IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-1730

UNITED STATES OF AMERICA,

Plaintiff-Appellant-Movant,

v.

MITCHELL E. MOSALLEM,

Defendant-Appellee.

ON EMERGENCY MOTION TO VACATE CONDITIONAL RELEASE ORDER
(TO BE ARGUED ON DECEMBER 16, 2003)

REPLY OF THE UNITED STATES

The United States in its emergency motion argued that the district court lacked authority under 18 U.S.C. § 3143(a)—a provision of the Bail Reform Act of 1984 that provides limited authority in certain specified circumstances to allow bail release after conviction—to issue the bail release order of November 25, 2003. According to the terms of that statute, Mosallem was no longer "awaiting ...

execution of [his] sentence," and the district court had therefore been deprived of release authority. Although the statute does not define the phrase "execution of sentence," common sense and sound judicial administration strongly support treating a sentence's execution as commenced, and the defendant no longer "awaiting" execution of sentence, when, as in Mosallem's case, there had already been imposition of a sentence, denial of bail, formal commitment to the Bureau of Prisons ("BOP") for imprisonment, and incarceration in the BOP's MDC. The plain language of the statute and BOP's interpretation of it confirms that by November 25 there had already been "commencement of [Mosallem's] sentence."

I. The District Court Lacked Authority to Release Mosallem.

A. Judge Griesa Denied Bail on November 13.

As an initial matter, Mosallem's claim that "Judge Griesa cannot fairly be said to have 'denied bail' to Mr. Mosallem on November 13" (Mem. 2) is insubstantial, since Judge Griesa very clearly denied bail that day on the statutory ground that Mosallem had failed to show by clear and convincing evidence that he was not a flight risk. U.S. Motion, Ex. B, p. 24, lines 7-18. Moreover, after the sentencing and denial of bail, Mosallem was returned directly to the BOP's MDC.[1]

[1] To the extent it may be suggested that the district court would have released Mossalem if he had not been arrested and instead had come to the sentencing on bail, *see* U.S. Motion, Ex. D, p. 51, lines 4-18, that does not change

B. Mosallem's Interpretation of § 3143(a) Is Mistaken.

In his opposition, Mosallem challenges the government's reading of § 3143(a) and incorrectly argues that there can be no execution of sentence under § 3143(a) until the defendant "is designated by the BOP to a prison facility, pursuant to the statutory direction in §3621(b), and arrives there" and that § 3585 is simply irrelevant. Mem. 4; 2-4.

To the extent that Mosallem argues broadly that the start of a sentence of imprisonment may not mark the "execution" of sentence, he is surely wrong, for it is inconceivable that once a defendant has commenced serving his sentence, execution of that sentence has not also begun. Otherwise, the time of "execution of sentence" remains an ongoing uncertainty that could last until the completion of the sentence many years later.[2]

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the fact that, under the circumstances presented here, the district court lacked the authority to release Mosallem under § 3143(a). *See United States v. Werber*, 149 F.3d 172, 177 (2d Cir. 1998) (finding it inconsequential that district court misunderstood sentencing credit statute, 18 U.S.C. § 3585(b), and would have taken different steps at sentencing proceeding if statute had been correctly understood).

[2] Mosallem's interpretation of § 3143(a) is also inconsistent with this Court's interpretation of similar language in the Federal Probation Act, formerly 18 U.S.C. § 3651, which was repealed and superceded by Congress in 1984 as part of the same public law that enacted the Bail Reform Act. *See* Pub. L. 98-473, §§ 212(a)(1) (repealing Federal Probation Act) and Pub. L. 98-473, §§ 202-10 (Bail Reform Act of 1984). This Court has interpreted the "imposition or

To the extent that Mosallem argues more narrowly that as of November 25 there had not been a commencement of sentence within the particular meaning of § 3585(a), he is also mistaken. As of that date, his situation fit the plain language of the statute: "in custody [at MDC] awaiting transportation to . . . the official detention facility at which the sentence is to be served." The fact that § 3585 is titled "Calculation of a term of imprisonment" does not, as Mosallem claims, detract from its applicability here. As we explained in our opening memorandum (¶¶ 20-21), it is because prisoners in Mosallem's situation have started serving their terms that it is important that BOP's calculation of those terms reflect when execution of sentence commenced.

Because there is no dispute that Mosallem was in exclusive federal custody on November 14, 2003—the date when Judge Griesa signed the Judgment & Conviction Notice ("J&C") and imposed the sentence—there can be no doubt that Mosallem commenced serving his sentence on that date. Indeed, this Court has

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execution of sentence" language in the Federal Probation Act to terminate a district court's authority – allowed under that act – to order probation once a defendant had *commenced* to serve his sentence. *See United States v. Ellenbogen*, 390 F.2d 537, 541 (2d Cir. 1968) (concluding that, under the Federal Probation Act, a district court's "authority [to order probation]... terminates when the convicted defendant actually enters upon the service of his prison sentence [citations omitted]. It follows that once a convicted defendant has commenced to serve his sentence no subsequent order suspending the execution of the balance of the sentence and placing him on probation can be entered.").

made clear that the Sentencing Reform Act does not give district courts any discretion to determine that a sentence commences on a date other than the date prescribed by § 3585 and as implemented by the BOP. *See United States v. Labeille-Soto*, 163 F.3d 93, 98 (2d Cir. 1998).

The fact that, as of November 25, BOP had not yet designated Mosallem to a prison under § 3621(b) (Mem. 4) does not—and cannot—mean that the execution of his sentence had not yet begun. If, as Mosallem suggests, execution of a sentence does not commence until BOP makes a formal prison designation under § 3621(b), the district court's authority under § 3143(a) will be troublingly uncertain—and inconsistent with proper statutory construction of other related sections, such as §§ 3585 and 3621, which were enacted by the same public law. *See* Pub. L. 98-473 (1984). Under Mosallem's interpretation, the district court's authority would wholly depend on the pace at which BOP in every specific case made the final prison designation. By contrast, the government's reading of § 3143(a) provides judges with a bright-line standard under which they decide when to retain jurisdiction and continue to exercise the limited authority Congress provided under the Bail Reform Act of 1984.

Thus, as happened with Mosallem on November 13, if a judge after conviction chooses to sentence a defendant, denies bail, and puts the defendant into

the custody of BOP for service of his sentence, then the judge would know that a consequence of that choice is to terminate the specific limited authority to exercise release jurisdiction under § 3143(a). If, on the other hand, a judge prefers further consideration of bail at a later date, while still protecting against the risk of flight, he or she may do so, consistent with the Bail Reform Act of 1984, by deferring sentencing and continuing the bail hearing and the defendant's detention.

C. Mosallem Is Wrong to Suggest He Was Not a Prisoner in the Custody of BOP.

Mosallem's argument that, once he was incarcerated in the MDC, a BOP facility, he was in the custody of the U.S. marshal and *not* the BOP because he had not, in fact, "attained the status of a prisoner in the custody of the BOP" (Mem. 2-3) is plainly wrong and misleading. First, Judge Griesa's J&C of November 14 makes clear that the court had "committed [Mosallem] to the custody of the United States Bureau of Prisons to be imprisoned . . . ." U.S. Motion, Ex. C, J&C, p. 2. Moreover, § 3621(a) gives the district court no discretion in this regard: It states that "[a] person who has been sentenced to a term of imprisonment ... *shall be committed to the custody of the Bureau of Prisons* until the expiration of the term imposed...." 18 U.S.C. § 3621(a) (emphasis added). The simple fact that the marshal delivered Mosallem to the BOP's MDC cannot support Mosallem's argument that somehow he was no longer in the BOP's custody.

II. Mosallem Failed to Show by Clear and Convincing Evidence That He Was Not Likely to Flee.

Even if the district court is viewed to have authority under the Bail Reform Act of 1984 to release Mosallem on November 25, it clearly erred in doing so because Mosallem failed to show by clear and convincing evidence that he was not likely to flee. On the contrary, Mosallem was as unacceptable a flight risk then as he had been on November 13 when the court refused to release him. In that 12-day period, the only factual change that might point toward release was an enhancement of the proposed bail package: bail was increased from $1.5 million to $2.5 million; Mosallem's "very wealthy" father added the security of his New York apartment; and two relatives and his father's companion signed the bond, although without posting *any* security. Mem. 6, ¶ 6. Mosallem, however, still had a significant incentive and ability to flee. He still faced nearly six years in prison, at the end of which he would be 65 years old, poor, and, as a repeat offender (there was a tax conviction in 1984), unlikely to get a decent job. Equally important, Mosallem still owed over $2 million to the IRS and Grey Global Group (U.S. Motion, Ex. D, p.18, lines 20-12), amounts that *exceeded* the value of his one-half equity interest in his apartment. He still had the $30,000 in cash which had been found stashed at various locations in his apartment on November 12. He still knew that his father was "a very wealthy man, extremely wealthy." U.S. Motion, Ex. B, p. 20, lines 7-8.

He was likely to think his father would not be significantly impaired by the loss of an extra million dollars, and thus this prospect—especially coupled with the amounts Mosallem owed to the IRS and Grey Global Group—would not deter him from the flight to Mexico which so troubled the district court on November 13.

Finally, there can be no justification for the court's refusal of the government's reasonable request for electronic monitoring to limit the serious risk of flight, especially since Mosallem told the district court at the November 25 hearing: "If there is some kind of a monitoring or reporting to Pretrial Services on a

daily basis, of course we are prepared to do that." U.S. Motion, Ex. D, pp. 15-16, lines 24-5 and 1.

Dated: New York, New York
December 15, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca Meiklejohn, a member of the bar of this Court, hereby certify that today, December 15, 2003, I caused copies of the accompanying REPLY OF UNITED STATES to be served by fax and by first-class mail on:

Paul B. Bergman, Esquire
950 Third Avenue
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REBECCA MEIKLEJOHN