

<input checked="" type="checkbox"/> FILED	<input type="checkbox"/> LODGED
<input type="checkbox"/> RECEIVED	<input type="checkbox"/> COPY
SEP 30 2003	
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY <u>[Signature]</u>	DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Samih Fadl Jamal,

Defendant.

CR 03-0261-1-PHX-FJM
ORDER

The Government seeks the detention of Defendant Samih Fadl Jamal ("Jamal") upon the grounds that he is a serious flight risk and that no release condition or combination of conditions exist that would reasonably assure his appearance at future court proceedings. See, Government's Motion for Detention (document #38) and Supplemental Motion for Detention (doc. #153), filed on August 1, 2003 and August 27, 2003, respectively. After considering the parties' written pleadings, all the evidence and proffers,¹ the arguments of both counsel,² the controlling and persuasive authorities on the issues *sub judice* and all the

¹ The detention hearing was held over the course of four weeks on four separate dates: August 27, 2003, September 2, 2003, September 9, 2003 and September 23, 2003.

² On August 29, 2003, the Hon. Frederick J. Martone denied Defendant's Motion to Seal the Government's Motion for Detention. See, document #166. Thus, the undersigned may freely discuss the evidence and proffers presented by the Government and Defendant at the various detention hearings.

231

1 factors set forth in 18 U.S.C. §3142(g), the Court **FINDS** that the Government has not
2 proven by a preponderance of the evidence that Jamal is a serious flight risk and that no
3 combination of conditions exist that would reasonably assure his appearance at future court
4 proceedings.

5 **NATURE AND CIRCUMSTANCES OF THE CRIMES CHARGED**

6 The Government asserts that the subject charges arise from Jamal's leadership
7 of a large fencing operation for stolen and fraudulently obtained infant formula which
8 generated millions of dollars per year that were laundered illegally in both the United States
9 and Lebanon. The indictment alleges the profits from the subject conspiracy are in the
10 aggregate of \$11 million. Jamal and numerous others were indicted on March 13, 2003 for
11 the alleged commission of eight (8) felonies: Conspiracy to Commit Interstate Transportation
12 of Stolen Property (Count 1); Interstate Transportation of Stolen Property (Counts 2, 3 and
13 4); False Statements (Counts 5, 6 and 7); and Conspiracy to Commit Money Laundering. The
14 maximum possible punishments for the various charges range from 5 to 20 years in prison.
15 Jamal has also been indicted by a Maricopa County grand jury on 63 counts of Class 3
16 felonies: Fraudulent Schemes and Artifices, Trafficking in Stolen Property, Illegal Control
17 of an Enterprise, and Attempted Trafficking in Stolen Property. See, Exhibit ("Exh.") 25,
18 Government's Motion for Detention (doc. #38).

19 The Government argues that Jamal is a serious flight risk and the charges involve
20 sophisticated criminal conduct. As Jamal points out, however, none of the federal crimes for
21 which Jamal has been indicted constitute a "crime of violence" as defined by 18 U.S.C. §3156
22 nor do they involve drug or illegal weapons offenses. Thus, no rebuttable presumption arises
23 pursuant to 18 U.S.C. §3142(e)(1)(2) that Jamal is a serious flight risk or a danger to the
24 community. Moreover, the Government does not seek detention of Jamal on the basis of
25 danger because the Bail Reform Act does not permit his detention on this basis unless one or
26 more of the crimes charged meet the statutory definition of "crime of violence." United States
27 v. Twine, ___ F.3d ___ (9th Cir. September 19, 2003). The Government does claim that Jamal
28

1 is motivated to flee the United States because, if convicted, Jamal would be sentenced to
2 significant prison terms. It contends, for example, that if Jamal were convicted on a single
3 count of Interstate Transportation of Stolen Property, he faces a guideline sentencing range
4 of 168 to 210 months in prison due to the imposition of numerous enhancements (i.e., twenty
5 levels based on the amount of loss; two levels due to the number of victims involved; two
6 levels for receiving, and being in the business of receiving, stolen property; and four levels
7 for Jamal's leadership role). The Government also contends that Jamal's criminal history
8 category would likely be Category II because he allegedly committed the subject offenses
9 while on federal probation. The Government points out that the Ninth Circuit permits the
10 Court to consider the possible punishment as it would impact Jamal's state of mind as a
11 motivational factor to flee the United States. In United States v. Townsend, 897 F.2d 989 (9th
12 Cir. 1990).

13 " . . . The defendants are charged with multiple counts, and it is reasonable, from
14 their perspective, to look at the potential maximum sentences they face if they
15 were found guilty on each count and sentenced consecutively on each count. . .
Facing the much graver penalties possible under the present indictment, the
defendants have an even greater incentive to consider flight.. ."

16 *Id.* at 995.

17 The Government presented unusual but credible evidence that Jamal himself was
18 surreptitiously recorded, pursuant to an unspecified electronic intercept authorized by the
19 Foreign Intelligence Surveillance Act³ ("FISA"), prognosticating that he would flee to
20
21
22

23 ³ "Enacted in 1978, FISA establishes a statutory procedure whereby a federal officer,
24 acting through the Attorney General, may obtain a judicial warrant authorizing the use of
25 electronic surveillance in the United States for foreign intelligence purposes." United States
26 v. Johnson, 952 F.2d 565, 572 (1st Cir.1991), cert. denied, 506 U.S. 816, 113 S.Ct. 58, 121
27 L.Ed.2d 27 (1992)("Although evidence obtained under FISA subsequently may be used in
criminal prosecutions . . . the investigation of criminal activity cannot be the primary purpose
of the surveillance," citing United States v. Duggan, 743 F.2d 59, 77 (2nd Cir.1984)); United
28 States v. Sarkissian, 841 F.2d 959, 964 (9th Cir.1988).

1 Lebanon if the United States Government were to make claims against Jamal for back taxes.⁴
2 Translated into English, the partial transcript reflects an Arabic conversation between Jamal
3 and an unidentified male on March 6, 2003. Jamal's undisputed statements provide the Court
4 with either a candid insight into his inclination and desire to flee the United States if he were
5 pursued for delinquent federal taxes, a much less serious legal problem than the subject
6 criminal indictment, or a "macho" boast to enhance his anti-American image as a mentor of
7 younger Arab-American men. According to the transcript, verified by a disclosed Arabic
8 interpreter, Jamal stated:

9 (Jamal). . . I'm trying to establish a business in Lebanon, because **I know**
10 **80% to 90%, that the day will come when the American government is going**
11 **to come and ask for taxes.** (Phone ringing in background). **OK, that's why, when**
12 **that day comes,** (Phone ringing in background), **I'll tell them Fuck you, take**
13 **everything. I'll carry myself and go to Lebanon,** understand me, because it
14 happened with me. It happened with me three times, they came and took
15 everything in front of me, everything in front of me, and what they didn't take,
16 they made me spend it on lawyers, expenses and a bond, why? They come up with
17 a little charge, and ask you to plead to a misdemeanor, misleading the public, by
18 repackaging the formula. Fuck them. . . (Emphasis added).

19 Jamal attempts to discredit the reliability of the transcript because the Government
20 failed to disclose and verify the unidentified male with whom Jamal is conversing and also
21 argues that the Government did not place the conversation in the context within which it was
22 made. Jamal further claims that the FISA warrant or order authorizing the March 6, 2003
23 intercept was illegal and a violation of FISA because he is not "a foreign power or an agent
24 of a foreign power." 50 U.S.C. §1804(a)(4)(A).

25 Jamal and his attorney were provided a copy of the tape and had more than
26 sufficient time to listen to and verify it. There was no evidence presented at the detention
27 hearing that would call into question the significance of the unidentified male conversing with
28 Jamal in Arabic and how his identity would diminish the substantive statements made by
Jamal. If his recorded statements were taken out of context, Jamal had the opportunity to
testify or proffer what the true context was. Nothing was presented to cast doubt upon Jamal's

27 ⁴ See, Exhibit 23 to the Government's Motion for Detention and Exhibit 1 to this
28 detention hearing.

1 expressed intent that he would flee to Lebanon if the United States came after him again for
2 back taxes.

3 Additionally, it is well settled that a magistrate judge may consider evidence at a
4 detention hearing that is challenged by a defendant to have been illegally obtained at least
5 until the district judge determines whether it was, in fact, illegally obtained. See, 18
6 U.S.C. §3142(f)("The rules concerning admissibility of evidence in criminal trials do not
7 apply to the presentation and consideration of information at the hearing."); United States v.
8 Apker, 964 F.2d 742, 744 (8th Cir.1992)(wiretap challenged); United States v. Angiulo, 755
9 F.2d 969, 974 (1st Cir. 1985)(challenged information obtained via electronic surveillance may
10 be considered regarding detention rulings at least until court determines information was
11 illegally obtained). Additionally, no evidence was presented by either side that Jamal is or is
12 not an agent of a foreign power.

13 The Government also argues that the risk of Jamal's flight is further exacerbated
14 by the fact that the United States does not have an extradition treaty with Lebanon, Jamal's
15 native country, where, the Government claims, Jamal is actively pursuing businesses and is
16 expressing political aspirations. The Government has provided credible evidence that Lebanon
17 has never extradited a person to the United States as a matter of comity or pursuant to
18 domestic law and alternative measures, such as deportation, have proven ineffective in
19 returning fugitives to the United States from Lebanon. See, Exhibit 29, Government's Motion
20 for Detention.

21 This detention factor weighs in favor of Jamal's detention.

22 **WEIGHT OF THE EVIDENCE AGAINST DEFENDANT**

23 Of all the detention factors for the Court to consider, the Ninth Circuit has stated
24 that the weight of the evidence is the least important of the various factors. United States v.
25 Motamedi, 767 F.2d 1403, 1407 (9th Cir. 1985); United States v. Honeyman, 470 F.2d 473,
26 474 (9th Cir.1972).

27

28

1 The Government has provided little information to the Court on the strengths and
2 weaknesses, if any, of its case against Jamal. At best from the information provided by the
3 Government at this early stage of the case, the quantum of evidence of Jamal's guilt is the
4 probable cause found by the grand jury that the charged crimes were committed.

5 This detention factor and the presumption of innocence weigh in favor of Jamal's
6 release.

7 HISTORY AND CHARACTERISTICS OF DEFENDANT

8 Jamal is a 34-year old naturalized U.S. citizen⁵ who was born in Lebanon, came
9 to the United States in 1992 and earned a Business Administration degree from Marshal
10 University in Huntington, West Virginia in 1993.

11 Jamal has substantial ties to the Phoenix community and District of Arizona. He
12 has been living in the Phoenix area since 1996. His immediate family, including his wife,
13 Gretchen, and five children, ages 9, 7, 4, 2 and 1, currently live in the family residence in
14 Mesa, Arizona. Two of Jamal's brothers and his mother reside in Jamal's other residence
15 located in Tempe, Arizona. Jamal's father and three other siblings live in Lebanon; another
16 brother resides in Tempe and yet another in Texas. He maintains frequent contact with all his
17 family and travels often to Lebanon, most recently in February and May, 2003 for usually a
18 two to three week visit. Mrs. Jamal and her children lived in Lebanon from 1996 to 1999
19 while Jamal lived in the United States. His wife has voluntarily consented to surrender her
20 passport, visa or international travel documents and those of all the minor children as a good
21 faith gesture that neither she nor her husband intend to flee the United States. Although
22

23 ⁵ Jamal was naturalized on January 31, 1996. The Government alleges that Jamal
24 provided false information in three separate I-864 forms to the former Immigration and
25 Naturalization Service denying he was financially supporting other immigrants and, thus, the
26 Government claims it will be seeking the revocation of his U.S. citizenship. For
27 denaturalization of citizenship to occur, the misrepresentations or concealments must be both
28 willful and material. 8 U.S.C. § 1451(a); Kungys v. United States, 485 U.S. 759, 767, 108
S.Ct. 1537, 1544, 99 L.Ed.2d 839 (1988). The Court finds the possibility of denaturalization
so speculative that the Court gives this argument no weight.

1 possible if sufficiently motivated, it is not reasonable to anticipate that Jamal would abandon
2 his wife, children, mother and siblings in the United States by fleeing to Lebanon.

3 In addition to real estate he owns in Lebanon,⁶ Jamal is the titled owner of two
4 Arizona residential properties; one located in Mesa (Sorenson Street) and the other in Tempe
5 (Watson Drive). Jamal and his immediate family have lived in the Mesa residence since May,
6 2003 while his mother and siblings currently live in the Tempe residence. Since the evidence
7 of Jamal's equity and debt related to these residential properties was disputed, the Court finds
8 that the Government's evidence is more credible due to the supporting documentation
9 provided by the Government. The recorded documents themselves seemingly reflect that
10 Jamal has approximately \$50,000 equity in the Mesa (Soreson) residence⁷ and no equity in the
11 Tempe (Watson) residence.⁸ The Government, however, has provided credible information
12 that the sellers of the Sorenson property, Harvey and Anne Cook, loaned Jamal \$113,000.00
13 so Jamal could make the \$118,000 cash down payment reflected in the Affidavit of Property
14

15 ⁶ Jamal's Personal Financial Statement confirms that Jamal owns vacant land in
16 Lebanon worth \$500,000.00 without any liens thereon. Exh. F, Government's supplemental
17 Motion for Detention.

18 ⁷ The Sorenson residence was purchased for \$551,500.00 on February 28, 2003 and
19 was, and remains, encumbered by a deed of trust with BNC Mortgage, Inc. executed in
20 March, 2003 for \$441,200.00 and a second deed of trust in the sum of \$54,650.00 to the
21 beneficiaries, Harvey and Anne Cook, from whom Jamal purchased the property. See, Exh.
22 E, Government's Supplemental Motion, doc.#153.

22 ⁸ The Watson residence was purchased for \$115,500.00 in 1999 and was, and remains,
23 encumbered by a deed of trust with Countrywide Home Loan in January, 2003 for
24 \$112,245.00 and a second deed of trust in the sum of \$55,650.00 to the beneficiaries, Harvey
25 and Anne Cook, from whom Jamal purchased the Sorenson property. On his Personal
26 Financial Statement (*Id.* at Exh. F), Jamal claims the residence is worth \$150,000 as of
27 January 2002. *Id.* at p.2. No credible evidence of current real market value, however, was
28 presented by Jamal at the detention hearing except the Affidavit of Property Value (a
required document under Arizona law signed by the parties prior to close of escrow)
provided by the Government regarding the Sorenson property. See, Exh. E, Government's
Supplemental Motion, doc.#153.

1 Value to purchase this residence. See, Exh. E, Government's Supplemental Motion, doc.#153.
2 Thus, in reality, Jamal made only a \$5000.00 out-of-pocket investment in the Sorenson
3 property. Therefore, the Court finds that Jamal has only approximately \$5000.00 equity in
4 the Mesa (Sorenson) residence and no equity in the Tempe (Watson) one.⁹ In sum, there are
5 insufficient financial incentives to voluntarily keep Jamal in the United States pending trial.
6 It is not reasonable to expect that Jamal would not flee to Lebanon because, by doing so, he
7 would forfeit only the minimal investments and equity in his Arizona real property.

8 As a U.S. citizen, Jamal may be legally employed in the United States. He is
9 currently a self-employed businessman whose business practices form the basis of the subject
10 indictment. He reports ownership of Jamal Trading Company, located in Tempe; partial
11 ownership on Arizona Nutrition Stores with three Valley locations; Baby's World and Kid's
12 Treasurers, a baby clothing store. Due to the subject indictment, Jamal indicated to Pretrial
13 Services that the only business currently in operation is Kid's Treasurers which he has owned
14 since July, 2003. Despite the Government's unsupported rhetoric that Jamal "has never had
15 legitimate employment in the United States and his illegal business constituted his entire
16 source of income" in the United States, doc. #38, p.11, Jamal, if released from custody, may
17 be gainfully and lawfully employed in his baby clothing business pending trial.

18 The Government contends that Jamal's illegal businesses generated over \$11
19 million but only \$300,000.00 has been seized by the Government. Therefore, the Government
20 argues, Jamal secretly controls the remainder of this money within or outside the United States
21 which provide him with a strong incentive and the means to flee the United States. The
22 Government, however, fails in its presentation of evidence, and the reasonable inferences
23 therefrom, that Jamal's alleged illegal businesses generated the significant sums of money the

24
25 ⁹ The Court notes, without finding, that by leasing the Watson residence to his family
26 members and by his residing in the Sorenson residence, Jamal may be violating the terms of
27 Jamal's deed of trust with Countrywide Home Loan because the Watson residence is no
28 longer his "primary residence" or by leasing it out, the Watson residence has become
commercial property. *Id.* at paragraph 6, Deed of Trust, page 5; Midfirst Bank v. Ranieri, 257
Mont. 312, 848 P.2d 1046 (1993).

1 Government claims they did. In fact, Jamal's residential real estate documents paint a picture
2 of a home buyer leveraging all of his equity in his first residence to qualify to borrow money
3 for a home loan to purchase a second residence for his mother and brothers. This is hardly the
4 picture of multi-millionaire swindler, swimming in cash.

5 On balance, these detention factors weigh in favor of Jamal's release.
6

7 **NATURE AND SERIOUSNESS OF THE DANGER TO RELEASE DEFENDANT**

8 Jamal does have a criminal history in the United States but it does not involve a
9 conviction for a crime of violence or the illegal distribution of drugs or firearms. He does not
10 have an illicit drug or alcohol abuse history. Jamal voluntarily tested negative for drugs by
11 Pretrial Services shortly after his arrest on July 30, 2003.

12 After being indicted in the Eastern District of Kentucky on 33 felony counts in
13 1998, Jamal pled guilty to only aiding and abetting the distribution and misbranding of infant
14 formula, a Class A misdemeanor, in violation of 21 U.S.C. §§331(a), 333(a)(1) and 18
15 U.S.C.2. He was placed on three years probation by the Hon. Karl S. Forester, U.S. District
16 Judge on or about January 29, 1999. The terms of his federal probation included providing
17 his probation officer with access to any requested financial information, including his business
18 and tax records. Knowing that one's business records were subject to review at any time by
19 a probation officer, it is not reasonable to expect one would engage in the white-collar crimes
20 alleged in the indictment. Except for the pending charges, there is no evidence or suggestion
21 that Jamal violated any of the terms of his 1999 federal probation. More importantly for
22 purposes of the subject motion, there is no evidence that Jamal failed to appear at any of his
23 court appearances in the Kentucky case as required by the district court or that he violated any
24 of the terms of his pretrial release pending resolution of the matter. Jamal's demonstrated
25 history of appearing in Court when faced with equally serious felonies in Kentucky is a
26 significant factor favoring Jamal's release.

27 These detention factors weigh in favor of Jamal's release.
28

1 DISCUSSION

2 The Court is mindful that "only in rare circumstances should release be denied,"
3 Sellers v. United States, 89 S.Ct. 36, 38, 21 L.Ed.2d 64 (1968) (Black, J., in chambers);
4 United States v. Motamedi, 767 F.2d at 1407, and "doubts regarding the propriety of release
5 should be resolved in favor of the defendant." Herzog v. United States, 75 S.Ct. 349, 351, 99
6 L.Ed. 1299 (1955); United States v. McGill, 604 F.2d 1252, 1255 (9th Cir.1979), cert. denied,
7 444 U.S. 1035, 100 S.Ct. 708, 62 L.Ed.2d 671 (1980). Additionally, the Bail Reform Act also
8 mandates release of a person facing trial under "the least restrictive" condition or combination
9 of conditions that will reasonably assure the appearance of the person as required. 18 U.S.C.
10 § 3142(c)(2) (1984); United States v. Motamedi, 767 F.2d at 1407["we are not unmindful of
11 the presumption of innocence and its corollary that the right to bail should be denied only for
12 the strongest of reasons, citing Truong Dinh Hung v. United States, 439 U.S. 1326, 1329
13 (1978)]. Alienage is also a factor which may be taken into account, but by itself cannot be
14 determinative. Motamedi, 767 F.2d at 1408.

15 Opportunity to flee is not enough to justify detention as the Bail Reform Act does
16 not seek ironclad guarantees. United States v. Himler, 797 F.2d 156 (3rd Cir. 1986). The
17 requirement that the conditions of release "reasonably assure" a defendant's appearance
18 cannot be read to require guarantees against flight. United States v. Chen, 820 F. Supp. 1205,
19 1208 (N.D. Cal. 1992).

20 The Government's burden of proof for detention is not trivial. The Government
21 must point to more than the indictment and, perhaps, his braggadocios comment to a young
22 Arabic-speaking male of what Jamal would do if the United States came after him again for
23 taxes to justify detention. It must prove by a preponderance of the evidence that the defendant
24 poses a "serious" flight risk. 18 U.S.C. §3142(f)(2)(A)("a serious risk that such person will
25 flee;"); United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991). It has failed to do so in
26 this case on the evidence presented.

1 Based upon all of the foregoing and the evidence presented at the subject detention
2 hearings,

3 The Court **FINDS** that the Government has not sustained its burden of proof by
4 a preponderance of the evidence that Jamal is a serious flight risk and that no condition or
5 combination of release conditions would reasonably assure his appearance at future Court
6 proceedings as required were he to be released.

7 The Court **FURTHER FINDS** that Jamal is a moderate flight risk but there are
8 a combination of release conditions that would reasonably assure his appearance at future
9 court proceedings, including, but not limited to, the posting of a \$150,000.00 cash bond, the
10 temporary surrender of his wife's and children's passports, visas or other international travel
11 documents to the FBI, electronic monitoring with restricted work-day and non-work day travel
12 except upon the express prior approval of Pretrial Services.

13 The Court **FURTHER FINDS** that the imposition of the subject cash bond, which
14 may be posted by family or friends, is an indispensable component of Jamal's release
15 conditions that will likely further assure Jamal's appearance at future court proceedings herein
16 as he will not likely risk financial ruin to his trusting, beloved family members or friends by
17 failing to comply with the Court's orders. United States v. Mantecon-Zayas, 949 F.2d 548 (5th
18 Cir. 1991)(explanation is required why the particular release condition is an indispensable
19 component for release).

20 Upon the posting of the subject bond by cashier's check with the Clerk, defense
21 counsel is authorized to contact the undersigned's Judicial Assistant and Pretrial Services to
22 schedule a bag and baggage hearing at which time a separate release order will be signed and
23 entered.

24 Accordingly,

25 **IT IS ORDERED** that Government's Motion for Detention (doc. #38) and

26 ///

27 ///

28

1 Supplemental Motion for Detention (doc. #153) are **DENIED**.

2 DATED this 30th day of September, 2003.

3
4 

5 Lawrence O. Anderson
6 United States Magistrate Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28