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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE WYATT ELMS,

Defendant.

Case No. 3:20-MJ-036-CLB

APPEAL FROM ORDER GRANTING GOVERNMENT'S MOTION TO EXTEND PRELIMINARY HEARING AND SPEEDY TRIAL ACT TIMETABLES IN LIGHT OF THE COVID-19 PANDEMIC

Comes now the Defendant, GEORGE WYATT ELMS, by and through his counsel of record, Christopher P. Frey, Assistant Federal Public Defender, and hereby appeals the magistrate judge's Order granting the Government's Motion to Extend Preliminary Hearing and Speedy Trial Act Timetables in Light of the COVID-19 Pandemic.[1]

This is appeal is based on the attached points and authorities, and any evidence and oral argument presented at the hearing this matter.

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[1] This appeal is timely filed. LR IB 3-1.

I. FACTS AND PROCEDURAL HISTORY

According to the government, "there hasn't been a grand jury in session since defendants' arrest based on the COVID-19 pandemic."[2] The only other mechanism in this district to determine probable cause is a preliminary hearing. Fed. R. Crim. P. 5.1.

On March 30, 2020, Chief Judge Miranda Du promulgated TGO 2020-05, authorizing preliminary hearings to be conducted by virtual means. One day after TGO 2020-05 authorized virtual preliminary hearings, and while no grand jury was in session, the government filed a criminal complaint against Mr. Elms.[3]

Mr. Elms was arrested on the complaint on April 2, 2020, and his initial appearance was held the next day, on April 3, 2020, triggering the 14-day clock to conduct Mr. Elms' preliminary hearing under Rule 5.1(c) of the Federal Rules of Criminal Procedure. Mr. Elms' initial appearance and contested detention hearing were conducted by videoconference technology, and all parties appeared and were heard.

In keeping with TGO 2020-05, and consistent with the course of practice in Mr. Elms' case so far of conducting proceedings by video, the magistrate judge scheduled a "Video Preliminary Examination . . . 4/16/20 at 11:00 AM."[4] On April 14, 2020, two days before Mr. Elms' scheduled virtual preliminary hearing, the government filed a motion to continue, asserting generalized complaints about the administrative burden of virtual proceedings, and raising hypothetical hardships in preparing for a virtual preliminary hearing, but nothing specific about the hardships it actually experienced in this particular case.[5]

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[2] ECF No. 19 at 3: 20-22.

[3] ECF No. 1.

[4] ECF No. 4.

[5] ECF No. 19 at 6-7.

Mr. Elms filed a response on April 15, 2020, and opposed the government's request to continue, arguing that the government failed to establish "good cause" for a continuance or make a showing of "extraordinary circumstances" as required under Rule P. 5.1(d). In the event that a virtual preliminary hearing could not be held within Rule 5.1(c)'s 14 day-clock, Mr. Elms invoked his right to release under 18 U.S.C. § 3060(d).[6]

The government's motion failed to identify what witnesses it believed were necessary for the preliminary hearing, where those witness were located, whether they were actually unavailable or lacked access to videoconferencing technology, and failed to establish that those witnesses actually needed to travel in order to review documents and files in preparation for the preliminary hearing. Nevertheless, the magistrate judge granted the government's motion to continue in a written order (the Order), reasoning that,[7]

> the Government will have difficulty preparing for the preliminary hearing given the inherent limitations presented by teleworking and the availability to review documents and evidence. Moreover, although the court is permitted to hold the preliminary hearing by video conferencing, the Court notes that events in this case took place in Winnemucca, Nevada—a considerable distance from the federal courthouse and outside of Washoe County. (ECF No. 1.) Thus, necessary witnesses are likely located in Winnemucca and not Reno. It is unknown whether or not these witnesses, particularly non-law enforcement or government employee witnesses, have access to the necessary technology to attend a video conference hearing. It is also unknown whether any accommodation could be made for these witnesses to appear by video conference, or if witnesses would be required to travel any distance to review documents or evidence in preparation of the hearing, potentially putting themselves and others health at risk.

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[6] ECF No. 22.

[7] ECF No. 24 at 6-7.

Having granted the government's motion to continue, the magistrate judge rescheduled Mr. Elms' preliminary hearing to May 15, 2020, without identifying if the continued preliminary hearing would be conducted in-person or by video.[8]

The magistrate judge's Order granting the government's motion to continue rests on findings of fact and legal conclusions that are clearly erroneous and contrary to law. Accordingly, the Order the government's motion to continue must be reversed and the matter remanded to the magistrate judge with instructions that Mr. Elms be released consistent with Rule 5.1(d) and 18 U.S.C. § 3060(d).[9] LR IB 3-1(b).

II. ARGUMENT

Virtual preliminary hearings have been authorized since March 30, 2020, under Temporary General Order (TGO) 2020-05, Mr. Elms has a right to a preliminary hearing no later than 14 days after his initial appearance, Fed. R. Crim. P. 5.1(c); 18 U.S.C. § 3060, and the government was on notice that a preliminary hearing would be the default mechanism for finding probable cause since it openly acknowledges that "there hasn't been a grand jury in session since defendants' arrest based on the COVID-19 pandemic."[10]

Accordingly, there were no "extraordinary circumstances" justifying a continuance of Mr. Elms' preliminary hearing, and the government failed to make a showing to the contrary, despite the magistrate judge having erroneously accepted the government's generalized complaints and hypothetical hardships as an actual showing of witness unavailability and bona fide difficulty. The magistrate judge's findings of fact and legal reasoning are clearly erroneous and contrary to law. Consequently, the magistrate judge improvidently granted the

[8] ECF No. 25.

[9] ECF No. 22.

[10] ECF No. 19 at 3: 20-22.

government's motion to continue, and this Court should reverse the magistrate judge's Order and remand the matter with instructions that Mr. Elms be released.

A. Erroneous Finding #1—The COVID-19 Pandemic on its Own Does Not Amount to Extraordinary Circumstances to Continue Video Preliminary Hearings Because the CARES Act and TGO 2020-05 Authorize Video Preliminary Hearings as a Way of Overcoming the "Inherent Limitations" of Conducting Criminal Litigation Remotely.

Temporary General Order (TGO) 2020-05 authorizes "the use of video conferencing, or telephone conferencing if video conferencing is not reasonably available, for all events listed in Section 15002 of the CARES Act."[11] Section 15002(b)(1) of the CARES Act lists a number of criminal proceedings that may be conducted virtually, to specifically include "[p]reliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure."

Once TGO 2020-05 was promulgated, the COVID-19 pandemic, on its own, no longer constituted "extraordinary circumstances" that could justify extending the time to hold Mr. Elms' preliminary hearing, as the government asserted below.[12] Section 15002(b)(1) of the CARES Act and TGO 2020-05 were intended to accommodate the exigency of the COVID-19 pandemic by allowing for virtual preliminary hearings. Accordingly, to the extent the magistrate judge made a finding in this respect, the sheer existence of the COVID-19 pandemic was not a sufficient basis on its own to continue Mr. Elms' virtual preliminary hearing.

And that arguably appears to have been one of the findings of the magistrate judge.[13] According to the magistrate judge, "the Government will have difficulty preparing for the

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[11] Temporary General Order 2020-05, available at: https://www.nvd.uscourts.gov/wp-content/uploads/2020/03/GO-2020-05-re-COVID-19-Remote-Hearings.pdf.

[12] ECF No. 19 at 6: 20.

[13] There is some ambiguity in the Order in this respect since the magistrate judge cites a number of out-of-district cases addressing "extraordinary circumstances" but does not directly apply those cases to the facts before it. ECF No. 24 at 3-6. In any event, those cases are distinguishable for the reasons outlined in Mr. Elms' Response, which is full incorporated here. ECF No. 22 at 5-6 (distinguishing *United States v. Carrilllo-Villa*, 2020 WL 1644773, at *2

preliminary hearing given the inherent limitations presented by teleworking and the availability to review documents and evidence."[14] To the extent "inherent limitations" was intended as a reference to the new constraints on conducting criminal litigation in the District of Nevada due to the COVID-19 pandemic, this finding is clearly erroneous. Those same constraints, along with recognition of the new necessity for teleworking, are precisely the concerns that animated the passage of Section 15002(b)(1) of the CARES Act and spurred promulgation of TGO 2020-05. Those provisions authorize video preliminary hearings as a way of working within the new constraints on conducting criminal litigation remotely and overcoming the "inherent limitations" of telework. As a purely logical matter, those same "inherent limitations" cannot be cited as grounds to claim that a video preliminary hearing is unworkable. As a practical matter, virtual proceedings had become the norm before the government filed its motion to continue, and the government had successfully participated remotely in every one of them.[15]

B. Erroneous Finding #2—The Availability of Documents and Evidence.

The magistrate judge further found that the government "will have difficulty preparing for the preliminary hearing given the inherent limitations presented by . . . the availability to review documents and evidence."[16] This finding is clearly erroneous for three reasons.

First, the government never claimed in its motion that it or any or its witnesses had experienced actual difficulty reviewing documents and evidence for this particular case. The magistrate judge's finding that the government "will have difficulty" is thus a finding with no tethering to the representations in the government's motion.

(S.D.N.Y. Apr. 2, 2020) and *United States v. Munoz*, 2020 WL 1433400, at *1 (S.D. Cal. Mar. 24, 2020)).

[14] ECF No. 6: 26-28.

[15] ECF No. 22 at 3: 4-13 n. 7, 8.

[16] ECF No. 24 at 6: 27.

Second, the government represented that "[m]any prosecutors and law enforcement agents are teleworking and have limited access to files and records."[17] This statement describes the profession generally, and says nothing about the charging prosecutor or the witnesses involved in this case specifically. The claim that prosecutors and law enforcement agents as professional groups may have limited access to files and records due to the new teleworking norm is precisely the difficulty that Section 15002(b)(1) of the CARES Act and TGO 2020-05 were designed to overcome by authorizing virtual preliminary hearings. Virtual preliminary hearings cannot both be the cure and the problem.

Third, the magistrate judge's finding that the government "will have" difficulty preparing for Mr. Elms' video preliminary hearing is framed in the future tense. The government had known about the April 16, 2020, preliminary hearing since Mr. Elms' arrest on April 2, 2020, but waited to file its motion to continue until April 14, 2020. The magistrate judge's finding that the government "will have" difficulty preparing for a preliminary hearing in two days begs the question of what the government was doing in the twelve days that preceded the filing of its motion. Yet the magistrate judge wholly failed to consider the government's diligence in preparing for the video preliminary hearing, an inquiry that was required under Rule 5.1(d) as a matter of considering whether "justice requires the delay."

Fourth, crediting a generalized claim that there may be limitations on reviewing documents and evidence is plainly unreasonable in the modern, digital age, especially when that claim is advanced by the United States of America, arguably the most technologically sophisticated party litigating in the court system. E-mail is a ubiquitous form of communication, and attaching documents to emails is a common way to transmit "files and records"[18] and

[17] ECF No. 22 at 6-7.

[18] ECF No. 19 at 6-7.

"documents and evidence."[19] *Id*. at 6-7. Sharing documents digitally in a digital age is just plain common sense.[20] So is just picking up the phone. As magistrate judge Brenda Weksler observed when dismissing a similar claim by the government[21]:

> it is not clear what would prevent these witnesses from gathering the information they need to review prior to the hearing. To the extent they do not already have access to this information, the government can email it to them. All witnesses can talk to the government over the phone in preparation for this hearing—there is no need for in-person meetings. Lastly, the government does not set forth reasons for why these witnesses cannot access the necessary technology, or at least a phone.

The government's motion to continue here was similarly devoid of the specifics whose absence was fatal to the government's motion in *Summerfield*. The government's motion thus similarly should have been denied. The magistrate judge's decision to grant it despite a record devoid of specifics and without a concern for the government's diligence was clearly erroneous.

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[19] ECF No. 24 at 6: 27.

[20] Email is not the only technology for digitally sharing documents. The options are "nearly endless," including DropBox, Box, Google Drive, and many more. *See* James A. Martin, Top 10 file-sharing options: Dropbox, Box, Google Drive, OneDrive and more, Computer World (September 17, 2019), available at: https://www.computerworld.com/article/3262636/top-10-file-sharing-options-dropbox-box-google-drive-onedrive-and-more.html. Moreover, while the government speculates that it could be the case that some of its witnesses may have to travel to access a smartphone, tablet, computer, or other video conference-capable digital device, it fails to identify who that would be, and the assertion that its witnesses do not have access to those devices in their homes is also unpersuasive. *See Riley v. California*, 573 U.S. 373, 385 (2014) ("[M]odern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."). As discussed below, the only necessary witness is the case agent, ATF Special Agent Joshua Caron. It is unreasonable to assume SA Caron does not have access to a video-conference capable device.

[21] *United States v. Che Summerfield*, 2:20-mj-00231-BNW, ECF No. 19 at 2: 15-20 (D. Nev. April 21, 2020).

C. Erroneous Finding #3—Unavailability of "Necessary" Witnesses.

The government's motion below failed to identify what witnesses it believed were necessary to the preliminary hearing, where those witness were located, or whether they were actually unavailable or lacked access to videoconferencing technology or a phone. Even though the government failed to identify who its necessary witnesses were and what they would say, the magistrate judge found that "witnesses are likely located in Winnemucca" and offered the legal conclusion that those witnesses were "necessary."[22] The magistrate judge's factual finding and legal conclusion are clearly erroneous.

If the government could not identify which witnesses it would call at the preliminary hearing, neither could the magistrate judge. Additionally, the magistrate judge could only surmise the location of the government's witnesses based on the situs of the offense—Winnemucca. The government never represented in its motion that any of the witnesses it expected to call for the preliminary hearing were located in Winnemucca. The magistrate judge's conjecture that the government's witnesses were nevertheless "likely" in Winnemucca thus has no grounding in the record and fails to align with any representations that the

[22] ECF No. 24 at 6: 27.

government made in its motion.[23] The government never represented in its motion that its witnesses were in Winnemucca, or even identified who its witnesses were.[24]

Moreover, the legal conclusion[25] that the government's witnesses, who were "likely" located in Winnemucca but who were never identified, were also "necessary" to establishing probable cause is defective in two ways. First, it lacks any support in the record. If the government failed to proffer the type of testimony that its unidentified witnesses would provide at the preliminary hearing, there was no basis for the magistrate judge to conclude that any particular witness was "necessary" in the first place.

Second, the magistrate judge's legal conclusion fundamentally misapprehends the nature of a preliminary hearing, which is not governed by the rules of evidence. A "necessary" witness is one without whom probable cause cannot be established, and whose testimony establishes a fact that cannot be proven by other means.[26] Hearsay is permitted at preliminary

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[23] The magistrate judge appeared to rest its finding that it was "likely" necessary government witnesses were in Winnemucca based on the affidavit accompanying the complaint. The affidavit is not a legitimate basis on which to render findings of fact. Even if it was, that document discloses that not a single Winnemucca witness is necessary to establish probable cause at the preliminary hearing stage. The offense was fully captured on video, Mr. Elms was in jail in Reno shortly thereafter and made a number of incriminating recorded phone calls, the stolen guns were recovered by ATF agents inside a car at the Grand Sierra Resort in Reno, and Mr. Elms gave a confession to ATF agents in Reno while at the Washoe County jail. The majority of the investigation occurred in Reno and the majority of the evidence was collected in Reno. Furthermore, the majority of the evidence (surveillance video, recorded jail calls, and Mr. Elms' confession) is readily admissible since the rules of evidence do not apply at preliminary hearings, and the defense could not object to any evidence on chain-of-custody or hearsay grounds or challenge the evidence's authenticity.

[24] ECF No. 19 at 6-7.

[25] Legal conclusions are reviewed de novo. *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) ("When de novo review is compelled, no form of appellate deference is acceptable."). To the extent the determination that the government's unidentified witnesses are "necessary" involves a mixed question of law and fact, the standard of review is similarly de novo. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004).

[26] *See* Black's Law Dictionary (11th ed. 2019) (defining "necessary" as something "[t]hat is needed for some purpose or reason; essential" and something "[t][hat must exist or happen and cannot be avoided; inevitable); *see also Hill v. Sheriff of Clark Cty.*, 85 Nev. 234,

hearings and the rules of evidence do not apply. Thus, the government need only put on its case agent, ATF Special Agent Joshua Caron, who is currently assigned to the Reno Field Office,[27] in order to establish probable cause. Accordingly, even if some people who turn out to be government witnesses at trial may be located in Winnemucca, the only necessary government witness for Mr. Elms' preliminary hearing was SA Caron.

D. Erroneous Finding #4—The Government Bore the Burden of Providing "Unknown" Information and the Magistrate Judge Clearly Erred in Using "Unknown" Information to Make a Finding About Risk.

The magistrate judge additionally used "unknown" information to determine that extraordinary circumstances existed to continue Mr. Elms' preliminary hearing. Granting relief to a moving party under a standard that requires an affirmative showing by that party is improper. The magistrate judge therefore clearly erred in this respect.

As the magistrate judge observed,[28]

> It is unknown whether or not these witnesses, particularly non-law enforcement or government employee witnesses, have access to the necessary technology to attend a video conference hearing. It is also unknown whether any accommodation could be made for these witnesses to appear by video conference, or if witnesses would be required to travel any distance to review documents or evidence in preparation of the hearing, potentially putting themselves and others health at risk.

The issue of whether the government's unidentified necessary witnesses had access to videoconferencing technology or had to travel to review documents and evidence were questions for the government to answer, which it did not. The magistrate judge thus could only

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236, 452 P.2d 918, 919 (1969) (gauging whether a preliminary hearing witness is necessary by "whether the same facts can be proven by other witnesses").

[27] ECF No. 1.

[28] ECF No. 24 at 6-7.

speculate that these witnesses would be at risk if the video preliminary hearing proceeded as scheduled. Findings of fact cannot rest on speculation.[29]

Moreover, there was only one necessary witness—SA Caron. It would be unreasonable to presume he did not have access to a videoconference-capable digital device, or a telephone for that matter. SA Caron is based out of the Reno Field Office.[30] He would not need to travel to review documents or evidence. Accordingly, the magistrate judge clearly erred in the first instance in assuming who the government's necessary witnesses would be, and likewise clearly erred in relying on "unknown" information to make a finding of fact that proceeding with the video preliminary hearing as scheduled presented a risk to those witnesses.[31] The only necessary witness is SA Caron, and there would be no risk to him in appearing remotely.

E. The Magistrate Judge Clearly Erred in Not Rendering Findings Regarding Due Diligence.

In addition to demonstrating "extraordinary circumstances," the government was required to demonstrate that "justice require[d] the delay" of Mr. Elms' preliminary hearing. Fed. R. Crim. P. 5.1(d). The government offered nothing to support why justice required the delay. Nevertheless, the magistrate judge found that it did, without any inquiry into the government's actual efforts to prepare for the preliminary hearing. This was clear error.

When the government fails to make any arrangements to conduct a preliminary hearing within Rule 5.1(c)'s 14-day window then files a motion to continue without documenting whether it had begun preparing for the preliminary hearing, "justice does not "require[] the delay." In that circumstance, justice requires that the accused be released consistent with 18

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[29] *See Sweeney v. Metro. Life Ins. Co.*, 92 P.2d 1043, 1046 (Cal. App. 1937) ("A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence.").

[30] ECF No. 1.

[31] All of the above demonstrates that there was no basis to conclude that a necessary government witness was unavailable, or that preparation was so impracticable, such that the video preliminary hearing could not proceed as scheduled.

U.S.C. § 3060(d). Yet the magistrate judge made no inquiry about the government's preparations up to that point, and thus granted the motion without regard for due diligence or whether the request to continue was simply for the purpose of delay. *See United States v. Fortenberry*, 2014 WL 6969615, at *1 (D. Nev. Dec. 8, 2014) ("Rule 5.1 does not permit continuance solely to enable the government to avoid a preliminary hearing by securing an indictment" and noting that "the drafters [of Rule 5.1] intended that delay from whatever source should be avoided wherever possible.") (internal quotation marks and citations omitted).

Because the formal authority for conducting Mr. Elms' preliminary hearing by alternative means pre-dated Mr. Elms' arrest and his initial appearance, and "there ha[d]n't been a grand jury in session since defendants' arrest based on the COVID-19 pandemic,"[32] the government knew from the beginning that Mr. Elms could not possibly be indicted and that a virtual preliminary hearing was inevitable. Indeed, TGO 2020-5 was promulgated on March 30, 2020, two days before charging on April 1, 2020, three days before Mr. Elms' arrest on April 2, 2020, and four days before his initial appearance on April 3, 2020, which triggered the 14-day clock under Rule 5.1(c). The government was thus on notice from the case's inception that Mr. Elms' preliminary hearing would be conducted by video.[33]

With two weeks of notice between initial appearance and the scheduled preliminary hearing, the government's failure to make the appropriate arrangements to present its case by video on the scheduled date is thus inexcusable. In its motion below, the government offered no reason why it could not prepare its case in the time allotted, and failed to articulate any prejudice to it in proceeding by video.[34] The Court in *United States v. Che Summerfield*, p

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[32] ECF No. 19 at 3: 20-22.

[33] ECF No. 19 (Government's Motion to Continue) at 3: 20-22.

[34] *United States v. Che Summerfield*, 2:20-cv-00713-APG-BNW, ECF No. 4 at (D. Nev. April 21, 2020) (denying the government's appeal from the denial of its motion to continue a video preliminary hearing, noting, among other things, that "the government has not shown any prejudice by having to conduct the preliminary hearing by videoconference or telephone").

2:20-cv-00713-APG-BNW, ECF No. 4 (D. Nev. April 21, 2020) recently ruled that the 14-day window of Rule 5.1(c) afforded the government a perfectly adequate amount of time to prepare for a video preliminary hearing. As the Court noted there, "the government has known about this hearing since April 7, 2020 [the initial appearance date] . . . [s]o, the witnesses and evidence should be available and ready to present in court."

The same was true here. Nevertheless, the government made no showing whatsoever regarding the efforts it made to make arrangements for the video preliminary hearing, and the magistrate judge granted the motion without distinguishing whether the government's motion was brought only after an exercise of diligence or brought only for the purpose of delay. In *Summerfield* the government delayed raising the issue of a continuance until approximately four days before the video preliminary hearing.[35] Here the government delayed raising the issue of a continuance until the eleventh hour, just two days before the preliminary hearing.[36] No reason was offered for the timing of the government's motion.

III. CONCLUSION

The magistrate judge improvidently granted the government's motion to continue Mr. Elms' preliminary hearing based on clearly erroneous findings of fact and legal conclusions

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[35] *United States v. Che Summerfield*, 2:20-cv-00713-APG-BNW, ECF No. 19 at 2-3. Magistrate judge Weksler reasoned as follows:

> The Court announced on March 30, 2020, that the use of videoconferencing would be available for certain proceedings with the consent of the defendant. Temporary General Order 2020-05. The preliminary hearing at issue has been scheduled since April 7, 2020. ECF No. 4. Conversations between the government and counsel for Mr. Summerfield did not seem to take place until April 17, 2020. The government was aware that it would not receive a response as to whether Mr. Summerfield would agree to continue the preliminary hearing until April 20, 2020. As a result, on April 17, 2020, the government should have recognized the possibility of Mr. Summerfield not agreeing to the continuance and should have started making arrangements to proceed with the preliminary hearing as scheduled.

[36] ECF No. 19.

that were contrary to law. Mr. Elms' video preliminary hearing should have been conducted on April 16, 2020, as originally scheduled and required by 18 U.S.C. § 3060(b)(1) and Rule 5.1(c). Accordingly, this Court should reverse the magistrate judge's Order and remand the matter with instructions that Mr. Elms be discharged from custody 18 U.S.C. § 3060(d).

DATED this 23nd day of April, 2020.

RENE L. VALLADARES
Federal Public Defender

By: */s/ **Christopher P. Frey***

CHRISTOPHER P. FREY
Assistant Federal Public Defender
Attorney for George Wyatt Elms

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that he is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on April 23, 2020, he served an electronic copy of the above and foregoing, APPEAL FROM ORDER GRANTING GOVERNMENT'S MOTION TO EXTEND PRELIMINARY HEARING AND SPEEDY TRIAL ACT TIMETABLES IN LIGHT OF THE COVID-19 PANDEMIC, by electronic service (ECF) to the person named below:

NICOLAS TRUTANICH
United States Attorney
Megan Rachow
Assistant United States Attorney
100 W. Liberty Street, Suite 600
Reno, Nevada 89512

/s/ Katrina Burden
Employee of the Federal Public Defender

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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GEORGE WYATT ELMS, and TRAVIS KLYN, Appellants, v. UNITED STATES OF AMERICA, Appellee.	Case No. 3:20-cv-00253-MMD-CLB (Appeal from Case No. 3:20-mj-00036-CLB) ORDER

I. SUMMARY

This is an appeal from Magistrate Judge Carla L. Baldwin's order in *U.S. v. Elms*, Case No. 3:20-mj-00036-CLB, ECF No. 24 (D. Nev. Filed April 1, 2020) ("*Underlying Case*") granting the government's motion to continue Appellants George Wyatt Elms and Travis Klyn's[1] preliminary hearings and extending the deadline by which their indictments must issue (the "Order").[2] (ECF No. 1.) Because the Court is persuaded by Appellants' argument that Judge Baldwin clearly erred in the Order—and as further explained below—the Court will vacate the Order and remand this case to Judge Baldwin with instructions to immediately release Elms and Klyn under 18 U.S.C. § 3060(d).

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[1]Klyn filed a motion to join Elms' appeal. (ECF No. 2.) The government does not oppose Klyn's joinder to the appeal. (ECF No. 5 at 2.) Because Klyn is materially identically situated to Elms, the Court grants his motion to join Elms' appeal, and refers to both of them collectively as Defendants throughout this order.

[2]The government filed a response (ECF No. 5), and Elms filed a reply (ECF No. 6).

II. BACKGROUND

The Court issues this order during the pandemic caused by the novel coronavirus known as COVID-19. In the ordinary sense of the word, this is an extraordinary time. But the primary question before the Court here is whether there are extraordinary circumstances specific to this case justifying continuance of Elms and Klyn's preliminary hearings, and whether those circumstances outweigh the interest of justice in not holding people in jail before the government has shown it has probable cause they committed a crime.

Like many courts across the country, the Court has restricted its operations in response to COVID-19, and currently relies on video and teleconferencing technology to conduct the limited hearings that are still occurring during this period of restricted operations. As pertinent to this appeal, the Court promulgated Temporary General Order 2020-05[3] ("TGO 2020-05") on March 30, 2020 to implement certain provisions of the "Coronavirus Aid, Relief, and Economic Security Act" ("CARES Act") authorizing the use of video and telephone conferencing, under certain circumstances and with the consent of the defendant, for various criminal hearings during the course of the COVID-19 emergency. *See* CARES Act, H.R. 748, Public Law No. 116-136.

The *Underlying Case* began two days after the Court issued TGO 2020-05 when the government filed a criminal complaint against Elms and Klyn—for breaking into a hardware store in Winnemucca, Nevada and stealing some 25 firearms. *See Underlying Case*, ECF No. 1 (filed April 1, 2020). Elms and Klyn both had their initial appearances by videoconference. *See id.*, ECF Nos. 4, 5. They also consented to have their preliminary hearings by videoconference. *See id.*, ECF Nos. 22 at 3-4, 23. Nevertheless, in the Order,

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[3] *Available at* https://www.nvd.uscourts.gov/wp-content/uploads/2020/03/GO-2020-05-re-COVID-19-Remote-Hearings.pdf.

Judge Baldwin decided to continue their preliminary hearings instead of holding them by videoconference. (*See* Order.)

The Court incorporates Judge Baldwin's description of the procedural history of the *Underlying Case* from the Order, and does not fully recite it here. *See* Order at 1-3. In short, the government requested that Elms and Klyn's preliminary hearings be continued, and its deadline for filing indictments against them be extended. *See Underlying Case*, ECF No. 19. Elms and Klyn did not consent to having their preliminary hearings continued (but, again, consented to having them by videoconference), so to grant the government its requested continuance, Judge Baldwin was required to find under the governing legal framework—and did find—"that extraordinary circumstances exist and justice requires the delay[.]" (*See* Order at 3-7.) Judge Baldwin went on to find that the Speedy Trial Act's "ends of justice" standard was also satisfied, for essentially the same reasons she found that "extraordinary circumstances" existed, and also because it is unlikely a functioning grand jury will exist in this district for some time, and thus also extended the government's deadline to file indictments against Elms and Klyn. (*See id.* at 7-9.) This appeal of the Order followed.

III. DISCUSSION

Defendants argue Judge Baldwin's Order is clearly erroneous,[4] so the Court should vacate it, and remand this case with instructions to release them. (ECF Nos. 1, 6.) The government of course responds that Judge Baldwin's Order should be affirmed. (ECF No. 5.) The Court agrees with Defendants.

The Court finds that, as Defendants argue (ECF No. 1 at 4-12), Judge Baldwin's factual findings in the Order are clearly erroneous, leading to the legal error of finding

[4]"A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case under LR IB 1-3, when it has been shown the magistrate judge's order is clearly erroneous or contrary to law." LR IB 3-1(a).

extraordinary circumstances exist in this case when she decided to grant the government's requested continuance of Defendants' preliminary hearings over their objections. At a high level, the issue with the Order is that it treats hypothetical arguments from the government as facts specific to this case, and fills in gaps in the government's minimal factual showing in its underlying motion with speculative factual assumptions that may not be true. The Court also finds that Judge Baldwin erred in not making any findings to support her conclusion that justice required delaying Defendants' preliminary hearings. (*Id.* at 12-13; *see also* Order at 3-7.) Moreover, Judge Baldwin erred in extending the government's deadline to file an indictment under the Speedy Trial Act, because her decision was based on the same clearly erroneous factual findings that led to her incorrectly continuing Defendants' preliminary hearings. (*See* Order at 8 ("The Speedy Trial Act's "ends of justice" standard is easily applied here because it is far less demanding than the "extraordinary circumstances" standard set forth in in Fed. R. Crim. P. 5.1(d), which the court has already found to exist.") (citation omitted).)

The Court begins its review with Judge Baldwin's factual findings. She first found the government "will have difficulty preparing for the preliminary hearing given the inherent limitations presented by teleworking and the availability to review documents and evidence." (Order at 6.) But as Defendants argue, this reason does not speak to the prosecutors and law enforcement agents involved in this case, nor does it identify any documents or evidence the government needed to review, nor does it explain why the government needed to review them. (ECF No. 1 at 6-11.) Moreover, the government did not point to anything specific to this case in its underlying motion that supports this finding. *See Underlying Case*, ECF No. 19 at 6-7. The government should have offered something about the specific people and documents involved in the underlying case, why they were unavailable, or what information they were looking for they lacked access to because of teleworking or conditions created by COVID-19. This factual finding is therefore clearly erroneous because it is untethered to factual circumstances specific to this case.

Moreover, this finding is problematic because both the governing statute and rule impose a burden on the government[5] to make "a showing that" extraordinary circumstances exist, and justice requires the delay. *See* 18 U.S.C. § 3060(c); *see also* Fed. R. Crim. P. 5.1(d); *see also U.S. v. Fortenberry*, Case No. 2:14-MJ-673-VCF, 2014 WL 6969615, at *2 (D. Nev. Dec. 8, 2014) ("This, however, was the government's burden."). The general statements the government offered untethered to the facts of this case—and upon which Judge Baldwin relied—do not constitute such a showing.

Judge Baldwin next found that necessary documents or witnesses may be in Winnemucca, Nevada, because that is where the alleged offense conduct occurred. *See* Order at 7. This factual finding is erroneous for several reasons. First, the government did not make this argument. *See Underlying Case*, ECF No. 19. Thus, in line with the discussion above, making a factual finding based on a showing the government did not offer ignores the government's burden in seeking a continuance of a preliminary hearing over the defendant's objection. Second, Judge Baldwin appears to have drawn this inference based on the content of the Complaint. (*See* Order at 7 (citing *Underlying Case*, ECF No. 1).) However, Defendants argue that much of the evidence, and many of the witnesses in this case—most notably the case agent—are located in Reno, Nevada. (ECF No. 1 at 10 n.23.) Judge Baldwin's inference may therefore be incorrect. That highlights why a factual finding based on speculation is clearly erroneous. Third, to the extent Judge Baldwin drew this inference from the affidavit attached to the Complaint, the case agent states in that affidavit that he is assigned to the Reno field office, the alleged criminal incident was captured on video, Elms was arrested in Reno, made several phone calls of interest from the Washoe County Detention Center, also in Reno, and the case agent

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[5]The statute and rule are written to impose this burden on the moving party in the event the defendant does not consent, so, as here, the government is the only party upon whom this burden could be imposed. *See* 18 U.S.C. § 3060(c); *see also* Fed. R. Crim. P. 5.1(d).

found Elms' car in Reno. *See Underlying Case,* ECF No. 1 at 5-16. Thus, even the affidavit attached to the Complaint pointed to at least some evidence and witnesses being in Reno rather than Winnemucca. Her factual finding that necessary witnesses and evidence may be in Winnemucca was clearly erroneous.

Judge Baldwin finally found that it was "unknown whether" some witnesses would be able to join a videoconference hearing, either because they lacked access to the technology or because they would need to travel to prepare for their appearance at a videoconference hearing. (*See* Order at 7.) This finding suffers from two of the flaws identified above as to Judge Baldwin's two other factual findings: (1) the government did not argue it; and (2) it is hypothetical and not tied to any facts or evidence in this case. Thus, this finding is also clearly erroneous. In sum, all three factual findings Judge Baldwin made to support her finding of "extraordinary circumstances" necessary to continue Defendants' preliminary hearings were clearly erroneous. The Court must therefore vacate her legal conclusion based on these erroneous factual findings.

Judge Baldwin only made one additional factual finding to support her determination to extend the deadline for the government to file an indictment—that there had not been a functioning grand jury since mid-March and there likely would not be one for some time. (*See* Order at 7-9.) The Court agrees with that finding, as far as it goes. However, there was no functioning grand jury at the time the government filed the Complaint, and there could have been no reasonable expectation that one would exist 30 days from that date given the Court's reduced operations due to COVID-19. Moreover, TGO 2020-05 was promulgated before this case began. Thus, as Defendants argue, the government should have known it would have to proceed via a preliminary hearing conducted over videoconference, rather than by obtaining an indictment, at the time it filed this case. (ECF No. 1 at 12-14.)

And as Defendants also argue, the issue of Judge Baldwin's reliance on the unavailability of a grand jury is intertwined with the legal error she committed in failing to

make any factual findings to support her conclusion that justice favored delaying Defendants' preliminary hearings. (ECF No. 1 at 12-14; *see also* Order at 7.) The basic point is that the government knew or should have known it would have to proceed with a preliminary hearing by videoconference within 14 days from the commencement of this case, but nonetheless moved to continue the preliminary hearings two days before those hearings had to occur. *See Underlying Case*, ECF Nos. 1, 19 (filed on April 1 and April 14, both after TGO 2020-05 had issued); *see also U.S. v. Summerfield*, Case. No. 2:20-cv-00713-APG-BNW, ECF No. 4 at 1 (D. Nev. Apr. 21, 2020) (explaining that the government knew it would have to proceed with a preliminary hearing when it initiated the case, likely by video or teleconference, and therefore "the witnesses and evidence should be available and ready to present in court."). And the government did not provide any reasons for its delay in preparing for the preliminary hearings in its underlying motion beyond the general statements of abstract difficulty discussed above. *See Underlying Case*, ECF No. 19.

The Court can therefore only infer a lack of diligence on the government's part weighing against a finding that justice favored delaying the preliminary hearings. *See Fortenberry*, 2014 WL 6969615, at *2 ("Rule 5.1 does not permit continuance solely to enable the government to avoid a preliminary hearing by securing an indictment[.]") (citation and internal punctuation omitted). But Judge Baldwin reached the opposite conclusion. (*See* Order at 7.) In addition, she did not make any factual findings that appear specific to her conclusion that "justice requires the delay." *See id.* Based on the language of 18 U.S.C. § 3060(c) and Fed. R. Crim. P. 5.1(d), the government should have provided specific reasons why justice required the delay in its motion, and Judge Baldwin should have made specific findings if she found those reasons persuasive. That is in part because—as Defendant argue—preliminary hearings exist to prevent indefinite detention of pretrial detainees. (ECF No. 6 at 2-3.)

Finally, the Court is persuaded by Defendants' argument that the caselaw Judge Baldwin relied on in her Order is distinguishable.[6] (ECF No. 1 at 5 n.13; *see also* Order at 4.) To start, the court in *U.S. v. Munoz*, Case No. 20MJ1138-MDD, 2020 WL 1433400, at *1 (S.D. Cal. Mar. 24, 2020) was operating under a temporary general order that suspended "all proceedings under Federal Rule of Criminal Procedure 5.1[,]" and made no reference to an order like TGO 2020-05, which permits preliminary hearings via videoconference with the defendant's consent. *See* TGO 2020-05. The same goes for *U.S. v. Xalteno-Alejo*, Case No. 3:20-MJ-00822-MSB, 2020 WL 1433416, at *1 (S.D. Cal. Mar. 20, 2020). (*See also* Order at 4 (relying on this case).) Similarly, the court in *U.S v. Carrilllo-Villa*, Case No. 20 MAG. 3073, 2020 WL 1644773, at *2 (S.D.N.Y. Apr. 2, 2020) does not appear to have been operating under an order like TGO 2020-05 that permits preliminary hearings to occur by videoconference. Moreover, in *Carrilllo-Villa*, the government appears to have made a much more specific showing of the impediments to holding a preliminary hearing then the government did here. *See id.* Thus, the Court also finds *Carrilllo-Villa* distinguishable. (*See also* Order at 4 (relying on this case).)

The government's arguments in response to Defendants' appeal fail to persuade. (ECF No. 5.) To start, the government attempts to buttress Judge Baldwin's Order with reasons for continuances that it did not present to Judge Baldwin. (*Compare id.* at 7-8 (stating that ATF policy prohibits its agents from using the videoconferencing service Zoom), 8-9 (arguing that it is difficult to conduct hearings by videoconference because of

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[6]For the same reasons described herein, the Court is unpersuaded by the government's reliance on the same set of cases. (ECF No. 5 at 6-7.) The Court also notes the government relies on these cases as examples "regarding the pandemic in general[,]" which is a good illustration of how the government's arguments in this appeal miss the point. (*Id.* at 6.) One of the primary issues with the government's motion in the *Underlying Case* was that it was too generalized and not tied to the facts of this case, but the government continues to make such generalized arguments on appeal. The Court finds these generalized arguments unpersuasive.

technical issues), 11 (noting the government plans to have a detective from Winnemucca available for any preliminary hearing) *with Underlying Case*, ECF No. 19 (declining to mention any of this).) These arguments involving new reasons for the government's requested continuances are inappropriate because the government did not raise them in the *Underlying Case*. *See United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (holding in the related context of review of a magistrate judge's recommendation on a dispositive issue that "a district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation"); *see also In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) (noting in the related context of appellate review that "[g]enerally, arguments not raised in the district court will not be considered for the first time on appeal."). If the government had these reasons for seeking a continuance all along, it should have put them in its motion directed to Judge Baldwin.

But the Court will nonetheless address some of the government's unpersuasive arguments in its response, beginning with the government's new arguments about its potential witnesses. (ECF No. 5.) If ATF policy prohibits the case agent from using Zoom, the government could arrange for the case agent to use a device at the U.S. Attorney's office in Reno with appropriate social distancing because the case agent is also located in Reno.[7] (*Id.* at 7-8; *see also Underlying Case*, ECF No. 1 at 5 (stating he is based in Reno).) And as the government is now arguing it is unsure whether the detective in Winnemucca can use Zoom, that highlights the government's lack of diligence, as it has been about a month since the government initiated this case, and answering that question would not take more than a phone call. (ECF No. 5 at 8.) Moreover, as described above,

[7]Defendants also point out in their reply that it would be reasonable to assume the ATF agent would have access to a non-agency digital device. (ECF No. 6 at 3.) Indeed, any digital device with a camera would allow one to participate in a Zoom video conference.

because the government bears the burden to show why a continuance is warranted, the government was required to sort out the availability of the detective in Winnemucca before it filed its motion in the *Underlying Case*.

The government also argues that proceeding by videoconference is undesirable, and may involve technical issues. (*Id.* at 8, 10-11.) The Court reiterates that TGO 2020-05 was in place before the government initiated this case, and that it implemented provisions of the CARES Act expressly intended to allow criminal proceedings, including preliminary hearings, to occur by video or teleconference with the defendant's consent. These provisions do not require the government's consent. Moreover, they were expressly adopted in recognition that in-person hearings are no longer prudent given COVID-19—and are temporary, implicitly because in-person hearings are preferable to video or telephonic hearings. *See* TGO 2020-05. In addition, the statute governing preliminary hearings is set up to protect the right of the defendant not to be held indefinitely without probable cause. *See* 18 U.S.C. § 3060(d) (requiring the court release the defendant if the defendant is not given a preliminary hearing within the prescribed time period). In sum, the applicable burdens here all favor criminal defendants—and for good reasons. The government would therefore have to show more than hearings held by videoconference are undesirable to justify a continuance.

Finally, the government insists that it was not inevitable it would have to proceed via preliminary hearings held over videoconference when it initiated this case. (ECF No. 5 at 12-13.) The Court finds this argument unreasonable. In addition to the explanation already provided above, at the time the government initiated this case, the Court had already issued four temporary general orders restricting court operations because of COVID-19, the governor of Nevada had ordered nonessential businesses to close, and

ordered everyone to stay home.[8] Under these circumstances, it was unlikely a functioning grand jury would exist for some time. In fact, the government even argued a grand jury would not sit before May 4, 2020 in its motion in the *Underlying Case*. *See Underlying Case*, ECF No. 19 at 3-4, 7-8. Thus, the government should have known it would have to proceed with preliminary hearings remotely at the time it initiated this case, unless it could obtain a continuance.

In closing, the parties agree Defendants' preliminary hearings should have been held on April 16, 2020. (ECF Nos. 1 at 15, 5 at 3.) They were not. And the Court is vacating Judge Baldwin's Order granting continuances of these hearings as clearly erroneous. The governing statute therefore leaves the Court no discretion. Elms and Klyn must be released immediately. *See* 18 U.S.C. § 3060(d).

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

It is therefore ordered that George Wyatt Elms' objection/appeal (ECF No. 1) is sustained.

It is further ordered that Judge Baldwin's Order is vacated.

It is further ordered this case is remanded to Judge Baldwin to immediately release Elms and Klyn from custody under 18 U.S.C. § 3060(d).

It is further ordered that Travis Klyn's motion for joinder (ECF No. 2) is granted.

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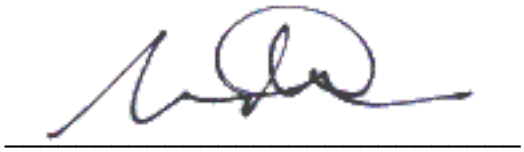
[8] *See* State of Nevada, Declaration of Emergency, Directive 010, Stay at Home Order (Issued March 31, 2020), https://nvhealthresponse.nv.gov/wp-content/uploads/2020/04/Declaration-of-Emergency-Directive-010-Stay-at-Home-3-31-20.pdf.

The Clerk of Court is directed to close this case.

DATED THIS 30th day of April 2020.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE