

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 20TH day of March, two thousand nine.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. ROBERT D. SACK,
HON. RICHARD C. WESLEY,
Circuit Judges.

- - - - -X
UNITED STATES OF AMERICA,
Appellee,

-v.-

09-1025-cr

BERNARD L. MADOFF,
Defendant-Appellant.
- - - - -X

1 **APPEARING FOR APPELLANT:** IRA LEE SORKIN, Dickstein
2 Shapiro LLP, New York, N.Y.

3
4 **APPEARING FOR APPELLEE:** MARC O. LITT, Assistant United
5 States Attorney, (Lisa A.
6 Baroni, on the brief), for Lev
7 L. Dassin, Acting United States
8 Attorney, Southern District of
9 New York, New York, N.Y.

10
11 Appeal from a judgment of the United States District
12 Court for the Southern District of New York (Chin, J.).

13
14 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
15 **AND DECREED** that the order of the district court be
16 **AFFIRMED.**

17
18 Defendant-appellant Bernard L. Madoff appeals the
19 district court's denial of bail pending sentencing pursuant
20 to 18 U.S.C. §§ 3143(a) and 3145(c).

21
22 Post-conviction, a defendant no longer has a
23 substantive constitutional right to bail pending sentencing.
24 Williamson v. United States, 184 F.2d 280, 281 (2d Cir.
25 1950) (Jackson, Circuit Justice); United States v. Abuhamra,
26 389 F.3d 309, 317 (2d Cir. 2004). As the district court
27 observed, the defendant "is no longer entitled to the
28 presumption of innocence." Accordingly, § 3143(a) places
29 the burden on a defendant to demonstrate by clear and
30 convincing evidence that he is not likely to flee or pose a
31 danger to the safety of others or the community.

32
33 Here the district court found that in light of the
34 defendant's age (70) and the length of a potential sentence
35 (150 years), he has an incentive to flee, and that because
36 he has the means to do so, he presents a risk of flight, and
37 therefore should not be released.

38
39 On an appeal from an order of detention pending
40 sentencing, we consider both the district court's factual
41 determinations and its overall assessment as to the risk of
42 flight, and we review for clear error. Abuhamra, 389 F.3d
43 at 317. "To identify clear error, we must do more than
44 entertain doubts about the district court's conclusions or
45 hypothesize reasonable alternative findings; we must be left
46 with the definite and firm conviction that a mistake has

1 been committed." United States v. Cavera, 550 F.3d 180, 204
2 (2d Cir. 2008) (in banc) (quotation omitted).
3

4 On appeal, the defendant argues that incentive to flee
5 is not a proper consideration under the statute, and that
6 the district court's findings are insufficiently detailed.
7

8 As to the incentive to flee (based on his age and
9 exposure to a lengthy imprisonment), we consider that such
10 an incentive naturally bears upon and increases the risk of
11 flight. This consideration was permissible under the
12 statute and reasonable under the circumstances, and
13 therefore not clearly erroneous.
14

15 As to the findings, our review of the record confirms
16 that the district court's findings were sufficient under the
17 circumstances of this case. The defendant's age and his
18 exposure to imprisonment are undisputed, and the court did
19 not err in inferring an incentive to flee from these facts.
20 Moreover, the district court's finding that the defendant
21 has the means--and therefore the ability--to flee was not
22 clear error. The defendant has argued that all of his
23 assets are accounted for and are inaccessible to him;
24 however, the district court was not required to treat this
25 defendant's financial representations as reliable. The
26 defendant has a residence abroad, and has had ample
27 opportunity over a long period of time to secret substantial
28 resources outside the country.
29

30 Finally, we note that there was substantial evidence in
31 the record to support a finding by the district court that
32 bail should be denied to the defendant because he had failed
33 to prove by clear and convincing evidence that he does "not
34 . . . pose a danger to the [pecuniary] safety of any other
35 person or the community if released" 28 U.S.C. §
36 3143(a)(1). See, e.g., United States v. Reynolds, 956 F.2d
37 192, 192-93 (9th Cir. 1992) (order) ("[D]anger may, at least
38 in some cases, encompass pecuniary or economic harm."). The
39 district court did not address this issue in its brief oral
40 decision, however. Inasmuch as we affirm in any event on
41 the ground of likelihood of flight, we need not decide
42 whether we can, in light of the record, also affirm on the
43 ground of endangerment. See Holcomb v. Lykens, 337 F.3d
44 217, 223 (2d Cir. 2003) ("It is well-settled that we may
45 affirm on any grounds for which there is a record sufficient
46 to permit conclusions of law, including grounds not relied

1 upon by the district court.") (citation and internal
2 quotation marks omitted).
3

4 In sum, the district court did not clearly err in its
5 assessment that the defendant has failed to show by clear
6 and convincing evidence that he is not likely to flee. The
7 order of the district court is hereby **AFFIRMED**.
8
9

10
11 FOR THE COURT:
12 CATHERINE O'HAGAN WOLFE, CLERK
13

14 By: _____
15 Frank Perez, Deputy Clerk
16
17