IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
NO. 3:06-CR-0074-2-BRITT

UNITED STATES OF AMERICA

v.

HOWELL WAY WOLTZ and
VERNICE CHAITAN WOLTZ,

Defendants.

MOTION FOR RECONSIDERATION OF DETENTION OF DEFENDANTS HOWELL WAY WOLTZ AND VERNICE CHAITAN WOLTZ WITH SUPPORTING MEMORANDUM

Defendants Howell Way Woltz and Vernice Chaitan Woltz ("Mr. and Mrs. Woltz"), through their undersigned counsel, respectfully move this Court to reconsider its April 24, 2006 Order (the "Detention Order") revoking the Order of Release of Defendants entered by Magistrate Judge Keesler on April 20, 2006, and order their release subject to conditions the Court deems appropriate.

Memorandum in Support

I. Introduction

During the hearing at which this Court issued the Detention Order (the "Detention Hearing"), the United States presented certain information to the Court that Mr. and Mrs. Woltz and their counsel have since learned was either inaccurate, incomplete, or misleading without additional context. Specifically, the Court was presented with information concerning Mr. and Mrs. Woltz's connections to the Bahamas, the purported ease with which they could travel to the Bahamas if released, and the possibility that they could be extradited from the Bahamas. The manner in which this information was presented created the false impression that there is a substantial risk that Mr. and Mrs. Woltz would flee if released. In reality, the risk that Mr. and

Mrs. Woltz would flee is low because they lack the means to do so at this time, because the United States could extradite them if they did flee, and because there are other, less drastic measures available that will reasonably assure their appearance in further proceedings before this Court.

II. Factual and Procedural History

On April 4, 2006, a federal grand jury sitting in Charlotte returned a Bill of Indictment (the "Indictment") against Mr. and Mrs. Woltz, as well as Ricky Edward Graves and Samuel Thomas Currin. The Indictment charges the Woltzes with three counts related to a civil suit filed by the Commodity Futures Trading Commission (the "CFTC Suit"): obstruction of the due administration of law (Ind. ¶¶ 76-78), obstruction of an official proceeding (Ind. ¶¶ 79-80) and conspiracy to obstruct the CFTC Suit. (Ind. ¶¶ 83-86). In addition, Mr. Woltz is charged with participation in a conspiracy to assist wealthy United States citizens evade federal income taxation (Ind. ¶¶ 50-53) and with perjury in a deposition in the CFTC Suit (Ind. ¶¶ 72-75). Mrs. Woltz is also charged with document concealment. (Ind. ¶¶ 81-82). Mr. and Mrs. Woltz were arrested and arraigned on April 18, 2006. On April 20, 2006, Magistrate Judge David Keesler issued an order granting their pretrial release and setting forth conditions for that release. The United States moved to revoke the Order of Release, and the Detention Hearing on that motion was held before this Court on April 24, 2006. After hearing the arguments of counsel, this Court granted the United States' motion, and ordered the Woltzes detained pending trial.

III. Legal Standard

The Bail Reform Act (the "Act") requires release of a defendant pending trial unless a judicial officer determines that no conditions of release will "reasonably assure the appearance of the person as required." 18 U.S.C. § 3142(c). Where the United States seeks the pretrial

detention of a defendant on the basis that the defendant is a risk of flight, it must demonstrate by a preponderance of the evidence that no combination of conditions set forth in the Act or imposed by the judicial officer will reasonably assure the defendant's appearance at trial. *See United States v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996). The Act does not require that these conditions ***guarantee*** the defendant's appearance, only that they "reasonably assure" it. *Id.* at 444.

The Act sets forth a number of conditions which may be used to assure the defendant's appearance, including, *inter alia*, remaining in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court; maintaining employment; abiding by restrictions on place of abode or travel; reporting on a regular basis to a designated law enforcement agency; complying with a curfew; executing a forfeiture agreement or bail bond; or "any other condition that is reasonably necessary to assure the appearance of the person as required." 18 U.S.C. § 3142(c). In determining whether there are conditions that will reasonably assure a defendant's appearance, section 3142(g) of the Act provides that a judicial officer shall consider the nature and circumstances of the offense, including its violent nature; the weight of the evidence against the person; the history and characteristics of the person, including his character, family ties, employment, length of residence in the community, community ties, past conduct, criminal history, and record of court appearances; and the danger, if any, that would be posed by the defendant's release.

The Act grants this Court power to reopen a detention hearing if the Court finds that information exists which was not known at the time of the Detention Hearing that has a material bearing on the issue of whether there are conditions of release that will reasonably assure their appearance as required in these proceedings. 18 U.S.C. § 3142(f). The Act likewise grants this

Court power to order the release of Mr. and Mrs. Woltz upon the proper showing that their continued detention is inappropriate. 18 U.S.C. § 3145(c).

IV. Argument

A. This Court was Not Presented With all the Relevant Facts and Evidence Pertaining to the Woltzes at the Detention Hearing

This Court's decision whether to release the Woltzes on bond turns only on the third of the four criteria outlined by section 3142(g) of the Bail Reform Act: the history and characteristics of Mr. and Mrs. Woltz, and in particular their ties to the United States and the risk that they will flee if released. No other factor is at issue. Mr. and Mrs. Woltz have not been charged with crimes of a violent nature. They would pose no danger to the community if released. Moreover, and despite the Government's arguments to the contrary, the evidence against the Woltzes is immaterial because it is identical to that against their co-defendants, who were not detained.

At the Detention Hearing and in its Motion for Revocation of Magistrate's Order of Release ("Motion for Revocation"), the United States argued strenuously that the Woltzes should be detained pending trial because they present a high risk of flight. Many of the factual assertions made by the government in support of its argument, however, simply were not true, or were misleading without additional context.

First, the United States asserted that the Mr. and Mrs. Woltz are "permanent residents of the Bahamas," (Mot. for Rev. at 5), describing the Bahamas as their "homeland." (Hearing Tr. at 7:14). This is not true. It is true that the Woltzes own property in Nassau (one of a number of prerequisites to permanent residency) comprised of three condominiums, only one of which is complete, and that Mr. and Mrs. Woltz ***applied*** for permanent residency status in the Bahamas three years ago. However, their application for residency there was never approved and, because

of this Indictment and related investigations, likely never will be. Until and unless their application is approved, the Woltzes may travel to the Bahamas only on the same basis as any person—that is, as tourists, subject to length-of-stay limitations and visa requirements.

Likewise, the Woltzes must obtain permission from the Bahamian government to work in the Bahamas. On April 3, 2006, however, the Bahamian Immigration Department denied that permission as to both Mr. and Mrs. Woltz. Letters stating the decision of the Bahamian Immigration Department are attached hereto as Exhibit A.

The United States also argued at the Detention Hearing that, should the Woltzes flee to the Bahamas, they could not be extradited to the United States. (Hearing Tr. at 8:24-25). This argument is misleading, however, because if the Woltzes waive their extradition rights as a condition of release, which they are prepared to do, the United States could bring them back without extradition in the unlikely event they tried to flee. Furthermore, because the Woltzes may only travel to the Bahamas as tourists, the Bahamian government could simply deport them if they attempted to remain in the country beyond the expiration of any applicable visa, and no extradition proceedings would be required for such deportation.

Even if extradition did apply to the Woltzes, Bahamian extradition law and the U.S.-Bahamas Extradition Treaty would permit extradition of the Woltzes ***on every offense*** for which they are charged except the tax conspiracy. It is true, as the United States argues, that a person who is extradited from the Bahamas may only be tried for crimes which constitute extraditable offenses under Bahamian law. *See* The Extradition Act § 5(1)-5(1)(b)(ii) (1994) (Bahamas), attached as Exhibit B. It is also true that a person may only be extradited from the Bahamas for offenses which are crimes in both the Bahamas and the United States. *See* The Extradition Treaty Between the Government of the United States of America and the Government of the

Commonwealth of the Bahamas Signed at Nassau on March 9, 1990, U.S.-Bahamas, Treaty Doc. 102-17, Art. 2, § 1, attached hereto as Exhibit C.

It is simply not the case, however, as the United States asserted at the Detention Hearing, that "there is not the equivalent of an obstruction of justice offense" in the Bahamas. (Hearing Tr. at 8:17-18). Indeed, Chapter 84 of the Statute Law of the Bahamas recognizes a number of obstruction offenses. For example, it is a crime in the Bahamas to "remove[], conceal[], injure[] or alter[] any instrument or document used or intended to be used in any judicial proceeding." Statute Law of the Bahamas, Ch. 84, § 429. Likewise, it is a crime for a person to fail to "obey[] any summons . . . for his attendance or for his examination on oath as a witness in any judicial proceeding, or for the production by him of any written or other evidence in any judicial proceeding." Statute Law of the Bahamas, Ch. 84, § 436. Sections 431, 434, and 435 proscribe other obstruction offenses; these sections, together with §§ 423-24, 429 and 436, are attached hereto as Exhibit D.

Perjury is also a crime in the Bahamas punishable by imprisonment for ten years. Statute Law of the Bahamas, Ch. 84, §§ 423-24. *See* Exhibit D. Likewise, money laundering, with which the United States has indicated that it may charge Mr. and Mrs. Woltz, is a crime in the Bahamas. *See* The Proceeds of Crime Act §§ 40-44 (2000) (Bahamas), attached hereto as Exhibit E.

At the Detention Hearing and in their Motion for Revocation, the United States also argued that Mr. and Mrs. Woltz have "unusual means to flee." (Mot. for Rev. at 5-7). In particular, the United States argues that the Woltzes have extensive offshore assets and control the Sterling banks and related entities in the Bahamas. This argument, too, is misleading, however, because the Bahamian and Anguillan governments have frozen and/or seized Mr. and

Mrs. Woltz's overseas assets and shut down their businesses. A letter from the Government of Anguilla revoking Sterling Trust's license is attached hereto as Exhibit F. Furthermore, the United States contends that Mr. and Mrs. Woltz have served as directors of a St. Lucian bank in which other people have deposited funds. The government's implication seems to be that the Woltzes could simply plunder others' accounts to fund lives as fugitives from the United States government. Mr. and Mrs. Woltz vehemently deny they would simply steal money belonging to others, but even if they were willing to do so, they have no access to this money because their Bahamian businesses have been shut down.

The United States has also contended that the Woltzes have the means to flee because Mr. Woltz is a pilot. Again, this argument is misleading. Although Mr. Woltz ***was*** a pilot nearly twenty years ago, he has not maintained his flight credentials since 1988. Specifically, he has failed to maintain his medical certification as required by 14 C.F.R. 61.3, attached hereto as Exhibit G. Accordingly, Mr. Woltz lacks the means to rent, purchase, or pilot an aircraft in the United States. Finally, the United States contended that Mr. Woltz had arranged a "watchdog" to assure his removal from the country in the event of trouble. As the Court observed at the Detention Hearing, this is a somewhat "bizarre" claim, and one that should not serve as the basis for the conclusion that Mr. Woltz has the means to flee the United States when the evidence indicates otherwise.

Finally, the United States urged at the Detention Hearing and in its Motion for Revocation that Mr. and Mrs. Woltz have few ties to the United States. (Mot. for Rev. at 4-5). This is the most preposterous of the Government's claims, as Mr. and Mrs. Woltz have numerous ties to the United States, a fact supported by the many witnesses who testified on behalf of the Woltzes at their initial detention hearing. Mr. Woltz is a U.S. citizen and lifelong resident of

North Carolina. Together, Mr. and Mrs. Woltz own a farm in Davie County. At one time, ***part*** of the farm was listed for sale, but it is not for sale at the present time. Two of their children attend school in North Carolina and Virginia, respectively. If permitted by the Court, Mr. and Mrs. Woltz stand ready to present numerous community and family members who will attest to their "ties" to North Carolina.

B. A Combination of Conditions for Release Will Assure Mr. and Mrs. Woltz's Appearance at Trial

Because the Woltzes lack the ability to flee and to remain abroad, and because they maintain significant ties to North Carolina, there are numerous release conditions that will reasonably assure their appearance at trial. For example, the Court could order their release into the custody of Mr. Woltz's mother or another individual the Court deems appropriate. It could subject them to home confinement and electronic monitoring at all times except to meet with their attorneys or appear in court. It could require their execution of asset forfeiture agreements and bail bonds as the Court deems appropriate. And it could require waiver of any extradition rights they may have under the U.S.-Bahamas Extradition Treaty or other applicable law.

Other courts have found, on facts similar to those of this case, that the imposition of these conditions would reasonably assure the appearance of a defendant—even a defendant with ***greater*** means to flee and with ***weaker*** ties to the United States than the Woltzes have. For example, in *United States v. Karni*, 298 F. Supp. 2d 129 (D. D.C. 2004), the defendant, an Israeli citizen and a resident of South Africa, was charged with exporting to Pakistan products capable of triggering nuclear weapons in violation of the Export Administration Act and International Economic Emergency Powers Act. 298 F. Supp. at 129. The Magistrate Judge ordered the defendant released on bond, and the United States appealed to the District Court, which affirmed the Magistrate Judge's order with modifications. Like the Woltzes, the defendant there was not

charged with a crime involving violence or narcotics. *Id.* at 131. As the Court did in this case, the court in *Karni* found the weight of the evidence against the defendant to be substantial. *Id.* Like the Woltzes, the defendant in *Karni* had no criminal history, mental impairments, or substance abuse problems. *Id.* at 132. Unlike Mr. and Mrs. Woltz, however, the defendant in *Karni* had ***no ties*** to the United States ***at all***. He was arrested while in Denver on a ski trip, and the court found that there was "***no evidence*** presented establishing that Defendant has ***ever lived in this country, owned property here, or that he has any family or community ties*** in the United States." *Id.* (emphasis added). Although it recognized that there was a significant risk the defendant would flee, the court in *Karni* nevertheless granted release on four conditions: that the defendant be confined at home subject to electronic monitoring, that he waive extradition rights, that he post a bail bond, and that he be released into the custody of his rabbi. *Id.* at 132-33. If these conditions were sufficient to reasonably assure the appearance of the defendant in *Karni*, then surely similar conditions would assure the appearance of Mr. and Mrs. Woltz, who, unlike the defendant in *Karni*, ***do*** have significant personal and family ties to the United States and have limited ability to flee.

Even if this Court concludes that there is a "substantial" risk that Mr. and Mrs. Woltz would flee, this would not necessarily warrant the conclusion that the conditions outlined above would not reasonably assure the Woltzes appearance in these proceedings. *See id.*; *Xulam*, 84 F.3d at 444 (stating that "[s]ection 3142 speaks of conditions that will 'reasonably' assure appearance, not guarantee it" and citing H.R. Rep. No. 1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3198 (acknowledging feasibility of conditions even "where there is a substantial risk of flight")). Mr. and Mrs. Woltz respectfully urge the Court to follow the lead of courts before it and "fully explore[] the commitments offered by [their] witnesses" that they will

assure the Woltzes's appearance, and consider as well Mr. and Mrs. Woltz's "proffer that [they are] willing to abide by whatever conditions the court impose[s]." *Id.* at 443.

C. Mr. and Mrs. Woltz Should be Released to Assist in Preparation for Their Trial, and to Care for Their Children

Mr. and Mrs. Woltz also respectfully urge the Court to order their release so that they may care for their minor children and assist in the preparation of their defenses. The Woltzes have two minor children together, ages twelve and sixteen. Since their parents' arrest six months ago, the children have been afforded only two visits, and the twelve-year-old has been living with relatives. The Woltzes ask that the Court consider the children's interests in making its decision regarding release.

The Woltzes also request that they be released to assist their counsel in the preparation of their defenses. As the Court is aware, their ongoing confinement makes meeting with counsel extremely difficult. And given the complexity of the case and significance of the discovery provided by the United States, confinement of Mr. and Mrs. Woltz makes it nearly impossible for them to assist their attorneys in preparing their defenses. Because their appearance can be reasonably assured through the imposition of conditions on their release, the Woltzes's confinement imposes unnecessary obstacles to their participation in their own defenses.

WHEREFORE, defendants Howell Way Woltz and Vernice Chaitan Woltz respectfully move this Court reconsider its order that they be detained pending trial, and order their release upon any conditions the Court deems appropriate.

This the 30th day of November, 2006.

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CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing Motion for Reconsideration of Detention of Defendants to be filed for electronic service on the following individual(s):

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This the 30th day of November, 2006.

s/ Matthew J. Hoefling