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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SAMUEL NWABUEZE, Defendant.	CR No. 10-411-MMM GOVERNMENT'S RESPONSE TO DEFENDANT'S APPLICATION FOR REVIEW OF MAGISTRATE JUDGE'S BAIL ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES RE: LEGAL STANDARD FOR DETENTION UNDER 18 U.S.C. § 3142 **HEARING DATE: June 14, 2010** **HEARING TIME: 1:15 p.m.**

I. BACKGROUND

A. Procedural History

On April 12, 2010, defendant SAMUEL NWABUEZE ("defendant") made his initial appearance before Magistrate Judge Frederick F. Mumm. See Clerk's Record ("CR.") 5. At that initial appearance, Magistrate Judge Mumm ordered defendant detained pending trial. Id. On May 21, 2010, defendant filed an application for review of the order of detention. CR 25. That matter was referred to Magistrate Judge Mumm (CR 26), who, on May 27, 2010, declined to

reconsider his initial order of detention. CR 28.

On June 7, 2010, defendant filed a second application for review of Magistrate Judge Mumm's detention order. Dkt. No. 29. And on June 9, 2010, defendant filed a Memorandum of Points and Authorities re: Legal Standard for Detention Under 18 U.S.C. § 3142 (the "Memorandum"). In the Memorandum, defendant first argued that 18 U.S.C. § 3142 and United States v. Twine, 344 F.3d 987 (9th Cir. 2003), restrict the "risks upon which detention may be based [in this case to] flight risk and any risk there may be that the defendant will obstruct or attempt to obstruct justice." Defendant also argued that Magistrate Judge Mumm based his decision on detention on "an inability to comply with conditions," which defendant claimed was an improper basis for detention under 18 U.S.C. § 3142.

Defendant's arguments are incorrect. First, defendant's reliance on Twine is misplaced, and the Court may order defendant detained pending trial if he is either a flight risk or danger to the community. Second, defendant's reading of Magistrate Judge Mumm's decision at the May 27, 2010, hearing is too restrictive, as, in context, it appears that Magistrate Judge Mumm's decision was based on the fact that defendant constitutes a flight risk. Finally, because defendant is both a flight risk and danger to the community, this Court should order that he continue to be detained pending trial.

B. Facts of the Offense

On or about April 23, 2010, defendant and co-defendant Chike Ngezelonye were indicted in a two-count indictment, alleging violations of 18 U.S.C. § 1029(b)(2): Conspiracy to Use Unauthorized Access Devices and 18 U.S.C. §§ 1029(a)(2), 2(b):

Fraudulent Activity in Connection with Access Device, Causing an Act to be Done. The government alleges that defendant and Ngezelonye, together with other unindicted co-schemers, knowingly and with intent to defraud conspired to obtain and use unauthorized access devices. Specifically, defendant and Ngezelonye requested financial institutions to send unauthorized access devices for victims holding credit card and other accounts at those institutions. Defendant and Ngezelonye would then use the unauthorized access devices to make purchases and withdraw cash from the victim's accounts.

II. ARGUMENT

A. Defendant's Reliance on *United States v. Twine* Is Misplaced

The plain language of the Bail Reform Act and well established case authority permits the detention of a defendant on the basis that he or she is either a danger to the community or a risk of flight or both. Nevertheless, the Ninth Circuit's decision in Twine has caused some defendants to argue (and some judges to hold) that a defendant may never be detained pending trial based on danger alone. In fact, Twine makes no substantive changes in the law governing the basis on which a defendant may be detained before trial, and instead stands for the well-established and unremarkable proposition that the government must first demonstrate that it is entitled to a detention hearing before a defendant may be detained prior to trial.

Twine simply holds that in order to ultimately detain an individual, the government must first demonstrate that it is entitled to a detention hearing based on one of the grounds set forth in § 3142(f). See 344 F.3d at 987 (describing district

court's holding that § 922(g)(1) is a crime of violence that "triggers the [Bail Reform] Act's express authority to hold Twine without bail pending trial after a hearing pursuant to 18 U.S.C. § 3142(f)"). Once the government makes a threshold showing that it is entitled to a detention hearing, the court may then hold such a hearing and detain the defendant if it finds that the defendant is a risk of flight or a danger to the community. See 18 U.S.C. §§ 3142(c),(e), (f), (g).

The defendant in Twine was charged with being a felon in possession of a firearm. Unable to demonstrate that defendant presented a flight risk, the government sought a detention hearing on two grounds: (1) the felon-in-possession charge was a crime of violence and (2) defendant was a danger to the community. The defendant was detained on the sole ground that he posed a danger to the community. In a brief, per curiam opinion reversing the detention order, the court observed, "We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the act would render meaningless 18 U.S.C. § 3142(f)(1) and (2)." Id. at 987. The Ninth Circuit also held that because the felon-in-possession charge was not a crime of violence, the government was not entitled to a detention hearing on that ground and therefore the court could not detain defendant on that basis. Id. at 988.

The context of Twine and the analysis and citations contained in the opinion demonstrate that the holding was limited to the issue of whether the government had proved that it was entitled to a detention hearing. The court's brief analysis in

Twine focused exclusively on the detention hearing provisions of 18 U.S.C. § 3142; the court noted its concern that the detention hearing provisions (subsections (f)(1) and (f)(2)) would be rendered meaningless if an individual were detained on dangerousness alone, and it concluded that because the crime at issue was not a crime of violence, the government could not "trigger the [Bail Reform] Act's express authority to hold Twine without bail after a hearing pursuant to 3142(f)." Twine, 344 F.3d at 987. However, Twine did not call into question the express statutory authority to detain an individual after hearing if the court finds the individual a danger to the community under 18 U.S.C. § 3142(c) and (e). Instead, Twine's holding is focused on the issue of a detention hearing, and correctly holds that a person cannot be detained as a danger to the community unless the government is entitled to a detention hearing on one of the grounds enumerated in 18 U.S.C. § 3142(f).[1]

The alternative reading of Twine – that no defendant, no matter how dangerous, may ever be detained on the basis of danger alone – is not only contrary to the plain language of the statute and Ninth Circuit case authority, but facially unreasonable, as well.

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[1] Two of the cases cited by Twine support this reading of that decision. See United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) ("Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists."); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986)(detention unwarranted unless government first demonstrates it is entitled to a detention hearing under § 3142(f)). While the Fifth Circuit's decision in United States v. Byrd, 969 F.2d 106 (5th Cir. 1992), appears to suggest that detention (as opposed to a detention hearing) cannot be ordered on the basis of dangerousness alone, the government respectfully submits that reading runs contrary to the statute and is unreasonable.

As a matter of statutory construction, § 3142(c) and (e) provide that a court "shall" detain a defendant if "no condition or combinations of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." "Only a disjunctive construction [of Section 3142(c) and (e)] is sensible," because under both subsections,

> the judicial officer must be satisfied that *both* the defendant's appearance and the community's safety are assured. The converse must also be true: if the judicial officer can conceive of no conditions which will reasonably guarantee either the person's appearance or the community's safety, conditional release must be denied.

United States v. Kouyoumdjian, 601 F. Supp. 1506, 1509 (C.D. Cal. 1985) (Rymer, J.) (emphasis in original). Subsection 3142(f)(2)(A) also authorizes a detention hearing where there is serious risk that a defendant will flee, and "[i]t is illogical to have that power without the correlative ability at the hearing to determine that detention is indicated on the sole basis of a finding that no conditions will assure appearance." Id. Likewise, subsection 3142(f)(2)(B) authorizes a detention hearing when there is a serious risk that defendant might obstruct justice or intimidate a witness, "a power that would make no sense if, upon hearing, the judicial officer were unable to detain based solely on a finding that no conditions will assure *safety*." Id. (emphasis in original). Section 3142(f) also establishes distinct burdens for detaining someone based on flight and dangerousness, suggesting that they are two independent findings, either of which warrants detention. Id. Finally, the legislative history of the Bail Reform Act indicates that "requiring findings on both appearance and safety before

detention could be ordered, would defeat the overriding purpose of the Bail Reform legislation." Id. at 1510.

The legislative history of § 3142 bears this interpretation out – the Senate Judiciary report on the Bail Reform Act states, "[T]he Committee has determined that danger to the community is as valid a consideration in the pretrial release decision as is the presently permitted consideration of risk of flight. Thus, subsection (a), like the other provisions of section 3142, places the consideration of defendant dangerousness on an equal footing with the consideration of appearance." See Report of the Committee on the Judiciary, United States Senate on S. 215, Rept. No. 96-147 (May 25, 1983).

As a matter of precedent, the Ninth Circuit has on at least two occasions held or assumed that § 3142 permits pre-trial detention based on dangerousness alone. In United States v. Motamedi, 767 F.2d 1403 (9th Cir. 1985), the court expressly stated that the Bail Reform Act "permits the pretrial detention of a defendant without bail where it is demonstrated either that there is a risk of flight or no assurance that release is consistent with the safety of another person or the community." Later, the Ninth Circuit affirmed the constitutionality of pretrial detention based on dangerousness alone in United States v. Walker, 808 F.2d 1309, 1311 (9th Cir. 1986). The implicit holding of Walker, then, is that pretrial detention based on dangerousness is authorized by § 3142.

In order to hold that pretrial detention based on dangerousness is not authorized under § 3142, Twine would have to overrule the express holding of Motamedi and the implicit holding

of Walker, something only an en banc panel could accomplish. Cerrato v. San Francisco Cmty. Coll. Dist., 26 F.3d 968, 972 n.15 (9th Cir. 1994). At the very least, Motamedi and Walker appear to conflict with a reading of Twine that forbids pretrial detention on dangerousness alone. Where intra-circuit precedent is in conflict, courts must attempt to reconcile it. Watts v. Frito-Lay, Inc., 978 F.2d 1093, 1108 (9th Cir. 1992). Motamedi, Walker and Twine can be reconciled by adopting the government's proposed interpretation of Twine and rejecting the notion that Twine holds that no defendant may be detained based on dangerousness alone.

More broadly, the government submits that Congress cannot have intended that an individual who poses a grave danger to the community – e.g., an individual with an unregistered silencer under his bed and hundreds of bodies buried in his back yard, or a massive arsenal of chemical weapons in his basement – cannot be detained so long as he is not a risk of flight – e.g., has lived in the community all his life and has no criminal history. Such an interpretation is simply inconsistent with the goals of the Bail Reform Act and common sense.

B. Defendant's Reading of Magistrate Judge Mumm's Decision Fails to Take Context Into Account

Defendant also claims that Magistrate Judge Mumm's May 27, 2010, decision on detention was based solely on defendant's apparent "inability to comply with conditions." In making this claim, however, defendant focuses on a few words to the exclusion of the transcript of the rest of the hearing. Indeed, as a review of the transcript makes clear, the focus of the hearing was on whether defendant was a risk of flight and whether the

bail resources that defendant was offering would adequately assure his appearance at future court appearances. Indeed, in the same paragraph of the transcript that defendant quotes, Magistrate Judge Mumm notes that, "in this instance *it's the flight risk that I should be directing my attention to*." (emphasis added). Magistrate Judge Mumm also noted that he was denying defendant's motion for reconsideration of the initial detention order because, "I just find that the *bail resources that have been offered are inadequate*." (emphasis added).

Based on the transcript of the hearing, Magistrate Judge Mumm did not base his decision to detain defendant solely on defendant's apparent inability to comply with the terms and conditions of pre-trial release. While defendant's poor record of compliance with terms and conditions of probation in other cases - as noted in the Pre-Trial Services Report - may have been one of the totality of factors that Magistrate Judge Mumm considered, it is clear that he determined that defendant was a flight risk and that the bail resources being offered were insufficient to assure defendant's future appearance. Because risk of flight is a proper reason for pre-trial detention under 18 U.S.C. § 3142, Magistrate Judge Mumm's decision at the May 27, 2010, hearing was not in error.

C. Defendant is a Flight Risk and a Danger to the Community

Based on the information contained in the Pre-Trial Services Reports prepared for defendant's April 12, 2010, and May 27, 2010, detention hearings, the government submits that defendant is both a flight risk and a danger to the community and, thus,

this Court should order that he continue to be detained pending trial in this case.

With respect to flight risk, while defendant is, by all accounts, a United States citizen, he has spent a significant portion of his life living in Nigeria. The government is unaware whether defendant is a dual-citizen of Nigeria, however, members of defendant's immediate family - i.e., his mother - continue to reside in that country. In addition, while defendant's father apparently maintains a residence in California, he, too, apparently travels with some frequency to Nigeria. Simply put, there is no indication that defendant could not freely and easily travel to Nigeria if he is released pending trial.

Defendant is also facing a term of imprisonment if convicted in this case. While, defendant has claimed that a possible term of incarceration would not motivate him to leave the country, the government submits that any term of incarceration is serious and could serve as a potential motivation to avoid prosecution.

Finally, as the government noted at the May 27, 2010, hearing, the bail resources that defendant is offering to secure his future appearance are simply not sufficient. Notably, defendant has not offered to put up any of his own resources to secure his release. Instead he relies only on a unjustified affidavit of surety from family members and his girlfriend, as well as a small cash bond which would apparently be put up by his mother in Nigeria.

With respect to danger to the community, the government notes that physical danger is not the only danger contemplated by 18 U.S.C. § 3142. Instead, it may also mean the risk of

"pecuniary or economic harm." United States v. Reynolds, 956 F.2d 192 (9th Cir. 1992). Consideration of defendant's alleged acts with respect to this case, in conjunction with defendant's criminal history, establishes that defendant most certainly poses a pecuniary or economic harm to his community. In the current case, defendant is alleged to have fraudulently obtained and used credit cards and personal information of multiple individuals for his own personal benefit. Moreover, defendant has been convicted of other, similar crimes in the past. Indeed, defendant has established a pattern of criminal behavior over the past five years which strongly indicates that he would continue to be a danger to his community if he was released pending trial.

III. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny defendant's application and order that defendant continue to be detained pending trial.

Dated: June 10, 2010

Respectfully submitted,

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