DOCKET NO. 19-2079

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

UNITED STATES OF AMERICA,
Appellee

v.

JOHANNY MEJIA-NUNEZ,
Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____

BRIEF FOR APPELLANT

_____

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JANUARY 12, 2020

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REQUEST FOR ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and Local Rule 34(a), Appellant Johanny Mejia-Nunez respectfully requests oral argument in this appeal, which involves important questions regarding Mr. Mejia-Nunez potentially being penalized for exercising his constitutional rights under the Second Amendment, and the District Court's erroneous denial of the Defendant's release pretrial.

JURISDICTIONAL STATEMENT

This is an interlocutory appeal from the October 9, 2019, denial entered by the United States District Court for the District of Massachusetts (Saylor, J.), of the Defendant's Motion to Revoke Pretrial Detention Order and to Place the Defendant on Conditions of Release. The Defendant timely filed a notice of appeal on October 22, 2019. RA. 7.[1] The District Court had jurisdiction pursuant to 18 U.S.C. § 3145(b). This Court has jurisdiction to review the District Court's final order pursuant to 18 U.S.C. §§ 3145(c) and 28 U.S.C. § 1291.

[1] Citations to the Record Appendix appear as "RA. [page]." The Defendant cites to the transcript of the June 18, 2019 Detention and Probable Cause Hearing as "Tr. page:line."

ISSUE PRESENTED

I. Whether the District Court erred in denying the Defendant's Motion to Revoke Pretrial Detention Order and to Place the Defendant on Conditions of Release where the Government failed to prove that Mr. Mejia-Nunez poses a risk of flight or danger to the community sufficient to warrant detention, and where there are conditions of release that would ensure his appearance in court and the safety of the community.

STATEMENT OF THE CASE

On June 12, 2019, the Government arrested the Defendant and obtained a complaint charging him with possession with intent to distribute fentanyl (400 grams or more). RA. 3, 4.

The complaint arises from an incident in which the Government alleges that the Defendant delivered narcotics to a confidential informant.

Task Force Officer ("TFO") Dean LeVangie testified at the Defendant's June 18, 2019 detention hearing before the Honorable Magistrate Judge Jennifer C. Boal. He stated that a confidential informant ("CI") was speaking with a Mexican national looking to transport drugs to the United States. Tr. 11:1.

Initially, a shipment was scheduled for May 18, 2019. Tr. 54:15, 56:5, 57:11. The transaction was never consummated, though, because the delivery driver was arrested in transit from New York to Massachusetts. Tr. 56:9. Afterwards, the Mexican national was "apologetic" and "scrambling" to complete the deal. Tr. 56:15. After the initial deal fell through, nothing occurred for several weeks, until June 8, 2019, when negotiations resumed. Tr. 56:22. The Mexican national, the CI, and an undercover agent negotiated a price of $40,000 per kilo, for five kilos of fentanyl. Tr. 20:8. They scheduled delivery of the drugs for June 12, 2019. Tr. 20:13. The investigation culminated on June 12, when the Defendant arrived at the delivery location and confirmed to the CI that he had the narcotics in his car. Tr. 26:6-27:8. Agents then arrested the Defendant and seized the drugs. Tr. 28:19.

The Defendant told police that he expected to be paid only $5,000 for transporting the drugs. Tr. 45:5. The Mexican national was getting $200,000 for the deal. Tr. 20:8. The Mexican national intended that ties with the Defendant be severed after this deal was done. Tr. 70:18-21.

On June 18, 2019, the Magistrate Judge held a hearing on the government's motion for detention. On June 26, 2019, the Magistrate Judge issued an Order allowing the Government's motion.

On August 27, 2019, the Defendant appealed the Magistrate Judge's Order to the District Judge, and filed a Motion to Revoke Pretrial Detention Order and to Place the Defendant on Conditions of Release.

In support of his Motion, the Defendant submitted exhibits, which demonstrate that he is a 43-year-old man with no prior criminal record. He is a lawful permanent resident of the United States, originally from the Dominican Republic. He has resided in Philadelphia, Pennsylvania since 2003. In 2004, he began a relationship with Wendy Rodriguez, a United States citizen, and the two married in 2007. See RA. 38-46. Together, they have two United States citizen children, G.M. (11 years old) and J.M. (12 years old). Additionally, Mr. Mejia-Nunez has three children and his wife has one child from prior relationships, each of whom is a lawful permanent resident. See RA. 50-68. The couple embraced each other's children and raised them together as a single family. Mr. Mejia-Nunez and

his wife live with all six children and Mr. Mejia-Nunez' mother in their Philadelphia home.

Mr. Mejia-Nunez has four siblings, two of whom have naturalized as United States citizens. RA. 69-71. His two brothers live in Philadelphia, and his two sisters live in Massachusetts.

Although Mr. Mejia-Nunez is not a United States citizen, he has lawful permanent resident status and is not currently removable. In 2013 upon his re-entry to the United States, the Defendant acknowledged to Department of Homeland Security agents that he entered the United States without inspection in 2003, and submitted fraudulent documents in connection with his 2008 application for adjustment of status. See RA. 107-108. As a result, the Government initiated a removal case. RA. 107-108. On June 10, 2014, the Honorable Justice Miriam K. Mills granted the Defendant a waiver of inadmissibility, allowing him to retain his lawful permanent resident status. See RA. 109-110.

Since 2017, the Defendant has worked as an Uber driver. Additionally, since 2011, the Defendant has worked as a tow truck driver. He also works for Properties Creations, LLC, as a construction worker,

where his supervisor describes him as "a family-oriented man," and "an asset to our company's future," whose "involvement in support of his community is also to be admired." See RA. 38-42.

With three of his siblings, the Defendant owns a garage located at 4268 North Penn Street, Philadelphia,[2] which generates rental income. See RA. 72-78. His wife co-owns their family home in Philadelphia[3] with an uncle, Jose Mejia. RA. 81-88.

In addition to being a husband and father, Mr. Mejia-Nunez is an active member of his community. He and his wife are registered members of the Holy Innocents Church, located in Philadelphia. See RA. 38. He and his son play together in a local softball league. RA. 40. The owner of his team describes him as a "great honest respectful person [sic]" and a "family man." RA. 40.

The Government submitted a brief in opposition to the Defendant's motion on September 10, 2019. RA. 277.

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[2] An August 15, 2019 appraisal valued the garage at $200,00. See RA. 111.

[3] A July 24, 2019 appraisal valued the residence at $192,500. See RA. 172-193. As of June 11, 2019, the owners owed $119,452.44 on their mortgage. See RA. 102-103. Consequently, the property has a positive equity of $73,047.56.

On September 11, 2019, the Defendant submitted a reply to the Government's brief. RA. 286.

On October 9, 2019, the Honorable Judge F. Dennis Saylor, IV, denied the Defendant's motion. RA. 292.

SUMMARY OF THE ARGUMENT

I. The District Court erred in denying the Defendant's motion to revoke the detention order, where the evidence showed that the Defendant is not a flight risk and poses no danger to the community, and where the Order punishes the Defendant for exercising his Second Amendment right to legally possess a handgun in his own home.

ARGUMENT

I. The District Court Improperly Denied the Defendant's Motion to Revoke the Pretrial Detention Order Where the Defendant Established that He is Not a Flight Risk or a Danger to the Community.

a. Standard of Review

The Court of Appeals must conduct an independent review of the District Court's decision. United States v. Tortora, 922 F.2d 880, 882-883 (1st Cir. 1990). This represents "an intermediate level of scrutiny, more rigorous than the abuse-of-discretion or clear-error standards, but stopping short of plenary or de

novo review[,]" with deference to the lower court's factual determinations. Id. "If upon careful review of all the facts and the trial judge's reasons the appeals court concludes that a different result should have been reached, the detention decision may be amended or reversed." Id. at 883, quoting United States v. O'Brien, 895 F.2d 810, 814 (1st Cir. 1990).

b. Standard for Pretrial Detention

In order to detain a defendant prior to trial pursuant to 18 U.S.C. §§ 3141 et. seq., the Court must find by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of the community or, by a preponderance of the evidence that no condition or combination of conditions will reasonably assure the defendant's appearance in court. 18 U.S.C. § 3142(f); United States v. Patriarca, 948 F.2d 789 (1st Cir. 1991).

If a judicial officer finds probable cause that the defendant committed an offense punishable by a maximum term of ten years or more under the Controlled Substances Act, a rebuttable presumption exists that no condition or combination of conditions will

reasonably assure the appearance of the defendant and the safety of the community. 18 U.S.C. § 3142(e). Although a defendant must produce "some evidence" to rebut this presumption, "[t]he government retains the burden of proving that no conditions will reasonably assure the defendant's appearance." O'Brien, 895 F.2d 815.

In addition to the presumption, as mitigated through the defendant's production of "some evidence" in rebuttal, the Court must consider the nature of the offense charged, the weight of the evidence against the defendant, and the defendant's character, family ties, financial resources, employment, length of residence in and connection to the community, past criminal history, and the nature of the danger to the community should release be ordered. See 18 U.S.C. § 3142(g).

c. Mr. Mejia-Nunez is not a Flight Risk.

Congress included the rebuttable presumption against release on conditions in cases involving those charged with drug offenses subject to sentences of ten years or more in large part because "[t]he Committee received testimony that flight to avoid prosecution is

particularly high among persons charged with major drug offenses." United States v. Jessup, 757 F.2d 378, 385 (1st Cir. 1985), abrogated by United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990), quoting S.Rep. No. 225, 98th Cong., 1st Sess. 19 at 20, 23-24 (1983). This is because drug traffickers "often have established substantial ties outside the United States from whence most dangerous drugs are imported[.]" Id. In addition, because drug trafficking is an extremely lucrative business, these defendants are not deterred by having to post even very high bails. Id., quoting S.Rep. No. 225, 98th Cong., 1st Sess. 19 at 20, 23-24 (1983). Congress observed that "there has been an increasing incidence of defendants, particularly those engaged in highly lucrative criminal activities such as drug trafficking, who are able to make extraordinarily high money bonds, posting bail and then fleeing the country. Among such defendants, forfeiture of bond is simply a cost of doing business . . ." Id., quoting S.Rep. No. 225, 98th Cong., 1st Sess. 19 at 20, 23-24 (1983). See also United States v. Palmer-Contreras, 835 F.2d 15, 17 (1st Cir. 1987) (the rebuttable flight presumption "reflects Congress's findings that drug traffickers

often have the resources and foreign contacts to escape to other countries. Forfeiture of even a large bond may be just a cost of doing business, and hence drug traffickers pose special flight risks.").

Mr. Mejia-Nunez is not this type of defendant. Instead of being a high-ranking member of a drug trafficking organization, Mr. Mejia-Nunez is a first offender who was recruited to drive a load of drugs to Massachusetts while supplementing his income by working as an Uber driver. Tr. 45:5-8. Instead of having contacts and connections to the drug trade, this was his first and only drug delivery, and the Mexican national ordered that all ties with the Defendant be severed after this one deal was completed. Tr. 70:18-21. Instead of partaking in a highly lucrative drug trafficking business, Mr. Mejia-Nunez expected to be paid only $5,000 for his driving. Tr. 45:8. Instead of having the resources to post a large bond and then sacrifice it as a "cost of doing business," Mr. Mejia-Nunez' wife and her uncle have agreed to offer the family home as collateral to secure Mr. Mejia-Nunez's release. RA. 87-88. Mr. Mejia-Nunez' siblings have also agreed to post the Philadelphia auto garage that they co-own with Mr.

Mejia-Nunez as collateral to secure his release. See RA. 72-74.

As Mr. Mejia-Nunez could not be further from the prototypical drug trafficker Congress had in mind when creating the rebuttable presumption, the presumption is entitled to much less weight in his case. United States v. Shea, 749 F. Supp. 1162, 1166 (D. Mass. 1990), quoting Jessup, 757 F.2d at 387 ("The less those features [of a defendant's case] resemble the congressional paradigm, the less weight the magistrate will likely give to Congress's concern for flight."). See also United States v. Moss, 887 F.2d 333, 337 (1st Cir. 1989) (Court believes "the characteristics that the defendant champions, e.g., no criminal record, and the likelihood that he would actually receive less than ten years imprisonment if convicted . . . are relevant to the weight that a magistrate or district court judge gives to the presumption"). The Magistrate Judge and District Court judge erred in relying on the presumption in denying the Defendant's Motion to Revoke Pretrial Detention Order and to Place the Defendant on Conditions of Release.

Further, Mr. Mejia-Nunez has substantial connections anchoring him to his community, even

though he is not a United States citizen. He has made this country his home since 2003, and no longer has firm ties to the Dominican Republic. Mr. Mejia-Nunez is married to a United States citizen, Wendy Rodriguez, with whom he has two young United States citizen children. Additionally, he brought his three children from a prior relationship to the United States and embraced his wife's child from a prior relationship. The family lives together under one roof with all six children and Mr. Mejia-Nunez' mother.

Mr. Mejia-Nunez and his family have planted deep roots here. They purchased their own small piece of this country and became part of the community. That Mr. Mejia-Nunez' siblings are willing to risk their business investment, and that his wife is willing to risk the roof over her six children's heads, demonstrates their complete confidence that Mr. Mejia-Nunez will honor his obligations to the Court.

Although Mr. Mejia-Nunez will become deportable after a conviction, his life and his family are firmly grounded in the United States. Mr. Mejia-Nunez and his family are actively engaged in their community, as evidenced by the letters he submitted from his pastor,

his employer, his barber, and the owner of his softball team.

Examination of the Defendant's immigration history reveals that he is not a flight risk. When the Government discovered irregularities with respect to Mr. Mejia-Nunez' visa in 2013, he cooperated fully with their investigation. He immediately admitted that he obtained his green card based on an inauthentic visa. RA. 107-108. As a result, the Government sought his removal. During the pendency of the removal case, Mr. Mejia-Nunez was paroled in to the United States.

Mr. Mejia-Nunez' immigration status at that time was far from certain, and he could have attempted to evade justice. Instead, he obtained a lawyer and faced his removal case, despite his uncertain prospects. He never failed to appear. That Mr. Mejia-Nunez responsibly faced that case supports an inference that he will do the same with respect to the instant case - particularly given the substantial surety he offers this Court in terms of his family home and family business.

It is true that if convicted, Mr. Mejia-Nunez faces a minimum mandatory prison sentence. However,

the realities of his sentencing prospects given the circumstances of his case attenuate any concern that he will flee to escape sentencing. Although Mr. Mejia-Nunez' base offense level is 34 (U.S.S.G. §2D1.1(c)(3)), he is likely to qualify for a three level reduction for timely acceptance of responsibility (U.S.S.G. §3E1.1(a),(b)) and a two-level reduction pursuant to the safety valve (U.S.S.G. §5C1.2), the latter of which would also eliminate the applicable mandatory minimum. 18 U.S.C. § 3553(f). As discussed more fully infra, Mr. Mejia-Nunez is the archetypal minimal participant, and is likely to receive a four-level reduction for his mitigating role in the offense. See U.S.S.G. §3B1.2(a) and application Note 4 ("the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant"). Given this likely total offense level of 25, and Mr. Mejia-Nunez' lack of criminal history, his guideline sentence is between 4.75 and 5.91 years.

Notably, were Mr. Mejia-Nunez to flee, the substantial benefits he would receive pursuant to U.S.S.G. §§ 3E1.1 and 5C1.2 would in all likelihood

evaporate. See U.S.S.G. § 3E1.1, Application Note 4; U.S.S.G. §5C1.2(a)(5). Rather than receiving important reductions, he would likely receive a two-level enhancement for obstructing or impeding the administration of justice. See U.S.S.G. §3C1.1, Application Note 4. Moreover, if he fled, Mr. Mejia-Nunez would likely lose his protection from the minimum mandatory sentence and expose himself to additional charges and consecutive sentencing. 18 U.S.C. § 3146(b)(1).

Stated simply, the end result of flight, when compared to the likely penalties for obedience to conditions of release, show that Mr. Mejia-Nunez has everything to lose and nothing to gain by fleeing from justice.

d. Mr. Mejia-Nunez is not a Danger to the Community.

Mr. Mejia-Nunez is not a danger to the community, even viewed in the context of the instant indictments. "[B]ecause of the interference of pre-trial detention with the 'importan[t] and fundamental ... right' of liberty, United States v. Salerno, 481 U.S. 739, 750 ... (1987), this Court will not make such a finding [of dangerousness] lightly." United States v. Diaz,

2019 WL 1993786, at *3 (D. Mass. 2019), quoting United States v. Silva, 133 F. Supp. 2d 104, 109 (D. Mass. 2001) (ellipses and brackets in original).

Although Congress has determined that narcotics offenses carry an inherent public safety concern, the circumstances of the instant case do not "resemble[] the congressional paradigm" underlying those concerns. Palmer-Contreras, 835 F.2d at 18. Congress codified the presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community in cases involving serious drug trafficking offenses because the nature of drug offenses "pose a significant risk of pretrial recidivism." Shea, 749 F. Supp. at 1165-1166. This risk of recidivism exists because "drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity." Id.

Here, no evidence indicates that the Defendant engaged in patterns of criminal activity. In fact, the evidence indicated quite the opposite - that this was an isolated incident.

The facts as introduced at the detention hearing show that beginning in May, 2019, a Mexican national and other co-conspirators negotiated the sale to the

CI. The Defendant took no part in these negotiations. After finalizing the deal, the Mexican national sought to make delivery on May 18, 2019. Tr. 54:15, 56:5, 57:11. This delivery failed when the driver was arrested in transit from New York to Massachusetts. Tr. 56:9-11.

Although the Defendant ultimately assumed the role of delivery driver, this did not occur immediately. Instead, after the failed delivery, the Mexican national was "apologetic" and "scrambling" to complete the deal. Tr. 56:16. Negotiations lay dormant for the next several weeks. The delivery did not occur until nearly one month later.

This sequence of events corroborates Mr. Mejia-Nunez' post-arrest statement to police -- that while working as an Uber driver a customer asked him if he wanted to make extra money transporting drugs to Massachusetts. Tr. 45:5-8. Mr. Mejia-Nunez' car was not equipped with any hidden compartments and he engaged in no counter-surveillance techniques that would be typical of an experienced drug dealer. Tr. 69:17. From this evidence, the Court may reasonably infer that Mr. Mejia-Nunez was a "new driver [who] had [n]ever done a delivery before." Tr. 57:16-18.

In United States v. Diaz, 2019 WL 1993786 (D. Mass. 2019), the District Court found that the defendant did not pose a danger to the community warranting pretrial detention despite his charge of cocaine distribution (and two state convictions for possession with intent to distribute cocaine), as there was no evidence "that the defendant has been involved with importing significant amounts of controlled substances into the community, participating in a widespread conspiracy to distribute narcotics, or using violence or a firearm in connection with the distribution of narcotics." Id. at *3. The Court accordingly found that defendant did not "match the congressional paradigm of a major trafficker in narcotics 'for which Congress has mandated a presumption against reasonably assuring safety without detention.'" Id., quoting Shea, 749 F. Supp. at 1171. Mr. Mejia-Nunez similarly does not match the congressional paradigm of a major narcotics trafficker, and in fact is even less of a safety risk than the defendant in Diaz as this was his first offense.

The evidence establishes Mr. Mejia-Nunez' only involvement in drugs arose in June 2019 in the context

of a single, failed transaction, for which he earned nothing more than a serious federal drug charge. In these circumstances, there exists no credible risk that he will continue his involvement with drugs if released.

Additionally, Mr. Mejia-Nunez' minimal role in the offense undermines any conclusion that he poses a risk of further involvement with dangerous drugs. Mr. Mejia-Nunez had no involvement in setting the quantity, price, or time and location of the delivery. Tr. 58:2. The Mexican national, the CI, and the UC exclusively controlled the details of the delivery, with the understanding that Mr. Mejia-Nunez would be "cut out" after completing the transaction. Tr. 70:14. Mr. Mejia-Nunez was not even made aware of how much money he was supposed to receive upon delivering the drugs. Tr. 58:11.

And though he believed he was delivering drugs, no evidence indicated that Mr. Mejia-Nunez knew what type of substance he was delivering. He never referenced the type of substance in his conversations with the CI and UC. Tr. 60:4. His only indication about the type of substance occurred when the CI asked him to confirm that the substance was fentanyl or

"China White," and Mr. Mejia-Nunez affirmed. Tr. 60:21. However, because Mr. Mejia-Nunez does not speak English and the CI does not speak Spanish, this purported "affirmation" suggests nothing about his actual knowledge. Tr. 61:1. Rather, as his recorded statement to police reveals, Mr. Mejia-Nunez believed he was transporting drugs, but was kept in the dark as to what type of drug was involved. Tr. 61:15.

Additionally, although the drugs had a value of $200,000, Tr. 20:8, Mr. Mejia-Nunez expected to be paid only $5,000 for transporting them. Tr. 45:5. Mr. Mejia-Nunez had no ownership interest in the drugs; instead he was paid to perform a single, limited function.

In sum, Officer LeVangie's testimony showed that the Mexican national allowed Mr. Mejia-Nunez no decision-making power, and no more knowledge than the bare minimum necessary to accomplish the discrete task of serving as a last minute substitute after his established driver was arrested in New York. Compare United States v. Perez-Franco, 839 F.2d 867, 870 (1st Cir. 1988) (affirming denial of release on conditions in part because defendants were "not just mules[,]" but instead "sell heroin for profit").

Given the evidence that his participation was as circumscribed as it was brief, the Government has not met its burden in establishing by clear and convincing evidence that Mr. Mejia-Nunez would pose a danger to the community if he were released.

Finally, evidence that Mr. Mejia-Nunez lawfully possessed a firearm and ammunition did not add weight to the Government's case. At the outset, it is important to underscore that the Government was not even aware of Mr. Mejia-Nunez' firearm until he voluntarily presented that information to the Court. Tr. 78:19. If Mr. Mejia-Nunez were prone to irresponsible or dangerous conduct with a weapon, he would hide it, not alert the Government to its existence and location. Mr. Mejia-Nunez brought the firearm to the Court's attention with the intent of being as forthcoming as possible. Mr. Mejia-Nunez' wife voluntarily turned over the firearm to police. See RA. 49. Mr. Mejia-Nunez' candor should be viewed favorably. It does not support a finding of danger. It militates against such a finding.

Notably, any concern that Mr. Mejia-Nunez possessed the firearm and ammunition for use in narcotics activities should be assuaged by the fact

that when Mr. Mejia-Nunez embarked on his journey from Philadelphia, through New York, to Massachusetts to deliver narcotics, he left the firearm and ammunition home.

Even though his itinerary took him to a Dunkin' Donuts parking lot in New York in order to receive narcotics from a stranger, Mr. Mejia-Nunez chose not to arm himself. Though he planned to meet another stranger to exchange a large quantity of narcotics for cash hundreds of miles from home, Mr. Mejia-Nunez did not bring his firearm. Where he did not bring his firearm to protect himself while transporting $200,000 in illicit merchandise, no evidence indicates that Mr. Mejia-Nunez possessed the firearm for anything other than lawful purposes.[4]

[4] The hollow point bullets in the Defendant's firearm support no inference of any nefarious intent. Not a single state has passed legislation outlawing hollow point ammunition. In fact, it appears that, aside from New Jersey, not a single state even limits possession of hollow point bullets. See generally Giffords Law Center, Ammunition Regulation: State by State, available at https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/ammunition-regulation-state-by-state/ (last visited December 30, 2019). New Jersey allows civilian possession of hollow point bullets, but only in the home. N.J.S.A 2C:39-3(g)(2)(a). Thus, even viewed under the strictest regulation in the country, the Defendant's possession of hollow point ammunition is lawful.

The Defendant has a constitutional right, not being subject to any disqualification, under the Second Amendment, to possess the firearm in defense of "hearth and home." District of Columbia v. Heller, 554 U.S. 570, 635 (2008). Because no facts indicate that he possessed the firearm for any other purposes, his possession of the firearm is constitutionally protected. Lawful exercise of a constitutionally protected activity cannot serve as the basis for detention. See United States v. Goodwin, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' . . . For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.").

In addition, even illegal possession of firearms to further a drug offense does not preclude the release of a defendant on conditions. See United States v. Bernal, 183 F. Supp. 2d 439, 439-441 (D.P.R. 2001) (defendant charged with conspiracy to possess over five kilograms of cocaine and not less than fifty grams of cocaine base and possession of firearms (AK-

15 and AK-47 assault rifles) during and in relation to a drug trafficking crime released on conditions).

Because the Government failed to establish that there are no conditions or combination of conditions that will assure the safety of the community, the District Court erred in denying the Defendant's Motion to Revoke Pretrial Detention Order and Place the Defendant on Conditions of Release.

CONCLUSION

For the foregoing reasons, the Defendant requests that this Honorable Court vacate the District Court's Order denying the Defendant's Motion with instructions to enter an Order allowing the same.

Respectfully submitted,
Johanny Mejia-Nunez,
By his Attorney,

/s/ Murat Erkan

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Date: January 12, 2020

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Dated: January 12, 2020

/s/ Murat Erkan
Murat Erkan
Attorney for Appellant

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US Attorney's Office
1 Courthouse Way
Ste 9200
Boston, MA 02210

Dated: January 12, 2020

/s/ Murat Erkan
Murat Erkan
Attorney for Appellant

ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Magistrate No. 19-7199-JCB

UNITED STATES OF AMERICA

v.

JOHANNY MEJIA-NUNEZ

ORDER ON GOVERNMENT'S MOTION FOR DETENTION

June 26, 2019

Boal, M.J.

Defendant Johanny Mejia-Nunez is charged in a complaint with possession with the intent to distribute four hundred grams or more of a mixture and substance containing a detectable amount of fentanyl in violation of 21 U.S.C. § 841(a)(1). An initial appearance was held on June 12, 2019, at which time the government moved for detention pursuant to 18 U.S.C. § 3142(f)(1)(B) (defendant is charged with an offense for which the maximum sentence is life imprisonment); § 3142(f)(1)(C) (defendant is charged with an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act) and § 3142(f)(2)(A) (risk of flight).

This Court held a probable cause and detention hearing on June 18 and 25, 2019.[1] The government called Massachusetts State Police Officer Dean LeVangie and submitted fifteen exhibits into evidence. The defendant cross-examined Levangie, called Jorguin Mejia, the defendant's brother, and submitted five exhibits into evidence. The government cross-examined Mejia. After careful consideration of the evidence, the parties' arguments at the hearing, and a

[1] At the June 18, 2019 hearing, this Court found that the government had demonstrated probable cause.

Pretrial Services Report recommending detention, this Court orders the defendant detained pending trial.

I. ANALYSIS

A. The Bail Reform Act

Under the Bail Reform Act, a defendant may only be detained pending trial if the government establishes either by clear and convincing evidence that the person poses "a danger to the safety of any other person or the community if released," or by a preponderance of the evidence that the person poses a serious risk of flight. 18 U.S.C. § 3142(f); United States v. Patriarca, 948 F.2d 789, 791-793 (1st Cir. 1991). If there is some risk, the Court should consider whether a combination of release conditions "will serve as a reasonable guard." Id. at 791.

In determining whether suitable release conditions exist, the judicial officer must take into account the following: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the accused, including family ties, employment and other factors; and (4) the nature and seriousness of the danger posed by the person's release. 18 U.S.C. § 3142(g). Each of these factors must be weighed, and the decision on whether to release is an individualized one. Patriarca, 948 F.2d at 794.

The government bears the burden of persuasion to establish that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991). Where, as here, there is probable cause to believe that the defendant committed a controlled substance offense with a maximum term of imprisonment of ten years or more, a "rebuttable presumption" of danger and flight arises. 18 U.S.C. § 3142(e). The presumption

imposes a burden of production on the defendant to come forward with "some evidence" to demonstrate that he is not a danger to the community or a flight risk. United States v. Jessup, 757 F.2d 378, 384 (1st Cir. 1985), abrogated on other grounds by United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990). Without credible evidence to rebut the presumption, the presumption alone may justify detention. United States v. Alatishe, 768 F.2d 364, 371 (D.C. Cir. 1985). Notwithstanding this rebuttable presumption, the burden of persuasion always remains with the Government. Jessup, 757 F.2d at 381.

B. Nature Of The Offense

The government alleges that on or about June 11, 2019, Mejia-Nunez drove to Massachusetts to deliver five kilograms of fentanyl to a cooperating witness for $200,000.

C. Defendant's History And Characteristics

Mejia-Nunez, age 43, was born in the Dominican Republic. He first traveled to the United States in 2003 and settled in Philadelphia, Pennsylvania. He purchased fraudulent documents to apply for Legal Permanent Resident status. Border officials flagged and stopped him as he was attempting to return to the United States from the Dominican Republic using that false identification. The defendant was then subject to removal proceedings. In 2014, however, Mejia-Nunez appeared before an immigration judge who waived his unlawful reentry and granted him proper Legal Permanent Resident status.

The defendant has been married since approximately 2008. He currently works for Uber and as a tow truck driver. He owns a garage with his three siblings that generates a monthly rental income.

The defendant has no criminal record. He owns a firearm which his family members surrendered in the past week. At the time of surrender, the gun was loaded with hollow point bullets.

D. Risk Of Flight

Mejia-Nunez has lived at the same address in Philadelphia since 2008. His mother, wife and six children also live there. The defendant's two brothers live in Philadelphia and two sisters live in Lawrence, Massachusetts.

The defendant faces significant jail time and deportation consequences if convicted of the underlying offense.

E. Dangerousness

The instant charge against Mejia-Nunez is one of narcotics trafficking, which is encompassed within Congress' definition of danger to the community. United States v. Leon, 766 F.2d 77, 81 (2d Cir. 1985). In addition, although the defendant's gun appears to have been purchased legally, the presence of hollow point bullets is concerning.

F. Assessment Of All Factors

The defendant's wife has offered to surrender the deed of the family home as collateral. His siblings also have offered to convey their interest in the garage as collateral. However, after carefully evaluating the evidence in light of the criteria for detention set forth in 18 U.S.C. § 3142, this Court finds that the government has met its burden regarding detention. In light of the nature of the present charges, particularly the amount of drugs involved, and the presumption

applicable to this case, the undersigned finds that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

ORDER OF DETENTION

In accordance with this memorandum, it is ORDERED that the defendant be DETAINED pending trial, and is further ORDERED that:

(1) Johanny Mejia-Nunez 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;

(2) Johanny Mejia-Nunez be afforded reasonable opportunity for private consultation with counsel; and

(3) on order of a court of the United States or on request of an attorney for the government, the person in charge of the corrections facility in which Johanny Mejia-Nunez is detained and confined deliver him to an authorized Deputy United States Marshal for the purpose of any appearance in connection with a court proceeding.

RIGHT OF APPEAL

THE PERSON OR PERSONS DETAINED BY THIS ORDER MAY FILE A MOTION FOR REVOCATION OR AMENDMENT OF THE ORDER PURSUANT TO 18 U.S.C. § 3145(b).

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge

Activity in Case 1:19-cr-10234-FDS USA v. Mejia-Nunez Order On Objection To Magistrate Judge Ruling

ECFnotice@mad.uscourts.gov <ECFnotice@mad.uscourts.gov> Wed, Oct 9, 2019 at 2:48 PM
To: CourtCopy@mad.uscourts.gov

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 10/9/2019 at 2:48 PM EDT and filed on 10/9/2019
Case Name: USA v. Mejia-Nunez
Case Number: 1:19-cr-10234-FDS
Filer:
Document Number: 33(No document attached)

Docket Text:
Judge F. Dennis Saylor, IV: "After careful review and consideration, defendant's Motion to Revoke Pretrial Detention Order and to Place the Defendant on Pretrial Release (Docket No. 25) is DENIED. The Court has conducted a *de novo* review of the Magistrate Judge's detention order. *United States v. Tortora*, 922 F.2d 880, 883 n.4 (1st Cir. 1990). The findings of the Magistrate Judge that defendant was both a danger to the community and a risk of flight, and that no condition or combination of conditions would reasonably assure his future appearance and protect the safety of the community, are amply supported by the record. The Magistrate Judge invoked the rebuttable presumption of 18 U.S.C. sec. 3142(e), and took into account the fact that defendant is charged with an offense involving more than five kilograms of fentanyl, which carries significant criminal penalties, including a mandatory minimum sentence; the fact that the defendant is not a citizen of the United States; the fact that he entered the country illegally in 2003, resided here without authorization until 2013, and used false identification documents to do so; and the fact that a firearm and hollow-point ammunition were recovered from his residence. Defendant notes that he has no prior criminal record; is a lawful permanent resident of the United States; has family in Pennsylvania, including children who are citizens and permanent residents; is regularly employed; and owns property in Pennsylvania, which could be used as collateral to secure his appearance. Defendant also contends, among other things, that he was a relatively minor player in the offense, and that he was not armed at the time of the transaction. While it is true that the defendant does have substantial ties to the United States, is not here illegally, and apparently purchased the firearm legally, nonetheless he is charged with a very serious crime, involving a large quantity of a very dangerous drug; he is not a citizen, and has substantial ties to the Dominican Republic; he used fraudulent identification in the past; and he possessed a firearm and ammunition. Under the circumstances, and while the issue is not free from doubt, the Court agrees with the conclusion of the Magistrate Judge that he is a danger to the community and a risk of flight and that no condition or combination of conditions would reasonably assure his future appearance and protect the safety of the community."
ELECTRONIC ORDER entered. Order On Appeal of Magistrate Judge Decision as to Johanny Mejia-Nunez. (Bono, Christine)

1:19-cr-10234-FDS-1 Notice has been electronically mailed to: