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

UNITED STATES OF AMERICA	)	
	)	No. 3:17-00092
v.	)	JUDGE TRAUGER
	)	MAGISTRATE JUDGE HOLMES
TAD ERIC CUMMINS	)	

DEFENDANT'S MOTION TO RE-OPEN DETENTION HEARING

Pursuant to 18 U.S.C. § 3142(f)(2)(B), defendant Tad Cummins moves to re-open his detention hearing in light of material information "that was not known to [him] at the time of the hearing." That new information is this fact: The government is detaining Cummins under conditions that deny him a reasonable opportunity to meet with counsel privately. This condition of his detention is unlawful because it violates his Fifth and Sixth Amendment rights to access the courts and to the effective assistance of counsel, and it violates his rights expressly guaranteed by the Bail Reform Act.

Background

On May 12, 2017, the Magistrate Judge held a detention hearing for Tad Cummins, who is charged with offenses stemming from him allegedly traveling cross-country with a 15-year-old student and engaging in sexual activity with her. (Complaint, R.1, PageID # 1-5; Order of Detention, R.14, PageID # 58-59.) There was no proof that Cummins ever restrained the student. (Order of Detention, R.14, PageID # 64, 70.) Cummins presented evidence of strong family support and of a viable release plan. (*Id.* at PageID # 66.) On balance, the Judge decided to detain Cummins. (*Id.* at PageID # 70-71.) Cummins was remanded to the custody of the U.S. Marshal.

The Marshal has contracts with various county jails to house federal pretrial detainees. Pursuant to such a contract, the Marshal has recently started housing some detainees in the

Henderson County Detention Center in Henderson, Kentucky. That jail is 145 miles from Nashville, making a round-trip drive to Henderson roughly four-and-a-half hours. Out of the seven detention facilities used by this district, five of them are located over two hours away from Nashville.

In the three months since Cummins was ordered detained, undersigned counsel has made two trips to the Henderson jail to confer with Cummins in person. Both times he has been denied the ability to meet with Cummins privately, although the first time was not as bad as the second.

Each time, counsel was directed to the jail's group visitation room. This room is big enough to hold several (approximately eight) meeting areas that resemble study carrels found in a library. These carrels are side-by-side. Although they provide thin partitions between people who are meeting there, those partitions do not extend all the way to the ceiling. Moreover, the walls of the room are cement. Consequently, when someone speaks in a normal tone, he is at risk of being heard by anyone in the room.

During the first visit, the defense team and Cummins were, by chance, the only people in the visitation room. Nonetheless, a guard walked – unannounced – through the room a few times during the meeting. Each time, counsel and Cummins quit speaking as soon as they realized the guard was there. When they complained, the guard told them he would continue to walk through the room when he wanted to, and that is what he did.

When, on August 17, 2017, counsel went for his second visit, there were two other people meeting in the visitation room. The visitation book appeared to indicate that at least one of the lawyers was meeting with multiple clients that day. Counsel again was told that his only option was to meet in the collective visitation room. Counsel declined to visit Cummins in that room because it was impossible to converse with Cummins in that room without being overheard by others, thereby breaching the attorney-client privilege. Moreover, speaking with Cummins in

such conditions would make it possible for another inmate to use what Cummins said as (1) a reason to abuse him in jail, (2) valuable information to provide the government in exchange for leniency, or (3) a foundation for fabricating a so-called jailhouse confession. *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L. Rev. 1375, 1375 (Winter 2014) ("According to some wrongful conviction scholars, jailhouse snitch testimony is the single greatest cause of wrongful convictions."); Stephen S. Trott,[1] *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1383 (1996) ("The most dangerous informer of all is the jailhouse snitch who claims another person has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.").

Counsel lacks any decent option for meeting with Cummins privately. The Marshal will not transport Cummins to the lockup in Nashville simply for a client meeting – and, moreover, those facilities are a poor setting for important communications because of the wire-mesh-glass partition that separates counsel from a client. Telephone calls cut off after fifteen minutes and, from counsel's experience over the last two years, he knows that jails are often recording attorney-client phone calls even when they claim they are not. Plus, a phone call is inherently an inadequate way to have some important conversations and review some discovery. The option of visiting Cummins in person in the Henderson jail is likewise inadequate. Counsel has to invest four-and-a-half hours to drive there *to simply have a chance to possibly* meet with his client in private – i.e., during a window when no one else happens to be using the room and the guards don't feel like eavesdropping.[2] If such conditions don't happen to exist, then counsel will have wasted most of a workday for nothing.

[1] Judge Stephen Trott sits on the U.S. Court of Appeals for the Ninth Circuit.
[2] The foregoing facts are offered as a proffer. Counsel can provide a sworn statement or testimony if necessary.

Argument

"In American criminal law, the right to privately confer with counsel is nearly sacrosanct." *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014); *see e.g. Merriweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009) (explaining that a prisoner has a "fundamental right" to communicate with counsel "in confidence"); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974) ("We think, that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts"). When the government causes a breach in the privacy of attorney-client communications, it raises "serious issues" because doing so infringes on a detainee's constitutional rights to freedom of speech, to access the courts, and to the effective assistance of counsel. *Nordstram*, 762 F.3d at 909; *Sallier v. Brooks*, 343 F.3d 868, 873-74 (6th Cir. 2003); *see also United States v. Henry*, 447 U.S. 264 (1980) (holding it is illegal for government agents to eavesdrop on attorney-client communications). Accordingly, a prison must give prisoners a reasonable way to meet in person with their lawyers such that they can "communicate privately." *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990). Since a pretrial detainee is accorded the presumption of innocence and has a pressing need to meet with counsel to litigate his case, a pretrial detainee's right to counsel must be, if anything, stronger than those of a prisoner. *See generally Miller v. Carson*, 563 F.2d 741, 747 (5th Cir. 1977) (quoting Blackstone: "'in this dubious interval between the commitment and trial, a [pretrial detainee] ought to be used with the utmost humanity.'").

Cummins has a compelling need to confer with counsel privately. And he has a constitutional right to reasonably do so. But, by detaining Cummins in these conditions, the government is seriously interfering with, *inter alia*, his Sixth Amendment right to counsel.

That interference mandates re-opening of the detention hearing. The Bail Reform Act permits the re-opening 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" he should be detained. 18 U.S.C. § 3142(f)(2)(B). Moreover, the Bail Reform Act requires that any pretrial detainee be "afforded reasonable opportunity for private consultation with counsel," 18 U.S.C. § 3142(i)(3), which means that a detainee must have the reasonable opportunity to communicate with counsel in a way that "preserves ethical obligations of confidentiality and carries no risk of waiver of attorney-client privilege." *United States v. Rodriguez*, 2014 U.S. Dist. LEXIS 115000, *23 (W.D.N.Y. Aug. 18, 2014). In fact, this Honorable Court specifically ordered that "Defendant shall be afforded reasonable opportunity for private consultation with counsel." (See Document #14) When the conditions of pretrial detention fall short of the minimal requirements of the Bail Reform Act, the court can consider whether to release the defendant on conditions in lieu of detention. *Id.* That is precisely what Cummins asks the Court to do here.

Conclusion

The government is detaining Tad Cummins under conditions that violate his constitutional and statutory rights to privately access counsel. He respectfully requests that the Court re-open the detention hearing and that it order him released on conditions. To be clear, Cummins is not asking to be moved from Henderson Detention, where he at least has some semblance of safety; we are asking for his immediate release. Additionally, counsel requests that Henderson County Detention Center have a representative available at the hearing to explain why the facility is so casual about trampling on Cummins' rights under the Fifth and Sixth Amendments of the United States Constitution.

Respectfully submitted,

s/ *Dumaka Shabazz*
DUMAKA SHABAZZ
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Attorney for Tad Cummins

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2017, I electronically filed the foregoing Motion to Re-open Detention Hearing with the U.S. District Court Clerk by using the CM/ECF system, which will send a Notice of Electronic Filing to the following: Sara E. Meyers and Philip H. Wehby, both Assistant United States Attorneys, 110 Ninth Avenue South, Suite A961, Nashville, TN 37203.

s/ *Dumaka Shabazz*
DUMAKA SHABAZZ