

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

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Appellee,</b>	)	
	)	
<b>v.</b>	)	<b>No. 06-3017</b>
	)	
<b>WALTER ANDERSON,</b>	)	
	)	
<b>a.k.a. Mark Roth,</b>	)	
	)	
<b>Appellant.</b>	)	

**APPELLANT WALTER ANDERSON'S APPEAL OF A  
PRE-TRIAL DETENTION ORDER**

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

- 1) The only parties to this action are the Appellant, Walter Anderson, and the Appellee, the United States of America.
  
- 2) The following rulings are relevant to this appeal:
  - ∞ Detention Memorandum, United States v. Anderson, 1:05-CR-66 (D. D.C. March 7, 2005) (Magistrate Judge Kay) (App. 569-574)
  
  - ∞ Opinion and Order, United States v. Anderson, 1:05-CR-66 (D. D.C. March 16, 2005) (Judge Friedman) (App. 89-108)
  
  - ∞ Memorandum Opinion and Order, United States v. Anderson, 1:05-CR-66 (D. D.C. April 1, 2005) (Judge Friedman) (App. 109-113)
  
  - ∞ Opinion and Order, United States v. Anderson, 1:05-CR-66 (D. D.C. Aug. 12, 2005) (Judge Friedman) (App. 549-559)
  
  - ∞ Memorandum Opinion and Order, United States v. Anderson, 1:05-CR-66 (D. D.C. Oct. 26, 2005) (Judge Friedman) (App. 560-568)
  
  - ∞ Transcript of Bench Ruling, United States v. Anderson, 1:05-CR-66 (D. D.C. Jan. 23, 2006) (Judge Friedman) (App. 1-85)

3) The on-going criminal case against Mr. Anderson before Judge Friedman in the United States District Court for the District of Columbia (United States v. Anderson, 1:05-CR-66 (D. D.C.)) is the only case related to this appeal. Judge Friedman's order of pretrial detention in that case is the subject of this appeal.

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to review the final order imposing pretrial detention in this criminal case. See 18 U.S.C. § 3145(c) (“An appeal from a release or detention order . . . is governed by the provision of section 1291 of title 28 . . .”). The District Court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The District Court issued its ruling imposing detention from the bench on January 23, 2006, and Mr. Anderson’s Notice of Appeal was filed January 30, 2006.

## **ISSUE PRESENTED FOR REVIEW**

Whether the District Court erred in determining that there was no condition or combination of conditions which would reasonably assure Mr. Anderson’s presence at trial and ordering Mr. Anderson detained.

The relevant statute for determining conditions for pretrial release or imposing pretrial detention is 18 U.S.C. § 3142.

## **STATEMENT OF THE CASE**

Mr. Anderson was alerted that he was under investigation for tax fraud by the Department of Justice (“DOJ”) on March 19, 2002, when federal agents conducted a search of his home and office.<sup>1</sup> Since the March 2002 search, Mr. Anderson’s counsel repeatedly was

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<sup>1</sup> In addition to seizing numerous books and records in the course of that search, the government also seized minuscule quantities of illegal drugs. Mr. Anderson pled guilty to possession of a controlled substance and drug paraphernalia in D.C. Superior Court on April 19, 2004 (No. 11097-03). He paid a

advised by DOJ attorneys that Mr. Anderson would be indicted. Mr. Anderson ultimately was indicted on February 23, 2005 -- nearly three years after the initial search of his home and office. He was arrested at Dulles International Airport as he was returning from London on Saturday, February 26, 2005. The following Monday when Mr. Anderson was to be arraigned, prosecutors served Mr. Anderson's counsel with a Motion for Detention less than an hour before the hearing was scheduled. At that hearing on Monday, February 28, 2005, Magistrate Judge Kay ordered Mr. Anderson detained. After the issue had been briefed by both sides, Magistrate Judge Kay again ruled that Mr. Anderson be detained as a flight risk on March 7, 2005. Mr. Anderson then appealed that decision to Judge Friedman. On March 16, 2005, Judge Friedman ruled that Mr. Anderson was a flight risk and ordered him detained, (App. 89-108), and Judge Friedman denied a motion for reconsideration on April 1, 2005. (App. 109-13.)

Although Mr. Anderson's counsel believed that the record justified Mr. Anderson's release upon his own recognizance, the District Court's concerns about flight led us to consult with various security experts and devise a set of extremely rigid conditions of release, where Mr. Anderson's home would be converted into a virtual prison, complete with multiple guards and state-of-the-art monitoring technology. A Second Motion for Reconsideration advancing these more rigorous conditions of release and presenting new evidence regarding Mr. Anderson's lack

\$1,000 fine, received a prison sentence that was suspended in favor of sixty days of supervised probation -- including fourteen days of house arrest in an electronic monitoring program -- and one year of unsupervised probation. Mr. Anderson always appeared in court when his presence was required and he fully complied with the conditions set by the court concerning his house arrest.

of funds was filed May 2, 2005. The District Court held an evidentiary hearing on the motion over the course of four days, May 17 (App. 114-243) and 31 (App. 244-465), and June 1 (App. 466-538) and 3, 2005 (App. 539-548).

At the time this expensive house arrest proposal was made, Mr. Anderson anticipated receiving the money necessary to fund the house arrest proposal and to pay his attorneys' fees through an indemnity agreement he had with one of the companies that he managed. Once it became clear that no payments would be made in the near future pursuant to the indemnity agreement, however, Mr. Anderson's counsel filed a Motion to Withdraw on August 1, 2005, and a Motion for Appointment of Counsel on August 12, 2005.

On August 12, 2005, the District Court also ruled on Mr. Anderson's Second Motion for Reconsideration. Although the District Court concluded that the government's claim that Mr. Anderson was a flight risk was not as well substantiated as it had claimed, the District Court concluded that Mr. Anderson nevertheless remained a flight risk. (App. 549-59.) The District Court declined to consider Mr. Anderson's house arrest proposal because Mr. Anderson lacked the funds to pay for it. (App. 551.) Mr. Anderson's attorneys filed a Notice of Appeal on August 22, 2005, but then moved this Court to dismiss the appeal so that the District Court could reconsider its detention order. This Court dismissed the appeal on October 24, 2005.

On October 26, 2005, the District Court granted Chadbourne & Parke LLP's Motion to Withdraw, subject to the firm continuing to represent Mr. Anderson on bail-related matters before the District Court and on appeal, and agreed to appoint counsel for Mr. Anderson due to his indigency. (App. 560-68.) In finding Mr. Anderson indigent, Judge Friedman explained that

“the evidence in the record, the sworn testimony heard by the Court, and the simple facts of Mr. Anderson’s situation strongly suggest that he is indeed without access to substantial funds at present.” (App. 563.) Judge Friedman noted that “Mr. Anderson fervently desired to obtain pretrial release under some Court-approved set of conditions” and found it “difficult to imagine that Mr. Anderson, if he truly had the wherewithal to afford counsel and the costs of the proposed release plan, would willingly forego these objectives simply to conceal assets from the Court.” (App. 564.)

On December 15, 2005, Mr. Anderson filed a new motion for release, asking to be placed in D.C.’s High-Intensity Supervision Program, subject to house arrest in his parents’ home, and his parents, other family members and friends offered to post their homes as bond. Mr. Anderson argued that the District Court’s recent ruling that he was indigent undermined one of the District Court’s prior justifications for detention -- that Mr. Anderson had the financial resources with which to flee and support himself while living as a fugitive. The District Court denied that motion from the bench on January 23, 2006 (App. 79-85), and Mr. Anderson filed his Notice of Appeal on January 30, 2006.

#### **STATEMENT OF FACTS**

Mr. Anderson is a fifty-two-year-old man who has spent most of his life in the greater Washington, D.C. area, where he was raised and where his closest family members and friends continue to reside. He also is one of the areas most respected business men, having achieved considerable success in the global telecommunications industry.

In 1993, Mr. Anderson concluded that he had made enough money to sustain himself for the rest of his life and he sought an avenue for using his wealth to advance the charitable causes that he believes in. He created an off-shore trust and donated assets worth a couple of million dollars to it. Mr. Anderson managed the trust assets and optimistically hoped that the value of the trust endowment would grow to somewhere between \$7 and 10 million dollars over the course of a decade and that when he was ready to retire he could turn his focus to dispensing the assets from the trust to various charities. Mr. Anderson saw this as a way not only to create positive change in the world through charitable giving, but also as a way to keep himself busy through his retirement. While building up the size of the trust endowment, Mr. Anderson did not want to draw attention to himself and subject himself to a barrage of inquiries from people and organizations seeking hand-outs, so he took steps to maintain his privacy and maintain a low profile for the charitable trust he managed.

The financial gains Mr. Anderson made for the trust in the following years were beyond his wildest imagination. The boom in the telecommunications market, fueled by the expansion of the internet, sent the stock of telecommunications companies soaring. The assets held by the trust-related investment vehicles rode this wave up to the very top of the market and reached a value on paper in the hundreds of millions of dollars, but that wave came crashing down when WorldCom, followed by a slew of other telecommunications giants, began restating their earnings in June of 2002. It turned out that the demand for internet and telecommunications services was far from what the industry had been forecasting and the race by those companies to expand their capacity led to a glut in service for the demand that remained. Almost overnight,

companies in the sector that had been the darlings of Wall Street suddenly found themselves bankrupt or on the brink of bankruptcy. The value of the assets in the trust were decimated, and Mr. Anderson had to struggle to maintain the viability of the trust in the ensuing months.

Mr. Anderson's personal fortune also was heavily tied to the telecommunications market as well, and he quickly saw himself headed toward serious financial difficulties. Mr. Anderson had borrowed or personally guaranteed multi-million dollar loans against the value of the telecommunication stocks he held, and the loans were suddenly and drastically under collateralized after the telecommunications bubble burst in June of 2002. Although Mr. Anderson held assets that were worth around \$3 million dollars at the time, Mr. Anderson knew that creditors would be coming and that he could be financially ruined. That has now come to pass, and Mr. Anderson presently has a negative net worth.

The government's tax fraud investigation of Mr. Anderson began before the June 2002 bust of the telecommunications market. Indeed, Mr. Anderson learned of the investigation just a few months before, when on March 19, 2002, his home and office were searched by federal agents. The government believed that the off-shore trust Mr. Anderson managed was not paying taxes to the United States government. Although such off-shore trusts are not required to pay U.S. taxes, the government was pursuing a theory that the trust was really some sort of sham. The government's view was that Mr. Anderson was the true owner of the trust -- and not merely its manager -- and that he should have been paying taxes on the money the trust earned. Mr. Anderson knew that the government's theory was wrong and hoped the matter would just go

away as the government gained a better understanding of the facts, but it did not. Mr. Anderson was arrested roughly three years later on tax fraud charges.

Despite this delay, Mr. Anderson firmly believed that federal prosecutors were determined to charge him. During the March 19, 2002 search of Mr. Anderson's home, the government discovered small quantities of illegal drugs, but the government did not choose to prosecute him until more than 20 months had passed and made the arrest on Christmas Eve, 2003, when it knew he would be entertaining a large number of family and out-of-town guests. Mr. Anderson believed his Christmas Eve arrest, for something that the government was aware of almost two years earlier, demonstrated that prosecutors were determined to punish him any way they could. Nevertheless, Mr. Anderson never made any attempt to flee from these charges -- even though he knew that additional and more substantial tax charges were looming, and even though he knew creditors would be pursuing his remaining assets. Instead, he pled guilty and complied with the house arrest and other sanctions imposed by the D.C. Superior Court.

During the time between learning of the government's investigation in March of 2002 and his December 2005 arrest, Mr. Anderson had the means and repeated opportunities to flee. In the course of liquidating assets to pay creditors, Mr. Anderson had well over a million dollars in cash at some points in time and control over substantial assets belonging to the trust that could have been liquidated. He could have used that money to flee both creditors and government charges. Nothing prevented Mr. Anderson from leaving the country, as he did repeatedly in trying to rebuild his businesses. Remarkably, during this period between learning of the government's investigation and his arrest, Mr. Anderson left the country and -- more importantly

-- he returned on roughly fifty occasions.<sup>2</sup> But Mr. Anderson never tried to go into hiding from the government or his creditors. He had fought too hard his whole life to live the rest of his life on the lam in some third world country.

The government's own agent confirmed in his testimony what everyone who knows Mr. Anderson already knows -- that Mr. Anderson is a fighter. The government's agent testified that in the six years he had investigated Mr. Anderson he had never seen any evidence that Mr. Anderson had ever run from a fight, and confirmed that Mr. Anderson had made his prior court appearances when he was required to do so in other cases. (App. 230.) Mr. Anderson is determined to stay and fight these charges so that he can clear his name and begin rebuilding his business empire and the value of the assets in the trust endowment.

### **SUMMARY OF ARGUMENT**

There is a heavy presumption in favor of bail, grounded in both the Eighth Amendment and the Bail Reform Act, which has not been overcome in this case. The government has failed to establish by a preponderance of the evidence that Mr. Anderson is a flight risk or, more

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<sup>2</sup> The government produced a log showing that Mr. Anderson re-entered the United States from abroad on 36 occasions from March 10, 2003 through February 3, 2005. (App. 86-88.) It is not clear how many international trips Mr. Anderson took during the year between the date of the March 19, 2002 search and March 10, 2003, when this log begins, and we know he took at least one international trip after February 3, 2005, because he was arrested at Dulles International Airport on February 23, 2005 returning from London. Mr. Anderson is not sure how many trips he took after the March 19, 2002 search that are not reflected on the log, but his international travel schedule was roughly the same then as it was later, which suggests that there probably were another 20 or so trips that are not accounted for. (See App. 262-65 (Agent Kutz testifying that Mr. Anderson traveled internationally 2-3 times a month while knowing he was under investigation and confirming that there were "no fewer than 40 or 50" international trips).)

importantly, that there is no condition or combination of conditions that would reasonably assure Mr. Anderson's appearance at trial. This Court has an obligation to independently review the factual findings of the District Court and to review de novo the mixed application of law to facts in determining whether this is one of the rare cases that warrants detention.

While it can be difficult for judges to play the role of behavioral scientists and try to predict whether or not a person would flee, this is not a case where the defendant was surprised by his arrest and we are left to wonder whether he would have fled had he seen the indictment coming. There is no question that Mr. Anderson knew that he would be indicted. Prosecutors made that fact clear to his lawyers repeatedly and they made that fact clear to Mr. Anderson. This is a case where we know that Mr. Anderson saw the indictment coming for three years and yet made no effort to flee.

Nor is this a case where we are left to wonder whether Mr. Anderson ever really had the opportunity to flee. Mr. Anderson had years to effectuate an escape, but simply chose not to pursue that route. Indeed, he successfully left the country on roughly fifty occasions only to return home to Washington, D.C. every time. He always returned home to face the government and his creditors, and he continues to try to salvage his businesses. Mr. Anderson had to fight all his life to succeed in the business world and he is determined to stay and fight these charges, rebuild his reputation and, ultimately, prove that he can succeed in business yet again.

If what is past is prologue, this Court has no reason to fear that Mr. Anderson would flee and, if the Court has any residual doubt on that issue, those concerns can easily be addressed through conditions regularly imposed on defendants who are released before trial. The District

Court has considerable latitude to fashion a vast array of conditions to limit whatever risk of flight it believes Mr. Anderson may pose. Everyone, including Mr. Anderson, must recognize that it would be virtually impossible for Mr. Anderson to flee given that the government has hyped this to be the biggest individual tax fraud case in history. Mr. Anderson's face would be everywhere in this post-9/11 world, and he would stand no chance of escape. Mr. Anderson already has signed a waiver of extradition agreement with DOJ, and he is more than willing to reaffirm that agreement. In addition, the Court could further mitigate any concern by subjecting him to electronic monitoring through the High-Intensity Supervision Program and by placing him on house arrest in the custody of his parents. Mr. Anderson's parents and other friends and family -- the people who know him best -- are so confident in Mr. Anderson that they even have agreed to post their very homes as bond on his behalf. Surely Mr. Anderson would do nothing to place the people who mean the most to him and who have stood by him at his time of need in harm's way. This Court should revoke the order of detention.

## **ARGUMENT**

### **I. THE GOVERNMENT HAS FAILED TO SATISFY ITS BURDEN THAT PRETRIAL DETENTION IS WARRANTED**

Consistent with the traditional presumption of innocence and the Eighth Amendment, the Bail Reform Act of 1984 provides that a defendant should be released pending trial on personal recognizance or "subject to the least restrictive further condition, or combination of conditions, that . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B). The Supreme Court has

explained: “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755 (1987)); see also United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) (“Detention until trial is relatively difficult to impose.”). As a general rule, courts should refuse to release defendants on bail “[o]nly in rare circumstances.” United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985) (Kennedy, J.), and “only for the strongest of reasons.” Id. at 1407. Any “[d]oubts regarding the propriety of release should be resolved in favor of the defendant.” Id. at 1405.

It is not enough for the government to prove by a preponderance of the evidence that Mr. Anderson is a flight risk. The government “must prove by a preponderance of the evidence that the defendant poses a ‘serious’ flight risk.” See United States v. Jamal, 285 F. Supp. 2d 1221, 1228 (D. Az. 2003) (quoting 18 U.S.C. § 3142(f)(2)(A) (“a serious risk that such person will flee”)). Moreover, the “[m]ere opportunity for flight is not sufficient grounds for pretrial detention.” United States v. Himler, 797 F.2d 156, 161 (3d Cir. 1986); see id. at 160 (“[I]t is reasonable to interpret the statute as authorizing detention only upon proof of a likelihood of flight . . .”). Rather, “[t]hat preponderance must, of course, go to the ultimate issue: that no combination of conditions--either those set out in the Bail Reform Act itself or any others that the magistrate or judge might find useful--can ‘reasonably’ assure that the defendant will appear for trial.” United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996). In this case, there is no reason to believe that Mr. Anderson is a “serious” flight risk or that the District Court is incapable of fashioning a set of conditions that would “reasonably” assure Mr. Anderson’s appearance at trial.

**A. The Government's Speculation That Mr. Anderson Is A Flight Risk Is Misguided**

The government and the District Court have mistaken evidence of Mr. Anderson's eccentricity as evidence that he is a flight risk. While it is true that there are unusual facts in this case and facts that can be portrayed in a sensational light, the government and the District Court failed to appreciate their significance. What they see as fake passports, the use of aliases and manuals for how to live abroad are all far more benign than they are made to sound. Far more can be learned of Mr. Anderson's intentions to show up at trial by looking to the fact that he always has showed up for his trial appearances in the past, and has made no effort to flee in the nearly three years he was aware of the government's investigation. Indeed, this is a man who left and returned to the U.S. roughly fifty times, when all that he would have had to do to avoid arrest was simply not hop on a return flight home. The strongest measure of Mr. Anderson's intent is that he has always come home to Washington, D.C., he has always maintained his innocence and desire to vindicate himself at trial, and he has never backed down from a fight.

To be sure, the government's use of highly charged phrases like fake passports, aliases and manuals for living as a fugitive have a sensational air about them, but we believe the District Court erred by giving these hyperbolic atmospherics more weight than the record would justify. What the government calls a fake passport is really nothing more than a novelty item, known as a camouflage passport. In its 2002 search of Mr. Anderson's home, the government seized a camouflage passport from a fake country -- British Guyana (which became Guyana in 1966) -- with printed (not stamped) "stamps" from imaginary destinations. (App. 285.) Mr. Anderson

purchased the camouflage passport on the internet in 1993, where they still can be purchased. The idea is that if you are taken hostage by an anti-American group abroad, you could use the camouflage passport to conceal your American citizenship from your abductor. Mr. Anderson never used the camouflage passport for travel purposes, nor could he because it was such an obvious fake. Indeed, the government's own agent testified that there was no evidence that the camouflage passport ever had been used for travel. (App. 236, 268-69.) Mr. Anderson was so disappointed with the quality of the camouflage passport that he assumed that not even a terrorist would think it was real. He never even traveled with it. It just sat in a drawer.<sup>3</sup> The government's agent conceded that when a second search of Mr. Anderson's home and business was conducted 18-months later, in November 2003, they did not locate a replacement camouflage passport or any sort of fake identification documents. (App. 286-87.)

Similarly, Mr. Anderson has used what the government calls "aliases" in the past. When sharing a home with roommates after college, he listed his name in the phonebook as Robert

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<sup>3</sup> The government also claimed that Mr. Anderson had multiple U.S. passports, but the government's agent conceded that Mr. Anderson only had one valid U.S. passport and copies of his expired passports with clipped corners, indicating they are not valid for travel. (App. 237-38.) Like many Americans, Mr. Anderson saved copies of his expired passports to remind him of places he has been. Mr. Anderson would gladly surrender his passport until the conclusion of the trial.

The government also alleged that Mr. Anderson had paperwork relevant to applying for dual citizenship with foreign countries at his home when it was searched in 2002, but the government's agent testified that this paperwork was filled out around 1998 -- years before the government began its investigation -- and that there is no evidence that Mr. Anderson ever applied for foreign citizenship anywhere. (App. 232, 272.) Nor did the government find any evidence that such documents were replaced during their second search of Mr. Anderson's home and business 18-months later. (App. 287.)

Zzyllch. It was a joke of sorts. He could tell people it was the last name in the phone book. (App. 241.) It also saved him the expense paying to have his number unlisted, and it helped protect his privacy. For decades, Mr. Anderson has used such “aliases” with the phone company, on his utility bills and in other places, to protect his privacy, but there was never anything nefarious about it. (App. 276-81.) Mr. Anderson always ensured that the bills were paid. It strains credulity to suggest that Mr. Anderson’s proven ability to give a false name to a phone company has somehow prepared him to assume a new name and pursue a life on the lam in a foreign country.

It also is true that Mr. Anderson’s vast library includes a number of counter-culture books that address “dropping out,” many of which date back to the 1960s, such as “Steal This Book” and “The Paper Trip.” Mr. Anderson is understandably intrigued by how people like Anne Frank, Jesse James, Josef Mengele and others have lived underground, and a small percentage of the books he owns address this subject. None of the books, however, portray life underground as a very positive experience. Despite Mr. Anderson’s interest in this subject over the past 40 years, he certainly has never attempted to live underground and he has no intentions of doing so.

None of the evidence introduced by the government demonstrates an intention by Mr. Anderson to try to flee, and his behavior since learning of the investigation demonstrates just the opposite. Without catching Mr. Anderson in the process of fleeing and without any evidence of an impending attempt to flee, all the government has to fall back on is evidence it believes shows that Mr. Anderson could flee if he wanted to badly enough. But that is true of almost every

defendant -- especially white collar defendants -- yet bail is routinely granted in such cases. This case is no different.

**B. Mr. Anderson's Alleged Ability To Flee Does Not Justify Detention**

This Court has rejected the notion that a defendant's ability to flee the country successfully can serve as the basis for pretrial detention. In United States v. Xulam, 84 F.3d 441 (D.C. Cir. 1996), the this Court rejected the government's contention that the defendant -- an immigrant from Turkey who was charged with falsifying information on a passport and who had only been in the country for three years -- should be denied bail because nothing could stop him if he decided to flee. This Court explained: "That, of course, is true of every defendant released on conditions; it is also not the standard authorized by law for determining whether pretrial detention is appropriate. Section 3142 speaks of conditions that will 'reasonably' assure appearance, not guarantee it." Id. at 444.

Similarly, the Third Circuit has rejected the notion that people with expertise in changing their identities should be denied bail for that reason alone. In United States v. Himler, 797 F.2d 156 (3d Cir. 1986), the defendant was charged with falsifying an identification document, an international driver's license, and he had a history of committing such offenses in the past.

Nevertheless, the Third Circuit explained:

While it is true that the defendant stands accused of an unlawful deceit, there is, of course, no per se presumption of flight where the crime charged involves the production of fraudulent identification. The defendant's past convictions do indicate a propensity over a period of time to engage in similar unlawful deceptions. The purpose of a Section 3142(e) risk of flight determination, however, is not to detain habitual criminals or

deceitful persons; it is to secure the appearance of the accused for trial. As the government concedes, the record indicates that the defendant when previously accused of similar crimes and not detained always appeared in court as described.

Id. at 161; see id. (“Mere opportunity for flight is not sufficient grounds for pretrial detention.”).

At best, the government’s evidence suggests that Mr. Anderson -- like the defendant in Himler -- has the ability to change his identity and flee the country (although Mr. Anderson has never adopted a different identity or used fake identification to travel). Like the defendant in Himler, however, Mr. Anderson should not be denied bail because there is no indication that he intends to flee. See id. at 162 (“He is clearly capable of obtaining false identification, but there is no direct evidence to suggest that he would flee from prosecution in the future.”). To the contrary, if past is prologue, Mr. Anderson will continue to make all of his court appearances and comply with whatever conditions the District Court imposes upon his release. This was the conclusion in Himler as well. See also Motamedi, 767 F.2d at 1408 (revoking a detention order for an Iranian citizen accused of illegal arms deals who allegedly had large bank accounts abroad and an ability to return to Iran with impunity).

The notion that Mr. Anderson is some sort of James Bond-like character or master of disguise is comical to all who know him. He is an intelligent and well-read middle-aged telecommunications executive who has grown accustomed to living the life of a successful business man in the United States. There is nothing in his background or experience that would equip him to go into hiding in some foreign destination, and now that Mr. Anderson is essentially bankrupt whatever ability he once had to do so has been greatly undermined.

### **C. Mr. Anderson Has Compelling Reasons To Appear At Trial**

Although being tried for a serious felony is something we all would seek to avoid, Mr. Anderson never fled to avoid arrest after learning that he would be indicted. He has every reason to stay and fight. Mr. Anderson is a true Washingtonian, he has spent virtually his whole 52-year-long life in the D.C. area. This is where his friends and his now-elderly parents are. This also is where Mr. Anderson built his reputation. Like most innocent men, Mr. Anderson is intent on proving his innocence in court to clear his good name, and so that he can return to his normal life in the place he has always called home, surrounded by his life-long friends and family.

For Mr. Anderson, there really is no alternative but to appear at trial. No country would admit him as a fleeing felon, so he would have to live life on the lam hiding from the U.S., its allies, and the government of whatever country the prosecution believes he may flee to. Being touted as the worst tax offender in history has left no doubt in Mr. Anderson's mind that the government would pursue him and find him wherever he could possibly go.

The fact that Mr. Anderson is a world traveler does not prove that Mr. Anderson would be well suited to living underground in some third world country. It is true that Mr. Anderson has stayed at some very nice hotels in countries around the world, but Mr. Anderson has no experience living underground and avoiding detection in such places. Nor is Mr. Anderson particularly well-suited or inclined to take a job picking crops or bussing tables in such a country, as he would have to do to survive because he would risk calling attention to himself by pursuing any more lucrative work. And Mr. Anderson is not prepared to abandon his elderly parents at

the end of their lives or walk away from his friends, businesses and everything he has ever known to start his life over again destitute and at age fifty-two.

## **II. THE DISTRICT COURT CAN IMPOSE CONDITIONS THAT WOULD REASONABLY ASSURE MR. ANDERSON'S PRESENCE AT TRIAL**

Even assuming that the government could demonstrate that Mr. Anderson is a serious flight risk, the government also bears the heavy burden of proving “that no condition or combination of conditions of release will reasonably assure [the defendant’s] appearance at trial.” United States v. Simpkins, 826 F.2d 94, 94-95 (D.C. Cir. 1987). This Court has made clear: “Section 3142 speaks of conditions that will, ‘reasonably’ assure appearance, not guarantee it.” Xulam, 84 F.3d at 444; see also United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969) (“The law requires reasonable assurance but does not demand absolute certainty”).

Surely the District Court has ample discretion to establish conditions that would more than reasonably assure Mr. Anderson’s presence for trial. Mr. Anderson is prepared to surrender his passport and to reaffirm his signed waiver of any extradition rights he may have abroad. This alone should be sufficient. Xulam, 84 F.3d at 443 (“On a more practical level, the government has taken away all his passports and travel documents, so it is unlikely he could go far even if he wished to.”). In addition, Mr. Anderson has agreed to be subject to electronic monitoring and placed on house arrest in his parents’ home under the High-Intensity Supervision Program. And many of Mr. Anderson’s friends and family, including his elderly parents, have offered to put up their very homes as bond to ensure that he appears at trial. Each is willing to agree not to be compensated by Mr. Anderson or anyone else in any way should they lose their homes. These

are the people who know Mr. Anderson best and their faith in him should inspire the Court to give him the benefit of a doubt on its bail decision -- a decision where Mr. Anderson already is entitled as a matter of law to the heaviest of presumptions in favor of bail.

How can it really be said that there are literally no set of conditions that can reasonably assure Mr. Anderson's presence? With house arrest, custody by his parents, electronic monitoring, call-in requirements or random calls to the house, with bond secured by the homes of his loved ones, with all travel documents being seized, with his having to work with his counsel on a regular basis, and other provisions, there are more than enough conditions that satisfy the legal requirement. The failure to impose these conditions in a case without any threat to safety is what causes this appeal.

### **III. DETENTION THREATENS MR. ANDERSON'S ABILITY TO RECEIVE A FAIR TRIAL**

Although it is not an issue typically addressed in the bail context, Mr. Anderson's detention raises a parallel concern about whether detention would compromise Mr. Anderson's ability to receive the fair trial he is entitled to by the Fifth and Sixth Amendments. Mr. Anderson's trial will be incredibly complex, focusing on the tax implications of several international transactions. The government advises that it expects the trial to last six months.

Mr. Anderson's counsel have had an incredibly difficult time preparing for trial due to their limited access to Mr. Anderson because he is in prison, and the concerns of Mr. Anderson's counsel are growing. Prison is exacting a heavy toll on Mr. Anderson both physically and mentally, which is compromising his counsels' ability to work with him in preparing his case.

We fear that this situation will only degenerate further over time, especially once the case heads to trial. When Mr. Anderson is needed in court, he is awakened at 1:00 a.m. to shower, eat and be transported and he typically does not arrive back to his cell until between 7:00 p.m. and 10:00 p.m. This affords very little time for sleep, and sleep is difficult for him in prison because someone is always making noise at night. It is difficult to imagine what toll this sleep deprivation will have on Mr. Anderson over the course of a six month trial, when he will need his time outside of court to assist his counsel in addition to sleeping. The situation may very well affect both his competency at trial and his ability to assist his counsel with his own defense. The importance of releasing Mr. Anderson so that he can work with his counsel to prepare for this highly complex trial and remain capable of assisting his counsel during trial should factor into the Court's bail determination. See United States v. Bodmer, 2004 WL 169790, at \*3 (S.D.N.Y. Jan. 28, 2004) (considering the complexity of the case and the importance of the defendant's uninterrupted access to trial counsel in authorizing pre-trial release); United States v. Ruedlinger, 1997 WL 445819, at \*4-5 (D. Kan. May 22, 1997) (same).

### CONCLUSION

For the foregoing reasons, this Court should revoke the District Court's detention order.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,177 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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