No. 09-____

IN THE

# Supreme Court of the United States

SHOLOM RUBASHKIN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether a district court has discretion to deny bail pending sentencing to a defendant found guilty of bank fraud who proffers conditions of release that effectively guarantee his appearance for sentencing and for service of his sentence.

2. Whether the Bail Reform Act (18 U.S.C. §1343(a)) is violated by an unexplained denial of bail pending sentencing on "flight risk" grounds to a defendant who made no attempt to flee from his home where he has lived with his family for 18 years during a highly publicized six-month investigation, adhered scrupulously to all conditions of pretrial release, and offers to pay for electronic monitoring and a 24-hour armed guard while he is under home detention.

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## OPINIONS BELOW

The Eighth Circuit issued no opinions in denying the petitioner's appeal (Pet. App. A, p. 1a, *infra*) and in denying rehearing and rehearing en banc (Pet. App. B, p. 2a, *infra*). The district court's opinion denying bail pending sentencing (Pet. App. C, pp. 3a-10a, *infra*) is not reported. The district court's opinion granting bail pending trial (Pet. App. D, pp. 11a-34a, *infra*) is not reported.

## JURISDICTION

The Court of Appeals for the Eighth Circuit issued its panel decision (Pet. App. A, p. 1a, *infra*) on January 8, 2010. A timely petition for rehearing en banc was denied (Pet. App. B, p. 2a, *infra*) on February 17, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

**18 U.S.C. § 3142(c)** provides:

(c) Release on conditions.--(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community,

which may include the condition that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the

Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

18 U.S.C. § 3142(g) provides:

(g) Factors to be considered.--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including--

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

18 U.S.C. § 3142(i) provides:

(i) Contents of detention order.--In a detention order issued under subsection (e) of this section, the judicial officer shall--

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

18 U.S.C. § 3143(a) provides:

(a) Release or detention pending sentence.--(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition

or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c). (2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless--

(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

## STATEMENT OF THE CASE

### 1. Introduction

Petitioner is a native-born American who has a wife and ten children. His family has lived with him in Postville, Iowa, since Mr. Rubashkin settled in Postville 18 years ago to be a vice president of a kosher beef and poultry slaughtering plant that his father Aaron Rubashkin established. Petitioner became the subject of extraordinary media attention after the Immigration and Customs Enforcement ("ICE") agency of the Department of Homeland Security conducted an immigration raid on the AgriProcessors Postville plant on May 12, 2008, and arrested 389 illegal immigrants at the plant.[1]

Mr. Rubashkin anticipated ever since the May 2008 raid that he would be accused in a federal indictment. He received a "target letter" in May 2008. His attorneys met and corresponded repeatedly with the federal prosecutors while petitioner remained in Postville awaiting the criminal charges that the prosecutors said they were intending to bring. Various employees of

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[1] ICE has apparently substantially reduced or discontinued its policy of enforcing the immigration laws with raids on employers allegedly employing illegal aliens. *See* "Delay in Immigration Raids May Signal Policy Change," *Washington Post*, March 29, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032801751.html. And in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), this Court held that the statute to which most of the illegal aliens apprehended in the May 2008 raid pleaded guilty did not apply to their conduct.

AgriProcessors were indicted in the months following the raid. Mr. Rubashkin made no attempt to flee notwithstanding the very public nature of the investigation in which he was targeted and the indictments of AgriProcessors employees. He even traveled to Canada to visit a sick friend and returned to Postville while the filing of formal charges and an arrest were imminent.

Before the May 2008 raid, petitioner had an absolutely clean record, and there is no reason to believe that he would flout the law or attempt to flee from it. In response to the charges filed against him he has asserted his innocence and declared that he is confident of ultimate vindication after a fair legal process. The details of the charges filed against Mr. Rubashkin more than five months after the raid are described below. Intense public scrutiny and extensive media attention were given to petitioner's arrests. After his initial arrest on an immigration charge on October 30, 2008, Mr. Rubashkin was released on a one-million-dollar bond. One day after indictment on the immigration offense, he was again arrested with extensive publicity on bank fraud charges. The magistrate judge ordered him detained. The district court reversed that decision after more than two months of imprisonment. Mr. Rubashkin complied punctiliously with all conditions of his release. Indeed, on one occasion when his electronic bracelet came loose, petitioner notified the authorities of this fact and had it corrected.

Mr. Rubashkin has been ardently supported in his defense by significant segments of the Orthodox Jewish community. Relatives, former employees, and

friends are certain enough that he will be remaining in the United States and will not flee that they have offered to post their homes, totaling approximately eight million dollars in equity, as security for his presence in court. The Orthodox Jewish community has even offered valuable and sacred Torah Scrolls as security. Mr. Rubashkin has proposed a restraint on his freedom that will imprison him at home under a 24-hour armed guard. That will enable him to follow the strict rules of Orthodox Jewish observance and assist his wife and family of ten children, including an autistic son and children aged 12, 8, and 5.

No one claims that Mr. Rubashkin poses any danger to the safety of any other person or the community if he is released from prison pending sentencing. The district judge denied petitioner's request for release on grounds "that Defendant poses a flight risk," without specifying any conduct by him or any probative evidence to support that conclusion. *See* Pet. App. C, p. 9a, *infra*. Moreover, both the court of appeals and the district court failed to comply with the language of Section 3143(a) that directs a court determining whether to grant bail pending sentencing to consider whether the defendant is a "flight risk" ***if released "under section 3142(b) or (c)."***

Section 3142(c)(B)(xiv) directs judicial officers to evaluate "any other condition that is reasonably necessary to assure the appearance of the person as required . . . ." In violation of Section 3142(i)(1), neither the court of appeals nor the district judge explained their rejection of the very significant

conditions that would "assure the appearance" of Mr. Rubashkin – including a 24-hour personal armed guard. The armed guard was proposed at a detention hearing in January 2009, but the district judge did not think this additional condition necessary and released the petitioner on a very substantial bond and GPS electronic monitoring.

Although (1) petitioner complied punctiliously with the conditions of pretrial release, (2) there is no evidence of any effort on his part to flee, and (3) the 24-hour armed guard at his home guarantees his appearance for sentencing (and for service of his sentence if he satisfies the standard of Section 3143(b) for release pending appeal), the courts below have, with no explanation whatever, subjected him unlawfully to presentence imprisonment.

### 2. AgriProcessors Is Raided in May 2008

To the accompaniment of massive national publicity, AgriProcessors' Postville plant was raided by ICE on May 12, 2008. *See*, *e.g.*, NEW YORK TIMES, May 13, 2008: "Hundreds Are Arrested in U.S. Sweep of Meat Plant." The agents arrested 389 illegal aliens employed at the plant.

During the following five-and-one-half months, Mr. Rubashkin received a "target letter," various arrests of AgriProcessors employees were announced, and some employees entered guilty

pleas.[2] Petitioner remained in Postville during this entire time while his lawyers discussed potential charges with the prosecutors.

### 3. Petitioner Is Arrested and Charged With Immigration Violations

On October 30, 2008, Mr. Rubashkin was arrested on a complaint charging him with immigration-law violations. He was indicted on November 13 in a three-count indictment relating to ***one*** allegedly forged resident alien card. On this charge – involving a single allegedly forged document – filed after petitioner had been residing in Postville during an intensive investigation with no suggestion of flight, he was released by the magistrate judge on a one-million-dollar bond and an electronic bracelet -- extraordinarily severe and unprecedented conditions for such a charge against an individual with a clean record and ample ties to the community.

### 4. Petitioner Is Rearrested on a Charge of Bank Fraud

On the day following his first indictment, the prosecutors re-arrested Mr. Rubashkin. The complaint alleged that he had committed bank fraud (1) by falsely certifying to AgriProcessor's lending institution that AgriProcessors was in compliance with the law when, in fact, it hired illegal aliens, and (2) by failing to deposit all checks received by

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[2] *United States v. De La Rosa*, 2:08-cr-01313-LRR; *United States v. Guerrero-Espinoza*, 2:08-cr-01314-LRR; *United States v. Althouse*, 2:08-cr-01323-LRR.

AgriProcessors in the "sweep account" and temporarily using (but subsequently reimbursing) funds received from customers for other AgriProcessor functions in Postville. Paragraph 14 of the criminal complaint acknowledged that virtually all funds temporarily diverted in this manner were reimbursed shortly thereafter to the "sweep account."

There was no proof that the bank was actually misled by this practice, but the prosecution asserted that it was "non-compliance" with the terms of Mr. Rubashkin's release. The prosecutors argued that Mr. Rubashkin should be denied bail pending trial because, *inter alia*, he could flee to Israel because he was Jewish (a specious claim that would justify detention of any Jewish person accused). The magistrate judge accepted the prosecution's argument and denied bail. Mr. Rubashkin was imprisoned for more than two-and-one-half months – from November 14, 2008, to January 28, 2009.

### 5. The District Judge Reverses the Magistrate's Decision

While Mr. Rubashkin was in prison, the prosecution secured three superseding indictments against him. The Fourth Superseding Indictment, returned on January 15, 2009, escalated the number of counts against Mr. Rubashkin from 12 to 97. The bank fraud allegations increased from 2 to 15, 10 new charges of money laundering were added, and 20 counts under a statute requiring prompt payment to cattle owners (7 U.S.C. § 195) that, to counsel's knowledge, has never been enforced criminally

against any person. The number of charges ballooned because the prosecution charged each of the lender's advances to AgriProcessors under the line of credit as a separate offense and charged each month's report by AgriProcessor to the lender as a separate offense. The money-laundering offenses related to the deposits Mr. Rubashkin made of funds received by AgriProcessors to the accounts of a local kosher grocery store and a local religious school, both of which served the Postville community. Not to be outdone, the Iowa Attorney General's Office also announced in September 2008 that it was filing 9311 misdemeanor counts of child-labor violations.

On January 26 and 27, 2009, the district judge held an evidentiary hearing on Mr. Rubashkin's motion to review the magistrate judge's detention order and release him pending trial. At the conclusion of the hearing, she granted Mr. Rubashkin's motion and stated her reasons in a written Order dated January 28, 2009. Pet. App. D, pp. 11a - 34a, *infra*. The district court rejected unjustified speculative hypotheses of preparation for flight that the prosecution had urged the Court to draw from circumstances of Mr. Rubashkin's arrest. The Court held that if he fled "he would forsake and disgrace his friends and family and betray their considerable trust in him." He would thereby "presumably cut all ties to Postville and his religious community" and "disgrace himself and forever sully his family name." Pet. App. D, p. 29a, *infra*.

The district court also explicitly rejected the prosecution's assertion that there was a risk that Mr. Rubashkin would flee to Israel. The court said –

with emphasis in the original – "there is **absolutely no evidence** Defendant has any ties to Israel or has made any preparations to flee to Israel," and rejected the prosecution's reliance on Israel's "Law of Return," saying that it "plays no part in the [Court's] analysis." Pet. App. D, p. 29a, *infra*. After 76 days in prison, petitioner was released pending trial on "a substantial security bond, active GPS electronic monitoring, travel restrictions and surrender of the passports and birth certificates of Defendant, Mrs. Rubashkin and their minor children." Petitioner complied punctiliously to these terms throughout his release pending trial.

### 6. Mr. Rubashkin Is Found Guilty by a Jury

The district court thereafter severed the immigration-law charges from the bank-fraud charges, and granted a defense motion for a change of venue to a nearby federal court, although rejecting the defense request that the case be tried in Chicago, Illinois, or Minneapolis, Minnesota. Over defense objection that there would be prejudicial "spillover" of immigration-law violations in a bank-fraud trial, the court directed that the bank-fraud case be tried first.

Mr. Rubashkin was tried in Sioux Falls, S.D., between October 13 and November 12, 2009, on the bank-fraud charges (Counts 73-163 of the Seventh Superseding Indictment). He was found guilty by the jury on 86 of the 91 counts after the jury heard evidence, for more that two trial days, of the immigration-law violations – testimony that the district judge had found so prejudicial that it

warranted severing the immigration charges from the bank-fraud charges. The district judge denied repeated motions for a mistrial and immediately remanded petitioner, on the prosecution's motion, after the jury's verdict.

The prosecution then moved to dismiss the immigration charges – Counts 1-72 of the Seventh Superseding Indictment. On November 19, 2009, the district court granted the prosecution's unopposed motion.

### 7. After an Evidentiary Hearing, Release Pending Sentencing Is Denied

On November 18, 2009, the district court held an evidentiary hearing on the prosecution's "Request for Detention." On November 20, 2009, the district court granted the prosecution's motion and continued Mr. Rubashkin's detention pending sentencing. Pet App. C, pp. 3a - 10a, *infra*. She summarized the evidence presented at the hearing, which included (1) testimony of the United States Probation Officer who testified that Mr. Rubashkin had complied without fail with all terms of release and had "alerted her immediately" when his monitoring ankle bracelet had "become dislodged from his ankle . . . to allow for its expedient repair," (2) evidence of extraordinary support from the Orthodox Jewish community, including "over one thousand letters and e-mails of support written by members of his community who vouch for [Mr. Rubashkin's] willingness to cooperate with the law" and offers from 43 individuals willing to pledge the equity in their homes for his bail, and (3) testimony from a rabbi who heads his legal

defense committee that Mr. Rubashkin is now so visible in the Jewish community that "there is nowhere Defendant could hide."

Mr. Rubashkin's counsel also presented a report from an Iowa security company that will provide 24-hour armed guard surveillance at Mr. Rubashkin's expense. Pet. App. E, pp. 35a-37a, *infra.* This proposal had been made at the January 2009 detention hearing, but the district judge had found such additional safeguard to be unnecessary at that time.

The district judge acknowledged in her Order (1) "the overwhelming support that Defendant's community has provided during the trial and the instant proceeding," (2) "that Defendant took great pains to comply with the terms of his pretrial release," and (3) "that Defendant has shown he is committed to his family and to his community."

Nonetheless, without stating any reason whatever, the district court said that the prosecution's evidence for detention was "compelling" because of Mr. Rubashkin's "actions prior to and during the pendency of the instant action" and his "powerful incentive to flee due to the jury's return of the Verdicts." She ordered that he be detained pending sentencing.

Neither the district court's Order of November 20, 2009, nor its Order of December 3, 2009, denying reconsideration, discussed the adequacy of the proposed conditions of release to "assure the appearance of [Mr. Rubashkin] as required" or gave

any reason for rejecting the conditions that effectively guarantee petitioner's future appearance.

### 8. The Eighth Circuit Affirms Without Any Explanation

A panel of the Eighth Circuit denied petitioner's appeal from this ruling without opinion. Pet. App. A, p. 1a, *infra*. A timely petition for rehearing en banc was denied without opinion. Pet. App. B, p. 2a, *infra*.

## REASONS FOR GRANTING THE WRIT

Sholom Rubashkin is not John Dillinger, although he has been treated as if he were. He was a businessman who, according to the prosecution's dismissed allegations, knowingly employed illegal aliens at his meat-processing plant. The jury's verdict found him guilty of misrepresenting the true value of the security for a business loan on which he was making timely interest payments and which he always intended to repay. He is surely entitled to the due process that federal law affords in contesting these charges and appealing after a jury trial and sentence.

Moreover, incarceration in prison rather than effective 24-hour arrest at his home imposes severe hardship on Mr. Rubashkin because of the stringent demands of the religious observance of Orthodox Judaism that severely limit one's diet and prescribe prayer and other rituals. These observances frequently cannot be practiced in a prison. Moreover, the Passover holiday – which has very strict requirements – will occur before his sentencing. His

imprisonment during that period – if it is, as we contend, unauthorized by the Bail Reform Act – will deprive him of the constitutionally and statutorily secured right to freely practice his religion.

The plain unambiguous language of the Bail Reform Act entitles petitioner, **as a matter of law**, to be released on bail pending sentencing if his appearance can be "assured." Neither of the courts below is assigned any discretion by the Bail Reform Act to imprison him if this statutory standard is satisfied. His treatment by the prosecution and the courts below has, however, been reminiscent of Lewis Carroll's Queen of Hearts: "Sentence first, verdict afterwards."

## ARGUMENT

### I.

### THE EIGHTH CIRCUIT'S UNEXPLAINED DENIAL OF BAIL CONFLICTS WITH THE PLAIN LANGUAGE OF THE BAIL REFORM ACT AND WITH THE RULE IN THE SECOND CIRCUIT

The Bail Reform Act of 1984 authorizes imprisonment of a defendant who is not a danger to the community prior to a final judgment only if there are no conditions of release that provide adequate assurance that such a defendant will appear as required. After an adverse jury verdict, the defendant has the burden of proving that he will appear at sentencing and will serve his sentence. But the district court and court of appeals are given

no discretion by the language of the Bail Reform Act to deny bail if the defendant proposes conditions of release that assure his presence in the future.

## A. Conflict With the Second Circuit

The Eighth Circuit's cryptic denial of bail appears to rest on that court's belief that it had discretion to deny petitioner's bail application. This premise conflicts with the rule announced by the Second Circuit in *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). The court said in *Abuhamra* that although the burden of proof regarding risk of flight shifts to the defendant after a guilty verdict, "if a defendant can make the required evidentiary showing, the statute establishes a right to liberty that is not simply discretionary but mandatory: the judge '*shall* order the release of the person in accordance with section 3142(b) or (c).'" (Emphasis original.) The Tenth Circuit appears to agree with the Second Circuit's ruling that release on bail pending sentencing is mandatory if the statutory condition is satisfied. *See United States v. Ingle*, 454 F.3d 1082, 1086 (10th Cir. 2006). And a number of district courts have applied the Bail Reform Act's provisions in this manner. *See United States v. Chavez-Rivas*, 536 F. Supp. 2d 962 (E.D. Wis. 2008); *United States v. Giordano*, 370 F. Supp. 2d 1256 (S.D. Fla. 2005); *United States v. Hart*, 906 F. Supp. 102 (N.D.N.Y. 1995).

## B. The Plain Language of Section 3143(a)

The language of the statute could not be clearer. Except for individuals found guilty of certain

offenses enumerated in Section 3142(f)(1) and defendants who pose a danger to the safety of any other person or to the community, defendants who are awaiting sentencing "shall" be released if "the person is not likely to flee . . . if released under section 3142(b) or (c)." The court is not authorized to consider any factor other than the sufficiency of proposed conditions of release. In this case, it is obvious that the courts below were moved by the extensive national publicity given to petitioner's case. There is simply no other reason why a court would commit to a prison facility, rather than detain at home under 24-hour armed guard, a person whose only offenses were bank fraud and, allegedly, immigration violations.

The obligation of a district court and a court of appeals to impose "the least restrictive further condition, or combination of conditions, that will reasonably assure the appearance of the person as required" is explicitly prescribed in Section 3142(c)(1)(B). And Section 3143(a), which governs release pending sentencing, incorporates Section 3142(c). A district court considering whether to release a defendant pending sentencing under Section 3143(a) must appraise the sufficiency of the conditions specified in Section 3142(c)(1)(B), which include "any other condition that is reasonably necessary." *See United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990) (electronic bracelet and posting home as security sufficient to reasonably assure presence of narcotics defendant who was a flight risk).

C. Proposed Conditions for Petitioner's Release

The 24-hour guard, electronic monitoring, forfeiture of valued religious scrolls, and $8 million in property posted by 43 individuals will guarantee Mr. Rubashkin's appearance.

**(1) 24-Hour Armed Guard** – Global Security Services of Davenport, Iowa, submitted a letter proposal for an armed guard to be stationed 24 hours a day at Mr. Rubashkin's home, where a camera system would also cover the exterior of the house. Mr. Rubashkin would be arrested and held by the armed guard if he ever tried to leave his home without prior authorization. Payment for the service would be made far enough in advance that the service could not lapse without ample advance notice to the prosecution.

**(2) Forfeiture of Valued Torah Scrolls** – Torah scrolls have been offered as security by seven rabbis. This is an extraordinary sign of confidence by the community in Mr. Rubashkin's promise to appear as required.

**(3) $8 Million in Friends' Property** – Family, friends, and associates are ready to provide their homes as security for Mr. Rubashkin's appearance.

D. No Basis For Finding "Flight Risk"

The grounds that have justified findings in reported cases that defendants are "flight risks" involve either (a) ties to a foreign country (*e.g.*, *United States v. Abad*, 350 F.3d 793, 799 (8th Cir.

2003) (foreign citizen with no children); *United States v. Jamal*, 326 F. Supp. 2d 1006 (D. Ariz. 2003)("concrete, ongoing, business interests in Lebanon and the Middle East" and minimal assets in the United States); *United States v. Ruiz-Corral*, 338 F. Supp. 2d 1195, 1198 (D. Colo. 2004) ("significant family ties to Mexico")); *United States v. Vergara*, 612 F. Supp. 2d 36 (D.D.C. 2009) ("not a United States citizen, has extensive foreign ties"), or (b) a history of flouting the law or of avoiding arrest (*e.g.*, *United States v. Braiske*, 2009 WL 3616246 (N.D. Iowa Nov. 2, 2009); *United States v. Scales*, 344 F. Supp. 2d 213, 216 (D. Me. 2004) ("history of violating State-imposed conditions of release or defaulting on appearance requirements")). We have found no reported case in which a defendant who, like Sholom Rubashkin, had no ties to a foreign country and had no history of evading the law was held to be a "flight risk" and detained pending sentencing.

## II.

## FAILURE OF THE COURTS BELOW TO STATE ANY REASON FOR REJECTING CONDITIONS OF RELEASE THAT WOULD GUARANTEE PETITIONER'S PRESENCE VIOLATES THE BAIL REFORM ACT AND WARRANTS THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS

Section 3142(i) unconditionally directs a court that issues a detention order to "provide a written statement of the reasons for the detention." The district judge's order granting the prosecution's detention request failed to satisfy this statutory

standard. Although it recited the history of the case and stated reasons why bail *should* be granted, it failed to provide any understandable "reasons for the detention" apart from a conclusory statement that the petitioner is a "flight risk." And the court of appeals – which had an independent obligation to consider whether petitioner had to remain in prison pending sentencing – stated no reason whatever in either the panel decision or the denial of rehearing.

The First and Seventh Circuits have taken the statutory obligation seriously, remanding bail denials and requiring district courts to explain why they were denying bail applications. *United States v. Blasini-Lluberas*, 144 F.3d 881 (1st Cir. 1998); *United States v. Swanquist*, 125 F.3d 573 (7th Cir. 1997). The total abdication of this judicial duty by a district court in the Eighth Circuit and by the full *en banc* Eighth Circuit warrants the exercise of this Court's supervisory jurisdiction under Rule 10(a) of the Rules of this Court.

## III.

## THIS CASE IS "CAPABLE OF REPETITION, YET EVADING REVIEW," AND MAY BE DECIDED SUMMARILY

We recognize that the petitioner may be sentenced before the full Court has an opportunity to consider the merits of this Petition for a Writ of Certiorari.[3] Nonetheless, the issue will not be moot.

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[3] On the date of filing this petition, the precise sentencing date is still unknown. It appears, however, that the sentencing will take place in mid-April 2010.

The question presented by this petition – whether a defendant may be denied bail as a "flight risk" if conditions of release guarantee his presence – is an issue that will ordinarily "evade review" by the full Court because the usual time that elapses between a jury's verdict and a defendant's sentencing is shorter than the time required for seeking review in this Court and plenary briefing and argument. The legal issue, however, is one that warrants ultimate review and determination by this Court. It is "capable of repetition" both in other cases and even with respect to the petitioner himself. Consequently, the issue remains "live" for consideration by this Court. *Honig v. Doe*, 484 U.S. 305, 317-322 (1988); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115 (1974).

If the petitioner appeals from his sentence, as he has every intention of doing, Section 3143(b)(1)(A) will again present the issue whether petitioner is a "flight risk," and the same considerations that led the courts below to deem him a "flight risk" will again be present. To be sure, petitioner's bail status will also depend at that juncture on whether he can satisfy the additional condition of Section 3143(b)(1)(B). But if the unexplained ruling of the courts below that he is a "flight risk" is permitted to stand, he will be imprisoned pending appeal notwithstanding the existence of very serious grounds for reversing his conviction.

Nor does this case require full plenary consideration by the Court. The lower courts' failure to comply with the explicit terms of the Bail Reform Act justifies a summary disposition on the petition for a writ of certiorari such as this Court has

recently provided in *Wilkins v. Gaddy*, No. 08-10914 (decided February 22, 2010); *Thaler v. Haynes*, No. 09-273 (decided February 22, 2010); *Presley v. Georgia*, No. 09-5270 (decided January 19, 2010); *Wellons v. Hall*, No. 09-5731 (decided January 19, 2010); *Michigan v. Fisher*, No. 09-91 (decided December 7, 2009); *Porter v. McCollum*, No. 08-10537 (decided November 30, 2009). The decision of the Eighth Circuit may be vacated under the plain language of the Bail Reform Act and Mr. Rubashkin may be released promptly to home detention under5 24-hour armed guard.

## IV.

## THE LEGAL ISSUE IS IMPORTANT ENOUGH TO DESERVE PLENARY REVIEW

The legal issue is, in any event, important beyond the facts of this particular case. This Court seldom has an opportunity to interpret and apply the terms of the Bail Reform Act because judicial decisions on these issues must be made in a time-frame that does not comport with the Court's ordinary schedule of briefing and argument. Yet the question that is presented by this petition arises in many high-profile prosecutions when there is strong public pressure to imprison an accused as quickly as possible. Lower courts are unlikely to resist public pressure and apply the law as Congress wrote it – as this case demonstrates – unless this Court sets down the guidelines.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted and the judgment below reversed with instructions to release petitioner pending sentencing on sufficient bail conditions.

Respectfully submitted,

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March 11, 2010

## APPENDIX

Appendix A - *Judgment of the Court of Appeals for the Eighth Circuit Denying Appeal*..... 1a

Appendix B - *Order of the Court of Appeals for the Eighth Circuit Denying Rehearing and Rehearing En Banc*..... 2a

Appendix C - *Opinion of the District Court for the Northern District of Iowa Denying Bail Pending Sentencing*..... 3a

Appendix D - *Opinion of the District Court for the Northern District of Iowa Granting Bail Pending Trial*..... 11a

Appendix E - *Iowa Security Company Report*.... 35a

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3939

United States of America,
*Plaintiff-Appellee*,
v.

Sholom Rubashkin,
*Defendant-Appellant.*

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Appeal from U.S. District Court for the Northern District of Iowa - Dubuque (2:08-cr-01324-LRR-2)

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## JUDGMENT

Appellant Rubashkin's motion for release pending sentencing has been considered by the court and is denied. Mandate shall issue forthwith.

January 08, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3939

United States of America,
*Plaintiff-Appellee*,

v.

Sholom Rubashkin,
*Defendant-Appellant.*

---

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque (2:08-cr-01324-LRR-2)

---

## ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 17, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

## APPENDIX C

United States District Court,
N.D. Iowa, Eastern Division.

UNITED STATES of America, Plaintiff,
v.
Sholom RUBASHKIN, Defendant.

No. 08-CR-1324-LRR.

Nov. 20, 2009.

## ORDER

LINDA R. READE, Chief Judge.

### *I. INTRODUCTION*

***1** The matter before the court is the government's "Request for Detention" ("Motion") (docket no. 737).

### *II. RELEVANT PROCEDURAL BACKGROUND*

On November 12, 2009, a jury returned guilty verdicts ("Verdicts") (docket no. 736) against Defendant Sholom Rubashkin on Counts 73-143, 145-152, 156-161 and 163 of the Seventh Superseding Indictment ("Indictment") (docket no. 544). Immediately after the jury returned the Verdicts, the government requested that the court detain Defendant pending sentencing. The court detained Defendant pending an evidentiary hearing ("Hearing") on detention.

That same date, Defendant filed a "Memorandum in Support for Motion for Continued Release Pending Sentencing" ("Def.Br.") (docket no. 733). On November 16, 2009, the government filed the Motion.

On November 18, 2009, the court held the Hearing. At the Hearing, Assistant United States Attorneys C.J. Williams, Peter Deegan, Jr., and Matthew Cole represented the government. Attorneys F. Montgomery Brown and Guy Cook represented Defendant, who was personally present. At the Hearing, the court received testimony and other evidence. Due to the nature of the evidence and arguments, the court reserved ruling on the Motion pending the issuance of the instant Order. Defendant was detained pending resolution of the Motion.

## *III. STANDARD OF REVIEW*

Title 18, United States Code, Section 3143(a) governs a defendant's release or detention pending sentencing. Section 3143(a) provides, in relevant part:

> [ ... T]he judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. [§ ] 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not

> likely to flee or pose a danger to the safety of any other person or the community if released under [§ ] 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with [§ ] 3142(b) or (c).

18 U.S.C. § 3143(a).

The presumption in 18 U.S.C. § 3142(b), which governs a defendant's release or detention before trial, favors release. *United States v. Kills Enemy,* 3 F.3d 1201, 1203 (8th Cir.1993) (citing 18 U.S.C. § 3142(b)). In contrast, the presumption in 18 U.S.C. § 3143(a), which governs a defendant's release or detention after trial and before sentencing, favors detention. *Id.* (citing 18 U.S.C. § 3143(a)). As a result, "[a] convicted person awaiting sentence is no longer entitled to a presumption of innocence or presumptively entitled to his freedom." *Id.* A defendant carries the burden to show by clear and convincing evidence that he or she "is not likely to flee if released upon suitable conditions." *United States v. Welsand,* 993 F.2d 1366, 1367 (8th Cir.1993) (per curiam).

## *IV. ANALYSIS*

***2** In addition to the evidence presented at the Hearing, the parties rely on evidence previously presented in conjunction with Defendant's pretrial detention and release (docket nos. 132, 134, 158, 162, 164, 166, 171, 194 and 199). The court has reviewed this evidence and incorporates it into the instant analysis. The court sets forth the new

evidence and arguments related to detention below.

### *A. Defendant's Evidence and Arguments*

Defendant argues that he has provided clear and convincing evidence to show that he is not a flight risk. Defendant argues that, aside from the fact that the jury returned the Verdicts, his circumstances have not changed since the court ruled on his pretrial release in the Order on his detention ("Detention Order") (docket no. 199). Defendant insists that his circumstances do not warrant detention.

At the Hearing, United States Probation Officer ("USPO") Lindsey Skelton testified that Defendant fully complied with all the terms of his pretrial release. USPO Skelton also testified that Defendant never abused his permission to travel out of state while on pretrial release and, when his Global Positioning System monitoring ankle bracelet became dislodged from his ankle, he alerted her immediately to allow for its expedient repair. Defendant argues that this compliance with the terms of his pretrial release is concrete proof that he is not a flight risk.

Defendant testified that he has no intent to flee despite the Verdicts. Defendant testified that he is committed to following the court's rulings, no matter the outcome of this case. Defendant testified that his religion obligated him to comply with the court's rulings.

Defendant also testified about his involvement in the Postville, Iowa, and larger Jewish community during his pretrial release. In particular, Defendant testified that he spent a substantial amount of time teaching the Torah to students enrolled at a Jewish school in Postville. Defendant reiterated that he has a strong relationship with his family as well as the Jewish community in Postville and at large.

Defendant testified that the instant action generated a great deal of interest and media attention in the Jewish community. Defendant testified that he received a great deal of support from members of the Jewish community through a committee formed by Rabbi Hecht, which funded Defendant's defense. As a result of this support from his religious community, Defendant argued that, if he were to flee, he would essentially abandon and betray his family and his community. [FN1]

> FN1. Defendant also argued that detention would make it difficult for him to prepare for trial on Counts 1-72 of the Indictment ("Immigration Counts"). However, on November 19, 2009, the court dismissed the Immigration Counts against Defendant. Therefore, Defendant's argument related to trial preparation on the Immigration Counts is moot.

Rabbi Hecht, who was heavily involved with the committee that raised money and supported Defendant's defense fund, testified about Defendant's visibility in the Jewish community.

Rabbi Hecht testified that, due to the publicity of this trial and the interest it generated in the larger Jewish community, Defendant would be known in any community to which he sought to flee. Rabbi Hecht believes that, as a result, there is nowhere Defendant could hide.

***3** Defendant also presented over one thousand letters and e-mails of support written by members of his community who vouch for Defendant's willingness to cooperate with the law. Additionally, Defendant presented evidence of forty-three individuals willing to pledge the equity in their homes for Defendant's bail. The court also considers the pledges of support from Rabbi Kotlarsky and Rabbi Kivman, which were submitted to the court after the Hearing.

### *B. Government's Evidence and Arguments*

The government argues that Defendant poses an unacceptable flight risk. The government argues that, because he has been convicted and faces many years of imprisonment, Defendant has "a far greater incentive to flee" than during his pretrial release. Gov't. Br. at 1. The government also presented evidence that Defendant violated the terms of his pretrial release by "committing bank fraud, attempting to obstruct justice[ ] and tampering with evidence." *Id.*

The government presented the testimony of Special Agent Michael Fischels. S/A Fischels testified that he spoke with Co-Defendant Hosam Amara on the telephone about Amara's flight from the United

States to Israel. Amara indicated to S/A Fischels that Defendant told him to leave the United States and return to Israel in order to remove himself from the situation facing Agriprocessors. The government also presented a copy of a check and bank documents that suggest Defendant provided financial assistance to Amara around the time that Amara fled the United States.

S/A Fischels also testified about Defendant's involvement with Schlomo Ben Chaim. This individual was a key witness who signed I-9s for certain illegal aliens on the Hunt payroll. S/A Fischels stated that he had learned through Mike Kruckenberg of Freedom Bank that Defendant was going to take over properties owned by Ben Chaim after Ben Chaim left the United States.

### *C. Ruling*

The court finds that the government's evidence for detention is compelling. Defendant's actions prior to and during the pendency of the instant action, when coupled with the powerful incentive to flee due to the jury's return of the Verdicts, demonstrates that Defendant poses a flight risk. The court notes that, in the Detention Order, it previously found that Defendant posed a flight risk.

The court acknowledges the overwhelming support that Defendant's community has provided during the trial and the instant proceeding. The court also recognizes that Defendant took great pains to comply with the terms of his pretrial release. The

court agrees that Defendant has shown he is committed to his family and to his community. Nevertheless, the court finds that this evidence does not rise to the "clear and convincing" level necessary to show that he is "not likely to flee [ ... ] if released under [§ ] 3142(b) or (c)." 18 U.S.C. § 3143(a). Accordingly, the court shall grant the Motion.

## *V. CONCLUSION*

In light of the foregoing, the Motion (docket no. 737) is **GRANTED.** Defendant shall remain detained pending sentencing.

***4 IT IS SO ORDERED.**

## APPENDIX D

United States District Court,
N.D. Iowa, Eastern Division.

UNITED STATES of America, Plaintiff,
v.
AGRIPROCESSORS, INC., Sholom Rubashkin, Brent Beebe, Hosam Amara and Zeev Levi, Defendants.

No. 08-CR-1324-LRR.

Jan. 28, 2009.

Peter E. Deegan, Jr., U.S. Attorney's Office, Cedar Rapids, IA, for Plaintiff.

James A. Clarity, III, Clarity Law Firm, Spirit Lake, IA, Kevin J. Nash, Finkel, Goldstein, Rosenbloom & Nash, LLP, New York, NY, Raphael M. Scheetz, Scheetz Law Office, Cedar Rapids, IA, for Defendants.

## ORDER

LINDA R. READE, Chief District Judge.

### *I. INTRODUCTION*

***1** The matter before the undersigned is Defendant Sholom Rubashkin's "Motion to the Chief District Judge for Revocation or Modification of Detention Order (Hearing Requested)" ("Motion") (docket no.

134).[FN1]

FN1. All docket numbers refer to documents filed under the above-captioned case number unless expressly noted otherwise.

## *II. RELEVANT PRIOR PROCEEDINGS*

The procedural history of this case is exceptionally complex. A detailed recitation of the prior proceedings is necessary to appreciate the procedural posture of the Motion.

### *A. First Complaint, Arrest, Release and the Superseding Indictment*

On October 30, 2008, the government filed a Criminal Complaint ("First Complaint") (docket no. 7 in case no. 08-MJ-363-JSS) against Defendant. In the First Complaint, the government charged Defendant with three federal crimes: (1) Conspiracy to Harbor Undocumented Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i); (2) Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2; and (3) Aiding and Abetting Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2. A warrant for Defendant's arrest immediately issued.

On the same date, federal agents arrested Defendant and brought him before a United States Magistrate Judge for his initial appearance on the First Complaint. The parties agreed to Defendant's release pending trial under certain conditions,

including a $1,000,000 bond, active Global Positioning System ("GPS") electronic monitoring and surrender of his passport. The parties also agreed (1) Defendant's wife, Mrs. Leah Rubashkin, would surrender her passport and (2) half of the bond would be secured by a surety acceptable to the government on or before November 5, 2008. The Magistrate Judge's Order Setting Conditions of Release ("Release Order") (docket no. 8) set forth in detail the conditions of Defendant's release. The Release Order specifically prohibited Defendant from "commit[ting] any offense in violation of federal, state, or local law" while on pretrial release. Release Order at ¶ 2.

On November 13, 2008, a federal grand jury handed down a three-count Superseding Indictment (docket no. 80) in the instant case against Defendant and Karina Pilar Freund.[FN2] The Superseding Indictment replaced the First Complaint. Count 1 of the Superseding Indictment charged Defendant with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i) and 18 U.S.C. § 2. Count 2 charged Defendant with Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2. Count 3 charged Defendant with Aiding and Abetting Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2.

> FN2. The grand jury had handed down a one-count Indictment (docket no. 1) against Ms. Freund on September 17, 2008. The

> Indictment had charged Ms. Freund with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(ii) and 18 U.S.C. § 2.

### *B. Second Complaint, the Non-Compliance Memorandum, Rearrest, Detention and Another Indictment*

On November 14, 2008, the government filed a second Criminal Complaint (docket no. 1 in case no. 08-MJ-381-JSS) ("Second Complaint") against Defendant. In the Second Complaint, the government charged Defendant with Bank Fraud, in violation of 18 U.S.C. § 1344. On the same date, the United States Probation Office ("USPO") submitted a Non-Compliance Memorandum, in which it alleged Defendant had committed Bank Fraud while on pretrial release. The USPO asked the court to issue a warrant for Defendant's arrest so he might "answer to the alleged violation." Order Revoking Pretrial Release (docket no. 17 in case no. 08-MJ-363-JSS), at 1.

***2** On the same date, Defendant was rearrested and brought before the Magistrate Judge for his initial appearance on the Second Complaint. The government moved for Defendant's detention pending his trial. The Magistrate Judge ordered Defendant detained pending a hearing on November 19, 2008.

On November 19, 2008, Defendant appeared before the Magistrate Judge for the detention hearing, arraignment on the Superseding Indictment and his initial appearance on the Non-Compliance Memorandum. By agreement of the parties, the evidence before the Magistrate Judge consisted of exhibits and proffers. The parties also agreed that the Magistrate Judge should proceed to the merits of the Non-Compliance Memorandum in lieu of an initial appearance thereon, because the government's evidence and arguments for detention to some extent overlapped with the government's arguments and evidence for revocation of Defendant's pretrial release. The Magistrate Judge reserved ruling on detention and revocation and ordered Defendant be detained pending a written order on the government's motion.

On November 20, 2008, the Magistrate Judge issued an Order for Detention (docket no. 17 in case no. 08-MJ-381-JSS). Based upon the record before him, the Magistrate Judge stated he could not "conclude by clear and convincing evidence that there [was] no combination of conditions which will reasonably assure the safety of the community if Defendant were released prior to trial." Order for Detention (docket no. 17 in case no. 08-MJ-381-JSS), at 11. However, the Magistrate Judge found Defendant was a serious risk of flight and there was no condition or combination of conditions which would reasonably assure Defendant's appearance at the time of trial. Therefore, the Magistrate Judge ordered Defendant to be detained before trial, pursuant to 18 U.S.C. § 3142(e). In a separate order

("Order for Revocation"), the Magistrate Judge found Defendant had committed Bank Fraud while on pretrial supervision and revoked his pretrial release for violating the terms of the Release Order.

On November 20, 2008, the grand jury returned a twelve-count Second Superseding Indictment (docket no. 94) against Defendant, Ms. Freund and four new codefendants, Agriprocessors, Inc., Brent Beebe, Hosam Amara, Zeev Levi. The Second Superseding Indictment fully subsumed and consolidated all pending charges against Defendant, including the government's allegations in the First Complaint, the Second Complaint and the Superseding Indictment. Count 1 charged Defendant with Conspiracy to Harbor Undocumented Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). Count 2 charged Defendant with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i) and 18 U.S.C. § 2. Count 3 charged Defendant with Conspiracy to Commit Document Fraud, in violation of 18 U.S.C. § 371. Count 4 charged Defendant with Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2. Counts 5 through 10 charged Defendant with Aiding and Abetting Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2. Counts 11 and 12 charged Defendant with Bank Fraud, in violation of 18 U.S.C. § 1344.

### *C. The Motion, the Motion to Reconsider and Another Indictment*

***3** On December 5, 2008, Defendant filed a "Motion for Reconsideration of [Detention Order] and for Expedited Hearing (Hearing Requested)" ("Motion to Reconsider") (docket no. 132). On December 8, 2008, Defendant filed the Motion. In the Motion, Defendant asked the undersigned to "defer Hearing on th [e] Motion until the [Motion to Reconsider] is heard and decided by [the Magistrate Judge]." Motion (docket no. 134-1), at ¶ 12.

On December 11, 2008, the grand jury returned the Third Superseding Indictment (docket no. 150). The Third Superseding Indictment was identical to the Second Superseding Indictment, except (1) all charges in the Indictment against Ms. Freund were dropped; [FN3] and (2) a forfeiture allegation was added.

> FN3. On December 10, 2008, Ms. Freund pled guilty to a one-count Information (docket no. 138). Ms. Freund pled guilty to Aiding and Abetting the Knowing and Unlawful Engagement in a Pattern or Practice of Hiring Illegal Aliens, in violation of 8 U.S.C. § 1324a(a)(1)(A) and 1324a(f)(1) and 18 U.S.C. § 2.

On December 17, 2008, the government filed a Resistance (docket no. 158) to the Motion for Reconsideration. On December 19, 2008, Defendant filed a Reply. On December 22, 2008, the Magistrate

Judge denied the Motion for Reconsideration.

On January 5, 2009, the government filed a Resistance (docket no. 166) to the Motion (docket no. 166). On January 12, 2009, Defendant filed a Reply (docket no. 171).

### *D. Fourth Superseding Indictment*

On January 15, 2009, the grand jury returned a 99-count Indictment (docket no. 177) against Defendant and co-defendants Agriprocessors, Inc., Brent Beebe, Hosam Amara and Zeev Levi. Defendant is charged in 97 of the 99 counts. In Count 1, Defendant is charged with Conspiracy to Harbor Undocumented Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). In Count 2, Defendant is charged with Harboring Undocumented Aliens and Aiding and Abetting the Harboring of Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i) and 18 U.S.C. § 2. In Count 3, Defendant is charged with Conspiracy to Commit Document Fraud, in violation of 18 U.S.C. § 371. In Count 4, Defendant is charged with Aiding and Abetting Document Fraud, in violation of 18 U.S.C. §§ 1546(a) and 2. In Counts 5 through 10, Defendant is charged with Aiding and Abetting Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2. In Counts 13 through 27, [FN4] Defendant is charged with Bank Fraud, in violation of 18 U.S.C. § 1344. In Counts 28 through 69, Defendant is charged with False Statements and Reports to a Bank, in violation of 18 U.S.C. § 1014. In Counts 70 through 79, Defendant

is charged with Money Laundering and Aiding and Abetting Money Laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i) and 2. In Counts 80 through 99, Defendant is charged with Willful Violations of an Order of the Secretary of Agriculture and Aiding and Abetting Willful Violations of an Order of the Secretary of Agriculture, in violation of 7 U.S.C. § 195 and 18 U.S.C. § 2.

> FN4. Defendant is not charged in Counts 11 and 12.

Defendant faces a statutory maximum of 10 years of imprisonment on Count 1; a statutory maximum of 10 years of imprisonment on Count 2; a statutory maximum of 5 years of imprisonment on Count 3; a statutory maximum of 10 years of imprisonment on Count 4; a combined statutory maximum of 12 years of imprisonment on Counts 5 through 10; a combined statutory maximum of 450 years of imprisonment on Counts 13 through 27; a combined statutory maximum of 1260 years of imprisonment on Counts 28 through 69; a combined statutory maximum of 200 years of imprisonment on Counts 70 through 79; and a combined statutory maximum of 100 years of imprisonment on Counts 80 through 99. The Fourth Superseding Indictment also contains a forfeiture allegation against Defendant.

### *E. Hearing*

***4** On January 26 and 27, 2009, the court held an evidentiary hearing ("Hearing") on the Motion.

Assistant United States Attorney Peter E. Deegan, Jr. represented the government. Attorneys F. Montgomery Brown, Guy R. Cook and Baruch Weiss represented Defendant, who was personally present.

The undersigned granted the Motion on the record at the Hearing. The instant Order is designed to more fully explain the factual and legal bases for the undersigned's decision to release Defendant pending his trial.

## *III. STANDARD AND SCOPE OF REVIEW*

Title 18, United States Code, Section 3145(b) governs a motion for revocation of a magistrate judge's detention order. Section 3145(b) provides:

> If a person is ordered detained by a magistrate judge ... the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

18 U.S.C. § 3145(b).

The undersigned reviews the Order for Detention and Order for Revocation under a de novo standard. *See, e.g., United States v. Maull,* 773 F.2d 1479, 1481 (8th Cir.1985) (en banc) (discussing 18 U.S.C. § 3145(b)); *United States v. Goba,* 240 F.Supp.2d 242, 245 (W.D.N.Y.2003) (same).[FN5] "The statutory scheme ... confers a responsibility on the district court [judge] to reconsider [the Magistrate Judge's decisions on release] as unfettered as it would be if

the district court [judge] were considering to amend [her] own action." *United States v. Thibodeaux,* 663 F.2d 520, 522 (5th Cir.1981) (considering similar provisions of prior statutory scheme).

> FN5. The government argues Defendant forfeited his right to seek review of the Order for Revocation, because he "has not appealed the [Order for Revocation]" as required by Local Criminal Rule 5(c). While it is true that Defendant's brief in support of his Motion was directed at the Order for Detention, the court finds it would be unfair to impose the extreme sanction of waiver on the facts of the present case. Defendant clearly wished to challenge the Order for Revocation in the Motion; anything else would be an exercise in futility. Indeed, the Motion itself asks the court for review of the Order for Revocation, and the Magistrate Judge incorporated Order for Detention into the Order for Revocation and relied upon the same for his analysis. The court will not elevate form over substance when cherished constitutional rights are at stake. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993).

In conducting de novo review, the a district court judge ordinarily "will judge the issues anew, but in doing so, utilize the factual and evidentiary record developed during the detention hearing before [the magistrate judge]." *Goba,* 240 F.Supp.2d at 245. However, the district court judge may hold an

additional evidentiary hearing if she so desires:

> Clearly, the district court [judge] is not required to start over in every case, and proceed as if the magistrate[judge]'s decision and findings did not exist [The district court judge] should review the evidence before the magistrate [judge] and make [her] own independent determination whether the magistrate[judge]'s findings are correct, with no deference. If the performance of that function makes it necessary or desirable for the district judge to hold additional evidentiary hearings, [she] may do so, and [her] power to do so is not limited to occasions when evidence is offered that was not presented to the magistrate [judge]. The point is that the district court [judge] is to make [her] own "de novo" determination of facts, whether different from or an adoption of the findings of the magistrate [judge]. It also follows that the ultimate determination of the propriety of detention is also to be decided without deference to the magistrate[ judge]'s ultimate conclusion.

***5** *United States v. Koenig,* 912 F.2d 1190, 1192-93 (9th Cir.1990); *see also United States v. Cisneros,* 328 F.3d 610, 617 (10th Cir.2003) (indicating that district court judge held own hearing and received additional evidence and affirming order of detention). As the Eighth Circuit Court of Appeals has recognized, "[t]o engage in a meaningful de novo review, the district court [judge] must have available the options open to the magistrate [judge]." *Maull,* 773 F.2d at 1481.

Before the Magistrate Judge, the parties relied on proffers and exhibits. This was perfectly appropriate. *See*18 U.S.C. § 3142(f) (expressly contemplating the presentation of evidence by proffer); *see, e.g., United States v. Martir,* 782 F.2d 1141, 1144-45 (2d Cir.1986) ("[T]he thrust of the legislation is to encourage informal methods of proof. Congress did not want detention hearings to resemble mini-trials, *United States v. Delker,* 757 F.2d 1390, 1396 (3d Cir.1985)). As the case worked its way to the undersigned, however, it became apparent that the parties interpreted the proffers and exhibits differently; each side had its own "spin" on the evidence. For this reason, the undersigned deemed it appropriate in this case to grant Defendant's request for a new hearing. A new hearing afforded the undersigned an opportunity to hear testimony, gauge the credibility of various witnesses and decide (1) how to resolve the inconsistencies in the record and (2) whether to draw various inferences from the evidence that the parties were suggesting. By agreement of the parties, the evidence received at the Hearing supersedes the record made before the Magistrate Judge and constitutes the entire evidentiary record for purposes of appellate review.

## *IV. REVIEW OF THE ORDER FOR DETENTION*

Under the terms of the Bail Reform Act, 18 U.S.C. 3141 *et seq.,* Defendant must be detained pending trial if the undersigned finds by a preponderance of the evidence that "no condition or combination of conditions will reasonably assure the appearance of the [Defendant] as required...." 18 U.S.C. § 3142(e);

*United States v. Abad,* 350 F.3d 793, 797 (8th Cir.2003).[FN6] The undersigned need not craft conditions that will "guarantee" Defendant's appearance at future hearings-the undersigned need only find conditions that will "reasonably assure" the same. *United States v. Orta,* 760 F.2d 887, 892 (8th Cir.1985) (en banc); *see also id.* at 888 n. 4 ("The legal standard required ... is one of reasonable assurances, not absolute guarantees."). "In our society liberty is the norm, and detention prior to trial ... is the carefully limited exception." *United States v. Salerno,* 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *see also Hamdi v. Rumsfeld,* 542 U.S. 507, 529-30, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (reaffirming this principle from *Salerno* ).

> FN6. The Magistrate Judge found Defendant was not a danger to any other persons or to the community. The government does not now argue to the contrary, at least in context of review of the Order for Detention. The rebuttable statutory presumption set forth in § 3142(e) does not apply, because there is no probable cause to believe Defendant committed an offense listed in § 3142(f)(1). *See*18 U.S.C. § 3142(e) (creating presumption); *cf. Abad,* 350 F.3d at 797 (holding presumption applied, where district court found probable cause the defendant committed an offense under 18 U.S.C. § 2423).

The threshold question is whether Defendant is a flight risk. In determining whether a defendant poses a flight risk (or poses a danger to any other

person or the community), the court considers the following factors:

*6 (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including-

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g) (emphasis in original). The court now turns to consider these factors.

While Defendant is not charged with any of the dangerous or violent crimes set forth in § 3142(g)(1), the undersigned agrees with the Magistrate Judge that the weight of the evidence against Defendant "would appear to be substantial." Order for Detention (docket no. 17), at 9. "Not only [has Defendant] left a paper trail, the employee responsible for accounts receivable will apparently be able to provide detailed testimony regarding the [bank fraud] scheme and Defendant's role in it." *Id.* The government presented the court with hundreds of pages of financial records to show Defendant has committed bank fraud. Numerous persons appear ready, willing and able to cooperate with the government and testify against Defendant on all charges in the Fourth Superseding Indictment. By the court's calculations, Defendant is presently subject to a combined statutory maximum sentence of 2057 years of imprisonment. It is important to emphasize, however, that Defendant is presumed to be innocent and the ultimate issue of guilt will be for a jury to decide. *See*18 U.S.C. § 3142(j) (reiterating and emphasizing that all defendants are entitled to the presumption of innocence). This presumption of innocence is inviolate unless and until a jury finds Defendant guilty.

Defendant is forty-nine years old. He is married and has ten children with his wife. He has lived in Postville, Iowa, for fifteen years.

Defendant's ties to Postville remain strong, although not as strong as when he was the CEO of Agriprocessors, Inc. (Agriprocessors, Inc. is now

under the supervision of a bankruptcy trustee.) Defendant's involvement in the community extends beyond Agriprocessors, Inc. to local religious and educational institutions. Defendant either founded or was instrumental in the development of such institutions.

Hundreds of letters and pledges of support are strong evidence of Defendant's involvement in Postville and his larger faith community. He has a history of leadership and charity. To attest to their support for Defendant and their firm beliefs that Defendant is not a flight risk, many persons have written the court and pledged the equity in their homes as security for his release. Such community support for a defendant is, to the undersigned's knowledge, unprecedented in this court.

***7** Defendant has no known criminal record or substance abuse problems. Defendant has been present at all scheduled court appearances. At the time he was rearrested on the Second Complaint, however, he was on pretrial release. There is some evidence one or more of Defendant's co-defendants may have fled the country.

Defendant returned from Canada shortly before his arrest on the First Complaint. The court does not find that the purpose of this trip was to lay the groundwork for an attempt to flee. The court found the testimony of Joe Schochet to be fully credible on this point. Defendant made a brief trip to Canada to visit an ailing friend. While in Canada, he also conducted business, in the sense that he made phone

calls and other inquiries in an unfruitful effort to help secure funding for Agriprocessors, Inc. before it slipped into bankruptcy. The government's allegation that Defendant went to Canada in furtherance of an attempt to escape is purely speculative. To the contrary, the fact Defendant returned to the United States with the knowledge that he was the target of the government's investigation militates against a finding of flight risk.

As did the Magistrate Judge, the undersigned finds it significant that, during the November 14, 2008 search of Defendant's residence, federal agents [FN7] found a bag containing a substantial amount of money, the birth certificates of Defendant and his wife, as well as the passports of some of his children. (Defendant and his wife had already surrendered their passports to the USPO.). Stashes of cash were found throughout Defendant's home. Money was found in a travel pouch designed to be worn under clothing during travel. The presence of money and documents in a bag is certainly suspicious, especially when "lock boxes" in Defendant's closet were empty.

> FN7. One of the persons who participated in a search of Defendant's home was not a government agent. The nature and extent of this person's authority is presently unclear to the undersigned.

At the Hearing, however, Mrs. Rubashkin explained that she put the money and documents in the bag to hide them from one of her sons, who has autistic

tendencies. The bag was Mrs. Rubashkin's bag, not Defendant's bag. And, some of the money was in the form of coins to be used for religious purposes. A box of money contained wads of $1 bills, which is evidence of charity, not flight. Because some creditors no longer accept Mrs. Rubashkin's checks, she uses cash in the house to pay daily expenses. The Rubashkins' monthly bills are significant, and the amount of cash in the house is dwindling. It would appear, however, that Defendant has substantial assets potentially available to him even if the Rubashkins' precise financial condition is foggy.

Weighing all of the foregoing factual findings against one another, the court finds Defendant poses a flight risk. On the one hand, Defendant certainly has the incentive and means to flee. On the other hand, were Defendant to flee, he would forsake and disgrace his friends and family and betray their considerable trust in him. Such an act would presumably cut all ties to Postville and his religious community. He would disgrace himself and forever sully his family name, in effect indicting himself to a watching public.

***8** Just as the Magistrate Judge recognized in his Reconsideration Order (docket no. 164), it is the undersigned's view that the parties have placed far too much emphasis in their briefing over Israel's "Law of Return." *See* Gov't Ex. 28 (setting forth the Law of Return of 1950 and the Knesset's subsequent amendments thereto). It is undisputed that Defendant would be entitled to Israeli citizenship

were he to flee to Israel. While the availability of foreign citizenship might ***theoretically*** make Defendant more likely to flee to Israel (just as if any other citizen were entitled to claim citizenship in a foreign country), there is ***absolutely no evidence*** Defendant has any ties to Israel or has made any preparations to flee to Israel. Based upon the particular circumstances of this case, Defendant is not a "de facto" dual citizen as the government alleges. Resistance (docket no. 158), at 3. [FN8] Consequently, the Law of Return plays no part in the undersigned's analysis.

> FN8. In any event, Israel and the United States have an extradition treaty. *See* Def.'s Exs. O-1 through O-3. Any benefit in fleeing to Israel would presumably be short-lived.

The court is unable find by a preponderance of the evidence that "no condition or combination of conditions will reasonably assure the appearance of the [Defendant] as required...." 18 U.S.C. § 3142(e). The combination of conditions the court deems appropriate are set forth on the record and in a separate release order to be signed and filed concurrently with the instant Order. In the undersigned's view, a substantial security bond, active GPS electronic monitoring, travel restrictions and surrender of the passports and birth certificates of Defendant, Mrs. Rubashkin and their minor children should reasonably assure Defendant's presence.

## *V. REVIEW OF THE ORDER FOR REVOCATION*

Title 18, United States Code, Section 3148 provides sanctions for a defendant who violates the terms of his pretrial release. Section 3148 provides:

(a) Available sanctions.-A person who has been released under section 3142 of this title, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

(b) Revocation of release.-The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer-

(1) finds that there is-

***9** (A) probable cause to believe that the person has committed a Federal, State, or local crime while on

release; or

(B) clear and convincing evidence that the person has violated any other condition of release; and

(2) finds that-

(A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of section 3142 of this title and may amend the conditions of release accordingly.

(c) Prosecution for contempt.-The judicial officer may commence a prosecution for contempt, under section 401 of this title, if the person has violated a

condition of release.

18 U.S.C. § 3148 (emphasis in original).

The court finds there is probable cause to believe Defendant committed a federal crime, Bank Fraud, while on pretrial release. A rebuttable presumption thus arises that "no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community." *Id.* However, the undersigned finds "there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions." *Id.* Specifically, the court believes an order prohibiting Defendant from any contact with potential witnesses in this case and restricting him from the premises of Agriprocessors, Inc. meet this statutory directive and rebut the presumption. (Defendant's attorneys, of course, are not subject to these restrictions.) Further, the bankruptcy trustee, Mr. Joseph Sarachek, has assured the undersigned in an affidavit that Defendant Rubashkin is a *persona non grata* at Agriprocessors, Inc. Mr. Sarachek will not permit Defendant entry onto Agriprocessors Inc.'s premises and assures the court Defendant will have "no access whatsoever" to Agriprocessors Inc.'s "banking information, checks or other financial account information." Def.'s Ex. X.

## *VI. DISPOSITION*

The Motion (docket no. 134) is **GRANTED.** The Order for Detention (docket no. 17 in case no. 08-MJ-381-JSS) and the Order for Revocation (docket no. 17 in case no. 08-MJ-363-JSS) are **VACATED.** A new Order Setting Conditions of Release shall be separately signed and filed with the instant Order.

***10 IT IS SO ORDERED.**

## APPENDIX E

GLOBAL SECURITY SERVICES®
*Helping to make our community safe*

Magistrate Judge Jon S. Scoles
Unites States District Court,
Northern District of Iowa
4200 C Street SW
Cedar Rapids, IA 52404

Re: Case No. CR 08-1324 (LRR)

Dear Judge Scoles:

We have been asked to provide security services in the event that Defendant Sholom Rubashkin is released on bail pending his trial in the above-referenced matter. We would ensure that Mr. Rubashkin is unable to leave the Court's jurisdiction. We understand that the government has claimed that Mr. Rubashkin also poses a risk of evidence tampering. Our services would prevent any such misconduct as well. In furtherance of these purposes, we recommend either of the following options:

Option 1: Install a camera system covering the entire exterior of Mr. Rubashkin's home and station an armed officer at the home twenty-four hours a day, seven days a week. Our security officers are armed, licensed, and trained extensively in the use of handguns. Should Mr. Rubashkin make any attempt to flee the jurisdiction, the security officers

would be authorized to the same extent as any police officer to use their handguns to effectuate his arrest. Mr. Rubashkin would then be held by us pending the arrival of local police officers or the FBI.

Option 2: Install a camera system covering the entire exterior of Mr. Rubashkin's home and provide twenty-four hour monitoring of the camera system and scheduled escorts for visits outside of the home. The camera system would be monitored from Davenport. If Mr. Rubashkin were observed leaving his home unescorted by one of our security officers, we would contact an officer in Postville to have him arrested. We would develop a point of contact with the Postville police in advance to ensure that an officer could be deployed immediately at any time to effectuate the arrest.

Our agency works with and regularly uses local law enforcement for processing arrests. Upon notifying local law enforcement, a report concerning the arrest would be generated by our security officer and the local law enforcement officer. The report would detail the nature of the offense and other pertinent information concerning the incident. Additionally, our security officer would be available to brief any point of contact deemed necessary upon conclusion of the incident. Our incident notification procedure is designed to ensure a timely exchange of information.

All of our camera systems include a DVR with remote view-ability which allows them to be accessed off-site from any computer with an internet connection. The cameras have infrared illuminators

which allow them to see with near zero light. We recommend Option 1 as most secure option, but are confident under either option that we can prevent Mr. Rubashkin from fleeing this jurisdiction or engaging in any other illicit activity.

Additional information regarding our expertise and services is attached. If you have nay further questions, please feel free to call me or Brad Utter at (563) 359-3896.

Sincerely,
/s/
Brad Utter
President, Global Security Services

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www.globablsecurityservices.com