

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Hon. Nancy G. Edmunds

Case No. 10-20403

v.

KWAME M. KILPATRICK, et al

Defendant.

**SECOND RENEWED MOTION FOR A HEARING TO ALLOW THE
DEFENDANT KWAME M. KILPATRICK TO BE RELEASED ON BOND
PENDING SENTENCING**

NOW COMES Kwame M. Kilpatrick, by and through his counsel James C. Thomas and Michael C. Naughton, of counsel to O'Reilly Rancilio, P.C., and moves this Honorable Court to release Mr. Kilpatrick on Bond pending sentencing in this matter.

1. Kwame M. Kilpatrick was charged in the above entitled matter in a Fourth Superseding Indictment which alleged several counts of federal violations including racketeering, in violation of 18 U.S.C. § 1962(d).
2. On March 11, 2013, Mr. Kilpatrick was found guilty by a jury of racketeering, extortion, tax evasion and wire fraud. He was acquitted of Count Ten, Extortion; Count Twenty-Seven, Mail Fraud; and Count Twenty-Nine, Wire Fraud. There was no decision from the jury on Count Seven, Extortion; Count Eight, Extortion; and Count Sixteen, Bribery.

3. On March 11, 2013, this Honorable Court held a hearing on the issue of Mr. Kilpatrick's bond pending sentencing. At that hearing, this Honorable Court heard arguments from the Government as well as counsel for Mr. Kilpatrick and Mr. Ferguson. The Government did not argue danger to the community as it related to Mr. Kilpatrick.

4. In reading its opinion, this Honorable Court stated:

I think this is a close call. I think it's possible that they would appear, and I think it's possible that they may not be a danger to the safety of any other person or the community, but they have not offered evidence or argument to overcome the presumption, and my decision is based squarely on the presumption set forth in the statute that detention is required in this circumstance." (See March 11, 2013 Detention Hearing Transcript, pages 20 - 21.)

5. Mr. Kilpatrick requests this Honorable Court's consideration of his bond pending sentencing and if necessary request a rehearing on the issue. It is acknowledged that 18 U.S.C. § 3143(a)(1) applies in this circumstance. In relevant part, the statute sets forth:

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).

6. Certainly, under the statute there is a presumption of detention. Mr. Kilpatrick has shown "clear and convincing" evidence that, considering the underlying facts in

the totality of circumstances, Mr. Kilpatrick is neither a risk of flight nor a danger to the community. *See* United States v. Vance, 851 F.2d 166, 169 (6th Cir. 1988).

7. Counsel and Mr. Kilpatrick embrace the recommendation of Federal Pretrial Services that states its opinion that he was neither a risk of flight nor a danger to the community. According to that report, Mr. Kilpatrick has complied in all respects with the conditions of release that were set by this Honorable Court before and during trial.
8. Counsel has sought concurrence with the Government on this matter pursuant to Eastern District of Michigan Local Rule 7.1. Concurrence was denied.

WHEREFORE, it is respectfully requested that this Honorable Court grant Mr. Kilpatrick's request for bond pending sentencing. Due to the rigors of trial and parole, he was unable to spend any meaningful time with his family and he requests permission to do so at this time.

Respectfully submitted,

O'REILLY RANCILIO, P.C.

By: _____ /s/
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Dated: April 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

/s/ James C. Thomas
James C. Thomas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Hon. Nancy G. Edmunds
Case No. 10-20403

v.

KWAME M. KILPATRICK, et al

Defendant.

**BRIEF IN SUPPORT OF SECOND RENEWED MOTION FOR A HEARING TO
ALLOW THE DEFENDANT KWAME M. KILPATRICK TO BE RELEASED ON
BOND PENDING SENTENCING**

NOW COMES, Kwame M. Kilpatrick, by and through his counsel James C. Thomas and Michael Naughton of counsel to O'Reilly Rancilio, P.C., and hereby moves this Honorable Court to release Mr. Kilpatrick pending sentencing for the following reasons:

A. Procedural Background

Kwame M. Kilpatrick was charged in the above entitled matter in a Fourth Superseding Indictment which alleged several counts of federal violations including racketeering, in violation of 18 U.S.C. § 1962(d).

On March 11, 2013, Mr. Kilpatrick was found guilty by a jury of racketeering, extortion, tax evasion and wire fraud. He was acquitted of Count Ten, Extortion; Count Twenty-Seven, Mail Fraud; and Count Twenty-Nine, Wire Fraud. There was no decision

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B. Mr. Kilpatrick Has Shown By Clear and Convincing Evidence That He Should Be Released

Mr. Kilpatrick requests this Honorable Court's consideration of his bond pending sentencing and if necessary request a rehearing on the issue. It is acknowledged that 18 U.S.C. § 3143(a)(1) applies in this circumstance. In relevant part, the statute sets forth:

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).

While counsel acknowledges this Honorable Court's reliance on the language of the presumption of detention, counsel submits that the Bail Reform Act specifically applies the standard of "clear and convincing," is a standard much less than beyond a reasonable doubt. The statute obviously contemplated that there would be facts and circumstances that would rebut that presumption. The totality of circumstances relating to Mr. Kilpatrick do overcome the presumption by clear and convincing evidence. *See United States v. Vance*, 851 F.2d 166, 169 (6th Cir. 1988).

In this instance, Pre-Trial Services for the Eastern District of Michigan, after thoroughly reviewing Defendant Kilpatrick's background, personal finances, criminal history, risk of flight, and danger to the community recommended that Mr. Kilpatrick receive an unsecured bond with no additional conditions. After the verdict was given in this case, the position of Pre-Trial services was unchanged, and again recommended that an unsecured bond, with no additional conditions be continued.

The Government referred to prior Probation and Parole technical violations being at issue, which have no bearing or relationship to the issues of risk of flight or risk to the community. The Government has misinformed the court as to the facts relating to the nature of these probation and/or parole technical violations, and has therefore mislead the court.

C. Factual Background of Mr. Kilpatrick's Previous Conviction and Probation Proceedings in State Court

Defendant Kilpatrick plead guilty to 2 counts of Obstruction of Justice in 2008. Defendant admitted lying under oath about an extra-marital affair. Defendant

Kilpatrick, resides in the State of Texas, and was under the supervision of the Texas Department of Criminal Justice (TDCJ) from February of 2009 until May of 2010. He had an exemplary probation report from the State of Texas. During the term of probation in Texas, Defendant Kilpatrick did not have one infraction, violation, verbal or written warning, missed or late appointment with probation officials, or any compliance issues with any conditions of his probation. This has been specified in writing by the TDCJ. In an unprecedented reporting structure for probation supervision responsibility, the State of Michigan began to jointly supervise the probation of Defendant Kilpatrick in March of 2010. In the last couple of months of his probation period, he was reporting to both Texas and Michigan.

Defendant Kilpatrick received a loan in February of 2009, while on probation and under the sole supervision of the TDCJ. The loan was reported to the Texas probation authorities. Probation authorities found that loans are not factored in restitution payment requirements and were not prohibited under the conditions of probation.

In an unprecedented hearing held in the Michigan Circuit Court, the grantors of the loan testified that it was indeed a loan, and produced the loan documents, signature page as well as repayment schedule. The Judge *sua sponte* ruled that the loan was income, and gave Defendant Kilpatrick 90 days to pay the entire \$240,000 loan to the court for restitution. This ruling was more than a year after receiving the loan and Defendant Kilpatrick no longer had the monies. Defendant turned over a little more than \$40,000 to the court and the Judge revoked his probation and sentenced Defendant Kilpatrick to prison for 18 months, even after Texas authorities sent a letter to the Judge,

stating that Defendant Kilpatrick had an exemplary probation record, and was in full compliance. An appeal was immediately filed with the Michigan Court of Appeals. The Appeals Court did not respond to the matter until Defendant Kilpatrick had served his prison sentence, saying only that the issue was "no longer ripe."

After being released from prison in August of 2011, Defendant Kilpatrick was under parole supervision of the Texas Department of Criminal Justice. Again, Defendant Kilpatrick had an exemplary record of parole. He had no infractions, no violations, no missed or late meetings with parole officials, and no compliance issues with any conditions or special conditions of parole. In September of 2012, when the instant trial began, parole supervision was arbitrarily taken back by the State of Michigan (Michigan Department of Corrections). Although Defendant Kilpatrick resides in the State of Texas, and has done so since February of 2009 with his wife and children, the State of Michigan chose to move Parole Supervision to the Detroit, MI office. The State of Texas sent notice to the Michigan Department of Corrections (MDOC) that Defendant Kilpatrick was in full compliance with all parole conditions, and had no parole violations during his time on parole. This was Defendant Kilpatrick's parole status at the time of transfer to the MDOC. On December 3, 2012, after being in trial for nearly 3 months, Defendant Kilpatrick reported to his Michigan Parole Officer that he had not been working, because of the trial, and could no longer afford to pay his home expenses, nor the \$500 restitution imposed by the court, and asked for a reduction. The Michigan Parole Officer told him that there would be no reduction and Defendant Kilpatrick should "do what he must" to pay the \$500. Defendant Kilpatrick then told his parole officer that

he would have to borrow the money or receive a gift in order to pay. The Michigan Parole Officer repeated his prior response to Defendant Kilpatrick that he should "do what he must." On December 9, 2012 Defendant Kilpatrick obtained a \$2000 gift from a friend through a wire transfer. Four minutes after receiving the \$2000, Defendant Kilpatrick used the same wire transfer service to send \$1200 to his wife in Texas for the purposes of paying monthly household expenses. On December 11, 2012 Defendant took \$500 of the remaining \$800 and met his restitution requirement to the court, by paying the required monthly fee. All receipts were produced and given to his Michigan Parole Officer. Television news reports and video tape from the Walmart Store, where the wire transfer service was located were released and aired on local television stations in Detroit, of Mr. Kilpatrick receiving and/or sending money. Although Mr. Kilpatrick has no parole condition or special condition to report gifts, he reported the money being sent to his wife for household expenses to his parole officer, he reported the specific household expenses that were paid with these monies to his parole officer, and he paid his monthly restitution obligation, Mr. Kilpatrick received a technical violation for failure to report the gift of \$2000. As well as other technical violations for not reporting the small fees associated with sending money through wire transfer.

The Government has asserted that Mr. Kilpatrick has had "many probation and parole problems." To the contrary, Defendant Kilpatrick spent the overwhelming majority of probation and parole under the supervision of the Texas Department of Criminal Justice and never had one problem. Again, Defendant Kilpatrick did not have

one infraction, violation, warning or non-compliance issue with any condition or special condition of probation or parole while under Texas supervision.

None of the issues raised by the Government about probation or parole have any thing to do with risk to the community or risk of flight. And further should have no bearing in the present matter of bond/detention.

Defendant Kilpatrick has been present for every court hearing, motion hearing, and trial date that required his presence. He was also in full compliance with Federal Pre-Trial Services, and they are currently recommending that he continue his unsecured bond with no additional conditions.

D. Mr. Kilpatrick Is Not a Risk of Flight

Defendant Kilpatrick has legitimate issues of Appeal in the present case. Defendant Kilpatrick has numerous issues from systematic issues such as the infringement on his Constitutional right to counsel, Misleading and Wrong Jury Instructions, Lack of an Allen Charge given during Jury Deliberations, issues related to Pre-Trial publicity, as well as many others. Defendant Kilpatrick also has numerous substantive issues on the merits of the crimes charged, as well as Post-Trial issues that will be raised on Appeal as well. Defendant Kilpatrick is no risk of flight. He believes that he is innocent of all charges and will tenaciously pursue justice through an appeal.

Defendant Kilpatrick was once called America's Hip-Hop Mayor. His case and verdict were broadcasted all over the United States of America. Defendant Kilpatrick's image and pictures have been displayed on local news stations throughout the country. The verdict of this present case was also broadcasted on CNN, MSNBC, Fox

News, as well as a host of other National Television Stations. The Verdict of the present case was also viewed by millions on international television networks such as the BBC and Al-Jazeera. Defendant Kilpatrick is also 6'4" and nearly 300lbs. He is very recognizable throughout the country, and is no risk of flight.

Defendant Kilpatrick resides in the State of Texas with his wife of nearly 18 years and 3 school aged sons. He has strong family and community ties, as his sister, nephews, niece and large church family reside in Texas as well. Defendant Kilpatrick has resided in the State of Texas since February of 2009.

Defendant Kilpatrick is financially destitute. He has no assets, no property, no retirement accounts, and no bank accounts. The court has determined that he is indigent and is currently paying all court cost and fees. Defendant Kilpatrick has no means to flee. The Government's assertion of anything to the contrary is political in nature, and has no legal or factual basis. Even through the Government's own investigations, that of the State of Texas and Michigan parole departments, as well as that of federal pre-trial services have found the same to be true of the lack of financial resources of Defendant Kilpatrick.

Defendant Kilpatrick has also been preliminarily diagnosed (awaiting an M.R.I.) with a torn Anterior Ligament (ACL). This injury occurred just after the verdict in this case on March 11, 2013. While Defendant Kilpatrick was exiting the federal building, chained and bound (hands and feet), he slipped on the rain soaked steel step of the Federal Marshal Van, being provided for transport to the Federal Detention Center at Milan, Michigan. After receiving no care for more than a week at the Detention facility,

and experiencing tremendous swelling of the knee, the Court convened a meeting of the federal marshals and Detention Center Staff. The next day Defendant Kilpatrick was seen by the staff physician at the Detention Center, who preliminarily diagnosed him with a torn ACL. A few days later a specialist was called in, who wanted to first drain the fluid and watch the progress over several weeks. More than 120cc's of very bloody fluid was removed from the Defendant's knee, and steroids were injected into the joints around the knee. Because of the lack of progress in healing, the staff physician called the Defendant for an appointment a few weeks after the injection and again diagnosed him with a torn ACL. An M.R.I. has now been ordered by the facility. If surgery is necessary, the institution does not have the medical staff, nor the rehabilitative services for these types of procedures. The risk of post-operation infection dramatically increases because of current detention conditions.

E. Mr. Kilpatrick Does Not Pose a Danger to the Community

The Court and the Government agree that Defendant Kilpatrick's background, history, and other factors rebut any presumption of being a danger to the community. Although the crimes of which Defendant Kilpatrick has been convicted of are serious, his criminal history, family ties, size, notoriety, lack of finances and legitimate issues for appeal in this case make him no risk of flight.

Defendant Kilpatrick's mother, former United States Congresswoman Carolyn Cheeks-Kilpatrick (retired), has agreed to offer her home and permanent residence as bond security, if necessary.

Mr. Kilpatrick insists that it is important for this Honorable Court to note that other politicians convicted in high-profile prosecutions were permitted an opportunity to be on bond pending sentencing.¹ Mr. Hill was permitted bond despite facing a large amount of time. Additionally, Mr. Jefferson was convicted of many of the same charges as Mr. Kilpatrick but still permitted bond pending sentencing and appeal. In the instant matter, the Government inexplicably will not consent to Mr. Kilpatrick's release.

F. Conclusion

For the reasons set forth above, Mr. Kilpatrick humbly requests this Honorable Court to release him pending sentencing in this matter. As established, there are conditions that can be set which allow Defendant Kilpatrick to be released and yet still ensure his appearance, and eliminate risk of flight. Defendant Kilpatrick would be willing to participate in an electronic monitoring program, if necessary.

Respectfully submitted,

O'REILLY RANCILIO, P.C.

By: _____ /s/
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Dated: April 29, 2013

¹ See United States v. Rod Blagojevich, Case Number 08-cr-00888-1, Docket Number 769; United States v. Don Hill, Case Number 07-cr-00289, Docket Number 107; United States v. William Jefferson Case Number 07-cr-00209, Docket Number 568.