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

Debra L. Leibowitz
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INTRODUCTION

A new federal Bail Reform Act (BRA or Act) was enacted in 1984. 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.” 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.” Others reject that definition and instead require a “close question” in the defendant’s appeal.

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

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).
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

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

Throughout the history of bail pending appeal, the judiciary and the legislature have had to balance the competing interests of the defendant and society. The defendant's interests in being released on bail include freedom pending judicial review, a desire to prepare one's case efficiently, and avoidance of the potential hardships of prison. The societal interests in denying bail to one convicted of a crime include preventing the defendant from fleeing the court's custody, protecting the community from potential danger, and avoiding delay in punishment. 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.

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.


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.


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


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. This is largely because the presumption of the defendant's innocence disappears after conviction and sentencing.

The first statute to address the issue of bail pending appeal was enacted in 1866. In 1891, the Supreme Court promulgated Rule 36(2) 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." In Hudson v. Parker 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."

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


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. While this new guideline placed the burden of demonstrating frivolousness on the government, it marked the first step toward making a meritorious appeal a prerequisite for release.

By 1934 the liberal attitude underlying the test had faded. In that year, the Supreme Court amended Rule VI of the Rules of Criminal Appeal 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." In applying the substantial question test, the courts defined "substantial" as "fairly debatable" or "fairly doubtful." The leading cases also considered substantial those questions that were new or novel or that "present[ed] unique facts not plainly covered by the controlling precedents." In addition, these courts included any "important questions concerning the scope and meaning of decisions of the Supreme Court," or that were in conflict among the circuits. The opinion in Herzog v. United States 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." When the

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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.


36. See id. at 277.


38. Id. at 664.


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").


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).


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), the courts interpreted it to mandate placing the burden of proof on the applicant rather than on the government.

In light of a renewed public and governmental concern for the criminal defendant’s rights, a 1956 Amendment to the Rules of Criminal Procedure allowed for release pending appeal “unless it appears that the appeal is frivolous or taken for delay.” This amendment greatly liberalized the basis for granting bail. 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. 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.” Thus, a denial of release was proper in only the most exceptional cases.

B. The Bail Reform Act of 1966

The Bail Reform Act of 1966 manifested a continuing concern for
the rights of criminal defendants. 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. Congress added, however, that the defendant could also be detained if a risk of flight or if danger to the community existed. 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. If the government failed to show that the defendant should be detained, the statute required that the defendant be treated the


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.


59. See id. Actually, the 1966 Act merely codified the factors that the courts had considered previously. See 18 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. 18 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).


Originally, the full burden had been on the government. See 18 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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{63} For the most part, courts agreed that bail should be denied only as a last resort,\textsuperscript{64} even where the defendant posed a potential danger to the community.\textsuperscript{65} The courts continued to resolve all doubts in favor of the defendant.\textsuperscript{66} Thus, the BRA of 1966 mandated a strong, albeit rebuttable, presumption in favor of bail.\textsuperscript{67}
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), dramatically changed the requirements for release. The interpretations that have emerged vary among the circuits 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, Congress has replaced "[not] frivolous" with "substantial question of law or fact likely to result in reversal or an order for a new trial." 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." The burden of proof is now indisputably on the defendant.

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

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.
72. See id. § 3143(b)(2).
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).
A liberal approach was to create a presumption against release, and thus reduce the availability of bail.

B. The Application of Section 3143(b)

The Third Circuit, in *United States v. Miller,* devised a four part test for the requirements of release. According to *Miller,* a person shall be detained unless: 1) the convicted defendant is not likely to flee nor pose any danger to another or to the community while released; 2) the appeal is not for the purpose of delay; 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. This last factor means that the question on appeal must be

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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.


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. 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. Virtually all of the circuit courts addressing the issue agree with this analysis.

Inevitably, situations arise in which a court must determine whether a substantial question exists on appeal. 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. 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 interpretation. 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.


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*—have defined “substantial” as fairly debatable or fairly doubtful. This restates the definition adopted by courts with respect to the earlier use of “substantial question.” To remain even more faithful to that earlier judicial interpretation, these modern courts include as substantial those questions that are new or novel, present unique facts not controlled by precedents, that involve the “scope and meaning of decisions of the Supreme Court,” and even those that are acceptable by any different school of thought, philosophy or the like.

The Eleventh Circuit in *United States v. Giancola* was the first circuit court to adopt the *Miller* analysis but to reject the accompanying definition of “substantial.” 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.” The purpose of the *Giancola* definition was to limit the granting of bail by restricting the scope of the *Miller/Handy* standard.

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-
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


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.


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


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

Consequently, Congress saw "no reason to favor release pending imposition of sentence or appeal." This presumption of guilt is justified because it is consistent with the sentencing judge's initial determination that the defendant belongs in prison. The presumption of guilt is also justified by the relatively low rate of reversal of district court convictions each year. Furthermore, letting convicted defendants out on bail despite the presumption of guilt may destroy any remaining deterrent effect for future offenders. This is especially germane to bail pending appeal because long delays often separate sentencing and appellate review. 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. Finally, permitting bail too freely in spite of this presumption might encourage frivolous and time-wasting appeals.

The legislative history of the 1984 Act gives little guidance on what is meant by "substantial question." 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-

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.
creasing the level of merit required in the defendant's claim. 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. Although this kind of historical analogy is appropriate in some cases, wholesale adoption of the earlier interpretations would frustrate the aim of the new BRA. The early use of the fairly debatable standard coincided with the practice of granting bail as a normal remedy. At that time, any doubts about whether bail should be granted would always be resolved in favor of the defendant. This is not Congress' intended result, which is a presumption against release. 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 on the Supreme Court habeas corpus case where "substantial" was defined as "debatable among jurists of reason" was inappropriate. In the habeas corpus context, doubts as to granting or denying release on the appeal could be reasonable but for opposing policies at the two times. However, analogy to prior common law interpretation can sometimes impede the utility 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).

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 utility 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.


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)).


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


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. Thus, this presumption is inap-
propriate 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 sub-
stantial questions those appeals that present new or novel issues, or those
with no easily controlling precedents, as the Miller and Handy courts
suggest. First, such an appeal may be so clearly wrong that no court
would be compelled to address the question. 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. The absence
of controlling precedent has been considered “only one factor” in deter-
moving whether the appeal raises a substantial question. Thus, a non-
frivolous question could fit under one of the blanket categories espoused
by Miller and Handy but still not be substantial. To accept categori-
cally 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 con-
fused the definition of “fairly debatable” with “not frivolous.” One Jus-
tice, for example, equated appeals that are “plainly not frivolous” with
questions “not free of doubt.” Other judges have stated that an appeal
is frivolous where “it presents no debatable question.” Yet “substan-
tial question” must signify more than “not frivolous” for Congress’
change in statutory language to have any value. The Handy court,

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); ac-
cord 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.
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).
Piper, 227 F. Supp. 735, 740 (N.D. Tex.), aff’d per curiam, 338 F.2d 1005 (5th Cir.
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. 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. 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. 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.

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. 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.

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. 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. 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. The eighth amendment provision against "excessive bail" 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." 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. Congress may freely restrict the categories of cases in which release shall be granted, provided that it legislates reasonably and non-arbitrarily. 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.

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

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144. See, e.g., United States v. Bilanzich, 771 F.2d 292, 299-300 (7th Cir. 1985) (defendant contending 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).


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.


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


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.

_Debra L. Leibowitz_