ORAL ARGUMENT NOT YET SCHEDULED

No. 21-3066

United States Court of Appeals for the D.C. Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

EDWARD JACOB LANG,
Appellant

APPELLANT'S REPLY MEMORANDUM OF LAW AND FACT IN OPPOSITION TO APPELLEE'S MEMORANDUM OF LAW AND FACT

On Appeal from the U.S. District Court for the District of Columbia,
No. 21-Cr-00053(CJN) - (Carl J. Nichols, District Judge)

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I. INTRODUCTION

The Government spends 17 pages of their brief trying to convince this court that the Appellant, Edward Jacob Lang (hereafter "Lang", "Jake") is not entitled to bond after applying all of the relevant Bail Reform Act (hereinafter "BRA")[1] factors, especially to January 6 defendants.

Jake, a young man, was unarmed on January 6, 2021, when he went to the United States Capitol to stand for Liberty, the Constitution, and assert his First Amendment Rights. Jake did not go there with an intent to assault anyone or take any leadership role. Instead, he was met with violence at the hands of officer's that were present whereby they were executing excessive force, spraying chemicals on people, and beating others to death. This led Jake having to literally save someone's life. If there is any doubt as to who Jake really is, all one has to do is ask Phillip Anderson, who clung to Ms. Boyland as she died.

Not all of Mr. Lang's actions can be deemed heroic and lifesaving, but none of the alleged conduct justify the denial of bond upon a totality of circumstances.

II. SUMMARY OF THE ARGUMENT

The Court erred in denying Jake bond, focusing on the belief "Lang does pose a threat to future violence . . . [because he] views the current United States government as illegitimate, and it is at least possible he may not comply with future

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[1] 18 U.S.C. 3141, *et seq*.

legal orders or respect the rule of law." (*See* Tr. at p. 72- 73). The Court also held that, "Mr. Lang's history and characteristics, perhaps we could suggest that some conditions of release might be possible without further violence or risk of flight, although some of that evidence is quite the contrary." (*Id.* Tr. at p. 76.).

The Court also determined that the conditions of confinement and denial of attorney client-privilege issues are not a factor that the Court can consider when considering a bond application under the BRA.[2]

The Government focus's a great deal of attention on conduct that they alleged the Appellant did after January 6, 2021. However, so much of what Appellant said was rhetoric and nothing came of it. If every person in America was punished for saying something that were driven by emotions and not facts, than so many more American's would be charged with crimes. However, the First Amendment to the United States Constitution guarantees American's the right to free speech. We are not a country that punishes people because their words came to be accurate based on mere coincidence. They are punished based on facts connected to evidence. Finally, defendants, like Appellant are presumed innocent until and if the Government can prove each and every single element of the crimes charged. However, here, we are faced with a prosecution that pre-supposes that they will be able to prove each and

[2] The Court reserved decision on some of these matters and directed defense counsel to try and pursue them with the Department of Corrections, which we have been doing since such day all to no avail.

every single element before a jury based on the evidence and the charges lodged against the Appellant.

There was no evidence presented in the lower court that supported the Court's decision to deny bond. Mere speculation is precisely what the court focused on. Not the fact that sufficient evidence was presented to justify that Appellant would return to court, would not violate his conditions of release, had family support and so much more.

Finally, the defendant established that several other similarly situated men were granted bond, but Appellant was denied bond:

Defendant	**Charge(s)**	**Category**	**Bond**
Michael Foy	Civil Disorder; Obstruction of an Official Proceeding; Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon; etc.	Violence	The court will GRANT Foy's Motion to Release from Custody
Emanuel Jackson	Assaulting an Officer of the United States; Assaulting an Officer of the United States with a deadly or dangerous weapon; obstruction of an official proceeding, etc.	Violence	Defendant remains on personal recognizance
David Lee Judd	Assaulting, Resisting, or Impeding Certain Officers of Employees Civil Disorder	Violence	Defendant remains on personal recognizance.
David Alan Blair	Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon; Civil Disorder; Obstruction of an Official Proceeding; Entering and	Violence	Defendant remains on personal recognizance.

	Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, etc.		
Robert Sanford	Civil Disorder; Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon; Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, etc.	Violence	Defendant remains on personal recognizance.
Federico Klein	Civil Disorder; Obstruction of an Official Proceeding and Aiding and Abetting; Assaulting, Resisting, or Impeding Certain Oflicers Using a Dangerous Weapon; Entering and Remaining in a Restricted Building or Grounds, etc.	Violence	Defendant remains on home detention.

POINT ONE

THE DISTRICT COURT'S DANGEROUSNESS FINDING WAS CLEARLY ERRONEOUS (RESPONDING TO GOVERNMENT'S POINT B)

The Court erred in its assessment of dangerousness. During Jake's bond hearing, the Court narrowed down the issue of whether there is a specific articulable risk that Government can articulate to establish dangerousness.

The government failed to address that the District Court erred in placing more stress on the weight and seriousness of the evidence, with Lang not showing remorse after January 6, and applied various other factors irrelevant to the applicable conditions.

Emerging in this area of case law recently, the *Klein* Court provided guidance as follows: "[t]he Court first considers "the nature and circumstances of the offense charged." 18 U.S.C. § 3142(g)(1). Chief Judge Howell has set forth a number of considerations, which this Court finds helpful, to differentiate the severity of the conduct of the hundreds of defendants connected to the events of January 6. *United States v. Klein*, 533 F.Supp.3d 1 (D.D.C. Cir. 2021) (*citing United States v. Chrestman*, 525 F. Supp. 3d 14 (D.D.C. Cir. 2021)).

The *Klein* Court explained six considerations. *Id.* Additionally, the *Klein* Court highlighted how even if the weight of the evidence factor weighs firmly in favor of detention, this factor "is the least important." *Id.* (*quoting United States v. Gebro*, 948 F.2d 1118, 1121–22 (9th Cir. 1991).

Here, however, the court's findings on the 3142 factors placed a clear emphasis on the firm belief that "[t]he time and place of the charged offenses raise their severity and suggest that Mr. Lang does pose a threat of future violence." (*See* Tr. at p. 72, ¶ 18-20).

The Circuit Court in *United States v. Padilla*, is instructive in this case in that

> The government also does not allege that Padilla attempted to flee or destroy evidence in this case, even after he knew he was under investigation by the FBI. Cf. Sabol, 2021 WL 1405945, at *16 (concluding that defendant's "attempted flight and his destruction of evidence that could be used against him in a criminal prosecution unquestionably weighs against pre-trial release"). Nor has evidence been put forward that Padilla

> even has the means to flee. He receives limited income from his disability benefits, and he has lived in Tennessee for the majority of his life, with no known ties to any other community. See 18 U.S.C. § 3142(g)(3)(A) (mandating consideration, inter alia, of defendant's "family ties," "family resources, length of residence in the community, [and] community ties"); see also United States v. Nwokoro, 651 F.3d 108, 128–29 (D.C. Cir. 2011) (describing the sophisticated nature of defendant's alleged crimes, resources in the United States, and substantial connections overseas as relevant to the BRA flight-risk analysis). That Padilla was "willing" and able "to leave [his] family to come to D.C." on January 6 does not alone establish that he can or would flee if released. See Hr'g Tr. 24:8–20.

United States v. Padilla, CR 21-214 (JDB), 2021 WL 1751054, at p. 12 (D.D.C. May 4, 2021)

Here, in adopting the belief about an "illegitimate government" and further advancing the notion that Mr. Lang could possibly "encourage others", the District Court further found:

> Evidence suggests he was under the belief that the United States' **current government is illegitimate**. He led and encouraged others in the day of the January 6th attack and through his internet-based messages, appears interested **in the possibility of continuing to attack** the United States government.

(*See* September 20, 2021, Minutes at p. 77, ¶ 3 – 8).

The history of Edward Jacob Lang does not logically add up to a legal conclusion that the District Court found because:

(1) even if he believes the "current United States government as illegitimate";

(2) those beliefs can somehow make it "possible" that Mr. Lang;

(3) "may not" in the future comply with legal orders or the law "in general"; or

(4) "may advocate" or "insight violence to advance his political beliefs".

The evidence presented to the District Court fails to establish a future threat to any individual, or the community at large, and falls short of establishing an articulable, specific explanation, as to how Mr. Lang presents a danger, thus establishing dangerousness. Overall, the Government failed to establish:

1) Jake attempted to flee;

2) Jake destroyed any evidence;

3) Jake has the financial means to flee the jurisdiction or avoid appearing in court; and

4) Jake would abandon his family or his community.

In light of the above, the District Court erred in formulating its finding of dangerousness with regards to Jake, when this is his history, and these are the facts regarding his background presented during his bond application.[3]

[3] Unlike other currently detained January Six Defendants, when Mr. Lang was arrested there were no weapons, anti-government reading material, or paraphernalia establishing or supporting violence seized from his apartment. Mr. Lang is not a gun owner and has never even owned a gun but has strong beliefs about American Citizen's Second Amendment Rights. These beliefs should not just be used against him for the worst, but rather should be placed in its proper

POINT TWO

APPELLANT'S DISCOVERY-RELATED COMPLAINTS JUSTIFY PRETRIAL RELEASE AND ARE NOT OTHERWISE PROPERLY BEFORE THIS COURT (RESPONDING TO GOVERNMENT'S POINT C)

On December 31, 2020, the Federal Bail Reform Act of 2020 was introduced "to amend title 18, United States Code, to amend provisions relating to the release or detention of a defendant pending trial, sentence, or appeal, and for other purposes."[4] The BRA of 2020 sought to address the problem we are raising here, that "the conditions of confinement, including access to adequate medical, mental health, and dental treatment, access to medications, and *the person's ability to privately consult with counsel and meaningfully prepare a defense*", should be considered under BRA.[5]

The Appellant concedes that Congress has not passed the Federal Bail Reform Act of 2020. However, it is clear that the law has laid dormant since its presentation to Congress, and it is most likely due to the January 6, 2021, cases. The proposed

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context with how guns and violence apply to Mr. Lang's application for pre-trial release.

[4] https://www.congress.gov/bill/116th-congress/house-bill/9065/text?r=3&s=1 (last visited 12/27/2021).

[5] https://www.congress.gov/bill/116th-congress/house-bill/9065/text?r=3&s=1#H06B3552C2B34418C9469B7A9495C157F (last visited 12/27/2021)

law should be considered by this court as it is directly relevant to the issues raised by the Appellant. The Bail Reform Act of 2020, proposed the following element as a condition of release,

> (F) the conditions of confinement, including access to adequate medical, mental health, and dental treatment, access to medications, and the person's ability to privately consult with counsel and meaningfully prepare a defense.[6]

The failure of the District Court and this Court to take into consideration the issues raised by the Appellant, is denying him the opportunity to participate in his own defense:

1) including reviewing discovery material;

2) communicating with his attorneys;

3) receiving legal mail from his attorneys;

4) having access to the facility law library; and

5) denying of medical care.

As highlighted in *Eppolito*, a "Defendants' presence in jail prior to trial will substantially impede the work of their attorneys. Extensive wiretaps and other evidence will require many hours of consultation between attorneys and clients that

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[6] https://www.congress.gov/bill/116th-congress/house-bill/9065/text?r=3&s=1#H06B3552C2B34418C9469B7A9495C157F (last visited 12/26/2021)

are difficult under jail conditions." *U.S. v. Eppolito*, No. 05-CR-192, 4 (E.D.N.Y. Jul. 11, 2005).

The DOT Policy[7], dated March 15, 2021, provided by the Government raises several issues that create several problematic matters that will deny defendant fully and adequate access to a laptop to review discovery.

The totality of the program does not muster a constitutional challenge about a defendant having adequate access to the discovery and participating in his own defense. Considering the constitutionally deficient program at DOC, bond should be granted.

Finally, the Office of Congresswoman Marjorie Taylor Greene issued a report, entitled, *Unusually Cruel – An Eyewitness Report from Inside the DC Jail* (December 2021) concluded:

> a) January 6 detainees are denied basic medical care, bathrooms, exercise, religious services, haircuts, and nutritious diet;
>
> b) The Marshals Service has already declared a portion of the facility unhospitable for more than 400 inmates, and the D.C. Mayor's Office has already signed a memorandum of understanding with the Marshals admitting that there is a need to correct certain problems, clearly more work remains to improve inmate conditions throughout the jail; and

[7] Procedure for Voluminous or Electronic Evidence Review at the Department of Corrections During the COVID-19 Pandemic (dated March 15, 2021).

c) The delegation of Representatives and staff that toured the facility on the evening of November 4 offer this report to support the basic dignity of January 6 inmates and others throughout the D.C. jail who continue to be unreasonably mistreated.

CONCLUSION

For the reasons stated above, this Court should reverse the Order detaining Jake and release him under strict conditions.

Dated: December 27, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) & 32(g), D.C. Cir. Rules 28(a), 28(c), 28(e) and 32, I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(c) because it contains 2268 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) and D.C. Cir. Rules 28(a) and 32 because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: December 27, 2021

Martin Tankleff

Martin H. Tankleff

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and D.C. Cir. R. 25 that on December 27, 2021, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

For ECF filers, the initial briefs are to be filed in electronic format only, unless the court requests paper copies. (Cir. R. 31(b)) However, in the Order filed on October 5, 2021 (Document #1916876), the Court directed that, "The parties are directed to hand-file the paper copies of their pleadings."[8] Therefore, briefs have been filed via ECF and physical copies have been mailed via overnight express mail this day.

Dated: December 27, 2021

Martin Tankleff

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[8] Pursuant to Cir. R. 9(a)(1), "an original and 4 copies of a memorandum of law and fact setting forth as many of the matters required by Circuit Rule 9(b) as are relevant." However, the Court Clerk directed counsel to file an original and 8 physical copies with the Clerk of the Court.