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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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 UNITED STATES OF AMERICA :  
 :  
 v. : CR 05-66  
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 WALTER ANDERSON, :  
 :  
 Defendant. :  
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Washington, D.C.  
June 3, 2005  
9:00 a.m.

Transcript of Motion Hearing  
Before the Honorable Paul L. Friedman  
United States District Judge

APPEARANCES:

For the Government: SUSAN MENZER, ESQ.  
 For the Defendant: ABBE D. LOWELL, ESQ.  
 (Via Telephone)  
 CHRISTOPHER D. MAN, ESQ.  
 SARAH J. LOOPE, ESQ.  
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COURTROOM DEPUTY: Criminal 05-66, United States of America v. Walter Anderson.

Ms. Menzer for the Government, Mr. Lowell appearing by telephone, Mr. Man and Ms. Loope for the Defendant.

THE COURT: Good morning, everybody.

Mr. Lowell, are you there?

MR. LOWELL: Yes, sir.

THE COURT: It's Judge Friedman. How are you?

MR. LOWELL: I'm good. Thank you.

THE COURT: I am speaking into my microphone, and I'll just remind everybody in the courtroom that the only way Mr. Lowell can hear any of us is if we speak into a microphone. So please do that.

The first thing I want to say, and I know I've said this before, letters are not acceptable. Letters are part of the record. We do memoranda of law. We do motions. We do submissions. We don't do letters. I've said it in this case a number of times to counsel on both sides.

If I deny the motion to reconsider and you decide to go to the Court of Appeals, none of these

1 arguments would be before the Court of Appeals  
2 because letters are not filed. I told the  
3 Government when they were proceeding by letter. I  
4 told Mr. Lowell and his team that before.

5           So I've read it, but if you want it to be  
6 part of the file, take the letter and turn it into  
7 something with a caption on it and call it a  
8 memorandum of law or a submission or whatever you  
9 want to call it or a supplemental memorandum of law  
10 and file it. It's not going to affect the argument  
11 this morning, but I think both sides want the  
12 record to be complete.

13           Okay. We finished all the testimony and  
14 we agreed to try to do this this morning as sort of  
15 a closing argument or final argument from both  
16 sides on the pending motion to reconsider, and  
17 obviously we wanted to do it at a time when Mr.  
18 Lowell was available, even though his mind is split  
19 between two important cases.

20           So who wants to go first? I guess the  
21 defendant should go first because it's -- the  
22 defendants can go first because it's their motion  
23 to reconsider, or the government can go first  
24 because it's their burden to demonstrate that there  
25 is no condition or combination of conditions that

1 will suffice.

2 MR. LOWELL: I'll do it either way, Your  
3 Honor. I don't have a lot to say. I just want to  
4 sort of wrap of four or five points, which you  
5 probably know in advance what I'll probably be  
6 wrapping up.

7 THE COURT: Ms. Menzer.

8 She's on her feet, Mr. Lowell.

9 MR. LOWELL: Okay.

10 MS. MENZER: I have a feeling I may be  
11 shorter than you, and that's not in height, which I  
12 know I am.

13 Your Honor, I'm just going to sum up very  
14 briefly, and the reason why we had this hearing  
15 that the government was forced to put on evidence  
16 not just by proffer, but by live testimony, is  
17 because the defendant had claimed that the  
18 government created an inaccurate record, and I  
19 think after the Court has seen the evidence and has  
20 heard from Agent Kutz and the other witnesses,  
21 that's simply not true.

22 The answer is we don't have the Swiss  
23 records. The answer is whether or not Sylvia Rubio  
24 de Melina is an account holder, which we still  
25 don't know because the Swiss, apparently from the

1 last correspondence appear confused. She's denied  
2 it. That's not to say that Mr. Anderson doesn't  
3 control those funds or didn't control those funds.

4           It's the government's belief, although  
5 there is no evidence to the contrary, that that  
6 account was closed after Mr. Anderson learned of  
7 the investigation. We can only do odds. We know  
8 it was sometime in 2002. The search warrant was in  
9 March of 2002. That's a 75 percent chance that it  
10 was after, not before. That's all we can do right  
11 now. We don't have the records.

12           So it's a reasonable belief that the  
13 government has. We don't know how much was in the  
14 account when it was closed, and we don't know where  
15 the money went. That is exactly what the  
16 government represented to the Court. We made no  
17 misrepresentations, and I think all of the  
18 correspondence back and forth between Agent Kutz,  
19 the United States, the tax treaty people over in  
20 France and Switzerland, have shown that the  
21 government is not trying to hide anything. We've  
22 been trying and trying and trying, and we  
23 accurately represented to the Court that the Swiss  
24 are not cooperating.

25           Now, that's the first one. The second

1 allegation was the government misrepresented that  
2 Mr. Anderson disobeys orders. Well, Mr. Litt would  
3 clearly -- his testimony shows you that he did  
4 disobey Judge Bates's order. He said tell us who  
5 are the beneficial owners of Iceberg. His answer  
6 was I don't know.

7           Mr. Lowell in his papers came back and  
8 said, Well, if that was the case, then he would  
9 have been found in contempt and he would have been  
10 sanctioned, but as you heard Mr. Litt say, we  
11 didn't know, we couldn't prove then that he was  
12 lying, but the government has submitted documents  
13 to the Court in its second filing that show at that  
14 time, Mr. Anderson knew. How did he know? Because  
15 he created the situation. He created the Smaller  
16 World Trust. He created the Smaller World  
17 Foundation. He knew he wasn't telling the truth.  
18 Mr. Litt may not have. Judge Bates may not have.  
19 But Mr. Anderson did.

20           Mr. Anderson also did not obey subpoenas  
21 that were issued upon him in 2002. I think the  
22 filings reflect that he was relying on counsel, and  
23 we do know, and I'm sure Mr. Lowell is well aware,  
24 that we had hearings, numerous hearings, before  
25 Chief Judge Hogan on the issue of subpoenas. Those

1 subpoenas were issued in 2004. The government was  
2 talking about the subpoenas that were served upon  
3 Mr. Anderson in 2002. If you've had the  
4 opportunity, and I'm sure you have to read --

5 THE COURT: Which ones do you say he  
6 disobeyed?

7 MS. MENZER: The 2002.

8 THE COURT: Okay.

9 MS. MENZER: If you've had the opportunity  
10 to read Agent Kutz's affidavits, they specifically  
11 address that issue, that Mr. Anderson, after  
12 receiving those subpoenas, told Ms. Restrepo, told  
13 the people at Morgan & Morgan not to give the  
14 government the documents even though he did  
15 exercise control. Now, whether or not his lawyers  
16 knew he did that, we don't know. Mr. Lowell hasn't  
17 presented evidence to the fact, but all we know is  
18 he didn't comply. In the affidavit, you'll see  
19 reference to letters that Mr. Anderson himself  
20 wrote to these people, telling them not to.

21 Illiquid assets, they talk about all of  
22 his assets being illiquid. The other day, we  
23 played a telephone conversation for you where you  
24 hear him, in fact, liquidating assets with the help  
25 of Sylvia Rubio de Melina. He's doing it from

1 jail, Your Honor.

2 We also think that this hearing has given  
3 the Court more evidence, rather than less, of Mr.  
4 Anderson's risk of flight. Through additional  
5 research, we've now determined that we have two  
6 passports, validly issued without the corners  
7 clipped passports that are unaccounted for. That  
8 would be Government Exhibit 100 and Government  
9 Exhibit 2-39. Those were the passports that Mr.  
10 Anderson claimed one was lost and one was quashed.

11 Not know where those are, Your Honor, the  
12 government can easily -- the defendant, once he's  
13 outside the United States and he has those  
14 passports, if he has access to them, he can go  
15 anywhere. He may not be able to come back into the  
16 United States, but he can go anywhere else in the  
17 world.

18 Safety deposit box, when we started this  
19 process, the government believed there was one  
20 safety deposit box. The government now knows about  
21 two.

22 THE COURT: Why don't you stop one minute  
23 and we'll see if Mr. Lowell is still with us.

24 Mr. Lowell, are you hearing everything?

25 MR. LOWELL: I am, Your Honor.

1 THE COURT: Okay.

2 MS. MENZER: So now we know that there are  
3 two boxes. How many could there be? The  
4 government did not claim it was worried that there  
5 was cash in those boxes. The government is more  
6 concerned that there are documents in those boxes,  
7 documents that, one, will give Mr. Anderson the  
8 ability to flee and, two, the ability to live his  
9 life as a fugitive. Maybe there's bearer bonds in  
10 there, Your Honor, to a company that we don't even  
11 know about, to a company that maybe worth 20, 30,  
12 40 million dollars. We don't know.

13 Ties to the community, which is not the  
14 most important of the circumstances for the Court  
15 to consider, but it is one, and with respect to  
16 ties to the community, we're heard from one uncle  
17 and that he's vouching for Mr. Anderson's  
18 credibility. We know his mother and his stepfather  
19 are vouching for his credibility, but how much do  
20 they really know? How often have they spent time  
21 with him? His uncle said once, twice a year. They  
22 live a thousand miles away. All of the people on  
23 that list, none of them, his family members, live  
24 close by, watched him grow up, knew what he was  
25 doing.

1           In fact, Mr. Weir, who testified,  
2 explained that for Mr. Anderson -- I thought this  
3 was very telling. His companies were like his  
4 children. That's something that matters to Mr.  
5 Anderson. Those companies, none of them are  
6 located in the United States. He has many more  
7 ties to the international community than he does to  
8 the United States. He moves comfortably throughout  
9 the world with his business associates. All of  
10 these things, the Court found in its initial order.  
11 None of that has changed.

12           So it's the government's belief,  
13 obviously, that we've met our burden. We've proven  
14 by a preponderance of evidence that Mr. Anderson  
15 is, one, a serious risk of flight and, two, that no  
16 condition or combination of conditions will assure  
17 his presence at trial. That's including Mr.  
18 Schwartz's plan.

19           We've listened and we spoken to Mr.  
20 Schwartz, and we have a lot of respect for Mr.  
21 Schwartz. He presented a plan. It sounds great,  
22 but, Your Honor, he's never done it before. He  
23 doesn't know if it's going to work.

24           Ms. Kelly pointed out that armed people  
25 could come in and take Mr. Anderson, and there

1 would be nothing that his guards could do. Mr.  
2 Schwartz said, Well, that's only going to happen  
3 once. Once is enough. That one time, he's gone,  
4 and the chances of the United States finding him  
5 once he leaves is very, very difficult, as you've  
6 heard how hard it was to find him in the District  
7 of Columbia.

8 Finally, Mr. Lowell claimed that Mr.  
9 Anderson, and so did Mr. Weir, he's a fighter. We  
10 don't dispute that. He is. He challenges the  
11 authority and challenges the government rules when  
12 he doesn't agree with them. He donates money to  
13 causes that most people probably laugh at. He has  
14 his ideas and he's willing to stand up for them.  
15 He litigates vigorously civil cases. We know that.

16 But you know that those fights are far  
17 different than the one he faces here. He's facing  
18 potentially a life sentence between the Federal  
19 charges and the District of Columbia charges. The  
20 money than allegedly he owes to the Federal  
21 Government, to the District of Columbia, and to all  
22 those civil litigants enhances the reason why he's  
23 going to flee.

24 Your Honor, I did do the research for you  
25 with respect to--I came out a little different than

1 Mr. Man did, and I will, as I will as the Court  
2 suggested put it in a memorandum form.

3 THE COURT: Okay. Mr. Lowell.

4 MR. LOWELL: Yes, Your Honor. Thank you.

5 First, I want to thank you and all the  
6 people in the courtroom for indulging me. I'm  
7 sorry the circumstances find me this way. You've  
8 been most patient in this whole matter. In fact,  
9 you've given us more time than anybody could  
10 expect, and I just can't tell how much Mr. Anderson  
11 appreciates the consideration and also I appreciate  
12 your putting up with my schedule and the outbursts  
13 that sometimes they have caused, and I apologize  
14 for that again.

15 Let me start where Ms. Menzer started. We  
16 got off on the wrong foot in this case because I  
17 think she thought that--and it's always a difficult  
18 moment when somebody who is an adversary claims  
19 that the other adversary has misstated or  
20 misrepresented. I'm not impugning the government's  
21 integrity. Here is what I think I'm trying to say.  
22 If I haven't said it right before, I'll correct it  
23 now. By the way, I probably will be,  
24 notwithstanding the physical aspects, shorter than  
25 Ms. Menzer.

1           If I'm hearing, as I hear in a lot of  
2 situations, the problem is that impressions get  
3 made quickly and it's a very fast moving target.  
4 The government has had the ability to make a  
5 statement that has some foundation. They then  
6 built the story or two or three on that foundation  
7 that isn't true. It doesn't pan out.

8           So when they say that he's a man of lost  
9 passports and when they talk about camouflaged  
10 passports, then the government attorney gets on the  
11 record and says it clear Mr. Anderson or somebody  
12 has travelled on it. They made that statement in  
13 court and it becomes part of the record, and it's  
14 not true. Or they say that he has lots of  
15 applications or numerous or more than one  
16 application for dual citizenship as if it were made  
17 and has been sitting in his desk for four years,  
18 and there was only one and it was never acted upon,  
19 but it creates an impression. Or they say that  
20 he's got \$75 million that he can use -- the quote  
21 they used on the record -- at the snap of his  
22 fingers, end quote, and that's not true.

23           So there's a germ of truth, perhaps, in  
24 each of these allegations, and that's their  
25 foundation. I'm not contesting the foundation.

1 They put a story or two on it, and it is a story,  
2 ad that's what we were trying to say, that you  
3 can't set out that the company made \$400 million  
4 without also saying and they lost \$400 million, and  
5 you can't say that there is evidence of lying about  
6 a safety deposit box when the safety deposit box,  
7 at least when we talked about it in front of  
8 Magistrate Kay, was one that was open after he had  
9 given his answer.

10 I just want to point out, especially to  
11 Ms. Menzer, that that's the point. I mean, they  
12 have the basis to say, Look, he used to make money  
13 and we don't know where it is now, and he has these  
14 funky books, but then they don't point out that  
15 they found a shelf with 400 or 500 other books, and  
16 it's that nuance difference that creates a  
17 misimpression in a moving target that is so  
18 critical in a bail or bond hearing. If I haven't  
19 said that well before, then I'm glad I had the  
20 opportunity to say it now.

21 And it is the government's burden, and I  
22 recognize it, but I also recognize they've had a  
23 lot of time. By their own understanding, they've  
24 been investigating him for six years and  
25 interviewed numerous people and have tons of

1 documents, been involved in lots of conversations  
2 with the authorities involved, and so when he was  
3 arrested and at the bond hearing, they made  
4 representations about foreign bank accounts, and it  
5 turns out that when you hear that, you go, Oh, my  
6 god, he's got foreign bank accounts, and then you  
7 have to start sorting it out and say, Okay, he's  
8 got foreign businesses. So that's not quite as  
9 nefarious.

10           If you go further, you find out that the  
11 Swiss account is closed for years on date on which  
12 he's arrested, and he didn't know when he was going  
13 to get arrested. You find out that the Cypress  
14 account on the records that the government has --  
15 and they'll say, Well, we don't know the whole  
16 thing. That's fine, but they do have the internal  
17 records of Mr. Anderson's companies, and there was  
18 no reason for him, as is going to be the basis for  
19 their case in chief, for him not to be able to use  
20 those, and it shows that this is an account that  
21 was opened with a minimum amount of money, \$600,  
22 and then \$500 was out. Then they talk about the  
23 Channel Islands, and they saw a lot of those  
24 records, and they see that--I don't know why they  
25 weren't closed, but they should be, and yet, you

1 know, they say, Yeah, they checked that account  
2 back in 2004 and didn't bother to check it again up  
3 until the point at which they went into court and  
4 said he's got foreign bank accounts.

5           That's the point. The point is that on a  
6 day where a record is created, the precision of  
7 that record in something as important as a bail  
8 hearing is critical, and conjecture about what  
9 could be in a safety deposit box that we don't  
10 know--that might be out there that could contain  
11 bearer bonds and could contain who knows what is  
12 not the same as satisfying the burden. You can't  
13 speculate into the evidence that you want to say,  
14 especially when you put that one or two extra  
15 stories on the foundation that doesn't exist. So  
16 that's what I wanted to start by saying.

17           The second thing I'd like to summarize and  
18 says, and I said it to you the first time that I  
19 appeared in your court on this matter, Your Honor,  
20 the law does distinguish between a person's ability  
21 to flee and their propensity to flee, and a lot of  
22 the government's evidence continues to be about his  
23 ability and not his propensity, and the fact that  
24 he's a foreign businessman, they say, shows that  
25 he's got of lot of ties abroad, that's true, but

1 then the other side of that coin, which we were  
2 able to again show through the agents' testimony is  
3 that he has every to know how serious this was, and  
4 his the pattern of coming and going back into the  
5 United States was clear and consistent.

6           And that's not a small piece of evidence  
7 given what he knew the government was doing about  
8 him, and on top of which you heard as well that  
9 there have been conversations where the government  
10 made quite clear to him that he was going to be  
11 indicted. And while there could be a  
12 misunderstanding between the government attorney  
13 and Mr. Mostaka as to whether Mr. Mostaka did or  
14 did not make the offer to self-surrender or what  
15 was about that, Mr. Mostaka is not an  
16 inconsiderable man, and if he says that that was  
17 his intention, then it was mistaken by him and his  
18 client what their intentions were, and those aren't  
19 small points either.

20           In terms of the difference between the  
21 propensity and ability, Ms. Menzer doesn't give  
22 enough weight to something that she conceded, which  
23 is his history of being a fighter, of standing up,  
24 of not fleeing the scene when there's something  
25 that he's against. In most cases where you have to

1 assess the human being, you don't have that kind of  
2 a record, the Court doesn't, to be able to really  
3 see the measure of somebody on a very important  
4 issue, what kind of person is he, and I think even  
5 in the time that we've had, which has been more  
6 than in the average case, but still not enough to  
7 really stamp somebody's personality, you have a  
8 little bit of that now. This is a fighter. He's  
9 been saying for six years that he's a man that's  
10 never fled the fight. He doesn't.

11 Now, on one hand, the government says,  
12 Well, those fights are different from these. Well,  
13 of course they are. This is the most important  
14 fight of his life, and what the witness, Mr. Weir,  
15 was able to convey, I think, was that when he says  
16 something like his life is his business, his  
17 children are his endeavors, that's not to say that  
18 they're so important to him. It's to point to the  
19 fact that he can't operate when he doesn't have  
20 anything.

21 Now, he may lose this fight with the  
22 government. It's certainly a considerable and  
23 serious case, but the point is he's got to fight  
24 it. He can't do what is his life and sustenance by  
25 sort of hiding in the jungle of Brazil and hope

1 that he won't be found. That's not what his life  
2 has been about. That's the importance of  
3 understanding the companies and entrepreneurship.  
4 Even his ideas about the commercialization of  
5 space, it's not that he's going to survive in a  
6 little hut in, you know, some place, and that's the  
7 basis or the importance of that.

8           So he's staying to fight, and the evidence  
9 of it is he even protested the government when they  
10 tell people that they should be -- they shouldn't  
11 be sitting in HOV lanes. That tells a lot about  
12 somebody. Ms. Menzer says the ties to the  
13 community is not the bigger factor. Well, it's a  
14 pretty big factor, and, you know, I tell you that  
15 the evidence was not insignificant when she said,  
16 Well, how many of these relatives know him very  
17 well. Okay. Maybe they don't see him once a  
18 month, but they told Your Honor something very  
19 important. They have told Your Honor that they'll  
20 put themselves in harm's way for Mr. Anderson, that  
21 they would put the houses in which themselves and  
22 their children live as collateral because they are  
23 so sure he will not run from this fight.

24           Your words are cheap, Your Honor. We  
25 lawyers certainly make our professional on them,

1 and I recognize how many words I speak, but actions  
2 do in this case speak louder, and there is no more  
3 important action when a third party or relative, a  
4 friend, can believe in you so much that they will  
5 put themselves in harm's way on your account, and  
6 Mr. Anderson has such people, and unlike people who  
7 walk into your court and say, Well, he has a lot of  
8 ties to the community, he's got 20 relatives that  
9 live within a 10-mile radius, he has people who  
10 will do what I've just said.

11 In addition, I mean, I know we're not  
12 saying that Mr. Anderson isn't a unique and very  
13 interesting person when it comes to his reading  
14 habits or when it comes to his having pursued the  
15 possibility of having a foreign citizenship, which  
16 that purpose was for business purposes, you see  
17 from his reading and his statements, he is almost  
18 obsessed with privacy and identity theft. There  
19 are lots of reasons to explain all that, but I  
20 think, you know, you can certainly say that, okay,  
21 that's not usual, but it doesn't mean that you're  
22 doing that for the purposes of fleeing, the  
23 difference between propensity and ability.

24 And on the issue of passports, I mean,  
25 again, I understand that she's saying, Look, now we

1 see the following evidence that we didn't have  
2 before, but, first, there should not be on this  
3 record statement that there are two passports that  
4 are unaccounted for, because -- we haven't checked,  
5 Your Honor, but it's our basis to believe that the  
6 passport that he said accidentally got lost was, in  
7 fact, turned over when he got the new one, and we  
8 think we could, post this closing, provide evidence  
9 of that.

10           On the other one he said was lost, again,  
11 I know that he doesn't have a track record with the  
12 government, but the government believes him.  
13 Again, the actions are when he's traveled, we have  
14 the records of his travel, and he's been traveling  
15 on one passport. When he was arrested, he had a  
16 photocopy, which, by a way, the government alleges  
17 -- advises you should have a copy of your passport  
18 in case your passport gets lost or stolen. You  
19 should put it two different places. The point is  
20 that the actions of his travel and whose name he  
21 traveled under and when he traveled all have been  
22 consistent with what he has said, which is he is  
23 not using fake identities when he travels, and  
24 those quirky things he does about not wanting to  
25 have a process of revealing an unlisted number even

1 for the sole purpose of a utility bill is not the  
2 basis of his business transactions, his travel, or  
3 creating businesses.

4           In terms of his following directions, I  
5 mean, I don't know what to say about this, because  
6 on one hand, the government is literally right when  
7 they say he resists complying or he fights back in  
8 civil litigation or he's very litigious, but we are  
9 going to say that a person's reaction is civil  
10 litigation to resisting providing documents up  
11 until the point where the legal arguments not to do  
12 so have been exhausted or the strategic reasons not  
13 to do so have been exhausted, when a person is  
14 represented by counsel and the counsel is involved,  
15 there's a basis to believe that on something as  
16 important as being able to have an ability to  
17 defend himself in this case after he has tasted  
18 prison for three months is the basis to say that he  
19 will not comply with any conditions is a stretch,  
20 and it's an unfair stretch.

21           You probably spend way too much of your  
22 time during the month refereeing fights between  
23 civil litigants on discovery requests, and that  
24 should never be the basis to make the decision that  
25 a person will not under the circumstance of his

1 freedom and his ability to mount a defense given  
2 what's happened in this case thus far shows  
3 anything about that person's inability to comply.  
4 In addition, on that issue, again, it goes back to  
5 the government making a bunch of statements, one  
6 and a half or two of which may be true, and then  
7 they build an extra two stories.

8           In the record of Magistrate Kay is the  
9 story about he misstated his whereabouts when he  
10 was supposed to give his handwriting exemplar only  
11 to find out that his lawyer stated where his lawyer  
12 thought he was, not where Mr. Anderson said, but it  
13 wasn't even a big deal anyway because it was all  
14 about whether he was available or not available for  
15 his handwriting exemplar. So with the issue of  
16 taking a step further, the basis exists for saying  
17 what you said.

18           And then on the issue of--pardon me. I'm  
19 sorry. On the safety deposit boxes, I've exhausted  
20 pretty what I need to say about it. The mail boxes  
21 a good example. You pose any of those--and Ms.  
22 Menzer and Ms. Kelly are strong and articulate  
23 advocates and have a good record on which to build,  
24 because not many people have as many businesses or  
25 bank accounts for business reasons as Mr. Anderson

1 does. So having what they call mail drops is very  
2 intriguing and very provocative, but then you  
3 explain it. There's lots of good reasons for a man  
4 who travels extensively and needs a place for the  
5 mail to be deposit. It, again, goes back to  
6 ability versus the propensity.

7           So having said all that, I'm glad to have  
8 been able to at least clarity what I mean when I  
9 say the record is not what the record was professed  
10 to be when the record was first made. It doesn't  
11 mean that the government doesn't have any points.  
12 It means the government has taken their point to a  
13 degree to which is not supported by the evidence  
14 and in some cases was not based on any, any,  
15 activity, yet they can cut that in terms of the  
16 foreign bank accounts. Is it possible, it is  
17 remotely possible that Mr. Anderson has all that  
18 things that Ms. Menzer is worried about? Of  
19 course, it's possible, but conjecture and  
20 possibility is not the way to satisfy the burden of  
21 proof.

22           Having said all that, I'm going to  
23 conclude on something I almost don't need to  
24 conclude about. I wanted to figure out -- on the  
25 risk of flight, it's a matter of trying to figure

1 out the percentages, and I know the government will  
2 say a hundred percent risk of flight, and I am not  
3 going to say that there is zero percent risk of  
4 flight, and so it comes down to issue of when you  
5 match what you determine to be the risk of flight,  
6 you then have to get back to the standard, and  
7 that's where I don't want to tell you what you do  
8 better than me, because you do it every day. You  
9 have the points about trying to apply the  
10 presumption in favor of that, the least  
11 restrictive, and, most importantly, the standard  
12 that you have to find that the government proved  
13 that there no set of conditions, none, zero, that  
14 will reasonably, not perfectly, not assuredly, but  
15 reasonably assure his presence at trial.

16           And what we have put forward, I think the  
17 record shows, is that whatever you decide on the  
18 continuum of risk to put in terms of percentages,  
19 there is a set of conditions that will reasonably  
20 assure his presence, and even with the unfortunate  
21 situation of him living in a communal situation,  
22 there are ways to deal with the legitimate concerns  
23 of this condo association, and some of them, you  
24 just can't deal with. Sure, it would be better for  
25 them if a controversial figure did not live in

1 their midst, and I understand that and I'm  
2 sensitive to it, but he has property rights too.  
3 His freedom rights are important and his ability to  
4 mount a defense is important.

5           Let me speak a moment on that last thing,  
6 because I wasn't at the end of the last hearing,  
7 and I apologize for that, as you know. We never  
8 said -- and again, I want to make sure I correct  
9 that now. We have never said that his inability to  
10 prepare an adequate defense means the he should be  
11 set free in the midst of the bail hearing. That's  
12 not a standard. It's not a factor of those  
13 criteria.

14           Now, running parallel to the bail hearing  
15 are, of course, other considerations in life as  
16 you, yourself, have identified them. One of them  
17 is a person's ability to mount a defense under the  
18 Sixth Amendment and other constitutional  
19 provisions. So they run parallel, but they're not  
20 unimportant to look at. So back to the point about  
21 a set of conditions, I think now -- I am sure that  
22 the record is clear when Magistrate Kay first  
23 looked at it, then you, and the events that Ms.  
24 Menzer put forward have now been clarified as to  
25 which ones are the foundation and which ones are

1 stories above there that don't have height to  
2 support. On the basis of that record, you can  
3 assess his risk of flight, I think better. As I  
4 said, the government may say a hundred percent.  
5 I'm not going to say zero, but it not what the  
6 government says. I can't sit here and say, Your  
7 Honor, it's five or it's ten, but I do know it's a  
8 range where there are set of conditions that meet  
9 the standard, and failing to create a set of  
10 conditions would violate the standard, because  
11 whether it's saying, Okay, look, you have to be in  
12 your house from, you know, eight clock at night  
13 until eight o'clock the next day and/or you can  
14 only leave to meet with counsel and go see  
15 documents or you have to wear an ankle bracelet or  
16 you have to have a little computer thing to look at  
17 and you're randomly called and whether you have an  
18 unarmed guard around or not, and, you know, you  
19 can't do this and you can't do that, those are  
20 conditions, and they're strict and tight.

21           The ones we put forward or a combination  
22 of the ones we put forward are more than adequate  
23 and are -- actually more than adequate. We have  
24 even gone forward, and I said this the day that I  
25 got in your courtroom, I think there are a set

1 condition that I think match and then we'll take it  
2 a step further and add a couple that we think are  
3 even beyond that to give the Court and the  
4 government assurances.

5           So it comes back to the bottom line, which  
6 is on this record, you have a man who is a very  
7 different kind of man that most of the people you  
8 deal with every week, but part of what makes him  
9 different is his passion, is his fervor in what he  
10 believes in, his desire to excel and his being not  
11 afraid to fight the battle, and those are the  
12 traits that make it clear that he's not going to  
13 shy from this one and that he wants to either clear  
14 his name or go down swinging, and that is something  
15 that you can tell from the history that goes all  
16 that way back to his first protest against the  
17 government where he did not flee the United States,  
18 as many other people did, to his point of writing a  
19 letter to a kid who stands up having to say a  
20 prayer a school he didn't want to have to say.

21           So I am concluding, Your Honor, again by  
22 thanking you for all the time, but by urging you to  
23 now make an assessment of the risk of flight on the  
24 scale and then see, and I think you have to see,  
25 that the government can't possibly prove what it

1 has to prove, that there are, quote, no set, end  
2 quote, of conditions. There are many sets or many  
3 combinations that would provide reasonable  
4 assurance.

5 And we know you have that panoply in Mr.  
6 Schwartz's presentation. You can take into  
7 consideration the condo association's concerns, and  
8 we can create --then we can get on to what will be  
9 the more difficult part of case by putting forward  
10 that which takes us to the next phrase.

11 So maybe I didn't take less than Ms.  
12 Menzer. I appreciate the time I was given.

13 THE COURT: Thank you, Mr. Lowell. I  
14 wasn't keeping track of time, but both of you spoke  
15 longer than you predicted you would speak.

16 Mr. Menzer, do you have anything you want  
17 to say in response?

18 MS. MENZER: I just have one thing I'm  
19 going to say, and that's about the passion, because  
20 that's something that I can't speak of. I don't  
21 get the opportunity to speak to Mr. Anderson, as  
22 you know, but I will say that what disturbed me the  
23 most about that statement was that Mr. Fitch, who  
24 we alluded to, who Mr. Lowell said Mr. Anderson  
25 didn't tell him his whole itinerary misrepresented

1 to the Court where Mr. Anderson was, Mr. Fitch was  
2 Mr. Anderson's attorney for more than a decade. He  
3 does know Mr. Anderson. Mr. Anderson did not tell  
4 him the complete truth. Why was that important?  
5 Mr. Anderson at that time, the government has  
6 shown, was in the British --

7 [Electronic interference.]

8 THE COURT: What do you think that is?

9 MS. MENZER: I'll stand back.

10 It's important because Mr. Anderson --

11 MR. LOWELL: Your Honor, I couldn't hear  
12 the last thing.

13 MS. MENZER: I'm still here.

14 MR. LOWELL: Go ahead.

15 MS. MENZER: I'll talk louder.

16 What I was trying to say is that's  
17 important for the Court to consider more than  
18 anything, because Mr. Lowell has sat there, and I  
19 understand that Mr. Anderson has his rights not to  
20 speak up for this detention hearing and Mr. Lowell  
21 is acting as his mouth piece, but many of the  
22 things that Mr. Lowell stated in his motion just  
23 weren't true, and only where he could have gotten  
24 that information was from Mr. Anderson. One was  
25 the armed guards being in the condominium. You've

1 heard the testimony and you've seen that that  
2 wasn't true.

3 THE COURT: What wasn't true?

4 MS. MENZER: That many sometimes there  
5 have been people living in the condominium who were  
6 armed, who had armed guards. You've heard that  
7 that just wasn't true. That wasn't determined, and  
8 I assume, and I don't know, but I assume that came  
9 from Mr. Anderson.

10 But the thing about Mr. Fitch and why it's  
11 important, Mr. Fitch was his attorney for a long,  
12 long time, and he was representing him in this  
13 criminal case, and coming in for his handwriting  
14 exemplars was important and it was important for  
15 Mr. Anderson to tell him where he was every step of  
16 the way, because he needed to get him back because  
17 Judge Hogan said no. So the fact is that he was  
18 not honest with Mr. Fitch. You can't lay it on Mr.  
19 Fitch that says, Well, it was he that represented  
20 to Judge Hogan. Where he was was so important in  
21 this case. He was in the British Virgin Islands  
22 forming yet another entity that the government  
23 alleges in Agent Kutz's affidavits was part of his  
24 obstruction of justice.

25 So the passion, yes. Is there passion?

1 Yes, but is it real and is it true? We don't know.  
2 That's what hasn't been tested. Those are the  
3 untested words, not the words of the government.  
4 The government has not built a story. The  
5 government is telling you it doesn't know. It  
6 doesn't know the rest of the story. There is no  
7 story here. We just simply don't know, and what  
8 we're saying is all those unknowns, it's just too  
9 much, too much to take the chance.

10 THE COURT: Mr. Lowell, anything else?

11 MR. LOWELL: No, Your Honor. I would only  
12 be repeating myself, and there's another set of  
13 government attorneys 10 minutes away looking to  
14 beat up on me. So I have to go to them now.

15 THE COURT: Okay. Anybody else need to  
16 say anything?

17 Okay. Well, I've heard all the testimony.  
18 I've got all the exhibits, and I've heard all the  
19 arguments. Mr. Anderson's lawyers will turn their  
20 letter into a memorandum of law. Ms. Menzer is  
21 going to file a memorandum of law, and then that  
22 will be a question as well, and then I'll have  
23 everything I need, I think.

24 Okay. Just so the record is clear, if  
25 this transcript ever gets to the Court of Appeals

1 for any purpose, Mr. Anderson has not been here  
2 this morning.

3 MR. LOWELL: I should have said that.

4 THE COURT: That's okay. And he, both  
5 through Mr. Man, one of his lawyers, and personally  
6 on the record two days ago when everyone was here  
7 waived his right to be here for this part of this  
8 criminal proceeding, which we told him at the time,  
9 and it turns out we were exactly right, was only a  
10 legal argument, and with that understanding, he  
11 waived his right to be present in the presence of  
12 his counsel.

13 Okay. Thank you all.

14 MR. LOWELL: Thank you again, Your Honor,  
15 for the consideration.

16 THE COURT: Okay. Mr. Lowell, good luck.

17 MR. LOWELL: Thank you. How's the weather  
18 in Washington?

19 THE COURT: It's raining.

20 MR. LOWELL: Okay. Thank you.

21 THE COURT: Okay.

22 All right. Ladies and gentlemen, thank  
23 you very much. I'll be in touch.

24 [Whereupon, at 9:43 a.m., the matter was  
25 adjourned.]

## REPORTER CERTIFICATE

I, **CATHERINE B. CRUMP**, the official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

  
**CATHERINE B. CRUMP**