IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Criminal Action **No. 12-cr-00033-JLK**

UNITED STATES OF AMERICA,

Plaintiff,
v.

1. JAMSHID MUHTOROV,

Defendant.

ORDER GRANTING DEFENDANT'S (THIRD) MOTION [Doc. 1418] FOR PRETRIAL RELEASE ON CONDITIONS

Kane, J.

This matter is before me on Defendant Jamshid Muhtorov's (Third) Motion for Pretrial Release (Doc. 1418). The Motion was precipitated by the continuance of codefendant Bakhtiyor Jumaev's trial from March 2017 to January 2018. Because Mr. Muhtorov's trial date remains set for July 31, 2017, the effect of the continuance was to force Mr. Muhtorov to either abdicate his previously-recognized right to proceed second to call Mr. Jumaev as a witness in his defense, or face what would likely be an additional year of pretrial detention in order to preserve it. Having already spent five and a half years in detention awaiting trial, Mr. Muhtorov argues an additional year would surely cross the constitutional rubicon from administrative to punitive.

Mr. Muhtorov's situation is unprecedented in my experience, and has weighed heavily. There is a presumption of flight risk and dangerousness that attaches to Mr. Muhtorov because he is charged with conspiracy and attempt to provide material support to terrorism. *See* 18 U.S.C. §3142(e)(2). Given that no death or injury is alleged to have resulted from his efforts or

actions, the maximum sentence he faces on the indicted charges is 15 years.[1] Six years of detention awaiting trial on these charges approaches the range of sentences imposed in other cases.

I have given Mr. Muhtorov's request long and careful consideration, and have weighed the equities thusly:

Mr. Muhtorov's Motion for Release on Conditions is made under the Bail Reform Act, which permits the reopening of a detention hearing based on "new information" bearing on the existence of conditions of release that will reasonably assure defendant's appearance at trial and the safety of other persons and the community. 18 U.S.C. §3142(f)(2). The Act also expressly admonishes that nothing in its provisions "shall be construed as modifying or limiting the presumption of innocence." §3142(j). In the two years since Mr. Muhtorov's detention was last revisited, there have been substantial developments and new information that bear favorably on the existence of the requisite conditions for release.

The period of detention he faces without a reopening under §3142(f)(2), moreover, implicates the presumption of innocence to which he is entitled not only under the Constitution, but under the Bail Reform Act itself. Under these circumstances, I decline to reconsider the substantive due process question of whether Mr. Muhtorov's pretrial detention has become punitive, rather than administrative, and limit my ruling to the requisite factors under the Act. My ruling severing Mr. Muhtorov's trial from Mr. Jumaev's, together with new information gleaned from evidentiary hearings that only recently took place, supports the REOPENING of

[1] Mr. Muhtorov is charged with conspiracy and attempt to provide material support to the Islamic Jihad Union in violation of 18 U.S.C. §2339b, which at the time of the indictment provided for imprisonment of "not more than 15 years" unless the "death of any person results." Section 2339b has since been amended to provide for a maximum sentence of 20 years. Mr. Muhtorov's charges are premised on his alleged conspiracy to join the IJU, provide $300 from Mr. Jumaev to the IJU, and to provide "communications equipment and services" to the IJU. *See* Second Superseding Indictment (Doc. 59). No deaths resulting from this conduct occurred or are alleged.

Mr. Muhtorov's detention hearing under 18 U.S.C. §3142(f)(2), and his Motion for Release on Conditions (Doc. 1418) is GRANTED for that purpose.

Discussion.

The Bail Reform Act permits the reopening of a detention hearing "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 [question of] 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).

Mr. Muhtorov's original detention hearing was held before a magistrate judge on February 15, 2012, approximately one month after his arrest. In his Order denying Mr. Muhtorov's original motion for release on bond (Doc. 24), the magistrate considered a hastily-assembled pretrial services report, an affidavit and live testimony from FBI Special Agent Hale, together with comments of counsel to conclude under 18 U.S.C. §3142(g) that Mr. Muhtorov represented both a flight risk and a danger to the community. As support for the flight risk determination, the magistrate cited: Mr. Muhtorov's arrest leaving the country; his statement to his young daughter that he "may not see her again on earth"; his "prior experience with the incarceration, in Uzbekistan, of his sister"; and the fact ICE had Mr. Muhtorov under detainer and "could, theoretically, remove [him] prior to his prosecution." Findings of Fact and Conclusions of Law (Doc. 24, pp. 3-6).

Support for the risk Mr. Muhtorov presented to the community was more tenuous, being premised on the Bay'ah (oath of allegiance) Mr. Muhtorov allegedly made to the IJU and to "jihad" generally, and the fact Mr. Muhtorov was arrested on his way to Turkey where "Turkish authorities [had] seized weapons and detained extremists associated with the IJU." *Id.* The oath,

together with the fact he was "leaving behind his wife and children" with over $2800 despite telling authorities he could "barely support" them, gave the magistrate judge "a grave concern that, rather than go to jail in the United States," Mr. Muhtorov "is at risk of choosing an alternative that would present a risk to other persons or the community." *Id.* No other facts supporting Mr. Muhtorov's dangerousness were offered or found. Notice was taken of the memoranda and documents offered by Mr. Muhtorov to rebut the §3142(e)(2) presumption (*see* Docs. 19-2, 19-3) but they were accorded no weight. Findings of Fact (Doc. 24) at pp. 1-2.

In July of 2015, more than three and a half years later, Mr. Muhtorov moved for reconsideration of bail "based on the extraordinary length of pretrial detention." (Doc. 783). I denied that Motion in a written Order dated August 19, 2015 (Doc. 809), finding the sole basis for the motion—the passage of time—to be "insufficient," under the "circumstances of the present case" to "justify the relief requested." I cited the serious nature of the charges; the severity of the penalties for conviction; the fact Mr. Muhtorov was apprehended while in the process of leaving the country with money and "electronic equipment capable of being used by a terrorist organization"; and the threat of violence implicit in these acts as outweighing any liberty interest "Mr. Muhtorov might claim." I also invoked the complexity of the case, the zeal with which Mr. Muhtorov was being defended, and the "absence of any indication that Mr. Muhtorov was being confined in order to punish him or thwart his exercise of his rights incident to a fair trial" as indicia weighing against any reconsideration of his pretrial detention.

Now, nearly two years later, Mr. Muhtorov again moves for reconsideration. This time, unlike in August 2015, there have been certain substantive events and evidentiary changes that must be noted.

- First, in November 2016, I granted Mr. Muhtorov's motion to sever his trial from

Mr. Jumaev's under *Bruton v. United States*, 391 U.S. 123 (1968), recognizing Mr. Muhtorov's right under the Confrontation Clause of the Sixth Amendment to call Mr. Jumaev as a witness in his defense. *See* Order (Doc. 1177). At that time, Mr. Muhtorov's trial date was moved from March 13, 2017 to July 31, 2017, so that Mr. Jumaev could be tried as originally planned and then be called as a witness in Mr. Muhtorov's trial after jeopardy attached.

- On March 1, 2017, after pressure by the court and adverse testimony by the government's expert witness, Dr. Guido Steinberg, the government voluntarily dismissed Counts 5 and 6 of the then-operative Third Superseding Indictment. Counts 5 and 6 had been added by the government in May of 2016 based on evidence and translated conversations that had occurred in late 2011 and early 2012 and had been in the government's custody since then. The counts greatly expanded the discovery and number of translations defendants had to develop, and the Counts' dismissal 12 days before Mr. Jumaev's trial was prejudicial in the sense that it meant defendants had wasted a lot of time. On that ground and others, Mr. Jumaev moved to dismiss the charges against him for *Brady* violations. (Doc. 1292.)
- On March 13, 2017, the date Mr. Jumaev's trial was set to begin, I denied Mr. Jumaev's Motion to Dismiss and prepared for trial to commence. Before the venire panel was called in, Mr. Jumaev asked for a brief recess to consider the impact of my order, and when he returned, moved to continue the trial on grounds that untranslated discovery materials disclosed in September 2016 were still so great, and the government's alleged *Brady* violations so prejudicial, that counsel

could not effectively represent him in a trial commencing that day. I granted the Motion, with the result that Mr. Muhtorov – who was not present in the courtroom – had little chance to address the continuance or its impact on his speedy trial rights or his previously recognized rights under *Bruton.*

- An additional change, and one with significant impact on the detention question before me under §3142(f)(2), is the actual factual basis we now have both for the nature of the crimes with which Mr. Muhtorov is charged and the flight and danger risks he poses. In 2015, as in 2012, there was little evidentiary basis for the findings I was required to make regarding the dangers Mr. Muhtorov poses or his flight risk. In fact, those findings were premised almost exclusively on Agent Hale's Affidavit attached to the original Information in January 2012 and his testimony before Magistrate Judge Hegarty. Since my August 2015 Order denying pretrial release, we have had several lengthy evidentiary hearings that have marshalled many of the facts on which the government will rely to establish Mr. Muhtorov's guilt. The January 2017 suppression hearing demonstrated some of the weakness in the government's translations and its linguists, and the February *James* hearing gave a thorough overview of the evidence the government has to support its conspiracy claims against both defendants. Dr. Steinberg's March 2017 *Daubert* hearing testimony gave rise to additional inferences that may be favorable to Mr. Muhtorov, including the fact that he was not taken particularly seriously by the IJU sodliqar "Administrator" and that he left for Turkey without ever hatching any plan with anyone from the IJU. There is reason to believe, after previewing the government's evidence and the strength of

his defenses, that Mr. Muhtorov has been invested with a sense of direction and a reason to stay and see the trial of his case through.

Mr. Muhtorov's trial date is set for July 31, 2017, and both parties affirm that the trial can commence on that date. Mr. Muhtorov's pending motion comes almost two years after his last and addresses the consequences for him of the events of March 13 and the fact that an exercise of his *Bruton* right, which I have endorsed, means he is facing almost another year in pretrial detention before his trial is complete. I have advised Mr. Muhtorov's counsel that I would permit a continuance so that the Mr. Jumaev can be called as a witness on his behalf, but they assure me that Mr. Muhtorov cannot tolerate a further continuance unless his motion for pretrial release is granted.

In light of the listed changes, I find that information exists today that was not known to Mr. Muhtorov or the Court at the time of the original bond hearing and that information has a material bearing on the issue of whether there are conditions of release that will reasonably assure his appearance and the safety of the community. *See* 18 U.S.C. § 3142(f). I further find that a combination of conditions for release can be crafted that will assure his attendance at a trial to be held in early 2018 and protect the safety of the community. While I am concerned about witness intimidation and the actions of Mrs. Muhtorov and others having previously attempted to contact people they believed were witnesses against Mr. Muhtorov, I am satisfied that Mr. Muhtorov can be made to understand the gravity of such actions and to comply with conditions prohibiting that contact.

I make this determination in light of the information now available concerning—

(1) the nature and circumstances of the offense charged;
(2) the weight of the evidence against [Mr. Muhtorov];
(3) the history and characteristics of [Mr. Muhtorov]; and
(4) the nature and seriousness of the danger to any person or the community that would

be posed by the [his] release.

18 U.S.C. § 3142(g). Among Mr. Muhtorov's relevant history and characteristics are his family and community ties, which are substantial, and his work history. §1342(g)(3)(A). His wife, Nagiza, has lived and worked in the community now for ten years. Muhtorov himself lived and worked in the community for 5 years without incident before his arrest. Throughout the time of his detention, Nagiza has visited Mr. Muhtorov. Their third child has been born. Their familial relationship has deepened.

Most significant in my view are the changes that have occurred as to factors (1) and (2) of §3142(g), with substantial evidence having been presented since 2015 suggesting Mr. Muhtorov's bark was more serious than his bite. His oath of Bay'ah, for example, was made but not accepted – a fact Dr. Steinberg explains is significant. Tr. (Doc. 1314) at 78-80. According to the government, Mr. Muhtorov left for Turkey with plans to attend a madrassa, with no invitation from or other plan or contact from anyone associated with the IJU. Dr. Steinberg's testimony again undermined the government's theory, this time that the madrassa was a "known" conduit to the IJU. *See id.*at 84-85. Evidence offered during the *James* hearing also undermined the seriousness or depth of the conspiracy between the codefendants, with large majorities of their conversations involving prattle and topics other than terrorism or plans to support it.

That is not to say that the government's charges are without merit or that the words and conduct of Jamshid Muhtorov are not serious or without consequence. To the contrary. The government, by its actions in surveilling and apprehending Mr. Muhtorov, may have thwarted an actual plan to provide smartphones and services to the IJU. The content of Mr. Muhtorov's conversations with Mr. Jumaev are abhorrent, the videos and pictures on his phone revolting. His professed desire to join a movement that justifies the murder and maiming of all who dare to

think differently than he does on matters of faith and religion deeply offend our values of religious liberty, the sanctity of life, tolerance, justice, and the rule of law. Nor is there any doubt that the men and women of our security services and intelligence communities act and have acted with the utmost rigor and good faith. Mr. Muhtorov, however, has already spent more than five years in detention before even being found guilty of acting, in any way, on his alleged terrorist beliefs. And it is to this point that I briefly turn.

In *United States v. Salerno*, 481 U.S. 739, 763 (1987), Justice Rehnquist wrote for a majority of the Supreme Court that the Bail Reform Act -- despite providing for the pretrial detention of individuals presumed, under the most sacrosanct of our civil liberties, to be innocent until proven guilty -- did not violate the Due Process Clause of the Fifth Amendment because pretrial detention can be considered regulatory, and not punitive. Even the majority recognized this exception was not without limits, and that pretrial detention could "not be excessive in light of the perceived evil." *Id.* at 754. In dissent, Justice Marshall wrote eloquently against the majority's holding, calling the elision of "punishment" as "regulation" to circumvent the Constitution's prohibition of its imposition a "mere[] exercise in obfuscation." *Id.* at 760.

Justice Marshall quotes *Williamson v. United States*, 95 L.Ed. 1379, 1382 (1950) (opinion in chambers), an opinion by Justice Jackson upon review of an application for bail pending appeal by members of the American Communist Party convicted Under the Smith Act.

> 'Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done . . . . If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice . . . .'

Salerno, 481 U.S. at 766. Justice Marshall concludes with the following admonition, which

surely resonates under the facts and circumstances of this case:

> Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be 'dangerous.' Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves.

Id. at 767. In this case, at this juncture, I elect to check this power. I find the weight of evidence and the circumstances of this case have changed in a manner that justifies finding Mr. Muhtorov can be released for the time necessary to vindicate his right to call Mr. Jumaev in his defense at trial without presenting an unreasonable risk of flight or any danger to the community or any other witness in this case.

Conclusion.

Cognitive dissonance is the state of mental discomfort one has when holding two or more conflicting thoughts at the same time. So in this matter, compliance with the Bail Reform Act, protection of the public and assurance of the accused's presence for trial conflict with the established presumption of innocence and the fundamental priority our system places on freedom. To end the cognitive dissonance, some sort of transformational learning that addresses biases must ensue so that while these values remain contrary, their accommodation can be achieved through greater tolerance.

Experience is the means by which the organization of the recognized biases occurs and thereby permits a change in view and opinion. It is a way out of the bubble of certainty and into a full atmosphere containing balance and moderation. Based on the foregoing, I am GRANTING Mr. Muhtorov's Motion for Release on Conditions, but will ABATE my order for his release so that the specific combination of conditions can be aired and determined with

comment from all sides. I am setting a hearing to determine the contents of my release order and the specific conditions with which Mr. Muhtorov is expected to abide.

Dated this 23d day of June, 2017.

John L. Kane
SENIOR U.S. DISTRICT JUDGE