UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT S. KELLY,

Defendant-Appellant

APPEAL FROM A DETENTION ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY MEMORANDUM OF LAW IN SUPPORT OF ROBERT S. KELLY'S MOTION FOR RELEASE FROM PRETRIAL DETENTION

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ARGUMENT

I. The District Court Clearly Erred in Denying Mr. Kelly's Temporary Release Because He Is Eligible Under 3142(i)

"The right to consult with legal counsel about being released on bond, entering a plea, negotiating and accepting a plea

agreement, going to trial, testifying at trial, locating trial witnesses, and other decisions confronting the detained suspect, whose innocence is presumed, is a right inextricably linked to the legitimacy of our criminal justice system. *United States v. Chandler*, No. 1:19-CR-867 (PAC), 2020 WL 1528120, at *2 (S.D.N.Y. Mar. 31, 2020) (*citing Fed. Defs. of N.Y. v. Fed. Bureau of Prisons*, 954 F.3d118, 134 (2d Cir. 2020); *United States v. Salerno*, 481 U.S. 739, 755, (1987)("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.")). These seemingly simple thoughts, that an individual is presumed innocent; that an individual should not be incarcerated people he has his day in court; and that, no matter how damning the allegations a defendant appear, he is entitled to a fair fight with adequate preparation - were seemingly wholly inconsequential to the trial court in Mr. Kelly's case. Instead, he is now facing a September 2020 trial date, for which he will be completely unable to prepare, in light of the COVID-19 crisis and the trial court's Order requiring him to be detained.

Here, the District Court erred in denying Mr. Kelly's release because, under Section 3142(i), Mr. Kelly clearly met the standard for release. The District Court ruled, "I have found that the defendant has

not presented compelling reasons for his release under § 3142(i) in part because he is not uniquely at risk for contracting severe illness from COVID-19. . . Section 3142(i) has been used sparingly to permit a defendant's release where, for example, he is suffering from a terminal illness or serious injuries." (Ex. H at 7-8). The District Court was plainly wrong. The District Court erred by not considering that § 3142(i)(4) should be applied in Mr. Kelly's case, given the fact that the COVID-19 pandemic has had an direct and compelling impact on Mr. Kelly's ability to present a defense - which satisfies § 3142(i). *United States v. Kennedy*, E.D. MI., No. 18-20315, March 27, 2020 p. 11.

More importantly, the Court in . *Kennedy* determined that even if the, "Defendant did not have a heightened susceptibility to COVID-19, the public health crisis-and its impact on Defendant's ability to present a defense-nonetheless satisfies § 3142." *Id.*

. Based on the District Court's ruling even if Mr. Kelly was not considered to have a heightened susceptibility to COVID-19 the District Court erred because it is unequivocal that the pandemic is impacting his ability to present a defense which satisfies § 3142. The District Court

ruled, "Release is necessary in order to allow Defendant to adequately prepare and consult with defense counsel for these proceedings." Id.

The Government concedes in its Response that a court my grant temporary relief pursuant 18 U.S.C. § 3142(i). The statute provides, in part, "The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason." (GA:60).

While Mr. Kelly is arguably high-risk for contracting COVID-19 (he now has a confirmed diagnosis of diabetes), the trials courts have generally *not*, as the trial court did here, required that a detainee actually be classified as high-risk as a prerequisite to granting release from detention. Under §3142(i), the question is whether release is necessary for the preparation of the person's defense [or for another compelling reason]. Accordingly, this Court does not even need to reach the issue of how the COVID-19 pandemic is personally affecting Mr. Kelly's health in order to determine that release from custody is appropriate. Release is clearly s necessary for the preparation of his defense. *See, e.g., United*

States v. Thornton, 787 F.2d 594, 594 (6th Cir. 1986) (suggesting that a district court can temporarily release a detainee pursuant to § 3142(i)(4), even after a prior order holding that the detainee was a flight risk or a risk to public safety); *United States v. Stephens*, No. 15-cr-0095, 2020 WL 1295155, *3 (S.D.N.Y. Mar. 19, 2020) (holding that 18 U.S.C. § 3142(i)(4) constitutes a "separate statutory ground" for post-conviction release, and that Defendant's inability to communicate regularly and effectively with counsel in light of BOP's visitation policies satisfied requirements for release under § 3142(i)).

Those rulings speak directly to the case at bar because Mr. Kelly needs to prepare a defense for his two federal criminal cases, in this judicial District and in the Northern District of Illinois. Other than writing that Mr. Kelly would have an adequate opportunity to prepare before his September 2020 trial (which seems difficult, even if he is released, and impossible if he is not released, given the current climate), the trial court did not even otherwise discuss or address Mr. Kelly's ability to prepare for trial and the impact of COVID-19 in its last denial Order of May 15, 2020. (Ex. H)

Presently, the EDNY case is scheduled for jury selection to begin on September 14, and for trial to begin on September 29, 2020. It is impossible for defense counsel to prepare with Mr. Kelly for that impending trial if he remains in custody. Add to the mix the fact that Mr. Kelly has literacy issues, which create an additional hurdle to trial preparation.

II. Mr. Kelly's Continued Detention Violates His Right to Counsel and Right to Assist in His Defense

The Government claims in its Response that Mr. Kelly's assertion that his constitutional right to have access to his counsel and to assist in his own defense has not been (and will not continue to be) reduced is "without merit." That position entirely ignores, and is contrary to, the realities of the current situation. The Government well knows and understands that Mr. Kelly currently does not have and has not had for a period of many months, any meaningful access to his counsel and cannot under the current circumstances assist in his defense, at all.

It is incongruous that the Government cites United *States v. Shipp*, No. 19-CR-29 (NGG), 2020 WL 3642856, at *4 (E.D.N.Y. July 6, 2020), for the proposition the *status quo* is just fine and thus state that "[E]very pandemic-era decision of which the court is aware has found that

temporary restrictions on attorney visits and legal calls is reasonable in light of the global pandemic and the threat it poses to inmates, residents of New York City, and the nation at large," completely ignoring what immediately followed in that decision:

> Finally, Mr. Shipp contends that his release is required under the Bail Reform Act. (Mot. at 5-6.) 18 U.S.C. § 3142(i) allows the court to 'permit the temporary release of the person' if the court 'determines such release to be necessary for preparation of the person's defense or for another compelling reason.' Pandemic era decisions applying this provision have ordered the temporary release of a pretrial detainee when it was necessary to enable him to prepare for an imminent proceeding. See, e.g., United States v. Chandler, —— F. Supp. 3d ——2020 WL 1528120, at *1 (S.D.N.Y. 2020) (ordering release pursuant to § 3142(i) in light of the jail suspending attorney contact other than short, non-private phone calls and where trial was scheduled to begin in roughly six weeks); United States v. Stephens, —— F. Supp. 3d. ——,2020 WL 1295155, at *3 (S.D.N.Y. 2020) (ordering release to allow defendant to prepare for a hearing that was less than a week away). However, courts have uniformly declined to temporarily release detainees in the absence of an imminent trial or hearin.7 See, e.g., United States v. Mercado, No. 19-CR-906 (JMF),2020 WL 2765879, at *1 (S.D.N.Y. May 28, 2020) (finding temporary release unnecessary for the preparation of defense when the 'trial [was] unlikely to occur for many months'); United States v. Peralta, No. 19-CR-818 (PGG), 2020 WL 2527355, at *4 (S.D.N.Y. May 18, 2020) (denying release when trial was not imminent, even though defendant spoke with counsel on the phone only once in nearly three months); United States v. Jimenez, No. 20-CR-122(LTS), 2020 WL 1974220, at *3 (S.D.N.Y. Apr. 24, 2020) (denying release because, inter alia, trial was not imminent).

> As explained above, Mr. Shipp's trial is not imminent, and his release would pose a danger to the community. Therefore, the court declines to order his release pursuant to § 3142(i). As with his due process claim, this analysis may change over time, and Mr. Shipp may refile his motion if a trial date is set and he is still unable to meaningfully participate in his own defense.

United States v. Shipp, No. 19-CR-29 (NGG), 2020 WL 3642856, at *4 (E.D.N.Y. July 6, 2020).

Mr. Kelly falls into the latter category; trial is imminent, and he cannot prepare. His situation is no different than the cases cited in *Shipp* where release was ordered to allow the defendant to prepare for trial. There is no distinction between those circumstances and those that Mr. Kelly faces.

The idea put forth by the Government, and agreed to by the trial court, that a federal criminal defendant could prepare for this case with the restrictions now in place is entirely without merit. Frankly, Mr. Kelly could not prepare for a disorderly conduct trial with these restrictions in place.

The reality of the situation is that none of his attorneys have been able to personally visit with him, face-to-face, for nearly four months. That is a situation that has existed and is expected to continue to exist,

given that there is no certainty as to when the BOP is going to resume face-to-face consultations. One wonders how the Government would like to prepare for a trial, any trial, let alone one of this magnitude, with mounds of discovery dating back decades, without the ability to sit down and speak with its agents, witnesses, or victims. That would never happen, and the trial court would never force the Government to trial under such circumstances. It is an impossible task. And while the Government seems to take solace in the trial court's consolation that the defendant and his lawyers will "as conditions return to normal, [have] additional time to prepare for trial" (G. Resp. p. 26), the simple fact is that there is a September 2020 trial date fast approaching and no indication things are going to return to normal at any time before that.

Even when things "return to normal," Mr. Kelly's attorneys are going to be amongst dozens of attorneys trying to personally visit hundreds of federal detainees. There is no chance of adequate availability for them to have the kind of meaningful dialogue required to prepare for trial. Certainly, there will not be an opportunity to make up for the four lost months. Coupled with the inevitable deluge of materials that the Government is certain to disclose as the trial approaches, any

notion that Mr. Kelly and his counsel will be able to adequately prepare becomes palpably fanciful.

The Government and the trial court also seem to take solace in the fact "he still has access to counsel via telephone." If not such a sad suggestion, it would be laughable. Mr. Kelly, like all BOP inmates, has extremely limited telephone minutes. Those minutes need to be used to, among other things, contact loved ones and family members. Obviously, those minutes do not go very far. To suggest that Mr. Kelly use them exclusively to call counsel would be to further cut him off from the rest of the world.

More to the point, all of those calls are monitored. To suggest that he prepare for trial by placing hours of collect calls to his counsel, a month (and thereby not talk to anyone else), allowing the Government to listen in on all those conversations, is preposterous. How would the Government like to have an arrangement where defense counsel can listen in on all of their trial preparations, which would be limited to eight hours of trial preparation a month? Beyond that, Mr. Kelly must share that phone with all of the other inmates. Using a shared phone, regularly, goes against every bit of the CDC guidance.

True, there is a procedure in place for calls with counsel that are *not* monitored. As Mr. Kelly previously indicated, those calls typically range from 15 to 30 minutes, depending on the time slot assigned by the BOP. The way those calls work is that counsel contacts the staff attorney at the institution and advises that he would like to speak to Mr. Kelly. Usually, within 24 to 72 hours, that attorney will respond and offer a couple of three-hour windows during which Mr. Kelly's attorneys can expect a call. Once that multi-hour window is selected, counsel then must wait for Mr. Kelly to call during that defined window. Thus, it normally takes approximately four days or more from the time the process starts until Mr. Kelly's counsel receives the call. Again, counsel is competing with dozens of other attorneys who are also trying to speak to their clients, so the calls are infrequent. But, even presuming that those calls could take place daily, Monday through Friday (which they cannot and are not allowed to), interaction is still quite limited, i.e., to a few hours per month.

Moreover, Mr. Kelly's counsel cannot review reports, documents, and other discovery materiality Mr. Kelly over the telephone. Mr. Kelly's counsel cannot show him hotel records, flight records, business records,

photographs, witness interviews, or any other materials over the phone. At the risk of redundancy, the Government would never allow or agree to being limited to merely discussing, by phone, such materials with its own agents, witnesses, and in preparation for trial – nor would any district court ever require the Government to proceed to trial under those conditions.

Finally, the Government downplays defense counsel's concerns about their own health and claims that those concerns are not ripe. Instead, the Government suggests that the courts should wait to see "When restrictions are lifted." Unfortunately, Mr. Kelly's attorneys do not have the luxury of that time to wait. They have an upcoming trial date, and no lifting on detainee restrictions anywhere on the horizon. It is telling that most of the United States Attorneys' Offices across the country, including apparently the one at issue here, are *not* even regularly requiring, or allowing, their prosecutors to report to work in-person. They certainly are not sending them out to BOP jails and other places of detention. That is what is called a double standard.

Moreover, to be clear, the concern is that, regardless of *when* BOP reopens, Mr. Kelly's attorneys do not feel comfortable going right back

into the Chicago MCC (or any other jail) for the foreseeable future. After all, Mr. Kelly will, on a daily basis, be in an environment of interaction with scores of other inmates and guards. Each of those individuals are going to be in contact with scores of other people.[1] In other words, for counsel to meet with Mr. Kelly, they will have to run all of the risks that he faces. They will have to go into that cesspool of an environment to prepare for trial, risking their own health. And of course, sit 6 feet away in a ten-foot room. The Government 's lawyers certainly are not being asked to do that and would never do so.

III. The District Court Clearly Erred in Finding That Mr. Kelly Was a Danger to the Community and a Risk of Flight Because He Met His Burden by Producing Credible Evidence that Rebutted The Government 's Presumptions

The two presumptions that Mr. Kelly must rebut are: 1) there are no release conditions that will assure the community's safety. and 2) there are no release conditions that will assure his own appearance. When the Government can trigger a rebuttable presumption of danger and/or flight, the defendant must produce some credible evidence that

[1] *See* CDC Correctional Guidance at https://www.cdc.gov/coronavirus/2019ncov/community/correction-detention/guidance-correctional-detention.html.

will rebut either or both presumptions. The burden of persuasion remains on the Government to show: (i) by a preponderance of evidence that the defendant is a flight risk. or (ii) by clear and convincing evidence that the defendant will endanger the safety of others or the community if released, and (iii) that *no conditions of release* will reasonably assure appearance and safety. *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001) (noting in "presumption cases," the burden of persuasion remains with Government; the defendant "bears a limited burden of production . . . to rebut that presumption"). The defendant's burden of production is "not a heavy one to meet; not a heavy one to meet;" rather, any evidence "favorable to a defendant that comes within a category listed in §3142(g) can suffice." *United States v. Hammond*, 204 F. Supp. 2d 1157, 1162 (E.D. Wis. 2002) (quotations and citations omitted).

A. The Government Has Not Met Its Burden

There are serious questions as to allegations in the Indictment. As to the racketeering allegations, it is an abuse of the statute. It includes the alleging of consensual sex as a predicate act.[2] The Indictment

[2]By way of example, the Indictment alleges in Count one, as predicate acts, violations of Sec. 2307 of the New York Code, "Venereal Disease; Person Knowing Himself to Be Infected." which provides that "Any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another

essentially alleges that Mr. Kelly's own successful music career was a racketeering "enterprise," designed to obtain sexual partners. This ignores the fact that he made successful music, won Grammy awards, and amassed millions of fans. It suggests that things such as the issuance of backstage passes and engaging in meet-and-greets with fans constitute criminal activities. It is a perversion of the purpose of both RICO and the Mann Act, and surely extends the bounds of both.

With respect to the history and characteristics of Mr. Kelly, he has strong family ties in the community, has lived in the Chicagoland community for over 50 years, and has a perfect, unblemished "record concerning appearance at court proceedings." *See* 18 U.S.C. § 3142(g)(3)(A). Moreover, at the time of the current offense or arrest, he was *not* on probation. *See* 18 U.S.C.§ 3142(g)(3)(B).

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shall be guilty of a misdemeanor." This statute prohibits sexual intercourse by anybody who has an STD. The definition is vast, ranging from HIV to yeast infections. *See* 10 CRR-NY 23.1.[1] The *only* requirement is that the individual knows that he has the venereal disease. In other words, it prohibits two consenting adults from having sexual intercourse if either, or both, know that they have an infectious venereal disease. It does not require that the disease be passed on, nor does it allow the consenting adults to have sexual intercourse if the venereal disease is disclosed beforehand. It does not permit the use of a condom, or account for modern day suppression drugs. A request made by Mr. Kelly's counsel to strike was denied. (DE:69).

As to the nature and seriousness of the "danger" purportedly posed by his release, the Pretrial Services Department is perfectly capable of monitoring Mr. Kelly and preventing him from contacting alleged victims. Moreover, the Government likely has its witnesses tightly under wraps, being monitored closely by FBI agents and by victim specialists. Should Mr. Kelly even attempt to contact one of them, assuredly they would immediately tell the FBI or the coordinator, causing this Court to revoke his pretrial release. And in this regard the District Court at one point concluded, without any evidence, that pretrial services were somehow stretched thin because of the pandemic. There is no evidence in support of this conclusion.

Pre-Trial Services in the NDIL recommended *release*, with conditions. While pre-trial in the EDNY did not, there does not appear to be any reason – they did not explain one and do not appear to have one. Additionally, knowing he was under investigation in the NDIL he did not flee. Equally, or perhaps even more importantly, when he was indicted for very serious charges in Cook County, Illinois in the Spring of 2019, he voluntarily surrendered the same day. When charges were added to that action, and he was told that he had to appear in court for

an arraignment on those additional charges, he promptly and voluntarily did so. Notably, the Illinois prosecutors did not even ask to increase or change any condition of his bond at that time. Last, instead of using the last of his money to flee. Mr. Kelly posted a $100,000.00 bond in that case.

Finally, because of the fundamental importance of Mr. Kelly's interest in liberty (*see Salerno*, *supra*, 481 U.S. at 750), this Court also should consider the length of his pretrial detention. *See United States v. Kashoggi*, 717 F. Supp. 1048 (S.D.N.Y. 1989); *United States v. El-Gabrowny*, 35 F.3d 63 (2d Cir. 1994) (noting that a substantial delay may require the Government to make a heightened showing of dangerousness or risk of flight). This too weighs strongly in favor of Mr. Kelly's release pending trial. Mr. Kelly has already been detained for over 12 months. If his trial does not move forward in September, he could be detained far longer. Mr. Kelly undoubtedly has and will suffer a prolonged period of detention before a determination ever is made about his innocence or guilt. Notably, the Bail Reform Act is expressly *not* intended to affect the

presumption of innocence coupled with not having the opportunity to prepare for that trial with his attorney's. 18 U.S.C. § 3142(g).[3]

B. There are a Combination of Conditions of Release that Will Reasonably Assure Appearance and Safety

The district court erred because it embraced the unfounded belief that Mr. Kelly is a risk to flee and that he would obstruct justice. It must be a serious risk of flight or of obstruction, not an ordinary risk. *See* 18 U.S.C. § 3142(f); see also United States v. Friedman, 837 F.2d 48 (2d Cir. 1988). To suggest that he is a "serious" risk of either ignores the facts but instead relies upon speculation, unfounded, at best.

As to the former, we have repeatedly pointed out to this court that Mr. Kelly has never missed a court date, either during prior proceedings,

[3] It should be pointed out that, in *US v. Avenatti*, the District Court determined conditions for release of a defendant who was detained because he violated the conditions of bail that were set at his arraignment, after he was subsequently found guilty. Additionally, the Court released the Defendant so he could meet with his counsel and prepare for the two impeding trials and doing so under the current conditions would have made that impossible. The Court clearly stated, "This Order does not withdraw, is not in derogation of, and does not conflict with this Court's prior finding, and the Ninth Circuit's affirmance of this Court's finding, that there is probable cause to believe that defendant committed state and federal crimes while on pretrial release, that defendant is a danger to the community, and that defendant failed to rebut the presumption that no conditions or combination of conditions will assure the safety of the community. See United States v. Avenatti, C.A. No. 20-50017(9th Cir. Mar. 6, 2020).

between 2002 and 2008 or during his current state case that preceded his arrest on federal charges. During the earlier state prosecution Mr. Kelly was allowed to travel out of the country and returned. The Government keeps claiming that he obstructed justice in that case, implying that is the reason why he prevailed, but the fact is that there was a three-week trial with dozens of witnesses, including some of the same witnesses that are involved in the federal proceedings now pending. Mr. Kelly was very much at risk of going to jail during those proceedings and still he showed up. Nor did he flee when he was charged in state court in 2019, rather he turned himself in after he was asked to do so. And he would have done the same thing here had he been given the opportunity.

Further, the Government has not presented evidence that Mr. Kelly has any resources to flee. Regardless of what he is receiving in royalties, that does not translate into resources. While the Government points out that Mr. Kelly receives approximately $200,000.00 each quarter in royalties, it fails to take into account the expenses he still has, including rent on the apartment he would live in if released, the warehouse he must maintain with all his touring equipment, employees, and agents and attorneys who receive a great percentage of each and every dollar he

earns. More importantly, the Government cannot point to a single individual that would attest to the fact that he has ever expressed any desire to flee. To that end, the Government cannot point to a single email or text message supporting its intent to flee theory. In any event, where could he possibly flees to? How would he go unnoticed? How would he have money to survive?

Courts routinely point to the defendant's failure to appear in a prior criminal proceeding as a reason supporting the denial of pre-trial release. If that is the case, then the opposite should also be true. Here, Mr. Kelly's perfect record of appearing in court should count for something.

Any suggestion that Mr. Kelly would flee also flies in the face of the reality that it is virtually impossible during this pandemic to fly anywhere, let alone to do it surreptitiously. Airports these days are completely deserted. He could not just walk through an airport undetected or sit on an airplane unnoticed. He does not even have a passport. Certainly, conditions could be fashioned that would ensure against any risk, including GPS or electronic monitoring, which would give instant notification if he left any premises.

The fact that there is no evidence he would flee, and historically that he has not fled, should be contrasted with the mere speculation that he would obstruct justice and flee. The Government has repeatedly cited that factor, and the District Court has repeatedly embraced it. However, Mr. Kelly must present a serious risk of future obstruction. Paradoxically, the District Court points to the fact that Mr. Kelly is alleged to have obstructed justice in his literally decades-old State court proceeding in Illinois as a reason to believe he would obstruct now, while entirely ignoring the fact that Mr. Kelly *always* appeared at that very proceeding.

Mr. Kelly's past behavior in the present case shows that he is unlikely to obstruct justice. One of the alleged "Jane Doe's" (victims) until very recently was Mr. Kelly's girlfriend. Although completely out of the norm, and even though she was an alleged victim, she was regularly allowed to visit with Mr. Kelly while he was in jail at the MCC Chicago, and to regularly correspond with him. It appears that, during an approximately six-month time period, she regularly visited with him, corresponded via letters, shared emails, and spoke daily on the telephone. While Mr. Kelly knew that she was one of the Jane Doe's, he never did a

single obstructive thing. Given that she is now cooperating with the Government, one would think that, if there was any evidence of obstruction, the Government would cite to it, and it has not. It never happened.

Frankly, the idea that Mr. Kelly would now obstruct anyone is folly. The Government has disclosed little evidence revealing the substance of its case. But what is known is that individuals are cooperating with the Government and have had absolutely no contact with Mr. Kelly, or anyone associated with him.

That is not the case with respect to all of the Jane Does. The Government has not formally disclosed the identity of two of them, one of whom is his former girlfriend who is continually on social media, along with her parents (and there is no evidence that he or anyone on his behalf has reached out to her). Another is represented by counsel, has sued Mr. Kelly, and has appeared in SRK2 telling her story. All of that makes it extraordinarily difficult to believe that, even if he wanted, to Mr. Kelly could somehow change her narrative. Another alleged victim is deceased, and Mr. Kelly has not had contact with the other alleged victims, if ever, for more than a decade. As for his now former girlfriend (and present

Government cooperator), she was still his girlfriend when he was arrested in this case. Although the norm is *not* to allow a federal criminal defendant to have any contact with witnesses in the case against him, she was allowed to have special visits with him while he was in the federal jail. They regularly communicated by phone and email. He knew that she was one of the Jane does. There is no evidence he ever tried to obstruct or influence with respect to her portion of the indictment. If he did not try to obstruct or influence his own girlfriend, then how is it at all credible that he would do it to someone else in the future.

Lastly, it should be noted that the two co-defendants in the NDIL, including the supposed mastermind of the obstruction, were both released on bail without objection.

To the point, the law speaks to the future, i.e., "a serious risk that such person will…", not that they have been. *See* 18 U.S.C. 3142(2)(B). Regardless of the past, any evidence or concern of future obstruction is unsupported. Notwithstanding years of rumors that Mr. Kelly was being investigated, television shows dragging him through the mud, and the filing of serious charges earlier this year in Illinois State court, the Government cannot identify any instances whatsoever where Mr. Kelly

tried to influence, intimidate, or tamper with a single witness or potential witness to obstruct any current prosecution.

Mr. Kelly is presumed innocent, his case is defensible, and he does not have any criminal record at all. Even when the Government has satisfied its burden; detention should be ordered **only** if no condition or combination of conditions can reasonably assure the defendant's presence and the safety of the community. The question is whether there are any conditions that would permit release. Here, conditions can easily be fashioned. He can have restricted internet access and be required to wear an electronic monitoring bracelet. He can be denied the use of a cell phone. Further, now that different jurisdictions are involved in prosecuting Mr. Kelly, it is safe to assume that any witness that Mr. Kelly would attempt to intimidate would immediately call whatever law enforcement arm has been working with them as part of these prosecutions.

CONCLUSION

This Court should reverse the Order of pretrial detention entered by the District Court and remand this matter for the imposition of appropriate conditions of release.

Dated: New York, New York
July 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 17, 2020, I electronically filed the foregoing DECLARATION OF THOMAS A. FARINELLA, with attached Exhibits A-D, with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: New York, New York
July 17, 2020

/s/ Thomas A. Farinella
Thomas A. Farinella