

No. 09-20444

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT ALLEN STANFORD,
Appellant,

v.

UNITED STATES OF AMERICA.
Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

U.S. COURT OF APPEALS
FILED

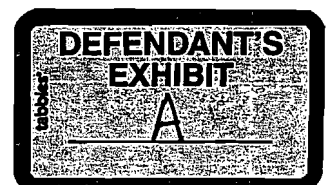
AUG 07 2009

CHARLES R. FULBROSE III
CLERK

**REPLY MEMORANDUM IN SUPPORT OF APPEAL OF
THE DISTRICT COURT'S DETENTION ORDER
AND ORDER DENYING DEFENDANT'S MOTION TO
RECONSIDER AND/OR REOPEN**

SUMMARY OF THE ARGUMENT

Mr. Stanford has been detained pending trial because the District Court violated the plain requirements of the Bail Reform Act. The District Court ignored the findings of the Magistrate Judge, who, after taking live testimony and evaluating the credibility of the witnesses, correctly concluded that Mr. Stanford's appearance at trial could reasonably be assured. The Court sidestepped its explicit statutory obligation to consider whether any "condition or combination of conditions will reasonably assure the appearance" of Mr.



Stanford. 18 USC § 3142(e). And, following the hearing, when the government conceded the utter falsity of two key allegations upon which the District Court expressly relied, the Court refused to entertain Mr. Stanford's Motion to Reconsider.

The result is an error of Constitutional proportions. As the Supreme Court has admonished, “[i]n 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). “This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction[.]” *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

In response, the government offers what may fairly be characterized as a rule of expedient deference. Unable to defend the merits, the government urges instead that the District Court's findings cannot be disturbed, while the Magistrate's findings should simply be ignored. The government contends that the District Court's failure meaningfully to consider alternatives to detention should be overlooked, as should the Court's refusal to reconsider its detention order, even after the government conceded that key facts upon which the Court relied were false.

Simply stated, the District Court abdicated its statutory responsibilities, and the government's position on appeal is that this Court must do so as well.

As we set forth below, the law is otherwise, and the detention order should be reversed.

ARGUMENT

I. THE DISTRICT COURT FAILED TO DEFER TO THE MAGISTRATE'S ABILITY TO JUDGE THE Demeanor AND CREDIBILITY OF WITNESSES, WHO APPEARED LIVE IN FRONT OF THE MAGISTRATE, AND FAILED TO CONSIDER THE CORRECT STANDARD MANDATED UNDER THE STATUTE.

1. Mr. Stanford previously demonstrated that this Court should affirm the Magistrate's conclusion that there were conditions of release that would reasonably assure Mr. Stanford's presence at trial. As did the District Court, the government virtually ignores the Magistrate's scrupulous findings of fact, relying instead on what it characterizes as the "de novo" standard of review applicable to a district court's review of a magistrate's findings. *See* Response at 9. That standard, however, is not intended to supplant the basic rule underlying the review of all lower court findings: namely, that the court hearing and observing witnesses during live testimony and reviewing evidence is in the best position to make findings of fact and judgments about credibility. *See, e.g., United States v. Aron*, 904 F.2d 221, 225 (5th Cir. 1990) (credibility determination in detention order appeal not to be overturned unless clearly erroneous); *Gordon v. United States*, 438 F.2d 858, 871 (5th Cir. 1971) (it is not the reviewing court's role to make credibility determinations); *United States v.*

Rodriguez, 414 F.3d 837, 845 (8th Cir. 2005) (“[C]redibility is a determination for the trier-of-fact, and its assessment is virtually unassailable on appeal.”).

As this Court noted in *Louis v. Blackburn*, “we have severe doubts about the constitutionality of the district judge’s reassessment of credibility without seeing and hearing the witnesses himself . . . in a situation involving the constitutional rights of a criminal defendant, . . . the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative.” 630 F.2d 1105, 1109 (5th Cir. 1980). Indeed, the government itself pays lip service to this principle, *see* Response at 19, contending that this “forum . . . is not suited for assessing the credibility of the evidence through cross examination and observation of a witness’s demeanor.” It conveniently forgets, however, that it was the Magistrate Judge, not the District Judge, who “assess[ed] the credibility” of witnesses, and the District Judge who failed to accord any deference whatsoever to the Magistrate’s findings.

When this error is considered, there is very little except expedience to support the government’s argument that this Court should defer to the District Court’s decision.¹ Even courts explaining the “de novo” review conducted by

¹ The government has devoted much ink to refuting the impression that the standard of review in this Circuit is unclear. *See* Response at 14-16. What is clear is this: the

a district judge as to a magistrate's findings make clear that deference should be paid to the court observing live testimony. *See, e.g., United States v. Harris*, 732 F. Supp. 1027, 1028 (N.D. Cal. 1990) ("Magistrate's pretrial detention order should not be revoked unless its findings of fact are clearly erroneous or its conclusions contrary to law"); *United States v. Foley*, 2009 WL 458558 at *3 (D. Mass., Feb. 24, 2009); ("As the Court of Appeals defers respectfully to the credibility determinations of a first-instance court, so it is appropriate for this court to defer to the credibility findings of the Magistrate Judge[.]"). Here, the findings worthy of deference are those of the Magistrate, who properly concluded that the government did not meet its burden on the "conditions of release" issue, as described more fully below.

2. Deference to the Magistrate is particularly appropriate here. Only the Magistrate, and not the District Judge, undertook the inquiry required by the statute: that is, consideration of whether any "condition or combination of conditions will reasonably assure" the defendant's appearance. While the

deferential standard typically applicable to a trial court's findings of fact does not extend to its legal conclusions, which have long been reviewed under a *de novo* standard, even in the pretrial detention context. *See, e.g., United States v. Bowman*, 98 F.3d 1343 (6th Cir. 1996) (reviewing the district court's findings of fact in pretrial detention proceeding under a clearly erroneous standard, and its legal conclusions *de novo*); *United States v. Rueben*, 974 F.2d 580, 586 (5th Cir. 1992) ("[a]bsent an error of law, we must uphold a district court's [detention] order if it is supported by the proceedings below.") (emphasis added); *United States v. Ols*, 450 F.3d 583, 585 (5th Cir. 2006) (errors of law entailing statutory interpretation in appeal of bail denial are reviewed *de novo*).

government urges this Court to rubber stamp the District Court's conclusions, the lower court's failure meaningfully to consider what the statute plainly requires is a legal error, itself meriting *de novo* review. See, e.g., *United States v. Ols*, 450 F.3d 583, 585 (5th Cir. 2006) (errors of law entailing statutory interpretation in appeal of bail denial are reviewed *de novo*); *United States v. Bowman*, 98 F.3d 1343 (6th Cir. 1996) (reviewing the district court's legal conclusions in pretrial detention proceeding under a *de novo* standard).

“Release pending trial is governed by the Bail Reform Act of 1984 which . . . mandates release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required.” *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985). As the courts have made clear, a conclusory finding that no conditions of release will reasonably assure a defendant's appearance is insufficient to satisfy the statute. “The structure of the statute mandates every form of release be considered before detention may be imposed.” *United States v. Orta*, 760 F.2d 887, 892 (8th Cir. 1985). The District Court's error here is substantial, and results in a violation not merely of the Bail Reform Act, but also of Mr. Stanford's constitutional rights. The “Fifth and Eighth Amendments' prohibition of deprivation of liberty without due process and of excessive bail require careful review of pre-trial detention orders to ensure that the statutory mandate has been respected.” *Id.*

Moreover, in assessing even the cursory findings by the District Court, it is important to emphasize where Congress has set the bar. As this Court has observed, “the standard is *reasonably assure appearance*, not ‘guarantee’ appearance, and . . . detention can be ordered on this ground only if no condition or combination of conditions will reasonably assure the appearance” *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985) (emphasis in original) (internal quotations omitted).² As the Eighth Circuit has explained, if all the government had to show was that no release conditions could guarantee a defendant’s appearance, “the burden on the government in most cases to show a defendant’s dangerousness and flight propensity would be lessened considerably[.]” *Orta*, 760 F.2d at 892; *United States v. Himler*, 797 F.2d 156, 162 (3d Cir. 1986) (reversing detention order in spite of the fact that the defendant had the ability to obtain forms of false identification; finding that the “[m]ere opportunity for flight is not sufficient grounds for pre-trial detention.”).

Such a result would contravene Congress’s intent “to favor release over pretrial detention.” *Orta*, 760 F.2d at 890. At a minimum, these statutory

² The ultimate result in *United States v. Fortna* is distinguishable, because the defendant there, accused of being the head of a long standing large illegal drug trafficking organization, was arrested at a hotel near the Dallas airport, where he had registered under another name and had \$38,000 in a briefcase. Despite these facts, this Court recognized the importance of addressing the sufficiency of proposed release conditions. *United States v. Fortna*, 769 F.2d 243, 249-250 (5th Cir. 1985) (finding that the magistrate judge failed to address whether any conditions would reasonably assure the defendant’s appearance).

commandments require what is altogether absent from the District Court's decision here: a reasoned consideration of alternatives to detention. Thus, even in *United States v. Westbrook*, 780 F.2d 1185, n.9 (5th Cir. 1986), upon which the government relies,³ this Court concluded that the lower court erred by failing to specify the rationale for ordering detention and by making the conclusory statement that no combination of conditions existed to assure appearance at trial.

The government's effort to fill the void left by the District Court is unavailing. Specifically, home detention was found insufficient, for no explained reason. Participation in a GPS monitoring program was deemed insufficient, for no explained reason. Pretrial Services supervision was deemed insufficient, for no explained reason. And, most significantly, the District Court made no finding with respect to the combination of all these and other conditions the Magistrate had imposed.⁴

³ The result in *Westbrook* is distinguishable because the defendant there had three prior felony convictions and had recently failed to report to his probation officer. At the time of his arrest, his whereabouts were unknown to his probation officer. He was also unemployed, without a fixed place of residence, and, considering the charges against him included firearms possession, detention ensured the safety of the community. *United States v. Westbrook*, 780 F.2d 1185, 1189 (5th Cir. 1986).

⁴ The conditions recommended by Pretrial Services and ordered by the magistrate court had been carefully considered. Pretrial Services conducted thorough interviews and background checks and made recommendations based on vast experience with these issues. The Magistrate weighed the evidence before her, which included evaluating and judging the live testimony of the government's witnesses, and assessed Mr. Stanford's character. For the District Court to pay no mind to the findings of

Indeed, the government nowhere contests the fact that it failed to offer any evidence below to demonstrate how any proposed specific condition of release or combination of conditions was insufficient to reasonably assure Mr. Stanford's appearance. Instead, the government argues simply that case law does not require a district court to "address and dismiss every possible condition," and, in any event, district courts are "well aware of a defendant's ability to remove GPS and other forms of monitoring[.]" Response at 36. Neither argument addresses the plain commands and evident intent of the Bail Reform Act, and neither adequately supports the District Court's actions.

Moreover, post-hoc, extra-record speculation about the limitations of electronic monitoring or any of the other conditions the Magistrate imposed cannot be used to justify detention. In fact, it is doubtful that the cases cited by the government on appeal involved the use of the most recent GPS technology for maintaining surveillance of pre-trial detainees.⁵ The government's

either the Magistrate court or Pretrial Services, particularly in light of the fact that it did not take live testimony and relied primarily on oral argument, has a further negative impact on Mr. Stanford's due process rights.

⁵ The cases cited by the government describe unique situations where a defendant removed a bracelet. They do not support the proposition that the use of electronic monitoring systems is ineffective or that imposing a monitoring system along with other conditions would not reasonably assure a defendant's appearance at trial.

The government's position is not only entirely unsupported by the record below, it is unsupported by the Department of Justice, which argued the exact opposite position in a brief to the Second Circuit, writing that the "government's reasonable request for electronic monitoring" was designed "to limit the serious risk of flight" of a

throwaway statement is contradicted by the U.S. Probation and Pretrial Services' good work in this field and is belied by the multitude of judges around the country who routinely order electronic monitoring in their cases, using either electronic bracelets or more modern GPS surveillance.⁶ In fact, as discussed in the opening brief and left unaddressed by the government in its opposition, courts have successfully imposed these types of conditions in cases exactly like this one.⁷ See Initial Br. at 11, n.8 (citing cases such as *United States v. Richard Scrushy* (N.D. Ala.); *United States v. Jeffrey Skilling* (S.D. Tex)).

In short, the decision to detain Mr. Stanford as a flight risk violates the Bail Reform Act, because the District Court failed to consider whether any “condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the

defendant. *United States v. Mosallem*, No. 03-1730, available at www.usdoj.gov/atr/cases/f201900/201935.htm (last visited Aug. 6, 2009).

⁶ See *United States v. O'Brien*, 895 F.2d 810, 814 (1st Cir. 1990) (finding that electronic monitoring was approximately 96 to 97.5% effective in deterring flight); *United States v. Ramnath*, 533 F. Supp. 2d 662, 671 (E.D. Tex. 2008) (combination of conditions including “a home confinement program enforced by electronic monitoring, intensive compliance monitoring by a United States Probation Pretrial Services Officer, and surrender of all family passports and other documents that might otherwise permit international travel” sufficient to release defendant who was awaiting extradition to the UK for manslaughter).

⁷ Nor does the government contest Mr. Stanford's argument that the Department of Justice's own empirical research demonstrates that in fraud cases, only a scant 1.5% failed to appear as required, and those were individuals with prior criminal histories, unlike Mr. Stanford. See Initial Br. at 40, n. 19.

community” as required by statute.⁸ 18 U.S.C. § 3142(e); *see also Salerno*, 481 U.S. at 742. Although both the Magistrate Court and Pretrial Services found that a combination of conditions could reasonably assure Mr. Stanford’s appearance, the District Court disregarded those findings entirely, without evidence or explanation. This error warrants reversal.

II. EVIDENCE PRESENTED BELOW, MUCH OF WHICH THE DISTRICT COURT REFUSED TO CONSIDER, FURTHER CONFIRMED THAT MR. STANFORD’S APPEARANCE COULD BE ENSURED THROUGH CONDITIONS OF RELEASE.

In support of the District Court’s conclusion, the government seeks to exclude not only the findings by the Magistrate, but also the evidence that the District Court refused to consider on Mr. Stanford’s Motion to Reconsider. *See* Response at 16-17.⁹ Curiously, the government does not take issue with the

⁸ This is the central, although not the only, argument on appeal in light of the fact that the overwhelming majority of cases in which this Court has allowed pretrial detention involve the question of whether a condition or combination of conditions will reasonably assure the safety of the community and the defendant’s appearance at trial. *See* Initial Br. at 8, n. 6.

⁹ Mr. Stanford appealed both the District Court’s detention order as well as the court’s refusal to reconsider. Notwithstanding the government’s claims to the contrary, materials presented in connection with the latter order are clearly an appropriate part of the record.

In addition, the government asks this Court to strike key Exhibits of Mr. Stanford’s appeal, which it contends should not be part of this Court’s review. Response at 16-19. Yet, the government cites no support for the proposition that Federal Rule of Appellate Procedure 9(a)(2) does not permit this Court to determine the appeal “on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires.” Indeed, a court of appeals may consider evidence that may not

substance of what Mr. Stanford asked the District Court to consider, choosing instead to quarrel over his timing. Perhaps previewing its trial strategy, the government takes Mr. Stanford—who had been detained and essentially held incommunicado from the time of his surrender in Virginia until the bail hearing—to task for his lack of preparation, arguing that “the vast bulk of the information Stanford sought to submit . . . was known to the defense just a week earlier[.]” Response at 38-39.

What this strategy fails to disguise is the fact that Mr. Stanford’s Motion to Reconsider centered upon the fact that *after* the hearing, the government backtracked on two key allegations that the District Court specifically relied upon to find that Mr. Stanford was a flight risk and to support his detention.¹⁰ Even on appeal, the government attempts to obfuscate both its discreditable role as the proponent of these false allegations and the true facts surrounding these issues. It devotes far more energy to seeking to exclude the evidence,

have been before the trial judge. See *United States v. Patriarca*, 948 F.2d 789, 795 n.6 (1st Cir. 1991) (“Fed. R. App. P. 9(a) permits this court to consider new evidence in a pre-conviction detention appeal.”). In its Response, the government simply states, with no support, that the rule applies to *other* types of documents not part of the official record, but not the types of documents attached as Exhibits to this appeal.

¹⁰ This Court reviews the District Court’s findings of fact under a “clearly erroneous” standard. See *Bowman*, 98 F.3d 1343 (reviewing the district court’s findings of fact in pretrial detention proceeding under a clearly erroneous standard, and its legal conclusions *de novo*).

which further undermines the factual findings made by the District Court, than to the facts themselves.

1. There was no “secret” Swiss bank account. This was a critical finding by the District Court. *See* R. at 421. At the hearing before the District Court, the government submitted “evidence” that Mr. Stanford had directed payments to be made from a “secret” Swiss bank account, implying that Mr. Stanford had access to a wealth of “secret” funds. Only after the hearing did the government grudgingly concede that its principal cooperating witness—who, by all accounts, has been available to the government since long before Mr. Stanford was detained—confirmed Mr. Stanford’s contention that the account was indeed an operating account used for legitimate business purposes.¹¹ Despite this new evidence and the government’s validation of Mr. Stanford’s statements on the subject, the District Court’s decision continues to rest, in part, on the so-called “suspicious payment.” R. at 421.

2. The government’s assertion that Mr. Stanford attempted to “hide” the existence of his passport from government officials has also proven to be incorrect. After prompting by Pretrial Services at the Magistrate hearing, the government abandoned its allegation that that Mr. Stanford had not been

¹¹ In an apparent double standard, the government acknowledges that it filed a document after the hearing clarifying that its earlier statements about the “secret account” required correction, but now claims that it was improper for Mr. Stanford to file his own documentary evidence relating to any issues addressed by the District Court in its findings.

truthful to Pretrial Services. R. at 522. In an attempt to cooperate fully, between the June 25 hearing before the Magistrate and the June 29 hearing before the District Court, counsel for Mr. Stanford obtained, with great effort, the unexpired Antiguan passport and tendered it to the Court. R. at 502.

Then, at the June 29 hearing, the government asserted that Mr. Stanford's "red" Antiguan passport was "unaccounted for." R. at 525. The District Court accepted the government's representation in its order denying bail. R. at 423-24. Yet only two days after the June 29th hearing, the "unaccounted for" Antiguan passport suddenly became "accounted for" when counsel for the SEC confirmed that it had been in the SEC's possession for months, just as Mr. Stanford had stated. Finally, on July 2, 2009, the government confirmed that the "missing" passport had been in the possession of the government for over four months. With this fact settled, the government admitted that it or the Court possessed all passports, Antiguan or otherwise. Despite this new evidence and the government's corroboration of Mr. Stanford's statements on the subject, the District Court's decision continues to rest, in large part, on the so-called "missing" passport.

Displaying a conspicuous lack of embarrassment, the government now contends that these egregious errors "do not alter the fundamental facts." Response at 2; *see also* Response at 42 (new information did not have a "material bearing"). But as the Bail Reform Act makes clear, it is for the Court,

not the government, to decide which facts are “fundamental” and which are not. The District Court’s refusal to reconsider its detention order, even after it became clear that it had relied on “facts” now proven to be false, warrants reversal, not deference. The District Court’s decision on the Motion for Rehearing should be reversed.

III. THE GOVERNMENT FAILS TO ADDRESS THE IMPORTANT CONSTITUTIONAL ISSUES IMPLICATED BY CONTINUED DETENTION.

The government has also failed to address the troubling constitutional implications of the District Court’s decision. As the Supreme Court has admonished, “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Salerno*, 481 U.S. at 755. “This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction[.]” *Stack v. Boyle*, 342 U.S. 1, 4 (1951). In contravention of these basic principles, Mr. Stanford’s detention casts a long shadow over his right to counsel and his prospects for a fair trial, greatly complicating the essential task of conferring with his attorneys and rendering nearly impossible any meaningful participation in the preparation of his own defense. Mr. Stanford’s Sixth Amendment right to counsel has been severely encumbered and his Fifth Amendment right to due process is gravely jeopardized.

Moreover, given the complexity of the charges, the number of potential witnesses and co-defendants (none of whom have been detained prior to trial), and the District Court's busy calendar, Mr. Stanford may be detained for well over a year before trial begins, raising additional constitutional problems. *See United States v. Gonzales Claudio*, 806 F.2d 334, 339 (2d Cir. 1986) (explaining that a continued detention warrants reevaluation, because "at some point and under some circumstances, the duration of pretrial detention becomes unconstitutional"); *United States v. Khashoggi*, 717 F.Supp. 1048, 1051 (S.D.N.Y. 1989) ("[a]t some point, traditional notions of due process cannot countenance protracted pretrial detention of an individual presumed innocent") (internal quotation omitted). The government's failure to address these constitutional infirmities is telling.

CONCLUSION

For the aforementioned reasons, and for the reasons set forth in the Initial Brief, Mr. Stanford respectfully asks this Court to reverse the District Court and remand for the Court to order his release on the conditions determined by the Magistrate Court.

Dated: August 7, 2009. Respectfully submitted,

/s/ Samuel Rosenthal

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF APPEAL OF THE DISTRICT COURT'S DETENTION ORDER AND ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER AND/OR REOPEN** has been provided to Gregg Costa, Assistant United States Attorney, by email to gregg.costa@usdoj.gov, and/or facsimile to 713-7178-3302 and/or United States Mail to PO Box 61129, Houston, Texas 77208-1129 on the 7th day of August, 2009.

/s/ Samuel Rosenthal

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