

No. 12-10245

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

OTIS MOBLEY,

Defendant-Appellee.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF UNITED STATES' APPEAL OF RELEASE ORDER
PURSUANT TO FRAP 9(a)**

Defendant Otis Mobley is charged with orchestrating the attempted armed robbery of an undercover federal agent. Mobley arranged a bogus arms sale with a confidential government informant (CI) and an undercover agent. After negotiating the deal to sell a grenade launcher for \$1,000, 23-year-old Mobley drove his 18-year-old cousin and another 19-year-old associate to the deal site, and stood outside of the undercover agent's car while his co-defendants each held a loaded gun to the agent's head and demanded his money. When surveillance officers rushed in, Mobley fled and avoided capture for 45 minutes.

A federal grand jury indicted Mobley and co-defendants Khusar Mobley and D'Marce Hutcherson with conspiring to rob and assault a federal officer, in violation of 18 U.S.C. § 371; robbing and assaulting a federal officer, in violation of 18 U.S.C. §§ 111(b), 2114; and using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A).¹ Khusar Mobley and Hutcherson are being detained; Mobley has been ordered released on conditions.

JURISDICTION, TIMELINESS, AND BAIL STATUS

On May 14, 2012, the district court ordered Mobley released pretrial. The next day, the United States filed a notice of appeal, Exh. 11, and an emergency motion to stay the release order pending appeal, pursuant to Federal Rule of Appellate Procedure 8. Dkt. 2. This Court granted a temporary stay until May 21, 2012, at 4:00 p.m., pending further consideration of the emergency motion. Dkt. 10. Defendant is in custody in accordance with that order.

The district court had jurisdiction over the bail motion under 18 U.S.C. § 3142. This Court has jurisdiction over this appeal pursuant to 18 U.S.C. § 3145 and 28 U.S.C. § 1291. *See also* Fed. R. App. P. 9-1.1.

¹ Defendant Otis Mobley will be referenced as "Mobley." Co-defendant Khusar Mobley will be referenced by his full name.

ISSUE PRESENTED

Whether the conditions of release fashioned by the district court reasonably assure Mobley's appearance and the safety of the community in light of Mobley's significant drug and alcohol use, his recidivist criminal history that includes firearms offenses and acts of violence, and his demonstrated refusal to comply with judicial orders related to court-mandated supervision.

STATEMENT OF THE CASE

On March 29, 2012, a complaint was filed in the United States District Court charging Mobley and his co-defendants with aiding and abetting the forcible assault of a United States officer using a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(b). Exh. 1. On April 5, 2012, the complaint was superseded by a four-count federal indictment. Exh. 2.

The United States moved to detain all three defendants. Exh. 16 at Clerk Record Number ("CR") 2, 3. The magistrate court ordered Khusar Mobley and Hutcherson detained, finding that the release of Khusar Mobley presented a risk of non-appearance, and that the release of each co-defendant presented a danger to the community. *Id.* at CR 20, 25; *see also* Exhs. 3 & 4.

On April 18, 2012, Magistrate Judge Kandis Westmore held a hearing on the government's motion for Mobley's pretrial detention. Exh. 16 at CR 23. The

magistrate judge ordered Mobley released. Exh. 7. The government appealed to the district court, Exh. 16 at CR 30, *see* 18 U.S.C. § 3145(a)(1), and on May 3 and May 14, 2012, District Court Judge Yvonne Gonzalez Rogers held hearings on the government's motion. Exhs. 8 & 9. On May 14, 2012, the district court ordered Mobley released with amended conditions. Exh. 10.

The government moved to stay the district court's order pending appeal. Exh. 9 at 19-20. The court granted a 24-hour stay. Exh. 9 at 20; Exh. 16 at CR 47. On May 15, 2012, the United States filed a notice of appeal, and asked the district court for a further stay. Exh. 16 at CR 50, 51, 56; *see also* Exh. 11. The court extended the stay order to Friday, May 18, 2012. Exh. 16 at CR 56. On May 15, 2012, the government filed an emergency motion for stay pending appeal with this Court, and the Court granted a temporary stay until May 22, 2012. Dkt. 2, 10.

The government files this memorandum in support of its appeal of the district court's release order.

STATEMENT OF THE FACTS

Mobley organized the armed robbery of an undercover federal officer. *See* Exh. 5 at p. 22. An Inspector with the Contra Costa County District Attorney's Office monitored telephone calls between Mobley and a CI. *Id.*; Exh. 16 at CR 30. Mobley arranged to sell a grenade launcher to the CI and the CI's associate (an

undercover ATF agent) for \$1,000. Exh. 1 at p. 4; Exh. 2 at p. 9. They set up a time and place to meet, and Mobley arrived with his 18-year-old cousin, Khusar Mobley, and 19-year-old Hutcherson. Exh. 1 at p. 4; Exh. 3 at p. 5; Exh 4 at p. 3. Khusar Mobley and Hutcherson got into the back seat of the ATF agent's car, while Mobley stood outside the car. Surveillance cameras set up in the car recorded the crime. *See* Exh. 15 (video of the crime filed under seal); Exh. 1 at p. 5. Although the limited camera angles do not show Mobley, one of the co-defendant's introduces him, saying, "That's my boy Otis." Exh. 15 at 04:52.

Within seconds of getting into the car, both co-defendants pulled out loaded handguns and held them to the undercover agent's head. *Id.* at 04:56; Exh. 3 at p. 4 n.1. While the agent pleaded with them, Mobley's co-defendants demanded the agent's money. Exh. 15 at 05:01. The CI that arranged the deal bolted from the car's front passenger seat, leaving the door open, and another government informant at the scene reached into the car, grabbed Khusar Mobley's gun and tried to wrench it from him. Exh. 15 at 04:56-05:12. Khusar Mobley and Hutcherson – the latter still armed – tried to run; responding law enforcement shot Hutcherson and quickly apprehended Khusar Mobley. Exh. 1 at p. 6.

Mobley fled and avoided arrest for 45 minutes until he was spotted from the air by a police helicopter. Exh. 1 at p. 6; Exh. 5 at p. 22. Upon arrest, Mobley

said, “Damn, I should have just stayed in the bushes. You guys wouldn’t have found me, huh?” Exh. 5 at p. 22. None of the three defendants had a grenade launcher. The deal Mobley set up was a ruse.

In support of his request for pretrial release, Mobley presented his parents and his 67-year-old grandmother as sureties. Exh. 5 at pp. 41-57. His grandmother, Madeliene Mitchell, agreed to post a \$150,000 bond, secured by her Sebastopol home, and to act as Mobley’s custodian. *Id.* at pp. 42-46. Mobley’s parents provided only unsecured signature bonds. *Id.* at pp. 50, 54. Mobley also submitted letters from family, friends, and community members. Exh. 6.

ARGUMENT

A. Standard of Review

In reviewing a district court’s pretrial release decision, this Court looks at the court’s factual findings for clear error, but it reviews de novo the court’s conclusion. *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985). “The inquiry transcends the facts presented and requires both the consideration of legal principles and the exercise of sound judgment about the values which underlie those principles.” *Id.* This Court makes an “independent examination of the facts, the findings, and the record to determine whether an order of pretrial [release] may be upheld.” *Id.* at 1406.

B. The Bail Reform Act permits pretrial release only if the defendant's appearance and the community's safety are reasonably assured.

The Bail Reform Act requires the pretrial release of a defendant if the court can define a “condition or combination of conditions” that “will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(c). Because Mobley is charged with a crime of violence, “a rebuttable presumption arises that no condition or combination of conditions will reasonably assure” his appearance or the community’s safety. *Id.* at § 3142(e)(2); *see United States v. Salerno*, 481 U.S. 739, 750 (1987) (noting that section of “[t]he [Bail Reform] Act operates only on individuals who have been arrested for a specific category of extremely serious offenses,” because “Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest”).

Even if a defendant rebuts the statutory presumption, it “remains in the case as an evidentiary finding militating against release, to be weighed along with the other evidence relevant to” the four factors set forth in 18 U.S.C. § 3142(g). *United States v. Abd Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). Section 3142(g) requires the court to consider: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the defendant’s history and

characteristics, including character, family and community ties, past conduct, substance abuse, criminal history, and history of noncompliance with court orders; and (4) the nature and seriousness of the danger to the community.

With few exceptions, the government does not dispute the district court's factual findings. But, in reviewing a district court's release order, this Court must ensure "that the factual findings support the conclusion reached." *Motamedi*, 767 F.2d at 1405. Here, the resounding dissonance between the court's factual findings and its decision to release Mobley mandate reversal.

1. The nature and circumstances of the charged offenses militate in favor of detention.

Mobley is charged with violent crimes. *See* Exh. 2; *see also United States v. Female*, 566 F.3d 943, 947 (9th Cir. 2008) (Section 111 is a crime of violence); *United States v. Hasan*, 983 F.2d 150, 151-52 (9th Cir. 1992) (same for Section 2114). He orchestrated a bogus arms deal to set up an armed robbery of a federal agent. The video shows that but for the quick and heroic act of a government informant and law enforcement's immediate response, Mobley would likely be facing a murder charge. Not only does the charged conduct prove Mobley's dangerousness, his attempt to run and hide shows that he is a flight risk. *See* Exh. 5 at p. 22 (magistrate judge agreed that Mobley's conduct adds to the risk of

nonappearance).

The magistrate judge discounted the seriousness of Mobley's conduct in comparison with his co-defendants because Mobley was outside of the car when the crime was consummated. This view stands in conflict with the law, *see Pinkerton v. United States*, 328 U.S. 640 (1946) (holding co-conspirators fully liable for conduct within the course of the conspiracy), and the facts, *see* Exh. 5 at p. 22 (detailing Mobley's role as leader and organizer of the crime) *and* Exh. 9 at p. 5 (Mobley's grandmother said of him that "he's the leader, even if he goes wrong").

The district court did not make the same mistake. The court held that the nature and circumstances of Mobley's offenses "weighs in favor of detention." Exh. 9 at p. 11.

2. The weight of the evidence supports detention.

The Bail Reform Act permits a court to review the weight of the evidence against a defendant – not to pre-judge guilt, but "to assess the likelihood that a person will fail to appear or will pose a danger to any person or to the community." *Motamedi*, 767 F.2d at 1408. The evidence against Mobley is significant. Law enforcement monitored calls between Mobley and the CI setting up the fake grenade launcher sale. Mobley drove the car carrying all three

defendants to the scene, and then stood outside the car while his younger cousin and the younger Hutcherson tried to rob their victim at gunpoint. Although Mobley is not visible on the video recording, one can hear him being introduced, documenting his presence at the scene. Additionally, in a home video recovered from Khusar Mobley's cellular telephone, Khusar Mobley watches as Mobley brandishes a Tech-9 assault weapon, the same type of firearm Khusar Mobley used in the later armed robbery of the agent in this case. Exh. 13. While waving the firearm, Mobley states: "Big mack, big Tech, big clip," apparently in reference to the Tech-9's extended magazine. *Id.* The district court found that the weight of the evidence "would weigh in favor of detention." Exh. 9 at p. 11.

3. Mobley's history and characteristics demonstrate that he is both a flight risk and a danger to the community.

In making its ruling, the district court narrowed the third statutory factor down to Mobley's criminal history only, and stated: "I've seen worse, [AUSA] Mann." *Id.* at p. 14. The court explained, "[T]hat's why [this case] is on the bubble." *Id.* But the record belies the court's conclusion that this is a close case.

Regarding Mobley's character, the court found that he has made repeated and conscious choices to become a criminal. "[T]he evidence that I have in front of me suggests that the defendant, when faced with choices, makes the wrong

choice. And that while . . . he sounds like he was a fabulous child and a fabulous teeny-bopper, for lack of a better phrase, at a certain point, he hit a crossroads and he made the wrong choice and has continued to make the wrong choice since that time.” Exh. 8 at pp. 22-23. Before issuing its decision, the court reiterated that, despite his family’s support, at some point Mobley “consciously and intentionally chose not to go down [a good] path.” Exh. 9 at p. 12. Although the court credited Mobley for engaging with the San Francisco Conservation Corps work program, it noted that Mobley committed the charged crime despite that involvement: “the fact that you turned around, and now find yourself in this situation within a couple of months of being in that program again gives me pause, again, makes me question your motives, your will power, and your ability to do right.” *Id.*

The district court took appropriate heed of Mobley’s admitted drug and alcohol abuse. Mobley, who is now age 23, admitted that he uses alcohol on a daily basis, marijuana twice per week (since age 16), and ecstasy once per week (since age 18). He also admitted to using cocaine between 2009 and 2011, with daily usage for eight or nine months in that period, and methamphetamine every few months from age 18 to present. Exh. 9 at pp. 7-8. Despite being on probation almost continuously since 2007, Mobley cites no break in his drug use. The court stated point-blank, if Mobley’s drug problem “cannot be controlled, then, yes, he

is a significant risk to the community.” Exh. 8 at p. 25. Even defense counsel recognized that Mobley’s past indicated that he posed a risk of flight and possible danger to the community, admitting that “[i]f the court released him without conditions, I think the risk would be – would be great, and unjustifiably great.” *Id.* at p. 27.

Although the district court lauded Mobley’s family and community support, it spotted obvious caveats. Mobley lived with his parents for the entire five years of his adult criminal career. While under their roof, he developed serious substance abuse habits and suffered nine arrests, five of which involved firearms. Ms. Mitchell, Mobley’s proposed custodian, stated her intolerance for criminal behavior, and insisted that she has taught Mobley and his family “against disobeying the law from the time they were little.” Exh. 5 at p. 45. But the court noted that co-defendant Khusar Mobley is from the same side of the family. Exh. 8 at p. 29. In fact, Khusar Mobley was also involved in a 2007 drug deal that resulted in Mobley shooting and killing Khusar Mobley’s marijuana dealer. Exh. 14. Mobley confessed to the shooting, and explained that he accompanied Khusar Mobley to the drug deal armed with a 9mm handgun because of a prior altercation between his cousin and the dealer, but that Mobley only shot because the dealer pulled his gun first. *Id.* Mobley admitted, however, that he always carried a gun.

Id. Mobley was not prosecuted for the crime, but the fact of the conduct cannot be ignored. Although the court refused to consider the fact that Mobley killed someone because the crime was uncharged, it did consider the “fact that he clearly was comfortable and was walking around with a gun.” Exh. 8 at p. 24.² Indeed, the court noted, Mobley’s past demonstrated that “his conduct over time” became “progressively more violent,” and that from “the perspective of protecting the community, he has become over time a greater risk.” Exh. 8 at p. 23.

Despite its cursory treatment of the third Section 3142(g) factor when issuing its ruling, the court made a detailed record of Mobley’s criminal history. *See, e.g.*, Exh. 8 at p. 24. Mobley’s criminal record shows that he is both a flight risk and a danger to the community. He committed six failures to appear in less than four years, and had two bench warrants issued for his arrest. *See* Exh. 7 at p. 8. The court characterized the nonappearances as mostly traffic violations. Exh. 9 at p. 14. This is neither accurate, nor an excuse. In May 2008, Mobley failed to appear in San Mateo Superior Court in relation to his arrest for stealing a car. Exh. 7 at p. 8; Exh. 5 at pp. 18-19; Exh. 12 (defendant’s rap sheet filed under

² There is no legal basis for the court’s refusal to consider the fact of the homicide as evidence of Mobley’s dangerousness. While the government bears the burden to show by clear and convincing evidence that he is a danger, *Motamedi*, 767 F.2d at 1406-07, Mobley confessed to this conduct. *See* Exh. 14.

seal). In March 2009, he failed to appear on his arrest for false impersonation to a police officer. Exhs. 7 & 12. 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, Mobley 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.*

The district court also acknowledged Mobley's repeated disregard for court-imposed conditions of release, stating: "He's never completed a term of probation." Exh. 8 at p. 23. In September 2007, he was arrested for vehicle theft while on probation for giving false information to a police officer. *Id.* at pp. 23-24; *see also* Exh. 12. He received a term of probation for the vehicle theft crime, and violated that with an October 2008 arrest for false impersonation. Exh. 12. 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. *Id.* 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.

See id.

Mobley's criminal history proves that he is a flight risk, but it also shows an alarming record of increasing violence and gun possession. All told, between 2005 and 2011, he was arrested five times for possession a firearm, once for domestic violence, and twice for resisting arrest. *See United States v. Mercedes*, 254 F.3d 433, 437 (2d Cir. 2001) (overturning district court's release order for defendant with no criminal history, but a history of domestic violence because "[a] willingness to strike loved ones offers probative evidence of a tendency to violence and dangerousness toward others"). As the district court said, "his conduct over time progressively has become more violent," and "from . . . the perspective of protecting the community, he has become over time a greater risk." Exh. 8 at p. 23.

Even if the district court has "seen worse," its own findings state explicitly that Mobley's history and characteristics demonstrate both a risk of flight and a danger to the community. For the court to hold otherwise would be a gross contrast to its factual findings.

4. The nature and seriousness of the danger to the community is apparent from Mobley's conduct.

Even defense counsel was hard-pressed not to admit that Mobley was a possible danger to the community if he was released without conditions to the community. Given his escalating criminal conduct, drug addiction, and his contempt for judicial orders, there is no doubt that his past conduct signals that there is a serious risk that if released he will pose a danger to the community.

C. The conditions of release do not "reasonably assure" Mobley's appearance or the safety of the community.

To mitigate the significant risks it identified, the court imposed the conditions of release that 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. Exhs. 7, 9, & 10. The district court has not yet provided its "Reading List" to Pretrial Services. *See* Exh. 10. The district court's own words confirm that these conditions are wholly inadequate to assure his appearance or the safety of the community.

Mobley's substance abuse is a grave concern to the community's safety, a fact apparent to the court. "Controlling somebody with a drug problem is difficult.

It is not clear to me that the grandmother has any training in controlling someone with a drug problem. And if that cannot be controlled, then, yes, he is a significant risk to the community.” Exh. 8 at p. 25. Yet, both the magistrate judge and the district court judge confirmed that Ms. Mitchell has neither the knowledge of the scope of her grandson’s drug problem, nor the requisite training to deal with that problem. *See* Exh. 5 at pp. 46-47; Exh. 9 at pp. 3-5. In fact, Ms. Mitchell admitted she was unaware of Mobley’s drug problems until these proceedings, and even now does not believe that he uses anything other than alcohol or marijuana. *See* Exh. 5 at p. 47; Exh. 9 at p. 6. The court stated that, although it was not asking for Ms. Mitchell to guarantee Mobley’s sobriety, it at least sought some insight into how Ms. Mitchell would control his behavior, “[a]nd Ms. Mitchell has given me nothing.” Exh. 9 at pp. 7-8. In the end, the court itself acknowledged about Ms. Mitchell, “It’s not clear to me that she understands what she is signing up for.” *Id.* at pp. 12-13. Yet, the court ordered Mobley released to her custody.

Pretrial Service’s oversight offers little more by way of drug abuse control. The Pretrial Services officer stated that once or twice weekly drug testing could be done at a contract facility, but gave the court no indication of how frequently it would do drug testing with Mobley on home confinement in Sebastopol. Exh. 8 at pp. 31-32. The record states only that the matter of drug testing will be left to the

discretion of the supervising officer. *Id.*

Under the conditions imposed, Mobley will be left to deal with a five-year addiction that includes use of marijuana, cocaine, methamphetamine, and ecstasy under the supervision of someone with no drug abuse counseling training, no resources, and no accountability except for random testing performed at unknown intervals. This does not give reasonable assurance against the “significant risk to the community” that the district court found.

In fact, despite his poor record of compliance with court orders, the majority of the conditions that the district court imposed – prohibitions on drug use, contact with criminals, engaging in criminal conduct – rely on Mobley’s voluntary compliance. Given this record, the district court’s reliance on Mobley’s cooperation to stay out of trouble is fraught with risk. *See Abd Hir*, 517 F.3d at 1081 (finding reliance on defendant’s voluntary compliance provided insufficient assurance, even where defendant had no criminal history).

Nor does the electronic monitoring sufficiently address the risk that Mobley may pose a threat to the community. 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 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, which, as stated, is not reliable. Furthermore, Mobley can simply remove the monitoring device and walk away from his grandmother's residence.

Finally, the condition that Mobley spend an hour a day reading from a yet-to-be-chosen reading list, and then produce book reports, while creative, does nothing to reasonably assure his appearance at future court proceedings or the safety of the community.

CONCLUSION

For the foregoing reasons, the United States respectfully asks that the district court's order releasing the defendant be reversed.

DATED: May 21, 2012

Respectfully submitted,

MELINDA HAAG
United States Attorney

BARBARA J. VALLIERE
Chief, Appellate Division
Assistant United States Attorney

s/ Suzanne Miles
SUZANNE B. MILES
Assistant United States Attorney

Attorneys for Appellant
UNITED STATES OF AMERICA

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), the United States' Emergency Motion for Stay is proportionately spaced and has a typeface of 14 points or more, and contains no more than 20 pages.

Dated: May 21, 2012

/s / Suzanne Miles
SUZANNE B. MILES
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the office of the United States Attorney, Northern District of California, and is a person over 18 years of age and not a party to the within action. The undersigned certifies that, on May 21, 2012, she served copies of the

• Memorandum of Points and Authorities In Support of United States' Appeal of Release Order Pursuant to Fed. R. App. P.9(a) & Exhibits 1 to 16

•Motion to Seal Exhibits 12 and 15

in the case of United States v. Otis Mobley, CA 12-10245, District Court No. 12-CR-00235 YGR to the party or parties listed below with respective methods of service:

Via Appellate CM/ECF, E-Mail, and
Federal Express service:
Suzanne M. Morris, Esq.
(Counsel for Otis Mobley)
899 Ellis Street
San Francisco, CA 94109
suzanne@mandglegal.com

Dated: May 21, 2012

/s/ Hui Chen
Hui Chen
Legal Assistant