

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROMAN SELEZNEV,

Defendant.

No. CR11-070-RAJ

**DEFENDANT’S REPLY IN SUPPORT
OF MOTION TO DISMISS
INDICTMENT PURSUANT TO
FEDERAL RULE OF CRIMINAL
PROCEDURE 12**

Note Date: April 17, 2015

*Evidentiary Hearing and Oral Argument
Requested*

DEFENDANT’S REPLY IN SUPPORT OF MOTION
TO DISMISS PURSUANT TO FED. R. CRIM. P. 12
(Roman Selevnez, No. CR11-070-RAJ)

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1 **I. Disputed Facts Remain Regarding the Government’s Alleged Legal Authority**
2 **to Arrest Mr. Seleznev, and the Circumstances of that Arrest in the Maldives.**

3 The United States goes to great lengths to contend that Mr. Seleznev’s detention “was the
4 result of a lawful Maldivian government operation conducted at the request of the United States
5 and in cooperation with the U.S. Secret Service and Diplomatic Security Service.” Response, Dkt.
6 No. 136 at 2. It brands Mr. Seleznev’s claim that he was kidnapped without cooperation from
7 Maldivian authorities as “plainly false.” *Id.* Yet the Government has never produced independent
8 evidence demonstrating that Maldivian officials legally authorized or approved Mr. Seleznev’s
9 arrest. To the contrary, in emails attached to both parties’ filings, *see e.g.* Dkt. No. 132-2, Defense
10 Exhibits, Exh. 8, we know a Maldivian warrant was being sought, was expected but that it never
11 materialized. A warrant from a Maldivian court would be the type of evidence that would support
12 the United States’ contention that Mr. Seleznev was not kidnapped or abducted. The Government
13 included no such document or other explanation with its Response. Although the Government
14 stridently asserts that no kidnapping or abduction took place, forcibly taking control of another
15 person without lawful authority is categorically kidnapping. Disputed facts exist on this critical
16 point.

17 While Mr. Seleznev anticipated that the Government would eventually produce an
18 authorizing communique between U.S. agents and Maldivian authorities, no such evidence has
19 been disclosed to the defense or to the Court. Instead, the prosecutor responded as follows to Mr.
20 Seleznev’s Motion to Compel Discovery, Dkt. No. 130: “the government has also provided
21 defendant with copies of all communications between U.S. officials and Maldivian officials.” Dkt.
22 138, at 5. The U.S. has now essentially admitted that it never had any documentation of the
23 permission it supposedly received to seize Mr. Seleznev. If the United States had authority to
24 conduct this operation, particularly authority coming from “the highest levels” of Maldivian
25 Government – whether from the President or the Attorney General or the Commissioner of Police

1 – it is simply incredible to believe that the only documentation of this would be self-serving
2 hearsay: the agents’ post-arrest, write-ups of being told this information (by someone whose
3 names they do not know or cannot recall, and the details of which they chose not to jot down), or
4 from subsequent newspaper articles quoting the Maldivian President’s reaction to press questions
5 regarding the political fallout to his administration and country.

6 In terms of the circumstances of the defendant’s arrest, the Government contends that
7 “Maldivian officials remained in control of the operation throughout the entire time the agents and
8 Seleznev were in the airport.” Response at 11. Disputed facts exist on this point as well. In
9 support of its position, the Government offers a photograph of two Maldivian police officers
10 standing in the background as Secret Service Special Agent Daniel Schwander interrogates Mr.
11 Seleznev (seated on a couch) in the foreground. Response at 18 (and its Attachment 10).
12 Interestingly, all photographs produced show U.S. agents (not Maldivian ones) effectuating the
13 formalities of an arrest and prisoner transport. The Government’s photographs do nothing to show
14 that the United States agents were acting at the direction of Maldivian police officials. In fact,
15 they are more in line with the defense’s view that U.S. agents controlled the operation while
16 Maldivian police stood idly by.

17 The essential facts establish that Mr. Selevnez’s was arrested by U.S. agents, not
18 Maldivian police, and the Government has said nothing to contradict these essential facts. First,
19 the Government does not dispute that Agent Schwander took Mr. Seleznev into custody before he
20 reached the immigration desk at the airport. Second, the Government admits that it was Agent
21 Schwander’s idea to handcuff Mr. Seleznev, which the agent himself did using his own handcuffs.
22 And third, the Government has not disputed the fact that Mr. Seleznev’s passport received a
23 normal exit stamp, not the stamp indicating that the bearer has been legally expelled from the
24 country. These facts show unequivocally that the arrest was carried out by U.S. agents, and that it
25 was done before Mr. Seleznev left the Maldives. The fact that Special Agent Schwander denied a

1 formal “arrest” when testifying in Guam, and that the Government persists in denying this in its
2 Response, only shows that each is conscious of the fact that the agents’ actions in the Maldives
3 were not pursuant to lawful authority under U.S. or Maldivian law. These blanket denials are at
4 odds with the objective facts.

5 Finally, the Government contends that the declaration of Sharafulla Shihab (at Dkt. No.
6 132-2, Defense Exhibits, Exh. 11), the one statement from a completely disinterested witness that
7 has been submitted by either party, “totally fails to support” Mr. Seleznev’s contention that
8 Maldivian police “did not participate in his abduction in any way.” Response at 18. To the
9 contrary, that is precisely what Mr. Shihab said in his declaration: “I did not see these officers
10 speak with Mr. Seleznev or participate in his arrest in any way.” Dkt. No. 132-2, Exh. 11 at ¶ 9.
11 The Government’s factual admissions also support Mr. Shihab’s description in that Mr. Seleznev
12 was handcuffed by U.S. agents, not Maldivian authorities, and it was U.S. agents who handled the
13 defendant throughout the airport. Alongside Mr. Seleznev’s own sworn declaration, Dkt. No. 132-
14 2, Exh. 4, the defense has presented sufficient admissible evidence of disputed facts to warrant an
15 evidentiary hearing.

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17 **II. The Court Should Reject the Government’s Quasi-Summary Judgment
Approach, and Proceed with an Evidentiary Hearing On the Motion.**

18 The Government asks the Court to employ a quasi-summary judgment standard in
19 determining whether an evidentiary hearing need be held on the defendant’s motion to dismiss,
20 and ultimately, as a way to dispose of the defendant’s dismissal claims in their entirety. In
21 essence, they posit that even if the Court were to take all of the defendant’s allegations as true,
22 there is still no basis for relief. Whether the prosecutor’s suggestion adopts other procedural
23 notions like resolving all disputed facts in favor of the defendant or drawing all adverse inferences
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1 against the Government, is somewhat unclear. In any event, this procedural approach conflates
2 several issues and should be rejected by the Court.

3 Preliminarily, the Government's move to block a hearing in this district runs contrary to
4 its various positions and statements in Guam regarding where the defendant should raise these
5 issues and his opportunity to do so in the future. More importantly, however, it was the clear
6 ruling of Judge Tydingco-Gatewood that her decision in Guam was without prejudice to the
7 defendant presenting this issue anew in Western Washington "based on full discovery." Dkt. No.
8 132-2, Guam Decision and Order, Exh. 13 at 7. The Government's efforts to avoid a full hearing
9 ignores this.

10 It is noteworthy that only two witnesses testified in Guam – Secret Service Special Agent
11 Schwander and his colleague Special Agent Michael Fischlin. Since the defendant's transfer from
12 Guam to this district, additional discovery has been provided regarding these agents' own actions
13 and the critical roles of other agents, including Special Agent Mark Smith of the Department of
14 State Diplomatic Security Service (who presented the initial plan to arrest the defendant to the
15 Maldivian Police Commissioner, and participated in the arrest) and Secret Service Special Agent
16 David Iacovetti (who also participated in the arrest). The defense has not had an opportunity to
17 cross-examine Agents Schwander and Fischlin about any newly-disclosed reports. And the
18 defense has *never* been able to confront Agents Smith and Iacovetti about their roles in planning
19 and effectuating this arrest. In no way did Mr. Seleznev's prior counsel have sufficient
20 information or a sufficient opportunity to question the witnesses who were called in Guam (or the
21 ones who have not yet taken the stand).

22 Of course, motions for summary judgment are weighed based on admissible evidence –
23 sworn declarations, non-hearsay admissible documents, witness testimony under oath at a
24 deposition or other hearing. If we accept this as the standard, then a hearing is absolutely
25 necessary. Aside from witness testimony as contained in the Guam Transcript, most of the

1 Government's points come from inadmissible sources: unsworn hearsay police reports, emails,
2 media reports, documents simply attached to a brief. For the defense's part, we also presented the
3 Guam Transcript (Dkt. No. 132-2, Exh. 6), but have contradicted much of that testimony with the
4 sworn declarations of the defendant and Sharafulla Shibab (Dkt. No. 132-2, Exhs. 4 and 11,
5 respectively).

6 Finally, any suggestion that the Court can resolve the merits of the defendant's dismissal
7 motion without taking evidence on the disputed facts and allowing the defense to fully confront
8 witnesses based on full discovery, simply gets the cart before the horse. None of us are in a
9 position to know in advance what the evidence will be at a hearing, how the testimony will
10 unfold, what will be deemed credible and what will lack credibility. That's why we hold hearings.
11 That is the essence of our adversary system, and its search for the truth. Once the facts are heard,
12 then the parties are in a position to argue the law to the Court, and the Court is in the best position
13 apply the law to the facts in reaching a fair and just determination of the issues.

14 DATED this 17th day of April, 2015.

15
16 *s/ Russell Leonard*
17 *s/ Dennis Carroll*
18 Assistant Federal Public Defenders
19 Attorneys for Defendant Roman Seleznev
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CERTIFICATE OF SERVICE

I certify that on April 17, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

/s/ Barbara Hughes
Barbara Hughes, Paralegal
Office of the Federal Public Defender