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.

REPLY IN SUPPORT OF UNITED STATES' APPEAL OF RELEASE ORDER PURSUANT TO FRAP 9(a)

This Court reviews a district court's pretrial release decision to ensure that the "factual findings support the conclusion reached." *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985). The district court's factual findings confirm that Otis Mobley is a repeat offender whose conduct has become "progressively more violent" over his five-year adult criminal career, and that his behavior is the product of "conscious[] and intentional[]" choices. Exh. 8 at 23; Exh. 9 at 12.[1] The court found that Mobley's abuse of alcohol, marijuana, ecstasy, cocaine, and methamphetamine, if left uncontrolled, makes him "a significant risk to the

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[1] The exhibit citations used herein refer to the exhibits filed with the parties' initial briefs. Dkts. 11, 17. "ARB" refers to Appellant's Response Brief.

community," that his grandmother has no "training in controlling someone with a drug problem," and that she offered the court "nothing" about how she would control Mobley's behavior. Exh. 9 at 7-8. The court found that Mobley has "never completed a term of probation," and questioned Mobley's "motives," "will power," and "ability to do right." Exh. 9 at 12.

The district court then ordered Mobley released to his grandmother's custody with conditions that rely heavily on his voluntary compliance. In light of its factual findings, the court's conclusion is perplexing. Because the facts do not support Mobley's pretrial release, and the release conditions are inadequate to reasonably assure Mobley's appearance and the safety of the community, this Court must reverse.

A. Mobley's release presents a danger to the community and a risk of nonappearance.

Under the Bail Reform Act, a defendant may be held in custody pending trial if he is either a flight risk or a danger to the community. 18 U.S.C. § 3142(e). Otis Mobley is both. The district court's factual findings make this plain, and Mobley does not meaningfully dispute it.

1. Risk of Nonappearance

Mobley's history proves his disregard for the law and the courts. Between 2007 and 2012, he failed to appear for six court proceedings, and he violated his

terms of probation with eight separate arrests for conduct involving false statements to police officers, public intoxication, firearm possession, domestic violence, and homicide. Exh. 7 at 8-9; Exh. 8 at 23–24; Exh. 12. Mobley also admits to uninterrupted abuse of alcohol, marijuana, ecstasy, cocaine, and methamphetamine during this time. Exh. 9 at 7-8. The government more than met its burden to show by a preponderance of the evidence that Mobley's release poses a risk of nonappearance. *See Motamedi*, 767 F.2d at 1406.

Mobley's conduct on March 28, 2012, conforms with his history. When a confidential informant thwarted the attempted armed robbery and police rushed in, Mobley ran and hid. He was found and arrested, but his statement to the arresting officers – "Damn, I should have stayed in the bushes. You guys wouldn't have found me, huh?" – shows he intended to flee. Exh. 5 at 22.

The conditions imposed do not reasonably assure Mobley's appearance. Electronic monitoring and Ms. Mitchell's oversight are not sufficient. The monitoring anklet can be cut off,[2] and even if Ms. Mitchell reports Mobley's disappearance, she may not know his whereabouts. Practically speaking, if Mobley is released from custody, his appearance depends on his compliance, and

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[2] *See, e.g.*, *United States v. Lee*, No. 12-CR-0324-JSW (ND Cal.) at CR 19, 24 (release order reversed after defendant cut off GPS ankle monitor).

the court found that the "evidence is that choice after choice after choice for him is to violate the law." Exh. 8 at 24. The posted bond and the assurances of his family and friends must be measured against his proven record of noncompliance and the significant consequences he now faces. Exh. 5 at 48 (district court noting there is "reason for us to be concerned that he might not show up for something this serious"); *see United States v. Abad*, 350 F.3d 793, 800 (8th Cir. 2003) (noting that defendant's 30-year maximum sentence "reduces the significance of the [$65,000] surety amount and weighs strongly in favor of finding Abad would be a flight risk"). The conditions fall short.

2. Danger to the Community

Mobley's release puts the public at risk. His counsel conceded that without adequate conditions, the "risk would be . . . unjustifiably great." Exh. 8 at 27.

Mobley makes several unavailing attempts to minimize his criminality and draw the district court's findings into question. First, Mobley tries to diminish his role in the charged crime. He says that the government offered no direct evidence that he knew his co-conspirators planned to turn the arms deal that he organized into an armed robbery, or that he personally participated in the crime. ARB at 7. At the bail stage, the government must show by clear and convincing evidence that Mobley is a danger. *Motamedi*, 767 F.2d at 1406. Law enforcement officers

monitored telephone calls during which Mobley offered to sell a grenade launcher to a government informant and agreed to the terms, the time, and the location for the deal. Exh. 1 at 3; Exh. 5 at 22. Mobley drove his co-conspirators to the deal, and stood outside the car while they met with the "buyers," and ambushed them. Exh. 5 at 22. Police arrested Khusar Mobley and Hutcherson at the scene, and Mobley 45 minutes later, and found no grenade launcher. Exh. 1 at 4-6. The evidence of Mobley's involvement is clear and convincing. The fact that the undercover officer had two guns pointed at his head, instead of three, does not lessen Mobley's culpability. *See United States v. Pinkerton*, 328 U.S. 640 (1946); *see also United States v. Mercedes*, 254 F.3d 433, 438 (2d Cir. 2001) (finding significant evidence tying defendant to crime, because although he was not found with a gun, he was found "at the appointed place and time of the robbery, with the others who were involved in this potential drug heist").

Mobley also tries to sidestep his prior arrests that did not result in convictions. But Congress intended courts to consider a defendant's entire criminal history in assessing bail: "[w]hile a prior arrest should not be accorded the weight of a prior conviction, the [Senate] Committee believes that it would be inappropriate to require the judge in the context of this kind of hearing to ignore a lengthy record of prior arrests, particularly if there were convictions for similar

crimes. . . . independent information concerning past criminal activities of a defendant certainly can, and should, be considered by a court." S. Rep. No. 225, 98th Cong., 1st Sess. (1983) at 23 n.66; *see also Motamedi*, 767 F.2d at 1407 (noting routine reliance on police reports).

Finally, Mobley cites the district court's statements in the May 15, 2012, hearing, attempting to bolster its May 14 detention ruling. The court affirmed that the nature of the offense and the weight of the evidence call for detention but said,

> with respect to his history and background . . . it was my explicit belief that that weighed in favor of release. And in terms of the nature and seriousness of the danger to the community, again, here, there is a mixed bag, as I think the record reflects. But given the totality of the all of those facts being balanced, they tip in favor of release.

Def. Exh. A at 9. The court's statements are unhelpful to Mobley for two reasons. First, the United States filed its notice of appeal before the hearing, so the district court retained jurisdiction only over the government's motion for stay. Exh. 11; *see* 18 U.S.C. § 3145 (providing for appeal of detention orders); *see also* Fed. R. App. R. 8 (requiring appealing party to seek a stay first in district court). Second, even if taken into account, the court's conclusions flatly contradict its factual findings. Regarding Mobley's background, the court found that: (1) Mobley "consciously and intentionally" chose to commit repeated criminal acts, Exh. 9 at

12; (2) his conduct has become "progressively more violent" over time, Exh. 8 at 23; (3) his motives, will power and "ability to do right," are questionable, *id.*; (4) he is disturbingly "comfortable" with guns, Exh. 9 at 14; (5) his drug problem makes him "a significant risk to the community," Exh. 8 at 25; and (6) his family, while supportive, has been unaware of his drug problem and has failed to stop his escalating violence thus far, *id.* at 24. The court's only statement suggesting that Mobley's history and background support release is that it has "seen worse." Exh. 9 at 14. The court's May 15 conclusions are irreconcilable with the facts.

B. The conditions of release do not reasonably protect the community.

Mobley characterizes the imposed release conditions as "restrictive," "intense," and "substantial," and insists that they will adequately control his behavior. ARB at 1. Except for the book report requirement, most of the conditions are standard. The conditions' practical application makes them far less restrictive than Mobley contends, and they rely too heavily on his voluntary compliance to reasonably assure the community's safety.

Under the court's terms, Mobley shall remain in Ms. Mitchell's custody, and make all court appearances, and he shall not commit any crimes, possess any weapons, use alcohol or any unprescribed narcotic, or have contact with anyone

involved in criminal activity. Exh. 7 at 23. To audit compliance, the court charged Ms. Mitchell with watching Mobley "24/7," ordered electronic monitoring, and provided for periodic drug testing. *Id.*

Ms. Mitchell cannot watch Mobley 24 hours a day. Unlike in official custody, where security measures limit access to telephones, computers, contraband, and criminal behavior, in home confinement Mobley retains access to much of what is prohibited. Mobley insists that Pretrial Services will gird his grandmother's watch, but the district court made a record of the agency's limitations. The Pretrial officer conceded the agency's cursory check of Ms. Mitchell's custodial capabilities. Exh. 8 at 11-12. When the court asked, "Have you done any evaluation whatsoever regarding her ability to actually control the conduct of the defendant?" the officer responded, "She said that she could." *Id.* The court urged the need for "the most aggressive plan" for drug testing, but then acquiesced to Pretrial's inability to specify its capacity for such testing, leaving the testing to the supervising officer's discretion. Exh. 8 at 31-32.

The drug provision is a clear example of the pragmatic problems with the court's ostensibly strict conditions. The court said the public is at risk unless Mobley's drug problem is controlled, but released him with no means to control it. Ms. Mitchell is untrained in drug counseling, and she admitted that she is reliant

on Mobley's abstention. When the court asked, "So what is it that you can do if you have no training, and if you obviously have no – even understanding of his drug issues?" Ms. Mitchell responded, "I have an understanding now that he does not want to live this way any longer, and he wants to make a turn, a positive turn for himself, for his family, for his child. And that's what I'm looking at. And I believe in what he has told me, that he's, from this day forward, going to do what is right by the law, by his family, and everybody, the community at large." Exh. 9 at 6. It is unrealistic to believe that a person with a five-year history of significant drug and alcohol use – that has persisted unabated through as many years on probation – will simply change.

The conditions rely too heavily on Mobley's compliance to provide reasonable assurance. *See United States v. Abd Hir*, 517 F.3d 1081, 1092 (9th Cir. 2008) (finding similar conditions inadequate). Mobley submitted character letters from family and friends, but none addressed his significant drug use or criminal history. Exh. 8 at 24 (court noting "[i]t is not clear to me that [his family members] understood how significant his drug use is"); *see Abad*, 350 F.3d at 800 (discounting community letters where none "indicate the writers knew the nature of Abad's alleged crime"). Mobley touts his participation in the RAMP and San Francisco Conservation Corps programs, but ignores that he continued using drugs

throughout his tenure in both programs. He insists that his devotion to his family will keep him on track, but addresses his domestic violence arrest for hitting his girlfriend in front of their son, only to clarify that it resulted in a "no harass" order, not a complete restraining order. Exh. 5 at 7. Most troubling, Mobley ignores his five-year history of probation violations, except to propose that he is more like to succeed with more stringent restrictions. Exh. 8 at 26-27; *see Mercedes*, 254 F.3d at 437 (finding the defendant's prior probation violations supported detention and noting "[a]lthough Roman contends that the conditions of his probation in that case were not as stringent as those here, we remain unpersuaded").

C. Conclusion

The district court recognized that Mobley's record of noncompliance, escalating violence, and drug abuse are a risk to public safety, acknowledged the limitations inherent in the conditions assigned, and yet ordered Mobley released. The court said, "Our community is wrought with young men comfortable with firearms and using them and scaring people and hurting people. And I will not have you anywhere close to community members where that is potentially a problem." Exh. 9 at 15. But the court's order will have that exact result. The court's conclusion is unsupported by the facts and must be reversed.

DATED: June 4, 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' Reply in Support of Its Appeal under FRAP9(a) is proportionately spaced and has a typeface of 14 points or more, and contains no more than 20 pages.

Dated: June 4, 2012

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

CERTIFICATE OF SERVICE

The undersigned hereby certify that on June 4, 2012, I electronically filed the United States' Reply in Support of Its Appeal under FRAP9(a), in the case of *United States v. Otis Mobley*, No. 12-10245, 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 further 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/ Hui Chen
Hui Chen
Legal Assistant