IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA Plaintiff, vs. Szuhsiung Ho a/k/a Allen Ho, Defendant.	Case No.: 16-CR-00046

DEFENDANT ALLEN HO'S MOTION TO STRIKE GOVERNMENT'S SUPPLEMENTAL PLEADING REGARDING BAIL

The government's supplemental brief (ECF No. 47) must be stricken for two reasons. Procedurally, the government violated Local Rule 7.1(d) by filing excessive pages despite citing the rule in its paper. Substantively, the government violated the Court's order, which allowed a limited supplemental submission identifying specific examples of Asian-Americans who violated the terms and conditions of their bail and fled the country with the help of a foreign government.

Dr. Ho's Motion to Vacate Order of Detention (ECF No. 33) identified more than one dozen Chinese or Taiwanese-Americans with close ties to either country, who were granted bail and showed up in court as ordered. In response, the government filed a two-page Opposition that failed to mention these examples—either to explain why the Court should not consider them as probative or, alternatively, to provide any counter-examples. *See* ECF No. 34. The government's new 9-page supplemental brief is an improper attempt to rewrite its Opposition. Regardless, the Opposition offers no evidence that Dr. Ho has the intention or ability to flee.

At the conclusion of the bail hearing on August 16, 2016, the Court granted the government leave to submit a supplemental brief identifying examples of Asian-Americans who were granted bail but failed to appear in court. Rather than follow the Court's instructions, the

government granted itself leave to file a 9-page Supplemental Brief with new arguments and case law. This Brief violates the Local Rules and goes far beyond what the Court allowed. *See* E.D. Tenn. L.R. 7.1(d) ("Any response to a supplemental brief . . . shall be limited to no more than 5 pages."); *cf.* L.R. 7.1(c) ("A reply brief shall not be used to reargue the points and authorities included in the opening brief, but shall directly reply to the points and authorities contained in the answering brief."). The Brief simply rehashes the government's oral arguments.

The government has, once again, failed to identify a single instance where an Asian-American was released under the Bail Reform Act and then fled the country. Indeed, in the only cited federal case, no one fled the country.[1] And the cited state cases are easily distinguishable.[2] Finally, has the government identified no examples of the Chinese government assisting a Chinese-American[3] to flee the United States. The government's concerns are pure speculation.

To the extent that the Government's Supplemental Brief goes beyond what the Court permitted, the defense respectfully requests that the brief be struck and disregarded. Should the Court entertain the entirety of the government's brief, the defense proffers the following:

A. The government ignores changed circumstances.

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[1] In *U.S. v. Peng*, the defendant ***agreed*** to detention and never fled. *See* Am. Court Minutes, 15-CR-113 (E.D. Wis. Mar. 26, 2015). The co-defendant also did not flee or violate any condition of release (passport surrender and travel restrictions). This case supports Dr. Ho's release.

[2] None involve a U.S. citizen like Dr. Ho. And the Court should reject the homicide and violent crime cases as wholly irrelevant. *E.g.*, *State v. Deng*, No. D-1-DC-13-205564, (Tex. Dist. Dec. 11, 2013) (Chinese man stalked and stabbed his Chinese ex-girlfriend); Malaika Fraley, Danville Driver Charged with Killing Cyclist Flees to China, SAN JOSE MERCURY NEWS, Sep. 2, 2011 (homicide); Christopher Collins, Chinese Massage Therapist May Have Fled Country Before Trial, ABILENE REPORTER- NEWS, Dec. 5, 2014 (sex crime). The only non-violent case involved a Chinese citizen who evaded a ***British*** court outside of the United States. *See* Austin Ramzy, China's Most Wanted Counterfeiter, TIME, Jan. 16, 2008. These cases are inapposite, and instead support Dr. Ho's release because he has no history of violence.

[3] It is worth noting that Dr. Ho is Taiwanese-American, ***not*** Chinese-American. The government fails to explain why China would risk an international incident to exfiltrate a foreigner.

Although the government asks this Court to affirm the Magistrate's Order, it fails to account for the dramatically changed circumstances of the case: since the first detention hearing, Dr. Ho's friends and family—evidencing their absolute confidence that he will appear in court—have pledged their homes to assure Dr. Ho's appearance. The secured bond is now three million dollars—triple what Dr. Ho offered before. Not only should the larger bond assure Dr. Ho's appearance, the Court should also recognize that the people who know Dr. Ho best—his family and closest friends—are willing to risk their homes on Dr. Ho's behalf. Obviously, no one with the slightest concern about Dr. Ho's reliability would take such a risk.

B. The nature and circumstances of the offense weigh in favor of release.

The government's statement that Dr. Ho "is facing a maximum sentence of life in prison if convicted" is misleading. A life sentence in is ***not*** mandatory here. Rather, the lead charge carries a ***potential*** sentence of life. Once again, the government fails to acknowledge the rather obvious fact that any 66-year-old defendant facing, for example, a wire-fraud charge faces a ***potential*** life sentence. Moreover, there is nothing about the facts of this case that make a life sentence remotely appropriate or likely. Even assuming that Dr. Ho failed to get the appropriate licenses before assisting CGNPC with the operation of its civilian nuclear power plants, the conduct was clearly ***licensable***. There was nothing intrinsically wrongful or malignant about the conduct at issue. This was conduct that the Department of Energy routinely licenses.

The three cases cited by the government provide no support for its argument. The government cites *U.S. v. Terry Lynn Nichols*, 897 F. Supp. 542 (W.D. Okla. 1995) for the proposition that defendants facing the death penalty are more likely to flee. ECF. No. 47 at 3. At the risk of stating the obvious, Dr. Ho is ***not*** facing the death penalty. And the argument that a judge's decision fact to preventively detain Terry Nichols, the man who blew up the Murrah

building in Oklahoma City, killing 168 people and injuring 650 others in the worst case of domestic terrorism in this country's history, as somehow instructive of how this Court should treat Dr. Ho, is disturbing. Dr. Ho has never engaged in violence of any kind; he was assisting a civilian nuclear power plant operate safely to ***prevent injury*** to people. Despite admitting that "this is not a terrorism case" (Hr'g Tr. at 26:11 (June 24, 2016) (ECF No. 36-1)), the government exercises no restraint in leveling inappropriate comparisons to a horrific terrorist case.

The other cited cases fare no better. *U.S. v. Rodriguez-Adorno*, 606 F. Supp. 2d 232 (D.P.R. 2009) involved charges of using a firearm in vehicle theft and murder. *Id.* at 233. Because of the nature of the charges, Arroyo faced "a rebuttable presumption that no conditions of release '[would] reasonably assure the appearance of [the defendant] as required ***and the safety of any other person and the community***." *Id.* at 234 (emphasis added). Unable to rebut this presumption, Arroyo was detained. Here, buried in a footnote, the government concedes that "[t]he rebuttable presumption in favor of detention . . . does not apply here." ECF No. 47 at 2 n.2. This case is inapposite.

Finally, *U.S. v. Eischeid*, 315 F. Supp. 2d 1033 (D. Ariz. 2003) is similarly unhelpful to the government's argument. Eischeid was charged with murder, and the government sought detention because he was both a danger to the community and a flight risk. *Id.* at 1034–35. The District Court affirmed the magistrate's release decision, concluding:

> [T]he Government has not met its burden of proving by clear and convincing evidence that Defendant Eisheid is a danger to the community. The charge against him is extremely serious. Indeed, it is difficult to think of one more serious. But the charge, at this stage, is simply an accusation. ***Defendant Eischeid is presumed innocent***. . . . In light of the defense proffer that he has lived a responsible and crime-free life, the Court cannot conclude that the Government has met its burden merely by the charge contained in the Indictment.

Id. at 1036 (emphasis added). *Eischeid* supports release here, not detention.

C. The weight of the evidence favors release.

The government has produced not a scintilla evidence that Dr. Ho is likely to flee. A motive to flee is, of course, very different from an intention to flee. *See Truong Dinh Hung v. United States*, 439 U.S. 1326 (1978) ("[O]pportunities for flight . . . hardly establish any inclination on the part of applicant to flee."). Here, the government conflates motive with intention. This utter failure of proof should be dispositive, as all parties agree that the government bears the burden of establishing this by a preponderance of the evidence.

While the defense was able to provide the Court with more than a dozen examples[4] of Asians and Asian-Americans who were admitted to bail and returned to court, the government's Supplemental Brief fails to identify a single counter-example of ***anyone*** who was granted bail under the Bail Reform Act and subsequently failed to appear.

The anecdotes and articles the government does cite to concern violent felons charged in non-federal cases that bear no relation to the facts before this Court. Rather than find federal cases involving the Bail Reform Act, the government has cited to press accounts of state court cases involving violent felons. The one federal case the government cites is completely inapposite.

D. Conclusion

The government cannot establish that no conditions exist that will "reasonably assure" Dr. Ho's appearance. Instead of evidence, the government offers conjecture. Accordingly, the defense respectfully requests that the Court grant its Motion to Vacate the Order of Detention.

[4] The government's statement that it "knows very little about the facts and circumstances surrounding these cases . . . other than what the defense proffers" is puzzling. These cases are all recent and their dockets available on Pacer to anyone interested in reading the relevant pleadings.

Dated: August 21, 2016

Respectfully submitted,

ARENT FOX LLP

/s/ Peter Zeidenberg

Peter Zeidenberg (pro hoc vice)
Taniel E. Anderson (pro hoc vice)

1717 K Street, NW
Washington, DC 20006
Tel: (202) 857-6000
Fax: (202) 857-6395
Email: Peter.Zeidenberg@arentfox.com
Taniel.anderson@arentfox.com

Wade V. Davies [BPR # 016052]
Ritchie, Dillard, Davies & Johnson, P.C.
606 West Main Street
Suite 300
Knoxville, TN 37902
Tel: 865-637-0661
Fax: 865-524-4623
Email: wdavies@rddjlaw.com

Attorneys for Defendant Allen Ho

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2016, I caused true and correct copies of the foregoing document to be filed with the Clerk of the Court using the CM/ECF system, and I further certify I will send a notice of electronic filing to the attorneys of record in this matter.

/s/ Xochitl Arteaga_____
Xochitl Arteaga