

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA

v.

BARRY R. STOKES

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**No. 3:06-00204
JUDGE ECHOLS**

**MOTION AND INCORPORATED MEMORANDUM
TO REOPEN DETENTION HEARING**

Barry Stokes, through counsel, and pursuant to the Fifth and Sixth Amendments to the Constitution of the United States, and 18 U.S.C. ¶ 3142, respectfully moves this Court to reopen his detention hearing so that he may present evidence that he is not a risk to flee and/or that there are conditions that will ensure his appearance in court. Mr. Stokes submits that he is entitled to a new hearing for because: (1) he has new evidence, not known to him at the time of the original hearing, that is material to the question of his eligibility for release; and (2) he was deprived of effective assistance of counsel at the original hearing when his attorney failed to present critical evidence establishing his family and community ties and rebutting the Government's claims of his flight risk; and (3) fundamental notions of fairness and due process in the Fifth Amendment and the fundamental right to bail in the Eighth Amendment counsel this Court to conduct a hearing regarding Mr. Stokes' right to be released.

I. BACKGROUND

Mr. Stokes' original detention hearing took place on October 19, 2006. At that hearing, Mr. Stokes was represented by Paul N. Buchanan, a bankruptcy lawyer from Round Rock, Texas. The Government called a single witness, Suzanne Nash, a Special Agent with the F.B.I. In addition to testifying about the strength of the Government's ERISA fraud case against Mr. Stokes, Agent Nash testified that Stokes had downloaded a document entitled *How to Change Your Identity* from the Internet approximately six weeks before his arrest. Agent Nash also testified that Stokes had cashed several checks, approximately one month before his arrest. On the basis of this evidence, the

Government argued that Stokes posed a significant flight risk and should be detained.

Mr. Stokes did not know that the Government intended to present evidence of either the downloading of the *How to Change Your Identity* document or the cashing of the six checks. Accordingly, Mr. Buchanan was not prepared to rebut this evidence at the hearing. Rather than request a continuance – to consult with Mr. Stokes about the surprise evidence and determine how to best respond – Mr. Buchanan failed to present any evidence to challenge the Government’s allegations. Accordingly, the Court was left with the impression that Mr. Stokes may have been preparing to flee the jurisdiction to avoid prosecution. After the Government finished its proof, Mr. Buchanan called one witness on Mr. Stokes’ behalf: Kevin Hunter Sharp, a Nashville-based attorney who represented 1Point Solutions, Stokes’ company. Mr. Sharp testified that Mr. Stokes had surrendered his passport to the defense team representing 1Point Solutions. Mr. Sharp had Mr. Stokes’ passport in his possession at the detention hearing and was prepared to turn in over to the Court.

On October 20, 2006, the Court ordered that Mr. Stokes be detained, explaining that the Government had proved, by a preponderance of evidence, that there was a serious risk that Stokes would flee or obstruct justice. Accordingly, Mr. Stokes has been detained continuously since his arrest on October 13, 2006.

However, the truth is that Mr. Stokes was not preparing to flee the jurisdiction. He cashed the checks because he needed money to hire a lawyer and he possessed the *How to Change Your Identity Document* because he was concerned about security issues at his company. This evidence was not presented because Mr. Stokes did not know he needed to rebut the evidence.

II. ARGUMENT

A. Mr. Stokes is entitled to reopen his detention hearing on the basis of new information.

The Bail Reform Act permits the reopening of a detention hearing “if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the

appearance of such person as required and the safety of any other person and the community.” 18 U.S.C. §3142(f)(2)(B); *see e.g. United States v. Peralta*, 849 F.2d 625 (D.C. Cir. 1988) (upholding district court’s reopening of detention hearing at government’s request on basis of defendant’s loss of suppression motion which increased likelihood of conviction). Section 3142(f) “seems to require something akin to ‘newly discovered evidence which by due diligence could not have been discovered’ earlier.” *United States v. Bradshaw*, 2000 WL 1371517, at *2 (D. Kan. July 20, 2000) (quoting Fed. R. Civ. P. 60(b)(2)).

Mr. Stokes has new evidence that corroborates his position that he is not a risk of flight. Although Mr. Stokes wants the court to know that it was never his intention to flee, there have been various developments in Mr. Stokes’ life, since his detention hearing, that have effectively eliminated any risk of flight.

First, since Mr. Stokes’ arrest and the initial detention hearing, he has been stripped of his assets by the Bankruptcy Court. Mr. Stokes’ financial condition has deteriorated further and he has lost any possible financial ability flee the jurisdiction. Such evidence of a defendant’s lack of financial resources is information that should be considered by the court in determining whether an accused poses a risk of flight. 18 U.S.C. §3142(g)(3)(A) (listing financial resources as one factor for court to consider in assessing “whether there are conditions of release that will reasonably assure the [defendant’s] appearance”); *United States v. Holmes*, 438 F. Supp.2d 1340, 1349-50 (S.D. Fla. 2005) (explaining that family ties, employment, financial resources and length of residence in the community are the factors that bear most directly on question of risk of flight, while other factors listed under 18 U.S.C. §3142(g) are more relevant to question of dangerousness); *United States v. Sacks*, 1999 WL 391356, at *2 (E.D. Pa. May 21, 1999) (defendant’s “present lack of substantial financial resources,” among other factors, led court to conclude that he was not a flight risk).

Second, Mr. Stokes has been incarcerated now for six months and this incarceration has been extremely difficult on him. Even though Mr. Stokes always intended to appear and fight his case, it has only made his desire to stay and fight the charges against him stronger and has solidified his

firm commitment to appear to answer these charges. Mr. Stokes has a history of appearing in court. He appeared in his civil cases related to this criminal charge at a deposition, at two meetings with the bankruptcy trustee, at hearings before Judge Nixon even though he was told by his attorney that he may be incarcerated, and he voluntarily turned over his passport. Additionally, during this six month incarceration his health has deteriorated. He has not received his diabetes medications and must walk laps of 4 or 5 miles day in his cell-block in order to keep his blood sugar under control. He is receiving a diet that is high in fat and high in carbohydrates in the jail and this poor diet is further aggravating his medical condition. He also has prostrate problems that he feels are not being treated properly in the jail. These developments over the last six months constitute new evidence that this Court should consider. Because of his deteriorating health, Mr. Stokes does not have the physical ability to flee the jurisdiction and this fact weighs in favor of his release.

Third, since the original detention hearing, Mr. Stokes father has died and his mother has had to go to a nursing home due to her deteriorating condition. His mother's vulnerable condition further ties Mr. Stokes to this area and weighs significantly against him being a risk of flight.

Mr. Stokes also seeks to introduce evidence that (a) he downloaded the *How to Change Your Identity* document when investigating internal problems with identity theft at 1Point Solutions, as well as the fact that he was reviewing security issues in order to secure a contract with AMEX and (b) he cashed the checks in order to pay legal expenses for his company and himself. This evidence – offering innocent explanations for Stokes' actions and rebutting the suggestion that his actions revealed an intent to flee– also constitutes new evidence under 18 U.S.C. §3142(f)(2)(B). Mr. Stokes had no advance notice that the Government intended to introduce proof that he downloaded the *How to Change Your Identity* document and withdrew amounts of cash in the six weeks before his arrest. Consequently, Mr. Stokes had not had any discussion with his attorney, Mr. Buchanan, about these allegations before the hearing and Buchanan was, therefore, *not* aware that Stokes had an innocent explanation for his actions. Thus, no evidence was presented at the hearing challenging the Government's characterization of the internet document or the cash withdrawals; at the time of

the hearing, Mr. Stokes did not know he needed to be prepared to rebut these allegations. In addition, and alternatively, Mr. Stokes submits that this is evidence that the Court should consider because of fundamental notions of fairness and due process contained in the Fifth Amendment and in order to protect Mr. Stokes' constitutional right to bail guaranteed by the Eighth Amendment. *See United States v. Shareef*, 907 F. Supp. 1481, 1483-84 (D. Kan. 1995) (ordering reopening of detention hearing to examine due process implications of prolonged, i.e. nine-month, detention).

In short, Mr. Stokes wants to present all of this new information to this Court and he wants to testify concerning the events in his life over the last six months and how he will appear in court and follow all the court's conditions. Collectively, Mr. Stokes' new evidence has "a material bearing on the issue whether there are conditions of release that will reasonably assure [his] appearance." 18 U.S.C. §3142(f)(2)(B); *United States v. Mango*, 2007 WL 772894, at 2 (hearing reopened on basis of new evidence of both defendant's mother's willingness to act as custodian as well as new information about strength of government's evidence). Accordingly, both Section 3142(f)(2)(B) of the Bail Reform Act, as well as general principles of due process, require that Mr. Stokes' detention hearing be reopened for consideration of his new evidence. *See e.g. United States v. Baucum*, (district court conducted second detention hearing at which it heard the defendant's proffer of new evidence but ultimately decided both that the evidence was not unknown to movant at time of first hearing and that defendant had effective counsel at first hearing).

B. Alternatively, Mr. Stokes' detention hearing should be reopened because he had ineffective assistance of counsel at the original hearing.

A defendant is also entitled to reopen a detention hearing if his attorney at the original hearing failed to present available, material evidence in support of his release. *United States v. Baucum*, 2001 WL 1448604, at *1-2 (D. Ariz. Nov. 15, 2001) (explaining that Sixth Amendment guarantee applies to every critical stage of proceeding, including a detention hearing; therefore, ineffective assistance of counsel provides a constitutional basis for reopening a detention hearing). To reopen a detention hearing on this basis, the defendant must first demonstrate that his attorney's

performance fell below an objective standard of reasonableness and was, therefore, deficient. *Id.* at 2 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). The defendant must then show that “there is a reasonable probability that, but for counsel’s deficient conduct, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

At the time of Mr. Stokes arrest on the instant ERISA fraud charges, Mr. Stokes was already being represented by Paul Buchanan in a separate bankruptcy case. When, however, Mr. Stokes was arrested on federal fraud charges, he asked Mr. Buchanan to represent him in the criminal case. Mr. Buchanan agreed to chart the unfamiliar waters of federal criminal court, even though he was, at the time, undergoing chemotherapy treatment for cancer, but he did not tell Mr. Stokes’s he was undergoing chemotherapy. Mr. Buchanan promised to meet with Mr. Stokes on the night prior to the detention hearing in order to prepare but failed to do so. He was unprepared for the hearing.

At the detention hearing, held six days after Mr. Stokes arrest, Mr. Buchanan was clearly ineffective. He failed to put on available proof of Mr. Stokes’ character, family and community ties, and history of appearing in court. This evidence – never heard by the magistrate judge because Buchanan neglected to present it – included Mr. Stokes’ strong ties to this community, including close relationships to family and friends in the area; his charitable, community, and public interest work in Middle Tennessee; and proof that he has always appeared in court in other cases to which he has been a party and is simply not the type of person to flee from accusations or difficulties.

Moreover, if the Court finds that Mr. Stokes’ rebuttal evidence on the issue of flight risk is not new evidence and should have been presented at the original hearing, then Mr. Buchanan was also ineffective for failing to request a continuance to prepare a rebuttal presentation. Had Mr. Buchanan asked for a continuance, he would have had time to consult with Mr. Stokes, properly assess whether to have Stokes testify in response to the allegations, and assemble corroborating evidence of Stokes’ innocent explanation for his actions.

In sum, Mr. Buchanan's performance at the detention hearing was grossly deficient. The outcome of the proceeding may well have been different had Mr. Buchanan (1) presented evidence of Stokes' family and community ties, good character, and history of appearing in court, and (2) presented evidence – or requested a continuance for additional time to gather evidence – to rebut the Government's allegations that Stokes posed a flight risk. *See United States v. Himler*, 797 F.2d 156, 161-62 (3rd Cir. 1986) (overturning lower court's decision to detain defendant where history of appearing in court and strong community ties outweighed evidence of flight risk). In other words, if the Court had heard all of the available evidence – including the evidence that Mr. Buchanan failed to present – there is a reasonable probability that the Government would not have been able to overcome the presumption against detention. *See United States v. Gloster*, 969 F.Supp. 92, 96-97 (D.D.C. 1997) (explaining that there is strong presumption against detention and Bail Reform Act carefully limits circumstances under which detention may be imposed). Accordingly, Mr. Stokes is entitled to reopen the detention hearing.

III. CONCLUSION

The original decision to detain Mr. Stokes was based on incomplete information. Because Mr. Stokes was deprived of effective assistance of counsel at the original hearing and now has new evidence material to the question of his eligibility for release, a new hearing is warranted under 18 U.S.C. §3142(f). Mr. Stokes respectfully requests that this court conduct a hearing and allow him to present evidence and testify so that he can demonstrate that he is not a flight risk and will appear in Court and abide by any conditions the court may fashion to guarantee his appearance.

Mr. Stokes should not be detained simply because of the accusations against him or as punishment; it is black letter law that punishment cannot be the purpose of detention. *United States v. Salerno*, 481 U.S. 739, 747-48 (1987) (explaining that pre-trial detention under Bail Reform Act is regulatory in nature and, therefore, does not constitute punishment in violation of due process). Moreover, the Bail Reform Act of 1984 clearly favors non-detention and should be considered the

last alternative. *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992). If there are conditions that will reasonably assure the defendant's appearance then the defendant should be released on those conditions. *Id.* Mr. Stokes is not a risk of flight. He will appear and answer these charges. Mr. Stokes respectfully requests that this Court conduct another detention hearing so that he may present new evidence as well as evidence that should have been presented by his counsel at the original hearing but for his counsel's deficient performance.

Respectfully submitted,

s/ R. David Baker

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2007, I electronically filed this *Motion and Incorporated Memorandum to Reopen Detention Hearing* with the clerk of the court by using the CM/ECF system, which will send a Notice of Electronic Filing to the following: Courtney Trombly, Assistant United States Attorney, 110 Ninth Avenue South, Suite A961, Nashville, TN 37203.

s/ R. David Baker

R. DAVID BAKER