IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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THE UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. CCB-03-0150**
GORDON ELLIOTT THOMAS, III	*	

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MEMORANDUM IN SUPPORT OF PRETRIAL RELEASE

The Defendant, Gordon Thomas, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Gary W. Christopher, First Assistant Federal Public Defender, respectfully submits this memorandum in opposition to the government's motion for detention and in support of an order releasing Mr. Thomas on conditions sufficient to assure reasonably the safety of the community.

PROCEDURAL AND FACTUAL HISTORY

An indictment was returned on March 27, 2003, charging Mr. Thomas with sexual exploitation of children in violation of 18 USC § 2251(a), attempted receipt of images depicting minors engaged in sexually explicit conduct in violation of 18 USC § 2252(a)(2), and possession of child pornography in violation of 18 USC § 2252(a)(4)(B). On April 1, 2003, he appeared pursuant to Rule 5 of the Federal Rules of Criminal Procedure, at which time the government moved for detention pursuant to 18 U.S.C. § 3142(f)(1)(A). A detention hearing commenced on April 3, 2003, and was continued to April 22, 2003, at which time the defense presented the testimony of Neil H. Blumberg, M.D., who qualified without objection as an expert in forensic psychiatry.

Dr. Blumberg testified that he had been retained by the defense to assess, if possible, whether conditions of release proposed by the defense would reasonably assure the safety of other persons and the community. Dr. Blumberg testified that he had considered all of the government's proffered allegations, had interviewed Mr. Thomas for five and one-quarter hours, had conducted appropriate psychological testing, and had interviewed Mr. Thomas' family and friends. He testified that he had reached diagnostic conclusions in conformance with the criteria of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition ("DSM IV"), and was able to conclude with confidence that Mr. Thomas would not reasonably pose a threat to others if released to the third-party custody of his parents and be subject to electronic home monitoring and other related conditions.

The government offered the declaration of James T. Clemente, a Federal Bureau of Investigation Supervisory Special Agent, assigned to the FBI's National Center for the Analysis of Violent Crimes, Behavioral Analysis Unit. While the declaration did not specify the nature or extent of Mr. Clemente's education, it appears that he is not trained as a mental health or social science professional. He claimed expertise in understanding and predicting how pornographers and child sex offenders operate.

He indicated that the method by which his conclusions were reached was "Criminal Investigative Analysis." With one exception, no literature sources were offered for any of his observations or conclusions. There was no indication as to whether his theories or any of the techniques he has employed in reaching his conclusions had been subjected to any testing, peer review, or publication, whether the techniques have a known or potential error rate, whether standards exist controlling the operation of the techniques he employs, or whether his techniques

have any acceptance within the larger relevant scientific community.

Much of what Mr. Clemente related in the declaration was characterized as "a summary of the institutional knowledge of the NCAVC/BAU with respect to child sex offenders in general." The last four pages of the declaration, however, offered Mr. Clemente's opinions specific to Mr. Thomas, *viz.*:

- that Mr. Thomas' purpose in maintaining a friendship with a neighbor and her children was merely to "groom" adult parents and children in order to "gain access and control over the girls;"
- that he "has exhibited the typical behavioral characteristics of a Preferential Child Sex Offender;"
- that Mr. Thomas used his "position as a neighbor and babysitter with children's videos and pet rodents [to] allow [] him access and authority over potential victims;"
- that Mr. Thomas "exhibits no remorse;"
- that Mr. Thomas' criminal behavior "is likely to continue;" and
- that Mr. Thomas "poses a real and continuing danger to the community and represents a risk of re-offending if released into the community."

At the conclusion of the hearing on April 22, the Court directed the parties to submit briefs addressing whether Mr. Clemente's conclusions should be admitted in evidence, and if so, how they should be considered and weighed on the matter before the Court.

ARGUMENT

THE OPINIONS CONTAINED IN S/A CLEMENTE'S DECLARATION ARE UNRELIABLE AND SHOULD BE ACCORDED NO WEIGHT BY THE COURT.

The government is offering S/A Clemente as an expert, *i.e.*, as one who by his "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." FRE 702.[1] Because his proffered testimony claims to rely on specialized and technical knowledge, its use at trial would be subject to challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Under FRE 702, such testimony at trial would be excludable unless it was shown (a) to be "based on sufficient facts or data, " (b) to be "the product of reliable principles and methods," and (c) that the witness applied the principles and methods reliably to the facts of the case. In the context of expert testimony at trial, courts must consider such factors as whether the method is susceptible of testing, whether it has been the subject of peer review, whether it has an acceptable margin of error, whether it has gained general acceptance, and whether the method has legitimate uses outside of litigation. *See Samuel v. Ford Motor Co.*, 96 F. Supp.2d 491, 493 (D. Md. 2000) (enumerating non-exclusive list of factors that court should consider). If, in light of these and other factors that the court deems relevant, the information is found to be reliable as well as helpful, then and only then may it be admitted.

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[1] The full text of Rule 702 provides:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under the Bail Reform Act, however, "the rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information of information at the [detention] hearing." 18 U.S.C. § 3142(f). On the other hand, the fact that the rules of evidence are inapplicable in the detention hearing context "in no way negates the traditional requirement that such evidence must be first found reliable." *United States v. Accetturo*, 623 F. Supp 746, 755 (D.N.J. 1985). *See also United States v. Jefferies*, 679 F. Supp. 1114 (M.D. Ga. 1988) (evidence of propensity to commit further crimes not reliably established). "This seemingly low threshold [of admitting evidence inadmissible under the Rules] is consistent with the informal nature of detention proceedings and the desire to keep them from morphing into 'mini-trials,' yet tempered by the court's obligation to ensure the reliability of proffered information. . . . [C]ourts retain the responsibility for assessing the accuracy of the government's proof." *United States v. Goba*, 240 F.Supp2d 242, 247 (W.D.N.Y. 2003). Moreover, the government may carry its burden in this case only through the production of "facts . . . supported by clear and convincing evidence," § 3142(f), a standard which reflects on the quality and reliability expected of proof offered to support detention at least as much as it reflects on the quantity of the proof. *See Cruzan v. Director*, 497 U.S. 261, 282 (1990).

Thus while *Daubert* and the requirements of FRE 702 do not operate to *exclude* evidence in the detention hearing context, the interests they protect are so closely tied to the reliability interests secured under the Bail Reform Act that their principles should largely govern the extent to which the court gives weight to the evidence produced in a detention hearing. The matter is analogous to how courts handle government proffers of uncorroborated hearsay in detention hearings. The proffers are not excluded; rather "the Court should consider the proffer with great

care and accord it limited weight." *United States v. Hammond*, 44 F. Supp. 2d 743, 746 (D. Md. 1999). Similarly in this context, unless the Court is satisfied that the proffered expert opinions are based on sufficient facts or data and are the product of reliable principles and methods which were applied reliably here, the opinions should be considered with great caution and accorded limited weight.

The declaration of S/A Clemente would utterly fail a *Daubert* challenge were it offered in a trial context, and for the same reason the Court should accord it no weight.[2] It is difficult to discern in the declaration more than a collection of suppositions and prejudices acquired in the course of a highly focused career in law enforcement. To the extent that the Agent's specialized knowledge is formalized at all, it is presumably under the rubric of "Criminal Investigative Analysis" involving the sexual victimization of children. Though the Agent's facility with these techniques was acquired by education and experience, no educational background is identified in the declaration, and it appears that there is no formal training at all in any of the sciences generally entrusted with the difficult task of risk assessment. There is no suggestion that the Agent is at all familiar with the extensive literature generated by the mental health profession on the subject of risk assessment.[3] Incredibly, his opinions were formed without any understanding

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[2] *United States v. Romero*, 189 F.3d 576 (7th Cir. 1999) scarcely supports the proposition advanced here that S/A Clemente's offender-specific testimony is sufficiently reliable to be credited. The challenged testimony in Romero went only generally "to the methods and techniques employed by preferential child molesters." *Id.* at 582. Indeed, the court acknowledged that testimony which directly or indirectly opined that the defendant was a molester would raise "legitimate concerns." *Id.* at 585.

[3] The only formal study cited is the unpublished J. Hernandez, "Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons Sex Offender Treatment Program: Implications for Internet Sex Offenders." It is a study of a relatively small non-random sample of inmates and scarcely supports Agent Clemente's opinion that Mr. Thomas is an active molester. The

at all of Mr. Thomas' background and history or any consideration of the stringent conditions under which he would be released. There is no indication whether any of his assumptions have ever been tested or exposed to the review of peers outside of law enforcement. On the justified assumption that Agent Clemente's methods are not infallible, one would expect to discern some calculation of a known or potential rate of error; the defense suspects that no such calculation has been attempted. Of greater concern is that there is nothing in the declaration even identifying what the methods are and whether standards exist to control its operation. The declaration is reckless pseudo-science. It is neither clear nor convincing, and it should not advance at all the government's contention that no combination of release conditions will suffice. The Court should give it no weight.

CONCLUSION

Mr. Thomas is charged with very serious conduct. While counsel suggests that the conduct underlying Count 1 – committed more than two years ago and never repeated – is less serious than the acts of molestation which typically accompany violations of 18 U.S.C. § 2251, it goes without saying that any substantial risk that such conduct would recur would give rise to a strong argument for detention.

It is clear, however, that there is no such risk. The government's thorough investigation of Mr. Thomas, his computer, his associates, and their inquiries of the victim and her family have

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study's thrust is that persons identified as molesters often were revealed to have victimized many more children than was known at the time or their arrest. More than half of the participants were known molesters before their arrest. Forty-two percent of the participants not known to be predators before they were sentenced were never associated with any sexual contact offenses, a statistic for which Dr. Hernandez had no explanation. The obvious explanation is that many of those possessing and aroused by child pornography have sufficient internal or external controls to keep from acting on their fantasies.

offered not one suggestion that the conduct underlying Count 1 is other than an aberration. Dr. Blumberg's thorough assessment confirms that he is what his family represents him to be: a decent young man with an inappropriate fixation that unfortunately manifested itself in conduct more than two years. He is appropriately sobered by his arrest, has acknowledged the disorder, and looks forward to obtaining therapy for it. He will reside with a concerned family which will carefully monitor his conduct and his recovery. His movements will be monitored electronically. A combination of conditions clearly exists which will reasonably assure the safety of the community. The Court should order release on conditions.

Respectfully submitted,

JAMES WYDA
Federal Public Defender

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2003, a copy of the foregoing memorandum was delivered to Jonathan P. Luna, Esquire, Assistant United States Attorney, 6625 United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 2l20l, and to Gina Sents, United States Pretrial Services Officer, United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

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GARY W. CHRISTOPHER
First Assistant Federal Public Defender