

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

SAID AZZAM MOHAMAD RAHIM

NO. 3:17-CR-169-B

**GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION TO REVOKE OR
AMEND MAGISTRATE’S ORDER OF PRETRIAL DETENTION**

On August 25, 2017, Defendant Rahim filed his Motion to Revoke or Amend Magistrate’s Order of Pretrial Detention. [Doc. No. 33]. Defendant asks the District Court to revoke the magistrate judge’s detention order claiming that: his detention violates due process; a change in circumstances has occurred since the initial detention hearing; and conditions could be imposed that would reasonably assure the defendant’s presence at trial. The Court should deny Defendant Rahim’s motion because his pretrial detention is regulatory rather than punitive, and therefore not a violation of due process; the circumstances surrounding the magistrate judge’s reason for finding Defendant Rahim a flight risk have not changed; and no condition or combination of conditions exists that would guarantee: 1) Defendant Rahim’s appearance at trial, and 2) the safety of the community.

Procedural History

On March 5, 2017, Defendant Rahim made multiple false statements to federal agents and was arrested based on the FBI's probable cause to believe a felony had been committed in their presence. On March 6, 2017, United States Magistrate Judge Toliver signed a criminal complaint charging Defendant Rahim with making false statements to a federal agent. Defendant Rahim also made his initial appearance on the complaint before Magistrate Toliver on March 6, 2017, and indicated to the court that he wanted to hire his own attorney. Judge Toliver temporarily detained Defendant Rahim for a week in order to give him additional time to locate an attorney. At the expiration of that time, Defendant Rahim informed the court that he had not hired an attorney and requested that a lawyer be appointed for him. The court appointed Defendant Rahim an attorney and scheduled his detention hearing for March 15, 2017, in order to give his lawyer time to prepare.

On March 15, 2017, Judge Toliver conducted Defendant Rahim's detention hearing. At the conclusion of the hearing, Judge Toliver found that Defendant Rahim should be detained pending trial because he posed a risk of non-appearance *and* because he posed a danger to the community. On March 22, 2017, a federal grand jury indicted Defendant Rahim for six counts of making a false statement to a federal agent in a matter involving international terrorism. On April 21, 2017, the parties filed a Joint Motion to Have Case Declared Complex and Continue Trial Date and Pretrial Deadlines [Doc. No. 24], and on the same day, the Court granted the motion. [Doc. No. 25]. The case is currently set for trial on December 4, 2017.

Judge Toliver's Detention Order Should not be Revoked

Standard of Review

Pursuant to 18 U.S.C. § 3145 (b) a person ordered detained by a magistrate judge may file a motion to revoke the detention order. Once a motion to revoke is filed, the district court acts *de novo* and must make an independent determination of the proper pretrial detention or conditions for release. *U.S. v. Rueben*, 974 F.2d 580, 585 (5th Cir. 1992) (citing *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985)). To impose pretrial detention on the defendant, the Court must find a lack of reasonable assurance of either the defendant's appearance or the safety of others or the community. *Id.* The Court need not find both. *Rueben*, 974 F.2d at 586. However, in this case, *both* factors are present.

The United States moved for the detention of Defendant Rahim under 18 U.S.C. § 3142(f)(2)(A), that is a serious risk that the defendant will flee. Section 3142(g) lists the factors the court shall consider when determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community. These factors include: (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, or whether the offense involves a controlled substance, firearm, explosive or destructive device; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings as well as whether, at

the time of the current offense, the person was on probation, parole or release pending trial; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

Flight Risk

During the hearing, the government presented evidence that Defendant Rahim was encountered at DFW airport, where he was attempting to board a Lufthansa flight through Germany and ultimately to Jordan. Defendant Rahim was carrying \$7,000 in U.S. cash and had newly shaved his beard. The government also presented evidence that Rahim had a daughter residing in Jordan. And finally, the government's witness testified that in a post-Miranda interview, Defendant Rahim stated that had nothing to hide, and that if he did have something to hide, he *would just leave the country*.

Based on the evidence presented at the detention hearing and the pretrial services report, the court found that there was no condition or combination of conditions which would reasonably assure Defendant Rahim's appearance as required. The court cited the nature and circumstances of the charged offense, the weight of the evidence, and Defendant Rahim's significant familial and financial ties outside of the United States. The court further stated that the threat of Defendant Rahim's "non-appearance is just as apparent from his own words. As Defendant stated to law enforcement agents who questioned him in this case, that if he has something to hide (which, based on the many false statements he allegedly made to them, it is reasonable to infer that he does), he would simply leave the country."

Defendant Rahim now asks this Court to revoke Judge Toliver's detention order, claiming that circumstances have changed because his "wife and daughter are currently working on travelling back to the United States." (*Defendant's Motion to Revoke* at 5). Defendant Rahim asserts that this is a material change to the circumstances surrounding the reason for his detention. This assertion is incorrect.

As an initial matter, Defendant Rahim's former wife and daughter have never been to the United States, so they could not be *returning* to the United States. Rahim, however, has travelled to Jordan on multiple occasions. Defendant Rahim and his former wife were married in Palestine in 2006, but have since been divorced. Additionally, the government has been unable to locate any formal attempts by Defendant Rahim's ex-wife or daughter to obtain documentation to enter the United States. Essentially, no circumstances have changed, and Defendant Rahim's motion should be denied. In the event that Defendant Rahim's ex-wife and daughter did travel to or attempt to travel to the United States, Defendant Rahim is still a flight risk based on his significant international travel, specifically to Jordan, his being intercepted at the airport by law enforcement, and his statements that if he had anything to hide, he would just leave the country. Accordingly, Defendant Rahim's motion should be denied because the government has established by a preponderance of the evidence that he is a flight risk.

Danger to the Community

In his motion, Defendant Rahim does not address Judge Toliver's additional reason for detention - that Defendant Rahim poses a danger to the community. After hearing the evidence presented at the detention hearing, the court found there was no

condition, or combination of conditions, which would reasonably assure the safety of the community or another person. The court specifically found that Defendant Rahim’s “speech was not mere expression, but included attempts to incite violent terroristic acts and threats to commit violent terroristic acts, both in the United States and abroad.” The court continued that no conditions could be imposed to prevent danger to the community, “in light of Defendant’s own explanation in the transcribed recordings that the tools with which terror can be inflicted are readily available, as well as Defendant’s repeated calls to commit violent acts (‘kill them’) anywhere and anytime.” [Doc. No. 11].

During the hearing, the court heard testimony on, and read transcripts of, multiple statements Defendant Rahim made on a social media platform about committing violence, including the praising of terrorist attacks in France, Turkey, and Orlando, Florida. (See *Detention Hearing Transcript*, attached as Exhibit 1). With respect to the attack in Orlando [in reference to the attack on Pulse Nightclub on June 12, 2016, committed by Omar Mateen], Defendant Rahim stated, “we rejoice for this attack which took place in America, in Orlando. Glory to the almighty God. Glory to the almighty God. I swear this attack shook them violently. Pictures of the attack are here” (Exhibit 1 at 22-23). Later in the conversation, Defendant Rahim continued “I mean this is a message we send to the agents of the intelligence, at the FBI and CIA, to tell their bosses. Enough, America . . . But to America, as you kill, you will be killed. The equation changed now . . . the equation changed, and State of the Islamic Caliphate is now a power to reckon with.” (Exhibit 1 at 23). Defendant Rahim goes on to tell the listeners that in the U.S., “to acquire a weapon is very, very, very easy. Just about any

person can have a weapon. I mean, most everyone is armed. Everyone is armed. They have weapons. It is not hard to get a weapon. You can go anywhere carrying a weapon. And you can go to the airport carrying arms, because no one check or anything. Nothing. Clubs, restaurants, anywhere. No weapons are there. No weapons. These are the elements which help these things.” (Exhibit 1 at 24). In fact, Defendant Rahim had access to at least one weapon prior to his arrest and can be seen on surveillance footage walking through the parking lot of his business, brandishing a firearm. (Exhibit 1 at 25).

When another social media user, located abroad, asked if it was permissible to kill people he worked with (or “bombing them or anything else”), Defendant Rahim took control of the social media platform and said:

Okay. Kill. And to not consult anyone or seek the opinion of others. Kill. Kill them and do not show them mercy or compassion, for neither the civilian clothes protect them nor the military uniform sanctions the shedding of their blood. They are all the same in their unbelief. Kill them, I mean. Don’t even consult with anyone. Go and kill. If you have the ability to go and kill, poison them, throw a rock, push down a building, do whatever you do. The important thing is that you kill. Kill with the intention of waging jihad for the sake of Allah and the intention that your banner is clear, the banner of there is no god but Allah and Mohammed is the messenger of Allah. Kill them, I mean, with the intention of jihad, with the intention of you being a mujahedeen for the sake of God. Maybe this act, I mean,

forgive your past and future transgressions. Rely on God. Kill if you have a chance. To hell with those Englishmen. The killer of an infidel will not go to hell. It is well known that shedding of the blood of the infidel is lawful. Shedding the blood of the infidel is lawful. But if they say you do—if they say to you in this case that he was a safeguarded Allah, then where is the Islamic State that this infidel lives and to be considered an ally and a free non-Muslim under Muslim rule? Does he pay tax? Does he? Does he? Does he? No. So kill. Kill. If you ask the scholars of the tyrants, they will tell you not to kill him, but kill him. Rely on Allah and kill them. Think of a way to kill the biggest number of people possible of those. May Allah's curse fall on them.

(Exhibit 1 at 12-13).

The detention hearing transcript is full of additional examples of Defendant Rahim praising, directing, or asking for the strength to perform violent acts himself. The evidence presented at the detention hearing constitutes clear and convincing evidence that Defendant Rahim is a danger to the community, and Judge Toliver's detention order should be upheld.

Defendant Rahim's Due Process Rights will Not be Violated by his Detention

In addition to arguing that Judge Toliver's detention order should be revoked because his family is returning to the United States, Defendant Rahim appears to also be raising a due process claim. He argues that his continued detention would be punitive

instead of regulatory, and therefore violates his Fifth Amendment right to due process. In this case, Defendant Rahim's detention is regulatory and appropriate and does not violate due process.

The Fifth Circuit has found that “the due-process limit on the duration of preventative detention requires assessment on a case-by-case basis, for the clause establishes no specific limit on the length of pretrial confinement.” *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989). When considering whether a due process violation has occurred, the court should consider both the factors relevant in the initial detention, “such as the seriousness of the charges, the strength of the government's proof that the defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits” as well as additional factors. Those additional factors include “the length of the detention that has in fact occurred or may occur in the future, the non-speculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay.” *Id.* As discussed above, the factors considered when Judge Toliver initially imposed detention weigh in favor of continued detention.

Length and Non-Speculative Nature of Detention

Because the factors under 18 U.S.C. § 3142 weigh in favor of detention, the Court next considers “the length of detention that has occurred or may occur and the non-speculative nature of future detention.” *United States v. Simpson*, 2010 WL 328053 at *3 (N.D. Tex. 2010, Fitzwater, C.J.). “Although the length of pretrial detention is one factor courts are to consider, it alone is not dispositive and carries no fixed weight in the

due process analysis. Indeed, length of detention will rarely by itself offend due process.” *United States v. Stanford*, 722 F.Supp.2d 803, 808 (S.D. Tex. 2010, Hittner, J.) (internal citations omitted). Defendant Rahim was taken into custody on March 5, 2017. After he was arrested, there was an approximately ten-day delay until Defendant Rahim’s detention hearing, based on requests by Defendant Rahim.¹ Defendant Rahim has now been in custody for approximately six months. The parties filed a joint motion to declare this case complex and to continue the trial date, and on April 21, 2017, this Court granted the motion, finding that “the nature of the prosecution is so complex that it is unreasonable to expect Defendant to be able to adequately prepare for pretrial proceedings in the time limits established by the Speedy Trial Act,” and setting this case for trial on December 4, 2017. [Doc. No. 25].

A nine-month detention does not violate Defendant Rahim’s due process rights. Courts across the country have found that delays much longer than nine months do not violate due process. *See e.g., United States v. El-Hage*, 213 F.3d 74, 77-79 (2d Cir. 2000) (finding thirty to thirty-three month detention did not violate due process); *United States v. Millan*, 4 F.3d 1038, 1049 (2d Cir. 1993) (finding expected detention of thirty months did not violate due process); *United States v. El-Gabrowni*, 35 F.3d 63, 65 (2d Cir. 1994) (finding twenty-seven month detention did not violate due process); *Simpson*, 2010 WL 328053, at *3 (sixteen month delay between arrest and trial did not violate due process); *Stanford*, 722 F.Supp.2d 803 at 809 (finding that a pretrial detention of 19

¹ The Government was prepared to move forward with Defendant Rahim’s detention hearing on the day of his initial appearance, March 6, 2017, and did not request any continuance to which it was entitled under the statute.

months did not offend due process); *United States v. Landron-Class*, 705 F.Supp.2d 154, 156-57 (D.P.R. 2010) (finding twenty-nine month detention did not violate due process); *United States v. McCarty*, 2009 WL 5061577, at *4-5 (D. Haw. 2009) (finding no due process violation where “Defendant had been detained for almost 17 months, and he would continue to be detained for several more months); *United States v. Telfair*, 2008 WL 5188846, at *4 (D. N.J. 2008) (“[T]wenty-two month pre-trial detention does not rise to the level of a due process violation.”); *United States v. Miller*, 2008 WL 2783146, at *2 (D. Kan. 2008 (finding seventeen months of detention did not violate due process); *United States v. Cos*, 2006 WL 4061168, at *11 (D. N.M. 2006) (Nineteen month pretrial detention would not create a case in which a due process violation had occurred). Similarly, Defendant Rahim’s detention of nine months based on his current trial setting does not violate due process.

Defendant Rahim also argues that the current trial date will likely be continued due to the pace of discovery. The government agrees that the current trial date could be moved again due to the complex nature of the discovery (but not based on government delay as the defendant suggests and is discussed more below). However, the prospect of a new trial date does not make Defendant Rahim’s detention “speculative.” Further, an additional continuance of even one year would not make Defendant Rahim’s detention punitive and would still be well within the limits required by due process. These factors do not suggest a due process violation has occurred.

Complexity of the Case

“When the complexity of a case is a reason for the length of the detention, the detention continues to be regulatory in nature rather than penal.” *Stanford*, 722 F.Supp.2d at 810. The Court has already determined that this case is complex, and the government has filed its CIPA Section 2 notice. Because future discovery in this case will be governed by CIPA, the nature of the case is necessarily complex, and any detention based on that complexity is purely regulatory in nature. As a result, the detention does not violate due process.

Trial Strategy Occasioning Delay

When the delay in a case is caused by prosecutorial strategy, it may be a basis for finding an exceedingly lengthy pretrial detention is a violation of due process. *See Stanford*, 722 F.Supp.2d at 810. Defendant Rahim suggests in his motion that, while maybe not intentional, the government has been dilatory in its discovery. That is simply not the case. The government produced hours of audio recordings of Defendant Rahim speaking in Arabic on the social media platform on April 10, 2017. Presumably, the defendant has hired an Arabic interpreter to listen to those recordings. On June 17, 2017, the government provided additional discovery that consisted of returns from grand jury subpoenas, and on August 1, 2017, the government provided Defendant Rahim with the recordings of his interviews with law enforcement and the Advice of Rights form he signed. The government has turned over the evidence it intends to rely on at trial to establish Defendant Rahim’s guilt on the charges. The vast majority of the Rule 16 material that has not yet been turned over to Defendant Rahim is governed by CIPA. The

government has met and is meeting its discovery requirements timely. Accordingly, there is no evidence of any strategy on the part of the government to delay this case and violate Defendant Rahim's due process rights.

Conclusion

The Court should deny Defendant Rahim's motion to revoke Judge Toliver's detention order because the record evidence shows by a preponderance of the evidence that Defendant Rahim poses a risk of non-appearance and by clear and convincing evidence that he is a danger to the community. Further, Defendant Rahim's detention is regulatory in nature, and therefore, does not violate his due process rights.

Respectfully submitted,

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