

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 2:13-cr-90-NT
)	
BINIAM TSEGAI)	

**GOVERNMENT’S OBJECTION TO DEFENDANT’S
MOTION TO MODIFY CONDITIONS OF RELEASE**

Defendant moves this Court to reopen the detention hearing in the above-captioned matter. This request follows a detention hearing that occurred on June 10, 2013, after which the court ordered that the defendant be detained pending trial (Docket ## 26, 28). For the reasons stated below, the Government respectfully requests that the defendant’s motion be denied.

BACKGROUND

On May 22, 2013, a federal grand jury returned a one-count indictment charging the defendant with conspiracy to distribute and possess with intent to distribute 28 grams or more of cocaine base (Docket # 3). The defendant was arraigned on May 23, 2013 (Docket #10). That same day, the Government filed a Motion for Detention alleging that the case was eligible for detention because the offense involved a 10+ year drug offense and a serious risk the defendant would flee (Docket # 9). The Government motion also alleged that the court should detain the defendant because there are no conditions of release which will reasonably assure the defendant's appearance as required or the safety of any other person and the community.

A detention hearing was held on June 10, 2013 (Docket # 26). During this hearing, the defendant called two witnesses as possible joint third-party custodians – Chhuk Chhay and Rith

Sok. (T. 6, 24).¹ Ms. Chay and Mr. Sok are the parents of the defendant's girlfriend and have known the defendant for several years (T. 10, 28). They live together with their children in Portland (T. 6, 24) and were willing and able to provide essentially around the clock supervision of the defendant (T. 16, 29). Ms. Chay testified that she works Monday through Friday, 3pm to 1130pm (T. 14). Ms. Chhay has no criminal record (T. 14 -15). She made clear to the court that she was more than willing to both welcome the defendant into her home and promptly report any violations of conditions of release to the court (T. 16).

Mr. Sok testified that he does not work on account of a disability and that he is home practically all day (T. 27,28). He expressed a willingness to supervise the defendant at any time Ms. Chhay was not available to do so (T. 30-31). His only prior conviction was an OUI approximately 10 years ago (T. 32).

As Government counsel noted during argument, both Ms. Chay and Mr. Sok appeared to be decent people and reliable third-party custodians (T. 38).

Following the hearing, the Court ordered the defendant detained, finding both that he was a risk of flight and a danger to the community. With respect to the former, the court found as follows:

I agree with the assessment of the United States Probation Office that there are no conditions available to reasonably assure that the defendant will appear as required. First, the defendant is facing a significant penalty in this case should he be convicted of the offense with which he has been charged. The penalty is far greater than any that he has faced to date, namely, no less than five and up to 40 years in prison. That penalty, in my view, heightens the risk of flight. I also agree with the Probation Office that the defendant's residential history, including his father who is presently temporarily overseas, has been variable. The defendant's employment history also heightens the risk of flight because the defendant is unemployed and has no financial ties to the area. Furthermore, the defendant

¹ References to the detention hearing transcript are denoted by (T.). References to the magistrate Judge's detention order are denoted by (Ord.). References to Defendant's Motion are denoted by (D.Mo.).

retains ties to his home country of Eritrea, where his family members reside and where he visited for two months as recently as last year. In short given the severity of the punishment that the defendant faces, the lack of financial ties to Maine, and the less than settled residential history of the defendant and his continuing ties overseas, the government has met its burden regarding risk of flight.

(Ord. 3)

With respect to the latter, the court found as follows:

With regard to the danger prong, I again agree with the United States Probation Office that there are no conditions available to reasonably assure that the defendant will not be a danger to others or the community. Since his incarceration after his arrest, the defendant's telephone calls from jail instructing others to change their telephone numbers and not to say anything on recorded lines and the defendant's apparent involvement in an assault on another inmate underscore the danger that he poses. In addition, the defendant's drug abuse history adds to this danger. Lastly, the defendant's criminal history, although not consisting of any felonies, contains several instances where the defendant has not complied with conditions of release, and in his many interactions with the police, the defendant has demonstrated contempt for law enforcement. Whatever conditions I might impose obviously have as a fundamental prerequisite that they be followed. The defendant, having not shown a willingness or an ability to follow earlier conditions, gives me no confidence that such conditions would be followed in this instance. So, even under the higher clear and convincing evidence standard, I find that the government has readily met its burden with regard to danger.

(id.).

MEMORANDUM OF LAW

A. Applicable Law

The Bail Reform Act of 1984, as amended, Title 18, United States Code, Section 3141-56, provides in relevant part that:

If, after a hearing pursuant to . . . [the statute], the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of such person and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

18 U.S.C. § 3142 (e).

The Bail Reform Act also provides, pursuant to Section 3142(f) that:

The 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)(2)(B).

Given the stringent standards for reopening a detention hearing, several courts approached with such a request in circumstances similar to defendant's case have denied such a motion. See United States v. Hughes, No. 09-30256, 2009 WL 1833593, at *1 (E.D. Mich. June 22, 2009) (not reported) (citing United States v. Dylan, 938 F.2d 1412 (1st Cir. 1991)); and United States v. Gagnon, Crim. No. 10-52-B-W, 2010 WL 1710066 (D. Me. Apr. 23, 2010) (not reported).

B. Discussion

In support of his request to re-open the detention hearing, the defendant proffers the following information:

At the time of the detention hearing on June 10, 2013, the defendant's father was not residing in Portland, Maine. The fact that his father is now residing here and would allow the defendant to reside with him has a material bearing on the issue of whether there are conditions of release that would reasonably assure the defendant's appearance as required.

(D.Mo. 2).

Assuming, but by no means conceding, that this proffered information constitutes "new" information², the information is nevertheless not "material" to the issue of whether conditions of release are appropriate. The defendant is simply offering to exchange one third-party custodial

² While it is the case the defendant's father was not in the country at the time of the initial detention hearing, it is also the case that the defendant was well aware of his father's travel itinerary and very easily could have continued the detention hearing to a date subsequent to his father's return to Maine. Defendant opted not to do so.

option for another. The defendant was not deemed a risk of flight and a danger to the community on account of any inadequacies on the part of the third-party custodians initially offered for consideration. Rather, the defendant was ordered detained because of the following: (1) the significant penalty the defendant faces; (2) the defendant's unstable residential history; (3) the defendant's unemployment status and lack of financial ties to the area; (4) the defendant's ties to Eritrea; (5) the defendant's troubling prison calls; (6) the defendant's drug abuse history; and (7) the defendant's criminal history – which includes many interactions with the police where the defendant demonstrated outright contempt for law enforcement as well as prior convictions for violating conditions of release.

The return of the defendant's father to Maine does nothing to alter this troubling history and little, if anything, to alleviate the concerns that flow from it. Accordingly, the defendant has not met his burden for reopening the detention hearing and his motion should be denied.

CONCLUSION

In light of the defendant's failure to meet his burden for reopening the detention hearing based on material information, defendant's motion to reopen the detention hearing should be denied.

Dated: August 6, 2013

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**UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2013, I electronically filed the Government's Objection to Defendant's Motion to Reopen Detention Hearing with Incorporated Memorandum of Law with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following:

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