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

UNITED STATES OF AMERICA, *Appellee,* v. PAUL MANAFORT, JR., *Appellant.*	Case No. 18-3037

APPELLANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RELEASE PENDING APPEAL

Defendant Paul J. Manafort, Jr. respectfully submits this reply in support of his motion for release pending appeal.

I. THE RELEVANT STATUTORY FACTORS FAVOR PRETRIAL RELEASE

A. Rule 9 Provides the Governing Standard

Special Counsel urges that this motion for release pending appeal under Federal Rule of Appellate Procedure 9 should be treated as a motion for a "stay . . . pending appeal" under Rule 8. He thus argues that Mr. Manafort must "show a likelihood of success on the merits and that the balance of equities favors" his release. Opp. 11. That is incorrect.

Federal Rule of Appellate Procedure 9 provides specific and unique procedures for "the release or detention of a defendant in a criminal case." Fed. R. App. P. 9(a)(1). Rule 9(a) provides that a defendant appealing a detention order

need only "file with the court of appeals a copy of the district court's order[,] . . . the court's statement of reasons," and, in certain circumstances, "a transcript of the release proceedings." *Id.* "Unless the court [of appeals] so orders, briefs need not be filed." Fed. R. App. P. 9(a)(2). On the basis of the relevant district-court records, "[t]he court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal." Fed. R. App. P. 9(a)(3).

Rule 9(c) then provides that that decision "***must***" be made "in accordance with . . . 18 U.S.C. [ ]§ 3142." Fed. R. App. P. 9(c) (emphasis added). That section requires the court to "take into account": (1) "the nature and circumstances of the offense charged"; (2) "the weight of the evidence"; (3) "the history and characteristics of the person"; and (4) "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g); *see United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999) (Under § 3142, the "judicial officer must consider [the] several enumerated factors."). Rule 9(c) could hardly be clearer: This Court "must" make its release determination "in accordance with" the § 3142(g) factors—not the factors relevant to a stay pending appeal. Fed. R. App. P. 9(c). Special Counsel cites no contrary authority.[1]

[1] *Nken v. Holder*, 556 U.S. 418 (2009), is the only case Special Counsel cites to support his assertion that "Manafort should . . . have to show a likelihood of success on the merits and that the balance of equities favors the extraordinary relief

The special procedures and carefully delineated standards governing motions for pretrial release make sense given what is at stake: the defendant's liberty. Even after conviction, "[d]oubts whether [bail] should be granted . . . should always be resolved in favor of the defendant." *Herzog v. United States*, 75 S. Ct. 349, 351 (1955) (Douglas, J., granting post-conviction bail application); *see Rhodes v. United States*, 275 F.2d 78, 82 (4th Cir. 1960) ("[N]ormally bail should be allowed pending appeal."). That principle applies *a fortiori* ***before*** conviction, when a defendant must be presumed innocent. *See Bame v. Dillard*, 637 F.3d 380, 390 (D.C. Cir. 2011) (pretrial detention permissible "'only because no other less drastic means can reasonably ensure [the defendant's] presence at trial'"). The specific Rule 9 standards, which account for those interests, control over any general Rule 8 standard for stays pending appeal.

B. The Rule 9 Factors Favor Release Pending Appeal

By relying on the inapplicable stay-pending-appeal standard, Special Counsel ignores most of the § 3142(g) factors. Those strongly favor release now.

1. Special Counsel fails to address "the nature and circumstances of the offense charged," 18 U.S.C. § 3142(g)(1), although it acknowledges that Mr. Manafort has not been charged with a violent offense. *See* Opp. 14-15. As the

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he seeks." Opp. 11. But that case does not address Rule 9 at all. It merely sets forth the standard for granting a stay pending appeal under Rule 8. *See Nken*, 556 U.S. at 434-35.

district court found, the offense charged at most poses an "abstract" threat to the "administration of justice." Dkt. 328, at 17. That Mr. Manafort was "not charged with a violent offense" is a "[f]act[] favoring appellant's pretrial release." *United States v. Nwokoro*, 651 F.3d 108, 110-11 (D.C. Cir. 2011) (per curiam).[2]

2. The bulk of Special Counsel's opposition focuses on the "weight of the evidence" against Mr. Manafort. 18 U.S.C. §3142(g)(2); *see* Opp. 2-8, 12-14.[3] But that evidence is weak—and was ignored by the district court. The only substantive communications attributed to Mr. Manafort are three brief text messages, to an individual nowhere referenced in the operative indictment, containing accurate information. *See* Dkt. 328, at 6 ("This is paul."); *id.* ("http://www.businessinsider.com/former-european-leaders-manafort-hapsburggroup-2018-2?r=UK&IR=T"); *id.* ("We should talk. I have made clear that they worked in Europe."). That paltry evidence is factually and legally insufficient to demonstrate any attempt to "knowingly" and "corruptly" "influence . . . testimony." 18 U.S.C. §1512(b)(1).

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[2] Special Counsel (at 16 n.5) calls *Nwokoro* "inapposite" because the district court there, unlike here, never issued written findings of fact. But, as Special Counsel acknowledges, *Nwokoro* held that the critical error was the district court's "'fail[ure] to demonstrate that [it] . . . considered all of the statutory factors,'" *i.e.*, the §3142(g) factors. Opp. 16 n.5 (quoting *Nwokoro*, 651 F.3d at 109). The same error plagues the district court's ruling here.

[3] Special Counsel's assertion (at 12) that Mr. Manafort "did not raise below" the need "to consider the weight of the evidence" is wrong. *See* Dkt. 329, at 36 (urging court to consider §3142(g) factors, including weight of the evidence).

Relying on out-of-circuit authority, Special Counsel insists that Mr. Manafort's "conduct represents a core form of corrupt persuasion covered by 18 U.S.C. §1512(b)(1)." Opp. 14. But the cited cases disprove Special Counsel's contention. In *United States v. Baldridge*, 559 F.3d 1126 (10th Cir. 2009), and *United States v. Edlind*, 887 F.3d 166 (4th Cir. 2018), the courts held that "corrupt persuasion" requires proof the defendant acted "'intentionally to bring about false or misleading testimony.'" *Baldridge*, 559 F.3d at 1143; *Edlind*, 887 F.3d at 174. There is no evidence of such intent here: The messages attributable to Mr. Manafort and Person A did not allude to questioning or testimony, nor did they reveal anything about Mr. Manafort's intent (other than his intent to speak to the individuals with whom he was attempting to communicate).

3. Special Counsel also fails to address Mr. Manafort's "history and characteristics," which strongly favor pretrial release. 18 U.S.C. §3142(g)(3); *see* Mot. 9-10. Mr. Manafort has no criminal record. *See* 18 U.S.C. §3142(g)(3)(A) ("history and characteristics" includes "criminal history"); *Nwokoro*, 651 F.3d at 110-11 (lack of "prior criminal record" "favor[s] appellant's pretrial release"); *see also United States v. Stone*, 608 F.3d 939, 950-52 (6th Cir. 2010) (similar). He is in sound "physical and mental condition," with no "history relating to drug or alcohol abuse." 18 U.S.C. §3142(g)(3)(A). And he has strong "family" and "community ties." *Id.* Special Counsel does not suggest otherwise.

4. Finally, release would not pose a "serious[] . . . danger to any person or the community." 18 U.S.C. §3142(g)(4). Special Counsel asserts that Mr. Manafort "vastly understates the seriousness of the conduct that prompted Manafort's detention" and "misunderstands the statutory concept of danger." Opp. 14-15. But every crime contains some element of "seriousness" or "danger." The issue under §3142(g) is whether the alleged crime is sufficiently "serious" and "dangerous" to warrant pretrial detention of an individual who is otherwise presumed innocent. *See* 18 U.S.C. §3142(g)(1) (requiring court to consider "whether the offense is a crime of violence"). An "abstract," speculative harm cannot meet that standard. Dkt. 328, at 17. That is not a "serious[] . . . danger" warranting pretrial detention. 18 U.S.C. §3142(g)(4); *see* Mot. 10-11.

II. MR. MANAFORT IS ENTITLED TO PRETRIAL RELEASE EVEN UNDER THE STAY-PENDING-APPEAL STANDARD

Even under the standard for stays pending appeal—which does not apply here, *see* pp. 1-3, *supra*—Mr. Manafort is entitled to pretrial release.

A. Mr. Manafort Is Likely To Succeed on the Merits

1. The district court committed legal and clear factual error in ruling that no combination of conditions would assure the safety of the community. *See* Mot. 8-9; Mem. (Doc. No. 1739291), at 10-17. Section 3148(b)(2)(A) expressly required the district court to "base[]" any conclusion of danger to the community "on the factors set forth in section 3142(g)," 18 U.S.C. §3148(b)(2)(A), including

"the weight of the evidence," *id.* §3142(g)(2). The district court's failure to consider the weight of the evidence, as well as other §3142(g) factors, flouted the plain text of the statute. *See* Mot. 6, 8; Mem. 10-14.

Special Counsel errs in asserting (at 12) that the court "considered the weight of evidence in making its detention decision." The court expressly refused to consider the weight of the evidence. *See* Dkt. 328, at 11 ("[T]he Court does not need to engage in an independent assessment of the weight of the evidence."); *see* Dkt. 329, at 18 (similar). The summary of the government's case identified by Special Counsel appears in connection with the district court's assertion that, even though Mr. Manafort had "c[o]me forward with some evidence to rebut the presumption" that no conditions would assure the safety of the community, Dkt. 328, at 15, "the [§3148] presumption ha[d] not been overcome," *id.* at 19. *See* Mem. 14 n.6. Because Mr. Manafort initially rebutted the presumption, the court was required to determine whether, "based on the factors set forth in section 3142(g)," some "combination of conditions of release" would "assure . . . the safety of . . . the community." 18 U.S.C. §3148(b)(2)(A).[4] The district court did not assess—or even mention—those factors, including the weight of the evidence, in its §3148(b)(2)(A) ruling. Had the district court considered them, as statutorily

[4] Special Counsel does not dispute that "the court . . . found that Mr. Manafort had presented enough evidence to carry his burden of production, initially rebutting the presumption." Mot. 5.

required, it would have concluded that every single factor weighed in favor of release. *See* pp. 3-6, *supra*.

2. Mr. Manafort has also shown a likelihood of success on his challenge to the district court's determination that he "is unlikely to abide by any condition[s] . . . of release." 18 U.S.C. §3148(b)(2)(B); *see* Mot. 11-13. In reaching that conclusion, the district court relied principally on Mr. Manafort's alleged violations of the Eastern District of Virginia release order and its own gag order. *See* Dkt. 328, at 18, 19. But those findings were legally and clearly erroneous.

The district court's finding that Mr. Manafort violated the release order ran directly contrary to the terms of that order and the evidence. Special Counsel's motion to revoke had alleged that D1 and D2 were witnesses on the Foreign Agents Registration Act ("FARA") charges pending in the District of Columbia. *See* Dkt. 315, at 3-7, 12-13. Those charges were not brought in the Eastern District of Virginia. *See* Superseding Indictment, *United States v. Manafort*, No. 1:18-cr-00083 (E.D. Va. Feb. 22, 2018), Dkt. 9.

Special Counsel asserts, for the first time, that D1 and D2 "are also witnesses on the FBAR and tax charges that are common to the D.C. and Virginia prosecutions." Opp. 17. But Special Counsel's motion to revoke made no such representation, relying solely on the FARA charges in the District of Columbia. *See* Dkt. 315, at 3-5, 13-17. The district court had no basis on which to conclude

that D1 and D2 were potential witnesses for unknown charges in a different jurisdiction.[5]

Apparently recognizing that Mr. Manafort did not violate the release order, Special Counsel claims the district court did not "base[] its decision on his violation of" that order, but merely "consider[ed] [Mr. Manafort's] compliance with" that order in determining whether he is likely to abide by his conditions of release. Opp. 16-17. That is a distinction without a difference: Whether the district court erroneously concluded that Mr. Manafort "violat[ed]" the order or failed to "compl[y]" with it, the effect is the same.

The district court's reliance on Mr. Manafort's non-violation of its own gag order was likewise clearly erroneous. *See* Dkt. 328, at 19. Although the court had initially ordered Mr. Manafort to show cause why he had not violated the order, the court ultimately dismissed its show-cause order without concluding that Mr. Manafort had violated the gag order. *See* Dkt. 112, at 11-12. That incident thus could not have supported the district court's decision, more than six months later, to detain Mr. Manafort.

[5] Similarly misplaced is Special Counsel's reliance on Person A's few alleged communications after the release order issued. *See* Opp. 17-18. Person A is not a subject of the order, and he, at most, expressed Mr. Manafort's desire to "connect" with D1. Dkt. 328, at 8. Person A's generic messages cannot, factually or legally, establish that Mr. Manafort violated the release order.

Special Counsel asserts (at 19) that the district court did not rely on the "episode" involving the Ukrainian opinion piece, claiming that the court merely concluded that the incident "demonstrate[d] Manafort's tendency to 'skat[e] close to the line,'" "raising doubts" about his ability to abide by conditions of release. *Id.* But Mr. Manafort could not have been "skat[ing] close to the line" if—as Special Counsel acknowledges—"'it wasn't entirely clear to the defendant that [his conduct] was covered by the [gag] order.'" *Id.* Moreover, Mr. Manafort was nowhere near the line: There is no evidence the Ukrainian paper would substantially prejudice (or reach) a D.C. jury so as to bring the conduct within the gag order. And the gag order was not a condition of Mr. Manafort's release, so its non-violation revealed nothing about his ability to abide by conditions of release.

B. The Balance of Equities Favor Pretrial Release

Equity heavily favors release. On one side of the balance, the factors relevant to detention militate in favor of his release. *See* pp. 3-6, *supra*. On the other side is the fact that Mr. Manafort is facing two imminent federal criminal trials, the first of which is set to begin in just two weeks. *See* Mot. 1. Mr. Manafort is currently in solitary confinement, locked in his jail cell for at least 23 hours per day, as a result of a detention order permeated by errors of law and fact. The detention conditions make it effectively impossible to prepare for the two trials he is facing. Equity thus requires that he be released pending appeal.

Special Counsel objects that Mr. Manafort's current confinement conditions are the result of his own failure to "avail[] himself of the government's offer of assistance." Opp. 20. The United States Marshals Service, not Special Counsel, has control over Mr. Manafort's confinement. *See Prisoner Operations*, U.S. Marshals Service (Nov. 8, 2012), https://www.usmarshals.gov/duties/prisoner.htm. The Marshals appear to have determined that solitary confinement at the location of his detention is the only way to ensure Mr. Manafort's safety. They surely would not impose such conditions unnecessarily.

Special Counsel also suggests that Mr. Manafort "delay[ed] . . . seeking relief" by waiting ten days to notice an appeal. Opp. 20. To the extent that counts as delay, it only underscores the barriers Mr. Manafort faces in communicating effectively with his counsel due to his conditions of confinement.

CONCLUSION

For the foregoing reasons, Mr. Manafort respectfully requests that this Court order his release pending resolution of this appeal.

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Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing document complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,554 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(f).

July 9, 2018

/s/ Frank P. Cihlar
Frank P. Cihlar

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, I electronically filed the foregoing reply in support of motion for release pending appeal with the Clerk of the Court using the Court's CM/ECF system, which will send notice of this filing to all parties.

/s/ Frank P. Cihlar
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