No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Gregory Bartunek – PETITIONER

vs.

United States of America – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF THE 8TH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS

I. IS IT UNCONSTITUTIONAL FOR THE LEGISLATURE TO DEFINE ALL CHAPTER 110 CRIMES OF 18 UNITED STATES CODE (18 U.S.C.), IN PARTICULAR § 2252, AND 2252A, AS "CRIMES OF VIOLENCE" AS DEFEINED IN 18 U.S.C § 3156(a)(4)(C)? AND THEN USE THAT "DEFINITION" AS THE SOLE REBUTABLE PRESUMPTION UNDER 18 U.S.C § 3142(e), WHICH CAN NOT BE REBUTED, TO DETAIN THE DEFENDANT PRIOR TO TRAIL?

II. IS IT UNCONSTITUTIONAL TO DENY BAIL PRIOR TO TRIAL UNDER 18 U.S.C 3142(e) SOLEY ON GROUNDS OF DANGEROUSNESS?

III. IS IT UNCONSTITUTIONAL OR ILLEGAL TO IGNORE THE PRESUMPTION OF INNOCENCE, UNDER 18 U.S.C. § 3142(j), WHEN EVALUATING EVIDENCE THAT IS BELOW THE LEVEL OF "CLEAR AND CONVINCING" UNDER 18 U.S.C § 3142(f)(2)(B)?

IV. IS IT UNCONSTITUTIONAL OR ILLEGAL UNDER 18 U.S.C. § 3161 TO STOP THE SPEEDY TRIAL CLOCK BECAUSE OF AN INTERLOCATORY APPEAL OF A DETENTION ORDER THAT DOES NOT RESULT IN A DELAY OF IN THE PROCEEDINGS IN THE TRIAL COURT?

V. IS IT UNCONSTITUTIONAL TO CONFINE A PERSON UNDER 18 U.S.C. § 3142 FOR OVER TWELVE MONTHS OR MORE BEFORE TRIAL IN A FACILITY WHERE DETAINEES AND PRISONERS BEING PUNISHED OR AWAITING APPEAL ARE TREATED THE SAME?

VI. DOES A DETENTION ORDER WHOSE CONTENTS DO NOT HAVE WRITTEN FINDINGS OF FACT AND/OR A WRITTEN STATEMENT OF REASONS THAT ACURRATELY REFLECT THE INDIVIDUAL FACTORS AND DETAILS OF THE CASE, OR THAT MERELY RE-SATES PART OF 18 U.S.C § 3142(f)(2)(B), VIOLATE THE CONSTITUTION OF THE UNITED STATES OR THE LAW UNDER 18 U.S.C § 3142(i)(1)?

VII. IS IT UNCONSTITUTIONAL OR VIOLATION OF ANY LAWS OR COURT RULES TO GRANT AN APPEAL BY THE PROSECUTOR OF A RELEASE ORDER UNDER 18 U.S.C. § 3145, AND REVOKE A RELEASE ORDER WHEN THERE ARE NO MATERIAL CHANGES, NO NEW FACTS, NOR ANY GOOD CAUSE SHOWN, BUT DENY THE DEFENDANT'S APPEAL TO REVOKE A DETENTION ORDER, WHEN THERE ARE MATERIAL CHANGES, NEW MATERIAL FACTS NOT PREVIOUSLY KNOWN, AND GOOD CAUSE IS SHOWN?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix [9] to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix [7], [8] to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

CITATIONS (OPINIONS BELOW CONTINUED)

Date	Filing No.	Citation
01/19/2017	1	Indictment
02/17/2017	9	Pretrial Report
02/23/2017	18	Order Setting Conditions of Release
02/28/2017	28	Order of Detention
05/24/2017	123	Judgement from USCA – 8th Circuit (17-1936) Appellant's motion for release pending appeal trial is denied for Order 28
06/14/2017	157	Mandate from USCA – 8th Circuit (17-1936) In accordance with the judgement of 05/24/2017
11/08/2017	223	Order that Motion for Review of Revocation of Detention Order and Re-Open Detention Hearing 212 is denied
11/14/2017	229	Text Order that defendant Gregory Bartunek's "Motion for this Court to take Judicial Notice and Request Hearing with Defendant Present for Motion for Review of Revocation of Detention Order and Re-Open Detention Hearing" (Filing No. 227) is denied as moot. Motion to Reconsider (Filing No. 228) is denied
12/20/2017	272	Judgment from USCA – 8th Circuit (17-3593) The judgement of the district court is summarily affirmed for Order 223 and Text Order 229
01/03/2018		Order from USCA – 8th Circuit (17-3593) The motion of appellant for an extension of time until January 10, 2018, to file a petition for rehearing is granted
02/15/2018	280	Order from USCA – 8th Circuit (17-3593) The petition for rehearing by the panel is denied
02/22/2018	282	Mandate from USCA – 8th Circuit (17-3593) In accordance with the judgement of 12/20/2017

BASIS FOR JURISDICTION

A. 12/20/2017 – Date of the Judgment, from USCA – 8th Circuit (17-3593) summarily affirming the district court Orders 223 and 229, to be Reviewed

B. 01/03/2018 – Date of Order from USCA – 8th Circuit (17-3593) granting the extension for time until January 10, 2018, to file a Petition for Re-Hearing

C. 02/15/2018 – Date of Order from USCA – 8th Circuit (17-3593) denying the Petition for Re-Hearing

D. 28 U.S.C. § 1254 – Statute conferring the Supreme Court jurisdiction to review on a writ of certiorari the judgement and order in question

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDANCES, AND REGULATIONS

1. Fourth Amendment to the United States Constitution
2. Fifth Amendment to the United States Constitution
3. Sixth Amendment to the United States Constitution
4. Eighth Amendment to the United States Constitution
5. Fourteenth Amendment to the United States Constitution
6. 18 U.S.C. § 16
7. 18 U.S.C. § 2252
8. 18 U.S.C. § 2252A
9. 18 U.S.C. § 3041
10. 18 U.S.C. § 3042
11. 18 U.S.C. § 3142
12. 18 U.S.C. § 3145
13. 18 U.S.C. § 3154
14. 18 U.S.C. § 3156
15. 18 U.S.C. § 3161
16. 28 U.S.C. § 1254
17. 28 U.S.C. § 1292
18. NECrimR 46

STATEMENT OF THE CASE

A. Jurisdiction

District Court – 18 U.S.C. § 3041, § 3142, § 3145

Court of Appeals – 18 U.S.C. § 3145, 28 U.S.C. § 1292

B. Facts

A Nebraska issued State Search Warrant (Filing No. 19, Exhibit 3) was executed on the defendant's residence, including the basement apartment of the defendant's tenant, Kyle St. John, on May 25, 2016 by the Omaha Police et. al (Filing No 122, TR 43, Exhibit 107). The Police did not arrest the defendant at that time. The defendant was indicted for two counts in violation of 18 United States Code on January 19, 2017. Count I of the Indictment charges the defendant with Distribution and Attempting to Distribute Child Pornography in violation of 18 U.S.C. § 2252A(a)(2). Count II charges the defendant with Possessing Child Pornography in violation of 18 U.S.C § 2252(a)(4)(B). (Filing No. 1). The defendant was subsequently arrested by U.S. Marshals on February 16, 2017. (Filing Nos. 5, 13).

For almost nine (9) months, between the time the Omaha Police et. al seized the property housed at the defendant's residence and the time he was arrested and incarcerated, the defendant was free in the community, working, maintaining his household, and spending time with his family, friends and his beloved dog. During that time the defendant continued to contribute to society, broke no laws, and presented no danger to any individual or the community.

On February 17, 2017, the defendant was arraigned, and pleaded not guilty to the charges. The prosecutor made an oral motion for detention. (Filing No. 11.) On

February 23, 2017, a detention hearing was held before Magistrate Judge Susan Bazis. (Filing No. 17). The Prosecutor presented evidence in support of detention. (Filing No. 19). The evidence presented by the prosecutor at that hearing and subsequent hearings was available to the Police et. al on May 25, 2016, and no new evidence was presented by the Prosecutor at any of the subsequent detention hearings. The defendant did not present any evidence. The magistrate took judicial notice of the Indictment and the Pretrial Services Report. (Filing No. 9). At the conclusion of the hearing the magistrate entered an order denying the government's motion for detention and releasing Defendant on bond as soon as electronic monitoring is in place. (Filing No. 18). According to the Probation Office, they could not have an electronic monitoring device for five (5) days until February 28, 2017. (Filing No. 120, TR 22). No one questioned this.

The Prosecutor appealed the Order on February 24, 2017. (Filing No. 24). The Prosecutor did not have any evidence that was not considered by Magistrate Judge Bazis, nor were there any material changes in circumstances between Februrary 23, 2017 and Februrary 24, 2017, nor was any good cause shown by the Prosecutor to grant the appeal as required by NECrimR 46.2. On February 28, 2017, the defendant appeared before Judge Robert Rossiter, Jr. for review of revocation of the magistrate's release order. (Filing No. 27). No new evidence was presented by either the plaintiff or the defendant. The district judge did take judicial notice of the Indictment, the Pretrial Services Report, evidence presented at the February 23, 2017 hearing, and an affidavit supporting the defendant's release from Stephen Kroll, a long-time colleague and friend of the defendant. At the conclusion of the hearing the district judge revoked the

magistrate judge's Release Order and then entered an order granting the government's motion for detention. (Filing No. 28).

On March 28, 2017, the defendant filed a Motion to Terminate Counsel. (Filing No. 36). On March 30, 2017 the defendant filed a Motion to Re-Open the Detention hearing (Filing No. 38), which was entered on April 3, 2017, after the defendant was granted Pro Se status by Magistrate Judge Bazis (Filing No. 41) during the hearing on the Motion to Terminate Counsel held on April 3, 2017. (Filing No. 40). On April 11, 2017, the Defendant appeared before Judge Rossiter, Jr. for the Motion to Re-Open the Detention hearing. The Plaintiff did not present any evidence. The defendant presented new material evidence to rebut the presumption 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. (Filing No. 122, TR 43). The district judge took judicial notice of everything presented at the February 23, 2017 hearing. At the conclusion of the hearing, the district judge denied the Defendant's Motion, leaving the Detention Order in place. (Filing No. 45).

On April 24, 2017, the defendant appealed Judge Rossiter Jr.'s denial of the Motion to Re-Open the Detention and an oral motion to be released by the defendant to the Court of Appeals of the 8th Circuit (No. 17-1936). (Filing No. 55). The defendant also filed an Affidavit in support of his Appeal. (Filing No. 57). On May 24, 2017, the Court of Appeals entered a Judgement denying the appellant's appeal. (Filing No. 123). On June 14, 2017, the Court of Appeals issued the Mandate for the appeal. (Filing No. 157).

On October 18, 2017, the defendant filed a Motion for Review of Revocation of Detention Order and Re-Open Detention Hearing. (Filing No. 212). Grounds for the motion were:

1. The defendant discovered additional evidence in support of his release that was unavailable to any of the previous detention hearings. (Filing No. 249).

    a. Court Documents
    b. Evidence
    c. Police Reports
    d. Testimony
    e. Research and Reports pertinent to rebuttal
    f. The law

2. The defendant planed on calling witnesses to offer testimony.

    a. Julie Gust – Pretrial Services
    b. David Pecha – Omaha Police
    c. Ed Hasenjager – Lawyer

On November 8, 2017, Judge Rossiter Jr. denied the defendant's motion without a hearing, and without seeing any of the new evidence, or hearing any of the testimonies. (Filing No. 223). On November 13, 2017, the defendant filed two motions, Motion to Take Judicial Notice (Filing No. 227), and Motion to Reconsider Order 223 (Filing No. 228). The respective grounds for the motions were:

1. The defendant's motion [Filing No. 212] was denied because Judge Rossiter Jr.'s Order stated that "there were no material changes in circumstances" since the last detention hearing on April 11, 2017, however there were.
2. The prolonged detention and continued detention before trial was a due process violation of the Fifth Amendment of the United States Constitution.

There were both material changes and new evidence to show that the defendant should not be detained, but the Judge refused to have a hearing, and never saw or

heard the evidence, as the evidence was not filed with the Motion. On November 14, 2017, Judge Rossiter Jr. denied Motion 227 as moot, and denied Motion 228. (Filing No. 229).

On November 22, 2017, the defendant appealed Judge Rossiter Jr.'s denial of Motion 227 and Motion 228 to the Court of Appeals of the 8th Circuit (No. 17-3593). (Filing No. 242). On December 20, 2017, the Court of Appeals summarily affirmed the Orders 223 and 229. (Filing No. 272). On January 3, 2018, the defendant filed a motion for an extension of time to file a Petition for Rehearing, which was granted that same day. The defendant filed his Petition for Rehearing on January 11, 2018, which was denied on February 15, 2018. (Filing No. 280). On February 22, 2018 the Court of Appeals issued the Mandate for the judgement of 12/20/1018. (Filing No. 282).

REASONS FOR GRANTING THE WRIT

I. IS IT UNCONSTITUTIONAL FOR THE LEGISLATURE TO DEFINE ALL CHAPTER 110 CRIMES OF 18 UNITED STATES CODE (18 U.S.C.), IN PARTICULAR § 2252, AND 2252A, AS "CRIMES OF VIOLENCE" AS DEFEINED IN 18 U.S.C § 3156(a)(4)(C)? AND THEN USE THAT "DEFINITION" AS THE SOLE REBUTABLE PRESUMPTION UNDER 18 U.S.C § 3142(e), WHICH CAN NOT BE REBUTED, TO DETAIN THE DEFENDANT PRIOR TO TRAIL?

18 U.S.C. § 3156(a)(4)(c) defines any felony listed in 18 U.S.C. Chapter 110 as a "crime of violence", including the crimes that Bartunek is charged with. This is in direct conflict with 18 U.S.C. § 16 and Black's Law Dictionary defines a crime of violence as an offence involving "physical force against the person or property of another." Congress has the power to reasonably legislate as to the right of bail for certain offenses, "provided the power is exercised rationally, reasonably, and without discrimination." Hunt v. Nebraska, 648 F. 2d 1148 (8th Cir. 1981); United States ex rel.

Covington v. Coparo, 297 F. Supp. 203 (S.D.N.Y. 1969). Since there is no person or property to use physical force against in sending, receiving, or possessing child pornography, logic defies defining these crimes as a "crime of violence." It is also discriminatory since there are no other victimless non-violent crimes that are considered a "crime of violence". If Congress is free to define any offense as a "crime of violence", they may deprive the Eighth Amendment of any force and accused persons of any protection, as was done to Bartunek in this case. In this case, both the United States and the Judge only used the fact that the rebuttable presumption was for a "violent crime" to detain the defendant. At the detention hearing on February 28, 2017, the Judge Rossiter Jr. stated,

> "I'm also required to take into consideration in that rebuttable presumption that Section 2252A(a)(2) is a crime of violence under the Statues and I must take that into consideration." (Filing No. 121 TR 13).
>
> On April 11, 2017,
>
> "And what you're charged with is also looked at as a crime of violence under the statutes. Tell me how you've (Bartunek) rebutted that presumption." (Filing No. 122 TR 23).
>
> The Unites States said,
>
> "The rebuttable presumption is for a violent crime and it's for danger to the community and that's what we've pushed for this entire time." (Filing No. 122 TR 35).

The Detention Order's "Finding of Fact" found the crime involves "A Crime of Violence". The only reason stated for the "Rebuttable Presumptions" in the Detention Order was that it was "A crime of violence". (Filing No. 28). Since a definition is not open to interpretation, it is impossible to rebut it, as it was in this case. Thus, the legislature has created an irrebuttable presumption that every individual charged with

these crimes has committed a "crime of violence", and is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release. It is impossible to rebut a presumption when the basis for that presumption is on an irrational definition as it was in this case.

> "The legislative history of the 1984 Act contained in Report of the Senate Committee on the judiciary, S. Rep. No. 98-225, 98th Cong., 2nd Sess. (1984 U.S. Code Cong. & Ad. News, p. 3182-3219)...The Report certainly makes clear that in the conduct of a case-by-case inquiry the judicial officer may not properly assume that a detention order may be justified solely on the basis of a finding that the defendant is charged with (A) a crime of violence..."

United States v. Ridinger, 623 F. Supp. 1386, 1394-1395 (W.D.Mo. 1985).

The defendant presented several facts to rebut the actual presumption based upon his charges. (Filing No. 122, TR 43; Filing No. 249). After the search and seizure of the property located in his residence on May 25, 2016, Officer Pecha told the defendant that there would be a grand jury, which might take some time, so the defendant knew he would most likely be indicted based on what Pecha told the defendant during his interrogation. (Filing No. 185, Exhibit 7, TR 1). Yet, for almost nine (9) months, between the time the Omaha Police et. al seized the property housed at the defendant's residence and the time he was arrested and incarcerated, the defendant was free in the community, working, maintaining his household, and spending time with his family, friends and his beloved dog. During that time the defendant continued to contribute to society, broke no laws, and did not flee nor present a danger to any individual or the community. He had affidavits from three (3) individuals attesting to his honesty and their belief that he would not flee from justice, nor that he would be a danger to society if released pending trial. (Filing No. 122, TR 43, Exhibits 101-103; Filing No. 249, Exhibit 125). The actual rebuttable presumption based on his

charges (not the unreasonable and irrational definition of "A crime of violence") was rebutted (or would have been rebutted if the Judge allowed the appeal and heard the evidence) simply by limiting the defendant's access to the Internet using a Firewall or other hardware or software designed to do so. Other individuals with the same charges as Bartunek have been released in the past. (Filing No. 120 TR 12). Further evidence was presented by Judge Bazis, when she granted the defendants release. Bartunek met his burden of production.

Contrary to what Judge Rossiter Jr. stated in the detention order, the weight of the evidence against the defendant/Appellant was not strong, and there was no clear and convincing evidence that the defendant/Appellant committed any prior bad acts or crimes. This is argued in Questions II and III.

On March 20, 2018, a hearing to appoint a Panel Attorney for the defendant was held. (Filing No. 308). Before the Panel Attorney was appointed, the defendant asked the judge Rossiter Jr. if there was any evidence that he could proffer that would allow him to gain pretrial release. The Judge told the defendant they were not going to discuss that matter, as it had already been resolved. The defendant again asked, but the Judge would not answer. Obviously the answer was no. Because the legislature defined the crimes the defendant was accused of as "A crime of violence", this created a logical paradox in the Judge's mind that he was unable to resolve. This definition is unconstitutional, violating the defendant's "due process", "reasonable bail", and "presumption of innocence" as guaranteed by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

The constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by an arbitrary Statute of Congress that is unreasonable and discriminatory. A judicial officer who is legislatively forced to consider the particular crime as a "crime of violence", when it is not a crime of violence, removes his discretion, and forces him to think of non-violent crimes as violent crimes, putting the defendant in the same light as a Murderer, Rapist, or Kidnapper, and to arbitrarily deny every defendant the right to bail based solely on the particular crime charged. Treating the crime the same when determining detention is not unlike when Chief Justice Burger said:

> "Freeing either a tiger or a mouse in a school room is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 419 (1971).

In this case, the Court of Appeals of the Eighth Circuit decided this important question of federal law that has not been, but should be, settled by this court, and it conflicts with previous relevant decisions of this Court, the appellate court of this circuit, as well as appellate courts in other circuits, as cited in afore cases mentioned.

II. IS IT UNCONSTITUTIONAL TO DENY BAIL PRIOR TO TRIAL UNDER 18 U.S.C 3142(e) SOLEY ON GROUNDS OF DANGEROUSNESS?

Pretrial detention is considered regulatory rather than punitive when initially imposed to prevent the risk of flight or to protect the safety of a prospective witness. But pre-trial detention is punitive and unconstitutional when imposed on grounds of defendant's alleged "dangerousness" to the community at large. In this case, the only grounds for denying the defendant bail prior to trial were based solely on his alleged dangerousness.

The detention order stated:

> B. Statement of Reasons For the Detention:
>
> _X_ By clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person or the community.

The detention order did not state that the defendant was a flight risk, nor did it identify any other person whose safety would be at risk if the defendant were released. According to United States v. Melendez-Carrion, 790 F. 2d 984 (2d Cir. 1986), "pre-trial is punitive and unconstitutional when imposed on grounds of defendants alleged 'dangerous' to the community at large." Although the Pretrial Report indicated there was a risk of Non-Appearance, the evidence they used to reach this conclusion was below the level of the "preponderance of evidence" required, and the court disagreed with the pretrial's conclusion.

The Pretrial Report's ASSESSMENT OF NONAPPEARANCE stated:

> The defendant poses a risk of nonappearance for the following reasons:
>
> 1. Mental Health History
> 2. Criminal History

However, the defendant had evidence to show that he did not have a mental health history or any criminal history that would prevent him from appearing as required. (Filing No. 249, Exhibits 102, 106, and 130). Contrary to what his brother stated, the defendant has evidence that he has never attempted suicide. The defendant does not have an alcohol or drug problem either. His brother is an alcoholic and believes anyone that drinks, drinks to excess. According to Black's Law Dictionary, a criminal history record is "An official record kept by the police of any crimes a person has committed.",

and a criminal is "Someone who has been convicted of a crime." The defendant has never been convicted of any crime, and thus has no Criminal History.

In this case, it is clear that both the Judges, the Prosecutor, and Public Defender, did not consider the defendant a flight risk. At the detention hearing on February 23, 2017, Magistrate Judge Susan Bazis stated:

> "I don't – I don't know that he's a flight risk, so to speak. He's lived here, he's got roots here, he's got a house and I don't know that that's ---" (Filing No. 120, TR 17-18).

Michael Norris, the Prosecutor, then stated:

"I'm not suggesting he is." (Filing No. 120, TR 18).

At the detention hearing on April 28, 2017, Public Defender, Michael Maloney stated:

> "Regardless of what their [Pretrial Services] recommendation was to the Court, they provided the Court with facts and information, basically his prior record, but showing that he is a person who is employed, who has long-standing ties to this community, a long-standing work history and so she [Magistrate Judge Bazis] can use that to say, in this particular case, I can find that this person is not a flight risk and I can put into place terms and conditions that will insure that he's not a danger to the community." (Filing No 121, TR 11-12).

Judge Robert Rossiter Jr. agreed with Maloney saying:

"Okay. Thank you. Well I agree with you." (Filing No. 121, TR 12).

At the detention hearing on April 11, 2017, Prosecutor Michael Norris stated:

> "So I won't have a rebuttable presumption to mental health history and I, frankly, don't care much about his mental health history." (Filing No. 122, TR 35).

Additional Evidence that the defendant is not a flight risk is shown by the fact that when the defendant was charged with 1st degree sexual assault on April 5, 2002, he posted bail with no conditions for release on May 23, 2002, and did not flee, as the case

was dismissed on March 17, 2003, 10 months after he bailed out. (Filing No 249, Exhibits 103, 201).

Judge Rossiter Jr.'s Detention Order's "Statement of Reasons for Detention" did not find any evidence whatsoever that the defendant would not appear as required. (Filing No. 28 P 1).

The detention order also stated that, "The weight of the evidence against the defendant was high." (Filing No. 28). At the detention hearing on February 28, 2017, Prosecutor Michael Norris incorrectly stated:

> "You have a Google search or a Google report to the National Center for Missing & Exploited Children that has from his IP address child pornography that is being distributed. So the weight of the evidence is very, very strong..." (Filing No. 121, TR 7).

Judge Rossiter Jr. also incorrectly stated:

> "I think there's weighty evidence based upon the Google search." (Filing No. 121, TR 13).

Both the Prosecutor and Judge are incorrect. According to the Affidavit for the Search Warrant, the evidence came from an unknown informant, omegle.com, whose reliability was never verified, not a well-known ISP like Google.com. (Filing No. 19, Exhibit 3).

Nothing in the affidavit for the warrant indicated that Omegle.com was an electronic service provider or ISP. Secondly, the information was only suspected child pornography from an uncorroborated IP Address, as NCMEC is only a conduit of the information it passes to law enforcement agencies, and does not verify the validity of any of the information it provided including a claim that it is or is not child pornography or that the IP Address information is accurate, and it is up to the law enforcement for its

independent review and analysis. (See Appendix 39: Prosecutor Discovery 000038). The NCMEC does not do the job of the police any more than does the phone company or the post office.

There is an implicit assumption that the IP addresses are unique, so that the said IP address could only be linked to the defendant's residence. This is not always true (See Appendix 41: Unreliable Informants: IP Addresses, Digital Tips and Police Raids). When two devices on the same network have the same IP address, it is called an IP address conflict. This can occur for any number of reasons including malicious mischief, errors in equipment, and configuration errors. In this case the conflict would be a duplicated address on the COX Communications network. When this happens, data can appear to come from the defendant's physical address, when in fact it came from a device elsewhere on the COX Communications network. Even COX Communications acknowledged the information it supplies linking the IP address to a subscriber is not for law enforcement purposes, and is not guaranteed to be accurate (See Appendix 40).

Finally, the judge didn't take into account that another individual, who was renting the basement apartment of the Defendant's residence and was sharing the Internet using the same IP address, could have been the source of the alleged pornography. The defendant has known the renter since 1999. The renter had moved in the Defendant's home just three (3) weeks prior to the alleged upload of the suspected child pornography. The Fact that there was a wireless router on the premises, leaves open, that someone other than the Defendant or his tenant, such as a neighbor, located at a

different physical address, was "joyriding" or using the Defendant's IP address to connect to Omegle.com. See U.S. v. Stanley, 753 F. 3d 114, 115-117 (3rd Cir. 2014).

Pretrial detention to avoid undue risks of flight or jeopardy to the trial process is not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law. Pretrial detention to prevent future crimes against society at large; however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is unconstitutional not because preventing crime is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.

Permitting an arrested person thought to be dangerous to remain at liberty unquestionably incurs a risk. The prediction of dangerous conduct, however difficult to make and however unreliable, will undoubtedly be correct in some instances. But all guarantees of liberty entail risks, and under our Constitution those guarantees may not be abolished whenever government prefers that a risk not be taken. The limited circumstances justifying incarceration for dangerousness serve to highlight the

fundamental unlawfulness of pretrial preventive detention. United States v. Gallo, 653 F. Supp. 320 (E.D.N.Y. 1986).

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Each defendant stands before the bar of justice as an individual. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951). In this case, the Court of Appeals of the Eighth Circuit decided this important question of federal law that has not been, but should be settled by this court, and it conflicts with previous relevant decisions of this Court, the appellate court of this circuit, as well as appellate courts in other circuits, as cited afore cases mentioned.

III. IS IT UNCONSTITUTIONAL OR ILLEGAL TO IGNORE THE PRESUMPTION OF INNOCENCE, UNDER 18 U.S.C. § 3142(j), WHEN EVALUATING EVIDENCE THAT IS BELOW THE LEVEL OF "CLEAR AND CONVINCING" UNDER 18 U.S.C § 3142(f)(2)(B)?

The reason that the defendant was detained had nothing to do with the current charges of child pornography, because the safety of the community could be reasonably assured by limiting the defendant's access to the Internet. The reason he is being detained is based on previous charges and allegations that are mere suspicions that don't even rise to the level of probable cause, and far from clear and convincing. They are:

1. Charges of 1st Degree Sexual Assault in 2002, which were dismissed. Filing No. 19 Exhibit 1,

2. A Crimestoppers tip concerning possible possession of child pornography years earlier. Filing No. 19 Exhibit 3,

3. Open investigation regarding the possible sexual assault of a seven-year-old boy. Filing No. 19 Exhibit 3, and

4. Photography of guns, a drawer of adult underwear, and dolls. Filing No. 9 P 5; (See Prosecutor Discovery 000528-530,000254).

In the 2002 incident there is no corroborating evidence any crime was committed at all. The sole source of all information about the alleged crimes came from the alleged victim, who was himself, charged with 1st Degree Sexual Assault, prior to accusing the defendant of wrongdoing. Although, the alleged victim was a minor, he was not a child as pretrial services and the prosecutor claimed. The alleged victim was found to be so unreliable, that two separate courts dismissed all charges against the defendant and did not charge the defendant with child pornography either.

The "evidence" of that the Police found during the execution of the warrant cannot be considered, because the search warrant was found illegal and unconstitutional by both Sarpe and Douglas County Courts, and any evidence of the poisoned fruit cannot be used in a court of law, or at a detention hearing. U.S. v. Apker, 964 F. 2d 742, 744 (8th Cir. 1992). Similar to the Apker case, the district judge in this case erred in admitting (and considering) the challenged evidence against the defendant which was found inadmissible by a final order of not one, but two courts! This information should not have been used as it would be a violation of the defendant's Fifth Amendment rights against self-incrimination to do so.

All evidence seized by the Omaha Police in 2002 was returned to the defendant on May 29, 2003 (See Appendix 42). Contrary to what the police reports indicated,

there was no child pornography found on any of the evidence seized, and then returned to the defendant.

Furthermore, since the alleged victim was in jail on a charge of 1st Degree Sexual Assault and acted as an undercover agent for the police at the time his information was given to the Omaha Police, who obtained the warrant, no information obtained by execution of the warrant, such as the sex toys or folder of photographs, can be used or even considered in any proceeding whatsoever.

> "A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever."

Nebraska Statute 29-2262.01

No information about the Crimestoppers tip was provided to corroborate the allegations against the defendant in this case. The prosecutor argues that the defendant was uncooperative during the "knock and talk". Filing No 24 P 9. This is not true. The defendant answered questions about his job and life, but when the officer asked if he could look at his computer(s), without a warrant, the defendant asked the officer if he respected the Fourth Amendment of the Constitution. The officer said that he did, and the defendant told him that he had his answer. But the officer's actions didn't reflect what he said, as he repeatedly attempted to get the defendant to give up his rights to be secure in his own home as guaranteed by the Fourth Amendment of the Constitution of the United States. To say that the defendant was not cooperating or infer that he is guilty of a crime because he was asserting his constitutional rights, is a slap in the face to our founding fathers and our Constitution. Furthermore, there was no

details about the Crimestoppers tip in the affidavit of the warrant. Statistics show that the number of arrests and charges arising from Crimestoppers tips are very low at 2.4% and 5.4%, respectively, making them a highly unreliable. The government has the additional information included in the Crimestoppers tip itself, but was unwilling to make this information available to the defendant at any of the detention hearings. The defendant has had no opportunity to rebut the same and the defendant denies the allegation. The Crimestoppers tip was used by the government in its argument (Filing No. 24 P 6, 9), and in the judge's decision to detain the defendant (Filing No. 28), but should not have been allowed since it violates the defendant's rights of due process, right to face his accusers, equal protection under the law, and presumption of innocence guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. Unlike United States v. Ridinger 623 F. Supp. 1386, 1390 (W.D.Mo. 1985) where evidence, not available to the defendant, was excluded in the judge's decision to detain the defendant in that case.

No details of the investigation of the alleged assault of the seven-year-old were included as evidence in the detention hearings by the government, because the government knew that it would weaken their argument. The fact is that the details of the investigation show that this alleged incident have the classic signs that the allegation is false. Those signs included:

1. Custody and visitation dispute in which the defendant was caught in the middle of.
2. The allegation was not spontaneous.
3. The child was caught in innocent or ambiguous behaviors with another child that triggered questions about sexual abuse.
4. There was an initial denial by the child of any wrongdoing by anyone.
5. The child was asked suggestive questioning by several relatives and friends.

6. There was an absence of coercion, threats, or secrecy by the defendant against the child.
7. Parents have personality or psychiatric problems.

Even without the details, research shows that over 50% of sexual abuse allegations in cases like this are false.

The alleged assault occurred in the summer of 2015, over a year before it was reported. The defendant was accused of touching the boy through his clothes one time. The father of the boy and the defendant were friends and remained so, after the incident was reported. The defendant continued to have contact with the boy and his father for several months after the report, until his father moved to another state. And then the defendant continued to maintain contact with the father after he moved.

As in this case, false accusations can be prompted, aggravated or perpetuated by law enforcement, prosecution officials or other government agencies, and the courts, who become convinced of the guilt of the accused. Disconfirming evidence can lead to cognitive dissonance on the part of these individuals, and lead them to deliberately or unconsciously attempt to resolve dissonance by ignoring, discounting or even destroying the evidence. Once any steps are taken to justify the decision that the accused is guilty, it becomes very difficult for the official to accept disconfirming evidence, and this can continue during appeals, retrials or any effort to revisit the verdict. This is so true in this case!

It is unclear as to why the photographs of the guns, underwear, or dolls is any evidence of any crime, or evidence to support detention.

And then there is the drawer of underwear. The prosecutor claims that several people identified that the drawer was a drawer of children's underwear. Although the

officers et. al claimed they were children's underwear, clearly the underwear was adult underwear as evidenced by the photographs taken during the execution of the search warrant on May 25, 2016. The officer's and marshal's judgments were tainted by what they expected to find, based upon what they allegedly knew. The evidence clearly shows it was adult underwear as shown by the brands, size, and included a clear picture of men's boxers size M 34-36.

In all three of the past unproven allegations of crimes, there is no "clear and convincing evidence" to support a conclusion that the defendant has ever committed any crime. Suspicions are not enough to prove that the defendant is a danger to any other person or the community. There is clear and convincing evidence in favor of the defendant's innocence of the past charges and allegations against him, introduced by the law in his behalf. That is the "Presumption of Innocence." The judge totally ignored the Presumption of Innocence included in 18 U.S.C. § 3142(j) as well as recognized by the Fourteenth Amendment of the Constitution of the United States. All of the evidence presented at the hearing was hearsay evidence of unproven inaccurate knowledge and unverified facts that were mere suspicions, not even rising to the level of probable cause, let alone to the level of clear and convincing evidence. The government failed to establish the reliability of the hearsay evidence in any way.

> "The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumption juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy. Concluding, then that the presumption of innocence is evidence in favor of the accused introduced by the law in his behalf..."

Coffin v. United States, 156 U.S. 432, 460 (1895).

One must ask, "Which carries more weight? Suspicions of past unproven charges and allegations lacking in probable cause, or the legal evidence of the presumption of innocence?" The answer is clear that the law of the presumption of innocence does, and thus all the past unproven allegations must not even be considered in the court's decision. To reach any other conclusion would be unreasonable, a violation of the defendant's constitutional rights, and a gross miscarriage of justice.

IV. IS IT UNCONSTITUTIONAL OR ILLEGAL UNDER 18 U.S.C. § 3161 TO STOP THE SPEEDY TRIAL CLOCK BECAUSE OF AN INTERLOCATORY APPEAL OF A DETENTION ORDER THAT DOES NOT RESULT IN A DELAY OF IN THE PROCEEDINGS IN THE TRIAL COURT?

According to 18 U.S.C. § 3161(c)(1), in any case in which a plea of not guilty is entered, the trial of the Defendant shall commence within seventy (70) days from Arraignment. This history of the Bail Reform Act supports the conclusion that Congress did not envision pretrial detention ever extending beyond a few months. Nevertheless, extended imprisonment has become the rule rather than the exception whenever pretrial detention is used. The Senate "did not fully appreciate just how long pretrial detention might last under the exclusions of the Speedy Trial Act." United States v. Melendez-Carrion, 790 F. 2d at 996. In some circumstances the Speedy Trial Act does not work to protect against lengthy incarceration. United States v. Colombo, 777 F. 2d 96 (2d Cir. 1985).

Excludable time provisions of the Speedy Trial Act often push back the trial for months, and even years, despite the possible detention of Defendants. The Speedy Trial Act lists eight major categories of reason for excludable time, with numerous sub-categories specifying the various exigencies that might necessitate delay. See 18

U.S.C. § 3161(h). 18 U.S.C. § 3161(h) makes it very clear that the excludable period must result from a delay caused by other proceedings such as interlocutory appeals, pretrial motions, etc. Many courts have ignored this fact, assuming any interlocutory appeal or pretrial motion automatically causes a delay. This is not true. For example, an interlocutory appeal of a detention or release order has no bearing whatsoever on the progression of the case. As such, an Interlocutory appeal of a detention or release order cannot cause a delay for the trial court, because before the appeal was made, the time for the motion and hearing for detention or release has already been excluded from the speedy time clock. Once jurisdiction is removed from the trial court by the appeal, the trial court is not affected in any way.

As in this case, on April 24, 2017 the Defendant filed an interlocutory appeal (Filing No. 55) to his detention order (Filing No. 28). The appeal was denied on May 24, 2017. (Filing No. 123). The mandate was issued on June 14, 2017 (Filing No. 157). The case continued to progress with no delay from the appeal, as motions were made, heard, and judged, orders were issued, notices were filed, requests made, and responses filed. Thus, an interlocutory appeal does not stop the speedy trial clock for two reasons: 1) No delay is caused by the appeal; 2) "an order fixing bail can be reviewed without halting the main trial -- its issues are entirely independent of the issues to be tried --" United States v. Hollywood, 458 U.S. 263, 265 (1982).

In the case of an Interlocutory Appeal of a Detention Order, clearly "the ends of justice will be served by not stopping the speedy trial clock. The interests of the public and the defender in a speedy trial outweigh delaying the trial because there is no actual delay incurred." Interlocutory Appeal delays for an appeal of detention order under 18

U.S.C. § 3161(n)(1)(c) are a violation of speedy trail clause of the Sixth Amendment of the United States Constitution, and are unconstitutional.

V. IS IT UNCONSTITUTIONAL TO CONFINE A PERSON UNDER 18 U.S.C. § 3142 FOR OVER TWELVE MONTHS OR MORE BEFORE TRIAL IN A FACILITY WHERE DETAINEES AND PRISONERS BEING PUNISHED OR AWAITING APPEAL ARE TREATED THE SAME?

Due Process Analysis

A trial court is obligated to examine the constitutional implications of detention in the context of changed circumstances. One significant area of inquiry is the effect of prolonged detention on due process. As is indicated in the discussion which follows, fixed, chronological parameters are not possible. Nevertheless, any pretrial detention of more than 90 days exceeds what Congress contemplated, and a pretrial detention of more than six months should flash a warning that a violation of due process has probably occurred.

a. *Punishment vs. Regulation*

Under the due process clause of the Fifth Amendment a defendant may not be punished prior to an adjudication of guilt conducted in accordance with due process of law. Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447 (1979); Ingraham v. Wright, 430 U.S. 651, 671-672 n.40, 674, 97 S. Ct. 1401, 1412-13 n.40, 1414, 51 L. Ed. 2d 711 (1977); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-67, 186, 83 S. Ct. 554, 565-67, 576, 9 L. Ed. 2d 644 (1963); Wong Wing v. United States, 163 U.S. 228, 237, 16 S. Ct. 977, 980, 41 L. Ed. 140 (1896).

Defendants can, nevertheless, be detained under the Bail Reform Act without many of the procedural protections ordinarily guaranteed by the due process clause when they are incarcerated for an acceptable regulatory reason, rather than for punishment of a delict. The decision to detain for regulatory purposes does not require proof of a threat beyond a reasonable doubt, is not subject to Sixth Amendment jury guarantees, and does not provide for the defendant's right to confront and cross-examine witnesses. A defendant may in fact be detained by the court on the basis of double or triple hearsay. *See* United States v. Accetturo, 783 F. 2d 382, 393 (3d Cir. 1986) (Sloviter, J., dissenting). A defendant thus may be incarcerated without the many constitutional and evidentiary protections normally guaranteed those who are to be punished pursuant to judicial proceedings.

Pretrial detention is considered regulatory rather than punitive when initially imposed to protect the safety of a prospective witness. *But cf.* United States v. Melendez-Carrion, 790 F. 2d 984 (2d Cir. 1986) (pre-trial detention is punitive and unconstitutional when imposed on grounds of defendant's alleged "dangerousness" to the community at large). Due process implications change considerably, however, when such detention is prolonged for such an extended period of time as to become punitive in effect. "[L]engthy delay can transform what might otherwise be a valid regulatory measure into one that is punitive regardless of Congress' stated intentions." *Id.* at 1007 (Feinberg, C.J., concurring in judgment).

> "[T]he mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment.... Even given, therefore, that pretrial detention may serve legitimate regulatory purposes,

> it is still necessary to determine whether the terms and conditions of confinement ... are in fact compatible with those purposes."

Schall v. Martin, 467 U.S. 253, 269, 104 S. Ct. 2403, 2412, 81 L. Ed. 2d 207 (1984). Thus, pretrial detention should be imposed in the least restrictive manner possible, only to the degree necessary to vindicate the non-punitive aims of such detention. *Id.;* Bell v. Wolfish, 441 U.S. 520, 537-38, 99 S. Ct. 1861, 1873-74, 60 L. Ed. 2d 447 (1979). The legislative history of the Bail Reform Act reflects Congress' understanding that though pretrial detention is not *per se* unconstitutional, it may be constitutionally infirm if accompanied by inadequate procedural safeguards or if detention is not limited to those cases where it is necessary to serve compelling societal interests. Senate Report at 8, *reprinted in* 1984 U.S.Code Cong. & Ad.News at 3191.

b. *Length of Detention*

Otherwise valid pretrial detention does assume a punitive character, and thus offends the due process clause, when it is significantly prolonged. Such incarceration is "rendered so harsh by its length that it ... degenerates into punishment." Melendez-Carrion, 790 F. 2d at 1008 (Feinberg, C.J., concurring). *See also* United States v. Gonzalez Claudio, 806 F. 2d 334 (2d Cir. 1986); United States v. Salerno, 794 F. 2d 64, 78 (2d Cir.) (Feinberg, C.J., dissenting), *cert. granted,* --- U.S. ----, 107 S.Ct. 397, 93 L.Ed.2d 351 (1986); United States v. Theron, 782 F. 2d 1510, 1516 (10th Cir. 1986); United States v. Colombo, 616 F. Supp. 780, 786 (E.D.N.Y.), *rev'd on other grounds,* 777 F.2d 96 (2d Cir. 1985).

Every court that has addressed the matter has decided that, despite Congress' silence on the issue in the Bail Reform Act, due process may be violated by reason of a prolonged extension of pretrial incarceration. United States v. Zannino, 798 F. 2d 544, 548 (1st Cir. 1986); United States v. Perry, 788 F. 2d 100, 118 (3d Cir.), *cert. denied,* --- U.S. ----, 107 S. Ct. 218, 93 L.Ed.2d 146 (1986); United States v. Accetturo, 783 F. 2d 382, 387-88 (3d Cir. 1986); United States v. Theron, 782 F. 2d 1510, 1516 (10th Cir. 1986); United States v. Portes, 786 F. 2d 758, 768 (7th Cir. 1985); United States v. LoFranco, 620 F. Supp. 1324, 1325 (N.D.N.Y.1985), *app. dism'd,* 783 F. 2d 38 (2d Cir. 1986); United States v. Hall, 651 F. Supp. 13 (N.D.N.Y.1985); United States v. Hazzard, 598 F. Supp. 1442, 1451 n. 5 (N.D.Ill.1984).

In United States v. Colombo, 777 F.2d 96 (2d Cir. 1985), the Second Circuit explicitly agreed with this court that in some circumstances where the Speedy Trial Act does not work to protect against lengthy incarceration, "the length of a defendant's pretrial detention might not survive a proper due process challenge." *Id.* at 101-102. And although the appellate court in Colombo overturned this court's release of the defendant because it would not accept this court's estimate of the time the defendant would be incarcerated before trial, it concurred that length of imprisonment is a significant factor that must be considered by the trial court in establishing the constitutionality of pretrial detention. *Id.* (See the discussion below, infra at 343, of the time Colombo actually was detained prior to trial.) Similarly, while the Circuit affirmed the denial of bail in United States v. Berrios-Berrios, 791 F. 2d 246 (2d Cir. 1986), it unambiguously implied that length was a factor to be considered in assessing the soundness of detention orders on a case-by-case basis. *Id.* at 252-53 & n.5. Even in

the case where "the enforcement of due process limits upon the duration of preventive detention creates the risk that a person accused of crime may avoid a trial" because of the likelihood that he may flee, the due process infringement of prolonged detention can at some point be "of at least equal gravity," mandating release. United States v. Gonzales Claudio, 806 F. 2d 334, 343 (2d Cir. 1986).

VI. DOES A DETENTION ORDER WHOSE CONTENTS DO NOT HAVE WRITTEN FINDINGS OF FACT AND/OR A WRITTEN STATEMENT OF REASONS THAT ACURRATELY REFLECT THE INDIVIDUAL FACTORS AND DETAILS OF THE CASE, OR THAT MERELY RE-SATES PART OF 18 U.S.C § 3142(f)(2)(B), VIOLATE THE CONSTITUTION OF THE UNITED STATES OR THE LAW UNDER 18 U.S.C § 3142(i)(1)?

The Detention Order was a "Cookie-Cutter" order that was invalid and illegal.

First of all, it did not include "a written statement of facts" for detention as required by 18 U.S.C. § 3142(i). Rather, the detention order involved in this case merely mimicked incorrect statements contained in the Pretrial report, which were simply conclusions, lacking any detailed facts, regarding the Defendant's alleged past conduct, not facts. It stated, "History/Charge involving a Child; History/Charge Involving Use of Computer to Facilitate Alleged Offense; History/Charge Involving Sex Offense/Abuse; Pattern of Similar Criminal Activity History; Safety Concerns for the Community or a Specific Individual; Criminal History". (Filing No. 9 P 5). There was no Criminal History, or Pattern of Similar Criminal Activity History, as the Petitioner has never been convicted of a crime. Then the court used the pretrial report in its legal findings to detain the defendant. According to the pretrial report, "This pretrial report has been prepared pursuant to 18 U.S.C. 3154(1). The recommendation is provided for the consideration of the Court and is separate from legal findings (emphasis added) as

weight of the evidence [18 U.S.C. 3142(g)(2)] or rebuttable presumptions for detention [18 U.S.C. 3142(f) and (e)]." (Filing No. 9 P 5). The Finding of Fact cannot be conclusions of the judge or summary of the recommendation of the Pretrial Report, but must specify detailed facts specific to the case that the Judge used to reach his reason for detention. Without these facts, there is no basis for detention or a way to rebut it.

Secondly, it did not include "a written statement of the reasons for the detention" for detention also required by 18 U.S.C. § 3142(i). Rather, the detention order involved in this case merely included a conclusory recitation of the statutory language of a sentence in 18 Section 3142(f)(2)(B). The Detention Order Statement of Reasons for Detention (Filing No. 28) stated:

> "By clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any person or the community."
>
> 18 U.S.C §3142(f)(2)(B) states:
>
> "that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."

The two statements are almost "word-for-word" the same, but in a different order. The detention order obviously failed to identify any "person" whose safety may have been endangered by the defendant's pretrial release. Nor did it state how the safety of the "community" would be protected by the defendant's pretrial detention. Certainly there is no finding, nor any evidence to support a finding that the Defendant would engage in any criminal activity to the detriment of the community if he were released on bail. The conclusory recitation of the language of the statue does not comply with the mandate of Section 3142(i), which sets forth the requirements of the contents of a detention order. For that section expressly provides that in all detention orders issued

pursuant to Section 3142(e), "the judicial officer shall--(1) include *a written findings of fact* and *a written statement of the reasons for the detention*." (Emphasis added). It is obvious that Section 3142(i) requires that the judicial officer include both (1) findings of fact, and (2) a written statement of the reasons for detention. The decision of whether a pretrial detention order should be entered must necessarily be decided on a case-by-case basis. The mere recitation of the conclusory statutory language of Section 3142(f)(2)(B) does not comply with the mandate of Section 3142(i). United States v. Ridinger, 623 F. Supp. 1386, 1394 (W.D.Mo. 1985).

VII. IS IT UNCONSTITUTIONAL OR VIOLATION OF ANY LAWS OR COURT RULES TO GRANT AN APPEAL BY THE PROSECUTOR OF A RELEASE ORDER UNDER 18 U.S.C. § 3145, AND REVOKE A RELEASE ORDER WHEN THERE ARE NO MATERIAL CHANGES, NO NEW FACTS, NOR ANY GOOD CAUSE SHOWN, BUT DENY THE DEFENDANT'S APPEAL TO REVOKE A DETENTION ORDER, WHEN THERE ARE MATERIAL CHANGES, NEW MATERIAL FACTS NOT PREVIOUSLY KNOWN, AND GOOD CAUSE IS SHOWN?

The Motion for Review of Revocation of a Release Order by the Plaintiff should have been dismissed because no additional evidence was presented, nor was any good cause shown to grant the motion as pursuant to NECrimR 46.2(c) and 18 U.S.C. § 3142(f)(2)(B). The rule states in part,

> "Appeal of Detention Order. When reviewing a magistrate judge's order of detention or release, a district judge may hear and consider additional evidence not considered by the magistrate judge if that evidence was not available to be presented to the magistrate judge at the hearing held under 18 U.S.C. § 3142(f) or for other good cause shown."

NECrimR 46.2(c).

The prosecutor didn't provide any legal reasons or basis, nor offer any additional evidence, nor any good reason(s), in his motion or at the detention hearing which would justify granting his motion. (Filing No. 24). The prosecutor only included previous

evidence to reinforce his opinion that the defendant be detained, but omitted material evidence that would have been in favor of release of the defendant. The evidence he did present to the judge was simply a reiteration of some of the evidence in the exhibits and pretrial report presented to and considered previously by the magistrate judge. Although he did present new arguments, the arguments were unreasonable, and they did not constitute new evidence. He tried to convince the court that the defendant was a sexual predator and that electronic monitoring would not be effective, even though his definition of a sexual predator didn't fit, and electronic monitoring has been effective for years. (Filing No. 24 P 8; Filing No. 121 P 8). There was no "clear and convincing" evidence to support his arguments.

In United States v. Ridinger the court stated,

> "The point of beginning is that recognized by Chief Judge Weinstein in his recent decision in United States v. Colombo, 616 F. Supp. 780, 784 (E.D.N.Y.1985). It was there suggested that the adoption of Section 3142 procedures that would require 'two evidentiary hearings--the first before the magistrate and the second before the district court'—should be avoided. (Id. At 784). Chief Judge Weinstein, we believe properly stated that 'the magistrate should conduct the bail application evidentiary hearing unless, in an unusual case, the district court judge, in the exercise of his or her discretion, reopens the matter for new evidence.' (Id. At 784).
> We carry that thought further by suggesting that the Section 3142 cases in which the district court judge, on de novo review, should be required to exercise his or her discretion to reopen a case should ordinarily be confined to cases in which a defendant may wish to offer newly discovered evidence (emphasis added)."

United States v. Ridinger, 623 F. Supp. 1386, 1401 (W.D.Mo. 1985).

In this case, Judge Rossiter Jr. did exactly what Chief Judge Weinstein and others feared a judge would do in Section 3142 cases, and held a second hearing before the district court without any new evidence or reasonable grounds to do so.

New facts and material evidence in favor of releasing the defendant were discovered and/or given to the defendant after the Detention Hearing on April 11, 2017, that were not available to the defendant prior to that hearing. NECrimR 46.2, 18 U.S.C. § 3142, due process and equal protection, and other rights and laws demand that the defendant be heard, evidence proffered, and witnesses called in a new detention hearing before an impartial and unbiased Judge (Filing No. 249).

VIII. CONCLUSION

The afore facts and arguments show that there are compelling reasons that this court grant this petition for writ of certiorari. The questions in this petition are very important matters, but have not been answered by this court because they deal with pretrial detention, and most defendants that are incarcerated for lengthy periods pending trial are represented by overburdened public defenders that don't have enough time to properly represent their clients, let alone, bring a petition such as this before the court.

The defendant/appellant will remain incarcerated for at least four more months, and with the possibility of mistrial, time for sentencing, appeals, he may remain incarcerated and punished before trial for up to two years.

Wherefore, the defendant/appellant prays that the court grant this petition and release the defendant/appellant pending trial under minimum conditions according to 18 U.S.C § 3142.

Respectfully Submitted,

Gregory P. Bartunek

Date: 07/02/2018

Gregory P. Bartunek