IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. OTIS MOBLEY, Defendants-Appellees.	No. 12-10245 **REPLY TO DEFENDANT'S RESPONSE TO EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

UNITED STATES' REPLY TO DEFENDANT OTIS MOBLEY'S RESPONSE TO EMERGENCY MOTION FOR A STAY

The United States moves this Court to stay the district court's order releasing Defendant Otis Mobley pending trial. The district court stayed Mobley's release until 4 p.m. tomorrow, May 18, 2012. Both the magistrate and the district court acceded that Mobley's release, even with the conditions prescribed, presents a risk to the community. He is a recidivist with a criminal history that includes firearms offenses, domestic assault, and an uncharged homicide, and has repeatedly failed to comply with judicial orders. Despite the acknowledged risk, the district court ordered his release. That order violates the Bail Reform Act. The government asks this Court to stay Mobley's release until it can address the United States' appeal of the district court's release order on the merits.[1]

A. Standard of Review

The Bail Reform Act authorizes this Court to review an appeal of a pretrial release order as a final decision of a district court. 18 U.S.C. § 3145 (cross-referencing 28 U.S.C. § 1291). Federal Rule of Appellate Procedure 8 permits this Court to stay or enjoin a district court's order pending appeal. Rule 8 governs this motion.

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[1] The United States filed its Notice of Appeal on Tuesday, May 17, 2012, pending final Departmental approval to proceed. The Solicitor General approved the appeal on Wednesday, May 18, 2012, and the government intends to file its opening brief on the merits on May 29, 2012, in accordance with this Court's scheduling order. Dkt. 1.

The government moved for a stay pending appeal in the district court. Fed. R. App. P. 8(a). Citing to this Court's standard of review of bail appeals, the court granted a limited stay until 4 p.m. tomorrow. The district court fashioned its order to provide expressly that defendant be prepared to walk out of the courthouse doors at 4 p.m. The government now turns to this Court for relief. *Id.* at 8(a)(2)(A)(ii).

Mobley quibbles with the factors by which this Court reviews Rule 8 motions. Regardless of whether the Court limits its review to the 18 U.S.C. § 3142(g) factors, as proposed by Mobley, or considers the additional injunction factors articulated in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the parties agree that the government's likelihood of success on the merits of its appeal is the heart of the inquiry. In this presumption case, where Mobley is charged with categorical crimes of violence, pretrial detention is warranted.

In assessing the merits, this Court will review the district court's factual determinations for clear error, but the ultimate question of whether detention is justified is reviewed de novo. *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). "The inquiry transcends the facts presented and requires both the consideration of legal principles and the exercise of sound judgment about the values which underly those principles." *United States v. Motamedi*, 767 F.2d

1403, 1406 (9th Cir. 1985).

The Bail Reform Act permits release of a defendant only if conditions are fashioned that will "reasonably assure" the defendant's appearance and the safety of the community. 18 U.S.C. § 3142(c). Because Mobley was indicted for crimes of violence, a statutory presumption arises "that no condition or combination of conditions . . . will reasonably assure the appearance of the person or the safety of the community." *Id.* at § 3142(e). Although the magistrate court discounted the seriousness of Mobley's conduct, because he stood next to the car while his accomplices tried to rob the federal officer at gunpoint, the violence of Mobley's alleged crime is indisputable, especially in light of his leadership role. *See Pinkerton v. United States*, 328 U.S. 640 (1946) (holding co-conspirators fully liable for conduct within the course of the conspiracy); *see also* 18 U.S.C. § 2.

B. Mobley's release presents a clear risk to the community's safety.

Both the magistrate and district courts acknowledged the risks presented by Mobley's release, and thus call into question the "exercise of sound judgment" in making that decision. The magistrate judge stated: "[I]t's a real burden to – to make the decision in this type of case where, you know, it can go either way, and so I'm taking a chance. . . . So I'm going to take a chance. I really am, and I – you know, don't make a fool out of me." Dkt. 2, Exh. 5 at 60. The district court

acknowledged the same concern. After explaining that the first two statutory factors weighed in favor of detention, reciting Mobley's significant history with drug use and guns, and expressing serious doubt about defendant's 67-year-old grandmother's ability to fulfill her custodial duties, the district court described this case as being "on the bubble." *Id.*, Exh. 3 at 11-15. The district court admonished Mobley, "given that you barely crossed over the line to the area of release, my confidence in [the release conditions] sufficiently protecting the community will change" with a single violation. *Id.* at 15. The record is clear that while both judges found that the release conditions tipped the scale slightly in favor of release, neither found that community safety was "reasonably assured." The Bail Reform Act dictates a different result.

C. The conditions imposed by the district court do not adequately safeguard the community.

The district court's conditions of release do not sufficiently restrict Mobley's conduct, and rely too heavily on his voluntary compliance, to protect the community against the risks imposed by Mobley's release. *See Hir*, 517 F.3d at 1093 (finding conditions of release that rely on the defendant's voluntary compliance inadequate, even in light of Hir's lack of criminal history). The conditions imposed require Mobley to stay at his grandmother's house, subject to

her custodial supervision and electronic monitoring; to abstain from drugs and alcohol, and submit to drug testing; to refrain from possessing any weapons or contacting his co-defendants; and to submit periodic book reports to Pretrial Services. Dkt. 2, Exhs. 2 and 4.

The conditions within the control of Pretrial Services are inadequate. The electronic monitoring device will alert Pretrial Services if Mobley leaves his grandmother's home but provides no control over Mobley's conduct within the four-walls of the house. Mobley retains unfettered access to the telephone, the internet, and to visitors. This is a glaring laxity given the nature of Mobley's crime. He orchestrated an armed robbery. Although his presence at the scene cannot be taken lightly, Mobley's role as organizer and leader in this crime are what highlight the gross inadequacy of the pretrial home confinement condition. Electronic monitoring will not prevent Mobley from using the phone in the same manner that he did here, arranging an arms deal-turned-armed robbery. Nor will it stop him from continuing to have contact with criminal associates. The conditions of release forbid him from associating with people engaged in crime, but that condition relies on Mobley's compliance. As discussed below, Mobley's history proves that his voluntary compliance is an inadequate safeguard.

Mobley cites to his family support as assurance against misconduct. This is

cold comfort. Mobley lived with his parents for the entire five years of his adult criminal career. While under their roof, he developed substance abuse habits that include daily use of alcohol and cocaine, weekly use of marijuana and ecstasy, and regular use of methamphetamine. He suffered nine arrests, five of which involved firearms, and one was for killing a man during a drug deal.[2]

Mobley has also shown no hesitancy in involving his family members in crimes. Co-defendant Khusar Mobley is Mobley's 18-year-old cousin. Khusar Mobley was also involved in the homicide. Exh. 3. Mobley involved a different cousin in a 2005 incident in which Mobley was arrested for possessing a loaded firearm at school. Mobley was arrested twice in the company of his girlfriend and son. On September 6, 2011, he was arrested for domestic violence when he slammed on the brakes of his car and hit his girlfriend in the face, cutting her lip. Their three-year-old son was in the backseat. *See United States v. Mercedes*, 254 F.3d 433, 437 (2d Cir. 2001) ("A willingness to strike loved ones offers probative

[2] Mobley argues that little weight should be given to his crimes that did not result in conviction. The government bears the burden to show by preponderance of the evidence that a defendant is a flight risk, or by clear and convincing evidence that he is a danger. *Motamedi*, 767 F.2d at 1406-07. Mobley's criminal history is established by his Criminal History Report (attached as Exhibit 2), Pretrial Service's investigation and report, police reports, and, in the case of the homicide, by Mobley's own confession (attached as Exhibit 3). The district court's refusal to consider the homicide was in error. Dkt. 2, Exh. 3 at 17.

evidence of a tendency to violence and a dangerousness toward others."). Eleven days later, Mobley was arrested for possessing a stolen .40 caliber handgun. The gun was hidden in the center console of the car that he was driving, with his girlfriend, another woman, and his child as passengers. *See United States v. Mobley*, No. 12-CR-235, Dkt. 30 (Govt Mot.) at 9.[3]

Mobley, and the district court, rely heavily on Mobley's grandmother's ability to control Mobley's behavior. Madeliene Mitchell's willingness to supervise is well-established by the record, but her ability is not. Before the magistrate judge, Ms. Mitchell stated that she has been a constant presence in Mobley's life, yet she admitted that she was unaware of his extensive drug use. Dkt. 2, Exh. 5 at 46-47. Ms. Mitchell insisted that she has taught Mobley and his family "against disobeying the law from the time they were little," but acknowledged that Mobley has a significant history of criminal conduct despite those teachings, and that Khusar Mobley is from the same side of the family. *Id.* at 45; *see also* May 3, 2012 Transcript (attached as Exhibit 1) at 29. The district court elicited that Ms. Mitchell has minimal, if any, experience managing someone with drug problems, and the court stated, point-blank, that it does not believe that

[3] *See also* the Pretrial Services Report sent to the Court via email. Pretrial Services will also file a copy of the document underseal with the Court.

Ms. Mitchell "understands what she's signing up for." Dkt. 1, Exh. 3 at 4, 13.

Even with Ms. Mitchell's best efforts, many of the conditions of release depend on Mobley's compliance and cooperation. The safety of the community cannot be allowed to rest on such unsafe ground. Mobley has proven his inability, or unwillingness, to abide by judicial orders.

Of foremost concern is the severity of his drug abuse. He admits to a continuous and escalating dependance on alcohol and drugs, including marijuana, ecstasy, methamphetamine, and cocaine. Despite being on probation almost continuously since 2007, Mobley cites no break in his drug use. Govt Mot. at 4. The release conditions order Mobley to refrain from drug and alcohol use, but provide no mechanism, other than his will and his grandmother's oversight, to aid his abstention. Ms. Mitchell has no drug counseling experience and, though she has committed to watching Mobley "24 x 7," this is impossible. Dkt. 2, Exh. 3 at 13. As stated above, the conditions do not restrict visitors, making access to drugs a possibility. Khusar Mobley and Mobley both stand as examples of drug use just within the immediate family. Even with Ms. Mitchell's presumed vigilance, the record is clear that Mobley successfully kept his drug use hidden from his family, including Ms. Mitchell, for at least five years despite its obvious contribution to his increasingly violent criminal conduct. The random drug testing provision is an

imperfect safeguard. Pretrial Services conceded that it has limited capacity to drug test, and the risk of inaccurate sampling is obvious in a noncustodial setting. Exh. 1 at 31.

Even outside the realm of addiction, Mobley demonstrates a committed refusal to comply with law enforcement. His record shows six failures to appear in less than four years, and the issuance of two bench warrants for Mobley's arrest. *See* Dkt. 2, Exh. 4 at 8. Both the magistrate and district courts discounted this conduct as commonplace disregard of traffic violations. Dkt. 2, Exh. 5 at 18-19; *id.*, Exh. 2 at 14. Even if such conduct were excusable, that characterization is wrong. In May 2008, Mobley failed to appear in San Mateo Superior Court in relation to his arrest for stealing a car. Dkt. 2, Exh. 4 at 8; *see also* Exh. 2. In March 2009, he failed to appear on his arrest for false impersonation to a police officer. Dkt. 2, Exh. 4 at 8. In June 2010, Mobley did not appear twice in traffic court, resulting in a criminal conviction for driving with a suspended license. *Id.* In July and August, 2010, two bench warrants were issued against Mobley related to his June 2010 arrest for battery, obstruction, and public intoxication. *Id.* In February 2011, failed again to appear in traffic court, and as recently as January 2012, he failed to appear in relation to a domestic violence arrest. *Id.*

Mobley has also demonstrated repeated disregard for restrictions on his

mobility. He has been caught driving with a suspended license numerous times, including driving the car to the scene of the instant crime.

Mobley has never successfully completed a term of probation. Exh. 1 at 23. In September 2007, he was arrested for vehicle theft while on probation for giving false information to a police officer. *Id.* He received a term of probation for the vehicle theft crime, and violated that with an October 2008 arrest for false impersonation. *Id.* Mobley was on probation when he shot and killed his cousin's drug dealer in May 2009; when he was arrested for firearm possession in June 2010, and then for resisting arrest and public intoxication three weeks later; when he was arrested for firearm possession and resisting arrest in August 2010; and when he was arrested for domestic violence in September 2011, and firearm possession two weeks after that. Exh. 1 at 23-24. Mobley was also on probation when he orchestrated and carried out the armed robbery of an ATF agent, the conduct for which he is currently charged. *Id.*

D. A stay pending appeal is warranted.

Mobley has a demonstrated drug abuse history and an inability to comply with court-ordered conditions of release. His grandmother's untested ability to supervise him, and the limits of Pretrial Service's oversight, does not "reasonably assure" his appearance or the community's safety.

Dated: May 17, 2012

Respectfully submitted,

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s/ SUZANNE B. MILES
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), the United States' Reply to Defendant Otis Mobley's Response to Emergency Motion for a Stay is proportionately spaced and has a typeface of 14 points or more, and contains no more than 10 pages.

Dated: May 17, 2012

s/ SUZANNE MILES
SUZANNE B. MILES
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ TYLE L. DOERR
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