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SALVADOR ARELLANO MARTINEZ

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SALVADOR ARELLANO MARTINEZ, Defendant.	NO. CR 11-00729-JAK NOTICE OF MOTION; MOTION TO COMPEL COMPLIANCE WITH DETENTION ORDER; MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date: October 3, 2011 Hearing Time: 8:30 a.m.

TO: UNITED STATES ATTORNEY ANDRÉ BIROTTE JR. AND ASSISTANT UNITED STATES ATTORNEY HYE CHON:

PLEASE TAKE NOTICE that on October 3, 2011, at 8:30 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable John A. Kronstadt, defendant, Salvador Arellano Martinez, will bring on for hearing the following motion:

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MOTION

Defendant, Salvador Arellano Martinez, through his counsel of record, Deputy Federal Public Defender Carlton F. Gunn, hereby moves this Honorable Court for an order that the United States Marshal's Office comply with the provision of the detention order in this case that defendant be afforded reasonable opportunity for private consultation with counsel, by either moving defendant to the Metropolitan Detention Center or applying the policy which is applied to detainees at other remote facilities, of transporting defendants to the courthouse lockup for attorney-client meetings on 24 hours notice. This motion is made pursuant to 18 U.S.C. § 3142 and the Sixth Amendment to the United States Constitution and is based upon the attached memorandum of points and authorities, all files and records in this case, and such additional argument and evidence as may be presented at the hearing on this motion.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: September 19, 2011

By */S/ Carlton F. Gunn*
CARLTON F. GUNN
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Mr. Arellano made his initial appearance in federal court on an illegal reentry charge on June 29, 2011. He was ordered detained without bond at that time, pursuant to 18 U.S.C. § 3142. *See* Exhibit A. Consistent with the requirements of § 3142, the detention order provided that "defendant be afforded reasonable opportunity for private consultation with counsel." Exhibit A, at 4. *See also* 18 U.S.C. § 3142(i)(3) (requiring that detention order issued under § 3142 "direct a person be afforded reasonable opportunity for private consultation with counsel").

Mr. Arellano was then held in custody at the San Bernardino County Jail, which is – or at least was – one of the facilities with which the United States Marshal's Office has a contract for the housing of defendants who have cases pending in this Court. The Marshal's Office transports defendants detained at San Bernardino County Jail to the courthouse lockup for meetings with counsel on 24 hours notice on all weekdays other than Mondays, so counsel was able to meet with Mr. Arellano in the lockup on several occasions. While not entirely satisfactory, this did, in counsel's view, "afford[ ] reasonable opportunity for private consultation with counsel."

At some point between counsel's last meeting with Mr. Arellano in the lockup and the entry of his guilty plea, the Marshal's Office moved Mr. Arellano to a different local jail with which it has signed a contract – the Orange County Jail, at 550 North Flower Street in Santa Ana. This jail is over 30 miles away via one of the most congested freeways in the Los Angeles area and, given typical traffic patterns, over an hour's drive away on most days. Requiring counsel to travel for attorney-client meetings would require counsel to dedicate half a day of his work schedule to a single

meeting with this single client. The Marshal's Office is nonetheless refusing to transport detainees from these jails.

Because this will make it very difficult for counsel to arrange meetings with Mr. Arellano on short – or even moderate – notice, this does not provide the "reasonable opportunity for private consultation with counsel" that is required by 18 U.S.C. § 3142(i)(3). It also creates a potential violation of the Sixth Amendment right to the effective assistance of counsel, which requires, among other things, adequate consultation between attorney and client. The defense brings this motion to require the Marshal's Office to comply with 18 U.S.C. § 3142(i)(3) – and the detention order which incorporates it – either by transferring Mr. Arellano to the Metropolitan Detention Center or agreeing to bring Mr. Arellano to the courthouse lockup on the same terms as inmates have been brought from the San Bernardino County Jail.

II.
ARGUMENT

A. HOUSING MR. ARELLANO AT A FACILITY A ONE- TO TWO-HOUR DRIVE AWAY WITH NO PROVISION FOR TRANSPORTATION TO LOS ANGELES FOR ATTORNEY-CLIENT MEETINGS VIOLATES BOTH 18 U.S.C. 3142(i)(3) AND THE DETENTION ORDER THAT IMPLEMENTS IT IN THIS CASE.

The preventive detention concept codified in 18 U.S.C. § 3142 as part of the Bail Reform Act of 1984 was a significant departure from past practice. Courts recognized both before and after the Act that it raises not just important policy questions, but that it raises serious constitutional questions as well. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987) (reversing Second Circuit decision finding

detention based on dangerousness unconstitutional); *Murphy v. Hunt*, 455 U.S. 478 (1983) (case granting certirorari on question, but then dismissing appeal as moot); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc) (upholding District of Columbia preventive detention statute). *See also* S. Rep. 98-473, at 3, *reprinted in* 1984 U.S.C.C.A.N. 3184, 3185, 3190 (herein-after "Senate Report") (acknowledging that "[t]he adoption of these changes marks a significant departure from the basic philosophy of the [prior] Bail Reform Act "); *id*. at 7 (acknowledging that "[t]he concept of pretrial detention has been the subject of extensive debate"). Those questions were eventually resolved in favor of the Act's constitutionality, *see Salerno*, *supra*, but that does not change the fact that detention without bond raises significant issues about both the Eighth Amendment right to reasonable bail and Fifth and Sixth Amendment rights such as the presumption of innocence and the right to the effective assistance of counsel.

Congress recognized these issues in drafting the Act and passing it in its final form, moreover. As a general matter, it stated:

> Based on its own constitutional analysis and its review of the *Edwards* decision, the Committee is satisfied that pretrial detention is not *per se* unconstitutional. However, the Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

Senate Report, *supra*, at 8.

Among the specific statutory provisions which Congress included to assuage the concerns it recognized were protections for defendants' Fifth and Sixth

Amendment rights. With respect to the presumption of innocence, Congress included a general provision stating that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence," 18 U.S.C. § 3142(j), and a more specific provision requiring detention orders to "direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal," 18 U.S.C. § 3142(i)(2). With respect to the effective assistance of counsel, it included a provision requiring detention orders to "direct that the person be afforded reasonable opportunity for private consultation with counsel." 18 U.S.C. § 3142(i)(3).

It is this last provision which is implicated here. Its importance is illustrated by the fact that several courts have relied on it as one ground for upholding the Bail Reform Act against constitutional challenges. In *Fassler v. United States*, 858 F.2d 1016 (5th Cir. 1988), for example, the court rejected the defendant's challenge because he "could have moved for additional relief to prepare his defense, or he could have challenged this facet of detention on review by the district court." *Id.* at 1018. In *United States v. Parker*, 848 F.2d 61 (5th Cir. 1988), the court rejected a facial challenge based in part on 18 U.S.C. § 3142(i)(3):

> Finally, Parker asserts that the Act denies a pre-trial detainee the effective assistance of counsel because it limits the detainee's access to his attorney and his participation in preparing a trial defense. This contention is similarly without merit. The Act provides that a detention order must direct that the detainee "be afforded reasonable opportunity for private consultation with counsel," and a judicial officer may subsequently order the temporary release of the detainee "to the extent that the judicial officer determines

> such release to be necessary for preparation of the person's defense." 18 U.S.C. Section 3142(i). Those provisions are sufficient to defeat Parker's facial challenge to the Act "whether or not they might be insufficient in some particular circumstances." (Citation omitted.)

Parker, 848 F.2d at 63. *See also United States v. Arnaout*, No. 02 CR 892, 2002 WL 31744654, at *1 (N.D. Ill. Dec. 6, 2002) (rejecting challenge to detention in part because "Section 3142(i)(3) is designed to protect a defendant's Sixth Amendment right to counsel, and if that right is being infringed, [the judge] has the statutory authority to protect [the defendant's] access to counsel" (quoting *United States v. Falcon*, 52 F.3d 137, 139 (7th Cir. 1995))); *United States v. Goveo-Santiago*, 901 F. Supp. 56, 58 (D.P.R. 1995) (rejecting defendant's argument that pretrial detention interfered with his ability to prepare his defense because "section 3142(i)(3) of the Bail Reform Act provides that the detention order must direct the detainee be afforded reasonable opportunity for private consultation with counsel").

A court can enforce § 3142(i)(3) while the case is pending, moreover. As the Court explained in *United States v. Falcon*, *supra*:

> Falcon has a judicial remedy that he has not pursued. Judge Moreno, who is presiding over Falcon's drug case pending in the Southern District of Florida retains jurisdiction over all pretrial, trial and post-trial aspects of that case. In particular, in this case, we may presume that Judge Moreno acted in accordance with 18 U.S.C. § 3142(i) in ordering pretrial detention for Falcon. Pursuant to Section 3142(i)(3), that order must direct the BOP to provide Falcon with "reasonable opportunity for private consultation with counsel." Moreover, Judge Moreno has discretionary authority under § 3142(i)(3) to order *Falcon* into the

> custody of a United States Marshal if he determines that such action is necessary for preparation of his defense. Section 3142(i)(3) is designed to protect a defendant's Sixth Amendment right to counsel, and if that right is being infringed, Judge Moreno has the statutory authority to protect Falcon's access to counsel.

Falcon, 52 F.3d at 139. A court also must have inherent authority to enforce its own orders, *see, e.g.*, *United States v. W.R. Grace*, 526 F.3d 499, 516 (9th Cir. 2008) (en banc), and here there is a specific order that requires, in language paralleling § 3142(i)(3), that "defendant be afforded reasonable opportunity for private consultation with counsel." Exhibit A, at 4.

There are three district court decisions which have upheld detention in locations one to two hours drive from defense counsel's location, *see, e.g.*, *United States v. Argraves*, No. 3:09cr117 (MRK), 2010 WL 283064, at *5 (D. Conn. Jan. 22, 2010); *United States v. Echeverri*, No. 91-Cr-885 (DRH), 1992 WL 81876, at *2 (E.D.N.Y. March 31, 1992); *United States v. MacFarlane*, 759 F. Supp. 1163, 1167 (W.D. Pa. Jan. 18, 1991), but (1) those opinions are of course not controlling on this Court; (2) the cases are, at least in some instances, distinguishable; and (3) those courts were playing with fire and at least risking a Sixth Amendment violation, *see infra* pp. 9-11. *McFarlane* is distinguishable because the defendant there was not seeking just transfer to another institution or transportation to the courthouse for attorney-client meetings but was seeking pretrial release. *See id*., 759 F. Supp. at 1166 (noting that defendant "next asks the Court to authorize his pre-trial release, limited in time and scope, for the sole purpose of assisting in defense preparation"). *Argraves* is distinguishable because there was no local detention facility which could be used in that case; indeed, the court noted that it was "sympathetic to Mr. Argraves's concerns," "acknowledge[d] that his detention at [the remote location] impose[d] some obstacles to his preparation for trial," and noted that each member of that court had "repeatedly

asked federal legislators to build a detention facility in Connecticut." *Id*. at *6. And *Echeverri* may be distinguishable for the same reason, though it is not clear. In any event, *Echeverri*, as well as the other cases, are distinguishable because there was not – at least as far as the opinions noted – any established alternative procedure of transporting defendants to lockup for attorney-client meetings.

Finally, the courts in each of the foregoing cases were playing with fire and at least risking a Sixth Amendment violation. They relied on cases such as the case of *United States v. Lucas*, 873 F.2d 1279 (9th Cir. 1989), which found only that there was no *facial* Sixth Amendment violation, not that there could never be one on the particular facts of a particular case. There is no reason for this Court to take that risk here, where there is a local jail facility, or in the alternative, an established procedure for attorney-client meetings in the lockup when defendants are not detained at the local jail facility.

B. THE PROVISIONS OF 18 U.S.C. § 3142(i)(3) SHOULD BE ENFORCED BECAUSE THEY EFFECTUATE THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment of course guarantees not just the presence of counsel but the effective assistance of counsel. *See generally Strickland v. Washington*, 466 U.S. 668 (1984). And beginning with an opinion almost 30 years old now, the Ninth Circuit has pointed out that the right to effective assistance of counsel includes adequate consultation between counsel and the client. The court noted in *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983), that "[c]ourts have repeatedly stressed the importance of adequate consultation between attorney and client," and the court then agreed with those other courts that "[a]dequate consultation between attorney and

client is an essential element of competent representation of a criminal defendant." *Id*. at 581. This principle has been reiterated in a string of subsequent decisions. *See, e.g.*, *Correll v. Ryan*, 539 F.3d 938, 943 (9th Cir. 2008); *Daniels v. Woodford*, 428 F.3d 1181, 1203 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 633 (9th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998); *Harris v. Wood*, 64 F.3d 1432, 1436 (9th Cir. 1995).

Whether or not remote detention will create sufficient problems to rise to the level of a Sixth Amendment violation depends on the circumstances and how those affect counsel and the client in the actual case. The Ninth Circuit did hold in *United States v. Lucas*, 873 F.2d 1279 (9th Cir. 1989) that detention of the client a two-hour drive from the court and his attorney "did not amount to the actual or constructive denial of the assistance of counsel for which a showing of prejudice is not required." *Id*. at 1280. The court then went on to find that there was not a showing of prejudice in that case, and so there was also no case-specific Sixth Amendment violation. *See id.*

All *Lucas* means is that there may or may not end up being a Sixth Amendment violation in this case depending on what problems may arise in the future. This Court is in a different position than the court in *Lucas*, because the question before it is how to avoid even the possibility of a Sixth Amendment violation. The wiser course in this "pre-violation" setting is for the Court to avoid creating a potential issue by ordering the Marshal's Office to comply with the detention order and 18 U.S.C. § 3142(i)(3). Such compliance can be accomplished either by moving Mr. Arellano to the Metropolitan Detention Center or by transporting him to the courthouse lockup for attorney-client meetings on 24 hour notice, just as defendants are transported from other remote detention facilities with which the Marshal's Office has contracts.

III.

CONCLUSION

Mr. Arellano's detention during the pendency of this case at the Orange County Jail without the usual agreement to transport him to lockup for attorney-client meetings on 24 hours notice violates 18 U.S.C. § 3142(i)(3), violates the specific detention order in this case, and creates a potential for violation of the Sixth Amendment. The Court should order the Marshal's Office to either transfer Mr. Arellano to the Metropolitan Detention Center or transport him to lockup for attorney-client meetings on 24-hour notice just as it transports defendants from other contract jails.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: September 19, 2011

By *_/S/ Carlton F. Gunn_*
CARLTON F. GUNN
Deputy Federal Public Defender

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Salvador Arellano Martinez

Defendant.

Case No.: 11-1498M

ORDER OF DETENTION

I.

A. ( ) On motion of the Government in a case allegedly involving:

1. ( ) a crime of violence.
2. ( ) an offense with maximum sentence of life imprisonment or death.
3. ( ) a narcotics or controlled substance offense with maximum sentence of ten or more years.
4. ( ) any felony - where defendant convicted of two or more prior offenses described above.
5. ( ) any felony that is not otherwise a crime of violence that involves a minor victim, or possession or use of a firearm or destructive device or any other dangerous weapon, or a failure to register under 18 U.S.C. § 2250.

B. ( ) On motion by the Government/( ) on Court's own motion, in a case allegedly involving:

( ) On the further allegation by the Government of:

1. ( ) a serious risk that the defendant will flee.

2. ( ) a serious risk that the defendant will:

a. ( ) obstruct or attempt to obstruct justice.

b. ( ) threaten, injure or intimidate a prospective witness or juror, or attempt to do so.

C. The Government ( ) is/( ) is not entitled to a rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance as required and the safety or any person or the community.

II.

A. (✓) The Court finds that no condition or combination of conditions will reasonably assure:

1. (✓) the appearance of the defendant as required.

and/or

2. (✓) the safety of any person or the community.

B. ( ) The Court finds that the defendant has not rebutted by sufficient evidence to the contrary the presumption provided by statute.

III.

The Court has considered:

A. the nature and circumstances of the offense(s) charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

B. the weight of evidence against the defendant;

C. the history and characteristics of the defendant; and

D. the nature and seriousness of the danger to any person or the community.

IV.

The Court also has considered all the evidence adduced at the hearing and the arguments and/or statements of counsel, and the Pretrial Services Report / recommendation.

V.

The Court bases the foregoing finding(s) on the following:

A. (X) As to flight risk:

(X) Lack of bail resources

( ) Prior failures to appear / violations of probation/parole

( ) No stable residence or employment

( ) Ties to foreign countries / financial ability to flee

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B. (X) As to danger:

(X) Nature of prior criminal convictions

(X) Allegations in present indictment

( ) Drug / alcohol use

( ) In custody for state offense

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VI.

A. ( ) The Court finds that a serious risk exists the defendant will:

1. ( ) obstruct or attempt to obstruct justice.

2. ( ) attempt to/ ( ) threaten, injure or intimidate a witness or juror.

B. The Court bases the foregoing finding(s) on the following:

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VI.

A. IT IS THEREFORE ORDERED that the defendant be detained prior to trial.

B. IT IS FURTHER ORDERED that the defendant be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.

C. IT IS FURTHER ORDERED that the defendant be afforded reasonable opportunity for private consultation with counsel.

D. IT IS FURTHER ORDERED that, on order of a Court of the United States or on request of any attorney for the Government, the person in charge of the corrections facility in which defendant is confined deliver the defendant to a United States marshal for the purpose of an appearance in connection with a court proceeding.

DATED: 6/29/11

MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE