UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**4:05-CR-96**
	)	
v.	)	
	)	
XXX XXX (10),	)	
	)	
Defendant.	)	
	)	

MOTION TO REVOKE DETENTION ORDER

Defendant, XXX XXX, hereby moves this Court to revoke the detention order entered by the Honorable Magistrate Judge Don Bush in the above referenced matter. In support of this motion, Mr. XXX sets forth the following facts and argument.

I. BACKGROUND

XXX XXX is charged with conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846. He and his co-defendant wife, Denise XXX, were arrested in the Northern District of Texas. Significantly, after conducting a thorough background investigation, the United States Pretrial Office for the Eastern District of Texas recommended that Mr. XXX be released pending trial.

At the detention hearing, Mr. XXX's friends and family packed the courtroom. The Court heard testimony regarding his extensive family ties in the North Texas area. Likewise, the Court heard testimony from two church members who, at Mr. XXX's request, had began counseling him in order that he could get out of any drug lifestyle, *prior* to his arrest on the instant charge. Mr. XXX's prior criminal history was limited to two, small misdemeanors (one being driving with a suspended license). Finally, it was learned that Mr. XXX made a complete

confession upon his arrest further emphasizing his desire to leave the lifestyle and take responsibility for his actions.

Magistrate Judge Bush had expressed concern at the detention hearing that guns were found in a closet in the room of Mr. XXX's daughter when the home was searched. Nevertheless, the home was registered in his wife's name and Magistrate Judge Bush *did* release Mr. XXX' wife. Moreover, there was unrebutted testimony that the daughter did not use this room.

II. THE LAW

This Court must review the Magistrate Judge's detention order promptly and under a *de novo* standard of review. *See* 18 U.S.C. § 3145(b); *United States v. Fortna,* 769 F.2d 243, 249 (5th Cir. 1985).

Pretrial release should only be denied for "the strongest of reasons." *Truong Dinh Hung v. United States,* 439 U.S. 1326, 1329 (1978) (citation omitted). Indeed, it is well understood that, when Congress enacted the Bail Reform Act, it retained the preference for the release of most defendants prior to trial. *See United States v. Byrd,* 969 F.2d 106 , 109 (5th Cir. 1992) ("There can be no doubt that this Act clearly favors non-detention."). Given that fact, the provisions of the Bail Reform Act should be narrowly construed in favor of release. *See,e.g., United States v. Singleton,* 182 F.3d 7, 23 (D.C. Cir. 1999); *United States v. Hinote,* 789 f.2d 1490, 1941 (11th Cir. 1986) (It is required "that we strictly construe provisions of the Bail Reform Act of 1984). *Cf. Williams v. United States,* 458 U.S. 279, 290 (1982) (Criminal statutes should be narrowly construed in favor of the defendant).

Mr. XXX concedes that a presumption of detention applies in this case. *See* 18 U.S.C. § 3142(e), therefore, he was required to present "some" credible evidence to overcome the

presumption. *Fortna,* 769 F.2d at 251. Magistrate Judge Bush determined that Mr. XXX had not overcome the presumption. Nevertheless, given the Fifth Circuit's holding in *United States v. Jackson*, 845 F.2d 1262, 1266 (5th Cir. 1988), Magistrate Judge Bush's conclusion is clearly incorrect. In *Jackson*, the Fifth Circuit concluded that "*w*here [a] defendant has presented considerable evidence of his longstanding ties to the locality in which he faces trial...the presumption contained in § 3142(e) has been rebutted." *Id*. It is simply impossible to reconcile the overwhelming community support that Mr. XXX demonstrated at the detention hearing with the conclusion that he failed to rebut the presumption under *Jackson*.[1]

The presumption having been overcome, it became the burden of the government to prove by a preponderance of the evidence that Mr. XXX was a flight risk or by clear and convincing evidence that he was a danger to the community. 18 U.S.C. §§ 3142(e)(f). Likewise, the burden was on the government to show that there are no conditions or combination of conditions which could be set that set that would "reasonably assure" Mr. XXX' appearance or the safety of the community. *See United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985) ("[T]he standard is *reasonably assure* appearance, not 'guarantee' appearance, and that detention can be ordered on this ground only if 'no condition or combination of conditions will reasonably assure the appearance.'); *United States v. Orta*, 760 F.2d 887, 891-92 (8th Cir. 1985) (*en banc*) ("In this case, the district court erred in interpreting the 'reasonably assure' standard set forth in the statute as a requirement that release conditions 'guarantee' community safety and the defendant's appearance.").

Here there was no indication whatsoever that Mr. XXX would flea. First, he has cooperated with the government and admitted guilt *as well as* the extent of his guilt when

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[1] The presumption in drug offenses is intended to prevent flight. *See generally United*

questioned upon his arrest.[2] Second, his wife and children as well as his wife's family lives in the Dallas area. Third, Mr. XXX has been a life long resident of the Dallas area. Fourth, Mr. XXX had no problems appearing for court in connection with the two misdemeanor charges on his criminal record. Fifth, he has no passport. Sixth, while he *voluntarily disclosed* the existence of a sister in Monterey, Mexico, there was nothing to indicate that he had contact with that sister much less that he has visited her.[3]

As set forth above, it appears that Magistrate Judge considered the "weight of the evidence" and the fact that it was alleged that Mr. XXX kept guns in the home where his young daughter resided to conclude that the government proved by "clear and convincing" evidence that he was a danger to his daughter thereby justifying his pretrial detention. First, Mr. XXX notes that the "wight of the evidence factor" is the least important factor that the Court can consider because the Court cannot make a pretrial determination of guilt. *See United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) ("The weight of the evidence against the defendant is a factor to be considered but it is 'the least important' of the various factors." (citation omitted)); *United States v. Montamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985) (same). Second, the simple fact that a parent keeps firearms in a home would make a significant number of Texans a danger to their children Third, he has no criminal history save two misdemeanors occurring on the same date. **Finally, this basis for detention would also apply to Mr. XXX' wife, Denise**

States v. Jessup, 757 F.2d 378, 395-98 (citing remarks form hearings on the Bale Reform Act).

[2] The government seems to believe that Mr. XXX' admission of guilty *supports* his detention. Surely this is not the case. Who is more likely to flee, a defendant who immediately accepts responsibility or a defendant who steadfastly denies his guilt in the face of overwhelming evidence against him or her?

[3] It should also be pointed out that the ability to flee is not synonymous with inclination to flee and a simple ability to flee does not justify detention. *See United States v. Himler*, 797 F.2d 156, 162 (3rd Cir. 1986 ("Mere opportunity for flight is not sufficient grounds for pretrial detention.").

XXX, nevertheless, Magistrate Judge Bush found that there *were* conditions of release that could be set for Ms. XXX. Indeed, Mr. XXX was similarly situated with his wife, and, unfortunately, one can reasonably be concluded that, ultimately, Magistrate Judge Bush detained Mr. XXX based upon his gender. It is axiomatic that a person cannot be detained for unconstitutional reasons. *Cf. J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994).

III. CONCLUSION

This Court should revoke Magistrate Judge Bush's detention order because it ignores that Fifth Circuit's holding in *Jackson* and is based upon unconstitutional considerations. Likewise, this Court can set conditions, however onerous the Court believes they need to be,[4] that would reasonably assure Mr. XXX' appearance in Court and the safety of the community.[5]

Respectfully submitted,

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[4] For example, requiring electronic monitoring would "arguably" rebut any presumption a defendant might flee. *See United States v. O'Brien*, 895 F.2d 810, 816 (1st Cir. 1990).

[5] Mr. XXX also notes that the government has chosen to indict this case in one massive indictment which will likely lead to an inordinate amount of pretrial delay. The length of pretrial detention is a factor this Court can consider in resolving this motion. *See, e.g., United States v. El-Hage*, 213 F.3d 74, 79-80 (2d Cir. 2000).

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on July 26, 2005, I caused the foregoing document to be served by electronic means, on all counsel of record

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F. Clinton Broden