

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
UNITED STATES OF AMERICA, : 16-mj-00280-VVP-1
: :
- versus - : U.S. Courthouse
: Brooklyn, New York
YANG KIM, :
Defendant : April 8, 2016
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR BAIL HEARING
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

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1 THE CLERK: Criminal Cause for Bail Hearing,
2 docket number 16-mj-280, USA v. Kim.

3 Counsel, please state your appearances for the
4 record.

5 MS. BERENSON: Nomi Berenson on behalf of the
6 United States. With me this morning is probation officer
7 Ryan Lehr.

8 Good morning, your Honor.

9 MR. JACOBSON: Good morning, your Honor.

10 Sam Jacobson, Federal Defenders on behalf of
11 Andrew Kim, who is present beside me and here with us
12 today also is social worker Danielle Azarelli.

13 THE COURT: I'm sorry?

14 MR. JACOBSON: Social worker Danielle Azarelli
15 is here today, as well.

16 PRETRIAL SERVICES OFFICER: Your Honor, I just
17 wanted to correct, that's pretrial services officer Ryan
18 Lehr.

19 MS. BERENSON: Excuse me.

20 THE COURT: Okay. And it's Naomi, did you say?

21 MS. BERENSON: Nomi.

22 THE COURT: Nomi, okay. I might as well get --
23 I'm sorry, your full name please, Officer?

24 PRETRIAL SERVICES OFFICER: Ryan Lehr.

25 THE COURT: L-E-A-R?

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1 PRETRIAL SERVICES OFFICER: L-E-H-R.

2 THE COURT: And the social worker please, Mr.
3 Jacobson?

4 MS. AZARELLI: Danielle Azarelli.

5 THE COURT: All right. So we're going to
6 address the motion essentially by the defendant to I
7 guess strike certain conditions of release. Before we get
8 started, the record is not clear as to what the
9 conditions of release are. I went and pulled the order
10 setting conditions of release and bond and it doesn't
11 reflect that any electronic monitoring was imposed but it
12 was my memory that I had, in fact, imposed electronic
13 monitoring in the second proceeding that we had that day.

14 But I did not impose any curfew, if I recall
15 and there were some -- I did not impose a curfew. None
16 of that is reflected in the order setting conditions of
17 release.

18 So I shouldn't say none of that. I mean, there
19 is no curfew in the order but there's also no electronic
20 monitoring, as far as I read this. Nevertheless, there
21 is, as I understand it, some kind of electronic
22 monitoring in place.

23 Mr. Lehr, do you know what specific kind of
24 monitoring is in place?

25 PRETRIAL SERVICES OFFICER: Yes, your Honor.

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1 The defendant is wearing a GPS bracelet and there's no
2 restriction on his time. So it's basically an open
3 schedule, we call it.

4 THE COURT: I know that there is no provision
5 for pretrial services supervision even in the -- or maybe
6 I am misreading -- I take it back. There is pretrial
7 services supervision. All right.

8 Well, this is the defendant's motion seeking a
9 modification of bail conditions and I'll let you speak
10 first, Mr. Jacobson. I do want you to address something
11 that really -- neither party addressed and it's not
12 anybody's fault, but the Adam Walsh Act seems to require
13 a curfew in addition to electronic monitoring and there
14 may be some other things that -- there are a couple of
15 other things that are mandated. And what is your
16 position in your presentation, Mr. Jacobson? I would
17 like you to address whether in the context of this case,
18 it's also would be unconstitutional to impose a curfew.
19 And if it's not unconstitutional to impose a curfew, then
20 how is the additional condition of electronic monitoring,
21 just to enforce or make sure of compliance with the
22 curfew unconstitutional.

23 So in other words, if it's constitutional to
24 impose a curfew, why would it be unconstitutional to
25 impose electronic monitoring to ensure compliance with

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1 the curfew? So address that somewhere in your remarks
2 and but otherwise, you're free to say what you want and
3 you're free to address whatever arguments were made in
4 the government's opposition because you didn't have a
5 chance to reply.

6 MR. JACOBSON: Thank you, your Honor. I can
7 address the curfew issue up front. It wasn't in our
8 brief because the government hadn't asked for a curfew
9 and curfew wasn't imposed as a condition. So it was my
10 understanding that we didn't have standing to brief that
11 issue and to challenge the constitutionality of that
12 issue.

13 THE COURT: That's fine. I'm not in any way
14 criticizing anybody for that. It's just that as I was
15 going through this and reading the cases and looking at
16 the statute, it came to my attention that electronic
17 monitoring and curfews is required.

18 MR. JACOBSON: Right. So we're specifically
19 challenging the electronic monitoring. If the government
20 were to ask for a curfew and the government -- and the
21 Court were to impose it, we would also challenge that
22 condition as unconstitutional for the same reasons that
23 the electronic monitoring is unconstitutional.

24 It has the same Eighth Amendment implications
25 and the same Fifth Amendment implications, as well as

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1 separation of powers issues. And if there are any
2 specific questions the Court has about how they differ
3 but our position is definitely that even without a
4 curfew, just electronic monitoring is also
5 unconstitutional.

6 THE COURT: Okay.

7 MR. JACOBSON: And I think there's also a bit
8 of a lack of clarity in the case law about what type of
9 challenges defendants are bringing to this statute,
10 whether it's as applied or a facial challenge. In our
11 case, we are bringing both a facial challenge to the
12 statute as a whole, and as applied challenge with respect
13 to Mr. Kim.

14 And when I say a facial challenge, a facial
15 challenge to the subsection of the Adam Walsh amendments
16 that address electronic monitoring and curfew, if that
17 were something that the government would be asking for.

18 And the reason it's a facial challenge is
19 because our position is that it's unconstitutional with
20 respect to every person who is subjected to mandatory
21 conditions of electronic monitoring and it's as an
22 applied challenge, because in this case, the Court made a
23 specific finding that electronic monitoring was not
24 necessary to ensure public safety and to ensure that Mr.
25 Kim came to his court appearances.

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1 So I would like to start out by addressing sort
2 of the general landscape and trends in the case law on
3 these issues. As an initial matter, I think that every
4 court that has addressed this issue in the Second Circuit
5 has found this subsection to be unconstitutional.
6 Specifically, that's U.S. v. Arzberger, which was
7 Magistrate Judge Francis in the Southern District, U.S.
8 v. Polizzi, which was the Judge Weinstein opinion in the
9 Eastern District and then a case that is not cited in my
10 brief but that I found, U.S. v. Karper and that's 847
11 F.Supp 2d 350. It's a 2011 opinion by Judge Trease in
12 the Northern District of New York. So, those three cases
13 to --

14 THE COURT: U.S. v. Karper, you say?

15 MR. JACOBSON: Karper, K-A-R-P-E-R.

16 THE COURT: All right.

17 MR. JACOBSON: So in those three cases, to be
18 sure, it was on different grounds that it was found
19 unconstitutional but in all three cases, the subsection
20 was found to be unconstitutional.

21 When we look outside the Second Circuit, you
22 find similar trends. On the Eighth Amendment question,
23 the excessive bail question, seven out of the nine courts
24 that have addressed it have found this subsection to
25 constitute excessive bail. And on the Fifth Amendment,

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1 due process issue, both substantive and procedural, you
2 have eleven out of the fourteen courts that have
3 addressed it, have found it to be unconstitutional.

4 I believe the three courts that didn't find it
5 to be unconstitutional it was only a facial challenge
6 because the Court had already made a specific finding as
7 to that individual that electronic monitoring was
8 necessary to protect the public. In some of those cases,
9 it was a hands on contact charge or there was a prior
10 offense that was alleged. And so, in those cases, the
11 defendant could not argue that it didn't apply to him
12 because the Court had already made a finding.

13 And then on the separation of powers issue,
14 three out of five courts that have addressed the issue
15 have found it to be unconstitutional. Really four out of
16 five because one of the two is Arzberger in the Southern
17 District where the Court said it wasn't a separation of
18 powers issue but said that it was, in fact, excessive
19 bail and was, in fact, a violation of the defendant's
20 procedural rights.

21 And the numbers are actually misleading because
22 some of the courts did find it unconstitutional on one
23 prong, have found it -- that found it constitutional on
24 one prong but found it unconstitutional on the other.

25 So in the Second Circuit have all of the Courts

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1 finding it unconstitutional and the other -- in other
2 circuits, you have the vast majority of courts finding it
3 to be unconstitutional.

4 I think the reason you see it, so few appellate
5 opinions in these cases is that the government just
6 decides not to appeal. They don't want to set bad law on
7 these cases. So instead, we end up litigating it judge
8 by judge. So there's certainly no Second Circuit opinion
9 on the issue.

10 I think I outlined the three grounds for relief
11 in our brief. So I just wanted to kind of address the
12 government's specific arguments and try to rebut some of
13 those. the government tries to use as some cases that
14 involve electronic monitoring as a condition of probation
15 or supervised release and I think this is a very
16 different context because pretrial -- people who are
17 released on bail pretrial, courts have said that there's
18 a different liberty interest at stake due to the
19 presumption of innocence and the statutes that are
20 involved. And specifically, that the Bail Reform Act
21 requires the least restrictive conditions.

22 The government points to the Medina test, as
23 opposed to Matthews Balancing on the procedural due
24 process issue and I wanted to point out that every court
25 that has addressed the due process issue has used

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1 Matthews balancing. And the reason for that is that the
2 Medina court was looking at the state law and used a
3 lower threshold for due process -- as a matter of comity,
4 federal deference to state law. Here we're dealing with
5 a federal statute. We don't need to provide such comity
6 and so that standard Matthews balancing test for
7 procedural due process applies.

8 The three kind of prongs of the Matthews
9 balancing is the private interest. I think the
10 government alleges that there's no liberty interest at
11 stake here and I think that the case law is squarely
12 against that and has held that their liberty interest at
13 stake for all of the various pretrial bail conditions and
14 it implicates freedom of movement, and freedom of travel
15 which are fundamental constitutional liberties.

16 On the government interest prong, the Act was
17 intended to protect minor victims and that's absolutely a
18 legitimate and important government interest but in this
19 case, it's just not tailored at all to specific
20 individuals which is what procedural due process
21 requires.

22 The Polizzi case dealt with a very similar type
23 of charge that we're dealing with in the instant case.
24 It was simply, you know, viewing minor victims on a
25 computer and there was simply no allegation that there

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1 was any risk to actual victims and that there was just no
2 statistical foundation, Judge Weinstein held, for saying
3 that the government had an interest in applying this as a
4 blanket provision for anyone charged with a crime in that
5 category.

6 As to the procedural prong of Matthews
7 balancing, I would say that not only is there -- it's not
8 that there's very little or insufficient procedure here,
9 there's zero procedure here because it's a mandatory
10 condition. The government relies in their brief on the
11 Solerno case, which is the major Supreme Court case on
12 procedural due process under the Bail Reform Act and the
13 Adam Walsh provisions. That case is simply inapplicable
14 here.

15 Solerno was about a finding of dangerousness to
16 remand someone pretrial and finding dangerousness by
17 clear and convincing evidence. The reason Solerno is
18 inapplicable is that a finding of dangerousness and a
19 remand on that ground is a rebuttable presumption, right?
20 There's a full adversarial hearing. The defendant can
21 put on evidence. It's exactly what the constitution
22 intends when it talks about procedure. There's actually
23 a hearing and there's full procedure and that's what the
24 Solerno court said.

25 And so under Solerno, the Adam Walsh amendments

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1 barely survive and they survive because there's a full-
2 blown adversarial hearing. Here we're talking about a
3 mandatory provision. It's not just a rebuttable
4 presumption and there's no case holds that a mandatory
5 provision can ever stand up against a procedural due
6 process challenge.

7 We're also bringing a substantive due process
8 challenge in this case and I think because the procedure
9 is so inadequate and the mandatory conditions are so
10 excessive for Mr. Kim, it raises the substantive due
11 process issue because the Fifth Amendment has been found
12 to protect against punishment. Right? The Eighth
13 Amendment, cruel and unusual punishment is imported into
14 the Fifth Amendment context for pretrial -- people who
15 have been released on bail pretrial, and a condition that
16 is so excessive and so denies due process can be found to
17 be punishment that not only is procedurally defective but
18 also violates substantive due process rights.

19 Very quickly on the excessive bail Eighth
20 Amendment point, again I think Solerno which addresses
21 and Eighth Amendment claim survives but only because
22 there is a full-blown adversarial hearing where the
23 defendant could rebut a finding of dangerousness.

24 And, you know, I think the touchstone of
25 excessive bail analysis is that it has -- excessive bail

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1 is a judicial finding. Every case to address that has
2 found that -- and this also implicates the separation of
3 powers issue where Congress is attempting to take away a
4 court's discretion for an entire category of people that
5 are charged with crimes and the Crowell case does a good
6 job of laying out the history of this but it says that,
7 "The setting of bail in federal criminal cases has been
8 recognized as representing the quintessential exercise of
9 judicial power." And that's both the separation of
10 powers issue and also an issue that implicates excessive
11 bail because what excessive means, and Judge Weinstein
12 addresses this also in the Polizzi opinion, excessive is
13 a judicial determination. And in this case, the Court
14 made a specific finding about what conditions were
15 sufficient but no greater than necessary and tailored for
16 this particular person. And anything above that would be
17 excessive bail under the Eighth Amendment.

18 I wanted to address also briefly two cases.
19 Basically, the two cases that go the other way that the
20 government cites in their brief. The first one is U.S.
21 v. Gardener (ph.) and that's a Northern District of
22 California case from 2007. That opinion is by Magistrate
23 Judge Eddie Chen, who is a great civil libertarian and
24 who is almost always right on issues of civil liberties.
25 And I think the reason our case and every other case can

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1 be distinguished from Judge Chen's case is that Judge
2 Chen did hold a hearing, just as this Court held a
3 hearing and Judge determined that a curfew was necessary
4 for that and this ties back to the curfew issue, Judge
5 Chen found that for that particular defendant, a curfew
6 was necessary both to protect the public and to guard
7 against a flight risk.

8 And at the initial bail hearing, imposed a
9 condition of curfew because he found that it was
10 necessary under the Bail Reform Act and then later, the
11 government moved to add a condition of electronic
12 monitoring and Judge Chen found that electronic
13 monitoring was necessary and narrowly tailored to enforce
14 the curfew. And if he wasn't making an extra finding
15 that the electronic monitoring was -- because he had
16 already given process on the question of curfew and
17 electronic monitoring is simply an apparatus to enforce
18 the curfew, it didn't implicate Eighth Amendment and
19 procedural issues because he, in fact, granted that
20 procedure at the initial bail hearing and made that
21 factual finding.

22 The other case the government cites is U.S. v.
23 Kennedy which is a very strange Ninth Circuit case. It's
24 an unpublished summary order. And I'm happy to address
25 Kennedy further. You know, I would say that the Kennedy

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1 court simply got it wrong and that every opinion to come
2 after Kennedy has said that Kennedy got it wrong. I
3 think that the -- with due respect to the judges on the
4 panel, they didn't understand what the Adam Walsh
5 Amendments actually said.

6 There's a good articulation of this in U.S. v.
7 Karper which is 847 F.Supp 2nd 350 which is a 2011 case.
8 Karper is the Northern District of New York. Footnote 6
9 in Karper has a long explanation of Kennedy and what
10 Kennedy got wrong and says that Kennedy gave short shrift
11 to the notion of due process by finding that the Adam
12 Walsh Act requires a court to exercise its discretion to
13 the extent practicable.

14 So Kennedy essentially says there's also a Law
15 Review article that I can -- it's a St. John's Law Review
16 article that I -- was not addressed in my brief but it's
17 called the "Mandatory Pretrial Release Provision of the
18 Adam Walsh Act Amendments, How Mandatory Is it and Is it
19 Constitutional?" by Brian Derringer -- sorry, it's from
20 2012, 85 St. John's Law Review, 1343. And it talks about
21 Kennedy using very harsh language and sort of endorsing
22 the views of all of the opinions that come after Kennedy
23 which shows that essentially Kennedy in a
24 -- remands the case in very short shrift saying that
25 ignoring the mandatory part of the provision and saying a

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1 court should just use its discretion to apply these
2 conditions as required by the Adam Walsh Act, which is
3 simply impossible, given the letter of the law in that
4 subsection of Adam Walsh.

5 Finally, I just wanted to mention that the
6 government essentially asks the Court to revisit its
7 factual findings at the original bail hearing which I
8 think would be inappropriate. The government talks about
9 the risk of danger to the community in this case and the
10 risk of flight in this case. And I think, you know, the
11 Court already made findings that were appropriate to Mr.
12 Kim.

13 And I wanted to emphasize that this is not just
14 an academic point for Mr. Kim. I think the government
15 refers to the electronic monitoring as an anklet, as if
16 it's a piece of jewelry and totally discreet.

17 Mr. Kim has already had to quit his job because
18 of this anklet. He works as a waiter at a sushi
19 restaurant and he couldn't continue because he knew that
20 they were going to see -- it's not discreet at all. It
21 can be seen through any pants, even baggy pants,
22 especially when -- it's very large and you can't pull it
23 up on your leg far enough. And again, this goes to the
24 liberty interest at stake here. And if employers find
25 out about it, especially in Mr. Kim's small church

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1 community, it could have had serious repercussions for
2 him.

3 I've had other clients who have to stay in my
4 office to recharge their anklets and I think it really
5 severe restricts their freedom to move and freedom to
6 travel. They really do have to be tethered to a wall and
7 abide by a strict schedule of charging it. And I think
8 if you just think about the fact that pretrial and the
9 government and defense are all joined in a desire to see
10 people working and being productive while they're out on
11 bail, and in situations where you have to be at your
12 place of work and say, you know, excuse me, while I plug
13 my leg into the wall for fifteen minutes because I am
14 charged with a crime, even though I am presumed to be
15 innocent, I think it is not -- the government really
16 tries to downplay that restriction. Thank you.

17 THE COURT: All right.

18 Ms. Berenson?

19 MS. BERENSON: Your Honor, there are a great
20 number of issues that have been raised. I can address
21 them in the order that Mr. Jacobson did or --

22 THE COURT: Yes.

23 MS. BERENSON: Okay.

24 THE COURT: However you would like -- I'm not
25 being mic'd -- do it in whatever order you wish.

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1 MS. BERENSON: I think first to address the
2 issue that the Court raised which is the matter of
3 curfew, the government agrees with the Court's reading of
4 the law that curfew of some sort need be imposed. For
5 that reason, the brief that was submitted to the Court
6 notes the interaction between curfew and electronic
7 monitoring and in so doing, I think appropriately notes
8 the discretion that the Court has in terms of fashioning
9 the appropriate curfew and form of monitoring for any
10 given defendant on an individualized basis.

11 That at its heart is the crux of the
12 government's argument as --

13 THE COURT: This is an issue that I gave a
14 little bit of thought to. I gave all of the issues some
15 thought but this one -- if the Court in its discretion
16 decided that a curfew was needed because of the Adam
17 Walsh Act, but a curfew of ten minutes was sufficient,
18 what's the point? I mean, in my discretion let me impose
19 ten minutes of curfew between the hours of 3:30 and 3:40
20 in the morning. Does that makes sense?

21 MS. BERENSON: No, it does, your Honor.

22 THE COURT: Okay.

23 MS. BERENSON: And the government's --

24 THE COURT: And so --

25 MS. BERENSON: -- position is that --

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1 THE COURT: -- because in my discretion I say -
2 - I mean, I'm taking Kennedy which I agree with --
3 frankly, I agree with the defendant on, Kennedy makes no
4 sense. You could remanded, so that the Court could
5 exercise its discretion in imposing some conditions. If
6 I imposed a -- it seems to me that if I imposed -- if I
7 made the finding and I already did, that no curfew was
8 necessary, or I at least implicitly made that finding,
9 then in my discretion, to impose a ten-minute curfew is
10 all that, you know, would be required. It just -- it
11 makes no sense for me to do that.

12 And nor does it make sense for me to impose
13 electronic monitoring to make sure there's compliance
14 with that ten-minute curfew. So I just can't square
15 that. I can't -- what discretion do I really have? Do I
16 have the discretion to basically read the requirement out
17 of the statute and if I do, then by imposing such a
18 curfew that's meaningless, if I have that kind of
19 discretion, then what's the point of imposing it at all?
20 So it's something I am grappling with. So -- and if you
21 think a curfew is necessary, I need to know why. What is
22 the curfew needed for, other than the fact that it's
23 mandated by the statute? So you can address all that.

24 MS. BERENSON: Your Honor, the government
25 agrees with the Court in that imposition of a de minimis

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1 curfew would not be appropriate and would not be
2 following the law. I would like to say that the
3 defendant here seems to raise some liberty interests
4 including freedom of movement, and liberty that are
5 simply not in his submission to the Court.

6 The defendant's movement is not limited in any
7 way by the application of -- and a bracelet certainly,
8 the curfew is another matter and the two certainly do
9 have an interplay. It seems like the Court is currently
10 asking more about the imposition of a curfew to which the
11 government can respond that Congress has legislated this,
12 among other requirements for certain classes of cases,
13 though it leaves to the Court the discretion to fashion
14 what is appropriate in each individualized case.

15 For instance, as you well know, some defendants
16 have a fairly restrictive curfew of something along the
17 lines of 7 p.m. to 7 a.m. Other defendants are allowed
18 to be out and about until 11 p.m. This defendant
19 currently in contravention of the law has no curfew set
20 on him and so to the extent that there's any argument
21 that his movement or liberty is currently restricted, the
22 government thinks respectfully that that's unfounded.

23 It's only really alerting pretrial at all if he
24 travels outside the bounds of New York City and Long
25 Island which is a term commonly imposed on defendants in

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1 this jurisdiction.

2 THE COURT: Well, but we don't impose
3 electronic monitoring to enforce that. I mean, that's
4 not the -- and it seems to me that electronic monitoring
5 in this case, although Congress is not all that clear on
6 it because I don't think they even made any findings
7 apparently, at least I didn't go study the legislative
8 history. Mr. Jacobson cited it and I didn't see any
9 argument with it.

10 But I think it's implied anyway, that the
11 reason for the electronic monitoring and the curfew
12 requirements and the mandated -- those mandated
13 requirements is Congress' somehow belief that people
14 charged with this particular offense, and others that are
15 mentioned in the statute, but this one also, are a danger
16 or pose a danger.

17 MS. BERENSON: I think that's right, your
18 Honor.

19 THE COURT: So we're not talking about risk of
20 flight here. That's not the purpose of the electronic
21 monitoring. So I'm not sure that the cases that deal
22 with electronic monitoring, to the extent that they do,
23 to protect against flight are applicable here.

24 Whatever interest is it that the government is
25 articulating here, is it seems to me, tied to

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1 dangerousness.

2 MS. BERENSON: I think that's true in part,
3 your Honor, but respectfully, I do think that flight also
4 plays a role here and I think that may be one reason why
5 these requirements are not mandatory, for example, on
6 defendants who are charged only with possession of child
7 pornography, which carries no mandatory minimum sentence,
8 as opposed to receipt or distribution, which do. They
9 all involved viewing child pornography and so presumably,
10 the same risk to the community and the children. And I
11 think that it says something that only the ones that
12 carry a mandatory minimum sentence of five years or more
13 have these impositions. So I do think that flight is
14 implicated.

15 And, in fact, in conversations with defense
16 counsel, he has specifically raised to me the defendant's
17 grave concern about being deported to a country that he
18 has not lived in since he was a young child. And so I
19 think that the defendant here, like many others similarly
20 situated, faces a strong incentive to flee.

21 THE COURT: Well -- very well. If that's your
22 argument and you think a curfew is necessary to protect
23 against that, I suppose you can make that argument. What
24 else did you want to say?

25 MS. BERENSON: Your Honor, the government

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1 believes that substantive due process is the appropriate
2 analysis here and not procedural due process for the
3 reasons set forth more fully in their brief. Namely,
4 that under the Supreme Court's decision in Connecticut
5 Department of Public Safety v. Doe, laws that apply to a
6 category of individuals where the determination of
7 dangerousness or risk of flight are irrelevant or have no
8 bearing on the particular imposition of a requirement,
9 for example registering as a sex offender, should govern
10 this case. The analysis is not that different.

11 The government also feels that -- excuse me --
12 the government also believes that to the extent the Court
13 is concerned with Kennedy in that it remanded a case down
14 for the exercise of discretion within certain bounds,
15 that respectfully all discretion is exercised within
16 certain bounds and so the imposition of parameters at the
17 edge here should not prevent the Court from ruling that
18 these implementations of pretrial bail release conditions
19 are constitutional.

20 THE COURT: All right.

21 MS. BERENSON: As for the excessive argument
22 under the Eighth Amendment, the government's position is
23 that bail refers to monetary conditions and defense has
24 not cited any case to the contrary. I don't know if the
25 Court has further questions on that.

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1 THE COURT: Well, it seems to me that Solerno
2 had -- I think in Solerno, there was certainly the
3 opportunity to make that argument and that the bail --
4 well, I think to me the question of -- the concept of
5 bail being restricted only to monetary terms is something
6 that is a product of history. We even call it the Bail
7 Reform Act, so that we're talking about setting
8 conditions of release. They don't even call it bail
9 anymore. And I don't think that means that the Eighth
10 Amendment no longer has application, simply because we
11 don't call it bail anymore. We call it conditions of
12 release.

13 In any event, so I am not persuaded by the
14 notion that bail, at least as it is used in the Eighth
15 Amendment is restricted to consideration of monetary
16 conditions.

17 MS. BERENSON: Well, your Honor, I think that
18 the historical reference is appropriate here and I would
19 note that the conditions of release that are not monetary
20 can be met by individuals regardless of their means. And
21 so I think it's appropriate to treat them differently.

22 THE COURT: I'm not sure I know what you mean.
23 I am not sure I am following the argument that you're
24 making.

25 MS. BERENSON: Well, were the Court to set a

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1 certain financial condition of bail or pretrial release,
2 not all defendants would have adequate means to satisfy
3 such a condition. They're not all wealthy.

4 But imposing a condition like curfew or
5 electronic monitoring, the two at issue here, are not
6 ones that a defendant can't be wealthy enough to comply
7 with. And so I think treating them differently makes
8 sense.

9 THE COURT: So that I guess the argument is
10 that except for excessive monetary conditions, there's no
11 -- the Court could impose detention, for instance, for
12 theft of mail, regardless of what -- I mean, Congress
13 could basically say in all theft of mail cases, detention
14 is mandated and that wouldn't be an excessive bail.

15 MS. BERENSON: I'm not sure I am prepared to
16 speak to that hypothetical, your Honor, and it's --

17 THE COURT: Well, it's not --

18 MS. BERENSON: -- as it's a little --

19 THE COURT: -- we weren't imposing a monetary
20 condition, we were just saying I mean, there's no
21 monetary -- Congress just makes a decision that detention
22 is always applicable and that that wouldn't be a
23 violation of the excessive bail clause.

24 MS. BERENSON: Well, your Honor, in that
25 instance and respectfully, I think that that hypothetical

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1 is quite far afield since in that hypothetical the
2 defendants would have to be remanded and that's not the
3 concern here.

4 THE COURT: Well, it struck me that the
5 decisions in the early fifties, the Supreme Court was
6 dealing with -- and we were dealing with a system of
7 pretrial release where bail was limited to imposing
8 monetary conditions. And what Courts started to do,
9 rather than saying you've got to detain somebody is they
10 just made bail so outlandishly high that people couldn't
11 possibly meet the bail, you know? And the Court said
12 that was excessive bail, right?

13 MS. BERENSON: Yes, your Honor.

14 THE COURT: I mean, a violation of the -- but
15 so we have a regime now where courts can make detention
16 decisions. But Congress doesn't make the decision.
17 Congress doesn't specify in advance that detention is
18 always mandated. As a matter of fact, I don't even know
19 if for capital crimes Congress has said detention is
20 mandated. Congress leaves that decision to the Court.

21 And I think to the extent you're making the
22 argument that bail as used in the Eighth Amendment means
23 only money, then it seems to me there's the -- except for
24 a court imposing excessive monetary bail, there could be
25 no violation of the excessive bail clause.

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1 MS. BERENSON: I think here, your Honor,
2 certainly there is none. I think that's right. I think
3 historically bail refers to financial conditions to pay.

4 THE COURT: Okay.

5 MS. BERENSON: And again, that's something that
6 some defendants simply may not have access to in terms of
7 their monetary resources. But --

8 THE COURT: Well --

9 MS. BERENSON: -- all defendants have equal
10 access to imposition of other types of conditions that
11 the Court fashions and thinks are appropriate.

12 THE COURT: No, I am talking about detention.
13 They don't even have a choice. I mean, they can't meet
14 the -- if Congress were to pass a statute that said that
15 in all cases defendants are supposed to be detained, I
16 don't care what the charge is, I don't think that that --
17 well, I think you're saying that that wouldn't be a
18 violation of the excessive bail clause because there
19 wasn't a monetary decision, it was Congress just decided
20 everybody had to be detained. All right. If that's your
21 argument, that's your argument.

22 We are dealing here with a statute that says
23 that this condition has to be imposed. Now I am not -- I
24 understand that I am using an extreme example but the
25 concept is the same. If you're saying that bail as used

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1 in the Eighth Amendment only means money and that the
2 excessive bail clause does not prohibit any other form of
3 restrictions on pretrial release, then -- I am not
4 convinced, let's put it that way.

5 MS. BERENSON: Your Honor, I am not sure that
6 the two are comparable in comparing terms of pretrial
7 release versus detention. I understand that you're
8 intentionally making a point that is, you know, at the
9 far end of this line of thought but I don't think every
10 argument can necessarily be carried to its --

11 THE COURT: Well, no, of course not.

12 MS. BERENSON: -- conclusion and still make
13 sense.

14 THE COURT: But the argument you are making is
15 that bail means only money and I guess I am dealing with
16 that argument and --

17 MS. BERENSON: Well, I --

18 THE COURT: -- that's why I am using the
19 extreme example.

20 MS. BERENSON: I mean the statute that you're
21 referring to, this hypothetical statute that could
22 require all defendants accused of any crime to be
23 detained, would violate other provisions of the
24 Constitution. I'm not sure that it would violate the
25 excessive bail clause if there was no imposition of a

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1 monetary fine.

2 THE COURT: Well, it may violate other things,
3 too. I don't know but I am -- all right.

4 MS. BERENSON: But respectfully, that's not
5 what we're dealing with here and though the statute does
6 require imposition of certain provisions including curfew
7 and electronic monitoring, the Court has complete (sic)
8 discretion in terms of fashioning what's appropriate in a
9 given case.

10 THE COURT: Not complete. Not complete. I
11 can't -- you were telling me that I really don't have the
12 discretion to impose ten minutes of curfew or five
13 minutes or thirty seconds --

14 MS. BERENSON: That's true.

15 THE COURT: -- of curfew.

16 MS. BERENSON: That is true.

17 THE COURT: So I don't have complete
18 discretion.

19 MS. BERENSON: That's correct, your Honor, not
20 complete. I misspoke.

21 THE COURT: Okay. All right. I didn't mean to
22 cut you off. If you have anything else you wanted to
23 address.

24 MS. BERENSON: I think that the argument as to
25 separation of powers is the most far flung of the

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1 defendant's. I don't know if you have questions on that.
2 I think there is ample case law demonstrating that our
3 three branches of government interact in a variety of
4 ways in that they don't function autonomously and I think
5 Congress is well within its bounds to set parameters for
6 the Courts in their functioning. I think they've done
7 that in other instances and this case is not remarkable,
8 though I understand that the Court has noted that it does
9 not have complete discretion to set all pretrial term
10 releases for certain categories of offenders.

11 THE COURT: All right.

12 Mr. Jacobson, you have about three to four
13 minutes.

14 MR. JACOBSON: I'll be very brief.

15 THE COURT: Oh, did you want to say something
16 else?

17 MS. BERENSON: Your Honor, before Mr. Jacobson
18 goes, I didn't know if Officer Lehr might like to address
19 some of the practical concerns raised here since he's
20 really closest to it.

21 THE COURT: All right. Well, I will let -- the
22 defendant did raise some practical matters. So maybe --
23 I mean, if Mr. Lehr wants to weigh in on that, I'll
24 certainly hear him.

25 PRETRIAL SERVICES OFFICER: I think with

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1 respect to the charging, I think it's a little over
2 exaggerated in that you're not -- you do have to follow a
3 charging regimen. We ask that they charge the bracelet
4 for an hour in the evening when they're home and an hour
5 before they leave in order for there to be enough time,
6 so that the battery doesn't deplete while --

7 THE COURT: And what does that -- charging
8 means they literally are restricted to -- they have to be
9 connected electrically to something?

10 PRETRIAL SERVICES OFFICER: Currently, yeah.
11 It would be similar to like phone charger. that's the
12 best analogy I can give you. There is new equipment
13 coming out which the AO has just approved which will make
14 it more -- a little more flexible because there will be a
15 battery that you can put in and take out and have another
16 one in at the same time but that's just being rolled out
17 towards this district probably at the end of the summer.
18 So we're not there yet but this is what we have to work
19 with right now.

20 But, yes, they do have to charge it. They have
21 to be -- since the bracelet cannot be removed, they have
22 to be in proximity to the outlet in order to have it
23 plugged in.

24 THE COURT: Okay. All right. Mr. Jacobson?

25 MR. JACOBSON: If Ms. Azarelli could briefly

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1 address the practical considerations from the social work
2 perspective?

3 THE COURT: Okay.

4 MS. AZARELLI: Thank you, your Honor.

5 THE COURT: All right.

6 MS. AZARELLI: So as, you know, Mr. Jacobson
7 noted, the imposition of the electronic monitoring has
8 interfered with Mr. Kim's ability to main his -- maintain
9 employment which --

10 THE COURT: Maintain employment, did you say?

11 MS. AZARELLI: Employment, right --

12 THE COURT: Okay.

13 MS. AZARELLI: -- at the Sushi restaurant. I
14 think that for someone like Mr. Kim, where this is his
15 first interaction with the criminal justice system,
16 wearing a bracelet is a particularly different and
17 stressful change that he's having to navigate in his life
18 right now. I think it has the potential, perhaps has
19 already had adverse psychological and interpersonal
20 consequences and I think would make it much more
21 difficult for Mr. Kim to fully and actively participate
22 in employment but also in educational and vocational
23 endeavors that we have discussed as well and kind of
24 integral to or inherent in those activities are
25 relationships and socializing which is -- and

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1 productivity which are all three important social work
2 values that I think, you know, from again to the extent
3 that I can talk about social work in this setting, I
4 think Mr. Kim would be very adversely affected by --
5 through electronic monitoring.

6 THE COURT: Mr. Jacobson, did you want to say
7 anything else?

8 MR. JACOBSON: I do. Thank you. I wanted to
9 briefly mention that Solerno explicitly says that the
10 excessive bail clause requires process and the only thing
11 that saved the statute in the Solerno case was that there
12 was process and there was robust process. It was the
13 entire -- the adversarial bail hearing.

14 And what saved the statute was that it was a
15 rebuttable presumption and I think Solerno really gets at
16 the point that as soon as you cross that line into a
17 mandatory condition, it has to be unconstitutionally
18 procedurally, substantively and under the excessive bail
19 clause of the Eighth Amendment.

20 The government addressed the Connecticut
21 Department of Public Safety, the Doe case, saying that
22 procedural due process doesn't apply and that it's
23 substantive due process here. I think the reason it's
24 distinguishable is that Connecticut Department v. Doe is
25 a post-conviction case. It's about Connecticut's Megan's

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1 Law provision which requires people who are convicted of
2 certain criminal offenses to register with the
3 Connecticut Department of Public Safety.

4 So that case doesn't implicate the excessive
5 bail clause at all. So, of course it's going to be
6 substantive due process but in a case where -- that
7 involves bail, a pretrial cases, where the excessive bail
8 clause is implicated, you're no longer in the Connecticut
9 v. Doe world. You're then in the Solerno universe which
10 clearly says that not only is substantive due process
11 implicated but procedural due process, as well.

12 And just quickly to address some of the factual
13 points here, if Kennedy is right -- if the Kennedy case
14 is correct that the Court has discretion to impose a ten-
15 minute curfew, the issue with that is that electronic
16 monitoring is always twenty-four hours a day, seven days
17 a week. There's no discretion for pretrial to say you
18 can take your bracelet off, except during that ten
19 minutes of curfew. And that's why the liberty interest
20 is implicated in a different way from some imaginary
21 discretion that the Kennedy court thought a judge might
22 have in tailoring the curfew. The electronic monitoring
23 can't be tailored in that same way.

24 And I think Judge Chen's point in his decision
25 is that electronic monitoring is really meant to enforce

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1 -- its meant as add-on to curfew and home detention.
2 Here we have I as a stand alone provision. In Judge
3 Chen's case, he had already made a finding that curfew is
4 necessary and then electronic monitoring was added as a
5 way to enforce that because again, electronic monitoring
6 is not intended to speak to risk of flight.

7 That's all I have. Thank you, your Honor. Oh,
8 one last thing on the separation of powers point, I do
9 agree that the branches of government interact in all
10 sorts of ways. I just think that the Courts have said
11 that they are not to interact when it comes to the
12 setting of bail and that's been a hard line that courts
13 have drawn.

14 For example, in the Crowell case where it says
15 that -- it states that "The setting of bail in federal
16 criminal cases has has been recognized as representing
17 the quintessential exercise of judicial power." So that
18 is not a situation where Congress can simply step in and
19 take that discretion away from the judges.

20 MS. BERENSON: Your Honor?

21 MR. JACOBSON: That's all I have.

22 MS. BERENSON: Your Honor, electronic
23 monitoring is being grossly oversimplified and
24 mischaracterized by the defense in this case and --

25 THE COURT: Well, as I understand it, wit the

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1 location -- at least for the location monitoring that Mr.
2 Kim is subject to, that is twenty-four hours. That
3 nobody may be monitoring him but he's got to wear it
4 twenty-four hours a day and it's communicated -- it's a
5 GPS sort of system, right --

6 MS. BERENSON: Yes, your Honor.

7 THE COURT: -- which is communicating with the
8 -- but I mean, I understand the distinctions between the
9 GPS and the location monitoring. He could have
10 electronic monitoring --

11 MS. BERENSON: Via telephone, for example.

12 THE COURT: -- via telephone, that's right. I
13 understand that.

14 MS. BERENSON: Yes.

15 THE COURT: And that's not what's in place here
16 but we could -- I could order that --

17 MS. BERENSON: Yes, should --

18 THE COURT: -- in --

19 MS. BERENSON: -- the Court decide that in
20 exercising its discretion in this case --

21 THE COURT: No, I understand that.

22 MS. BERENSON: -- that that's more appropriate
23 and --

24 THE COURT: Right.

25 MS. BERENSON: -- the defendant here --

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1 THE COURT: But it would still require twenty-
2 four hours wearing of a bracelet. You --

3 MS. BERENSON: No.

4 THE COURT: -- can take off the bracelet?

5 MS. BERENSON: There's no bracelet involved in
6 the telephone monitoring, your Honor.

7 THE COURT: How is that done?

8 PRETRIAL SERVICES OFFICER: Your Honor,
9 sometimes it kind of gets lumped together but we have
10 three distinct types of technology. The voice I.D.,
11 which is what Ms. Berenson is referring to, which is
12 simply the telephone call. So in that hypothetical
13 situation if you wanted to have a ten-minute curfew and
14 it had to be home, then we would have the phone calls
15 come in at that point. There would be nothing to wear.

16 THE COURT: Oh, that's electronic monitoring
17 within the meaning of the statute?

18 PRETRIAL SERVICES OFFICER: Yeah, I believe it
19 is, your Honor, yes.

20 THE COURT: Oh, okay.

21 MR. JACOBSON: We have never had a client who
22 had that without an ankle bracelet, so far as I know.

23 THE COURT: Well, but the government --

24 MS. BERENSON: But that's within the Court's
25 discretion.

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1 THE COURT: -- but the government is saying
2 that it's -- a bracelet is unnecessary.

3 MS. BERENSON: That's correct, your Honor.
4 It's within the Court's discretion to fashion the
5 appropriate forum and parameters of electronic monitoring
6 and curfew in all of these cases. And the government
7 would also note that defense counsel previously
8 represented to the government that the reason the
9 defendant lost his job is because out of shame, due to
10 his parents' relationship with the owners of the sushi
11 restaurant he quit, not that he was unable to adequately
12 charge the bracelet.

13 THE COURT: Okay. All right.

14 MR. JACOBSON: May I address that, your Honor?

15 THE COURT: I've heard enough. I think I've --
16 I have heard enough but I am prepared to rule. I am
17 prepared to rule. I have given some thought to this. I
18 didn't read the Karper case but I am persuaded by the
19 reasoning of the cases that have held that this mandatory
20 imposition of both curfew and -- well, they were dealing
21 more with the electronic monitoring but the mandatory
22 conditions that are imposed by Adam Walsh to the extent
23 that they restrict liberty interests are
24 unconstitutional.

25 And I am persuaded that that's the case here

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1 and so I am going to grant the modification of bail
2 conditions such that the electronic monitoring
3 restriction is removed and I won't impose a curfew, which
4 wasn't imposed before.

5 I am just going to briefly articulate the
6 reasons for the decision. I'm relying really -- there's
7 no point in my restating the arguments that are made in
8 the cases that have held in accord with my ruling.
9 Specifically, I am ruling that it violates both due
10 process and the Eighth Amendment excessive bail clause.
11 I'm not as convinced about the separation of powers,
12 although frankly I'm troubled by the notion that Congress
13 will -- is encroaching on what is as one court has said,
14 a quintessential judicial function.

15 But since a decision on that ground is not
16 required, I am not going to make it but to the extent
17 that the Adam Walsh Act restricts liberty interests
18 without giving a defendant any opportunity to demonstrate
19 that those limitations on liberty are unnecessary is a
20 violation of the due process clause. I don't know
21 whether that means it's a substantive violation or a
22 procedural violation. There is no procedure. So I guess
23 the lack of having any procedure means it violates a due
24 process clause.

25 The restrictions on liberty are not

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1 insubstantial, even with a curfew because a person is
2 required to be at a certain place during certain periods
3 of time. So that is a clear restriction and a limitation
4 on liberty interests and it's a fundamental interest.

5 I think that the Supreme Court has recognized
6 rights to travel, rights of movement and there's a
7 privacy interest implicated too which hasn't been
8 articulated in the cases yet but I think the Supreme
9 Court in the decisions it's handed down recently in
10 United States v. Grady, and United States v. Jones,
11 reflect even greater awareness of the right that a person
12 has to restrict the government from knowing where they
13 are, if you want to put it that way. And Grady, indeed,
14 involved a requirement imposed by North Carolina that a
15 person wear location monitoring and this was post-
16 conviction, a sex offender, who had twenty-four hour
17 location monitoring. The Supreme Court said that was a
18 search and that that was unconstitutional unless there
19 was a demonstrated reasonableness and remanded to permit
20 the lower courts to deal with that.

21 But it is a greater awareness, shall I put it
22 that way, that there's a growing belief that people do
23 have an interest in not having the government know where
24 they are twenty-four hours a day, unless there's a reason
25 to do it.

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1 And here, there has been no demonstration
2 whatsoever that Mr. Kim poses a danger to any minor and I
3 believe that various conditions of release that are
4 imposed including pretrial supervision, but others as
5 well, are sufficient to assure his presence.

6 And so to the extent that the Court would
7 further restrict his movement without -- would be an
8 unnecessary imposition. And to the extent that the Adam
9 Walsh Act requires that the Court imposes it, it's
10 unconstitutional.

11 I do agree with the defense, I think Solerno
12 actually does have application in this case because I
13 agree that what the way I read Solerno is that what saves
14 the Bail Reform Act is that the Court retains -- is that
15 there is a procedure for the Court to make an
16 individualized determination as to what bail conditions
17 are needed, including whether detention is necessary.

18 And so to the extent that Adam Walsh takes that
19 individualized determination away from the Court and away
20 from -- and deprives the right of a defendant to have
21 such a determination, it is a violation of the due
22 process clause.

23 I think it's also a violation of the excessive
24 bail clause, although I will say this, it becomes a
25 closer case when as the government -- the less

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1 restrictive the electronic monitoring is, the less likely
2 it is to be excessive. So it is a much closer call to me
3 to say that electronic monitoring, if it's of the nature
4 that the government now has articulated, that is that it
5 conspiracy be done by simply having telephone monitoring,
6 then it becomes a little bit harder to -- I shouldn't say
7 harder, it's a closer case to say that that's excessive.

8 And nevertheless, it does require a defendant
9 to be at a specific place at a specific time and it is a
10 restriction on movement in that regard and it is to the
11 extent that it's unnecessary, I still find that that
12 could be excessive. And again, it is in essence a curfew
13 that is -- being a restriction on a fundamental interest
14 can be excessive if it is imposed in a case where it's
15 unnecessary.

16 In any event, that's the rulings. I am
17 removing the electronic monitoring provision and as I
18 said, I am relying on the many cases including the case
19 Judge Weinstein's decision, Judge Francis' decision, for
20 the basis for my rulings.

21 Is there anything else I need to do? The
22 record is not all that clear, as I said, because there is
23 -- I don't know if there's any modification needed to the
24 actual conditions of release because the conditions of
25 release that I pulled up didn't contain the electronic

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1 monitoring condition. But it's perhaps noted somewhere
2 in the docket entry.

3 PRETRIAL SERVICES OFFICER: You know, your
4 Honor, there's supposed to be a second page to this,
5 which is sort of --

6 THE COURT: No, I have the second page.

7 PRETRIAL SERVICES OFFICER: And it doesn't
8 reflect electronic monitoring?

9 THE COURT: No. I got the original --

10 PRETRIAL SERVICES OFFICER: Oh, okay.

11 THE COURT: I got a copy of the original. I
12 know what's on the docket is not the -- is just the first
13 page. But for whatever reason, the second page was not
14 changed, probably because this was a sort of end of the
15 day, last minute modification and so it didn't make it
16 into the record.

17 MR. JACOBSON: I don't think the second
18 appearance was docketed with an entry.

19 THE COURT: At all?

20 MR. JACOBSON: I don't think so.

21 THE COURT: Yes. But nevertheless, the
22 electronic monitoring was imposed and that was
23 appropriate. I don't mean to suggest it wasn't but to
24 the extent that it was imposed before, it's now vacated
25 and the government has its appeal, if it wishes. All

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1 right?

2 MS. BERENSON: Thank you, your Honor.

3 THE COURT: If there's nothing else, we're
4 adjourned.

5 MS. BERENSON: Thank you, your Honor.

6 THE COURT: Thank you.

7 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 9th day of April, 2016.


Linda Ferrara

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