IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN/DUBUQUE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR 08-1324 LRR
	)	
SHOLOM RUBASHKIN,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESISTANCE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF PRETRIAL DETENTION AND FOR EXPEDITED HEARING

I. INTRODUCTION

The United States resists defendant's motion for Reconsideration of Pretrial Detention and For Expedited Hearing (document #132). In a clumsy attempt to manufacture an equal protection violation, defendant tries to recast the government's evidence regarding defendant's de facto dual citizenship as a legal rule. That defendant's connections to Israel include rights to de facto Israeli citizenship has nothing, per se, to do with defendant's race or religion. Under an equal protection analysis, the government's argument is constitutionally permissible.

Otherwise, the new bail conditions proposed by defendant do not warrant reopening of the prior hearing nor tip the balance in favor of release. Defendant remains a flight risk and his motion should be denied without a hearing.

II. DEFENDANT'S EQUAL PROTECTION ALLEGATION

A. The Government's Argument Is Not Race or Religion-based Per Se

For the first time in his motion for reconsideration, defendant asks the Court to find an equal protection violation based upon the government's evidence that defendant is entitled to de facto Israeli citizenship.[1] The evidence was presented as a part of the government's overall showing, by a preponderance of the evidence, that no "condition or combination of conditions ... will reasonably assure the appearance of [defendant] as required." 18 U.S.C. § 3142(f).

At the detention hearing, the government proffered evidence that defendant had the motivation to flee, the inclination to flee, and ties to at least one foreign country where he would be accepted as a citizen. Regarding defendant's motivation, the government proffered facts showing defendant was facing years in prison and that the evidence against defendant was strong. Regarding defendant's inclination, the government proffered evidence of a bag of money and identification documents at the ready in defendant's closet. Also of significance was the government's evidence that defendant had attempted to obstruct justice while on pretrial release and, thus, had violated the previous order of the Court. Regarding defendant's ties to a foreign country, the government offered a travel itinerary and a hotel receipt showing defendant and his wife had traveled to Israel in December 2007 – within a year of the detention

[1]The fact that defendant is entitled to Israeli citizenship does not appear to be in dispute. As acknowledged in defendant's appeal to Chief Judge Reade (document #134-2), "Israel's Law of Return, enacted just two years [after Israel was founded], affirmed the already well-established right of any Jew to become an *oleh*, or immigrant and to secure a visa, citizenship, and to settle in Israel." Defendant's Memorandum in Support of Defendant's Motion for Revocation of Detention Order, p 18.

and revocation hearing. The government also proffered evidence that two other Agriprocessors' managers (both believed to be Israeli citizens) had fled to Israel in the wake of the government's investigation. These were defendant's managers; and would constitute contacts for defendant in Israel in the event he were to flee. They would also be sources of information for defendant regarding how to flee to Israel. Finally, the government offered the evidence at issue – that defendant has de facto duel citizenship in Israel by virtue of Israel's Right of Return law.

The government's argument that defendant is incrementally more likely to flee because of his de facto citizenship in a foreign country is hardly unusual. A defendant's foreign ties - including foreign citizenship - are routinely relied upon as evidence of flight risk. *See, e.g. United States v. Maull*, 773 F.2d 1479, 1488 (8th Cir. 1985) (that defendant "had numerous connections with people living abroad who might be willing to assist him and was fluent in Spanish and capable of traveling with ease through many countries in South America" was a factor justifying defendant's pre-trial detention); *United States v. Cantu*, 935 F.2d 950, 951-52 (8th Cir. 1991) (upholding order of detention where defendant had previous drug conviction, the evidence against defendant was strong, defendant faced substantial prison time if convicted, and defendant lived near the border and worked in Mexico); *United States v. Amirnazmi*, No. 08-429-01, 2008 WL 4925015 at *2 (E.D.Pa. Nov. 18, 2008) (unpublished) (ordering detention and stating, "[t]his Court also found that Defendant is not without financial and practical means by which to flee the jurisdiction, even though the Government holds his passport. Defendant is a dual citizen of both the United States and Iran and 'any one

that has dual passports, dual citizenship with passports even though they are now retained by the federal government, is always suspect of having an available avenue to flee'"); *United States v. Arvanitis*, 667 F.Supp. 593, 597-598 (N.D.Ill. 1987) (ordering detention of a naturalized United States citizen, born in Greece, and finding that, despite an extradition treaty with Greece, defendant could "easily" obtain a Greek passport on "relatively short notice"); *United States v. Zarger*, No. 00-CR-773-S-1 JG, 2000 WL 1134364 at *1-2 (E.D.N.Y. Aug. 4, 2000) (unpublished) (ordering detention of Israeli citizen who had lived in the United States since he was seven years old based on defendant's ties to Israel and recent trips there); *United States v. Saani*, 557 F.Supp.2d 97, 99 (D.D.C. 2008) (ordering detention and stating, "Defendant is a citizen of both Ghana and the United States, and until recently held passports from both countries. While Defendant's various passports have now apparently been seized by the Government, Defendant may still be able to effect reissuance of his Ghanian passport") *United States v. Arndt*, 329 F.Supp.2d 182, 198-99 (D.Mass. 2004) (ordering detention of United States citizen, stating, "[t]he defendant is a highly educated individual who appears to have traveled frequently in the past" and noting the defendant's business partner was a Venezuelan national).

That defendant's right to foreign citizenship is based upon defendant's cultural heritage is solely a matter of foreign law. It simply makes no difference, for the purposes of the government's argument, how that right is derived. Accordingly, it is a mischaracterization to say that the government's argument improperly accounts for defendant's race or religion. Indeed, the opposite is true. If the government were to

forego its argument regarding defendant's right to foreign citizenship, it would be treating defendant differently based upon defendant's cultural heritage. Defendant should not be treated differently than other defendants because his right to foreign citizenship – and corresponding incentive to flee – is based upon what would be considered a suspect classification under the law of the United States.

B. Defendant's Equal Protection Rights Have Not Been Violated

Even assuming the government's factual argument were subject to challenge on equal protection grounds, the argument passes constitutional muster. Defendant's claim appears most akin to a selective enforcement claim for the purposes of equal protection analysis. *See* Defendant's Memorandum in Support of Defendant's Motion for Revocation of Detention Order, p. 25 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996), for the proposition that "[T]he Constitution prohibits selective enforcement of the law based upon considerations such as race. ... [T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause").

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * * the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). *See also*, *United States v. Perry*, 788 F.2d 100, 116 (3rd Cir 1986) (analyzing defendant's allegation of discriminatory application of the Bail Reform Act, 18 U.S.C. § 3142(e), under *Yick Wo*).[2]

[2]Defendant's suggestion that, by virtue of the government's argument, his entire detention determination is subject to "strict scrutiny/narrowly tailored" analysis is untenable.

"'[O]rdinary equal protection standards' govern claims alleging racially selective enforcement of facially neutral laws." *United States v. Hare*, 308 F.Supp.2d 955, 990 (D.Ne 2004) (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985))). "The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 608). Here, as argued above, defendant cannot show that he was treated differently than anyone else with regard to the application of the Bail Reform Act. Rather, defendant has been treated exactly like every other defendant despite the fact that his de facto foreign citizenship is derived from his cultural background pursuant to Israeli law. Moreover, defendant has failed to allege – and cannot allege – that the application of the Bail Reform Act was motivated by a discriminatory purpose. For these reasons, the Court should reject any suggestion of an equal protection violation.

III. DEFENDANT'S PROPOSED ADDITIONS TO THE BAIL PACKAGE DO NOT WARRANT RELEASE

In addition to his equal protection argument, defendant offers additions to his proposed bail package in support of his claim that he is not a flight risk. Defendant claims (1) he will hire a private security company to guard himself, (2) he will execute a waiver of extradition, and (3) he will post additional security.

See Defendant's Brief pp. 18-19 ("More narrowly tailored measures – tight bail conditions and extradition when necessary – suffice"). "The Bail Reform Act is racially neutral on its face." *Perry*, 788 F.2d at 116 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), and *Washington v. Davis*, 426 U.S. 229, 238-44 (1976)). The standards set forth in the Act are to be applied to defendant in the same manner as with any other defendant.

Foremost, defendant has not shown that he is entitled to reopen his hearing on these bases. Pursuant to 18 U.S.C. § 3142(f)(2) and Local Criminal Rule 5(c), defendant's detention hearing may be reopened only if the Court finds that "information exits that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person ...." 18 U.S.C. § 3142(f)(2). Defendant fails to allege or show that these new proposed conditions constitute information "not known to the movant" at the time of the hearing. Certainly with regard to defendant's willingness to execute a waiver of extradition, defendant cannot claim he was unaware of his own willingness earlier. Regarding the security company and additional security, defendant has not alleged that he was unaware of these options at the time of the hearing. In addition, none of these new proposals – alone or in combination – have a "material bearing" on the question of whether defendant is a flight risk. The fact remains that defendant's family's business is bankrupt and under the control of a trustee, defendant is facing likely conviction upon strong evidence and years in prison, defendant had a bag of money and identification documents at the ready in his closet, and defendant attempted to obstruct justice while on pretrial release. Because defendant has failed to make the required showing under section 3142(f)(2), the hearing should remain closed.[3]

[3]Absent the required showing under section 3142(f)(2), a defendant's offer of additional facts in support of release would constitute an inappropriate manipulation of the record for appeal purposes.

Even if defendant were entitled to reopen his detention hearing, the additional information offered does not tip the balance in favor of release. Regarding any waiver of extradition, the nature of any extradition process is not directly relevant. That is, the question is whether there are conditions of release that will reasonably assure defendant's appearance as needed. There can be no dispute that defendant will be needed for court appearances long before any extradition could be completed. Defendant argues that the extradition process itself creates a disincentive for defendant to flee to Israel. However, any evidence of an alleged disincentive is outweighed by the evidence that defendant was already preparing to flee when previously released.

Regarding the private security company, it is difficult to imagine the Court relying upon a private company hired by defendant to assure his compliance with conditions of release. Such a company would not fall within the Court's direct control or authority. Moreover, even if the security company were contractually obligated to guard defendant, they would be only one missed payment away from being released from such obligations. In essence, the Court would be relying upon a private company to take directives from the Court, and it would be relying upon defendant to pay his bills on time. Such an arrangement is not a reasonable alternative to Marshals Service custody.

Regarding the posting of additional security, whatever the total, the fact remains that such security consists of other people's money. Defendant has a demonstrated history of misusing money belonging to others. The current bank fraud charges – and the strength of evidence in support thereof – are evidence enough that defendant is not

adequately deterred by the possibility of a financial loss to another. In addition, the previous security posted on behalf of defendant did not deter his illegal conduct while on pretrial release. For these and all of the reasons previously offered in support of detention, the Court should find additional security to be an inadequate alternative to pretrial custody.

IV. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny defendant's motion for Reconsideration of Pretrial Detention and For Expedited Hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on December 17, 2008.

UNITED STATES ATTORNEY

BY: s/ S. Van Weelden

COPIES TO: Counsel of Record