

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

**DEFENDANT'S MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
REOPEN DETENTION
PROCEEDINGS AND MODIFY
DETENTION ORDER**

INTRODUCTION

Defendant Thomas Joseph Petters requests that the Court reopen the detention proceedings and modify the detention order.

PROCEDURAL BACKGROUND

The Government arrested Mr. Petters at his home on October 3, 2008 and moved for pretrial detention. [Docket Nos. 27, 28, 29.] On October 7 and 8, 2008, a detention hearing was held before Magistrate Judge Jeffrey J. Keyes. Magistrate Judge Keyes ordered that Mr. Petters remain detained at Sherburne County Jail pending trial. [Docket Nos. 55, 56, 57, 61, 62.]

Mr. Petters moved to revoke the detention order. [Docket Nos. 66, 67.] A hearing was held on October 31, 2008 before United States District Court Judge Michael J. Davis. [Docket No. 74.] Chief Judge Davis issued an order denying Mr. Petters' motion. [Docket No. 76.]

The Government has now filed an Indictment, and the matter has been reassigned.
[Docket No. 79.]

ARGUMENT

A detention hearing “may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists 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 as required and the safety of any other person and the community.” 18 U.S.C. § 3142(f).

Thus, a defendant must “present information that was not known or available to him at the time of his original detention hearing that is material to and has a substantial bearing on whether he should remain detained.” United States v. Archambault, 240 F. Supp. 2d 1082, 1084 (D.S.D. 2002); accord David N. Adair, Jr., The Bail Reform Act of 1984 at 28 (3rd ed. 2006) (“Section 3142(f) expressly authorizes reopening the detention hearing when material information ‘that was not known to the movant at the time of the hearing’ comes to light.”).

Moreover, federal courts revisit a detention order when the pretrial detention has or will become so lengthy that it arguably infringes on the defendant’s due process rights. Archambault, 240 F. Supp. 2d at 1084; United States v. Salerno, 481 U.S. 739, 747 n.4, 107 S. Ct. 2095, 2102 n.4 (1987) (acknowledging that the length of pretrial confinement could become excessive “in relation to Congress’ regulatory goal”).

The First and Third Circuits have identified two types of criteria to guide courts in the determination of whether due process requires release. First, “due process judgments . . . should reflect the factors relevant to the initial detention decision, such as the seriousness of the charges, the strength of the government’s proof that defendant poses a risk of flight or danger to the community, and the strength of the government’s case on the merits.” [United States v. Zannino, 798 F.2d 544, 547 (1st Cir. 1986); United States v. Accetturo, 783 F.2d 382, 388 (3rd Cir. 1986).] Second, “these judgments should reflect such additional factors as the length of the detention that has in fact occurred, the complexity of the case, and whether the strategy of one side or the other has added needlessly to that complexity.” Id.

The Second Circuit has held that when considering the due process implications of a prolonged pre-trial detention, a court must consider (1) the length of detention; (2) the extent of the prosecution’s responsibility for the delay of trial; and (3) the strength of the evidence upon which the detention was based. [United States v. Orena, 986 F.2d 628, 630 (2d Cir. 1993).]

Archambault, 240 F. Supp. 2d at 1085. “At some point due process may require a release from pretrial detention or, at a minimum, a fresh proceeding at which more is required of the government than is mandated by section 3142.” Accetturo, 783 F.2d at 388.

Federal courts must also consider whether pretrial detention is prejudicial to a defendant’s ability to assist in his own defense. See Adair, at 30 (“Of course, a defendant is free to argue that unlawful pretrial detention prejudiced his or her ability to defend himself or herself.”). Indeed, the Bail Reform Act provides: “The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.” 18 U.S.C. § 3142(i) (emphases added).

Our grounds are these:

1. This case is highly complex and involves hundreds of thousands of documents as well as the contents of multiple computer hard drives. The defense did not know and could not know that the Government would be so tardy in supplying key documents, i.e., documents seized by the Government during the execution of a search warrant at Petters Company, Inc. headquarters four months ago. Mr. Petters has now been detained for more than three months. Trial is scheduled approximately five months from the date of this Memorandum. Yet the defense has not been able to review these key documents. This factor must weigh heavily upon the Court's detention decision because the defense is badly in need of Mr. Petters' assistance in document management, i.e., identifying and reviewing key documents. It is not possible to accomplish this task while Mr. Petters remains in custody.

2. Magistrate Judge Keyes, Chief Judge Davis, and even the Government have acknowledged that Mr. Petters should have ready ability to consult with his attorneys, review evidence, and prepare for trial. Indeed, Chief Judge Davis indicated that the United States Marshall should consider holding Mr. Petters in a Hennepin County facility or a Ramsey County facility. [10/31/2008 Tr. at 121.] This has not occurred.

3. The Government's position on detention cheapens the attorney-client relationship, a form of condescension. The meetings downtown are not in a neutral place, rather at the United States Attorney's office. The trust level in that setting is de minimus. The room itself has a camera, evincing paranoia and hostility. Given the travel arrangements, Mr. Petters' arrival there is unpredictable. The length of the meetings are

often suddenly cut off hours before the end of the business day by the Marshal's return schedule. There is a spatial limit as to what can be brought to the room itself. The process, moreover, is wasteful, in that a Government agent sits outside on a bench with nothing to do but watch a closed door.

4. The Government has now suggested an alternative – that the meetings be shifted to Sherburne County Adult Detention Facility. We invite the Court to visit. To wait to get in, to wait for the inmate client to be summoned, to be removed for emergency counts, to be excused for lunch hour, for dinner, for afternoon breaks, to be watched by the inmates passing the glass door, the orange tops flashing back and forth, back and forth, empty eyes looking in as the Court would look out, like what happens in a fish tank.

We invite the Court to carry the 160 boxes of materials that must be reviewed, to visually see how many can be squeezed into the cement cubicle, and placed on the Formica-topped table as the pages are flipped over one at a time.

5. The proposals thus far – review on the Sixth Floor, or sitting in the cold at Sherburne – are untenable. They may work for the ordinary case, where the discovery is contained within a file, a small notebook; where the decisions are easy to make. But with a three billion dollar fraud allegation, the scale changes even though the setting cannot.

6. The issue is not one of danger. Considerations of flight caused Mr. Petters to be detained, the Government insisted he had hidden bank accounts. But that reason, we now know, is vacuous. The Government told both Magistrate Judge Keyes and Chief Judge Davis that its investigation was continuing, and that it may uncover evidence of

overseas assets, preparations for lengthy overseas travel, and/or other evidence of flight. [10/7/2008 Tr. at 16, 17-18, 94; 10/31/2008 Tr. at 36, 106-107.] Three months later no such evidence has been found. Rather, every indication is that the entirety of Mr. Petters' assets are now under the control of a receiver, and that there are no assets out of the country. Further, Mr. Petters, of course, has provided substantial assistance to the receiver in locating and preserving assets.

7. Certain members of Mr. Petters' family are willing to pledge their own personal assets to assure Mr. Petters' appearance at trial. In some cases, they will pledge all of their assets. This, too, is a new development that was considered by neither Magistrate Judge Keyes, nor Chief Judge Davis. This new information also bears upon the Court's decision as to risk of flight, surely.

8. Mr. Petters himself will pledge all of his assets, of whatsoever kind, wherever located. Nothing in the receivership Orders bars this.

9. The Government has trumpeted the strength of its evidence as grounds for detention. It is a hollow sound. There will be much to say at trial in Mr. Petters' defense. He is presumed innocent as a matter of law, Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 1936 (1978), and by statute, 18 U.S.C. § 3142(j).

CONCLUSION

Mr. Petters should be released pending trial on conditions that will assure his appearance in Court.

Dated: January 19, 2009

s/Jon M. Hopeman

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