No. 16-1581

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,

v.

John A. Bennett,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(JUDGE SUSAN D. WIGENTON)

RESPONSE OF THE UNITED STATES OF AMERICA TO APPELLANT'S MOTION FOR RELEASE FROM CUSTODY PENDING SENTENCING

WILLIAM J. BAER
Assistant Attorney General
BRENT C. SNYDER
Deputy Assistant Attorney General

JEFFREY MARTINO
HELEN CHRISTODOULOU
DANIEL MARC TRACER
MIKHAIL ZUCCONI VANYO
Attorneys
U.S. Department of Justice
Antitrust Division

JAMES J. FREDRICKS
SEAN SANDOLOSKI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
202-598-2846

INTRODUCTION

On March 16, 2016, the District Court, the Honorable Susan D. Wigenton, U.S. District Judge, entered a jury verdict against John A. Bennett for: (1) conspiracy to commit major fraud against the United States and to pay kickbacks, in violation of 18 U.S.C. § 371, and (2) major fraud against the United States, in violation of 18 U.S.C. § 1031. A-76 to -77.[1] That same day, the government requested Bennett's immediate remand under 18 U.S.C. § 3143(a). Bennett opposed, arguing that he was not a flight risk. The District Court agreed with the government and ordered Bennett to report to prison the following day. Appellant Ex. A at 17-18. Bennett now appeals, requesting release pending sentencing from this Court. His request should be denied.

Bennett fails to provide the clear and convincing evidence that he is not a flight risk necessary to overcome the strong presumption in favor of pre-sentencing detention. 18 U.S.C. § 3143(a). He cannot provide that evidence because he presents a clear flight risk: He is an eighty-year-old Canadian citizen. He faces a lengthy term of imprisonment. He has

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[1] Citations beginning "A- " are to the attached Appendix of record documents.

practically no ties to the United States. He has both the incentive and means to flee. And he knows that he could delay sentencing for four to five years or evade justice entirely by fleeing to Canada.

STATEMENT OF THE CASE

Beginning in approximately December 2001, Bennett engaged with co-conspirators in a scheme to defraud the United States, acting through the EPA, at the Federal Creosote Superfund Site in Manville, New Jersey. As CEO and Chairman of Bennett Environmental, Inc., Bennett conspired with others to inflate contracts with and pay kickbacks to Sevenson Environmental Services, Inc. ("Sevenson"), the prime contractor hired by the EPA and the U.S. Army Corps of Engineers to oversee the cleanup of the superfund site. The scheme was straightforward: Gordon McDonald, Sevenson's project manager at the superfund site, would ensure that Bennett's company won certain subcontracts from Sevenson. (He did this, for instance, by providing Bennett Environmental a "last look" at its competitors' bids before submitting its own bid. *See* A-89.) In exchange for the subcontracts, Bennett's bids would be inflated to cover the costs of kickbacks to

McDonald[2] and other Sevenson employees. These kickbacks took many forms, including wire transfers to a shell company owned by McDonald and a luxurious Mediterranean cruise. The scheme continued until at least August 2004 and, all told, Bennett and his co-conspirators paid Sevenson and its employees over $1 million in kickbacks and defrauded the United States of over $1 million. *See* A-93.

On August 31, 2009, a federal grand jury indicted Bennett. A-1 to -35. Bennett—a Canadian citizen—was then residing in Vancouver, British Columbia. Appellant Ex. C at 5. In February 2010, after learning that Bennett would not submit to the jurisdiction of the United States, the government submitted a request for extradition to Canadian law enforcement authorities. Bennett opposed. A-61. In early 2012, the Supreme Court of British Columbia, the province's superior trial court, conducted an extradition hearing and ordered Bennett committed to the custody of the United States. A-61 to -62. Bennett

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[2] In early 2014, a jury convicted McDonald on three counts of conspiracy to commit fraud against the United States and to pay kickbacks, one count of major fraud against the United States, and four other counts. A-36. The District Court sentenced him to 168 months' imprisonment. His appeal is currently pending in this Court. *See United States v. McDonald*, No. 14-1587 (3d Cir.).

then submitted a request for relief to the Canadian Minister of Justice. The Minister denied his request and ordered him to surrender on August 24, 2012. A-62. Bennett sought reconsideration by the Minister and, when that was denied, judicial review in the Court of Appeal for British Columbia and the Supreme Court of Canada. *Id.* On October 30, 2014, the Supreme Court of Canada denied Bennett leave to appeal and ordered his extradition to the United States. *Id.* Bennett was extradited on November 14, 2014, more than five years after his indictment. *Id.* Throughout this lengthy process, the Canadian government expended its own resources to litigate at every level of the Canadian judicial system. A-50.

After an initial bail hearing on November 24, 2014 (Appellant Ex. C), the District Court released Bennett under strict conditions, requiring home incarceration, twenty-four hour electronic monitoring, and a $1 million bond. A-45 to -47. The District Court also required Bennett to surrender all of his passports and restricted his travel to the Central District of California, the District of New Jersey, and the Southern and Eastern Districts of New York. A-46. Bennett sought to have that travel ban lifted during pre-trial proceedings, asking

repeatedly for permission to travel to Canada for medical proceedings; the District Court denied these requests. *See, e.g.*, A-65; A-66.

In February 2016, a three-and-a-half week jury trial began. A-67. The government presented five witnesses, including two of Bennett's co-conspirators who directly implicated him in the fraudulent scheme, and contemporaneous documents corroborating their testimony. *See, e.g.*, A-71 (testimony of R. Griffiths); A-80 (testimony of Z. Tejpar); A-89. For example, one co-conspirator, Robert Griffiths, testified: "There's no doubt in my mind, he was an active conspirator with me." A-71. Bennett testified in his own defense during the trial, denying the conduct for which he was charged. *See, e.g.*, A-83 (Bennett testifying that he had "Never" "paid a bribe to find out information about a competitor's bid"); *but see* A-88 (Bennett arranging wire transfer of bribe paid to shell company owned by McDonald). The jury, apparently, did not believe him to be telling the truth and returned a verdict finding him guilty of both counts against him on March 16, 2016. A-76 to -77.

After the guilty verdict was entered, the government requested Bennett's immediate remand under 18 U.S.C. § 3143(a). Appellant Ex. A at 9. The District Court heard from both the prosecution and defense

in open court on the record and addressed the issue with counsel in-chambers. *Id.* at 9-17. It balanced the presumption of incarceration reflected in Section 3143(a) and concerns that Bennett may flee with his compliance with the requirements imposed on him through trial, ultimately concluding that Bennett should be detained prior to sentencing. *Id.* at 17-18. It permitted him to surrender voluntarily the following day, March 17, 2016. Appellant Ex. B. Sentencing is set for June 27, 2016. A-74 to -75.

On March 17, 2016, Bennett noticed an appeal of the detention order and filed with this Court an Emergency Motion to Stay the Surrender Date Pending an Appeal of Denial of Bail. The government opposed, arguing that the underlying appeal had a low likelihood of success on the merits and that the public would be irreparably harmed were Bennett allowed free on bail. The Court denied the Emergency Motion, and Bennett now presses the underlying appeal.

ARGUMENT

Under 18 U.S.C. § 3143(a), there is a "presumption in favor of detention" after a guilty verdict. *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). Section 3143(a) provides for mandatory

detention of a defendant who is awaiting imposition or execution of a sentence unless a "judicial officer finds by clear and convincing evidence that the person is not likely to flee." 18 U.S.C. § 3143(a).[3] The defendant bears the "plainly substantial" burden of making this showing. *Abuhamra*, 389 F.3d at 319; Fed. R. Crim. P. 46(c).

In reviewing a district court's order denying pre-sentencing release, this Court "independently determine[s]" whether a defendant is entitled to bail pending sentencing, while recognizing that "the trial court has firsthand experience with the defendant and the crime." *United States v. Strong*, 775 F.2d 504, 505 (3d Cir. 1985) (internal quotation marks omitted). This Court, therefore, "give[s] the reasons articulated by trial judges respectful consideration." *Id.* If, after carefully considering "the trial judge's reasoning, together with such papers, affidavits, and portions of the record as the parties present, the court of appeals independently reaches a conclusion different from that of the trial judge," it may "amend or reverse a detention or release decision." *Id.*

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[3] The judicial officer must also find that the defendant is not likely to "pose a danger to the safety of any other person or the community." 18 U.S.C. § 3143(a). The government does not believe Bennett poses a danger to the safety of others.

I. The District Court Properly Detained Bennett Because He Has Not Presented Clear and Compelling Evidence that He Is Not a Flight Risk

Bennett raises a number of arguments in support of his claim that he is not a flight risk, but is unable to meet the substantial burden to establish this point by clear and convincing evidence.

1. Bennett's compliance with pre-trial bail conditions does not demonstrate that he is unlikely to flee. Mot. 4-8, 13-14. Bennett's incentive to comply with any conditions imposed on him by the District Court is now greatly diminished. Prior to entry of the guilty verdict against him it remained possible that he could convince a jury that he was innocent; any attempt to flee might be viewed by the jury as a tacit admission of guilt and would undermine his trial strategy. This flight would also be an independent basis for criminal punishment. 18 U.S.C. § 1073. Now that he has been found guilty of defrauding the United States, no such disincentive to flee exists. He is no longer "presumed innocent, and his exposure is now much more concrete." *United States v. Nouri*, 2009 WL 2924334, at *3 (S.D.N.Y. Sept. 8, 2009).

Contrary to his claim otherwise (Mot. 16-17), Bennett's "age and exposure to a lengthy imprisonment" provide "the incentive to flee" and

that "incentive naturally bears upon and increases the risk of flight." *United States v. Madoff*, 316 F. App'x 58, 59 (2d Cir. 2009). Bennett faces a statutory maximum sentence of 180 months' imprisonment and a Guidelines range of at least 78 to 97 months' imprisonment. This conservative estimate reflects the government's belief that Bennett has, at a minimum, a total offense level of 28 and a criminal history category of I.[4] It is possible, then, that Bennett will spend a substantial portion of the rest of his life in prison. Flight would, at the least, delay the start of his prison term—giving him more time to spend with his family in Canada. And even if flight were to lead to a longer term of imprisonment, it is possible that Bennett would not serve this additional time due to his age and health.

Bennett claims that he may not be sentenced to prison as punishment for his crime. But the only support he provides for this claim is the cherry-picked sentence of his co-conspirator, Zul Tejpar.

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[4] Using the 2015 U.S. Sentencing Guidelines, this calculation includes a base offense level of 8 (§ 2B4.1(a)) and the following sentencing enhancements: a 14 point increase for a loss greater than $550,000 but less than $1.5 million (§ 2B1.1(b)(1)(H)), a 4 point increase for serving as an organizer of a criminal activity that involved five or more participants (§ 3B1.1(a)); and a 2 point increase for obstructing the administration of justice (§ 3C1.1).

Mot. 17. Tejpar played a relatively minor role in the conspiracy and agreed to cooperate with the government early in its investigation; his substantial assistance resulted in a ten-level downward departure under U.S.S.G. § 5K1.1. A-141 to -143. Griffiths, whose sentence Bennett neglects to mention, played a similar role to Bennett in the conspiracy and was initially sentenced to 50 months' imprisonment despite receiving an eight-level downward departure for substantial assistance. *See* A-113 to -118.[5] Unlike Griffiths, Bennett has not cooperated and will receive neither credit for accepting responsibility under U.S.S.G. § 3E1.1, nor a downward departure for substantially assisting the investigation under U.S.S.G § 5K1.1.

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[5] This Court vacated Griffiths's 50-month sentence and remanded for resentencing because the District Court premised the eight-level downward departure on its belief that this was equivalent to the largest departure for assistance in this investigation, when in fact, the court had previously departed downward ten levels in sentencing Tejpar. *See* 504 F. App'x 122 (3d Cir. 2012). On remand, the District Court sentenced Griffiths to 46 months' imprisonment and later reduced his sentence to time served (approximately 25 months) due to the government's Rule 35 motion following Griffiths's assistance at McDonald's trial. A-126 to -132; A-133 to -139.

2. Bennett's claimed ties to the United States do not constitute clear and convincing evidence that he presents no flight risk. His ties to this country are tenuous at best.

Bennett contends that his former ownership of a condominium in California serves as a "longstanding" tie to the United States. Mot. 14. But past ownership of property does not serve as evidence of a present tie to this country. That he has been living with his wife in California for the past year-and-a-half is similarly irrelevant. Mot. 14. They have not been living there by choice, but rather because Bennett was released on bail into the third-party custody of a friend who lives in California. A-44; Appellant Ex. C at 12.

His attempt to manufacture family ties to the United States falls similarly flat. Bennett states that he has a grandson now attending college in the United States (Mot. 14), but provides no information regarding the strength of their relationship or whether his grandson intends to remain in the United States permanently. *See United States v. Townsend*, 897 F.2d 989, 996 (9th Cir. 1990) (affirming detention of alien defendant who presented "no evidence . . . concerning the nature of [her] relationship" with a relative living in the United States).

Bennett's supposed business ties to the United States also fail to establish that he is not a flight risk. Mot. 11, 14. He does not suggest that he owns any businesses in the United States, only that his companies, all of which are Canada-based, have occasionally conducted business here. This does not tend to show that he has any incentive to remain in the United States and instead shows that he has every incentive to flee to Canada, where his business is based.

3. Bennett argues that his life story indicates that he is not a flight risk. Mot. 10. Bennett characterizes himself as an esteemed inventor and active member in the Canadian environmental business community. He fails to make clear, though, how his inventions or community involvement in Canada lessen the possibility of flight. Again, the natural inference from Bennett's claim is that there exist many reasons for him to attempt a return to Canada.

Bennett also highlights his "lack of any criminal record or history of using false aliases or concealing assets." Mot. 2. But he has now been found guilty of defrauding the United States. Further, after the trial it is clear that Bennett has no qualms about obstructing justice. He lied under oath to the jury about his illegal activities. And a co-conspirator

testified that Bennett had encouraged him to submit a knowingly false letter to the court in a wrongful termination lawsuit, requesting he lie in the letter about the Mediterranean cruise given to McDonald and other Sevenson employees as a kickback. *See* A-72 to -73; A-94 to -95. Bennett tries to downplay the relevance of his own testimony and notes that giving it was "his Constitutional right." Mot. 14-15. But the Constitution does not grant a defendant the right to lie under oath at trial, nor the right to be free from the adverse consequences—such as damage to his credibility—that flow from those lies. *See Fraternal Order of Police v. City of Phila.*, 859 F.2d 276, 281 (3d Cir. 1988) ("The fifth amendment does not protect a citizen against the consequences of committing perjury.")

Bennett's damaged credibility undermines his assertion that "he lacks the financial resources to flee." Mot. 15. The record contains evidence that he, or an individual operating on his behalf, could generate significant liquid resources to aid his flight. Bennett owns 20 million shares of Global Bio-Tech Coal & Energy. Appellant Ex. C at 6-7. His home, which he claims is "highly leveraged" (Mot. 15 n.7), is valued conservatively at $3.7 million with approximately $2 million of

equity. A-86; Appellant Ex. C at 8. And he holds over $100,000 cash in various bank accounts and owns two boats (Appellant Ex. C at 27), one valued at approximately $70,000. Admittedly, much of this information comes from the November 2014 pretrial report and initial bail hearing. Because his assets remain in a foreign country, the government cannot readily confirm their value. Bennett, however, effectively asks this Court to take his word that he is impoverished. Mot. 15. Given his lack of credibility, this claim should be rejected.

4. Bennett's pending motion for a judgment of acquittal does not indicate he is unlikely to flee. Mot. 17. Section 3143 reflects Congress's "recognition that harm results not only when someone is imprisoned erroneously, but also when execution of sentence is delayed because of arguments that in the end prove to be without merit." *United States v. Shoffner*, 791 F.2d 586, 589 (7th Cir. 1986). Bennett provides nothing on which this Court could evaluate the strength of the motion, saying only that it "raises [] substantial questions of law that could result in a judgment of acquittal." Mot. 17.

Regardless, his acquittal motion is almost certain to fail. Federal Rule of Criminal Procedure 29 provides for an acquittal if "the evidence

is insufficient." There is no question, let alone a substantial one, that the evidence was sufficient in this case. *See supra* at 5. *Cf. United States v. Perez*, 280 F.3d 318, 344 (3d Cir. 2002) (holding that uncorroborated accomplice testimony may provide the exclusive basis for a criminal conviction). And the other arguments he has made previously have been roundly rejected by the District Court, including at the close of the government's presentation to the jury.

5. The District Court's giving Bennett an additional day to surrender does not warrant his release. Mot. 3, 9. Its benevolence does not undermine its conclusion that Bennett had failed to provide clear and convincing evidence that he is not a flight risk.

Bennett claims that the District Court did not sufficiently articulate the reasons for its finding (Mot. 13), but the court stated its rationale for ordering his pre-sentencing remand. In addition to a lengthy in-chambers discussion with counsel, it stated in open court that there were "concerns as to whether [Bennett] will appear" for sentencing. Appellant Ex. A at 17. It did more than provide a "mere recitation of the statutory language followed by nothing more than a conclusory statement that the applicable factors have (or have not) been met."

United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997). Reviewed in this context, rather, it succinctly described the two sides' views, explained its reasoning, and provided a basis for appellate review. No more is required.

II. Bennett Presents a Clear Flight Risk

Bennett complains that the "government has not presented a scintilla of evidence" that he presents a flight risk. Mot. 14. This argument is irrelevant. The government bears no burden to prove that Bennett presents a flight risk. 18 U.S.C. §3143(a); Fed. R. Crim. P. 46(c).

But even if it were appropriately made, this claim is demonstrably false. The government presented its argument in support of its request for immediate remand before the District Court (*see* Appellant Ex. A at 12-14), and the record readily relied on by the government demonstrates that Bennett is a clear and obvious flight risk: he has been found guilty of two crimes; he is facing the likelihood of a substantial term of imprisonment at an advanced age; he has, at most, weak ties to the United States; he has demonstrated a pattern of deception; and he possesses the resources to flee. *See supra* at 8-14.

Additionally, Bennett's strong ties to and citizenship in Canada makes his flight likely. The government agrees that Bennett's Canadian citizenship does not "create an irrebuttable presumption in favor of his incarceration." Mot. 11. But foreign citizenship is highly relevant to the question whether a guilty defendant is likely to flee. See*, e.g.*, *United States v. Khanu*, 370 F. App'x 121, 121 (D.C. Cir. 2010); *United States v. Castiello*, 878 F.2d 554, 556 (1st Cir. 1989). Bennett has simply failed to provide evidence to overcome this salient factor and the many others indicating that he poses a flight risk.

The uncertainty and difficulty of extraditing Bennett to the United States a second time gives him even more reason to flee to Canada. The treaties between the United States and Canada provide no mechanism—other than a second extradition proceeding—to bring Bennett within the custody of the United States if he were to flee. A-56. Bennett's extradition waiver is of no consequence. A-58 ("[A]n anticipatory waiver has no force or effect under Canadian law and could not be used as a mechanism to expedite Mr. Bennett's removal to the United States . . ."). *United States v. Cirillo*, 1999 WL 1456536 (3d Cir. July 13, 1999) is not to the contrary. In that case, the Court did not

address the question whether an extradition waiver is enforceable under Canadian law; it simply listed a magistrate-imposed extradition waiver as one factor among others supporting the decision to release the defendant on bond pre-trial. Contrast that to this case, where there exists strong evidence that the extradition waiver is not enforceable in Canada—namely, a letter from the Canadian government agency responsible for extradition.[6]

A second extradition request would present a real risk that Bennett would not be returned to the United States. For instance, the Canadian Minister of Justice could deny this request, a possibility potentially increased if the United States proves unable to keep Bennett in its custody after the Canadian government expended significant resources to extradite him in the first instance. A-57. Even assuming the Minister

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[6] Bennett claims that this argument is undermined by an extradition waiver in Griffiths's plea agreement. Mot. 16. Griffiths voluntarily surrendered into the custody of the United States and, when he entered the plea agreement in July 2009, the government did not have the benefit of the Canadian Department of Justice's views. A-96 to -111. Bennett is also mistaken when he claims that the government elicited testimony regarding Griffiths's waiver at trial. Although the header at the top of the transcript erroneously reads "Griffiths-direct," the testimony quoted in Bennett's motion was actually elicited on cross-examination by his attorney, Mr. Robert Anello. *See* Appellant Ex. E at 12-132.

granted the request, expended its resources on the U.S. government's behalf a second time, and the extradition process was ultimately successful, it could again last for four years in the likely event that Bennett opposed. *Id.* And throughout the process Bennett would probably remain free in Canada. *Id.* ("[I]t would be unusual to detain in custody an elderly person who is not accused of violent crimes.")

Contrary to Bennett's assertion otherwise, this line of argument is not "entirely speculative." Mot. 15. It is grounded in a legal opinion from the Canadian Department of Justice. Bennett contends that there is an "obvious likelihood" that he would eventually "be extradited to the United States." Mot. 15. But that prediction may not be accurate; for instance, the Ministry of Justice could reject the government's second extradition request. And even assuming the prediction's accuracy, it does not "logically negate[] any incentive he might have to flee." *Id.* Remaining free at home presents an incredibly compelling incentive to flee, particularly given Bennett's age and health.

CONCLUSION

Bennett's motion should be denied.

Respectfully submitted.

/s/ Sean Sandoloski

WILLIAM J. BAER
Assistant Attorney General
BRENT C. SNYDER
Deputy Assistant Attorney General

JEFFREY MARTINO
HELEN CHRISTODOULOU
DANIEL MARC TRACER
MIKHAIL ZUCCONI VANYO
Attorneys
U.S. Department of Justice
Antitrust Division

JAMES J. FREDRICKS
SEAN SANDOLOSKI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
202-598-2846

April 11, 2016

CERTIFICATE OF COMPLIANCE

1. This response complies with the page limitations of Rule 27(d)(2) of the Federal Rules of Appellate Procedure because it contains twenty pages, excluding the parts of the brief exempted by Rule 27(d)(2).

2. This response complies with the typeface requirements of Rules 27(d)(1)(e) and 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rules 27(d)(1)(e) and 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with a 14-point New Century Schoolbook font.

April 11, 2016

/s/ Sean Sandoloski
Attorney

CERTIFICATE OF SERVICE

I, Sean Sandoloski, hereby certify that on April 11, 2016, I electronically filed the foregoing Response of the United States of America to Appellant's Motion for Release from Custody Pending Sentencing with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 11, 2016

/s/ Sean Sandoloski
Attorney