

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

JOHN KAPOOR, et. al.

Defendant.

Case No. 1:16-cr-10343-ADB

**DEFENDANT JOHN KAPOOR'S
MOTION TO MODIFY CONDITIONS OF RELEASE**

Defendant Dr. John Kapoor, by and through undersigned counsel, respectfully moves this Court to modify the conditions of his pretrial release so that he is no longer forced to wear an electronic monitoring bracelet. Seventy-four-year-old Dr. Kapoor is not a danger to the community. With his deep and strong familial and community ties to his hometown of Phoenix, he is also not a flight risk, particularly given that he already has turned in his passport. Notably, none of Dr. Kapoor's co-defendants—all of whom live outside of Massachusetts, and at least one of whom lives in Arizona—has been required to wear an electronic bracelet. There is no reasonable statutory basis for this Court to impose that burdensome condition on Dr. Kapoor alone.

Factual Background

Born in India in 1943, Dr. Kapoor has lived in the United States since 1964 and is an American citizen.¹ For the past twenty years, Dr. Kapoor has resided in Phoenix, and his ties to the Phoenix community are strong and deep. Dr. Kapoor is involved in a variety of

¹ Dr. Kapoor does not hold citizenship in any other country, including India.

entrepreneurial and philanthropic endeavors in Phoenix, including the Editha House, which provides free housing to cancer patients who have traveled to Arizona for treatment and which Dr. Kapoor named after and dedicated to his late wife. In addition, two of Dr. Kapoor's children live in the Phoenix area. Dr. Kapoor also has a strong support network of friends in Phoenix.

Though the Government's charges against Dr. Kapoor are only a few weeks old, it was actually several years ago when Dr. Kapoor first learned that the Government was investigating Insys Therapeutics, the company that Dr. Kapoor founded in 1990. Furthermore, since at least December 2016, when the original indictment in this case was unsealed, Dr. Kapoor has been aware of the potential that the Government might seek criminal charges against him. At no point during the Government's investigation, however, did Mr. Kapoor make any attempt to flee his home in Arizona (let alone the United States) or otherwise obstruct the Government's work. This case is Dr. Kapoor's first and only interaction with the criminal justice system. Dr. Kapoor maintains his innocence on the charges that the Government has brought against him, and he looks forward to vindicating his good name and reputation at trial.

Procedural History

Dr. Kapoor appeared before U.S. Magistrate Judge Michelle Burns in the U.S. District Court for the District of Arizona on October 26, 2017, shortly after over a dozen agents stormed his home and arrested him at gunpoint. Judge Burns released Dr. Kapoor on a secured bond in the amount of \$1 million subject to additional conditions, including that he not travel without permission outside of Maricopa County (the County where he resides in Arizona) and that he surrender his passport and other official travel documents. Judge Burns also ordered that Dr. Kapoor be subject to electronic GPS monitoring, a condition to which none of Dr. Kapoor's co-defendants is subject. It is only this last condition, GPS monitoring via an electronic bracelet,

that Dr. Kapoor respectfully asks this Court to remove.² Dr. Kapoor is a daily jogger, and the cumbersome bracelet makes it virtually impossible for him to run. The Government cannot carry its burden of showing that the electronic bracelet condition is necessary to reasonably assure Dr. Kapoor's appearance, and it is not fair to impose on Dr. Kapoor alone a condition that would prevent him from engaging in his preferred manner of exercise while he spends many stressful months awaiting the resolution of this case.

Discussion

The Bail Reform Act imposes upon the Court the obligation of ordering the “least restrictive” condition or set of conditions that will reasonably assure the defendant's appearance as required and the safety of the community. 18 U.S.C. § 3142(c)(1)(B). It is the Government's burden to prove by a preponderance of the evidence that a particular condition of release is necessary to reasonably assure the defendant's appearance. *Cf. United States v. Patriarca*, 948 F.2d 789, 793 (1st Cir. 1991).

At the outset, it is important to note what is *not* reasonably in dispute: Dr. Kapoor has no criminal history and is not a danger to the community. Moreover, aside from the electronic bracelet, Judge Burns imposed on Dr. Kapoor several other conditions—including a substantial secured bond, domestic travel restrictions, forfeiture of his passport, and routine reporting to Pretrial Services—that are specifically designed to deter and prevent Dr. Kapoor from fleeing. Thus, the sole question for the Court is whether the Government can show that the electronic bracelet is an additional condition without which the Government cannot reasonably assure Dr. Kapoor's appearance at trial. In answering this question, the Bail Reform Act instructs the Court

² Though he does not challenge the other conditions of release that Judge Burns imposed, Dr. Kapoor is not conceding that the general conditions of release specified in 18 U.S.C. § 3142(b) would have been insufficient to assure his appearance.

to consider Dr. Kapoor's personal history and characteristics, the nature of the charged offenses, and the weight of the evidence against him. *See* 18 U.S.C. § 3142(g). Proper consideration of these factors call for the removal of the electronic bracelet condition that Judge Burns originally imposed on Dr. Kapoor, a condition to which none of the other six defendants has been subject.

As an initial matter, to the extent Dr. Kapoor can be viewed as even a theoretical flight risk, that concern has been adequately addressed through the various other conditions of release that Dr. Kapoor is not here challenging. *See supra*. Moreover, Dr. Kapoor's history and characteristics affirmatively demonstrate that he does not present a reasonable risk of flight. Dr. Kapoor is an American citizen and has lived in the United States for over fifty years. Dr. Kapoor established his family and several successful businesses in Chicago and later in the Phoenix area, where he has resided for the past twenty years. His day-to-day life—including two of his four children, his friends, many of his charitable endeavors, and his hobbies—is centered in Phoenix and the surrounding area. Dr. Kapoor last traveled internationally (to Mexico for vacation) in April of 2016, and he has forfeited his passport as a condition of release. Equally important, all of Dr. Kapoor's financial assets are based here in the United States.³ Any suggestion that Dr. Kapoor, rather than put the Government to its heavy burden of proof at trial, would abandon his family and friends, his home, and his considerable life savings in exchange for an isolated life on the lam at age seventy-four is farfetched.

Indeed, Dr. Kapoor already has *proven* through his own conduct that he is not a flight risk. The Government's investigation of Insys Therapeutics has been known to Dr. Kapoor and his lawyers for years, and the original indictment in this matter was unsealed in December 2016.

³ The majority of Dr. Kapoor's assets are tied up in two domestic corporations, Insys and Akorn Pharmaceuticals, a manufacturer of generic pharmaceutical drugs. He has no plans to liquidate those assets. Indeed, Dr. Kapoor is transferring all of his interest in Insys to a trust which he will not control.

Accordingly, Dr. Kapoor has long been conscious of the possibility that the Government might choose to bring serious criminal charges against him. Still, Dr. Kapoor continuously has maintained his home in Phoenix, intent on defending his reputation and fighting back against whatever unfounded criminal charges might arise. Given the fact that Dr. Kapoor was not inclined to become a fugitive at any point over the last several years, this Court should have extreme confidence that he will not do so now and thereby violate federal law, abandon his family, and forfeit his entire life savings.⁴ See *United States v. Simone*, 317 F. Supp. 2d 38, 49 (D. Mass. 2004) (finding that defendant's decision not to flee despite knowing he was the target of an investigation suggests he is not a serious risk of flight); cf. also *United States v. Martin*, No. CR417-208, 2017 WL 4080689 at *2 (S.D. Ga. Sept. 14, 2017) (finding that defendant's lack of flight despite knowing he was the target of a federal investigation "weigh[ed] against the statutory presumption that defendant is a significant flight risk" (citing cases)); *United States v. Thayer*, No. CR 07-0812-DLJ, 2008 WL 3916106 at *3 (N.D. Cal. Aug. 25, 2008) (finding defendant did not pose a serious demonstrated flight risk in part because he "did not change his residence or otherwise attempt to evade his arrest" after "being informed that he was the target of an investigation").

With respect to the nature of the charges against Dr. Kapoor, while the charges are undoubtedly serious, they are the *exact* same charges as those against the other six defendants, none of whom is subject to electronic GPS monitoring. And with respect to the evidence, the allegations in the indictment that are specific to Dr. Kapoor are thin, vague, and conclusory, both absolutely and relative to the allegations specific to the other six defendants. Dr. Kapoor is

⁴ The Government may argue that Dr. Kapoor's financial condition makes him a greater flight risk than his co-defendants. Dr. Kapoor, however, is not the only defendant of considerable net worth in this matter. Furthermore, the magnitude of what Dr. Kapoor would forfeit by fleeing, however, arguably should weigh *against* a finding that Dr. Kapoor is a flight risk.

presumed innocent, of course, and it is not his burden at this or any other stage of the proceeding to prove his innocence. *See* 18 U.S.C. § 3142(j). For now, it suffices to say the weight of the evidence factor does not justify imposing on Dr. Kapoor an electronic monitoring condition to which none of the other defendants is subject and that would cause Dr. Kapoor a substantial hardship in an important aspect of his health and well-being (exercise).⁵

WHEREFORE, defendant Dr. John Kapoor respectfully requests that the Court:

- a. Modify the conditions of his release such that the electronic bracelet is removed; and
- b. Grant such additional relief as the Court deems just and proper.

Dated: November 13, 2017

Respectfully submitted,

DR. JOHN KAPOOR

By his attorneys,

/s/ Brian T. Kelly
Brian T. Kelly
Robert Fisher
Mark Knights
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
Tel: (617) 345-1000
Email: bkelly@nixonpeabody.com
rfisher@nixonpeabody.com
mknights@nixonpeabody.com

⁵ Again, in addition to the factors set forth in 18 U.S.C. § 3142(g), the Court must consider how the GPS tracking bracelet negatively impacts Dr. Kapoor's day-to-day life. At seventy-four years old, Dr. Kapoor remains very active, jogging several miles each day. The cumbersome electronic ankle bracelet, however, prohibits Dr. Kapoor from jogging and exercising as he normally does. As this case is likely to drag on for many months, the electronic bracelet is certain to cause a significant decrease in Dr. Kapoor's health and overall quality of life.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, filed electronically with the Court through the Electronic Case Files system, will be sent electronically to registered counsel of record as identified on the Notice of Electronic Filing (“NEF”) and a paper copy will be sent via first-class mail on November 13, 2017, to any counsel of record who are not registered on NEF.

/s/ Brian T. Kelly
Brian T. Kelly