

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-MJ-364

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

**DEFENDANT’S MEMORANDUM
OF LAW IN SUPPORT OF
MOTION FOR REVOCATION OF
DETENTION ORDER**

INTRODUCTION

Defendant Thomas Joseph Petters (“Mr. Petters”) respectfully submits this memorandum of law in support of his motion for revocation of the magistrate judge’s detention order. The Court should release Mr. Petters from detention. Aside from a single rambling telephone conversation, the Government does not have evidence that Mr. Petters constitutes a flight risk. Moreover, there are less burdensome options which will reasonably assure Mr. Petters’ appearance at trial. The order for detention should be revoked, and Mr. Petters should be released subject to reasonable conditions, such as electronic home monitoring.

BACKGROUND

The Government claims that Mr. Petters and others engaged in fraudulent activity at Petters Company Incorporated (“PCI”). The Government filed a criminal complaint alleging that, in connection with the alleged fraudulent scheme, Mr. Petters and others engaged in conspiracy, mail and wire fraud, money

laundering, and obstruction of justice in violation of 18 U.S.C. §§ 371, 1341, 1343, 1956, 1957, 1512. It is alleged that Mr. Petters and others procured investment funds by falsifying documents. [Docket Nos. 26, 27.]

The Government arrested Mr. Petters at his home on October 2, 2008. Mr. Petters has been detained at Sherburne County Jail since that date. The Government moved for pretrial detention of Mr. Petters. [Docket Nos. 27, 28, 29.] On October 7, 2008, a detention hearing was held before Magistrate Judge Jeffrey J. Keyes. The magistrate judge ordered that Mr. Petters remain detained at Sherburne County Jail pending his trial. [Docket Nos. 55, 56, 57, 61, 62.]

ARGUMENT

A. This Court Conducts A Non-Deferential De Novo Review Of The Magistrate Judge's Decision Regarding Pretrial Detention.

Pursuant to 18 U.S.C. § 3145(b) and § 3142, Mr. Petters seeks revocation of the order for detention. With respect to a detention order, a district court judge reviews the magistrate judge's decision de novo. United States v. Maull, 773 F.2d 1479, 1481 (8th Cir. 1985). Thus, the Court must "review the record before the Magistrate Judge and make a thorough and non-deferential determination" as to the propriety of the detention order. United States v. Leyba, 104 F. Supp. 2d 1182, 1182 (S.D. Iowa 2000).

B. Mr. Petters Is Not A Flight Risk; The Government's Presentation At The Detention Hearing Is Insufficient To Support Pretrial Detention.

The first issue before the Court is whether Mr. Petters constitutes a flight risk within the meaning of the Bail Reform Act.¹ The Government bears the burden to show by a preponderance of the evidence that “no condition or combination of conditions will reasonably assure the appearance of the person” for trial. 18 U.S.C. § 3142(c); United States v. Abad, 350 F.3d 793, 797 (8th Cir. 2003). In making this determination, the statute mandates consideration of a number of factors, including “the history and characteristics of the person, including . . . the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings” 18 U.S.C. § 3142(g)(3).

Section 3142 “continues to favor release over pretrial detention.” United States v. Goodsell, No. 07-CR-225, 2007 WL 2746838 (D. Minn. Sept. 19, 2007) (quoting United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985)). Thus,

¹ At the detention hearing, the Government also argued that Mr. Petters poses a safety risk to the community. [Tr. at 98-99.] However, the Government framed the issue in terms of non-violent interference with Government witnesses, which does not implicate “safety” to the community within the meaning of the Bail Reform Act. 18 U.S.C. § 3142(f)(1), (2). At any rate, the magistrate judge based his order of detention solely upon flight risk, and made none of the required findings as to community safety by clear and convincing evidence as required by 18 U.S.C. § 3142(e), (f)(1). [Tr. at 113.] Thus, the issue before the Court is whether Mr. Petters constitutes a flight risk.

detention is the exception rather than the rule. Leyba, 104 F. Supp. 2d at 1183 (citing Orta, 760 F.2d at 890-891).

1. Recorded Conversation Between Mr. Petters And Robert White.

To support its motion for detention, the Government relied on a recorded telephone conversation between Mr. Petters and Robert White, who is allegedly an accomplice in the scheme set forth in the complaint. The telephone conversation took place on October 1, 2008. [Tr. at 26-28.]

The magistrate judge was troubled by the content of the conversation between Mr. Petters and White. The magistrate judge specifically cited Mr. Petters' statements regarding potential plans to flee via boat, a supposed attempt to obtain false identification, and a "Marc Rich"-type plan to evade prosecution by absconding outside the United States.² [Tr. at 114-117.]

The magistrate judge took portions of the conversation between Mr. Petters and White out of context. This Court must review the recording and transcript of the conversation de novo and draw its own conclusions. Maull, 773 F.2d at 1481.

The larger point, however, is that there is a marked difference between Mr. Petters' words and his actions. Aside from the bizarre conversation between Mr.

² The Government's sole witness, FBI Special Agent Brian Kinney, testified that Marc Rich is an American businessman who was indicted in federal court in the 1980s, but who fled to the country of Switzerland rather than stand trial. Special Agent Kinney asserted that former President Clinton pardoned Rich, purportedly due to political contributions. [Tr. at 36-37.] According to external sources, this is an oversimplification of the Marc Rich case. However, for the purposes of the detention hearing, the defense accepts Kinney's characterization for what it is worth.

Petters and White, the Government proffered nothing to suggest that Mr. Petters was seriously contemplating flight. Rather, the greater weight of the evidence reveals this conversation as the confused ramblings of a man under extreme stress, egged on by a manipulative White.

With respect to White, the Government filed a felony information on September 30, 2008, alleging that White had committed mail fraud and money laundering in connection with the alleged scheme. This, of course, signals that White had begun cooperating with the Government on or before September 30, 2008. Indeed, on October 8, 2008, White pleaded guilty to mail fraud and money laundering in connection with the scheme. United States v. Robert Dean White, No. 08-CR-299 (PAM) (D. Minn.). Given White's cooperation agreement with the Government, White had every incentive to bait Mr. Petters into an incriminating conversation.³

Not surprisingly, the evidence shows that White had been making numerous telephone calls to Mr. Petters prior to conversation at issue. [Tr. at 59-60.] Further, the defense did not have an opportunity to cross-examine White as to whether White had previously planted seeds in the mind of Mr. Petters. Since we

³ Other participants in the scheme have pleaded guilty and are cooperating with the Government. Specifically, in connection with the alleged scheme, Deanna Coleman has pleaded guilty to a felony information alleging conspiracy to commit mail fraud, United States v. Deanna Lynn Coleman, No. 08-CR-304 (PAM) (D. Minn.), and Michael Catain has pleaded guilty to a felony information alleging money laundering, United States v. Michael Alan Catain, No. 08-CR-302 (PAM) (D. Minn.).

lack the benefit of context, this single conversation must be viewed with an appropriate degree of skepticism.

Even the Government's own witness implicitly concedes that the recorded conversation lacks proper context. Special Agent Kinney testified:

Q: I take it you know from your investigation that it's not particularly hard to get Mr. Petters to talk on almost any subject, right?

A: He likes to converse, that's correct.

Q: In fact, at times he is manic in his conversation, right?

A: You could say so, yes.

[Tr. at 60.] The Government's own witness concedes Mr. Petters' communication style is "manic"—a term that is generally associated with mental hyperactivity and disorganization of thought. [Tr. at 18, 60.]

This view is further supported by the testimony of Mr. Petters' daughter, who listened to the recorded conversation. Mr. Petters' daughter testified that Mr. Petters suffers from attention deficit disorder and anxiety disorder. [Tr. at 85, 86.] He treats both afflictions with medications such as Adderall and Klonopin. [Tr. at 85, 86.] Having listened to the recorded conversation, Mr. Petters' daughter testified that Mr. Petters sounded "loopy," which she said occurs frequently when Mr. Petters is under high stress. [Tr. at 86, 87.]

Add to this the long list of absurdities that Mr. Petters uttered during the conversation with White. The absurdities uttered during the conversation indicate

a lack of organized and serious thought—a “manic” conversation that is unlikely to result in action.

For instance, Mr. Petters told White that he had been contacted by politicians with regard to his current legal situation, including Senator Amy Klobuchar, Representative Jim Oberstar, and Representative Jim Ramstad. [Tr. at 41.] The idea that these politicians have rushed to Mr. Petters’ aid is ludicrous, and no evidence was presented to support such an assertion. Rather, published reports indicate that the opposite has occurred—politicians are publicly distancing themselves from Mr. Petters. See, e.g., Patrick Condon & Amy Forliti, “Politicians Getting Rid Of Petters Donations,” Minneapolis Star Tribune (Oct. 9, 2008).

With respect to the “Marc Rich”-type plan, Mr. Petters said that White’s wife could stay with the President in the White House. [Tr. at 66.] The Government’s own witness acknowledged that this was a joke. [Tr. at 67.]

At one point Mr. Petters seems to suggest that White take a “vacation” on his boat, which apparently is docked in Chesapeake Bay. [Tr. at 48-49.] Although the Government believes that this was a suggestion that White flee by boat, it is clear that Mr. Petters does not have the foggiest idea about how one would do so. [Tr. at 48-49.] In the recording, Mr. Petters even says, after talking about the matter for quite some time, “I don’t know anything about sailing.” [Tr. at 49.]

In addition, the magistrate judge commented that Mr. Petters’ Florida residence is bounded by the Atlantic Ocean and a waterway, implying ease of

maritime flight. [Tr. at 118-119.] However, there was no evidence presented at the detention hearing to support this finding.

In the middle of this far-flung “escape plan,” Mr. Petters and White launch into a non sequitur about polling data regarding the American presidential race. [Tr. at 41-42.] Indeed, throughout the meandering conversation, Mr. Petters constantly shifts to unrelated topics without warning. For instance, during this conversation Mr. Petters suddenly begins discussing the performance of certain business entities with which he had been associated. [Tr. at 46.] The lack of focus and overall absurdity of the discussion deepen skepticism that this was a serious discussion of flight.

There is also a remarkable disconnect between Mr. Petters’ words to White and Mr. Petters’ actual actions. The Government concedes that it has no evidence that Mr. Petters withdrew a large amount of cash to finance a trip. [Tr. at 55.] There is no evidence from Mr. Petters’ accountant or from any other source that Mr. Petters amassed overseas assets. [Tr. at 67.] The Government has no evidence that he procured false identification or travel papers. [Tr. at 55.] There is no evidence that Mr. Petters independently researched nations that have no extradition treaty with the United States. [Tr. at 56.] Based on the conversation, there are no specifics as to where Mr. Petters would travel, what passport he would use, what ticket he would use, or really anything at all about how such a “plan” would be executed. [Tr. at 63.] In short, other than the single conversation with

White, there is no evidence that Mr. Petters was preparing for a long, anonymous trip. [Tr. at 61.]

Quite the contrary, the evidence at the detention hearing showed that Mr. Petters was preparing for a trip to Florida so that he could be with his family and prepare his defense. Mr. Petters' daughter testified that this trip had been in the works for the entire week prior to his arrest. [Tr. at 81-83.] Mr. Petters' brother also testified that this was the plan that had been conveyed to Mr. Petters' family. [Tr. at 90.]

Mr. Petters' daughter testified that Mr. Petters had made arrangements to fly his family to Florida—including his partner, his two young sons, and nannies. [Tr. at 81-83.] Mr. Petters also made arrangements to work with his attorneys via a video conferencing system from his Florida residence. [Tr. at 82-83.] Even the Government concedes that Mr. Petters had an airline ticket for a Florida destination. [Tr. at 60-61.]

In sum, the single conversation with White is too thin a reed upon which to base a detention order. The entire conversation has a rambling, “manic” air about it. And the conversation is inconsistent with Mr. Petters' observed actions. The Court should give the recorded conversation far less weight than the magistrate judge assigned it.

2. Cooperation With The Government.

Prior to his arrest, Mr. Petters has been compliant with the Government. Mr. Petters voluntarily turned over his passport to the Government on September

28, 2008, even though he had not been arrested or charged with any crime at the time. [Tr. at 51-52, 76.]

In a related case, United States v. Thomas Joseph Petters, et al., No. 08-CV-5348 (ADM/JSM) (D. Minn.), Mr. Petters has cooperated with the Government by voluntarily resigning his positions with a number of business entities. As of October 6, 2008, he stipulated to the transition of certain entities into receivership. [Tr. at 76.]

Mr. Petters' cooperation with the Government shows his compliance with reasonable requests, and strongly indicates that he is not a flight risk.

3. Assets Under Government Control.

The Government presented evidence that Mr. Petters holds approximately \$1 billion in personal assets, which have been restrained in the above-referenced civil case. [Tr. at 14-15.] A defendant with over \$1 billion at stake has a tremendous incentive to appear for trial.

Although the Government speculates that Mr. Petters may possess a cache of hidden assets, no evidence of this was brought forth at the detention hearing. The magistrate judge suggested that such hidden assets could exist, but this is rank speculation and is not supported by competent evidence in the record. [Tr. at 120.]

4. Ties To Family And The Community.

As the magistrate judge conceded, Mr. Petters has deep and varied ties to the Minnesota community. [Tr. at 118.] His mother, father, and siblings all live in

Minnesota. His partner lives in Minnesota, and he lives with his two young sons, ages three and one. [Tr. at 78-79.]

The magistrate judge failed to give adequate consideration to Mr. Petters' family circumstances. Mr. Petters' partner is presently in an addiction treatment program, and is unable to care for the young children. [Tr. at 79-80.] Now, because of Mr. Petters' confinement, his young children are without day-to-day contact with their father and mother. [Tr. at 79-80.] The young children must stay with Mr. Petters' family members and with paid nannies. [Tr. at 79-81.] This is germane to the flight risk issue because, as Mr. Petters' daughter testified, Mr. Petters is devoted to his family and it is not in his character to leave them. [Tr. at 80, 84.]

C. There Exist Equally-Effective, Less-Restrictive Alternatives To Pretrial Detention.

The magistrate judge did not give sufficient consideration to less-restrictive alternatives that would reasonably assure Mr. Petters' appearance at trial, such as electronic home monitoring. Technology has evolved and continues to evolve in the realm of electronic monitoring, such as global positioning systems, to the point where it is an extremely effective means of guarding against flight. See "GPS: Your Supervising Officer is Watching," 39 The Third Branch: Newsletter of the Federal Courts No. 4 (April 2007), available at <<http://www.uscourts.gov/ttb/2007-04/gps/index.html>>. The magistrate judge did not adequately consider technological advances which make electronic home

monitoring a less-restrictive, less-burdensome, and less-costly alternative to Sherburne County Jail.

The decision whether to order pretrial detention without bail is of enormous importance to any defendant. Pretrial detention strips the accused of his liberty before he has an opportunity to put on a fair defense. The issue is greatly magnified in complex white collar criminal cases such as this one. It is simply impossible for Mr. Petters to adequately assist his counsel when he is subject to the severe restrictions imposed by Sherburne County Jail.

According to the Government, there are hours and hours of recordings and thousands of documents to review in this case. The Sherburne County Jail sharply restricts the materials that may be brought into the facility. The Government can bring Mr. Petters to the United States Attorney's Office during the day, but this time window does not give Mr. Petters sufficient time to study the mountain of discovery materials in this case, nor to assist his counsel in understanding the complexities of his business.

Finally, it is worth noting that courts in this district and in this circuit have not hesitated to overturn a detention order issued by a magistrate judge. For instance, in United States v. Bradai, No. 04-16, 2004 WL 413281 (D. Minn. Feb. 26, 2004), the district court overturned the magistrate judge's order for detention, even though the defendant had lived in Minnesota for a relatively short period of time and had traveled with false papers. The Court was satisfied that the defendant had community ties that would reasonably assure his appearance at trial.

And in Leyba, the Court was satisfied that the defendant did not pose a flight risk even though he was charged with a serious crime which could result in a very long sentence; the Court was persuaded in part by the defendant's willingness to be subject to electronic home monitoring. 194 F. Supp. 2d at 1184.

CONCLUSION

Mr. Petters respectfully requests that the Court review the detention hearing record de novo. The Court will see that the Government has not shown by a preponderance of the evidence that Mr. Petters represents a bona fide flight risk. The Government's entire argument is based upon a single recorded telephone conversation which, based on all of the circumstances, provides a myopic picture as to Mr. Petters' thoughts and plans. The undersigned respectfully submits that the Court should pay more attention to Mr. Petters' actions, as opposed to his words uttered during a single, bizarre telephone conversation. That is, the Court should note that Mr. Petters consented to restraint of his assets, voluntarily gave up his passport, and took active steps to bring his family to his Florida residence to prepare his defense. Moreover, there exist far less restrictive means of ensuring Mr. Petters' appearance at trial, such as electronic home monitoring. Mr. Petters should be released pending trial, subject to reasonable restrictions such as electronic home monitoring.

Dated: October 20, 2008

s/ Eric J. Riensche

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