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 APPEAL OF MAGISTRATE COURT'S ORDER OF PRETRIAL DETENTION

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I. INTRODUCTION

The United States resists defendant's Appeal of the Magistrate Court's Order of Pretrial Detention (document #134). Defendant's Appeal should be denied.

First, the record evidence shows defendant violated his previous conditions of pretrial release by committing bank fraud, attempting to obstruct justice, and tampering with evidence. In a November 20, 2008, Order Revoking Pretrial Release, Magistrate Judge Scoles found, "following his release on October 30, Defendant engaged in activity in furtherance of the crime of bank fraud." (08-MJ-363, document #17, p. 2). Defendant has not appealed the revocation of his pretrial release and has not otherwise challenged the Magistrate Court's finding. On this basis alone, defendant should remain detained pending trial.

Second, the government produced overwhelming evidence defendant poses an unacceptable risk of flight. Such evidence included a bag, seized from defendant's bedroom closet, containing thousands of dollars in cash, original birth certificates for defendant and his wife, and passports for several of defendant's children (defendant and his wife's passports had previously been surrendered to the pretrial services). In the same closet were two lockboxes which were unlocked and empty. The Magistrate Court correctly determined by a preponderance of the evidence that no condition or combination of conditions will reasonably assure defendant's appearance at the time of trial.

Third, the record evidence supports a finding that no condition or combination of conditions will reasonably assure the safety of the community if defendant were

released prior to trial. In the face of both immigration and bank fraud related criminal investigations, defendant has made dauntless attempts to manufacture and tamper with evidence. The day before a May 12, 2008, immigration worksite enforcement action, defendant helped a large number of his employees get new, fake identification documents in different names in order to thwart law enforcement efforts. Following a lawsuit by Agriprocessors' largest creditor which alleged misappropriation of bank collateral, defendant directed employees to destroy records of such misappropriation. Defendant is a prolific violator of the law who seems motivated – rather than deterred – by the threat of criminal consequences. There is little doubt that, if released, in the face of strong evidence of guilt, defendant will continue his attempts to impair the administration of justice.

Finally, defendant is exceedingly likely to commit additional violations if released. Having previously violated his conditions of pretrial release, defendant should be detained on this basis. See 18 U.S.C. § 3148(b)(2)(B).

II. EVIDENCE

The government relies upon pretrial services report, the evidentiary proffers and exhibits from the November 19, 2008, revocation and detention hearing, as well as the prior criminal complaints in 08-MJ-363 (the harboring case) and 08-MJ-381 (the bank fraud case) which were incorporated by reference in the government's evidentiary proffer. (DT 10-11).[1]

[1]The transcript of the November 19, 2008, detention hearing will be referred to as "DT" and followed by the appropriate page reference. The government's exhibits received

The government's proffer of evidence is set forth in pages 10-27 of the detention hearing transcript. (DT 10-27).

III. LEGAL STANDARDS

A. Introduction

Defendant has not appealed the Magistrate Court's November 20, 2008, Order Revoking Pretrial Release in 08-MJ-363. Any request for review was due no later than 10 court days from the issuance of that Order. See LCrR 5(c). Accordingly, the question of whether defendant's pretrial release should be revoked in 08-MJ-363 is not before the Court, and that determination is dispositive with regard to whether defendant should be released.

The instant appeal only addresses the issue of the government's request for defendant's detention in 08-MJ-381. Generally, the Court reviews a Magistrate Court's detention order *de novo*. *United States v. Maull*, 773 F.2d 1479, 1481 (8th Cir. 1985). Because the November 19, 2008, hearing addressed both revocation of defendant's pretrial release and detention in 08-MJ-363 and the government's request for detention in 08-MJ-381, two statutory schemes are potentially implicated. 18 U.S.C. § 3148 governs both revocation of pretrial release and detention because a violation of pretrial release has occurred. Had no violation occurred, defendant's detention would be governed under 18 U.S.C. § 3142.

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at the November 19, 2008, detention hearing will be referred to as "GOV EXB" and followed by the appropriate exhibit number. The defendant's exhibits received at the November 19, 2008, detention hearing will be referred to as "DEF EXB" and followed by the appropriate exhibit number.

B. Revocation and Detention under Section 3148

Because defendant violated the conditions of his pretrial release, 18 U.S.C. § 3148(b) governs both revocation of his pretrial release and detention. Pursuant to that subsection:

> . . . . The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—
>
> (1) finds that there is –
>
> (A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or
>
> (B) clear and convincing evidence that the person has violated any other condition of release; and
>
> (2) finds that –
>
> (A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or
>
> (B) the person is unlikely to abide by any condition or combination of conditions of release.
>
> If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of section 3142 of this title and may amend the conditions of release accordingly.

18 U.S.C. § 3148(b). In sum, because there is probable cause to believe defendant committed a felony while on pretrial release (and the Magistrate Court's finding of a violation has not been appealed), a rebuttable presumption arises that defendant should be detained as a danger to the community. The Court proceeds to determine whether defendant has rebutted that presumption, and, ultimately, whether defendant is a flight risk, a danger to the community, or "is unlikely to abide by any condition or combination of conditions of release." 18 U.S.C. § 3148(b)(2)(B). Unlike under 18 U.S.C. § 3142(f), the Court's finding regarding danger to the community is by a preponderance of the evidence. *United States v. LaFontaine*, 210 F.3d 125, 134 (2d Cir. 2000) (the government's burden under 18 U.S.C. § 3148(b)(2) is to prove by a preponderance of the evidence that no condition of release will prevent danger to the community).

C. Alternative Detention Standard under Section 3142

If the Magistrate Court's Order Revoking Pretrial Release in 08-MJ-363 were subject to review, and if the Court were to determine the evidence does not support a finding of probable cause that defendant violated the law while on pretrial release, the Court would consider whether defendant should be detained under 18 U.S.C. § 3142. That is, the Court would determine whether defendant is an unacceptable flight risk by a preponderance of the evidence, and/or whether he is an unacceptable danger to the community by clear and convincing evidence. See 18 U.S.C. § 3142(f).

IV. FLIGHT RISK

A. The Evidence of Flight Risk is Overwhelming

The government has demonstrated "there is no condition or combination of conditions of release that will assure that [defendant] will not flee." 18 U.S.C. § 3158(b)(2)(A). In fact, the evidence strongly suggests that, at the time of defendant's arrest and the search of his residence on November 14, 2008, defendant was prepared and ready to flee.

- During the November 14, 2008, search of defendant's residence, agents found approximately $20,000 in cash and approximately 20-25 silver coins. (DT 23).

- Most of the cash was in a bag on the floor of the closet in defendant's master bedroom. The bag contained several envelopes of money, mostly in $100 bills. (DT 23-24; GOV EXBs 15-23).

- Within the bag was a travel pouch - a fabric bag of the sort a traveler would wear under their clothing – that contained several thousands of dollars. (DT-24; GOV EXB 17-18).

- Also within the bag were several original identification documents for defendant and his family members. These included original birth certificates for both defendant and his wife, three to four passports appearing to belong to defendant's children, and at least two original social security cards. (DT 24; GOV EXBs 18, 19, 21-23).

- In the same master bedroom closet as the bag were three lockboxes. Two of the lockboxes were open and empty. The third was locked and contained nothing of interest. (DT 26).

In addition to the evidence defendant was prepared to flee, the record demonstrates defendant has the means to flee - possibly to Canada or Israel.

- Defendant has access to thousands of dollars in cash and silver coins.[2] (DT 23).

- Defendant's foreign ties include a one-week trip to – or through – Canada from approximately October 21, 2008, through October 28, 2008. (DT 26-27; GOV EXB 27). The purpose of defendant's trip is unknown. Defendant told U.S. Customs agents in Toronto that he was in Canada visiting a friend for a week and he "conducted no business." (GOV EXB 27). Defendant proffered to the Magistrate Court that the purpose of his trip was to meet with a potential investor "to try to enlist him to fund and become and investor in Agriprocessors ...." (DT 67).

- Two of defendant's managers at Agriprocessors are believed to have fled to Israel in the wake of the May 12, 2008, search. Poultry manager Hosam Amara, a Muslim with dual Israeli and United States citizenship, has fled to Israel – possibly through Canada. A second manager in the poultry division, an Israeli citizen, has been gone since he was called to the grand jury for a photograph within weeks of the search. (DT 27-28; see GOV EXB 28). Both of these individuals 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.

- Defendant and his wife traveled to Israel at least once within a year of the detention hearing. Hotel receipts and a flight itinerary show a trip to Jerusalem by defendant and his wife in December 2007. (DT 26; GOV EXBs 24-26).

- If defendant were to flee to Israel, he would be entitled to Israeli citizenship under Israel's Law of Return. The same right would apply to defendant's spouse and children. (DT 27; GOV EXB 28). According to the U.S. Department of State, a United States citizen who is automatically granted a foreign citizenship does necessarily risk losing their United States citizenship. (DT 27; GOV EXB 29).

- Defendant has previously assisted others in obtaining false identification documents. (08-MJ-363, document #1; DT 10-11).

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[2]The money and coins were outside of the scope of the search warrant and were not seized. (DT 23).

Finally, defendant's motivation to flee has only increased since his initial arrest. Additional charges have been brought, his sentencing exposure has increased, he faces strong evidence of guilt, and his ties to Agriprocessors have been cut.

- Defendant's bank fraud charges dramatically increase his sentencing exposure. The potential loss to the victim bank is over $30,000,000. (See GOV EXB 1, p. 10). Under USSG §2B1.1(b)(1)(L), a loss exceeding $20,000,000 results in a sentencing enhancement of 22 levels.

- The evidence against defendant is in the harboring case is strong. Approximately 389 illegal workers were arrested at defendant's business on May 12, 2008. The evidence shows defendant funded the purchase of new false identification documents for several existing employees just before the May 12, 2008, search. Defendant asked human resources personnel to work on Sunday, May 11, to process the new application paperwork for several existing employees. Defendant was personally present and inspected the documents. Approximately 96 fake resident alien cards were seized from the human resources offices on May 12, 2008. (08-MJ-363, document #1; DT 10-11).

- Regarding the strength of the bank fraud case, defendant acknowledged to bank personnel in October 2008 that customer payments (constituting of bank collateral) had been diverted, and that such payments totaled approximately $1,400,000. (DT 12-13; see GOV EXBs 1-7). According to an accounting clerk at Agriprocessors, the money was diverted at defendant's direction. Defendant directed similar diversions - totaling millions of dollars in bank collateral - over approximately two years. Defendant instructed the accounting clerk to draft checks representing the diversions in odd (seemingly random) amounts – and the checks reflect those amounts. (08-MJ-381, document #1, ¶¶ 11-16; GOV EXBs 4-7). According the same accounting clerk, on October 29 and 31, 2008 (the day before and the day after the bank filed a lawsuit against Agriprocessors), defendant instructed the clerk to destroy evidence of the fraud. (08-MJ-381, document #1, ¶¶ 15-17). According to another accounting employee, on November 5, 2008, defendant instructed her to "clean her desk." As a result of the directive, the employee shredded additional evidence of the fraud. (DT 14-15).

- Defendant's family's company is bankrupt and a trustee had been appointed to operate the business. Even if he were released, defendant would have no access to Agriprocessors and the financial support it once provided. (See Bernard S. Feldman Affidavit, DEF EXB 1).

The evidence of flight risk is overwhelming. Even if the Court were only to consider the evidence from defendant's master bedroom closet, the Court should find defendant is a flight risk by a preponderance of the evidence.

B. Defendant's Equal Protection Argument

For the first time in his motion for reconsideration before the Magistrate Court, defendant asked the Court to find an equal protection violation based upon the government's evidence that defendant is legally entitled to Israeli citizenship.[3] In a clumsy attempt to manufacture a constitutional violation, defendant mischaracterizes the evidence and corresponding argument as a legal rule. To the contrary, the Law of Return was presented as a mere evidentiary factor in the government's overall showing, by a preponderance of the evidence, that defendant is a flight risk.

At the detention hearing, the government offered substantial evidence that defendant had the motivation to flee, the inclination to flee, and the means to flee – including the right to citizenship in Israel. Defendant's ties to Israel go beyond his right to citizenship. As noted above, the record includes a travel itinerary and a hotel receipt showing defendant and his wife traveled to Israel in December 2007 – within a year of the detention and revocation hearing. The record also includes evidence that two other Agriprocessors managers (both believed to be Israeli citizens) fled to Israel in the wake

[3]The fact that defendant is entitled to Israeli citizenship does not appear to be in dispute. As acknowledged in defendant's instant appeal, "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.

of the government's investigation. One of them may have fled through Canada. These were defendant's managers who 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, there is evidence defendant recently flew in and out of Canada and then gave inconsistent reasons for his travel. It is simply inaccurate to suggest the government's citizenship argument is the only evidence tying defendant to Israel.[4] It is similarly inaccurate (and inflammatory) to suggest that the government's evidence and argument would apply equally – or at all – to other Americans simply because they are Jewish.

The government's argument that defendant is incrementally more likely to flee because of his right 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. *Maull*, 773 F.2d at 1488 (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

[4]It should be noted that the government did not cite the Law of Return at defendant's initial appearance on October 30, 2008, as a justification for the requested bail conditions. It was only after the search of defendant's home, the discovery of the items in his bedroom closet, and the discovery of travel documents showing previous travel to Israel that the Law of Return evidence was offered.

prison time if convicted, and defendant lived near 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 'anyone 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).

It simply makes no difference, for the purposes of the government's argument, how defendant's right to foreign citizenship 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 because Israel relies upon cultural heritage to determine who is entitled to citizenship. Defendant should not be treated differently than other defendants because his right to foreign citizenship is based upon what would be considered a suspect classification under the law of the United States.

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*).[5]

"'[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 right to 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.

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[5]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. 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.

V. DANGER TO THE COMMUNITY

Defendant has failed to rebut the presumption that he is a danger to the community, and the evidence establishes "there is no condition or combination of conditions of release that will assure that [defendant] will not ... pose a danger to the safety of any other person or the community." 18 U.S.C. § 3148(b)(2)(A).[6] In anticipation of an immigration raid, defendant accelerated the falsification of Agriprocessors' employment paperwork. Despite knowledge that he was being investigated for various offenses, defendant continued to commit bank fraud – both before and after his October 30, 2008, arrest. Defendant has brazenly attempted to obstruct justice on multiple occasions – including while on pretrial release.

- In the face of news reports that ICE may be preparing for an possible immigration raid in Northeast Iowa, defendant funded the purchase of new false identification documents for several existing employees. Defendant personally oversaw the use of those documents to create false employee paperwork the day before the May 12, 2008, search. (08-MJ-363, document #1; DT 10-11).

- Shortly after the May 12, 2008, search, in order to convince the bank to continue to loan Agriprocessors money, defendant falsely told the bank's loan officer that defendant was unaware any of the employees were illegal workers. (08-MJ-381, document #1, ¶ 7).

- In the face of a lawsuit by the victim of his bank fraud, defendant concealed and destroyed evidence of the fraud — and directed others to do the same. On October 29, 2008, defendant asked one accounting clerk to give him a thumb drive containing spreadsheets which would both prove the diversion of bank collateral and contradict fraudulent representations made by Agriprocessors to the bank. That same day, defendant asked for and took copies of diverted customer checks from the same clerk. (08-MJ-381, document #1, ¶ 15).

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[6]Moreover, and although the Magistrate Court did not so find, even if the "clear and convincing evidence" standard from section 3142(f) applied, the government would still have met its burden.

- On October 31, 2008, while on pretrial release, defendant asked the same accounting clerk to delete evidence of diverted checks from Agriprocessors' computer accounting system. The clerk did so. (08-MJ-381, document #1, ¶ 16).

- According to another accounting employee, on November 5, 2008, while on pretrial release, defendant instructed her to "clean up her desk." As a result of the directive, the employee shredded additional evidence of the fraud. (DT 14-15).[7]

As defendant's legal and financial troubles mount, defendant seems more inclined to find a criminal solution to his problems. The community should no longer be subjected to defendant's inevitable, criminal acts.

VI. LIKELIHOOD OF FUTURE VIOLATIONS

Under 18 U.S.C. § 1348(b)(2)(B), having violated his previous terms of pretrial release, defendant "shall" be detained if the Court finds he is "unlikely to abide by any conditions or combination of conditions of release." For the same reasons as set forth in part V above, defendant is exceedingly likely to violate conditions of release. He is a prolific violator of the law who should be detained pending trial.

[7]Moreover, on October 30, 2008, just before defendant's arrest, defendant called an Agriprocessors customer and asked him to send a customer payment directly to a feed supplier rather than to Agriprocessors. This act constituted another example of diversion of bank collateral. (DT 29). Additionally, and although not relied upon by the Magistrate Court, the record includes evidence that defendant attempted to influence a witness in a prior bank fraud case in which defendant was implicated (DT 18-21; GOV EXBs 8-9), and evidence that Agriprocessors settled a civil bankruptcy fraud case for $1,400,000, and that defendant was unable to provide an adequate explanation for huge transfers of money between the bankrupt company and Agriprocessors. (DT 21-22; GOV EXBs 10-12).

VII. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny defendant's Appeal of his pretrial detention.

Respectfully submitted,

MATT M. DUMMERMUTH
United States Attorney

By: *s/Peter E. Deegan, Jr.*

PETER E. DEEGAN, JR.
Assistant United States Attorney
401 First Street SE, Suite 400
Cedar Rapids, IA 52401
319-363-6333
319-363-1990 (Fax)
Peter.Deegan@usdoj.gov

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 January 5, 2009.

UNITED STATES ATTORNEY

BY: s/ S. Van Weelden

COPIES TO: Counsel of Record