UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

ROBERT SYLVESTER KELLY,

Defendant.

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ORDER
19-CR-286 (AMD)

ANN M. DONNELLY, United States District Judge:

On May 1, 2020, the defendant made his third request for temporary release. (ECF No. 63.) The defendant argues that he is entitled to bail because medical tests demonstrate that he is "likely diabetic." (*Id.* at 1.) Raising most of the same arguments pressed in his previous applications, the defendant continues to contest the Court's findings—and presumably, the same findings by other courts—that "no condition or combination of conditions will reasonably assure [his] appearance as required and the safety of any other person and the community." 18 U.S.C. § 3142(e). The Government opposes. (ECF No. 64.) For the reasons that follow, the defendant's motion is denied.

18 U.S.C. § 3142(e) permits a district court to order pretrial detention if it concludes 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)(1). When a defendant has been charged with a qualifying crime involving a minor, as this defendant has, there is a rebuttable presumption of pretrial detention under Section 3142(e)(3). The defendant has been charged in this District with violating 18 U.S.C. §§ 2251, 2421, 2422 and 2423 (*see* ECF No. 43 ¶¶ 14, 19, 21-30, 39-42), and in the Northern District of Illinois with

violating 18 U.S.C. §§ 2251, 2422 and 2252A(a)(2) (*see United States v. Kelly et al.*, 19-CR-567, ECF No. 93), all of which are qualifying crimes involving a minor (*see* § 3142(e)(3)(E)); therefore, there is a rebuttable presumption of pretrial detention.

The defendant "bears a limited burden of production—not a burden of persuasion—to rebut that presumption by coming forward with evidence that he does not pose a danger to the community or a risk of flight." *United States v. English*, 629 F.3d 311, 319 (2d Cir. 2011) (quoting *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001)). "Once a defendant has met his burden of production relating to these two factors, the presumption favoring detention does not disappear entirely, but remains a factor to be considered among those weighed by the district court." *Mercedes*, 254 F.3d at 436 (citation omitted). "Even in a presumption case, the government retains the ultimate burden of persuasion by clear and convincing evidence that the defendant presents a danger to the community" and "by the lesser standard of a preponderance of the evidence that the defendant presents a risk of flight." *Id.* (citations omitted).

As relevant here, temporary release of a defendant is governed by 18 U.S.C. § 3142(i), which permits a court to order temporary release for a "compelling reason." In this case, the defendant must rebut the statutory presumption of pretrial detention under Section 3142(e)(3) or show that a "compelling reason" calls for his release under Section 3142(i).[1] The defendant has done neither.

[1] It is not entirely clear whether the defendant is moving for reconsideration of prior bail determinations under Section 3142(e) or for temporary release under Section 3142(i). The distinction is not merely academic. *See United States v. Perez*, No. 19-CR-297, 2020 WL 1329225, at *2 (S.D.N.Y. Mar. 19, 2020) ("The Court intends to terminate the defendant's temporary release and return the defendant to pretrial detention as soon as the Court concludes that the defendant no longer faces the acute health risk posed by the current circumstances," specifically, the COVID-19 pandemic.). Accordingly, I address both statutory grounds for release separately.

I. Release Under Section 3142(e)

In determining whether a defendant has rebutted the presumption that he is dangerous and a flight risk, a court is obligated to consider certain factors, including the nature of the charges against the defendant, the weight of the evidence against him, his history and characteristics and the extent to which his release would pose a risk to any person or the community. 18 U.S.C. § 3142(g); *see also Mercedes*, 254 F.3d at 436 (The district court considers the Section 3142(g) factors "[t]o determine whether the presumptions of dangerousness and flight are rebutted.").

Both indictments charge the defendant with serious crimes that span years. In this District, the indictment charges that for almost twenty-four years, the defendant led an enterprise, the purposes of which were to promote the defendant's music, to recruit women and girls to engage in illegal sexual activity with the defendant and to produce child pornography. (ECF No. 43 ¶¶ 2, 12.) In the Northern District of Illinois, the defendant is charged with participating in a long-running conspiracy to obstruct justice and a conspiracy to receive child pornography. (*United States v. Kelly et al.*, 19-CR-567, ECF No. 93 at 5-17.)

In connection with the obstruction charge, the defendant is alleged to have secured witnesses' silence, and in at least one instance to have suborned perjury, through bribes, blackmail, threats and intimidation. (*Id.*) This conduct strikes at the heart of the integrity of the trial process and "has been a traditional ground for pretrial detention by the courts." *United States v. LaFontaine*, 210 F.3d 125, 134 (2d Cir. 2000) ("In *Gotti*, we held that a single incident of witness tampering constituted a 'threat to the integrity of the trial process, rather than more generally a danger to the community,' and was sufficient to revoke bail.") (quoting *United States v. Gotti*, 794 F.2d 773, 779 n.5 (1986)).

The defendant takes issue with the Court's consideration of the charges in evaluating his dangerousness and risk of flight. (ECF No. 63 at 5 ("What is more troubling from the defense's perspective is that this court accepts the *allegations* regarding obstruction as true and as evidence that he would obstruct now if released, but completely discounts the *factual and historical evidence* of appearance.").) However, because "an indictment returned by a proper grand jury 'conclusively determines the existence of probable cause,'" *Kaley v. United States*, 571 U.S. 320, 326 n.6 (2014) (citations omitted), a court does not "unfairly skew[] things" (ECF No. 63 at 1) against a defendant when it takes the charges into account. Nor does it mean that a judge is simply accepting the Government's position without critical analysis, as the defense argues.

The other judges who have considered the question of bail—the Honorable Harry D. Leinenweber, United States District Judge for the Northern District of Illinois, where the defendant is currently being held, and Magistrate Judge Steven Tiscione, to whom the defendant made his first application for bail in this District—also found that the defendant was a flight risk and a danger to the community. Judge Leinenweber characterized the charges against the defendant as "extraordinarily serious," and emphasized the obstruction of justice charge:

> [A]s far as the obstruction of justice, according to the specific count in the indictment that the acquittal was at least in some part obtained because of obstruction of justice which involved allegedly paying off of witnesses and threatening witnesses and buying back certain evidence in the forms of the videos. . . [A]ccording to the indictment – again, I go by the fact that a grand jury found that there's probable cause – that witnesses were paid and witnesses were threatened in order to either change testimony or not appear at all. So it appears to me that the defendant has failed to overcome the presumption of requiring detention in both the case here in Chicago and the case in New York.

(*United States v. Kelly et al.*, No. 19-CR-567, ECF No. 40 at 31:19-32:17.)[2]

[2] The defendant filed a motion for temporary release in the Northern District of Illinois, but requested that Judge Leinenweber "defer any ruling until after the New York court has acted on his request."

Judge Tiscione likewise denied bail because the defendant posed a risk of flight and dangerousness. Judge Tiscione observed that the defendant faced "incredibly serious charges of sexual abuse of minors, coercion of minors, [and] child pornography," and that the defendant "has a history of similar allegations, dating back more than a decade." (Bail Hr'g 15:15-22, Aug. 2, 2019.) Judge Tiscione was "extremely troubled by the issues of potential obstruction in prior cases" and the "strong possibility that there could be potential witness tampering in this case if he's released." (*Id.* at 16:6-16.)[3]

In an effort to rebut the presumption of detention, the defendant cites, as he has before, his history of returning to court in the 2008 Illinois state court case. The significance of that record is substantially undermined by the grand jury's probable cause finding in the Illinois federal case that the defendant obstructed justice during that trial. The defendant is presumed innocent of the charges, but, as explained above, the grand jury's probable cause finding that he obstructed justice in the past as well as the nature of the other charges are relevant factors in the pretrial detention analysis under Section 3142. *See Kaley*, 571 U.S. at 329 n.6 ("The grand jury's unreviewed finding similarly may play a significant role in determining a defendant's eligibility for release before trial under the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq*.").

Nor are the defendant's proposed measures—that he be kept on home confinement and monitored by pretrial services—sufficient to eliminate the danger to the community. These

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(ECF No. 115 at 1-2.) The defendant moved to reargue Judge Leinenweber's order of pretrial detention on August 1, 2019 (ECF No. 54), but later withdrew the motion (*see* ECF No. 115 at 1).

[3] During that hearing, the defendant acknowledged that the Court could rely on the allegation of obstruction in deciding bail. (*Id.* at 10:2-10 (THE COURT: "But because it is just an allegation [of obstruction], he hasn't been convicted of it yet, I should just ignore it for purposes of dangerousness of the defendant? MR. ANTON: "Definitely not. But the Court has the right to require a little more than just the government say so that this exists . . . .").) In fact, of course, it is not just the Government's "say so" upon which the Court relied, but the grand jury's finding of probable cause that the defendant obstructed justice.

measures can be "circumvented by the 'wonders of science and of sophisticated electronic technology,'" and the "monitoring equipment can be rendered inoperative." *United States v. Orena*, 986 F.2d 628, 632 (2d Cir. 1993) (quoting *United States v. Gotti*, 776 F. Supp. 666, 672-73 (E.D.N.Y. 1991)). Without the "confidence of security" assured by a detention facility, *United States v. Millan*, 4 F.3d 1038, 1049 (2d Cir. 1993) (citing *Gotti*, 776 F. Supp. at 672), the danger to the community cannot be eliminated, especially where, as here, the proposed measures are powerless to stop a defendant from inducing others to interfere with witnesses. *See United States v. Choudhry*, 941 F. Supp. 2d 347, 359 (E.D.N.Y. 2013) ("It is well established that home detention and electronic monitoring may be insufficient to protect the community against dangerous individuals, particularly where those individuals have the ability to command others to do their bidding.") (citations omitted); *see also United States v. Sindone*, No. 01-CR-517, 2002 WL 48604, at *1 (S.D.N.Y. Jan. 14, 2002) ("The stakes in a criminal case are high, and temptations of perjury, subornation and intimidation are ever present.").

The circumstances that led Judge Leinenweber, Judge Tiscione and me to conclude that the defendant has not rebutted the presumption of detention have not changed: the defendant is charged in Illinois and New York with extraordinarily serious crimes, for which he faces a long prison term if convicted. That prospect makes him a flight risk. The nature of the charges—which include crimes against minor victims, threats against potential witnesses and paying bribes to keep witnesses from cooperating—make him a danger to the community, including that he could attempt to tamper with prospective witnesses.

For these reasons, the Government sustained its burden of proving by clear and convincing evidence that the defendant poses a danger to the community, and by a

preponderance that he is a flight risk.[4] There are no conditions or combination of conditions that "will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community." 18 U.S.C. § 3142(e).

II. Temporary Release Under Section 3142(i)

As he did in a previous application, the defendant cites the global coronavirus pandemic as a compelling reason justifying his release. In my prior rulings, I have found that the defendant has not presented compelling reasons for his release under Section 3142(i) in part because he is not uniquely at risk for contracting severe illness from COVID-19. (ECF Nos. 53, 61.) The defendant argues that he is now uniquely at risk because he has been diagnosed as prediabetic.[5] (ECF Nos. 63, 66.)

I do not agree that a diagnosis of prediabetes presents a compelling reason for the defendant's release. While the CDC has identified diabetes as a risk factor for COVID-19, the same is not true for prediabetes, a condition that affects nearly one in three American adults. *See* "Groups at Higher Risk for Severe Illness," *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html; *see also* "Diabetes and Prediabetes,"

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[4] In a second reply, submitted "solely and exclusively on the issue of obstruction," the defense describes various people that it suspects are the Jane Doe victims, and posits reasons why they would not be amenable to "any overture from the Kelly camp." (ECF No. 67.) Witness tampering can take many forms—including blackmail, threats and intimidation—that do not require the target's receptiveness to a defendant's overtures. The defendant has been charged in the Northern District of Illinois with using "physical abuse, violence, threats of violence, blackmail, and other controlling behaviors against victims so that [he] could maintain control over them, prevent them from providing evidence to law enforcement, and persuade them to continue to abide by prior false statements relating to [his] sexual contact and sexual acts with minors and videos of such conduct." (*United States v. Kelly et al.*, No. 19-CR-567, ECF No. 93, Count 5, ¶9.)

[5] The defendant's argument that he should be released because he "is at substantial risk and in danger *regardless* of whether his diagnostic numbers firmly put him in *any* defined medical category" and "is at risk and in danger *because* he is housed at the MCC Chicago" (ECF No. 66 at 3), is inconsistent with his previous disclaimers: "Furthermore, to be crystal clear, Mr. Kelly's counsel is not asking this Court to 'release the entire BOP population,' as claimed by the Government in its Response . . . That is a false and straw man argument." (ECF No. 58 at 2.)

available at https://www.cdc.gov/chronicdisease/resources/publications/factsheets/diabetes-prediabetes.htm. My review of the defendant's medical records reflect that he is receiving more than adequate care to manage this condition. The health care professionals at the MCC see him regularly, and are working with him to implement lifestyle changes so that his condition improves. (ECF No. 65 at 1-6.) Those recommendations include diet, weight loss and exercise. (*Id.*)

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." *United States v. Hamilton*, No. 19-CR-54, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (collecting cases). The defendant's diagnosis of prediabetes—a relatively common and treatable condition—is not a "compelling reason" for his release. *See United States v. Deutsch*, No. 18-CR-502, 2020 WL 1694358, at *1 (E.D.N.Y. Apr. 7, 2020) (finding no compelling reasons where a defendant has a prediabetes diagnosis but "does *not* have Type 1 or Type 2 diabetes, he does not suffer from any pre-existing respiratory issues, he is young, and his medical condition appears well managed throughout his pretrial detention").

CONCLUSION

Accordingly, the defendant's motion for reconsideration of the Court's pretrial detention orders and his motion for temporary release are denied.

SO ORDERED.

s/Ann M. Donnelly

Ann M. Donnelly
United States District Judge

Dated: Brooklyn, New York
May 15, 2020