20-50017

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

USDC NO. SA-CR-19-61-JVS
Central District of California

V.

MICHAEL J. AVENATTI

DEFENDANT-APPELLANT

REPLY TO GOVERNMENT OPPOSITION TO FRAP 9(A) APPEAL

H. Dean Steward
107 Avenida Miramar, Ste. C
San Clemente, CA 92672
949-481-4900
Fax- 949-496-6753
Counsel for Appellant
Michael J. Avenatti

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I. Introduction

In his opening brief, appellant Michael J. Avenatti pointed to several government positions and interferences by private counsel that were unfair during the bail hearing in district court. The government continues in this mode in their opposition to appellant's Rule 9(A) brief.

First, the initial words of the government's brief take the position that appellant has committed a number of crimes. GB 1[1]. But the indictment in the instant case is only a charge, not proof of anything. The case is 3 months away from trial. An "indictment is not evidence against the accused and affords no inference of guilt or innocence." *U.S. v. Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983); Indeed, the presumption of innocence alone is a factor to consider regarding bail:

> "...the Court does consider that a presumption of innocence may be a factor in determining the weight of an alleged economic harm and whether it would rise to the level of danger to the community."
>
> *U.S. v. Madoff* 586 F. Supp. 2d 240, 253 (SDNY 2009), (defendant alleged to be an economic danger, yet admitted to pre-trial bail).

[1] GB refers to government's opposition brief at docket #3 herein.

Second, the government relies in part in their brief on activities that happened after the hearing and were obviously not part of the record considered by the district court. At GB 4, they point to the appellant's very recent conviction in the Southern District of New York, well after the hearing herein, as a reason that this Court should deny this appeal. But citations to events outside the record are improper and should not be considered here. *U.S. v. Black* 482 F.3d 1035, 1041 (9th Cir. 2007), (Appellate courts "generally will not consider facts outside the record...").

While it is true that the appellant presented no testimony during the hearing, counsel did provide common sense answers to the government's bald suspicion and conjectures. These explanations defused the government's shrill accusations, as follows:

II. Government Points

1. $1 Million Settlement- as indicated to the district court, this settlement and fee were earned (after formal arbitration with a neutral in Los Angeles), solely by the appellant. [RT 1-15-20, p. 30]. His former firm, partners and employees had nothing to do with the case.

In addition, appellant's creditors here did not have a right to this particular fee, or any other specific property.

> "Although the government correctly states the duty that *Hickman*[2] imposes on directors of insolvent corporations, it does not follow from the existence of this duty that the creditors have a property right in the corporation's assets. Rather, as the court in *Hickman* itself clearly explained, a violation of the duty merely creates a right "to an action against the directors to recover sums improperly paid out by the corporation.' *Id.* That is, it creates a right to sue the directors personally, not a right to any particular funds."

U.S. v. Adler 186 F.3d 574, 578 (4th Cir. 1999), emphasis added

2. 5-Year Old Car- surely a used car, which provided needed transportation for appellant, a practicing southern California attorney, was not part of some scheme to hide money. Counsel represented to the district court that the car was intended for appellant's ex-wife (first) and was merely loaned to appellant. The government dumped suspicion and guess-work on this arrangement, baselessly.

3. Cashier's Checks- counsel for appellant represented to the district court, (and common sense would confirm) that appellant had to use a number of cashier's checks in order to pay his routine monthly recurring bills. [RT 1-15-20, p. 8]. Funds held in a bank account would be seized by other creditors. So to make

[2] *Hickman v. Hyzer*, 261 Ga. 38, 401 S.E.2d 738, 740 (1991)

payments for rent and other normal expenses, appellant was compelled to use cashier's checks.

4. Currency Reporting- the government alleged that appellant violated currency reporting laws. Again, suspicion and guess-work gave rise to these allegations.

> "But currency structuring is not inevitably nefarious. ...Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark."
>
> *Ratzlaf v. U.S.* 510 U.S. 135, 144 (1994), (The Supreme Court held that to establish the defendant "willfully violated" the anti-structuring law, government must prove defendant acted with knowledge that his conduct was unlawful).

Appellant was trying to manage his daily affairs, and with a number of aggressive creditors. He had to use cash more than most people. Counsel explained as follows:

> "For example, they [prosecution] talk about structuring. The truth is the cash taken out of US Bank account or -- before that, the Chase account, are in amounts of $3,000, $4,000, not 9500. There was one check Mr. Avenatti believes that was like for 8500. Each one of those were not for the purposes

> of avoiding reporting requirements, but rather to get cash so he can pay off all of these various creditors. Again, that would be on a monthly basis."
>
> RT 1-15-20, p. 8

The district court erred in remanding the appellant, based in part of these allegations.

5. State of Washington- the district court made no findings regarding the government's allegations regarding activities in Washington State.

III. No Probable Cause to Believe Any Law Violations Occurred

Viewing the over-all picture presented here, there was no probable cause to believe that law violations had occurred. The government presented suspicions and theories, not concrete facts. Common sense and this Court's precedents set out that mere suspicion or speculation cannot be the basis for creation of logical inferences. *U.S. v. Lindsay* 634 F.3d 541 (9th Cir. 2011).

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IV. "Ongoing Danger"

Indeed, contrary to the government's brief, the appellant *does* challenge the district court's finding of "ongoing danger". First, genuine economic danger is rare, and a custody remand should occur seldom and sparingly on this basis. *U.S. v. Reynolds*, 956 F.2d 192 (9th Cir.1992), which held that "danger may, *at least in some cases*, encompass pecuniary or economic harm." (emphasis added). As the *Reynolds* court recognized, danger to the community in an economic sense should be found rarely, and only in "some cases".

The danger here, as alleged by the government, is that appellant's creditors will not get their money. However, with appellant in custody, the creditors will remain in the same boat- no money. In addition, the government complained about some creditors not being paid. However, it cannot be a crime to pay some creditors over others. The government concedes throughout the hearing that *some* creditors were in fact being paid. Pre-Trial Services was advised of the payments, as was required by appellant's bond R 1-15-20, p. 6. The government simply didn't like the order that appellant chose.

The government pointed to no bounced checks or other "bogus" payments. The record shows an attorney in debt, trying to pay at least some creditors. For this effort, he was remained to custody, in error.

But even if the government had proven some economic danger, release still was required unless there was no possible conditions of release that could reasonably assure the community's safety. *U.S. v. Hir* 517 F.3d 1081,1091, 1092 (9th Cir. 2008).

The district court could have ordered:

1. All monetary transactions by appellant to be approved in advance by Pre-Trial Services before payment or receipt (appellant's counsel suggested this condition RT 1-15-20, p. 35)

2. Court ordered neutral to monitor on appellant's finances

3. Close all bank accounts, ban the use of any such accounts

4. Appoint receiver over appellant's finances

5. Electronic monitoring

6. House arrest

On the record, the court did not discuss any possible conditions, and simply remanded the appellant. RT 1-15-20, p. 37. Failure to consider any alternatives to incarnation was error by the district court. 18 USC §3142(c); *U.S. v. Motamedi* 767 F2d 1403, 1405 (9th Cir. 1985).

And it seems apparent, once again, that the attorneys for appellant's creditors are using the U.S. Attorney's Office as a collection agency.

V. Conclusion

Federal law has traditionally provided that a person arrested for a noncapital offense shall be admitted to bail. *Stack v. Boyle*, 342 U.S. 1, 4 (1951); Only in rare circumstances should release be denied. *U.S. v. Honeyman*, 470 F.2d 473, 474 (9th Cir.1972). There is "only a limited group of offenders who should be denied bail pending trial." *U.S. v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007).

Appellant is a well known attorney with no criminal convictions. While he struggled with debt and creditors, this was insufficient reason to surmise that he may have committed crimes. His jailing was "profoundly unfair" RT 1-15-20, p. 33 and unwarranted, and appellant asks this Court to reverse that order and re-admit him to bail.

Dated: 2-24-20

/s./ H. Dean Steward

H. Dean Steward

Counsel for Appellant

Michael J. Avenatti

CERTIFICATE OF SERVICE

I hereby certify that on Feb. 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

REPLY TO GOVENMENT OPPOSITION TO 9(A) APPEAL

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to:

Andre Julian & Brett Sagel, Asst. U.S. Attorneys at

brett.sagel@usdoj.gov &

julian.l.andre@usdoj.gov

Dated: Feb. 24, 2020 /s./ H. Dean Steward

H. Dean Steward