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APR 28 2005

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

**MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT**

UNITED STATES OF AMERICA)

vs.)

JAMES MARCELLO)

) No. 02 CR 1050-02
) Honorable James B. Zagel
)
)

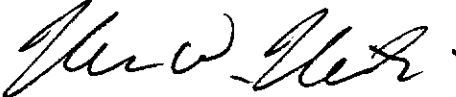
NOTICE OF FILING & CERTIFICATE OF SERVICE

To: AUSA Mitchell Mars
AUSa John Scully
219 S. Dearborn, 5th Floor
Chicago, IL 60604

Please take notice that on this 28th day of April, 2005, I caused to be filed with the Clerk of the Court for the Northern District of Illinois:

**DEFENDANT JAMES MARCELLO'S
POSITION PAPER ON PRETRIAL RELEASE**

MARC W. MARTIN, an attorney, certifies that he has served the above-described document by causing personal delivery to the U.S. Attorney's Office in Chicago this 28th day of April, 2005.



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**DEFENDANT JAMES MARCELLO'S
POSITION PAPER ON PRETRIAL RELEASE**

Defendant James Marcello, by his attorney, pursuant to the provisions of the Bail Reform Act and the Fifth and Sixth Amendments, for his position paper on pretrial release states as follows:

I. General Legal Standards

The Bail Reform Act is not designed to determine guilt before trial, or to serve as a form of pretrial punishment. *United States v. Cox*, 635 F. Supp. 1047, 1054 (D. Kan. 1986); *cf. United States v. Edwards*, 430 A.2d 1321 (D. C. App. 1981) (*en banc*) (construing District of Columbia's predecessor to Bail Reform Act). Rather, the predominant consideration of the Bail Reform Act is whether the government can prove that *no* set of release conditions can prevent recidivism. *Cox*, 635 F. Supp. at 1056. In regard to any "dangerousness" issue, the overriding focus must be whether "conditions will reasonably assure the safety of the community." *United States v. Traitz*, 807 F.2d 322, 326 (3rd Cir. 1986); *cf. United States v. Lopez*, 827 F. Supp. 1107, 1110 (D. N.J. 1993) ("exceedingly strong" nature of evidence against a defendant is not a basis to detain absent clear and convincing evidence the defendant is dangerous). Given the Bail Reform Act's use of the phrase "reasonably assure," the statute cannot be interpreted to require a *guarantee* that the safety of the community will be assured as a condition precedent to release.

United States v. Orta, 760 F.2d 887, 891 (8th Cir. 1985) (*en banc*); *see also United States v. Shea*, 749 F. Supp. 1162 (D. Mass. 1990) ("As used in the Bail Reform Act, 'safety' also invokes a concept of probability rather than certainty.").

In addition, detention should be the exception rather than the norm, *e.g.*, *United States v. Torres*, 929 F.2d 291, 292 (7th Cir. 1991), *Orta*, 760 F.2d at 890-92, *Cox*, 635 F.Supp. at 1049 and S.Rep. No. 225, 98th Cong., 1st Sess. 6-7, *reprinted in* 1984 Code Cong. & Adm. News at 3189, and "doubts regarding the propriety of release should be resolved in defendant's favor." *United States v. Clark*, 791 F. Supp. 259, 260 (E.D. Wash. 1992). Furthermore, the Bail Reform Act requires consideration of "the possibility of less restrictive alternatives to detention." *United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991). With respect to the dangerousness prong, the test is whether the government has proved by clear and convincing evidence that no set of release conditions would reasonably assure the safety of the community. *E.g.*, *United States v. Dominguez*, 783 F.2d 707 (7th Cir. 1986).

Perhaps the government will argue that it is entitled to a presumption in favor of detention because the alleged offenses involve crimes of violence. *See* 18 U.S.C. § 3142(f)(1)(A). But no substantive offense charging a crime of violence is alleged in the indictment. While Count One mentions the commission of murders, it is a RICO conspiracy count, rather than a substantive crime of violence.

Even if the presumption applies, it is not the end-all. The presumption is subject to rebuttal, and the defendant's burden in this regard is not great. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (describing defendant's burden in rebutting presumption as not being "heavy"); *see also United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985). The presumption

is rebutted once the defendant comes forward with some evidence that he does not pose a flight risk or danger, *i.e.*, evidence of socio-economic ties to the community. *Dominguez*, 783 F.2d at 707. The defendant's burden of producing evidence to rebut the dangerousness presumption is not heavy. *Id.*

In determining whether there are conditions that will reasonably assure the defendant's appearance and the safety of the community, the court may assess the factors in 18 U.S.C. § 3142(g). Consideration of such factors is also guides the determination of whether the presumption has been rebutted:

(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including --

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

18 U.S.C. § 3142(g).

Assuming rebuttal of the presumption, the issue becomes whether the government has proved that no set of bond conditions will assure the defendant's appearance in court and the safety of the community. To acquire the pretrial incarceration of the defendant, the government must come forward with independent evidence showing the defendant presents a risk of flight or danger to the community. *Dominguez*, 783 F.2d at 707 (finding of dangerousness based solely on the application of presumption and after defendant produced some evidence to rebut the presumption was improper); *United States v. Knight*, 636 F.Supp. 1462, 1467 (S.D. Fla. 1986) (defendants charged with drug crimes listed in § 3142 should not, *ipso facto*, be detained).

II. Proffer

The Bail Reform Act permits a defendant to proceed by way of proffer, and Defendant James Marcello does so here:

- a. James Marcello is 61 years old. He was born on December 13, 1943.
- b. James Marcello was born in Chicago, Illinois. He is a United States citizen. Aside from a period of incarceration, he has lived his entire life in the Chicagoland area. He presently resides in Lombard, Illinois, the family home for the past 38 years.
- c. James Marcello has substantial family ties to this community. He has been married to Sandra for over 40 years. His mother is alive, and resides in Rosemont, Illinois. His brother and sister live in this community (and another sister lives in Arizona.) He has three children. All three of his children are married and have children. James Marcello has eight grandchildren. Two of his children reside in homes in Lombard, Illinois. The remaining child resides in Palos Hills, Illinois with his family.
- d. James Marcello does not possess a passport. He has never been issued a passport. He does not possess any false identity documents.
- e. As a result of pre-indictment publicity and the service of wiretap inventories, Mr.

Marcello at some point acquired knowledge of a pending federal investigation. Despite this, James Marcello made no attempt to abscond. Agents found him in his home on April 25, 2005.

- f. James Marcello works for DVD, a management company in Oak Brook, Illinois. James Marcello's employer is supportive and states that Mr. Marcello's employment is available if released on bond.
- g. James Marcello has been on supervised release since November 2003. No violations of supervised release have ever been filed. As stated in the pretrial services report, James Marcello has been in compliance with release conditions.
- h. Pretrial Services has recommended that James Marcello be released subject to conditions.
- i. Family and community members are supportive of James Marcello's pretrial release and have offered to post real estate as surety for release. In total, Mr. Marcello's release could be secured by as much as \$12.5 million in real property as described below:
 - i. Family home of Joseph and Theresa Borsellino located in Oak Brook, Illinois, with approximate equity of \$9 million. Theresa Borsellino is James Marcello's niece.
 - ii. Family home of Nicholas and Dorothy Vangel located in Oak Brook, Illinois, with approximate equity of \$1.1 million. Nicholas Vangel employs James Marcello, and is a longtime friend.
 - iii. Family home of James and Tina Marcello located in Palos Hills, Illinois, with approximate equity of \$180,000. James Marcello is the defendant's son. He is a successful businessman. He is employed as a broker at the Chicago Mercantile Exchange.
 - iv. Summer home of James and Tina Marcello located in Michigan City, Indiana, with approximate equity of \$110,000.
 - v. Farm property owned by James Marcello, Jr. in Harvard, Illinois, with approximate equity of \$270,000.
 - vi. Summer home of Timothy and Julia Hendricks in Long Beach, Indiana, with approximate equity of \$1.5 million. Timothy Hendricks employs James Marcello's son, James.

- vii. Vacation home of Timothy and Julia Hendricks in Long Beach, Indiana having approximate equity of \$420,000.

III. Argument

In light of the foregoing, James Marcello has rebutted the presumption, if applicable. He certainly has produced sufficient evidence of socio-economic ties to the community.

With respect to the question of flight risk, the government has not produced any independent evidence that James Marcello would seek to abscond. If he desired to run, he would have done so. However, knowing the investigation (from media reports and the service of wiretap inventories), James Marcello made absolutely no effort to leave the jurisdiction, or in any way elude the government.

Moreover, the fact that James Marcello has so much family in this area heavily weighs against any supposition that he would seek to flee. Flight would mean loss of contact with loved ones, and it would subject them to law enforcement scrutiny. James Marcello, however, is a devoted family man, who would not do that to his family. As stated in *United States v. Torres*, 929 F.2d 291, 292 (7th Cir. 1991):

A person who care deeply about spouse and children may be more likely to appear for trial than one who has no family. Refraining from flight keeps the family together longer. Even an imprisoned person can see his family more frequently than one on the lam.

With respect to the dangerousness issue, a defendant cannot be expected to rebut that certain crimes involve dangerousness. As stated by then-Chief Judge Bauer in context of narcotics offenses:

A defendant can hardly be expected, after all, to demonstrate that narcotics trafficking is not dangerous to the community. Nor can a defendant 'rebut' the government's showing of probable cause to believe he is guilty of the crimes

charged.

Dominguez, 783 F.2d at 706.

Bail should not be denied simply because an offense may be labeled as “dangerous.” Indeed, pretrial services has recommended pretrial release subject to conditions in this case. Other cases in which defendants have been released notwithstanding the “dangerous” nature of the alleged offenses, include: *United States v. Patriarca*, 948 F.2d 789 (1st Cir. 1991) (crime boss charged with RICO); *United States v. Traitz*, 807 F.2d 322 (3rd Cir. 1986) (defendants charged with numerous offenses including extortion; defendant committed acts of intimidation, violence and obstruction of justice); *United States v. Chimurenga*, 760 F.2d 400 (2nd Cir. 1985) (defendant charged with RICO conspiracy to commit three armed robberies, conspiracy to commit three prison escapes and weapons offenses); *United States v. Eischied*, 315 F. Supp. 1033 (D. Ariz. 2003) (pretrial release ordered for defendant, a Hell’s Angels Motorcycle Club member, charged with a Violent Crime in Aid of Racketeering, *i.e.*, the murder of a female who was “beaten brutally, taken to a remote desert location, stabbed repeatedly, left to die”); *United States v. Lopez*, 827 F. Supp. 1107 (D. N.J. 1993) (defendant charged with cocaine trafficking); *United States v. Clark*, 791 F. Supp. 259 (E.D. Wash. 1992) (defendant charged with drug offenses and was arrested for another offense shortly after being released on bond); *United States v. Gatto*, 750 F. Supp. 664 (D. N.J. 1990) (mafioso defendants released after being held for some time; court impressed with fact that the one defendant who had been previously released had not violated the terms and conditions of release); *United States v. Shea*, 749 F. Supp. 1162 (D. Mass. 1990) (two defendants charged with committing drug and weapon offenses and tape-recorded uttering threats of violence released; one defendant was an enforcer with a criminal record);

United States v. Jones, 614 F. Supp. 96 (E.D. Pa. 1985) (defendant charged with drug offense); *United States v. Beesley*, 601 F. Supp. 82 (N.D. Ga. 1984) (same); *United States v. Infelise*, 90 CR 87, Mem. Op. & Order (N.D. Ill., May 15, 1990) (Williams, J.) (some defendants charged with RICO conspiracy, alleging the commission of murder and extortion, released on stringent conditions); *United States v. Samuel Volpendesto*, 90 CR 470 (N.D. Ill.) (defendant released on stringent conditions; defendant charged with a baseball bat beating of a federal witness).

The Court is also permitted to consider the weight of the evidence. Although we are not privy to much discovery at this point, it must be noted that the RICO conspiracy charge is vague. Although Count One lists sundry murders, it does not identify James Marcello as actually having committed any particular murders.

We nevertheless recognize that the government may proffer certain evidence. But hearsay allegations emanating from an informant who has motive to curry favor with the government are notoriously unreliable, and are insufficient to meet the government's burden under the Bail Reform Act. *See, e.g., United States v. Hazzard*, 598 F.Supp. 1442, 1453 (N.D. Ill. 1984) ("It may very well be that hearsay alone will rarely, if ever, satisfy the clear and convincing standard" imposed by the Bail Reform Act).

Also consider the timing of the allegations. James Marcello was released from prison in November 2003. If he was so "dangerous," why was he not then arrested, especially in light of the fact that the original indictment in this case was returned in 2002? As stated in *United States v. DiGiacomo*, 746 F. Supp. 1176, 1180 (D. Mass 1990):

[W]hile the court understands that some time after the conclusion of an undercover phase of an investigation is necessary to conduct related overt investigation and to prepare a case for indictment, it is evident that the

government was not greatly concerned by the risk of flight of danger presented by [the defendants] after they were informed in February, 1987 of the undercover operation.

If the function of bond is not to punish before conviction, the relevant question must be whether the government has proved by clear and convincing evidence that a defendant is *presently* dangerous. Here, the supposed acts of violence are antiquated. There is no proof that James Marcello, age 61, is presently dangerous. If he was, then his supervised release would have been revoked.

Finally, the indictment in this case is broad and the charges complex. Substantial pretrial preparation time will be needed. Elongated pretrial detention will be restrictive and impede the free exercise of constitutional rights. Stated simply, it is exceedingly difficult for counsel to prepare a defense (especially in a complex case) when the defendant is housed in the Chicago, MCC, or worse yet, a remote county jail. Release is imperative so James Marcello may adequately prepare for trial.

IV. Suggested Release Conditions

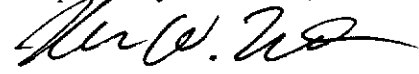
As found by the pretrial services officer, release conditions can assure the safety of the community and prevent flight. Suggested release conditions include, but are not limited to the following:

- a. That pretrial release be secured by the posting of as much as \$12.5 million in real property;
- b. That James Marcello be placed on house arrest and be required to wear an electronic monitor, with release from his home for authorized reasons only;
- c. That James Marcello refrain from possessing a mobile phone (he presently does not have one);

- d. That James Marcello agree to the interception of his telephone calls;
- e. That James Marcello agree not to obtain a passport;
- f. That James Marcello refrain from any contact with persons designated by the government;
- g. That James Marcello's son, James, serve as a third party custodian;
- h. That James Marcello maintain employment;
- i. That James Marcello refrain from possessing a firearm, destructive device, or other dangerous weapon;
- j. That James Marcello refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance;
- k. That James Marcello report daily by telephone to pretrial services; and
- l. That James Marcello abide by any other release condition set by the Court.

These proposed conditions are more than adequate to assure the safety of the community and prevent flight. Defendant James Marcello respectfully moves this Honorable Court to release him on bail subject to conditions.

Respectfully submitted,



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