UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-20943-CR-MOORE

UNITED STATES OF AMERICA

vs.

CARLOS ALVAREZ,
a/k/a "David," and
ELSA ALVAREZ,
a/k/a "Deborah,"

Defendants.
_____/

GOVERNMENT'S OMNIBUS RESPONSE TO DEFENDANTS' PRETRIAL DETENTION APPEALS

I. INTRODUCTION

Faced with the prospect of explaining two interlocking confessions to the crime of serving as agents of the Republic of Cuba within the United States without notifying the Attorney General, Defendants Carlos Alvarez and Elsa Alvarez ("Defendants") strategically focus on their ties to the community in attempting to secure pretrial release. But the fundamental point in this bond appeal is that Defendants have been charged with what the Magistrate Judge termed "a crime of deception," see Transcript, at 71, in that they betrayed the friends, community, and country whose support and familiarity they now seek to invoke. Implicit in the claim that Defendants have led a stable life in South Florida is that they have had no ulterior motive for being here, and that they have looked to no other country as a place to live. But almost by definition, spies in the service of a foreign power maintain even stronger ties to a second home. This too was on the Magistrate Judge's mind when she ruled that Defendants likely would flee to Cuba and receive "a hero's welcome." See Transcript,

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at 77. Defendants' claim of community ties collapses under the weight of the criminal allegations themselves.

Even more uncomfortable for Defendants is their attempt to explain their confessions. As argued to the Magistrate Judge, Defendants themselves confirmed the taskings that they received from the Directorate of Intelligence, their methods of communicating, their travels to Cuba to exchange information, and their other assignments. In the teeth of these admissions, which themselves are corroborated by computer evidence and FISA wiretap intercepts, Defendants appear to sheepishly admit that they have spied, just not lately or seriously. For example, Carlos Alvarez claims that, at worst, he passed only "gossip and his own perspective" back to Cuba. See Carlos Alvarez Motion, at 9 (emphasis in original). But unfortunately, a gossipy or opinionated spy is a spy nonetheless. For her part, Elsa Alvarez claims that she wanted to distance herself from "the CuIS [Cuban Intelligence Service] or the Government of Cuba," all the while begging the question of why an innocent South Florida social worker would have these concerns. See Elsa Alvarez Motion, at 7. To bolster this weak assault on the government's case, Defendants further underwhelm the record with citations to newspaper articles, which present only biased and uninformed views of the government's case. This is no defense, and the Magistrate Judge was right to detain.

II. FACTS

On January 6, 2006, Defendants were arrested on a sealed indictment charging each of them with serving as an agent of the Republic of Cuba within the United States without notifying the Attorney General, in violation of 18 U.S.C. §§ 951(a) and 2. In plain English, the government has charged Defendants with working as covert spies for the Castro government. From at least the early 1980's, Defendants acted as a husband and wife team, knowing each other's secret communications

and activities, and assisting each other's information gathering and transmission. Defendants informed on friends and other members of their own South Florida community, with a focus on university educators and anti-Castro and exile groups, efforts that garnered them medals of commendation from the Cuban intelligence service. When not serving Havana, Defendants themselves worked as university educators, which itself provided an opportunity to collect information and a cover for foreign travel during which meetings with Cuban handlers could be arranged. These activities convinced the Magistrate Judge to order pretrial detention based on risk of flight:

> [B]ased upon the nature of the offense here, based upon the commendations of the Cuban government, based upon the acknowledgment by Mrs. Alvarez that her primary allegiance is to Cuba, based upon the fact that [Carlos Alvarez and Elsa Alvarez] are facing a substantial period of incarceration[,] . . . and the fact that it is a crime of deception, . . . it is likely that they would flee to Cuba where they are likely to be well received for their efforts.

See Transcript, at 70-71.

At the pretrial detention hearing on January 9, 2006, the government proffered more than sufficient evidence to prove by a preponderance that Defendants should be detained. For starters, the government focused on the background of these individuals, which does show a stable employment record in South Florida. But the true nature of Defendants' activities raises the issue of their motivation for remaining in this community. More to the point, Carlos Alvarez admitted to having worked for Cuban intelligence agencies since 1977, and Elsa Alvarez admitted to the same affiliation since 1982. See Transcript, at 10. When coupled with the fact that the Directorate of Intelligence tasked both Defendants to spy on prominent South Florida individuals and Cuban exile groups, the reason why these individuals have remained in South Florida for so long becomes subject

to question. In other words, the fact that Defendants' covert taskings were so location-specific, focusing on the Cuban exile community in South Florida, suggests that the primary reason they remained here is the same reason for which they have been indicted. See id. at 11.

Moreover, the government detailed the secretive and duplicitous nature of Defendants' activities in this community. Of course, the failure to register is itself deceptive in that Defendants did not want to alert governmental authorities of their true affiliation. But more than that, Defendants secretly communicated with the Cuban government in a variety of ways. For example, Defendants would receive assignments via shortwave radio transmissions. These messages were encoded in five-digit groupings. See id. Once received, Defendants would input these coded messages into their home computer, which was equipped with decryption technology contained on a diskette. This technology had been supplied to them through supervisors at the Directorate of Intelligence. See id. at 11-12. Carlos Alvarez was primarily responsible for intercepting and decoding these messages, and then would burn the notes and any other physical evidence of these messages after each transmission, itself more evidence of deception. Additionally, Carlos Alvarez attempted to erase all electronic or digital evidence that he was using his computer to communicate in code. See id. at 12.

The process of scrambling communications was repeated for outgoing reports and other messages. Using a similar diskette, this time equipped with encryption technology, Carlos Alvarez would send coded communiques back to his supervisors at the Directorate of Intelligence. This would be accomplished through mailing an encrypted computer diskette to postal mailboxes throughout the United States. See id. at 12-13. Defendants would not communicate with the Cuban government using their real names, but were given, and used, the aliases "David" and "Deborah."

influential not just locally but also nationally, while others and their organizations, such as Brothers to the Rescue, figured in highly important geopolitical issues. Id. at 14-15. Not only specific individuals, but also popular opinion was of interest to Defendants' handlers, and at one point Defendants reported on community attitudes after the FBI made a series of arrests related to another Cuban spy network in 1998. See id. at 16. It was only a failure on the part of Defendants' supervisors that saved college-level exchange students from becoming a topic of covert reporting; as late as 2002, Carlos Alvarez was asked to assess which exchange students of Cuban heritage would be amenable to recruitment into the Directorate of Intelligence. See id. at 15-16. Alvarez claims not to have tendered this report, but added that if asked, he would have done so. Rooted as they were in South Florida, Defendants functioned as the eyes and ears of the Directorate of Intelligence here. These activities continued through 2004; Defendants never attempted to divest themselves of their agency relationship with Cuba. See id. at 17.

Defendants' confessions are corroborated through forensic computer evidence. At one point, Carlos Alvarez turned over a home computer to the FBI, which contained the remnants of coded messages that Defendants had sent back to Cuba. This home computer was used during the encryption and decryption process referenced above. See id. at 17. The series of fragmentary messages were exactly what FBI analysis and experts would have expected to find in terms of the form and content of reports from Cuban intelligence operatives. Each message was typed in all capital letters. Each message used the five-digit serial numbers. Each message was signed "David and Deborah." Each message contained pro-Communist and pro-revolutionary rhetoric. See id. at 17-18. Moreover, a consent search of Defendants' residence yielded a shortwave radio antenna of the type used by other Cuban operatives as well as what purports to be a diplomatic or official Cuban

passport. The passport is in the name of Carlos Alvarez, though he never held any consular or diplomatic post. See id. at 18.

The record of these Defendants as covert operatives indicates that they were honored members of the Directorate of Intelligence, and were entrusted with important training, technology, and assignments. In this connection, Defendants admitted to having received medals of commendation from the Cuban intelligence service in the 1990's. See id. at 19. Moreover, according to experts, the fact that the Directorate of Intelligence entrusted Defendants with highly-sensitive encryption and decryption technology itself indicates that they were not seen as minor or marginal operatives. See id. Due to their value as intelligence assets, Defendants likely are equipped with an escape plan, much like the Cuban spies arrested in the 1998 case. To a person, these individuals were equipped with emergency contacts, false travel documents hidden in concealed locations, assumed identities, travel routes within the United States, and travel routes through third countries that would take them back to Cuba. See id. at 19. Far from the typical case of a Cuban exile who would not return to life under Castro, this would be a viable option for Defendants. And of course, if Defendants were to flee, then there would be no extradition or other means of recourse to retake them through official process.

As befitting the seriousness of their offense, Defendants have been charged with a crime that carries a stiff sentence. Section 951(a) has a ten year statutory maximum, and courts have unwaiveringly applied it. In the absence of an analogous guidelines sentence, in the 1998 Cuban spies case, those defendants who pleaded guilty under 951(a) received seven years' imprisonment. Those who went to trial and were convicted for the same offense received the statutory maximum of ten years. See id. at 21-22. This case will be discussed in more depth below, but for present

purposes, it is noteworthy that the Magistrate Judge considered the government's position in this regard and rejected it. The Magistrate Judge suggested that the probable sentence was 51 to 63 months' imprisonment. See id. at 71. The government submits that the Magistrate Judge erred on the limit issue of calculating the probable sentence, but even so, the Magistrate Judge still ordered detention based on the strength of the government's evidence:

> "[Defendants] were acting in the interests of a foreign government. I think the evidence is very, very strong, in addition to the fact that the indictment provides probable cause as to their own confession."

See id. (emphasis added).

III. ARGUMENT

A. Legal Standard

Under the pretrial detention statute, 18 U.S.C. § 3142(f)(2)(A), a judicial finding that a defendant is a risk of fight need be supported only by a preponderance of the evidence. See United States v. King, 849 F.2d 485, 489 (11th Cir. 1988). On appeal from the findings of a magistrate judge, the district court need not hold another pretrial detention hearing, but instead need only exercise independent consideration of all facts properly before it. See id. at 489-90. If the district court concludes that the magistrate judge was correct, then it must explicitly adopt the magistrate judge's pretrial detention order. See id. at 490. On the other hand, if the district court concludes that additional evidence is necessary or that factual issues remain unresolved, then a de novo evidentiary hearing must be followed by written findings of fact and conclusions of law. See id. at 490-91. Either way, however, provided a proper record is made, a district court's factual findings in support of pretrial detention are reviewed only for clear error. See id. at 487. On the record here, this Court has the latitude to simply approve the Magistrate Judge's thorough and correct work without further

hearing.

The Eleventh Circuit has upheld the pretrial detention of defendants under similar factual circumstances. For example, in United States v. Quartermaine, 913 F.2d 910 (11th Cir. 1990), the court found that detention was appropriate given that the defendant had access to funds outside the United States, that he had relatives and acquaintances in Honduras, and that he had once stated that Honduras and not the United States was his country. See id. at 916. The factors that were dispositive in Quartermaine (apart from the presumption of detention applicable in that case) are present here as well. Defendants have more than foreign funds or offshore accounts; they have a sovereign government that is certain to assist them. Based on the appreciation and trust that the Directorate of Intelligence has shown, Defendants would indeed receive the proverbial "hero's welcome." Moreover, like the ex-patriot Quartermaine defendant, it is apparent that Defendants see themselves first and foremost as Cubans, not as citizens of the United States. Elsa Alvarez pointedly told the FBI that "she does not consider herself an American but a Cuban." See Elsa Alvarez Motion, at 6. Whether or not Elsa Alvarez' feelings are representative of her husband's, the sentiment is certainly consistent with both Defendants' criminal behavior.[1]

B. Nature and Circumstances of Offense

The first factor to consider under section 3142(g) is the nature and circumstances of the offense charged. Defendants have been charged with a serious national security offense. In every

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[1] Elsa Alvarez claims there is no evidence that she owes allegiance to the Cuban government, an assertion belied by her covert work and the pro-Castro rhetoric of her "Deborah" transmissions. At best, it appears that she is indifferent to the Communists, and would return to Cuba no matter who was in power. See Elsa Alvarez Motion, at 6 (explaining that Elsa Alvarez wanted to return to Cuba "with or without Castro"). The point is that even if Defendants do not think Castro is a reason to return, they certainly do not consider him a reason to stay away.

other case in which a defendant has been charged with a section 951(a) violation, the defendant has been pretrial detained. See, e.g., United States v. Shaaban Hafiz Ahmad Ali Shaaban, United States District Court for the Southern District of Indiana, Case No. 05-34-CR-01 (pretrial detention for defendant charged under section 951(a) with acting as agent of Government of Iraq); United States v. Tongsun Park, United States District Court for the Southern District of New York, Case No. S3 05 CR 59 (pretrial detention for defendant charged with conspiracy to violate section 951(a) for acting as agent of Government of Iraq); United States v. Michael Ray Aquino, United States District Court for the District of New Jersey, Case No. 05-719 (pretrial detention for defendant charged under section 951(a) with acting as agent of Government of the Philippines); United States v. Leandro Aragoncillo, United States District Court for the District of New Jersey, Case No. 05-3096 (pretrial detention for defendant charged under section 951(a) with acting as agent of Government of the Philippines); United States v. Khaled Abdel-Latif Dumeisi, United States District Court for the Northern District of Illinois, Case No. 03 CR 664 (pretrial detention for defendant charged under section 951(a) with acting as agent of Iraqi Intelligence Service). The government knows of no instance in which a defendant has been charged under section 951(a) and then has convinced a court to order pretrial release. The rationale in these cases is that an individual who illegally operates as an agent of a foreign country within the United States almost per se poses a serious risk of flight.[2]

This uniform result in spying and espionage cases is largely explained by the very nature of

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[2] Defendants incorrectly claim that the government here is deviating from the type of bond recommendations made in other section 951(a) cases. See Carlos Alvarez Motion, at 12-13 n.12. The three cases Defendants cite–Coll, Franklin, and Keyser–were all false statements cases. This is also true of Awadallah, which Defendants inaccurately characterize as a September 11th terrorism prosecution. See id. at 19. None of these individuals was charged with serving as a covert agent of a foreign power.

the charged offense. Whether the case involves national security secrets or not, the fact that Defendants are accused of spying itself counsels in favor of detention. In United States v. Kostadinov, 572 F. Supp. 1547 (S.D.N.Y. 1983), the court ordered that an accused Bulgarian spy be pretrial detained, and explained that the nature of the offense was the overriding consideration:

> Espionage differs from all other crimes in one unique, highly significant respect. The purpose of espionage is political: to undermine the government of the United States with a view to its destruction. This goal is shared by all enemies of this country. Countries antagonistic to the United States who would not offer asylum to murderers or thieves very likely will open their doors to one who shares their political purpose inimical to the United States.

Id. at 1551. Moreover, the court in Kostadinov was concerned not only about the accused spy's motivation to flee the country, and the availability of safe havens around the world, but also about his ability to flee pursuant to an escape plan or route. Even without specific evidence that the defendant there possessed a concrete plan, the court was unwilling to close its eyes to the very real possibility that such a plan existed:

> It is beyond doubt that a vast underground spy network exists in this country and around the world. A spy would undoubtedly have access to many exit routes and to places which would afford him sanctuary as a hero and not as a criminal.

Id. Aside from the uncanny parallels to the Magistrate Judge's rationale and ruling here, the instant case presents even more of a risk of such an escape plan being activated. The Kostadinov case involved a single Bulgarian spy without precedent; here, the Southern District of Florida has had extensive experience with Cuban spy networks, and understands their tradecraft. Based on the fact that each Cuban agent in prior cases possessed an escape plan, it is likely that Defendants do so as well.

Moreover, though Defendants attempt to analogize their probable sentence to an espionage

offense not involving national security information, section 951(a) sentences in the Southern District of Florida have not been calculated in this manner. In United States v. Gerardo Hernandez, et al., Case No. 98-721-CR-LENARD, the issue of an analogous guideline was raised, and Judge Lenard expressly found that there was no such thing. See Sentencing Transcript, at 37 ("I agree with the conclusion by the probation officer that after examination there is not an analogous statute and thus an ensuing guideline provision for the [section 951(a)] offenses.") (Transcript attached hereto as Exhibit A). Moreover, Judge Lenard sentenced the five defendants who were convicted at trial under section 951(a) to ten years' imprisonment. (Judgments attached hereto as Collective Exhibit B). The same ten year sentence was imposed again in United States v. George Gari, Case No. 01-810-CR-UNGARO-BENAGES, another section 951(a) case, such that Defendants are overly optimistic that they will serve only 51 months. (Judgment attached hereto as Exhibit C). When Defendants claim that prosecutions under section 951(a) are rare, and that resulting sentences are light, they could not be further from the truth.

As to the facts of the offense itself, Defendants confessed that they shared information with the Cuban government, but now they claim that they did not share anything important. This is no defense to the charge because the statute allows for no such qualification. Defendants operated at the direction of their Cuban handlers, and gathered what information they were asked to find. At the very least, the Castro regime deemed this information to be important. In fact, as the proof at trial will show, Defendants reported on individuals and organizations who were in a position to influence official United States policy towards Cuba. Whether or not this information involved military secrets, the fact of the matter is that Defendants were Cuban spies, they admitted to it, and if convicted, they will likely serve a ten year prison sentence. There is no way to minimize the

seriousness of this betrayal to the United States, itself an attack on the rule of law that now governs these proceedings, and it is highly ironic that Defendants now ask a United States court to trust them. Cf. United States v. Burstyn, 2005 U.S. Dist. LEXIS 14995, at **13-15 (S.D. Fla. Mar. 18, 2005) (Opinion attached hereto as Exhibit D) (ordering detention of attorney with strong community ties because he counseled clients to flee, which shows willingness to disregard court orders in his own case).

C. Weight of Evidence

Under the second statutory factor for pretrial detention, the weight of the evidence, Defendants fare no better. The Magistrate Judge found the government's proof to be "very, very strong," and with good reason. The existence of two interlocking confessions means that Defendants themselves will serve as the government's most forceful witnesses at trial. See United States v. Stewart, 388 F.3d 1079, 1091 (7th Cir. 2004) ("A confession is powerful evidence in any case."). The confessions were lengthy and detailed, they corroborate each other, and there can be no serious allegation that they were involuntary. Although the interlocking nature of these confessions no longer obviates Bruton issues at trial, see Cruz v. New York, 481 U.S. 186, 172 (1986), both confessions weigh on both Defendants for purposes of pretrial detention. Moreover, the government has corroborated the substance of these confessions with computer fragments of Defendants' transmissions back to Cuba, FISA wiretap intercepts, and selected items taken from a consent search at their residence.

In a bizarre assertion, Defendants claim that their confessions were not confessions after all. See Carlos Alvarez Motion, at 13. It is difficult to see how Defendants' recounting of their activities as Cuban spies is not a confession, but even so, it is apparent that what Defendants really mean is

that the confessions were involuntary. Carlos Alvarez points to promises that allegedly render his confession suppressionable, see id. at 13 n.13, but the fact is that no concrete promises were made to either of Defendants. And in any event, the issue is not whether a promise was or was not made, but whether the confessions were voluntary under the totality of the circumstances. See Arizona v. Fulminante, 499 U.S. 279, 285 (1991). Here, the totality of the circumstances shows that Defendants' confessions were not coerced, and that each confessed to the section 951(a) offense. In an attempt to muddy the waters, Defendants now suggest that it is unclear exactly to what offense, if any, they confessed. See Carlos Alvarez Motion, at 13-14. But the confessions confirm that Defendants received requests for information and other assignments from the Cuban intelligence service, and regardless of whether they were paid for their services, they collected and transmitted this information, much of it nonpublic in nature. This more than meets the elements of section 951(a).

The fact that the government was aware of Defendants' activities for some time does not preclude this prosecution. To be sure, the government conducted intelligence gathering wiretaps of Defendants under FISA for years, but it was not until the USA PATRIOT Act, enacted October 26, 2001, which itself amended the FISA statute, that the government was able to use this evidence in furtherance of a criminal prosecution. Moreover, the government did not obtain Defendants' confessions until June and July 2005, which means that the pre-indictment delay was, at most, a matter of months. And the existence of the FISA wiretaps, which ran through the date of Defendants' arrest, proves that the government was not indifferent or lax in its monitoring or surveillance of Defendants; the fact is that the government maintained almost continuous coverage of Defendants' activities and movements, partially to ensure that they would not flee prior to arrest.

Although it may be a recent revelation to the defense, the government has long been concerned that Defendants would opt not to remain in this country.

D. Personal History and Characteristics

The third and final element to consider regarding pretrial detention, the history and characteristics of the person, is notably broader than the concept of community ties. For this reason, the issue of Defendants' stability in the community must be viewed in the context of their true activities here. Unlike a citizen of unquestioned allegiance to the United States who has lived for a long time in South Florida and has committed an isolated criminal offense, Defendants have engaged in covert spying on fellow community members for decades. This was not an isolated lapse of judgment, but a long-running crime of deception. In fact, almost every aspect of Defendants' lives in this community–their careers, friendships, associations, and travels–have been impressed into the service of the Directorate of Intelligence. For this reason, one cannot be certain whether Defendants were in this community merely because the Cuban government wanted them to be. But regardless, it is a fair reading of Defendants' underlying criminal conduct that their contacts in this community were to them an expediency used for other purposes. This casts doubt not only on their ties, but also on their trustworthiness. Based on their true track record in the community, Defendants have a weak claim to sincerity and honesty, prerequisites for pretrial release.

IV. CONCLUSION

The crux of the matter is whether the nature of the charged offense or the nature of Defendants' ties are the stronger consideration. Normally, this would require a balancing of two separate and distinct issues. But this case presents a different situation, where the former directly undercuts the latter. Although a crime of whatever nature may be considered to harm the community

as a whole, offenses that do not impact national security or touch on national allegiance do not in themselves undercut a defendant's claim that he will remain true to his local ties. But where, as here, a defendant commits a crime that turns his back on the very things that he invokes in support of bond, a court would be well within its prerogative to order pretrial detention. Here, Defendants betrayed friends, community, and country, and cannot now hold them high as evidence that they deserve to be set free. For all of the foregoing reasons, the government respectfully requests that this Court affirm the Magistrate Judge's pretrial detention order without further hearing.

Respectfully submitted,

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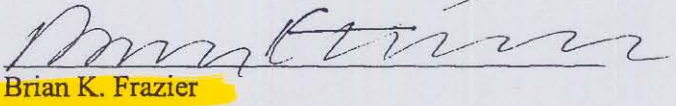
By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via first-class United States Mail, postage prepaid, on this the 6th day of March, 2006, to:

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