 300 (7th Cir. 1985); United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985).

112. S. Rep. No. 225, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3209; *see* United States v. Handy, 761 F.2d 1279, 1284 (9th Cir. 1985) (Farris, J., dissenting) (citing H.R. Rep. No. 907, *supra* note 108, at 186-87); United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985) (same).

113. *See* S. Rep. No. 225, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3209. According to one circuit judge, the time between notice of criminal appeal and oral argument in the Tenth Circuit is approximately one year. *See* United States v. Affleck, 765 F.2d 944, 961 (10th Cir. 1985) (Seymour, J., dissenting). Indeed, granting release pending appeal may itself cause delays. Yankwich, *Release on Bond by Trial and Appellate Courts*, 7 F.R.D. 271, 282 (1948); *see* Albanese v. United States, 75 S. Ct. 211, 211 (Frankfurter, Circuit Justice 1954).

114. United States v. Kenney, 603 F. Supp. 936, 939 (D. Me. 1985); United States v. DiMauro, 614 F. Supp. 461, 464 (D. Me. 1985).

115. Although few appeals succeed, see *supra* note 111 and accompanying text, courts very rarely find that a question on appeal is frivolous. *See* 3A C. Wright, *supra* note 3, § 767, at 128. It follows that unless a significantly stricter standard for the merit of the question on appeal is used, convicted defendants will be encouraged to bring frivolous appeals.

116. *See* Lay & De La Hunt, *supra* note 11, at 947; *see also* S. Rep. No. 225, *supra* note 19, at 26 (requiring, but not defining, "substantial question"), *reprinted in* U.S. Code Cong. & Ad. News 3182, 3210. In addition, although prior to 1984 Congress had enacted a provision for the District of Columbia courts identical to § 3143 of the BRA of 1984, *see* D.C. Code Ann. § 23-1325(c) (1981), there does not appear to be any elaboration on the meaning of "substantial question" in subsequent District of Columbia cases, nor in the legislative history of the Act. *See* H.R. Rep. No. 907, *supra* note 108, at 186-87; Lay & De La Hunt, *supra* note 11, at 947.

creasing the level of merit required in the defendant's claim.[117] By changing the words of the BRA from "[not] frivolous" to "[involving a] substantial question," Congress must have intended a significant change. Thus, if the substantial question requirement is to carry out Congress' intent to restrict bail, the courts must adopt a strict reading of "substantial."

B. *"Close Question" as the Stricter Standard*

The *Miller* and *Handy* courts applied the "fairly debatable" test in part because it followed the interpretation given the same phrase by the earlier courts.[118] Although this kind of historical analogy is appropriate in some cases,[119] wholesale adoption of the earlier interpretations would frustrate the aim of the new BRA.[120] The early use of the fairly debatable standard coincided with the practice of granting bail as a normal remedy.[121] At that time, any doubts about whether bail should be granted would always be resolved in favor of the defendant.[122] This is not Congress' intended result, which is a presumption *against* release.[123] The policy behind the creation of the earlier definition and the current policy on bail are incongruous, despite the use of the same phrase. It would thus be improper to adopt the old definition without reservation.

For the same reason, the *Handy* court's reliance[124] on the Supreme Court habeas corpus case[125] where "substantial" was defined as "debatable among jurists of reason"[126] was inappropriate.[127] In the habeas corpus context, doubts as to granting or denying release on the appeal

117. The Senate report explaining the changes in the new Act specifically states that requiring the courts to find affirmatively that the appeal raises a "substantial question of law or fact" is meant to further restrict bail pending appeal. *See* S. Rep. No. 225, *supra* note 19, at 26, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3210.

118. *See Handy*, 761 F.2d at 1281-83. See *supra* notes 38-46 and accompanying text.

119. *See Handy*, 761 F.2d at 1285 (Farris, J., dissenting) (majority's analogy to history would be reasonable but for opposing policies at the two times). However, analogy to prior common law interpretation can sometimes impede the ulitity of new statutes. As Justice Cardozo noted, statutes can provide a "new generative impulse transmitted to the legal system." Van Beeck v. Sabine Towing Co., 300 U.S. 342, 351 (1937).

120. *Handy*, 761 F.2d at 1285 (Farris, J., dissenting). See *supra* note 119.

121. *See* D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950).

122. *See* United States v. Iacullo, 225 F.2d 458, 459 (7th Cir. 1955) (quoting Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955)).

123. *See Handy*, 761 F.2d at 1284 (Farris, J., dissenting); United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc) (quoting 130 Cong. Rec. S938 (daily ed. Feb. 3, 1984) (statement of Sen. Thurmond)); United States v. Austin, 614 F. Supp. 1208, 1218 (D.N.M. 1985). See *supra* notes 73-76 and accompanying text.

124. *See Handy*, 761 F.2d at 1281-82.

125. Barefoot v. Estelle, 463 U.S. 880 (1983).

126. *Id.* at 893 n.4 (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

127. *See Handy*, 761 F.2d at 1285 (Farris, J., dissenting). To attack the majority's reliance on habeas corpus cases defining substantial, Judge Farris uses an argument analogous to that used by other circuits in attacking *Handy*'s reliance on pre-1956 bail pending appeal cases. See *supra* notes 118-23 and accompanying text.

are resolved in favor of the petitioner.[128] Thus, this presumption is inapposite to the presumption now mandated by Congress in the bail pending appeal context.

It would also defeat the goals of the BRA of 1984 to include as substantial questions those appeals that present new or novel issues, or those with no easily controlling precedents, as the *Miller* and *Handy* courts suggest.[129] First, such an appeal may be so clearly wrong that no court would be compelled to address the question.[130] The *Giancola* court also noted that, while there might be no controlling precedent in a particular circuit, there may be no reason to believe that the circuit would deviate from unanimous resolution of the issue by other circuits.[131] The absence of controlling precedent has been considered "only one factor" in determining whether the appeal raises a substantial question.[132] Thus, a nonfrivolous question could fit under one of the blanket categories espoused by *Miller* and *Handy* but still not be substantial.[133] To accept categorically such questions as substantial would contradict the design of section 3143(b) to limit bail to exceptional circumstances by opening the door to a barrage of potentially insubstantial appeals.

Throughout the history of bail pending appeal, courts have often confused the definition of "fairly debatable" with "not frivolous." One Justice, for example, equated appeals that are "plainly not frivolous" with questions "not free of doubt."[134] Other judges have stated that an appeal is frivolous where "it presents no debatable question."[135] Yet "substantial question" must signify more than "not frivolous" for Congress' change in statutory language to have any value.[136] The *Handy* court,

128. Gordon v. Willis, 516 F. Supp. 911, 912 (N.D. Ga. 1980) (citing Jones v. Warden, 402 F.2d 776, 776 (5th Cir. 1968) (per curiam)).

129. See *supra* notes 91-94 and accompanying text.

130. United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam); *accord* United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985); United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985); United States v. Austin, 614 F. Supp. 1208, 1217 n.61 (D.N.M. 1985).

131. *See* United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam); *see also* United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985); United States v. Austin, 614 F. Supp. 1208, 1217 n.61 (D.N.M. 1985).

132. *See* United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985).

133. *See, e.g.*, United States v. Molt, 758 F.2d 1198, 1199 (7th Cir. 1985) (question of whether challenges to coconspirators' statements should be based on requirements of Federal Rules of Evidence or of sixth amendment is not frivolous but not substantial despite conflict in the circuits); United States v. Caldwell, 605 F. Supp. 260, 261 (N.D. Ga.), *aff'd*, 776 F.2d 989 (11th Cir. 1985) (question of court's discretion in determining right to cross-examine jurors not frivolous, but insubstantial).

134. *See* D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice 1950).

135. United States v. Esters, 161 F. Supp. 203, 206 (W.D. Ark. 1958); United States v. Piper, 227 F. Supp. 735, 740 (N.D. Tex.), *aff'd per curiam*, 338 F.2d 1005 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

136. *See* United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam); *see also* United States v. Greenberg, 772 F.2d 340, 341 (7th Cir. 1985). See *supra* notes 116-17 and accompanying text. The difference between the two phrases was noted under the BRA of 1966 as well. *See* Harris v. United States, 404 U.S. 1232, 1233 (Douglas,

which suggests "fairly debatable" as a guideline, agreed that the term "substantial question" mandates a stricter standard.[137] Yet the definition fails to assure recognition of this distinction by the courts. In effect, "fairly debatable" implies a standard comparable to "not frivolous."

The definition "close question" is far more responsive to the goals of the 1984 Act. "Close question" implies the more stringent standard that bail will be granted in fewer, and only in the strongest, cases.[138] Courts that have applied the "close question" standard recognize that it considers only those cases that "*very well* could be decided" in the defendant's favor.[139] One court following this standard has found it to imply a requirement of "more than a 50% chance" that the defendant's argument is valid.[140] Furthermore, the Fifth Circuit adds that a close question means that the appeal must present a "substantial doubt" and not merely a "fair doubt" about the outcome of the issue.[141] Thus, while the *Miller/Handy* definitions would not significantly change prior law, the *Giancola* definition significantly departs from the old view, as the BRA of 1984 envisioned.[142]

The "close question" definition does not by itself decrease the instances of bail pending appeal. The federal courts must adopt the "close question" standard as interpreted by *Giancola* and its progeny.[143] A substantial question should be one in which the defendant's argument raises enough doubt that a reasonable court could as easily find in favor of the defendant as for the prosecution. Thus, "close question" should signal to the courts a very strict approach to bail pending appeal.

Circuit Justice 1971). Even in the habeas corpus context, "substantial" was held to require more than the absence of frivolousness. *See* Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977).

137. *See Handy*, 761 F.2d at 1282 n.2.

138. *See* United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc).

139. United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam) (emphasis added); *see, e.g.*, United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); United States v. Powell, 761 F.2d 1227, 1231 (8th Cir. 1985) (en banc); United States v. Caldwell, 605 F. Supp. 260, 261 (N.D. Ga.), *aff'd*, 776 F.2d 989 (11th Cir. 1985). The Seventh Circuit recently explained "close question" to mean that "the appeal could readily go either way, that it is a toss-up or nearly so." United States v. Greenberg, 772 F.2d 340, 341 (7th Cir. 1985).

140. United States v. Cirrincione, 600 F. Supp. 1436, 1439 (N.D. Ill.), *aff'd*, 780 F.2d 620 (7th Cir. 1985).

141. *See* United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985).

142. United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc). The court in *Powell* notes further that even if the congressional policy on release seems unwise or unusually strict, it must be complied with. *See Powell*, 761 F.2d at 1232.

143. See *supra* notes 138-41 and accompanying text. The Eighth Circuit noted that the definition "close" might be "inexact." United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc). Nonetheless, the court believed that "experienced judges and lawyers" could apply it properly without much difficulty. *See id.*

C. *Constitutionality of the Strict Interpretation*

In the past, laws restricting release have been challenged as violating the eighth amendment to the Constitution.[144] A strict reading of "substantial question," however, raises no constitutional problems. It is widely accepted that a convicted defendant has no constitutional right to bail.[145] The eighth amendment provision against "excessive bail"[146] has been construed by the Supreme Court not to provide a right to release on bail in all cases, "but merely to provide that bail shall not be excessive in those cases where it is *proper* to grant bail."[147] Nor does a right to bail appear elsewhere in the Constitution.

Furthermore, it has long been recognized that the power to grant or deny bail depends solely on statutory law.[148] Congress may freely restrict the categories of cases in which release shall be granted,[149] provided that it legislates reasonably and non-arbitrarily.[150] Thus, reading "substantial question" to mean "close question" and inferring a very stringent standard of review is not constitutionally infirm merely because the rule would place a strict limit on release.[151]

CONCLUSION

By changing the language of section 3143(b), Congress made it clear that bail pending appeal was not to be routinely granted. This Note does not purport to state that the Bail Reform Act of 1984 requires the use of

144. *See, e.g.*, United States v. Bilanzich, 771 F.2d 292, 299-300 (7th Cir. 1985) (defendant contended making bail pending appeal difficult to obtain violated excessive bail clause of Constitution); Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (court held state law classifying sex offenses as non-bailable was unconstitutional), *vacated as moot per curiam sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982).

145. *See* Carlson v. Landon, 342 U.S. 524, 545-46 (1952); Harris v. United States, 404 U.S. 1232, 1232 (Douglas, Circuit Justice 1971); United States v. Bilanzich, 771 F.2d 292, 299-300 (7th Cir. 1985); United States v. Provenzano, 602 F. Supp. 230, 232 (E.D. La. 1985); United States v. Delaney, 8 F. Supp. 224, 225-26 (D.N.J. 1934). Nor have courts found a constitutional right to bail for pretrial applicants. *See* Duker, *supra* note 24, at 86-88.

146. U.S. Const. amend. VIII.

147. *See* Carlson v. Landon, 342 U.S. 524, 545 (1952) (emphasis added). Thus, the purpose of the excessive bail clause is to limit the judiciary in setting reasonable conditions of bail, not to limit the power of Congress. *See* United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985); United States v. Edwards, 430 A.2d 1321, 1330 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). "Excessive bail" was defined by the Supreme Court in Stack v. Boyle, 342 U.S. 1 (1951), as that "set at a figure higher than an amount reasonably calculated" to assure the presence of an accused defendant. *Id.* at 5.

148. *See* United States *ex. rel.* Carapa v. Curran, 297 F. 946, 954 (2d Cir. 1924); Bongiovanni v. Ward, 50 F. Supp. 3, 4 (D. Mass. 1943); Duker, *supra* note 24, at 87.

149. Carlson v. Landon, 342 U.S. 524, 545 (1952); *see* Duker, *supra* note 24, at 86-87.

150. *See* Hunt v. Roth, 648 F.2d 1148, 1160-61 (8th Cir. 1981), *vacated as moot per curiam sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982); Lay & De La Hunt, *supra* note 11, at 950-51.

151. Indeed, no federal court to date has found § 3143(b) to be unconstitutional in any respect. On the contrary, the Eighth Circuit has held this section to be constitutional. *See* United States v. Powell, 761 F.2d 1227, 1235 (8th Cir. 1985) (en banc).

the word "close" in defining "substantial." However, in deciding release pending appeal cases, federal courts must understand that the goal of the Act is to decrease substantially the number of convicted defendants released on bail. Applied properly, the *Giancola* definition of close question is more responsive to that demand because it advocates a stricter approach to bail pending appeal.

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