No. 21A-_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

UNITED STATES OF AMERICA,

v.

DESLOUIS EDOUARD, JR.
APPLICANT

_____

APPLICATION FOR BAIL PENDING TRIAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

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PARTIES TO THE PROCEEDING

The applicant(defendant-appellant below) is Deslouis Edouard, Jr.

The respondent (appellee below)is the United States of America.

RELATED PROCEEDINGS

None

IN THE SUPREME COURT OF THE UNITED STATES

_____

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DESLOUIS EDOUARD, JR.

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APPLICATION FOR BAIL PENDING TRIAL
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_____

Pursuant to the Rules of this Court, Applicant, Deslouis Edouard, Jr., respectfully applies for Bail Pending Trial:

STATEMENT OF FACTS

Defendant is Deslouis Edouard, Jr. Defendant is a citizen and resident of the Commonwealth of Pennsylvania residing in Bethlehem, Pennsylvania.

According to the government, defendant used false names to rent apartments and obtain utility services. Defendant was alleged to have lived in the apartments and failed to pay the landlord and utility bills. When faced with eviction, defendant left the apartment. This was alleged to have happened on four (4) occasions. Defendant was alleged to have opened cellphone accounts and bought Apple products with

stolen identities. Defendant allegedly purchased a 2016 Audi Q5 for approximately $32,000.00, using another individual's identity. Upon a search of his premises, the government is alleged to have found stolen information and other fruits of defendant's crime.

According to the government, defendant's sentencing guidelines are between 46 and 57 months plus a twenty-four (24) month mandatory minimum. The loss amount according to the government is $522,000.00. Defendant has no prior criminal record.

PROCEDURAL HISTORY

On or about October 21, 2020, defendant was indicted by the Grand Jury and was charged with the following: two (2) counts of violating 18 U.S.C. § 1341 (mail fraud); two (2) counts of violating 18 U.S.C. § 1343 (wire fraud); one count of violating 18 U.S.C. § 1029(a)(2) (access device fraud); one (1) count of violating 18 U.S.C. § 1029(a)(4) (possessing device making equipment); and four (4) counts of

violating 18 U.S.C. § 1028(a)(1), (c)(4) and (c)(5) aggravated identity theft.

On January 17, 2021, defendant was arrested in Miami, Florida. Defendant was taken before the Honorable Magistrate Judge Alicia O. Valle of the United States District Court for the Southern District of Florida (Fort Lauderdale), 21-mj-06019. On January 19, 2021, defendant had an initial appearance before Judge Valle. On January 22, 2021, defendant appeared before Judge Valle and waived identity and removal hearing. On January 22, 2021, the criminal case was transferred to the Eastern District of Pennsylvania. It is believed defendant remained incarcerated in Florida for the next three (3) months. Thereafter, he was taken to Oklahoma and then returned to the Eastern District of Pennsylvania.

On May 14, 2021, defendant appeared before the Honorable Marilyn Heffley, U.S.M.J., for an initial appearance. Judge Heffley ordered defendant temporarily detained. On May 18, 2021, the United

States filed a Motion for Pretrial Detention. On May 21, 2021, defendant filed a response to the Motion for Pretrial Detention.

On May 21, 2021, defendant appeared before the Honorable Carol Sandra Moore Wells, U.S.M.J., for arraignment and pretrial detention. Judge Wells ordered defendant detained pending trial. Judge Wells did not conduct any real legal analysis in her decision to detain defendant other than stating "I'm not comfortable." (N.T. May 21, 2021, at 18:16-18.).

On June 1, 2021, the undesigned was retained to represent defendant. On June 2, 2021, Defendant moved to vacate Judge Wells' Order for Pretrial Detention and order defendant released on conditions, including O/R bond. On June 28, 2021, a hearing was held, via video communication before the Court with defendant present via video. On July 1, 2021, the Honorable Jeffrey Schmehl, U.S.D.J. denied the Motion to Vacate. Defendant timely files the within appeal of Judge Schmehl's Order. The District Court found that

defendant had knowledge of being indicted and "went dark". Id. at 5. The Court denied the motion ostensibly based upon the length of defendant's potential exposure and the weight of the evidence against him noting there were no conditions to assure his appearance. Id. at 7.[1]

On July 9, 2021, Appellant filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. On July 27, 2021, the Third Circuit denied the Motion for Bail Pending Trial.

On June 4, 2021, notice was filed of a jury trial for July 26, 2021. On June 29, 2021, the Government filed a Motion to Continue the trial date and to Exclude Time under the Speedy Trial Act. On June 30, 2021, the trial court granted the government's motion and relisted the trial for September 27, 2021.

[1] Both the Magistrate Judge and the District Judge denied the defendant bail based upon reasons that run headlong into binding Circuit precedent. See United States v. Himler, *supra* (forbidding District Courts from denying bail based upon potential length of sentence when it is not a "presumption case." There is no direct evidence defendant was ever apprised of the filing of the indictment.

PERSONAL BACKGROUND OF DEFENDANT, DESLOUIS EDOUARD, JR.

Axiomatically, defendant is a non-violent individual who has never had trouble with the law. He is an American Citizen with strong ties to the United States. Defendant was born in Miami, Florida to a Haitian father and a mother who was born in Guadalupe. Unfortunately, defendant's father passed away in June, 2020. As will be discussed below, defendant returned to Florida for his family following his father's passing. Defendant has several brothers and sisters all of whom reside in the United States. Defendant remained in Florida for much of his formative years, eventually leaving Florida and setting down roots in the Allentown, Pennsylvania. Defendant obtained his CDL license from Tennessee and started operating trucks out of Pennsylvania. Defendant has one (1) child, approximately four (4) years of age. Defendant maintains a good relationship with the child's mother. Defendant has not expressed nor is there any indication defendant has a substance abuse problem or drinking

problem. Similarly, defendant is not and has never been on probation, parole and / or supervised release.

LEGAL STANDARD

When analyzing the Bail Reform Act this Court "must make an independent determination with respect to the statutory criteria for detention or release." Himler, 797 F.2d at 159 (citing United States v. Perry, 788 F.2d 100, 104 (3d. Cir. 1986)). This Court cannot "ignore the trial court's supporting statement of reasons for the action taken", but may "reach a different outcome . . . [and] amend or reverse the detention decision." Himler, 797 F.2d at 159 (citing Delker, 757 F.2d at 1400).

Pursuant to the Bail Reform Act, the court must order the pretrial release of a defendant on personal recognizance or unsecured appearance bond "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). Pretrial

detention may be ordered where, after a hearing upon motion by the government, a "judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C § 3142(e).

Should the Court impose conditions of release, they should be "the least restrictive" conditions that the Court "determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C.§ 3142(c)(1)(B). In evaluating whether conditions of release are adequate to satisfy the mandate of the Bail Reform Act, the Court shall consider: 1) the nature and circumstances of the offense charged; 2) the weight of the evidence against the person; 3) the history and characteristics of the person; and 4) the nature and seriousness of the danger to any person and the community that would be posed by the person's release. 18 U.S.C.§ 3142(g). The government must prove

dangerousness to the community by clear and convincing evidence and risk of flight by preponderance of the evidence. United States v. Himler, 797 F.2d 156, 160-161 (3d Cir 1986); 18 U.S.C.§ 3142(f).

The Bail Reform Act allows a court to detain an individual not lawfully present in the United States "so that immigration . . . officials can take custody of such individuals before [Bail Reform Act] conditions are set." United States v. Nunez, 928 F.3d 240, 244 (3d. Cir. 2019); 18 U.S.C. § 3142(d). The temporary detention is for a period of 10 days and the Court must determine that the defendant "may flee or pose a danger to any person or the community." 18 U.S.C. § 3142(d)(2). "Other than during this temporary detention period, individuals release arising from other offenses and non-citizens are treated the same as other pretrial criminal defendants under the [Bail Reform Act]." Nunez, 928 F.3d at 244-245.

LEGAL ARGUMENT

I. APPELLANT, DESLOUIS EDOUARD, JR IS NOT A RISK OF FLIGHT AND PRETRIAL DETENTION IS UNNECESSARY

As a threshold matter, Appellant, Deslouis Edouard, Jr. is being asked to be released on a personal recognizance bond. Defendant has proposed conditions of release that would satisfy the requirements of the Bail Reform Act. It has never been alleged Appellant is a danger to the community or others. The proposed conditions of release provide adequate assurance that he would appear in court as required and addressed any concerns about risk of flight. He proposes the following conditions of release, which we respectfully submit satisfy the requirements of the Bail Reform Act:

1) Defendant shall comply with the requirements of 18 U.S.C. § 3142(c)(1);

2) Anthony Andoll shall act as custodian and provide reasonable assurance to the court that defendant will appear as required and as directed by 18 U.S.C. § 3142(c)(1)(B)(i);

3) Defendant's passport shall remain in the custody of the FBI and/or Pretrial Services during this period of temporary release and throughout the pendency of this case; and

4) Defendant shall sign an O/R bond of $50,000.00;

Our submission is that the proposed conditions of release are adequate to assure Appellant's appearance at all future court proceedings and safety of the community. 18 U.S.C.§ 3142(g).

A. Nature and Circumstances of the Offense Charged

The court is to consider the nature and circumstances of the offense charged, including whether the offense is a crime of violence. Defendant is accused of Aggravated Identity Theft, a non-violent offenses. Because defendant's non-violent fraud related charges involve only $552,000.00, the offense is not sufficiently serious; therefore this factor weighs in defendant's favor. See United States v. Reese, 2019 U.S. Dist. LEXIS 120, 127 (E.D.Pa. 2019).

B. Weight of the Evidence Against Defendant, Deslouis Edouard, Jr.

The government contends they have a mountain of evidence against Defendant and defendant has already met with the government and engaged in a "proffer" regarding

the facts and circumstances alleged in the indictment. However, this factor alone does not necessarily amount to a rejection of the request for release from pretrial detention. The other factors should be taken into consideration as well.

C. History and Characteristics of Defendant, Deslouis Edouard, Jr.

As noted above, defendant is an American citizen with strong ties to the United States. Defendant is a native of Miami, Florida. His father, who has since passed away was from Haiti and his mother is from Guadalupe. Defendant remained in Florida for much of his formative years, eventually leaving Florida and setting down roots in the Lehigh County / Northampton area. Defendant has a commercial driver's license. He is the father of a four (4) year old child. Again, he does not have either a drinking or drug problem.

By way of background, defendant's property was raided by the F.B.I., in or around January, 2020. Defendant was not arrested. Following the raid, ostensibly, the government having reviewed the fruits

of the raid reached out to defendant, through his attorney at that time, Robert Goldman, Esquire. Defendant and his attorney made the decision to engage in a proffer with the United States Attorney's Office. The proffer was conducted, in or around May, 2020. Defendant was represented by Robert Goldman, Esquire at the proffer. Following the proffer, a plea agreement was circulated between the parties. Defendant did not execute the plea agreement.

In June, 2020, defendant's father passed away while living in Florida. Defendant was living in Allentown area at the time of his father's passing. On or about June 22, 2020, Defendant returned to Florida in order to be with his family and pay his respects to his father. Defendant's mother, who was residing in Florida was present and defendant made the decision to stay with her in Florida as his mother was suffering from various medical conditions and defendant wanted to be present for her in Florida. Defendant never attempted to evade the authorities. Defendant remained

in Florida until the time of his arrest. Moreover, at the time of his arrest, defendant was not in possession of any large sums of money.

In October, 2020, defendant was indicted by the government on these economic crimes. Defendant was unaware of the indictment and did not return to the Philadelphia area nor did defendant secret himself away in Florida. Defendant simply went along living his life not knowing, if and when, the government would indict him. To say defendant was evading capture would be a serious overstatement of what took place here. Defendant did not travel outside the country, in fact, he has not been out of the country since he was a minor. Further, the government is in possession of his passport and he is unable to travel. There is simply no risk of flight at present.

The government may maintain defendant failed to keep in touch with attorney Goldman, however, this is not the case. Defendant was in touch with the attorney regarding the plea agreement and the fact he would not

sign the plea agreement as he was not satisfied with the plea and it was not being adequately explained to him. Defendant would have no reason to know when an indictment would be coming or if an indictment would be coming. Defendant should not be held to have the burden of inquiry in this respect. Defendant's attorney at the time never communicated to him that he had been indicted or that he was required to return to the Eastern District. At the time of his arrest for a motor vehicle stop, defendant provided the officer with his identity through a driver's license. Finally, upon being arrested, defendant voluntarily agreed to return to the Eastern District. If defendant was truly attempting to evade being captured, he would have never voluntarily submitted his actual driver's license to the arresting officer. Implicitly, this would establish defendant was unaware he had been indicted or there was a warrant for his arrest. Moreover, defendant has never made any admissions about fleeing prosecution, nor does defendant have the knowledge,

ability or resources to assume a different identity or somehow travel outside the United States.

D. The Nature and Seriousness of the Danger to Any Person or the Community

Defendant poses no danger to any person or the community. There are no allegations of violence nor has the government proffered any evidence in this or the related case that any violence or threat of violence was involved in the alleged conduct at issue.

As the Court noted in Himler, "[w]hile it is true that the defendant stands accused of unlawful deceit, there is, of course, no *per se* presumption of flight when the crime charged involves the production of fraudulent identification." Id. at 797 F.2d 156, 161. Likewise, the government's argument for detention i.e., risk of flight is based upon pure speculation. The Himler court held "the statute does not authorize the detention of the defendant based on danger to the community from the likelihood that he will if released commit another offense involving false identification."

Id. at 160. Again, there is no basis for a finding that defendant poses a serious risk of flight.

II. VIOLATION OF THE SPEEDY TRIAL ACT UNDER 18 U.S.C. § 3164(c)

18 U.S.C.§3164(c) provides that failure to commence trial of a detainee through no fault of the accused or his counsel, shall result in the automatic review by the court of the conditions of release. No detainee shall be held in custody pending trial after the expiration of a ninety (90) day period. In the present case, Mr. Edouard was entitled to have trial commencing "no later than ninety days" following his detention on January 17, 2021. Defendant initially did not file any motions (other than the motion to vacate), therefore the failure to proceed to trial by mid-July, 2021, was in no way attributable to him. See U.S. v. Mendoza, 663 F. Supp. 1043 (D.N.J. 1987).

It should be further noted that the statute unconditionally mandates release from custody in all cases wherein defendants have not been brought to trial within ninety (90) days of arrest. 18 U.S.C.§ 3164.

See United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976) holding "the language of § 3164 is straightforward. We find no ambiguity in its interpretation…Under the clear, language of the statute the reason for delay is irrelevant, so long as it is not occasioned by the accused or his counsel." Id. at 1299. The legislative history, moreover, make it clear that release of the defendant from custody and nothing less, is the sanction for delay beyond the ninety-day period. "Failure to commence the trial of a detained person under this section results in a person already under detention, released from custody", S. Rep. No. 1021, 93d Cong., 2d Sess., reproduced in 4 U.S. Code Cong. and AD. News 7401, 7416 (1974)." The Tenth Circuit in United States v. Theron, 782 F.2d 1515, 1516 (10th Cir. 1986), found that four months incarceration without bail or trial demands release.

This Court should vacate the Order denying Pretrial Release and order Deslouis Edouard, Jr., be released within 48 hours of the filing of this opinion. See

Tirasso, Id. at 1301 (ordering the District Court to release the Appellant within 48 hours of the filing of this opinion).

III. DUE PROCESS VIOLATION

The District Court made no findings concerning any aspects of a due process violation of Defendant's protections. This Court has ruled that where excessive length of pretrial detention, triggers due process concerns, a district court must, at a minimum require a "fresh" proceeding at which more is required of the government than is mandated by § 3142. See United States. v. Accetturro, 783 F2d 382, 388 (3rd Cir. 1986), where the court found in order to avoid transforming pretrial detention into a punitive vehicle through excessive prolongation, at some point a pretrial detainee denied bail must be tried or released citing United States v. Gonzalez-Claudio, 806 F.2d 334 (2nd Cir. 1986).

In this case, Defendant has been confined for almost six (6) months when this appeal will be heard.

The trial date has been scheduled for September, 2021, and it is guesstimated that a trial date could be further continued. This would mean that Defendant would remain incarcerated for over nine (9) months without a trial. As previously noted the total advisory guidelines range is for months' imprisonment. A twenty-four (24) month sentence for Identity Theft Detention that has lasted six (6) months, and without speculation, is scheduled to last considerably longer, points strongly to a denial of due process.

The question is who bears responsibility for the length of the pretrial delay that has already occurred in the case *sub judice.*

As in Gonzales-Claudio, *supra*, the court reasoned "We need not determine with precision the amount of pretrial delay attributable to the prosecution, nor assess the extent to which the Government may have been at fault in contributing to the delay. It suffices for present purposes to conclude that the Government even it not deserving of blame, bears a responsibility for a

portion of the delay significant enough to add considerable weight to the defendants' claim that the duration of detention has exceeded constitutional limits." Id. at 342-343.

See United States. v. Hall, 651 F. Supp. 16 (N.D.NY. 1985) where the court's decision was also influenced by the potential length of defendant's incarceration. Preventive detention for many months without a finding of guilt, raises a serious constitutional question. See also United States v. LoFranco, 620 F. Supp. 1325 (N.D. NY. 1985) wherein the court determined if the detention order remains in effect until trial, defendant will have been imprisoned without trial for at least nine and a half (9½) months, which would violate the due process of law.

This is not a complex case. Defendant has never been deemed a risk of flight by the preponderance of the evidence. Defendant has no history of violence or failure to appears in his background and the alleged offense is non-violent.

Defendant is asking this Court to fix a timetable beyond which no person can be held in pretrial detention on the ground of risk of flight. The timetable should not be extended for reasons attributable to any factor other than that detainee's own waiver. Failure to comply would only result in a defendant's release pending trial under appropriate conditions. This suggestion is hardly radical since it was in use for 200 years. A long period of pretrial detention without a finding of guilt, based solely on risk of flight, desecrates the notion that a defendant is innocent until proven guilty. This Court has the means to remedy the abridgment of liberty of the presumption of innocence. In various circumstances this Court has used its inherent supervisory powers to establish rules that will effectuate a defendant's constitutional rights. See e.g., Gov't. of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980) where in finding a court's inherent power to protect defendant's compulsory process rights by conferring immunity on an

essential witness. United Sates v. Moskow, 588 F.2d 882 (3rd Cir. 1978). Supervisory powers available to review conditional plea, United States v. Starks, 515 F.2d 112 (3rd Cir. 1975). Supervisory power used to recommend that District Court conduct a voir dire of jurors whenever possibility of juror prejudice arises.

See generally Schwartz, The Exercise of Supervisory Power by the Third Circuit Court of Appeals, 27 Vill.L.Rev. 506 (1982). As the Supreme Court has stated, "Judicial supervision of the administration of Criminal Justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." Such standards are not met without affirmative action. If this Court does not establish rules that will vindicate a detainee's loss of his or her liberty interests during pretrial incarceration which will be irreparable if she/he is subsequently found innocent, then for whom? Defendant suggests to this Court to follow suit with the other Courts of Appeals who have set deadlines. See Theron,

782 F.2d 1515 (10th Cir. 1986). (Four months additional incarceration before trial is too long.) U.S. v. Gonzales-Claudio, 806 F.2d 340 (2nd Cir. 1986).

The District Court made no findings regarding this constitutional question, but Appellant seeks that the Court decide and resolve the question without remanding to the District Court for such findings. This Court needs to do so for two reasons. First the significant length of time that pretrial detention has already lasted and is currently scheduled to last makes it appropriate to avoid further delays in the resolution of the Appellant's constitutional claims, since the record permits the Court to do so. Second there are sufficient undisputed circumstances concerning the Government's responsibility for a period of the pretrial delay to permit adequate consideration of this facet of the constitutional issue without additional fact finding. See Gonzales-Claudio, *supra* at 341. Relief in this type of case must be speedy if it is to be effective. Stack v. Boyle, 342 U.S. 1 (1951).

Appellant also asks that the Court find that all of the delay from January 17, 2021, through present, is attributable to the Government. See United States v. Bert, 801 F.3d 125 (2nd Cir. 2016), institutional delays are attributable to the Government. United States v. Roberts, 515 F.2d 642 (2nd Cir. 1975), United States v. West, 164 U.S. App. D.C. 184, 504 F.2d, 253 (D.C. Cir. 1974). Although the country has suffered with and impacted by a pandemic, that does not absolve the Government of their duty under the 6th Amendment to bring defendant to trial in a speedy and timely manner, notable seventy (70) days from Indictment. The Courts were open in July 2020, and a trial court have occurred, but the Government chose instead to sit back and stand silent and idle. Thus the period mentioned above should be attributable to the Government. See Barker v. Wingo, 407 U.S. 514 (1972) holding that delay by the courts are attributable to the Government, but weighed less heavily than intentional delays.

Traditionally, Federal law has provided that a person arrested for a non-capital offense shall be admitted to bail. Stack v. Boyle, *supra*. Only in rare instances should release be denied. Sellers v. United States, 89 S. Ct. 36 (1968). Doubts regarding the propriety of release should be resolved in favor of the defendant. Herzog v. United States, 75 S. Ct. 349 (1955). United States v. McGill, 604 F.2d 1252 (9th Cir. 1979) cert denied 444 U.S. 1035 (1980). See also United States v. Motamedi, 767 F.2d 1403 (9th Cir. 1985) (granting bail and reversing lower court).

Defendant requests that the Court find a due process violation and order him released. Defendant further asks the Court to announce a rule that no detainee shall remain detained after 4 months of pretrial incarceration, as long as the delay was not caused or requested by a defendant.

Defendant seeks and asks that the ruling that defendant is not a risk of flight within the meaning of § 3142 should be entered. The Court should also find

that Defendant's Speedy Trial Rights under § 3164 have been violated. The Court should further conclude that a due process violation has occurred and fashion a remedy or rule for this Circuit wherein no defendant can be held in pretrial detention longer than 6 months through no fault of his or her own.

CONCLUSION

Therefore, for all of the foregoing reasons, it is respectfully requested this Honorable Court grant Applicant, Delouis Edouard, Jr.'s Application for Bail Pending Trial.

Respectfully submitted.

AUGUST, 2021

JONATHAN J. SOBEL, ESQUIRE