

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

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

**APPELLANT WALTER ANDERSON'S REPLY MEMORANDUM IN SUPPORT
OF HIS APPEAL OF A PRE-TRIAL DETENTION ORDER**

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INTRODUCTION

The Framers of our Constitution and of the Bail Reform Act knew exactly what the government's opposition reminds the Court over and over again: we can never know with absolute certainty that a person is not a flight risk, there is a possibility that every condition of release may fail, and the surest way to guarantee a defendant's presence at trial is to lock him up in advance. Yet the Constitution, the Bail Reform Act and the case law do not require absolute certainty, they accept the possibility of some risk, and emphasize that pretrial detention is to be avoided at almost all costs. Detention is not authorized based on whether there is a risk of flight -- there must be "a serious risk that such person will flee." 18 U.S.C. § 3142(f)(2)(A) (emphasis added). The presumption of innocence entitles defendants to remain free "subject to the least restrictive" conditions of release that will "reasonably assure" -- not guarantee -- the defendant's appearance at trial. 18 U.S.C. §3142(c)(1)(B). Only where there is this "serious risk" of flight and "no condition or combination of conditions will reasonably assure the appearance of the person" can detention be justified. 18 U.S.C. § 3142(e). This high standard has not been met in this case.

I. The Scope Of This Court's Review Is Broader Than The Government Claims

The government makes the remarkable suggestion that this Court's review is limited only to considering the new evidence submitted in Mr. Anderson's request to reopen the detention hearing, and should not afford Mr. Anderson the complete review of the merits of the district court's detention decision that he is entitled. (Gov't Opp'n at

10-12.) The government is mistaken. Judge Friedman considered Mr. Anderson's new evidence and ruled that it did not change his conclusion that bail would be denied, but he did not decline to reopen the detention hearing. Nor did Judge Friedman share the government's belief that the review of his detention order would be as limited as the government suggests. To the contrary, Judge Friedman reminded us that he is "not infallible" and that appellate judges "might have a different view if they looked at the same record." (App. 84.) Judge Friedman then advised that

if the defense were interested in pursuing an appeal, they do de novo reviews of bond decisions as well, they can review the record. And if they think that I'm wrong, they'll say so, and they'll either try to fashion conditions or they'll more likely send it back to me since I'm more directly involved with the case with the direction to fashion some conditions that will permit him to be out and not locked up.

(App. 85.)

There also is no question that Mr. Anderson presented new evidence that had direct bearing on the detention issue. In its August 10, 2005 Order detaining Mr. Anderson, the district court justified detention in part because "millions of dollars in assets" were unaccounted for and the district court found "that a significant probability exists that Mr. Anderson therefore has control over assets which could facilitate his flight from prosecution." (App. 557.) Upon a more careful review of Mr. Anderson's finances at a later date, the district court questioned Mr. Anderson and his counsel regarding his financial situation and held in its October 26, 2005 Order 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.) The district court further explained: “It is difficult to imagine that Mr. Anderson, if he truly had the wherewithal to afford counsel and the cost of his proposed release plan, would willingly forego these objectives simply to conceal assets from the Court.” (App. 564.)

Plainly, the district court’s subsequent ruling presented a new basis for returning to the district court to reconsider a matter of “material bearing” to that court’s prior denial of bail.¹ See United States v. Peralta, 849 F.2d 625, 626-27 (D.C. Cir. 1988) (subsequent rulings may provide a basis for a district court reconsidering prior bail determinations).

¹ 18 U.S.C. § 3142(f)(2) addresses reopening a detention hearing, either “before or after a determination” by the court, based on evidence that was not known to the movant at the “time of the hearing.” The detention hearing concluded on June 3, 2005 when all the evidence was heard. (App. 547 (concluding the June 3, 2005 hearing, Judge Friedman noted that “I’ve heard all the testimony, I’ve got all the exhibits, and I’ve heard all the arguments”).) The government erroneously believes that the evidence must be new, not at the time of the “hearing,” but by the time the court ruled on the evidence presented at the hearing in its August 10, 2005 Order. (Gov’t Opp’n at 11 & n.13.) That view is at odds with the express language of the statute, which says the evidence must not be known at the time of the “hearing,” and even clarifies that the new evidence can be presented either “before or after a determination” by the judge. 18 U.S.C. § 3142(f)(2). This “before or after a determination” language confirms that Congress recognized that there is a difference between the “hearing” and the “determination” courts would reach following such a hearing. Mr. Anderson did not learn that there would be no indemnification, and therefore that he would not have the money to pay lawyers or for the proposed security plan until August 2005 -- roughly two months after the detention hearing closed. (App. 560-61.) It was the fact that Mr. Anderson was conceding that he did not have the money to finance the release plan or pay his lawyers, and would likely have to stay in jail before trial as a result, that provided what Judge Friedman found to be the strongest proof that Mr. Anderson presently is without access to substantial funds. That powerful evidence was not available at the time of the detention hearing.

Bail determinations require a careful balancing of various factors, see 18 U.S.C. § 3142(g) (entitled “Factors to be considered”), and new evidence -- such as the district court’s new conclusion that Mr. Anderson no longer appeared to have access to substantial funds -- requires that balance to weighed again. The statute expressly does not limit what a district court considers when a bail hearing is reopened, it merely requires the existence of new evidence to trigger the reopening.

The government’s position would produce an illogical result in this and countless other cases involving pretrial detainees. When “new” evidence surfaces that may justify reconsideration of bail that was denied based on an out-dated record, it makes the most sense for the district court to reevaluate its decision on the basis of the best evidence available. No court of appeals is going to consider new evidence for the first time on appeal, and there is no point in asking a court of appeals to balance a variety of factors using a record that new evidence shows is either mistaken or incomplete. The appeal would only invite delay so that a decision could be rendered that addresses a set of facts that do not even exist. The better course is the one actually found in the statute, where a pretrial detainee can seek to reopen the detention hearing before the district court based on the “new” evidence and then appeal the whole matter to the court of appeals, which is as efficient as possible and presents the most complete record possible.

II. Mr. Anderson Is Entitled To Pretrial Release

The government does not deny that Mr. Anderson successfully left the country on more than fifty occasions and always returned home, even after he was advised by the

prosecution that he would be indicted. Nor does the government deny that Mr. Anderson could have fled with millions of dollars on any number of those occasions, but did not. If Mr. Anderson really wanted to flee -- as the government claims -- all he had to do was not hop on a return flight to the United States. He could have taken millions of dollars that he then had and tried to hide from both the prosecution and his numerous creditors. On more than fifty occasions though, Mr. Anderson returned home where he knew he could be arrested at any time. The government's claim begs the question, why would someone trying to flee the United States return to the country after having left successfully, and not just once but more than fifty times? The government offers no plausible answer to that question.

Nor does the government have any of the evidence this Court typically sees in flight cases. Mr. Anderson was not trying to flee when he was arrested and did not resist arrest. In fact, he was returning from abroad when he was arrested.² The government also did not introduce any evidence that Mr. Anderson had any particular plan to escape, had ever told anyone that he would try to flee or identify any other evidence of an impending flee attempt. The government's only evidence relates to a potential to flee, but it has nothing indicating that Mr. Anderson had the intention to flee.

² When he was arrested, Mr. Anderson was not carrying any fake passports or identification, or any of the other things that the government claims he could have used to flee or live as a fugitive. (App. 266.)

The evidence that the government has produced as to Mr. Anderson's potential to flee pales in its probative value to the fact that Mr. Anderson had every opportunity to leave, did leave on more than fifty occasions and returned every time. The fact that Mr. Anderson has books about fugitives, had a novelty-like "British Guyana" camouflage passport (which was seized years ago and not replaced), had reported two U.S. passports lost (which would cause them to be cancelled), used aliases as a college student and beyond on his utility bills and so forth hardly equips Mr. Anderson with the ability to flee or live as a fugitive. Moreover, it strains credulity to suggest that anyone would risk trying to flee on a camouflage passport ordered off the internet or forged documents when they had the option of flying out of the country comfortably and legitimately on a commercial airline, as Mr. Anderson had done several dozen times after he learned he would be arrested. The government's principal agent agreed on the stand that Mr. Anderson is precisely the type of person who stands and fights for the things in which he believes. (App. 117.) Certainly, his reputation, criminal record and freedom are as dear as any cause for which Mr. Anderson has fought in the past.

The government does not offer any supposed motive for Mr. Anderson to return to the United States so many times if, as it claims, he really wanted to flee. Rather than take the money and run, as one might expect a want-to-be-fugitive to do, Mr. Anderson liquidated his personal assets and many of the trust assets that he managed, paid their

respective creditors and tried to keep the businesses afloat. In the process, Mr. Anderson has essentially bankrupted himself.³ The money that he could have used to flee, to pay the lawyers of his choice to represent him or to fund an expensive pre-trial release program are now gone. Not only would a man looking to flee the United States have stayed put once he made it abroad successfully, but he would not have returned home, risked getting caught or squandered his remaining money by paying creditors or trying to rebuild businesses that he was planning to abandon.

III. Conditions Exist That “Reasonably Assure” Mr. Anderson’s Presence At Trial

The government’s opposition suggests that the Bail Reform Act’s reference to conditions of release that “reasonably assure” a defendant’s presence at trial must be a

³ The government continues to suggest with no evidence that Mr. Anderson must have money somewhere abroad. Whatever trust assets that exist, the record shows are in illiquid investments and subject to litigation that has prevented them from being sold. This is what forced Mr. Anderson to scrap his expensive release proposal and seek the appointment of counsel as an indigent. (App. 564-65.) After an extensive hearing on this issue, Judge Friedman concluded that the evidence “strongly suggest that [Mr. Anderson] is indeed without access to substantial funds at present” and that it is “difficult to imagine” that he would forego his hired counsel and pursuing his plan for pretrial release “simply to conceal assets from the Court” (App. 563-64.) The government’s speculation that money must be somewhere out there is baseless. While the government focuses on the fact that Mr. Anderson formed companies, transferred assets and opened or closed bank accounts after learning of the investigation to suggest that something nefarious was occurring, Agent Kutz testified that Mr. Anderson was doing the very same sort of things before he ever learned he was under investigation and that these are the sort of things international businessmen routinely do. (App. 319-21.) Despite the enormous efforts of numerous government agents and private creditors, no one has identified foreign assets belonging to Mr. Anderson that he could use to flee or live as a fugitive.

reference to conditions that do not really exist. The government notes that electronic monitoring can be circumvented or rendered inoperative, that some defendants may let their friends and family forfeit the bonds they post,⁴ that false travel documents could be used to replace a surrendered passport, or that the government may have difficulty enforcing a waiver of extradition. (Gov't Opp'n. at 18-20.) These deficiencies in the conditions of release are not specific to Mr. Anderson, but apply in all cases where they are imposed. Nevertheless, these conditions are imposed routinely because they "reasonably assure" that defendants are present at trial and that is the appropriate standard. 18 U.S.C. § 3142(c). There is no reason to treat Mr. Anderson any differently than the typical middle-aged defendant accused of tax fraud.

The answer to the question that the government cannot answer is a fairly simple. The reason Mr. Anderson returned to Washington, D.C. from abroad on more than fifty occasions, even after he learned that he would be indicted, is that Washington, D.C. is where Mr. Anderson wants to be. This has been his home for virtually his entire fifty-two-year-long life and this is where he established himself as one of the country's most

⁴ The government also suggests that nothing prevents friends and family from being reimbursed by Mr. Anderson, but Judge Friedman addressed that concern. Friends and family could be required to agree not to be reimbursed as a condition of granting the bond, to forfeit any money paid as reimbursement and incur other sanctions for violating a court order prohibiting reimbursement. (App. 529-30.)

reputable businessmen. It is where he is surrounded by friends and family,⁵ including his elderly parents who are at the end of their lives and who he loves dearly. For Mr. Anderson, being around his friends and family is what makes life worth living. He has traveled all over the world and could have lived anywhere he wanted, but he always chose to come back to Washington, D.C. -- not because he had to, but because he wanted to live here. His love for his friends and family is the reason he has not fled and they are the reason he will not flee. Certainly, he would not do anything to place them in harms way by causing them to forfeit their homes, especially after each has stood by him through this difficult time. Mr. Anderson knows that running would mean never seeing the people he cares about ever again. His only chance to get his life back is to stand trial and vindicate himself. That is what Mr. Anderson has every intention of doing.

⁵ The proffered testimony of Mr. Anderson's uncle, Sheldon Anderson, informed the court that Mr. Anderson was raised among six of his cousins and regarded them as his brothers and sisters. He also advised the court that Mr. Anderson's family means a great deal to him, that he has gone out of his way to be with them on a regular basis and that he does all he can to help them when they need it. (App. 468-69.) All of Mr. Anderson's family lives in the United States; none live abroad.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2006, a true and correct copy of the foregoing Appellant Walter Anderson's Reply Memorandum In Support Of His Appeal Of A Pre-Trial Detention Order was served by hand delivery on John Borchert, United States Department of Justice at 555 4th Street, N.W., Washington, DC, 20530. A copy of the brief was additionally served by facsimile and electronic mail.

Christopher D. Man

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,762 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the word processing program Microsoft Word XP in 12-point in Times New Roman.

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March 15, 2005