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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR 07-336 WHA (BZ)
	)	
v.	)	<b>ORDER OVERRULING DEFENDANT</b>
	)	<b>BIBBS'S OBJECTION TO THE</b>
MAURICE BIBBS,	)	<b>GOVERNMENT PROCEEDING AT THE</b>
	)	<b>DETENTION HEARING BY WAY OF</b>
Defendant.	)	<b>PROFFER</b>
_____	)	

At his initial appearance on May 31, 2007, the Government moved to detain Mr. Bibbs and a hearing was scheduled for June 7, 2007. Defendant objected to the Government proceeding by way of proffer at the detention hearing, and filed a memorandum supporting his objection. Defendant renewed his objection at the June 7 hearing, and requested that I issue subpoenas for the Government's witnesses. Essentially, defendant argues that under Crawford v. Washington, 541 U.S. 36 (2004), allowing the government to proceed by proffer violates his Sixth Amendment right of confrontation.

Prior to Crawford, the Ninth Circuit and every other circuit of which I am aware, had ruled that "the government may proceed in a detention hearing by proffer or hearsay."

1 U.S. v. Winsor, 785 F.2d 755, 756 (9<sup>th</sup> Cir. 1986) (citations  
2 omitted); see also U.S. v. Smith, 79 F.3d 1208, 1210 (D.C.  
3 Cir. 1996) (collecting cases). Crawford rejected the use of  
4 hearsay testimony at **trial** as violating a defendant's Sixth  
5 Amendment right to confront his accusers. See 541 U.S. at 50-  
6 51 ("[W]e once again reject the view that the Confrontation  
7 Clause applies of its own force only to in-court testimony,  
8 and that its application to out-of-court statements introduced  
9 at *trial* depends upon 'the law of Evidence for the time  
10 being.'" (emphasis added); id. at 53-54 ("[T]he Framers would  
11 not have allowed admission of testimonial statements of a  
12 witness who did not appear at *trial* unless he was unavailable  
13 to testify, and the defendant had had a prior opportunity for  
14 cross-examination.") (emphasis added); id. at 59. The Ninth  
15 Circuit recently described Crawford as "speaking to trial  
16 testimony." U.S. v. Littlejohn, 444 F.3d 1196, 1199 (9<sup>th</sup> Cir.  
17 2006).<sup>1</sup>

18 Nothing in Crawford requires or even suggests that it be  
19 applied to a detention hearing under the Bail Reform Act,  
20 which has never been considered to be part of the trial.  
21 Shortly after the Bail Reform Act was passed, the Supreme  
22 Court held that a detention hearing is not a "criminal  
23 prosecution" to which the Sixth Amendment applies. See U.S.  
24 v. Salerno, 481 U.S. 739, 746-52 (1987) (emphasizing the  
25 regulatory purpose of pre-trial detention); see also U.S. v.

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27 <sup>1</sup> While Littlejohn dealt with sentencing hearings, not  
28 detention hearings, the court's description of the holding of  
Crawford applies with equal force.

1 Ebro, 948 F.2d 1118, 1121-22 (9<sup>th</sup> Cir. 1991) (“[T]he bail  
2 statute neither requires nor permits a pretrial determination  
3 of guilt.”); Windsor, 785 F.2d at 756-57 (9<sup>th</sup> Cir. 1986)  
4 (defendant has no right to cross-examine adverse witnesses not  
5 called to testify in detention hearing); cf. U.S. v. Hall, 419  
6 F.3d 980 (9<sup>th</sup> Cir. 2005) (Sixth Amendment does not apply to  
7 revocation hearing on supervised release).

8 Defendant has cited no authority (post-Crawford or  
9 otherwise), and I have found none, for the proposition that  
10 the Sixth Amendment right to confront witnesses applies in a  
11 detention hearing. To the contrary two other judges of this  
12 court have ruled that Crawford did not alter the procedures  
13 for conducting detention hearings under the Bail Reform Act.  
14 See U.S. v. David Henderson, CR 05-672 MHP (EMC) (Order of  
15 Detention Pending Trial, Docket No. 11); U.S. v. Leonardo  
16 Henderson, CR 05-609 JSW (ECL) (Order of Detention Pending  
17 Trial, Docket No. 12).<sup>2</sup> I therefore reject defendant’s Sixth  
18 Amendment argument.

19 I also reject defendant’s argument that the due process  
20 clause requires me to allow defendant to subpoena the  
21 Government’s witnesses for cross-examination. Without  
22 explaining the source of the right, Windsor suggests that

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23  
24 <sup>2</sup> In U.S. v. Abuhamra, 389 F.3d 309 (2<sup>nd</sup> Cir. 2004),  
25 the court held that the District Court’s reliance on  
26 information it received ex-parte and in camera information to  
27 deny bail violated defendant’s due process rights and the  
28 public’s Sixth Amendment right to a public hearing. The  
viability of Abuhamra in the Ninth Circuit is not clear. See  
U.S. v. Terrones, 712 F. Supp. 786 (S.D. Cal. 1989)(relying on  
information received in camera to detain defendant), conviction  
aff’d in U.S. v. Sanchez, 908 F.2d 1443 (9<sup>th</sup> Cir. 1990). In  
any event, the Second Circuit in Abuhamra did not reach the  
Sixth Amendment confrontation clause.

1 where facts material to the detention decision are in dispute,  
2 a defendant may have a right to cross-examine adverse  
3 witnesses. See 785 F.2d at 756-57. At the hearing, counsel  
4 generally denied defendant's guilt but proffered little in the  
5 way of specific, material factual disputes. Neither the Ninth  
6 Circuit nor Congress intends the detention hearing to serve as  
7 a mini-trial on the ultimate question of guilt. At any rate,  
8 as explained in my separate detention order, I relied almost  
9 exclusively on non-disputed facts to justify detention.

10 For the foregoing reasons, defendant's objection to the  
11 Government's use of proffers is **OVERRULED**.

12 Dated: June 8, 2007

13 

14 Bernard Zimmerman  
United States Magistrate Judge

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