

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) Case No. 09-00296-02-CR-W-FJG
)
 ERIC BURKITT,)
 Defendant.)

**MOTION OF DEFENDANT ERIC BURKITT FOR REVIEW OF DETENTION
ORDER WITH SUGGESTIONS**

Comes now defendant Erick Burkitt, by and through his appointed counsel, moves the District Court to review the Order of Detention previously entered in this cause (Doc. No. 34) pursuant to the provisions of 18 U.S.C. §3154(b), and in support thereof states the following:

1. The defendant was charged by an indictment filed in the Western District of Missouri on September 24, 2009 (Doc. No. 12) charging him with the Class A felony offense of conspiring with others to distribute: (1) a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in an amount of five hundred (500) grams or more; and (2) cocaine, a Schedule II controlled substance; and (3) marijuana, a Schedule I controlled substance contrary to the provisions of Title 21, United States Code, § 841(a)1) and 841(b)(1)(A) all in violation of Title 21, United States Code, § 846.

2. That on October 1, 2009, a hearing was conducted before the magistrate court based on the government's Motion to Detain defendant pending all further proceedings.

3. That at said hearing, it was demonstrated that the undersigned had been previously appointed to represent this defendant at the request of government counsel who had determined that defendant Burkitt was to be a "target defendant" with whom they wished to discuss this case, but who could not afford to hire his own attorney. (Ex. "A"). This request was made of the Court in July 2007, at which time the undersigned

was asked by the Court to undertake the representation of Mr. Burkitt, an appointment that was ultimately made by Court order dated July 18, 2006. (Ex. "B").

4. That at said hearing, it was represented without contradiction that the undersigned had had a number of conversations with Jeffrey Valenti, assistant United States Attorney representing the government in this case, during the ensuing months and that there were routine inquiries of government counsel regarding the status of the case, the timing of the indictment etc. That moreover, it was submitted that the defendant had been apprised of the serious nature of the case that was going to be filed. A letter directed by the undersigned to the defendant in August of 2007, clearly refers to the fact that not only would an indictment be forthcoming, but also that the penalties Mr. Burkitt would be facing would be considerable, including a statutory mandatory minimum sentence of ten years all the way up to a maximum of life imprisonment. That correspondence refers to the fact that those items were covered with the defendant in person as well. A portion of that letter is also attached to this motion. (Ex. "C").

5. That it was further demonstrated at said hearing that counsel had made the defendant aware of the fact that he was following the status of an indictment involving similar charges filed against other members of a motorcycle club of which defendant Burkitt was a member as well as the various dispositions in that case. (Doc. No.1 refers to that case styled United States of America v. William Eneff, et. al.). In spite of all of this information and the passage of all of this time, Mr. Burkitt nevertheless continued to maintain contact with his attorney, as well as to make himself available for all calls and meetings, and that he also continued to maintain the same residence in Kansas City.

6. That it was further demonstrated to the magistrate judge at the Detention Hearing that the case agent knew of no further criminal acts on the part of this defendant with regard to this specific indictment. It was, however, correctly pointed out by the government that the defendant was charged in Jackson County Missouri, March, 2009, with the forcible rape and sodomy of a lady who, along with her ex-husband were friends of Mr. Burkitt and also members of the same motorcycle club. The allegations, which were covered in the Pretrial Services Report, involved claims which arose out of a single incident and are allegations which the defendant has consistently denied and which he intends to deny until a trial, if necessary. That it is noteworthy that the court in Jackson

County did determine in that case that there were conditions of release that could satisfy any concern that the defendant would return to court when necessary or that he would pose any risk to that alleged "victim" as well as anyone else when it imposed bond conditions which called for the defendant's pretrial release in that case subject to house arrest; that defendant has been out on bond in that case since April 23, 2009 (See Pretrial Services Report). Though not representing the defendant in that case, the undersigned has been advised that there have been absolutely no problems whatsoever with regard to his continued compliance with those conditions. Moreover, it has been determined that the defendant's federal trial would proceed at an earlier point in time than the state case which is presently scheduled for a trial in early 2010.

7. That the defendant has no prior convictions of any offense on his record.

8. It is further submitted that the facts related to his involvement in the instant case arise for conduct apparently alleged to have occurred between the years 2002 and 2007 and that although there are indications that there may have been acts of violence perpetrated by some of the defendants, there is no evidence whatsoever that this defendant was involved in any violent behavior. It would appear that based on his alleged involvement in this conspiracy, that he would be, at worst, a minimal participant in any such conspiracy.

9. That the defendant, prior to his arrest in the instant case, was gainfully employed by Stonearch Welding who has indicated they would keep his job and he would be able to return to that employment if released on bond in the instant case.

10. That the defendant is in the process of buying his own home where he has lived since January 2008; he has resided in the Kansas City metropolitan area since his birth in 1984 and has never lived anywhere else.

11. That although as previously noted, the defendant cannot hire his own attorney, he does have financial resources such as equity in his home, and a bank account and is able to produce monthly income at the approximate rate of \$2,400.00 monthly. He also has an automobile and has been able to get to and from work. The defendant has no history of substance abuse nor has he had to undergo any treatment for substance abuse.

12. That although the defendant recognizes the serious nature of the charge in this case, it is but a charge and the defendant would submit that there are conditions that

could be placed on this defendant as conditions of bond for pretrial release which could satisfy the statutory goals of insuring his future attendance at all court proceedings as well as to insure that the public is protected.

13. That it is submitted that any person arrested for a non-capital offense should be released on bail unless there are no condition or combination of conditions, which would “reasonably assure” the appearance of the person is required to the safety of the community. See 18 U.S.C. §3142(c); see also *United States v. Orta*, 760 F. 2d. 887,890 (8th Cir. 1985).

14. That although, as the defendant has previously conceded in this motion, there is a statutory presumption in favor of incarceration in those cases where the mandatory sentence is 10 years or more, that “presumption” is rebuttable. 18 U.S.C. § 3142(g). Among the factors to be considered in analyzing this issue are such things as the nature and circumstance of the crime charged, the weight of the evidence against the defendant, the history and characteristics of the defendant, including family ties, employment, community ties, past conduct, and the nature and seriousness of the danger to the community or to an individual.

15. In looking at the case of defendant Burkitt, and, given the fact that conditions of release have been set for at least one of the codefendants charged in this case, it is submitted that the issue of primary concern would likely be the newly charged crime in Jackson County, Missouri. Looking at all of the other factors would appear to militate strongly in favor of the argument that there could be conditions imposed that would allow for the necessary assurances to the Court that defendant would correctly respond to this charge against him, since he has done so already for many months and that would insure that there would be no danger to society as a result of his pretrial release. With respect to that pending charge, which is indeed a serious one, it is noteworthy that the state court handling that case not only determined that the alleged victim in that case would be safe when it imposed strict bond conditions in April of this year, but it has also been consistently assured throughout these many months both of that alleged victim’s safety as well as the defendant’s continued adherence to those strict conditions of bond.

16. With regard to the evidence in the instant case, although there has been no production of discovery materials to date in the process, the undersigned can say categorically that Mr. Burkitt has insisted from the outset of his representation that he intends to fight this case and to take whatever steps necessary to do so. This matter has been recently set for trial on the December trial docket (which will predate the scheduled trial date for the state case), and the defendant and the undersigned plan to be ready to face these allegations at that time. Moreover, there has been no indication that the alleged involvement in this conspiracy involves any violence or threat of violence on the part of this defendant, nor, again, that there are any allegations of his involvement in any drug conspiracy since the July 31, 2007, alleged in the indictment to be the concluding date of the conspiracy charged in that indictment.

17. That the defendant's personal history as revealed by the Pretrial Services Report clearly indicates that he has long-standing ties to the community, is a property owner, is gainfully employed and that he has no previous criminal record.

18. That undersigned counsel respectfully suggests that there are indeed additional conditions, short of detention, which could be utilized and which would satisfy the statutory conditions pertaining to conditions for pretrial release including supervision by Pretrial Services, electronic shackling (consistent with the present conditions imposed in the Jackson County matter and which have been working remarkably well in that case).

19. That although the undersigned filed a motion requesting the magistrate judge to reconsider its decision ordering Mr. Burkitt's decision, that motion was denied. (Doc. No. 81)

20. That 18 U.S.C. § 3145 provides as follows:

“(b) Review of a detention order. – If a person is ordered detained by a magistrate judge,...the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.”

21. Mr. Burkitt contends that the magistrate's order failed to recognize that there were and have been adequate conditions imposed on Mr. Burkitt both to insure his

presence at all future court appearances and that he not be considered a “flight risk” as well as to insure the safety of those in the community. This is true, notwithstanding the present allegation pending against Mr. Burkitt in Jackson County, Missouri, an allegation which understandably would have concerned the magistrate judge as well as this Court. However, it is hoped that it has been adequately demonstrated that Mr. Burkitt has, for many months now, been adhering without question to the stringent bond conditions set in that case which included house arrest, and has been fully complying with all of those conditions. He would, if released, continue to do so.

WHEREFORE, Mr. Burkitt through counsel prays that this Honorable Court review the Order of Detention filed herein, and that after so doing, that it grant pretrial release to Mr. Burkitt under such conditions as may be deemed appropriate by the Court.

Respectfully submitted,

LAW OFFICES OF F.A. WHITE, JR., P.C.

/s/ F.A. White, Jr.

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following via the Court's electronic filing system and a copy electronically served on all parties this 5th day of November, 2009. .

/s/ F.A. White, Jr. _____

F.A. (Al) White, Jr.