U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 27, 2020

BY ECF

The Honorable Sidney H. Stein
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. David Smith*, S1 07 Cr. 453 (SHS)

Dear Judge Stein:

The Government respectfully writes in opposition to the bail application in light of coronavirus/COVID-19 filed by defendant Daniel Smith, dated March 25, 2020. Smith, who has pled guilty to a serious tax felony, fled from the United States to Canada and remained a fugitive for over a decade in response to the charges in this case, and has only provided conclusory and insufficient evidence of his medical issues and his claim that the Bureau of Prisons will be unable to provide care and treatment in the current environment. Accordingly, and as set forth in greater detail below, Smith cannot meet his burden in support of his bail application, and the Court should deny Smith's motion.

A. Background

This case is the result of a multi-year, wide-ranging investigation of unlawful tax shelters. On May 22, 2007, an indictment (the "Indictment") was filed against four current or former partners of the accounting firm Ernst & Young ("E&Y"), charging them with, among other things, participating in a massive conspiracy to design, market, and implement tax shelters used by wealthy individuals to eliminate, reduce, or defer billions of dollars in tax liabilities.

On February 19, 2008, a superseding indictment (the "Superseding Indictment") was filed, which, in addition to the four E&Y defendants named in the Indictment, charged Charles Bolton, a promoter of certain of the tax shelters, and the defendant. The Superseding Indictment charged the defendant with participating in the far-reaching tax shelter conspiracy (Count One). Among other things, the defendant developed one of the tax shelters, CDS, and then introduced and licensed it to E&Y, receiving at least $3.75 million in licensing fees between August 2000 and November 2000. He also helped the other defendants market another tax shelter, CDS Add-On. Together, the use of CDS and CDS Add-On resulted in a tax loss to the United States Treasury of over $1 billion. The defendant was also charged with evading income taxes the defendant personally owed on $18.4 million in income earned in 1998 (Count Twelve). Finally, the defendant was charged with filing a false tax return for calendar year 1999 (Count Thirteen). Among other things, the tax return filed by the defendant was false because it did not disclose his control of an overseas bank account that he used to evade his 1998 taxes.

Between the filing of the Indictment in May 2007 and the filing of the Superseding Indictment in February 2008, the Government met with the defendant and his then attorney multiple times and remained in contact with that attorney. Until at least late 2007, the defendant lived in the San Francisco area. (*See* Transcript of Feb. 22, 2008 Conference ("2/22/08 Tr.") at 7, attached hereto as Exhibit A). He owned one property in Marin County and one property in San Francisco. (*See id.*). Approximately a week and a half before the defendant was indicted, the defendant's attorney told the Government that the defendant had sold his residence in California and moved to Canada. (*Id.*). Around the same time, the defendant's attorney told the defendant that he would be indicted, and the defendant told his attorney that he would voluntarily appear in the Southern District of New York to be interviewed by Pretrial Services and arraigned on the Superseding Indictment. (*Id.* at 4). A few days before the scheduled arraignment, the defendant received a copy of the Superseding Indictment and reiterated that he intended to voluntarily appear in New York. (*Id.* at 5-6). The day before the scheduled arraignment, agents saw a "For Sale" sign outside the defendant's San Francisco property, and a realtor told the agents that the defendant had moved to Canada. (*Id.* at 7).[1] The defendant did not appear for his arraignment, and the Court signed a bench warrant for his arrest. (*Id.* at 7-8).

Between 2008 and 2019, the Government sought and the defendant resisted the defendant's extradition from Vancouver, Canada. On July 11, 2019, after the Court of Appeal for British Columbia dismissed the defendant's appeal of an order of committal issued by the Supreme Court of British Columbia, the defendant was extradited from Canada.

On July 12, 2019, the defendant was arraigned by the Court. Thereafter, the Court held a bail hearing. (*See* Transcript of July 12, 2019 Conference ("7/12/19 Tr.") at 8-19, attached hereto as Exhibit B). Despite his flight to Canada and his subsequent effort to avoid extradition, the defendant argued, as he does now, that he is not a flight risk. (*Id.*). He argued, as he does now, that he should be released to his sister's house in Wisconsin. (*Id.* at 14-15). The Court rejected these arguments, finding that there was no condition or combination of conditions that would assure the defendant's appearance. (*Id.* at 18). In support of this finding, the Court noted that the defendant had fled the jurisdiction, had notice of the investigation, had sold assets prior to his flight, and had fought his extradition. (*Id.* at 18-19).

On February 20, 2020, the defendant pleaded guilty, pursuant to a plea agreement (the "Plea Agreement"), to Count Thirteen of the Superseding Indictment, which charged him with filing a false or fraudulent tax return for calendar year 1999, in violation of Title 26, United States Code, Section 7206(1). In the Plea Agreement, the defendant agreed that, in addition to the tax loss resulting from his evasion of income tax due and owing on $18.4 million he earned from 1998 to 1999, the tax loss of more than $100 million resulting from his participation in the CDS and CDS Add-On shelters is properly included as relevant conduct under the Guidelines for the purposes of calculating the applicable Guidelines offense level. The defendant further agreed that, because the defendant's range

---

[1] The defendant's California properties were located in Marin County (93 Sugarloaf Drive, Tiburon, CA) and San Francisco (2312 Gough Street, San Francisco, CA). According to a real estate website, the Marin County property was sold on September 15, 2006 for $5.6 million, and the San Francisco property was listed for sale on November 5, 2007 at a price of $3.945 million. *See* https://www.zillow.com/homedetails/93-Sugarloaf-Dr-Belvedere-Tiburon-CA-94920/68961026_zpid/; https://www.zillow.com/homedetails/2312-Gough-St-San-Francisco-CA-94109/15072978_zpid/.

under the Guidelines of 108 to 135 months exceeds the statutory maximum sentence of 36 months' imprisonment, the defendant's Stipulated Guidelines Sentence is 36 months' imprisonment. In addition, the defendant agreed to pay restitution in the amount of $7,767,719, representing taxes owed by the defendant for calendar year 1998.

Yesterday, the Probation Office issued the Presentence Investigation Report ("PSR"). The Probation Office recommends that the defendant's sentence include 36 months' incarceration, the statutory maximum. (PSR at 24).

B. Legal Standard

"Post-conviction, a defendant no longer has a substantive constitutional right to bail pending sentencing," because "the defendant is no longer entitled to the presumption of innocence." *United States v. Madoff*, 316 F. App'x 58, 59 (2d Cir. 2009) (internal quotations omitted). "In general, following a [conviction], there is 'a presumption in favor of detention.'" *United States v. Nouri*, No. 07 CR. 1029DC, 2009 WL 2924334, at *2 (S.D.N.Y. Sept. 8, 2009) (quoting *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004)). "Unless the applicable Guidelines would not call for a term of imprisonment, the court "shall order that a person who has been found guilty of an offense and who is awaiting imposition . . . of sentence . . . be detained." *Nouri*, 2009 WL 2924334, at *2 (quoting 18 U.S.C. § 3143(a)(1)). "Accordingly, § 3143(a) places the burden on a defendant to demonstrate by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of others or the community." *Madoff*, 316 F. App'x at 59.

C. Smith Poses a Risk of Flight and Continued Detention is Fully Warranted

Smith has been convicted of a serious crime and he faces significant exposure for his crime and his related conduct of playing a central role in a far-reaching conspiracy to defraud the IRS of over $1 billion. As noted above, his statutory maximum and applicable Guidelines sentence is 36 months' imprisonment, which is the sentence recommended by the Probation Office in the PSR. The Government believes a substantial sentence will be appropriate in light of the serious crime for which he was convicted and his related conduct. The Government respectfully submits that any appropriate sentence should substantially exceed the approximately ten months that he has served thus far. There is thus no basis to bail him now.

This is particularly true under the heightened standards for bail pending sentence. The defendant simply cannot meet his burden to "demonstrate by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of others or the community." *Madoff*, 316 F. App'x at 59. The defendant's claim that a potential sentence of 36 months' imprisonment is "hardly the type of sentence one would flee from," (Def.'s March 25, 2020 Ltr. ("March 25 Letter") at 2), is belied by the fact that his co-defendants in this case each received a sentence of 36 months or less and the defendant nevertheless tirelessly fought extradition. Likewise, the defendant has not explained how it is that he no longer has any assets with which to flee after an extraordinarily lucrative career. Before the conduct at issue in this case, the defendant worked for 20 years at several of the world's premier accounting firms and brokerage houses. In 1998 alone, he received at least $18.4 million in income for which he did not pay taxes. In approximately four months in 2000, he received $3.75 million in CDS licensing fees. Around the time of his flight to Canada, he owned multiple multi-million dollar

properties in the San Francisco area.[2] Finally, now that the defendant has firsthand experience of life in custody, he has every incentive to flee in order to avoid further imprisonment.

D. The COVID-19 Pandemic Does Not Justify Smith's Release

Smith focuses his bail application largely on the COVID-19 pandemic, and his alleged vulnerability based on his age of 63. However, as described below, the Bureau of Prisons ("BOP")—and the Metropolitan Correction Center ("MCC") in particular—are equipped to address the current public health crisis. Furthermore, the defendant has provided no support for his claim that his celiac disease or hernia render him especially vulnerable to COVID-19. The Court should therefore deny the defendant's motion to the extent it relies on COVID-19 as a changed circumstance justifying his release from custody.

1. BOP and MCC Are Capable of Protecting the Health and Safety of Inmates

The defendant essentially contends that the BOP generally, and the MCC where the defendant is housed specifically, is unable to protect the health and safety of defendants in their custody from coronavirus/COVID-19. The defendant is incorrect.

BOP is well prepared to handle the risks posed by coronavirus/COVID-19, as with other infectious diseases and other medical conditions.[3] Since at least October 2012, BOP has had a Pandemic Influenza Plan in place. *See BOP Health Management Resources*, available at https://www.bop.gov/resources/health_care_mngmt.jsp.[4] Moreover, beginning approximately two

---

[2] During his presentence interview, the defendant was evasive about his employment in Canada. (*See* PSR ¶ 107). He reported that, between 2007 and 2015, he was the CEO of a company and earned $1 per year. (PSR ¶ 107). When the Probation Office asked how he survived on a $1 salary, he said that he was living from his savings but did not specify how much he had in savings. (*Id.*).

[3] As of yesterday, ten inmates in BOP custody have been diagnosed with COVID-19, all of whom are in isolation. *See BOP COVID-19 Coronavirus Disease Resource*, available at https://www.bop.gov/coronavirus/index.jsp (one inmate at MCC; one inmate at MDC; one inmate at RRC Brooklyn; four inmates at FCC Oakdale (Louisiana); two inmates at USP Atlanta; and one inmate at RRC Phoenix). The inmate who tested positive at MCC (the "Positive Inmate") was evaluated at New York Presbyterian Lower Manhattan Hospital, and did not meet the criteria for hospitalization. Accordingly, the Positive Inmate was returned to the MCC, where he is now being quarantined. Prior to his diagnosis, the Positive Inmate was housed in a separate unit (the "Separate Unit") at MCC where inmates deemed at higher risk due to their age and/or underlying health conditions were moved as a safety precaution. Following the positive test result, all inmates who were housed with the Positive Inmate in the Separate Unit were quarantined in the Separate Unit. According to the MCC, the Separate Unit was cleaned and sanitized. In addition, inmates in the Separate Unit have been closely monitored by MCC Health Services, including twice daily checks for above-normal temperatures.

[4] *See also Module 1: Surveillance and Infection Control*, available at https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf; *Module 2: Antiviral Medications and Vaccines*, available at https://www.bop.gov/resources/pdfs/pan_flu_module_2.pdf; *Module 3: Health*

months ago, in January 2020, BOP began to plan specifically for the coronavirus/COVID-19 to ensure the health and safety of inmates and BOP personnel. *See Federal Bureau of Prisons COVID-19 Action Plan*, available at https://www.bop.gov/resources/news/20200313_covid-19.jsp. As part of its Phase One response to coronavirus/COVID-19, BOP began to study "where the infection was occurring and best practices to mitigate transmission." *Id.* In addition, BOP set up "an agency task force" to study and coordinate its response to coronavirus/COVID-19, including using "subject-matter experts both internal and external to the agency including guidance and directives from the [World Health Organization (WHO)], the [Centers for Disease Control and Prevention (CDC)], the Office of Personnel Management (OPM), the Department of Justice (DOJ) and the Office of the Vice President. BOP's planning is structured using the Incident Command System (ICS) framework." *Id.*

On Friday, March 13, 2020, BOP, after coordination with the Department of Justice and the White House, implemented its Phase Two response "in order to mitigate the spread of COVID-19, acknowledging the United States will have more confirmed cases in the coming weeks and also noting that the population density of prisons creates a risk of infection and transmission for inmates and staff." *Id.* BOP's national measures are intended to "ensure the continued effective operations of the federal prison system and to ensure that staff remain healthy and available for duty." *Id.* For example, BOP (a) suspended social visits for 30 days (but increased inmates access to telephone calls); (b) suspended legal visits for 30 days (with case-by-case accommodations); (c) suspended inmates movement for 30 days (with case-by-case exceptions, including for medical treatment); (d) suspended official staff travel for 30 days; (e) suspended staff training for 30 days; (f) restricted contractor access to BOP facilities to only those performing essential services, such as medical treatment; (g) suspended volunteer visits for 30 days; (h) suspended tours for 30 days; and (i) generally "implement[ed] nationwide modified operations to maximize social distancing and limit group gatherings in [its] facilities." *Id.* In addition, BOP has implemented screening protocols for both BOP staff and inmates, with staff being subject to "enhanced screening" and inmates being subject to screening managed by its infectious disease management programs. *Id.* As part of BOP's inmate screening process, (i) "[a]ll newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms"; (ii) "[a]symptomatic inmates with exposure risk factors are quarantined; and (iii) "[s]ymptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols." *Id.*[5]

Accordingly, BOP has established and implemented significant protocols to protect the health and safety of Smith and other defendants in its custody.

2. The Defendant's Health Conditions Do Not Require His Release

The defendant claims that because of his alleged health conditions, including celiac disease and a hernia, he is particularly vulnerable to COVID-19. (March 25 Letter at 7-8). But the defendant offers no evidence documenting his conditions or their severity nor any support for his claims

---

Care Delivery, available at https://www.bop.gov/resources/pdfs/pan_flu_module_3.pdf; *Module 4: Care for the Deceased*, available at https://www.bop.gov/resources/pdfs/pan_flu_module_4.pdf.

[5] Thus, the defendant's assertion that "there are no general screening protocols in place," (*See* March 25 Letter at 7), at MCC is incorrect. The defendant further asserts that COVID-19 tests are not available on site at MCC. (*See id.*). The availability of COVID-19 tests is generally limited nationwide, and BOP is working to test inmates where needed.

regarding the relationship between those conditions and his vulnerability to COVID-19.[6] Nor does the defendant offer any evidence that BOP's established protocols and procedures will be unable to effectively test and treat him, particularly in light of the extensive efforts and planning that BOP has made and is making, as detailed above.

3. The Cases Relied Upon by Smith Do Not Support His Release in this Case

Finally, the defendant's reliance on *United States v. Raihan*, No. 20-CR-68 (BMC) (E.D.N.Y. Mar. 12, 2020), *United States v. Santiago Ramos*, 20-CR-04 (ER) (S.D.N.Y. Mar. 19, 2020), and *United States v. Stephens*, No. 15-CR-95 (AJN) (S.D.N.Y. Mar. 19, 2020) (ECF Doc. No. 2798), is misplaced. (*See* March 25 Letter at 7).

In *Raihan*, the defendant had previously been released on bail and had tested positive for drugs while on bail. The Government sought detention based on that drug use, but the court denied the motion, holding that sending the defendant into the MDC would potentially put the community within the MDC at risk. The court emphasized that the defendant was "not doing something to affirmatively endanger people" and that the court was "hesitant to respond to drug usage with incarceration." Here, the defendant is already in custody and therefore the specific concern animating the court in *Raihan* does not apply.

In *Santiago Ramos*, the defendant produced medical records confirming that he was HIV positive, which made him immunocompromised and therefore particularly susceptible to the more serious consequences of COVID-19.

In *Stephens*—a violation of supervised release proceeding involving a defendant accused of possessing a firearm while on supervised release—Judge Nathan released a previously detained defendant after finding that "the strength of the primary evidence relied upon by the Government to demonstrate the danger the Defendant poses to the community has been undermined by new information not available to either party at the time of [the prior detention] hearing." Specifically, while the Government had previously argued that the defendant had possessed a loaded firearm in proximity to drugs, new facts showed that the arresting officer had "identified a different individual as holding the bag that contained the firearm." In stark contrast, in the instant case, the essential facts surrounding the defendant's risk of flight that were the basis for detention at his July 2019 hearing—his demonstrated efforts to sell his significant assets, flee to Canada, and fight extradition for over a decade—remain and establish a significant risk of flight. Indeed, the only circumstances that have changed since the defendant's remand in July 2019 is that he has pled guilty to a serious felony and the Probation Office has recommended that the defendant serve an incarceratory sentence of 36 months, which point to an increased risk of flight and need for continued detention.

As for the risks to the defendant from the COVID-19 pandemic, Judge Nathan specifically declined to rule on whether the health risks from the pandemic presented a "compelling reason necessitating [the defendant's] release." In that regard, Judge Nathan's ruling is consistent with a growing body of decisions in this District rejecting applications for bail based on generalized

[6] The defendant reported to the Probation Office simply that he is allergic to wheat and needs glasses to read. (PSR ¶ 101). He reported that he has scars on his shoulder due to a rotator cuff injury and his groin from a hernia surgery. (*Id.* ¶ 100).

assertions relating to COVID-19. *See United States v. Bradley*, 19 Cr. 632 (S.D.N.Y. Mar. 25, 2020) (Daniels, J.) (denying bail application for inmate detained in MCC on controlled substances and firearm charges who had recently experienced a stroke and had high blood pressure); *United States v. Rivera*, 20 Cr. 6 (S.D.N.Y. Mar. 25, 2020) (Rakoff, J.) (denying bail application for inmate detained in MCC on controlled substance charge who had a childhood history of asthma); *United States v. White*, 19 Cr. 536 (S.D.N.Y. Mar. 25, 2020) (Castel, J.) (denying bail application for inmate detained at Valhalla on controlled substance and Hobbs Act charges with history of whooping cough); *United States v. Alvarez*, 19 Cr. 622 (S.D.N.Y. Mar. 24, 2020) (Cote, J.), ECF No. 17 (denying bail application for inmate detained in MCC on controlled substances charges who had been diagnosed with Hepatitis B); *United States v. Acosta*, 19 Cr. 848 (S.D.N.Y. Mar. 25, 2020), ECF No. 14 (Buchwald, J.) (denying bail application for inmate detained in MCC that "reli[ed] mainly on a form letter proffering general reasons to release inmates because of the spread of the COVID-19 virus).

Furthermore, in *Stephens*, Judge Nathan found release appropriate under Section 3142(i) because the defendant had proffered specific, unrebutted facts demonstrating that the precautions taken by the BOP were impeding his ability to prepare for a hearing scheduled for March 25, 2020. Here, by contrast, for all the reasons set forth above, the defendant has not overcome the statutory presumption of his risk of flight, and the Government has met its burden of demonstrating the defendant's risk of flight. Moreover, unlike the defendant in *Stephens*—who demonstrated that he was unable to prepare for a "merits hearing" scheduled just *one week* in the future—Smith has already been convicted and has no upcoming evidentiary hearing or trial for which to prepare; his sentencing proceeding is presently scheduled for a date over two months from now, on June 4, 2020.

E. Conclusion

For all of the reasons set forth herein, the Court should deny the defendant's motion for bail.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: /s/
Timothy V. Capozzi
Assistant United States Attorney
(212) 637-2404

cc: Defense Counsel (via ECF)