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3 **UNITED STATES COURT OF APPEALS**
4 **FOR THE SECOND CIRCUIT**
5

6 August Term, 2012
7

8 (Argued: September 4, 2012 Decided: October 5, 2012)
9 (Amended: October 9, 2012)
10

11 Docket No. 12-2988-cr
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13
14 UNITED STATES OF AMERICA, *Appellee*
15

16 – v. –
17

18 ANTONIO BRIGGS, *Defendant-Appellant*
19
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21 Before: CALABRESI and CARNEY, *Circuit Judges*.^{*}
22

23 Antonio Briggs, who stands indicted for substantive and conspiratorial drug
24 crimes, *see* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 841(b)(1)(D),
25 841(b)(1)(E), and 846, and who, having been arraigned on August 17, 2010, has been
26 detained with no trial date set, appeals from an order denying him bail pending trial.
27 Briggs challenges his ongoing pretrial detention as a violation of due process. We
28 conclude that the district court (Skretny, *J.*) properly applied our test for due process
29 review of pretrial detention and that its findings of fact were not clearly erroneous. We
30 therefore AFFIRM the detention order without prejudice to Briggs's moving this court to
31 recall the mandate and reinstate his appeal if the district court does not begin Briggs's
32 trial, or set reasonable bail for him, on or before February 1, 2013.

33 JOEL L. DANIELS, Buffalo, N.Y., *for Defendant-*
34 *Appellant*.
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36 MONICA J. RICHARDS, Assistant United States
37 Attorney, *for* William J. Hochul Jr., United States
38 Attorney for the Western District of New York,
39 Buffalo, N.Y., *for Appellee*.
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^{*} For health reasons, the third judge originally assigned to the panel was unable to hear the case. In accordance with our local rules, the two remaining members of the panel have decided the case. *See* 28 U.S.C. §46(d); 2d Cir. IOP E(b); *United States v. Desimone*, 140 F.3d 457, 458-59 (2d Cir. 1998).

1 CALABRESI, *Circuit Judge*:

2 Antonio Briggs stands indicted for his alleged principal role in a multi-count,
3 multi-defendant drug distribution conspiracy. A Third Superseding Indictment charges
4 Briggs with conspiring to possess with intent to distribute, and to distribute, 5 kilograms
5 or more of cocaine, 28 grams or more of cocaine base, heroin, MDMA, oxycodone,
6 hydrocodone, and marijuana in violation of 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B),
7 841(b)(1)(C), 841(b)(1)(D), 841(b)(1)(E), and 846. Briggs was arraigned on August 17,
8 2010 and has been detained, with no date set for trial, ever since.

9 On September 1, 2010, Magistrate Judge Hugh B. Scott ordered Briggs held
10 without bail pending trial. On December 23, 2010, the magistrate judge denied Briggs's
11 motion for reconsideration. The district court (Skretny, *J.*) reviewed this denial and, in
12 an order dated March 4, 2011, affirmed it. Earlier this year, Briggs again challenged the
13 magistrate judge's order in district court—this time on the ground that his ongoing
14 detention violates due process. On July 13, 2012, the district court rejected this
15 challenge. Briggs now appeals here.

16 Before us, Briggs challenges the lower courts' finding that he represents a risk of
17 flight and a danger to the community. He also complains that his detention has been
18 too long—longer, he contends, than due process can tolerate. We disagree, and affirm
19 the order of the district court. But we also find that unless Briggs's trial begins within a
20 reasonable time, his ongoing detention may well violate due process. We therefore
21 affirm the detention order without prejudice to Briggs's moving this court to recall the
22 mandate and reinstate his appeal if the district court does not begin his trial, or set
23 reasonable bail for him, on or before February 1, 2013.

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Briggs invokes his family and business ties to Western New York to rebut lower-court findings that he represents a risk of flight, and he adduces his non-violent record to rebut findings that he poses a danger to the community. He asks that we condemn his nearly twenty-six month detention as a violation of due process, and that we order the district court to set reasonable bail for him. In the alternative, he asks that we order for him the earliest possible trial date.

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Pretrial detention satisfies due process only if its purpose is regulatory rather than punitive. *United States v. Salerno*, 481 U.S. 739, 746–47 (1987); *Bell v. Wolfish*, 441 U.S. 520, 536-537 (1979). Permissible regulatory purposes include “preventing danger to the community,” *Salerno*, 481 U.S. at 747, and “ensur[ing] [a defendant’s] presence at trial,” *Bell*, 441 U.S. at 536. In a due process challenge to pretrial detention, “we review the district court’s findings of historical fact . . . for clear error” and “its

1 ultimate resolution of the constitutional due process issue *de novo*.” *United States v.*
2 *Millan*, 4 F.3d 1038, 1043 (2d Cir. 1993).

3 Briggs contends that his long detention offends due process. We have
4 consistently held that due process places no bright-line limit on the length of pretrial
5 detention. *See United States v. Orena*, 986 F.2d 628, 630 (2d Cir. 1993); *United States*
6 *v. Melendez-Carrion*, 820 F.2d 56, 59 (2d Cir. 1987). While length of detention is
7 “obviously a central focus of our inquiry,” *United States v. Gonzales Claudio*, 806 F.2d
8 334, 340 (2d Cir. 1986), “the due process limit on the duration of preventive detention
9 requires assessment on a case-by-case basis,” *id.* (internal quotation marks omitted).

10 In making such an assessment, we consider the strength of the evidence justifying
11 detention, the government’s responsibility for the delay in proceeding to trial, and the
12 length of the detention itself. *See United States v. El-Hage*, 213 F.3d 74, 79 (2d Cir.
13 2000); *United States v. El-Gabrowny*, 35 F.3d 63, 65 (2d Cir. 1994); *Millan*, 4 F.3d at
14 1043.¹ The longer the detention, and the larger the prosecution’s part in prolonging it,
15 the stronger the evidence justifying detention must be if it is to be deemed sufficient to
16 justify the detention’s continuance.

17
18 (1) *Strength of the Evidence Justifying Detention*

19 By statute, courts order the pretrial detention of a defendant when necessary to
20 “assure the appearance of the person as required and the safety of any other person and
21 the community.” 18 U.S.C. § 3142(c)(1)(b). In determining whether a defendant poses a

¹ We have sometimes described the standard as a four-part test that looks at the length of detention, the prosecution’s responsibility for delay, the gravity of the charges, and the strength of the evidence justifying detention. *See El-Hage*, 213 F.3d at 79; *El-Gabrowny*, 35 F.3d at 65. Because Congress has required courts to consider “the nature and circumstances of the offense charged” as part of their inquiry into the strength of the evidence justifying detention, *see* 18 U.S.C. § 3142(g)(1), we feel that no substance is lost, and some clarity is gained, by stating the standard in three parts.

1 risk of flight or represents a danger to the community, courts must consider “(1) the
2 nature and circumstances of the offense charged . . . ; (2) the weight of the evidence
3 against the person; (3) the history and characteristics of the person . . . ; [and] (4) the
4 nature and seriousness of the danger to any person or the community that would be
5 posed by the person’s release.” 18 U.S.C. § 3142(g)(1)-(4).

6 In its order of March 4, 2011, the district court properly examined each of these
7 factors and decided that they all weighed against Briggs. The district judge observed
8 that the charges against Briggs not only involved “a controlled substance,” *see* 18 U.S.C.
9 § 3142(g)(1), but that Briggs was charged with having “held a principal role” in “a large-
10 scale drug-trafficking conspiracy involving various controlled substances.” Order of
11 March 4, 2011, at 4. Congress has created a statutory presumption of flight risk and
12 dangerousness for a defendant who, like Briggs, is charged with “an offense for which a
13 maximum term of imprisonment of ten years or more is prescribed in the Controlled
14 Substances Act,” 18 U.S.C. § 3142(e)(3).² The district court adjudged that “the nature of
15 Defendant’s alleged offenses and his potential for a lengthy period of incarceration
16 provide a motive to flee and weigh against release.” Order of March 4, 2011, at 4.

17 The district judge found, moreover, that the evidence against Briggs “appears to
18 be strong,” consisting, among other things, “of intercepted communications between
19 [Briggs] and other co-defendants, regarding the alleged purchase and distribution of
20 narcotics.” *Id.* Although Briggs invoked his nonviolent history and family and business
21 ties to western New York to rebut the presumption of flight risk and dangerousness, the
22 district court found that Briggs’s personal characteristics and history cut both ways. *Id.*
23 at 5. Thus, the district judge highlighted Briggs’s criminal history of narcotic

² If convicted, Briggs faces a minimum prison term of ten years.

1 convictions, as well as information that the government had received “from a
2 previously-credible confidential source” indicating that Briggs “had stated an intention
3 to flee or take his own life upon pretrial release.” *Id.* at 5-6. Finally, the district judge
4 underscored government allegations that members of Briggs’s family were seeking to
5 identify informants and had hinted at reprisals. *Id.* at 6-7.

6 Reviewing Briggs’s detention order sixteen months later, the district judge held
7 that these “circumstances [had] not changed.” Order of July 13, 2012, at 3. We see no
8 reason to think that these factual findings of the district court were in error. We, like the
9 district judge, conclude that the evidence justifying Briggs’s detention is strong.

10
11 (2) *Responsibility for the Delay*

12 Earlier this year, we upheld by summary order the 24-month detention of a
13 defendant who, like Briggs, was charged with participation in a large drug conspiracy.
14 We noted that the defendant’s long detention was justified in part by “the inherent
15 complexities of this large multi-defendant case, which presents defense counsel with
16 voluminous discovery to absorb and the court with myriad motions to address.” *United*
17 *States v. Hill*, 462 F. App’x 125, 127 (2012) (summary order). On the record of that case
18 we discovered “no intentional, unwarranted delay by the prosecution,” and determined
19 that “most of the delay [was] attributable to the continuances requested by [the
20 defendant’s] twenty co-defendants and the complexities inherent in a twenty-defendant
21 case.” *Id.*

22 A review of the record in the instant case yields a similar conclusion. This case,
23 too, has been slowed by repeated motions and abundant discovery. As the government
24 points out in opposition to Briggs’s appeal, Briggs himself has joined most of the

1 motions that his co-defendants have filed. *See* Appellee's Mem. in Resp., at 6. It
2 appears, therefore, that he bears some of the blame for his trial's delay. Accordingly,
3 this fact also weighs against finding a due process violation.

4 We caution, however, that the difficulties faced by the prosecution in a large and
5 complex case do not justify the indefinite detention of the defendants. The realities of
6 limited resources and the interests of efficiency may lead us to uphold exercises of
7 prosecutorial discretion, but they do not suffice to excuse failures of prosecutorial
8 diligence. When the government decides to prosecute a case of considerable complexity
9 and scope, it must still pursue that case with promptness and energy. Due process does
10 not slumber because cases are complex.

11
12 (3) *Length of Detention*

13 We have often affirmed that the Constitution imposes no bright-line limit on the
14 length of pretrial detention. *See Millan*, 4 F.3d at 1044; *Orena*, 986 F.2d at 630. But we
15 have also stressed that very long detentions must be exceptional.

16 Twelve years ago, for instance, we upheld against constitutional challenge the
17 pretrial detention, projected to last between 30 and 33 months, of a defendant charged
18 "with being a key participant in the terrorist organization founded by [Osama] Bin
19 Laden, called 'al Qaeda.'" *El-Hage*, 213 F.3d at 77. We emphasized, however, that the
20 length of detention in that case was "extraordinary, and justified only by the
21 unprecedented scope of violence that the conspiracy of which defendant was allegedly a
22 part inflicted on innocent victims, by the extraordinarily complex and difficult
23 preparation needed to present this case, and, more particularly, because the lengthy
24 delay in bringing defendant to trial may not be laid at the government's doorstep." *Id.* at

1 76-77. We added later in the opinion that “the length of El-Hage’s detention weighs
2 heavily in his favor in his argument that his due process rights have been violated.” *Id.*
3 at 80.

4 In an earlier case, we condemned as unconstitutionally excessive the detention of
5 two defendants charged with participating in the robbery of a Wells Fargo depot by
6 paramilitary Puerto Rican nationalists. *Gonzales Claudio*, 806 F.2d 334. The
7 defendants in that case had been held for fourteen months, and their trial, set for four
8 months following the disposition of their appeal, was expected to last eight months
9 more. *Id.* at 335.

10 In considering Briggs’s claim below, the district judge noted the discrepancy in
11 the outcomes of these cases, observed that length of detention is not dispositive, and
12 proceeded to consider the other relevant factors. Order of July 13, 2012, at 2. Finding
13 that each of these factors weighed against Briggs, the district judge determined that “the
14 totality of the circumstances” did not support a finding of due process violation. *Id.*

15 We affirm this holding. But we emphasize that we are deeply troubled by the
16 length of Briggs’s detention. We stress, moreover, that our repeated statements that
17 length of detention alone is not dispositive must not be read to authorize detentions of
18 any length simply because the other relevant factors weigh against the defendant. There
19 is no bright-line limit on the length of detention that applies in all circumstances; but for
20 every set of circumstances, due process does impose some limit. Although we affirm the
21 district judge’s ruling that the other relevant factors weigh sufficiently strongly against
22 Briggs to justify his ongoing detention at this point, we find that the length of his
23 detention is approaching the limits of what due process can tolerate.

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We are disturbed by Briggs's long detention. But we conclude, after weighing the relevant factors, that Briggs's detention does not, at this time, violate due process. Our decision to uphold the district court's ruling, however, is a close call. Because of the length of Briggs's detention, due process demands that the district court begin Briggs's trial, or set reasonable bail, very soon. Accordingly, while we AFFIRM the district court's holding that Briggs's detention does not now violate due process, we do so without prejudice to Briggs's moving this court to recall the mandate and reinstate his appeal if the district court does not begin his trial, or set reasonable bail for him, on or before February 1, 2013. The Clerk of Court shall refer any such motion to this panel. The mandate shall issue forthwith.