No. 18-3037

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL J. MANAFORT, JR.,

Appellant.

REPLY MEMORANDUM OF LAW AND FACT FOR APPELLANT PAUL J. MANAFORT, JR.

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INTRODUCTION

Mr. Manafort is currently facing two imminent federal criminal trials, the first scheduled to begin in just two days. The detention order, which impedes Mr. Manafort's preparation for those trials, rests on legal error and clear factual error. The order should be vacated to allow Mr. Manafort to assist with trial preparation and trial.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT NO CONDITIONS WOULD ASSURE THE SAFETY OF THE COMMUNITY RESTS ON LEGAL ERROR AND CLEAR FACTUAL ERROR

A. The District Court Committed Legal Error by Failing To Consider the Weight of the Evidence

Special Counsel does not dispute that the Bail Reform Act required the district court to consider the weight of the evidence against Mr. Manafort in determining that no conditions would assure the safety of the community. *See* 18 U.S.C. §3148(b)(2)(A); *see also* Mem. 10-13. Nor does Special Counsel dispute that "conclusions of law"—*e.g.*, the district court's interpretation of §3148(b)(2)(A)—are reviewed "*de novo*." *United States v. Bazuaye*, 82 F. App'x 734, 734 (2d Cir. 2003); *see* Mem. 9. Special Counsel instead claims that the district court ***did*** consider the weight. Opp. 14. The record belies that assertion.[1]

[1] Special Counsel notes that district courts have "discretion in making detention determinations." Opp. 13-14. Discretion is irrelevant where the district court

1. At the bail-revocation hearing, the district court repeatedly stated that it was "not going to get into ***any assessment*** of the strengths or the deficiencies of the evidence" because the June Superseding Indictment created a presumption that no conditions of release would assure the safety of the community. *Hr'g Tr.* 18 (emphasis added). The court made clear its view that, in those circumstances, there was no "need to weigh the evidence." *Id.* at 17. The detention order doubled-down on that position, declaring that "the Court does not need to engage in an independent assessment of the weight of the evidence." *Detention Order* 11.

Special Counsel suggests that, despite repeatedly declaring that the statute did not require it to consider the weight of the evidence, the court really was trying to say that the statute did not require it to make a "statutory probable-cause finding." Opp. 15. The only support Special Counsel can muster for that strained reading is the court's statement that it did not "'need to weigh the evidence [it]self to state . . . that there has been a finding of probable cause to believe that this defendant committed a felony offense while he was on pretrial release.'" *Id.* at 15 (quoting *Hr'g Tr.* 17). But, in the same breath, the court separately concluded that it need not "get into any assessment of the strengths or the deficiencies of the evidence." *Hr'g Tr.* 18. On that basis, the court refused to address "a number of issues concerning the quality of the government's proof," including that "Special

misinterprets the statute. "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Counsel's case is thin." *Id.* at 17-18. There is no natural reading of those clear statements that can be reconciled with Special Counsel's assertion that the district court "expressly considered the weight of [the] evidence." Opp. 14.

2. Special Counsel also points to the court's ***summary*** of the evidence as proof that it considered the weight of the evidence. But recitation is not consideration. *Cf. Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 302 (11th Cir. 1989). Special Counsel highlights the court's nod to "'the evidence supplied in support of the government's motion, including the number of contacts and attempted contacts [with Persons D1 and D2], the persistence of the efforts to make contact, the inferences that can be drawn from what was said, and the clear impact the statements had on [one] recipient.'" Opp. 14-15 (alterations in original) (quoting *Detention Order* 19). And it points to six pages at the beginning of the detention order where the court summarized the parties' factual allegations—four of which are a chart of alleged communications. *See* Opp. 15 (citing *Detention Order* 5-10).

The district court's recognition that there was some evidence does not reflect any serious engagement with the ***weight*** of that evidence. *See, e.g.*, *United States v. Lee*, 206 F. Supp. 3d 103, 112 (D.D.C. 2016). Attempted contacts, numbers of contacts, etc., do not show the efforts sought to induce false testimony or statements—a *sine qua non* of witness tampering.

3. Apparently realizing that the court—true to its word—did not analyze the weight of the evidence, Special Counsel suggests that the court declined to do so due to "the likelihood of press coverage and the need to preserve potential jurors'" impartiality. Opp. 15. But the court did not attempt to address any such concerns. If the district court had any concerns about affecting potential jurors' views, it could have resolved them by sealing portions of the record, as it has done on multiple occasions throughout this case. *See, e.g.*, Jan. 9, 2018 Minute Order; Jan. 22, 2018 Minute Order; Feb. 22, 2018 Minute Order. That the court did not seal any part of the record concerning those proceedings or its detention order reveals Special Counsel's speculation for what it is. Besides, any concerns the court might have had about revealing sensitive information when analyzing the §3142(g) factors would not excuse it from performing the analysis that 18 U.S.C. §3148(b)(2)(A) requires. The court failed to weigh the evidence. The reason why it failed to comply with statutory requirements is irrelevant.

B. The Evidence Is Weak

The evidence here, moreover, was weak. Special Counsel asserts that Mr. Manafort's conduct "represents a core form of corrupt persuasion." Opp. 16. That conclusion is inconsistent with precedent and the actual evidence presented in court.

This Court has established that witness-tampering requires requests to witnesses to make ***false*** statements or omissions. *See* Mem. 15 (collecting cases). Special Counsel does not attempt to distinguish this Court's cases, pointing instead to out-of-circuit precedent with facts completely unlike those at issue here. *See* Opp. 16-18. For example, in *United States v. LaShay*, 417 F.3d 715 (7th Cir. 2005), the defendant reached out to a witness "to make sure [the witness] remembered" a partly false story. *Id.* at 717, 719. In *United States v. Baldridge*, 559 F.3d 1126 (10th Cir. 2009), the defendant instructed one witness to lie to an FBI agent and faxed another witness "a sort of deposition or 'Q-and-A' . . . apparently supplying answers to questions" the witness might be asked by authorities. *Id.* at 1133. In *United States v. Edlind*, 887 F.3d 166 (4th Cir. 2018), *cert. pending* (No. 18-5028), the defendant advised a witness not to "'go into detail'" during his "upcoming testimony" and "not [to] meet with the prosecutors to go over his testimony prior to trial." *Id.* at 171, 174. And in *United States v. LaFontaine*, 210 F.3d 125 (2d Cir. 2000), the defendant "met on several occasions" with a witness the court had expressly forbidden the defendant from contacting. *Id.* at 128. Contrary to Special Counsel's claims, none of that remotely, much less "exactly[,] . . . happened here." Opp. 17.

The limited alleged attempted contacts with D1 are nothing like the conduct in those cases. Mr. Manafort did not know D1 was a witness or potential witness,

he never suggested that D1 say ***anything*** to authorities, and he did not say anything untruthful to D1. *See* Mem. 15-17. Special Counsel does not deny that Mr. Manafort's only statement of substance to D1 was ***indisputably true***: "'I have made clear that they worked in Europe.'" *Detention Order* 6. Special Counsel cannot identify a single false statement made by Mr. Manafort to D1 or D2. Nor does Special Counsel identify as false any statements made by Person A. *See* Opp. 16-18. There are no facts to support a finding that the weight of the evidence against Mr. Manafort was strong enough to command his immediate detention just before two imminent federal criminal trials.

C. The Order Must Be Vacated

Special Counsel claims (at 14 n.5) that, under *United States v. Nwokoro*, 651 F.3d 108 (D.C. Cir. 2011) (per curiam), the errors below "at most warrant a remand for additional findings, not release." That assertion is incorrect.

Remand was appropriate in *Nwokoro* because the court did not issue any written findings; thus, this Court could not tell whether it had considered the §3142(g) factors. *See* 651 F.3d at 111-12. Here, the situation is quite different: The court issued written findings in which it made clear that it believed it ***was not required*** to consider the §3142(g) factors. *See, e.g.*, *Detention Order* 11 ("[T]he Court does not need to engage in an independent assessment of the weight of the evidence."); *see also* pp. 2-3, *supra*. Proper consideration would have weighed in

favor of Mr. Manafort's continued release because the evidence was weak. *See* pp. 4-6, *supra*. The legal and clear factual errors plaguing the detention order require that it be vacated and that Mr. Manafort be immediately released.

II. THE DISTRICT COURT CLEARLY ERRED IN CONCLUDING MR. MANAFORT IS UNLIKELY TO ABIDE BY ANY CONDITIONS OF RELEASE

The Special Counsel characterizes the district court's conclusion that Mr. Manafort "could not be trusted to abide by any conditions of release" as an "independent basis" supporting his pretrial detention. Opp. 18. That claim is meritless. There was no valid support for that conclusion, and it rests on clear legal and factual error.

A. The District Court Clearly Erred Legally and Factually in Relying on the Allegations in the June Superseding Indictment

First, the district court relied on the witness-tampering allegations in the June Superseding Indictment to conclude that Mr. Manafort was unlikely to abide by any combination of conditions of release. *See Detention Order* 11, 19. Mr. Manafort pointed out in his opening memorandum (at 18) precisely why that reliance was unsustainable. Special Counsel offers ***no response***.

Any conclusion that Mr. Manafort was "unlikely to abide by any . . . conditions of release," 18 U.S.C. §3148(b)(2)(B), must be "established by a preponderance of the evidence." *United States v. Aron*, 904 F.2d 221, 224 (5th Cir. 1990); *see also United States v. Gotti*, 794 F.2d 773, 778 (2d Cir. 1986)

(similar). But an indictment is issued on "probable cause." *Kaley v. United States*, 571 U.S. 320, 328 (2014). The lower standard of proof embodied by an indictment cannot substitute for the "'[f]inely tuned'" preponderance-of-the-evidence finding the court was required to make. *See Florida v. Harris*, 568 U.S. 237, 243 (2013). The Special Counsel offers no answer, because none exists.

B. The District Court Clearly and Legally Erred in Relying on the Eastern District of Virginia's Pretrial Release Order

The district court also relied on alleged violations of the Eastern District of Virginia's Pretrial Release Order, which required Mr. Manafort to "avoid all contact, directly or indirectly, with any person who is a . . . witness in the investigation or prosecution of the defendant." *E.D. Va. Pretrial Release Order* 3. *See Detention Order* 18; *Hr'g Tr.* 50. But Mr. Manafort did not violate the Order. *See* Mem. 19-20.

1. Special Counsel does not dispute that Mr. Manafort's communications—which occurred ***before*** the Order issued—could not have violated the Order. *See* Mem. 19-20. Special Counsel claims that the district court could nonetheless "consider[] [Mr. Manafort's] compliance with [that] court's order" to determine whether Mr. Manafort could be "trust[ed]" to comply with conditions of release. Opp. 19-20. But the error is not "consider[ation]" of Mr. Manafort's "compliance" with the Order. It is the conclusion that Mr. Manafort had not

complied with the Order when its date of issuance and terms make clear that he had. *See* Mem. 19-20.

Apparently recognizing that Mr. Manafort himself did not violate the Order, Special Counsel points to the alleged communications by Person A, who was not a subject of the Eastern District of Virginia Pretrial Release Order. Opp. 20-21. Those communications also fail to establish Mr. Manafort's noncompliance with the Order. Nearly all of Person A's alleged attempted communications with D1 and D2 also occurred before the Order issued. *See* Mem. 20; *Detention Order* 8. The few alleged communications that occurred afterward were general greetings that contained nothing of substance, much less false statements. *See* Mem. 16-17.

Contrary to Special Counsel's assertions, Mr. Manafort is not "responsible for" Person A's statements on a co-conspirator liability theory. Opp. 21. The district court would have had to "make explicit findings as to the scope of [the] defendant's conspiratorial agreement ***before*** holding him responsible for a co-conspirator's reasonably foreseeable acts." *United States v. Tabron*, 437 F.3d 63, 66 (D.C. Cir. 2006) (emphasis added). It did not. There is no indication that the district court relied on co-conspirator liability, and Special Counsel's assertion that it could have is incorrect.

2. There was, moreover, no violation of the Eastern District's Order because neither D1 nor D2 is a witness in the Eastern District of Virginia

prosecution; as a result, neither was within the Order's scope. *See* Mem. 19. Special Counsel ***now*** represents (at 20) that they are witnesses in that prosecution. But prior to this appeal, Special Counsel had never hinted that those individuals had any connection to the charges pending in the Eastern District of Virginia. The district court could not reasonably have concluded that those individuals were witnesses in a case that was not before it without so much as a suggestion from the government to that effect. Nor is there any evidence in the record that it reached such a conclusion.

C. The District Court Clearly Erred in Relying on the Non-Violation of the Gag Order

Finally, the district court relied on Mr. Manafort's involvement with an opinion piece published in a Ukrainian newspaper—conduct the court itself found not to violate its gag order. *See* Mem. 20-22. That conduct could not support the conclusion that Mr. Manafort was likely to violate any combination of conditions of release because, as Special Counsel concedes, the district court "discharged [the] show-cause order" relating to the alleged noncompliance with the order. Opp. 21.

Special Counsel claims that, although the district court found that Mr. Manafort had ***not*** violated the gag order, the court properly relied on it to "re-inforce[] the finding that Manafort 'skat[ed] close to the line.'" Opp. 21 (second alteration in original) (quoting *Hr'g Tr.* 50). But Mr. Manafort could not have

been "skating close to the line" if, as the court found, "it wasn't entirely clear to the defendant that [his conduct] was covered by the [gag] order." *Hr'g Tr.* 7.

Mr. Manafort was nowhere near the line in any event. The gag order prohibited only communications that pose a "substantial likelihood of material prejudice to this case." *Gag Order* 2. Mr. Manafort's conduct related to editing a short opinion piece by a Ukrainian that was published in a Ukrainian newspaper months before the trial date and did not discuss the criminal proceedings against Mr. Manafort. *See* Dkt. 84-1. As the district court acknowledged with understatement, that Ukrainian newspaper was "probably not the most popular" in the Washington, D.C. community, from which the jury would be drawn. Dkt. 112, at 11. It is difficult to see how Mr. Manafort's actions could have affected the pending criminal proceedings at all, much less how they could have posed a substantial likelihood of material prejudice.

CONCLUSION

For the foregoing reasons, Mr. Manafort respectfully requests that the order of detention be vacated and that he be immediately released under the conditions of release in place before the June 15 revocation.

Dated: July 23, 2018
Washington, D.C.

Respectfully submitted,

By: /s/ Frank P. Cihlar

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and this Court's Rule 32(e), I hereby certify that this memorandum complies with the applicable type-volume limitations. This memorandum was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(e)(1), this brief contains 2,594 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2010) used to prepare this memorandum.

July 23, 2018

/s/ Frank P. Cihlar
Frank P. Cihlar

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, I electronically filed the foregoing memorandum with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system and caused four hard-copies of this memorandum to be hand-delivered to the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

July 23, 2018

/s/ Frank P. Cihlar
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