UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3033
(No. 19-cr-18 (ABJ))

UNITED STATES OF AMERICA, Appellee,

v.

ROGER J. STONE, JR., Appellant.

GOVERNMENT'S RESPONSE TO APPELLANT'S EMERGENCY MOTION APPEALING THE PARTIAL DENIAL OF HIS REQUEST TO POSTPONE SELF-SURRENDER DATE

Appellant Roger Stone, Jr., challenges the district court's denial of his request for a 60-day extension of the time to report to serve his 40-month sentence. The district court denied appellant's request in part, ordering him to report to his designated Bureau of Prisons (BOP) facility by July 14, 2020. Although the government did not oppose appellant's 60-day extension request, the district court's independent decision to extend appellant's self-surrender date for 14 days is a reasonable exercise of that court's discretion based on the totality of the factual and legal

circumstances, particularly given appellant's failure to satisfy the statutory requirements for his continued release pending appeal, *see* 18 U.S.C. § 3143(b)(1). Accordingly, the government supports the district court's ruling, and this Court should affirm it.

PROCEDURAL AND FACTUAL BACKGROUND

In November 2019, a jury convicted appellant of several offenses: False Statements (five counts), in violation of 18 U.S.C. § 1001; Obstruction of a Proceeding (one count), in violation of 18 U.S.C. §§ 1505 and 2; and Witness Tampering (one count), in violation of 18 U.S.C. § 1512(b)(1) (ECF #328, 1). Though the United States asked that appellant be remanded to custody following the jury's guilty verdicts, the district court declined to do so (11/15/19 Tr. 11-14), and appellant remained on his then-current conditions of release (ECF #385, 2).

In February 2020, the district court sentenced appellant to 40 months' imprisonment on the obstruction count and 12 months and 18 months on the false-statement and tampering counts, respectively, ordering those sentences to run concurrent to the obstruction sentence (ECF #328, 2). Finding by clear-and-convincing evidence that appellant was not a flight risk or a danger to the community under 18 U.S.C.

§ 3143(a)(2) (2/20/20 Tr. 91), the district court permitted appellant to "surrender for service" of this sentence at the institution designated by BOP, however, the actual surrender date would be contingent upon the district court's decision on appellant's then-pending, new-trial motion (ECF #328, 2).

On April 16, 2020, the district court denied appellant's new-trial motion, reiterated that he remained "on bond" pursuant to 18 U.S.C. § 3143(a)(2), and again ordered that he could "voluntarily surrender" at the BOP's designated institution (ECF #361, 1).[1] Appellant's counsel thereafter contacted BOP officials and expressed "concerns regarding [appellant's] health" in the context of the unfolding coronavirus pandemic

[1] "A person who has been sentenced to a term of imprisonment . . . shall be committed to custody of the Bureau of Prisons," 18 U.S.C. § 3621(a), which has "broad authority to determine the place of a prisoner's confinement," *United States v. Cosby*, 180 F. App'x 13, 13 (10th Cir. 2006) (unpub. op.); *see also* 18 U.S.C. § 3621(b). "The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau . . . [and] that the Bureau determines to be appropriate and suitable, considering," among other things, the resources of the facility contemplated, the nature of the prisoner's offense, the "history and characteristics of the prisoner," and "any statement by the court that imposed sentence." 18 U.S.C. § 3621(b).

(ECF #385-1). Counsel thus asked that appellant's self-surrender date be delayed until June (*id.*). BOP agreed and set a voluntary surrender date of June 30, 2020 (ECF #385, 3). BOP also designated FCI Jesup as the facility to which appellant was to self-surrender, specifically Jesup's Camp FCI Facility and not Jesup's Medium FCI Facility (*see* ECF #381, 1).

Near the end of June, appellant asked the district court to extend his surrender date 60 days because of "his heightened risk of serious medical consequences from exposure to the COVID-19 virus in the confines of a BOP facility" (ECF #381, 1). Appellant argued such an extension was required because of "the exceptional circumstances arising from the serious and possibly deadly risk he would face in the close confines of a Bureau of Prisons facility, based on his age [68 years old] and medical conditions" (*id.*). Appellant filed under seal a letter from his treating physician that "provide[d] further detail regarding [his] medical conditions and the danger to his health that incarceration would present at this time" (*id.* at 4). Appellant also noted that, although BOP's website did not "currently show any inmates with the COVID-19 virus at FCI Jesup," the website reported there were "25 tests pending" (*id.* at 3).

In response, the district court directed the United States to describe its position on appellant's motion and to inform the court of the results of the COVID-19 tests identified by appellant (6/23/20 Minute Order).[2] The United States explained that it did not oppose appellant's motion because, on March 26, 2020, the Executive Office of the United States Attorneys had directed all U.S. Attorney's Offices not to object to such a request "'unless the defendant poses risk of flight or public safety dictates a more immediate reporting date'" (ECF #385, 4-5). This Directive applied to all defendants, without respect to age, health, or other COVID-19 risk factors (*id.* at 4). EOUSA's Directive "stem[med]" from a separate Attorney General Directive that instructed BOP to utilize home confinement "where appropriate, to protect the health and safety of BOP

[2] The district court also ordered appellant to address whether BOP had previously extended his surrender date and to provide details of his contacts with BOP officials (6/25/20 Minute Order), which appellant did (ECF #386). In his supplemental submission, appellant explained that BOP "was no longer extending surrender dates based on COVID-19 and that, therefore, BOP would not be changing [appellant's] June 30, 2020 surrender date" (ECF #386, 2). In a sealed minute order, which the district court briefly described in its subsequent Memorandum Opinion, the court also asked appellant to detail his "personal preventive practices" concerning the coronavirus (ECF # 389, 5 n.2), which appellant did in a sealed pleading.

personnel and the people in [BOP] custody'" (*id.* at 4 (citing AG's "Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic" Directive)). "[F]aithful adherence to EOUSA's directive," the United States concluded, "dictate[d]" that it not oppose a 60-day extension of appellant's self-surrender date (*id.* at 5). But, the United States emphasized, EOUSA's directive was the "only" reason it did not oppose the motion (*id.* at 1).[3] Finally, the United States informed the court, all 25 tests administered to FCI Jesup inmates "came back negative" and that, as of June 24, 2020, there had "been no confirmed COVID-19 cases among either staff or inmates at FCI Jesup" (*id.* at 3 n.1).

[3] The United States explained that it did not believe there were public-safety grounds to depart from EOUSA's Directive, noting that the district court had not previously detained appellant even though the government had argued he posed a risk to the community because of: "his attempt to incite violence upon a federal judge by posting on social media an image of the judge overlaid with crosshairs and recklessly accusing the judge of a political vendetta"; "his abuse of social media and other media outlets to intimidate individuals and witnesses involved in [his] case"; his "patently false statements" at his show-cause hearing; and his conviction for witness tampering, "including threats of physical harm to a witness and the witness's dog" (ECF #385, 5).

The district court granted appellant's motion only in part, extending his self-surrender date two weeks (ECF #389, 4-5).[4] Though recognizing there is an "undeniable risk of [COVID-19] contamination in prison settings in general," the district court found that appellant had provided nothing other than his "doctor's '[r]easonabl[e] speculation' to support the conclusion that he is particularly vulnerable to infection or complications from infection for reasons other than his age" (*id.* at 2). Indeed, the court additionally found, appellant's health "condition appears to be—as it has been for some time—medically controlled" (*id.* at 3). Moreover, there were "currently no COVID-19 cases" at BOP's FCI Jesup facility and "the Bureau [of Prisons] itself is not of the view that another extension on this basis is required" (*id.* at 2-3). Finally, the court noted, though certain other judges may have granted self-surrender extensions, there was no indication in those cases that the defendant had "failed to abide by conditions of release" (*id.* at 4). "By contrast, [appellant] was convicted of threatening a witness and throughout the

[4] The district court has unsealed its Memorandum Opinion (*see* 6/29/20 Minute Order; *see also United States v. Stone*, 2020 WL 3629985 (D.D.C. June 26, 2020)).

course of the[] criminal proceedings, the Court has been forced to address his repeated attempts to intimidate, and to stoke potentially violent sentiment against an array of participants in the case, including individuals involved in the investigation, the jurors, and the Court" (*id.* at 4).[5] "For all these reasons," the district court extended appellant's self-surrender date only to July 14, 2020, which was "seventy-five days beyond his original report date" (*id.*).[6]

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[5] Recognizing that it had previously denied the government's post-verdict request to detain appellant (11/15/20 Tr. 11-12), and had permitted him to self-surrender after sentencing, the district court explained that—in the period before a BOP facility designation—it had not wanted to remand appellant to a "local jail 1,000 miles from his home and family" (ECF #389, 4). "Also, there was already a motion for new trial pending, flight was not a factor, and it is fair to say that no one was contemplating that approving voluntary surrender could lead to a possible six-month delay in reporting" (*id.*).

[6] The court also modified appellant's release conditions by immediately requiring his home confinement, which would "address [his] stated medical concerns during the current increase of reported [COVID-19] cases in Florida" and also "protect the health" of other inmates at the Jesup Camp FCI Facility upon his self-surrender (ECF #389, 4-5). Though appellant contends (at 16) that this condition is "unnecessarily punitive," it is largely consistent with the Attorney General's Directive, which directs BOP to place any inmate to whom it grants home confinement in a mandatory 14-day quarantine before discharging the inmate. *See* https://dojnet.doj.gov/usao/eousa/ole/tables/misc/aghome.pdf.

ARGUMENT

The District Court Did Not Err in Denying in Part Appellant's Motion.

As all parties agree, appellant's request is analyzed under the Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq. *See*, *e.g.*, *United States v. Roeder*, 807 F. App'x 157, 159-61 (3d Cir. 2020) (unpub. op.). Quoting 18 U.S.C. § 3145(c), appellant maintains (at 10, 20) that his medical conditions, age, and the risk of a COVID-19 outbreak at FCI Jesup, present "'exceptional reasons why [his] detention would not be appropriate.'" Thus, he asserts (at 3), "this Court should order the extension of [his] surrender date from July 14, 2020 to September 3, 2020, to avoid the life-threatening risks that he would face in a BOP facility at this time." But appellant is eligible for an "exceptional reasons" release only if he satisfies the conditions set forth in the Bail Reform Act's release-or-detention-pending-appeal provision, including the condition that his appeal "raises a substantial question of law or fact" likely to result in reversal or a new-trial order. 18 U.S.C. § 3143(b)(1)(B). Because

appellant has never attempted to satisfy this condition precedent, this Court must affirm the district court's order.[7]

"While the COVID-19 pandemic has given rise to exceptional and exigent circumstances that require the prompt attention of the courts, it is imperative that they continue to carefully and impartially apply the proper legal standards that govern each individual's particular request for relief." *Roeder*, 807 F. App'x at 161; *see also United States v. Dade*, 959 F.3d 1136, 1139 (9th Cir. 2020) (same); *United States v. Roach*, 2020 WL 2736118, *1 (D.N.M May 26, 2020) (unpub. op.) ("COVID-19 is not its own legal standard"). Here, the proper legal standard is the release-or-detention-pending-appeal provision of the Bail Reform Act. Pursuant to § 3143(b)(1), a 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 . . . be detained, unless the judicial officer finds—(A) by clear and convincing evidence that the person is not likely to flee or pose a danger . . . ; *and* (B) that the appeal is not for the purpose of

[7] Because the district court's order is a "decision denying . . . amendment" of a "detention order," 18 U.S.C. § 3145(c), this Court has jurisdiction over this appeal. *See Roeder*, 807 F. App'x at 159; *see also* 28 U.S.C. § 1291.

delay and raises a substantial question of law or fact" likely to result in, among other things, a "reversal" of his conviction. 18 U.S.C. § 3143(b)(1)(A)-(B) (emphasis added).

Appellant is subject to § 3143(b)(1)'s mandatory-detention provision because: (1) a jury found him guilty of several criminal offenses on November 15, 2019; (2) the district court sentenced him to a term of imprisonment on February 20, 2020; and (3) appellant filed an appeal on April 30, 2020, challenging his judgment of conviction and the denial of his new-trial motion (ECF #376). When appellant moved for relief from the district court's order that he be detained beginning June 30, he thus had to show, among other things, that there was a substantial question of law or fact likely to result in the reversal of his conviction. Appellant, however, made no effort in the district court to demonstrate such a substantial question. Consistent with § 3143(b)(1)'s mandate—the judicial officer "shall order" that a person found guilty, sentenced to imprisonment, and who has filed an appeal, "be detained"—the district court thus properly denied in part appellant's extension motion. *See Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("[J]udges are presumed to

know the law and to apply it in making their decisions."), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002).

Nor has appellant tried to make the requisite "substantial question" showing before this Court. Instead, as he did below,[8] appellant tries to leapfrog the applicable § 3143(b)(1) criteria, arguing only (at 10) that "'there are exceptional reasons why [Stone's] detention would not be appropriate,' 18 U.S.C. § 3145(c), at the present time." But § 3145(c)'s plain language forbids appellant from circumventing the release-or-detention-pending-appeal requirements in § 3143(b)(1): "A person subject to detention pursuant to section 3143(a)(2) or (b)(2),[9] and *who meets the conditions of release set forth in section 3143(a)(1) or (b)(1)*, may be

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[8] *See* ECF #381, 1 ("This motion is based on the exceptional circumstances arising from the serious and deadly risk he would face in the close confines of a Bureau of Prisons facility . . . .").

[9] Though appellant himself repeatedly invokes (at 5, 8-9, 10, 23) § 3145(c)'s "exceptional reasons" standard, it is not apparent that he was subject to detention pursuant to 3143(b)(2), rather than (b)(1). While the government's proof established that he physically threatened a witness, he was convicted of witness tampering pursuant to 18 U.S.C. § 1512(b)(1), not § 1512(a)(2) (ECF #328, 1). *See* 18 U.S.C. 3156(a)(4) (defining "crime of violence"). In any event, even if appellant was not subject to detention pursuant to § 3143(b)(2), he still would have had to satisfy § 3143(b)(1)'s release criteria, including the substantial-question-of-law-or-fact criterion, which he has not done.

ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c) (emphasis added).[10] Because appellant has failed to demonstrate a substantial question of law or fact—a condition precedent to an "exceptional reasons" release—this Court must affirm the district court's denial of his request for a 60-day extension of his surrender date.[11]

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[10] *See also*, *e.g.*, *Roeder*, 807 F. App'x at 159 ("*If* there has been a finding 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,' *see* 18 U.S.C. § 3143(a), *we may grant relief* 'if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.' 18 U.S.C. § 3145(c)."") (emphasis added). *Roeder* applied § 3143(a)'s release criteria and not § 3142(b)'s because, having pleaded guilty, the defendant never filed an appeal of his conviction or sentence. *See* Dkt. No. 18-cr-259 (E.D. Pa.). Instead, he only appealed the denial of his motion to extend his self-surrender date (*id.*, ECF #63).

[11] *See*, *e.g.*, *Dade*, 959 F.3d at 1139 ("Dade argues . . . that this case involves the 'special circumstance[ ]' of the COVID-19 pandemic and the risks to Dade if he contracts it in prison. This is indeed a special circumstance, and it might warrant a change in the conditions of his confinement (including transfer to another facility) if those risks are not being adequately addressed. But we do not have that issue before us in this motion. Instead, we have Dade's request that, in light of the risks of COVID-19, he should be released *entirely*. Without a showing that Dade at least satisfies § 3143(b)(1)(A)'s standards he is not entitled to that relief.") (citations omitted).

Alternatively, this Court should affirm the district court's order because appellant has not "clearly shown" that there are "exceptional reasons" warranting a 60-day extension of his time for self-surrender. 18 U.S.C. § 3145(c). "Although [this Court] must independently determine whether relief is appropriate, [it must also] give careful consideration to the reasons offered by the District Court." *Roeder*, 807 F. App'x at 160. Such careful consideration shows that the district court's reasons amply support its conclusion that appellant should be granted a 14-day, rather than a 60-day, extension and that he should be detained beginning July 14.

First, the district court found, appellant's "condition appears to be—as it has been for some time—medically controlled" and he had not shown that he "is particularly vulnerable to infection or complications from infection for reasons other than his age" (ECF #389, 3). Appellant challenges this factual finding (at 10-12), claiming that the district court "[w]holly ignor[ed]" his doctor's "medical opinion." But the district court did not ignore the doctor's opinion. Rather, the court simply assigned it less weight than appellant did, noting the doctor himself labeled it "'[r]easonabl[e] speculation'" (ECF #389, 3). Such a disagreement does

not render a factual finding clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *see also Roeder*, 807 F. App'x at 161 n.16 ("the existence of some health risk to every federal prisoner as the result of this global pandemic does not, without more, provide the sole basis for granting release to each and every prisoner within our Circuit").

Second, the district court found, there "are currently no COVID-19 cases at the facility to which [appellant] has been designated" (ECF #389, 2). Though appellant suggests (at 6 n.1, 18) that this "factual premise no longer applies" because four inmates at Jesup's Camp FCI Facility have now "Abbott tested COVID-19 positive and are awaiting confirmation,"[12] he does not now rely on this changed circumstance. Instead, he argues (at 18), "the lower court erred on this point even under the mistaken factual premise."[13] Presumably appellant has forsaken such an argument

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[12] This is an apparent reference to the Abbott company's "rapid, portable testing instrument." *See* https://www.abbott.com/coronavirus.html.

[13] Specifically, appellant claims (at 18-20), the district court "did not consider" that "only 30 of 1409 inmates had been tested" and that the "number of cases in Georgia has recently spiked." But the district court

because, as he concedes (at 6 n.1), the "preferred course" is a reconsideration motion before the district court when facts change, *see*, *e.g.*, *United States v. Slough*, 61 F. Supp. 3d 103, 108 (D.D.C. 2014), which he did not pursue. In any event, this "Court has often stressed that it will not usurp the duty of the primary fact-finder by imposing its own findings." *G & R Corp. v. American Sec. & Trust Co.*, 523 F.2d 1164, 1172 (D.C. Cir. 1975). Accordingly, if this Court determines that such factual findings are necessary, it should remand this matter. Of course, the BOP may not designate appellant to serve his sentence at any facility that does not meet the Bureau's "minimum standards of health and habitability." 18 U.S.C. § 3621(b).

Third, in denying appellant's motion, the district court properly considered that he had been convicted of threatening a witness and, during the proceedings below, had "attempt[ed] to intimidate," and "to stoke potentially violent sentiment against," numerous "participants in the case," including jurors and the court itself (ECF #389, 4). Although the district court did not deem these facts sufficient to establish

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did not "consider" these facts because appellant did not bring them to the court's attention (*see* ECF #381, 1-5).

appellant's danger to the community for purposes of § 3431(b), they were certainly relevant to the court's assessment of whether appellant had "clearly shown" "exceptional reasons" why his detention was not "appropriate," 18 U.S.C. § 3145(c).[14]

[14] Appellant repeatedly emphasizes (at 4, 5, 7, 10, 23) that the United States did not oppose his request to extend his surrender date. As explained *supra*, the United States' position below was premised entirely on the EOUSA Directive. The district court's subsequent decision, however, reflects a well-reasoned exercise of its discretion, one that is rooted in a thorough examination of the facts and a proper application of the law. In any event, "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young v. United States*, 315 U.S. 257, 259 (1942),

CONCLUSION

WHEREFORE, the government respectfully submits that the district court's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this response contains 3818 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This response has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, David L. Shoen, Esq., dschoen593@aol.com, and Seth Ginsberg, Esq., srginsberg@mac.com, on this 9th day of July, 2020.

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