

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.

**APELLEE OTIS MOBLEY'S RESPONSE TO UNITED STATES'
APPEAL OF RELEASE ORDER PURSUANT TO FRAP 9(a)**

The relevant inquiry in bail determinations is not whether a defendant presents a danger or a flight risk, but whether any combination of release conditions can mitigate against those dangers and reasonably assure his appearance and the safety of the community. See 18 U.S.C. § 3142(e). After weighing the relevant factors, the district judge found that the risks associated with release in this case will effectively mitigated by the balance of restrictive conditions, intense supervision, substantial bail, and a zero tolerance policy. Exh. A at pp. 8-10. The government has not proven otherwise. Accordingly, this Court should uphold the release order.

I. PROCEDURAL HISTORY

Following an incident in Richmond, California on March 28, 2012, the government returned an indictment charging 23-year-old Otis Mobley, Jr. (“Mr. Mobley”); 18-year-old D’marce Hutcherson (“Hutcherson”); and 19-year-old Khusar Mobley (“Khusar”) with (1) conspiracy to commit robbery of mail, money or property of the United States and assault a federal agent in (18 U.S.C. § 371); (2) assault on a federal officer (18 U.S.C. §§ 2 and 111(b)); (3) robbery of mail, money or property of the United States (18 U.S.C. §§ 2 and 2114); and (4) using, carrying, possessing and brandishing a firearm (18 U.S.C. § 2 and 924(c)(1)(A).) Gov. Exh. 2.

Otis Mobley is not alleged to have personally possessed, brandished, or carried a firearm or to have personally carried out the alleged assault and attempted robbery. Rather, the government contends that Mr. Mobley conspired with his co-defendants to commit an armed robbery and is liable as an accessory. Gov. Exh. 1; Gov. Exh. 2. Although he is not alleged to have possessed a firearm, the allegation that Mr. Mobley violated section 924(c)(1)(A), gives rise to a rebuttable presumption under 18 U.S.C. § 3142(e)(3)(B) that no condition or combination of conditions would reasonably assure his future appearance and that no condition or combination of conditions

would reasonably assure the safety of the community. Thus, the government sought detention. Gov. Exh. 16 at CR 4.

Pretrial Services did full bail study to assess risks associated with release and evaluate whether conditions could reasonably assure future appearance and the safety of the community. As part of that investigation, Pretrial Services interviewed Mr. Mobley and various members of his family. Mr. Mobley submitted letters from family and teachers attesting to Mr. Mobley's character the quality of his recent participation with a full-time work / study program. Pretrial Services recommended release, finding that the safety of the community and future appearance can be reasonably assured by restrictive conditions and intensive supervision.

Mr. Mobley appeared before Magistrate Judge Kandis A. Westmore for a detention hearing on April 18, 2012. After a lengthy contested proceeding, during which, the court weighed heavily the nature and circumstances of the charges, the weight of the evidence, and Mr. Mobley's personal characteristics, the magistrate judge concluded that despite risks of danger to the community, community safety and future appearance and flight present are reasonably assured by the balance of a secured bond, restrictive release conditions and close supervision. See Gov. Exh. 5; Gov. Exh. 7.

The court ordered Mr. Mobley released on the following conditions: (1) he is to be released on a \$150,000 bond, secured by real property owned by his grandmother, Madeline Mitchell, co-signed by both of his parents, and signed by Mr. Mobley himself; (2) he will remain on house arrest, at Ms. Mitchell's home in Sebastopol, California and may not leave the home for any purpose other than legal or medical appointments; (3) Ms. Mitchell will assume custody of Mr. Mobley, meaning she is legally required to report any violation of release conditions and to personally deliver him to all court appearances; (4) he will wear an electronic monitor, equipped with a GPS tracking device, so that Pretrial Services may track his whereabouts and his compliance with the condition of house arrest around the clock; (5) he may not consume any alcohol or controlled substance without a valid prescription; (6) he will be subject to drug and alcohol testing to monitor compliance; (7) he must undergo drug and alcohol counseling; (8) he may not have contact with either co-defendant outside the presence of counsel; (9) he must not have contact with anyone known to him to be involved in criminal activity; (10) he shall not possess any firearm or explosive device; (11) he must not commit any other state or federal crime; (12) he must not harass, threaten, intimidate, injure, tamper with or retaliate against any witness, victim, informant, juror, or officer of the court, or obstruct any criminal investigation;

(13) he must make all court appearances and surrender himself as ordered by the court. See Gov. Exh. 5 at pp. 58-66; Gov. Exh. 57 at p. 13.

The government moved to revoke that order pursuant to 18 U.S.C. § 3145(a)(1). After a thorough review of the record and two additional hearings, District Judge Yvonne Gonzalez Rogers adopting Magistrate Judge Westmore's Release Order, which sets forth extensive, well-reasoned findings with respect to each of the four § 3142(g) factors. The district judge supplemented the order with modifications. Exh. A at p. 8-11; Gov. Exh. 9 at p. 17; Gov. Exh. 10.

The government now appeals the district court's decision.

II. FACTUAL BACKGROUND

The government alleges that in the week prior to 3/28/12, Otis Mobley and an individual named Robert Williams, engaged in conversations with a confidential informant that culminated in Mr. Mobley's agreement to meet the informant and a would-be buyer in a Chevy's parking lot in Richmond to sell a grenade launcher. Exhibit 1, p. 3. On 3/28/12 an undercover ATF agent and two civilian informants ("CI 1" and "CI 2")¹ set up in the Chevy's parking lot to await Mr. Mobley and Mr. Williams. The indictment alleges that Otis Mobley drove into the parking lot with his cousins, Hutcherson and Khusar. Robert

¹ For reference, the undersigned identifies CI 1 as the person with long braids and a plaid shirt. The undersigned identifies CI 2 as the person dressed in black wearing a beanie and a vest.

Williams was not present. Mr. Mobley was not in possession of a grenade launcher and was not otherwise unarmed. Gov. Ex. 1, p. 3-4; Ex. 2, at pp. 3-5.

The undercover car was equipped with cameras. The government filed a video of the incident as Exhibit 15. As the video begins, CI 1 and CI 2 are milling around outside of the undercover car. At approximately 3:08:10² p.m., CI 1 waves at someone off screen. At 3:09:36, Khusar is seen walking around the back of the car. He gets into the back seat on the passenger side and closes the door behind him. Hutcherson gets into the back seat on the driver's side and closing the door behind him. CI 1 gets into the front passenger seat, leaving the door open. CI 2 can be seen outside the car near the front passenger door. The agent, CI 1, Khusar and Hutcherson greet each other inside the car. Gov. Exh. 13 at 2:49 – 4:55. At approximately 3:10:15, Khusar lunges suddenly over the front seat, with a gun. It is unclear what, if anything, precipitated this action. As Khusar lunges forward, CI 1 jumps out of the car. The agent shouts, “don't shoot, don't shoot. I'll give you everything you need. Let me park the car, let me park the car. I'm emptying out my pockets.” The car, which was previously parked, appears to be rolling backwards slowly. Gov. Exh. 13 at 4:55 – 5:10.

At 3:10:31, 16 seconds after Khusar pulls the weapon, CI 2 reaches in to grab the weapon. CI 2 pulls on the gun for 8 seconds before breaking it free. At

² 3:08:10 refers to the time stamp visible the top right corner of the screen.

3:10:39, after losing the firearm, Khusar yells, “get out of the car.” Both Hutcherson and Khusar pile out and run out of view. Agents opened fire in their direction. An unidentified agent is heard saying, “shoot that motherfucker.” In total, two agents fired eight shots. Hutcherson was struck three times -- in the back shoulder blade and legs. According to a Richmond Police Report, Khusar’s clothing was pierced by at least one bullet. Prior to shots being fired, no agent identifies himself as law enforcement. Gov. Exh. 13 at 5:11-5:21. The incident lasted less than a minute. *Id.* at 4:23 – 5:24.

The government alleges that Otis Mobley was outside near the rear of the car when the incident occurred. The government does not allege that Mr. Mobley possessed, brandished, or carried a firearm; that he behaved in an aggressive or threatening manner toward either CI, though both were outside the car with him during the incident; or that he made statements during the incident to suggest that he was involved in what occurred inside the car. The government proffers no direct evidence to establish that he conspired to commit the alleged assault and robbery or personally participated in those crimes. Gov. Exh 1; Gov. Exh. 2. It is the government’s theory that communications with the informant were “a ruse . . . and the armed robbery was intended from the start, as defendant brought no grenade launcher to the transaction.” Exh. C at p. 8.

The government's theory will be contested by the defense in future proceedings.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. STANDARD OF REVIEW

The standard of review for pretrial detention orders is deference to the district court's factual findings, absent a showing that they are clearly erroneous, coupled with an independent review of the facts, the findings, and the record to determine whether the order may be upheld. *United States v. Motamedi*, 767 F.2d 1403, 1406.³

B. BAIL REFORM ACT OF 1984

The Fifth and Eighth Amendments' prohibitions of deprivation of liberty without due process and of excessive bail require that pretrial detention orders comply with the Bail Reform Act. *Motamedi*, 767 F.2d at p. 1405. Under the Bail Reform Act of 1984, 18 U.S.C. §§ 3141, et seq., a defendant must be released pending trial unless a judicial officer finds “that no combination of conditions 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)(2);

³ Under the “clear error” standard of review, a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed. *United States v. Hinkson* (9th Cir. 2009) 585 F.3d 1247, 1260 (citing *Easley v. Cromartie*, 532 U.S. 234, 242).

Motamedi, 767 F.2d at 1405. Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor. *Id.*

Cases alleging a violation of 18 U.S.C. § 924(c), as alleged here, give rise to a rebuttable presumption that “no condition or combination of conditions 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(e)(3)(B). When the rebuttable presumption is triggered, the court must “hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community.” 18 U.S.C. §3142(f).⁴ The defendant must rebut the presumption by producing evidence to establish some basis for concluding that release conditions may be sufficient to assure that the defendant will not engage in dangerous criminal activity pending trial and reasonably assure his appearance in court. *United States v. Jessup* (1st Cir. 1985) 757 F.2d 378, 381 (abrogated on other grounds by *United States v. O'Brien* (1st Cir. 1990) 895 F.2d 810). Once the presumption is rebutted, the burden shifts to the prosecution to persuade the court that no combination of

⁴ 18 USC § 3142 (c) sets forth various conditions that may be appropriate to reasonably assure appearance and the safety of the community and includes a catch-all provision, allowing judicial officers for fashion any other condition reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

conditions can reasonably assure community safety and future appearance.

United States v. Hir, 517 F.3d 1081, 1086 (9th Cir. 2008). The court government must prove (1) by clear and convincing evidence that the defendant poses a danger to the community and that no condition or combination of conditions can reasonably assure the safety of the community; or (2) by a preponderance of the evidence that the defendant is a flight risk and that no conditions of release can reasonably assure future appearance. *Id.* at 1406-07. See also *United States v. Gebro* (9th Cir. 1991) 948 F.2d 1118, 1121.

In determining whether conditions of release may reasonably assure future appearance and the community safety, factors to be considered are: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the history and characteristics of the person, which includes the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 USC § 3142 (g); *Motamedi*, 767 F.2d at 1407.

II. THE DISTRICT COURT SOUNDLY CONCLUDED THAT RESTRICTIVE RELEASE CONDITIONS, CLOSE SUPERVISION AND SIGNIFICANT BOND WILL REASONABLY ASSURE THE SAFETY OF COMMUNITY AND MR. MOBLEY'S FUTURE APPEARANCE

The determine whether the conditions imposed by the magistrate would reasonably assure future appearance and community safety, the district court reviewed the record *de novo*. The court reviewed the parties' section 3145(a)(1) briefs,⁵ the exhibits in support, the transcript of the magistrate proceedings, and the original and supplemental Pretrial Service Reports. The district court also conducted two additional hearings, further questioned the proposed custodian further, and conferred with pretrial services regarding its monitoring abilities. After a thorough review of the record, the court balanced the interests at stake in connection with Mr. Mobley's request to be released on bail. The district judge ultimately agreed with the magistrate that notwithstanding factors that present a serious risk of danger to the community, Mr. Mobley's history and background weighed in favor of a finding that community safety will be reasonably assured by the "very significant conditions" imposed in this case and their enforcement under a zero tolerance policy. Exhibit A, 8-9.

⁵ The government did not include the briefing in its Exhibits for this court. Given that they weighed in the district court's decision, they are attached to this brief as Exhibits C, D and E.

A. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND WEIGHT OF THE EVIDENCE

There is no dispute as to the serious nature and circumstances of the charges. The district court found that the nature of the offense was a factor weighing in favor of detention as did the magistrate.

As to the weight of the evidence, the government criticizes the magistrate's recognition that the weight of the evidence as to Mr. Mobley "is not nearly as great as it is against the two co-defendants." The court noted that Mr. Mobley's actions, as described by the agent's affidavit, do not convincingly establish that Mr. Mobley knew that Khusar planned to pull his firearm on the agent." Gov. Exh. 7 at p. 6; Gov. Memo at p. 8-9. Nevertheless, Judge Gonzalez Rogers concluded that Mr. Mobley's presence at the scene of the crime coupled with the fact that he ran, weighed in favor of detention. Gov. Exh. 9 at p. 10.

Nevertheless, the court recognized that "[e]ven where a defendant poses a danger, he must still be released if there is a "condition or combination of conditions [that] will reasonably assure ... the safety of any other person and the community." 18 U.S.C. § 3142(e). Consistent with that mandate, the district judge turned its attention to Mr. Mobley's history and characteristics to determine whether release conditions could be fashioned to reasonably assure the safety of the community and future appearance. Exh. A at p. 9; Gov. Exh. 7 at p. 6.

B. Mr. Mobley's personal history and characteristics and the seriousness of the danger posed to the community

Otis Mobley, Jr. is 23 years old. Born in Oakland and raised in Richmond, California, he has lived in the Northern District most of his life. His parents, Tonnette Lynch and Otis Mobley, Sr., have been married for nineteen years. They have raised five children, including Mr. Mobley. His parents, siblings and grandfather O.D. Mobley live together Richmond. Exh. A, at p. 10. Mr. Mobley has been in a relationship with Meliza Contreras for 5 years. They have one son, Otis Mobley, III, age four. Ms. Contreras and Mr. Mobley are raising their son together. Mr. Mobley's family is very supportive. They fill the courtroom at every appearance.

The defense filed letters with the district court from members of Mr. Mobley's family and community, speaking to his character and community. Those closest to him characterize him as kind, compassionate, respectful, patient, protective, and as having integrity. Several letters acknowledge Mr. Mobley's struggles in recent years as well as his recent efforts to positively re-direct his life through the RAMP Program and the San Francisco Conservation Corps, a job skills and education program. Exh. B.⁶ Since joining the SFCC, Mr. Mobley has kept a school and work schedule of 7:30 a.m. to 4:30 p.m.

⁶ The government filed several of these letters as Gov. Exh. 6. Notably, the Exhibit 6 omits relevant letters from Mr. Mobley's case manager at the San Francisco Conservation Corps, the Director of Academics from the same program, and a former teacher. A complete set is attached as Exhibit B.

attending two hours of class each morning and working until 4:30 p.m. He was accepted into the program after graduating from the RAMP program.

In a letter to the court, Mr. Mobley's case manager at the SFCC, reported that

Otis is one of the few individuals I work with who readily seeks out my help, continuously looking for ways he can improve himself and his future. Otis has been attending John Muir Charter School and is working hard to obtain his California High School diploma. He has been working with me to gain better conflict resolution skills, increase his parenting skills, as well as developing better ways to appropriately conduct himself as a young adult.

Exh. B at p. 2.

Similarly, Samantha Sassi, Associate Director of Academics at the John Muir Charter School wrote,

while attending school, Otis consistently demonstrates very good efforts to progress academically, actively participates in class, and is taking significant steps to overcome some of the barriers to his education, which he had previously experienced. *Otis is a conscientious individual, who readily follows the directions of his teachers, listens attentively and complies with requests from his supervisors.*

Exh. B at p. 1.

These comments indicate that Mr. Mobley's personal character will lend itself to compliance with the conditions of release and he is likely to benefit from the direction and supervision of pretrial services.

1. Mr. Mobley's prior contacts with law enforcement

Mr. Mobley has four prior misdemeanor convictions, including a misdemeanor conviction for domestic violence in September 2011 (age 22); public intoxication and driving on a suspended license in June of 2010 (age 20); providing false identification to a police officer in October 2008 and April 2007 (age 18 and 19); and taking a vehicle without the owner's consent in September 2007 (age 18). He has never been convicted of a felony.

Mr. Mobley was on misdemeanor probation at the time of his arrest. To his credit, he was attending anger management classes. While the underlying offense indicates that Mr. Mobley may present a danger to Ms. Contreras, Ms. Contreras volunteered to act as a surety indicating that she is not afraid of him. Significantly, rather than issue a stay away order commonly issued in domestic violence cases, the court deemed it appropriate to impose a "no harass" order, which prohibits Mr. Mobley from harassing or annoying Ms. Contreras, but does not prevent them from being in contact. Notably, it was after this arrest that Mr. Mobley sought out the support of SFCC.

In arguing that Mr. Mobley must be detained because he is a danger to the community, the government details several incidents in which Mr. Mobley was detained in a car where a firearm was found. None of the summarized contacts resulted in conviction. In each instant multiple were people present in

the car or had access to the car. No forensic evidence linked Mr. Mobley to any of the firearms. The government further argues that Mr. Mobley must be detained because of an incident that occurred in 2009, when at age 19, Mr. Mobley reported that he shot a man that threatened his and his cousin by charging at them with a loaded firearm after they tried to walk away. Mr. Mobley admitted to carrying a gun for defensive purposes. Mr. Mobley was not prosecuted.

The district court weighed these incidents heavily in considering detention. Ultimately however, the court found that given other factors in Mr. Mobley's history and characteristics, the safety of the community could be reasonably assured by the restrictive release conditions and close supervision contemplated.

2. The bond is incentive to comply with the conditions of release, given his family ties

The letters from family are significant because they illustrate extensive ties to the community, strong family relationships in the district, and a broad support network, all of which are disincentive to flee. Moreover, Mr. Mobley's close family relationships and the characteristics described in the letters, support a finding that the \$150,000 bond imposed in this case will provide incentive for Mr. Mobley to comply with the conditions of release.

Mr. Mobley's parents co-signed a \$150,000 bond. Though they do not own property, they have stable employment. Ms. Lynch works full time as a bus driver for AC transit. Mr. Mobley, Sr. works full time at De Anza High School in El Cerrito. Both have held those jobs in excess of 15 years. In addition to being co-signed by Mr. Mobley's parents, Mr. Mobley's grandmother, Madeline Mitchell will post her home in Sebastopol to secure the bond. Both parents and Ms. Mitchell were present throughout the detention proceedings; were advised of the charges and consequences of conviction; and were thoroughly admonished in Mr. Mobley's presence of the financial consequences of his failure to comply with the terms of release. Their willingness to co-sign and post-property demonstrates their confidence in his ability to comply with the terms of release.

3. Release to Ms. Mitchell's Custody Will Mitigate Risk of Danger and Non-Appearance

In addition to posting property to secure the bond, Ms. Mitchell will act as Mr. Mobley's custodian. Mr. Mobley will remain on house arrest in her home, in Sebastopol, California. As Mr. Mobley's custodian, Ms. Mitchell will act as the eyes and ears of the court around the clock. She is obligated to report any violation of release conditions, however slight. She's been admonished that failure to report any violation of release will jeopardize her financial security

and expose her to criminal prosecution. Ms. Mitchell must personally deliver Mr. Mobley to all court appearances.

Accordingly, not only will the bond motivate Mr. Mobley to comply with the conditions of release, he will be under constant supervision of Ms. Mitchell and Pretrial Services. Ms. Mitchell interactions with the court and her personal history demonstrate that she is competent and responsible. She is recently retired after a 34-year career with United Airlines. At United, she worked as a secretary and rose to the ranks of management employee, while raising four children. She foster parented nine children. At home full time, she can supervise Mr. Mobley around the clock. She does not drink alcohol or use drugs and keeps neither in her home. She has no criminal record. She has strong community support.

Mr. Mobley will be on house arrest in Ms. Mitchell's home. He may leave only for legal or medical reasons. He will wear a GPS electronic monitor, enabling pretrial services to monitor his compliance around the clock. This will mitigate against risk of flight and will mitigate against danger to the community presented by release. In imposing a zero-tolerance policy, Judge Gonzalez Roger impressed upon Mr. Mobley that any minor violation will result in automatic remand. Removing Mr. Mobley from the high-risk community of Richmond; restricting his ability to engage in certain activities (i.e. alcohol and

drug use); and restricting his ability to associate with certain individuals (co-defendants and known criminals) dramatically reduce potential danger to the community.

The court, pretrial services and the government share a concern that Mr. Mobley's admitted history of frequent drug and alcohol use increase risk of flight and violation pre-trial release violations. The condition prohibiting Mr. Mobley from using alcohol or controlled substances without a valid prescription mitigates this risk. Mr. Mobley will be subject to testing by pre-trial services. Additionally, Mr. Mobley will be will be confined to a drug and alcohol free home. The district court noted, if Mr. Mobley's substance use "cannot be controlled, then, yes, he is a significant risk to the community." Exh. 8 at p. 25; Exh. 9 at pp. 7-8. Ultimately, the court was satisfied that drug and alcohol testing could effectively monitor compliance in concert with Ms. Mitchell's obligation to report violations.

After weighing the totality of the circumstances, the court concluded that Mr. Mobley's ties to the community, lack of passport and lack of means to flee indicate that he is not a flight risk. The government conceded at the initial hearing that "the government is not concerned that Mr. Mobley is going to flee to some other jurisdiction, some other country. The question is, is he going to show up at future court appearances." Gov. Exh. at p. 15. Prior failures to

appear are not dispositive of the likelihood of appearance in this case. There is a significant distinction between release on a promise to appear in a misdemeanor and traffic case and release under strict supervision on a \$150,000 bond, to a custodian obligated to ensure appearance.

CONCLUSION

At the 5//14/12 hearing, the court sternly admonished Mr. Mobley and Ms. Mitchell as to the concerns that factored into its ultimate conclusion. The government contends that “the resounding dissonance between the court’s factual findings and its decision to release Mobley mandate reversal.” The government ignores the fact that the district court adopted the magistrate’s Release Order, which set forth the factors weighing in favor of release and supplemented its own comments at the hearing on 5/15/12. The court sought to clarify that despite its thorough consideration of the factors weighing in favor of release in this case, the entirety of the record regarding Mr. Mobley’s history and characteristics persuaded the court that the safety of the community was reasonably assured by the conditions of release. Exh. A, 8-10.⁷

Dated: 5/31/12

Respectfully Submitted,

/s/

Suzanne M. Morris

Counsel for Mr. Mobley

⁷ The government did not include this transcript, nor did it include copies of the written arguments considered by the district court in rendering its decision. Those documents are attached as exhibits to this Response.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2),

OTIS MOBLEY'S RESPONSE TO UNITED STATES' APPEAL OF
RELEASE ORDER PURSUANT TO FRAP 9(a)

is proportionately spaced and has a typeface of 14 points or more, and contains
no more than 20 pages. Dated: May 31, 2012.

/s / Suzanne M. Morris

SUZANNE M. MORRIS

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IN THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND, CALIFORNIA; DEPT ONE; YVONNE GONZALEZ ROGERS, JUDGE

THE UNITED STATES OF AMERICA) 4:12-CR-0235-02-YGR

PLAINTIFF,) TUESDAY, MAY 15, 2012

V.) FURTHER HEARING RE

OTIS MOBLEY,) GOVERNMENT REQUEST TO APPEAL

) TO NINTH CIRCUIT REGARDING

DEFENDANT.) RELEASE OF DEFENDANT

_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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REPORTED BY: STARR A. WILSON, CSR 2462

1 OAKLAND, CALIFORNIA; TUESDAY, MAY 15, 2012; 10:03 A.M.,
2 DEPARTMENT ONE; YVONNE GONZALEZ ROGERS, JUDGE

3 -oOo-

4 THE CLERK: All rise. Court is in session. The
5 Honorable Yvonne Gonzalez Rogers presiding.

6 Please be seated.

7 THE COURT: Good morning, everyone.

8 Ms. Hansen.

9 MS. HANSEN: Good morning, your Honor.

10 THE COURT: Are you specially appearing?

11 MS. HANSEN: I am, your Honor. I'll make that on
12 the record.

13 THE CLERK: Calling criminal action 12-235, **United**
14 **States versus Otis Mobley**. Counsel, please state your
15 appearances.

16 MS. MILES: Good morning, your Honor. Susan Miles
17 and James Mann appearing for the United States.

18 THE COURT: Good morning.

19 MS. HANSEN: Good morning, your Honor. Angela
20 Hansen with the Federal Public Defender's Office. I'm
21 specially appearing today for Ms. Morris on behalf of Otis
22 Mobley, who is present in custody.

23 Ms. Morris apologizes. After leaving court
24 yesterday, it slipped her mind that she had an appellate
25 argument in San Jose this morning so she is -- she's down

1 there.

2 THE COURT: All right. That's fine.

3 I'm sorry. I know Mr. Mann. I'll memorize these
4 names soon.

5 MS. MILES: Miles.

6 THE COURT: I'll learn these names soon.

7 MS. MILES: Ms. Miles.

8 THE COURT: Miles.

9 MS. MILES: Thank you.

10 Your Honor, to give you an update on where we are.
11 We have filed a -- or we're in the process of filing a
12 protective notice of appeal, still pending is the Solicitor
13 General's review of our request for appeal.

14 We have received approval from the Solicitor
15 General's office to file an emergency motion for a stay of
16 this court's order, if that's deemed necessary. But we
17 renew our motion before this Court asking for this Court to
18 stay its order pending our decision on whether or not to
19 appeal.

20 We, um, the decision or the memorandum is on the
21 Solicitor General's desk at the moment. Our understanding
22 is that he will be reviewing it today and we hope to have an
23 answer either by later today or by tomorrow. We're doing
24 this on, as much of an expedited schedule as we possibly
25 can.

1 THE COURT: Any comments, counsel?

2 MS. HANSEN: Your Honor, yes, Ms. Morris and I
3 researched this together yesterday and discussed it at
4 length. There are no provisions in available format for
5 this court to stay a decision that it makes on release
6 conditions.

7 What a stay would essentially be is a detention
8 order. Because this court has made findings that Mr. Mobley
9 should be released, and that there are conditions that can
10 be met to mitigate danger and risk of flight, we believe
11 that the Court's order should be allowed to be executed.
12 And if the government would like to ask the Court of Appeals
13 to stay your Honor's order, that would be the appropriate
14 procedure.

15 MS. MILES: Your Honor, if I may. The federal
16 rule of appellate procedure Eight allows this Court to stay
17 it's own order. In fact, it requires the government to seek
18 a stay with this court before we file a motion with the
19 Ninth Circuit and inform the Ninth Circuit about this
20 Court's ruling on that issue and any reasons for denying the
21 stay before we seek relief from the Ninth Circuit. It is
22 under that rule that this Court has the authority.

23 MS. HANSEN: That is not a rule that covers bail
24 and release though. That is an appellate, when the
25 government seeks to appeal an order of this court, that is a

1 general appellate rule. It is not -- it does not govern
2 available format, your Honor, which I believe in this case
3 would take precedent.

4 MS. MILES: Your Honor, if I may address that.

5 THE COURT: You may. Just a moment.

6 MS. MILES: Although the federal rule of appellate
7 procedure itself does not specifically attend to bail
8 motions, the case law has applied the standard from federal
9 rule of appellate procedure eight to these types of motions.
10 I looked specifically at Hilton versus Braunskill, which is
11 481 United States 70 -- 770, excuse me. And it is -- it's
12 the government's interpretation of that case that the
13 federal rule of appellate procedure eight applies to all
14 interlocutory appeals, and all appeals of motions by the
15 district court up to the Ninth Circuit. And that we need to
16 comply with rule eight in making such an interlocutory
17 appeal.

18 Um, it is that rule that, again, as I say, gives
19 this court both jurisdiction over this matter and the
20 authority to stay its motion.

21 MS. HANSEN: I believe we looked at the Hilton
22 case yesterday. It is out of circuit, I believe, and also
23 that is a generous reading of that case, and I do not have
24 it with me.

25 MS. MILES: It is a Supreme Court case, your

1 Honor. I don't have it with me either, although we
2 certainly could get a copy of it from our office, if needed.

3 THE COURT: Okay. Well, I'll take a recess and go
4 over the case.

5 (At 10:07 a.m. a recess is taken until 10:44 a.m. when the
6 following proceedings are had:)

7 THE CLERK: Remain seated. Court is in session.

8 Recalling criminal action 12-0235, United States
9 versus Otis Mobley. And, counsel, please state your
10 appearances.

11 MS. MILES: Good morning, your Honor. Susan Miles
12 for the United States.

13 MS. HANSEN: Angela Hansen on behalf of Mr.
14 Mobley. Again specially appearing, your Honor.

15 THE COURT: Good morning.

16 Okay. I have now taken an opportunity to read
17 Hilton v. Braunskill, a Supreme Court case from 1987, 481
18 U.S. 770. Not directionally on point, it is a case about
19 habeas and whether stays should be granted using -- and uses
20 a civil model as opposed to a criminal model for making that
21 determination.

22 Um, I've also taken a look at the Federal Judicial
23 Center's 2006 publication on the Bailiff Form Act of 1984.
24 It is my third edition.

25 It seems to indicate that the circuits are split

1 on the manner in which orders from a district court are
2 reviewed by the various circuits and the various standards
3 of review, um, that the various circuits afford to the
4 district courts.

5 Here in the Ninth Circuit, unlike some of the
6 other circuits, the standard of review is that of de novo,
7 although they do give great deference.

8 According to the Ninth Circuit case of United
9 Stats versus Townsend, this is 8 2nd 989, which I also
10 reviewed. This is a 1990 case.

11 And in that 1990 case, um, the Ninth Circuit
12 instructs that "only in rare cases should release be
13 denied". That's at page 994.

14 Now, the doubts regarding propriety of release are
15 to be resolved in favor of Defendants. That in light of
16 these principles, the district courts, your view of the
17 district court's factual findings are done under a
18 deferential clearly erroneous standard. That being said,
19 there are mixed questions of law and fact which require the
20 exercise of sound judgment as to the values underlying the
21 legal principles. And because of that, the Ninth Circuit
22 will review and decide on a de novo basis.

23 So having considered all those greater authorities
24 than I, um, let me make a couple of more supplemental
25 remarks for the record and then tell you what I'm going to

1 do so that it's clear in terms of the record that the Ninth
2 Circuit has.

3 Yesterday, as I went through the factors that I
4 considered regarding the order to release the Defendant
5 under very significant conditions, I want to make sure that
6 the record is clear that while those first two factors I did
7 indicate weighed in favor of detention, specifically, the
8 nature of the offense and the weight of the evidence against
9 the Defendant, while I talked at length regarding the third
10 and fourth factors regarding the Defendant's history and
11 characteristics and nature and the seriousness of the danger
12 to him, but to the community, I did not, I don't think,
13 explicitly said that with respect to his history and
14 background that it the was my explicit belief that that
15 weighed in favor of release.

16 And in terms of the nature and seriousness of the
17 danger to the community, again, here, there is a mixed bag,
18 as I think the record reflects. But given the totality of
19 all of those facts being balanced, they tip in favor of
20 release.

21 It's also the reason why I indicate -- indicated
22 on the record that there would be a zero tolerance. Um, the
23 one note that should be added is that I don't think there is
24 a risk of flight in this case. The Defendant doesn't have a
25 passport. He doesn't have significant -- there's no

1 indication that he has any significant monetary resources.
2 And what the record will not reflect to the Ninth Circuit is
3 that the courtroom has consistently been filled with members
4 of the community who, I believe, are here to support him.
5 So those things should be, and now are, clearly identified
6 on the record.

7 But in light of the ambiguity regarding the
8 various circumposition on review of the district court's
9 release order, I am going to grant a very short stay. The
10 stay will be in effect until 5:00 p.m -- no, make that 4:00
11 p.m. on Friday.

12 The Defendant is to be returned here to this
13 courthouse. That will assist pretrial services in the event
14 that the Ninth Circuit itself doesn't issue its own stay
15 pending review.

16 If the Ninth Circuit issues its own stay, then
17 that's clearly within their jurisdiction. If not, the
18 Defendant will be here to be released to pretrial services
19 at four o'clock on Friday.

20 Okay. We will not -- I will not put this on the
21 calendar unless the marshals require that. But, okay, so
22 the marshals are not requiring that it be put on the
23 calendar. There will be no appearance but the Defendant
24 will be brought back here to the courthouse and the stay
25 will be in effect until four o'clock on Friday.

1 MS. HANSEN: The marshals, mainly what we refer to
2 as a roll up order, your Honor, which just means that he is
3 processed from Santa Rita Jail or North County Jail where he
4 comes to the court house. Is that correct?

5 THE COURT: I'm prepared -- so all right. I will
6 issue that order and that's just to bring him back here, but
7 I wanted to make sure that everybody knew that they didn't
8 have to appear in court at four o'clock on Friday. You have
9 until that time to go to the Ninth Circuit and get a stay of
10 this order if you so choose.

11 MS. MILES: Thank you, your Honor. And just to
12 let your Honor know, we have filed the emergency motion for
13 stay while your Honor was deliberating over this so that has
14 been filed in the Ninth Circuit now.

15 MS. HANSEN: And if that's denied, your Honor, if
16 Ms. Morris is able to respond to that, perhaps you can try
17 to expedite the release before Friday.

18 THE COURT: If it's denied, um, then you need to
19 give the other side notice. But I'm -- actually, I will at
20 the Ninth Circuit Thursday and Friday. So my staff will
21 know how to reach me, if necessary. If the Ninth Circuit
22 denies it, then I can issue, I would be willing to issue an
23 order to provide for an earlier release.

24 As I understand though, from pretrial services, in
25 order that -- so that we have a -- I want the Defendant

1 released from this courthouse because I understand from
2 pretrial services it will make it much easier for them to
3 make sure that he is outfitted with -- with the monitoring
4 system that they need to have -- to make sure that there is
5 an easy transition. So I don't want there to be a gap. Um,
6 and that is the reason I do not want him released from Santa
7 Rita so that I get him safely to Petaluma or to Sebastopol
8 so that he is there with the equipment necessary to keep him
9 monitored 24 x 7. And then everything's fine from my
10 perspective. Okay.

11 Um, did you need to address me?

12 MS. MENDOZA: No, your Honor. Cheryl Mendoza from
13 pretrial services. I've simply come up in the case if you
14 had any further questions from pretrial.

15 THE COURT: That is my understanding based on my
16 research how we can best make this transactions happen.

17 MS. MENDOZA: It's completely accurate.

18 THE COURT: Okay.

19 MS. MENDOZA: So if I just might ask. So if -- if
20 it happens that he, everything goes into motion, that he is
21 released earlier than Friday at 4:00 p.m, we will also be
22 notified; correct?

23 THE COURT: Yes, you will. I will not release him
24 without pretrial services being notified and ready to go on
25 this matter.

1 MS. MENDOZA: Okay. Thank you.

2 MS. MILES: Thank you, your Honor.

3 THE COURT: Anything else?

4 And while I'm at the Ninth Circuit, I'll ask them
5 if they maybe perhaps issue some kind of decision and make
6 this more clear for all of us. In the meantime, this is
7 best we can do.

8 MS. MILES: Thank you.

9 THE COURT: All right. Thank you.

10 We're adjourned.

11 (Whereupon, at 10:55 a.m. the proceedings concluded.)

12 COURT REPORTER'S CERTIFICATE

13 I, STARR A. WILSON, CSR NO. 2462, United States
14 District Court, Northern District of California, do hereby
15 certify that the foregoing is a correct transcript from the
16 record of proceedings in the above-entitled matter.

17 I certify that the transcript fees and format
18 comply with those prescribed by the Court and Judicial
19 Conference of the United States.

20

21 /s/ _____

22 STARR A. WILSON, CSR NO. 2462

23

24

25



John Muir Charter School
Fort Mason Bldg. 102
SF, CA 94123

Dear Sir/Madam:

This letter is to certify that Otis Mobley was enrolled with and regularly attended the John Muir Charter School, beginning in January 2012. While attending school, Otis consistently demonstrates very good efforts to progress academically, actively participates in class, and is taking significant steps to overcome some of the barriers to his education which he had previously experienced. Otis is a conscientious individual, who readily follows the directions of his teachers, listens attentively and complies with requests from his supervisors.

Additionally, Otis has proved himself to be attentive and respectful, with a reserved and kind demeanor. He has formed bonds with several other students, and has benefited from the camaraderie and direction those interactions provided him with. He has not been disruptive, distracting, or disrespectful in class, and is considered by students and instructors to be a genuinely nice individual with a good heart.

It is our hope that these statements may help support Otis during this difficult time, and stand as a testament to his excellent character.

Please feel free to contact us with any questions you may have, or if we may be of any further assistance to Otis.

Sincerely,

A handwritten signature in cursive script, appearing to read "Samanta Sassi".

Samanta Sassi
Associate Director of Academics
John Muir Charter School
(415) 867 - 8612

4/16/2012

Re: Otis Mobley

Suzanne Morris,

I am currently employed as a Case Manager with the San Francisco Conservation Corps (SFCC) and have had the opportunity to work directly with Otis since he joined the program in December of this year. From the beginning, Otis has been an eager and willing participant, who has put forth a lot of effort to help better his own life and current living situation.

Prior to starting with the SFCC, Otis successfully completed the RAMP academy's intensive 7 week job readiness training program. Otis received glowing recommendations from the RAMP staff where he worked on developing his professional skills and behavior as well as starting to create his work portfolio that including a resume, cover letter, and master application; in hopes to achieve his career goals and begin a life of dedicated employment.

Since Otis started with the SFCC, we have been working together on ways to achieve his education, employment, and career goals while limiting any personal and life barriers that may currently be in his way. Otis is one of the few individuals I work with who readily seeks out my help, continuously looking for ways he can improve himself and his future. Otis has been attending John Muir Charter School and is working hard to obtain his California High School Diploma. He has also been working with me to gain better conflict resolution skills, increase his parenting skills, as well as developing better ways to appropriately conduct himself as a young adult.

Otis is an extremely polite and kind young man who has a lot of gifts that will help him be successful if he is provided with the right support. I eagerly ask that Otis is given the opportunity to maintain his current level of support at the SFCC and is also given the opportunity to continue to address the barriers and pitfalls that may keep him from being successful in the future. While we all may continue to face bumps in the road ahead, I am confident that Otis is ultimately on a "right" path and that he is working hard to better his own life for both himself and for his family.

Thank you very much for your time and consideration,



Jeff Wolcott, MSW
Case Manager
San Francisco Conservation Corps
102 Fort Mason
San Francisco, CA 94123

April 16, 2012

To Whom It May Concern:

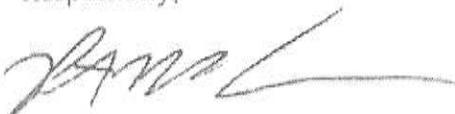
My name is Peter MacEwan, and I am writing to attest to the character of Otis Mobley. As teacher at Sacred Heart Elementary School and currently at Making Waves Education Program I have had the pleasure of working with several children in the Mobley family and maintaining relationships with the entire family for the past 10 years. I taught Otis during his eighth grade school year at Sacred Heart Elementary in my capacity as social studies and technology teacher during the 2002-2003 school year.

Otis stood out as an exceptionally bright student in my class. He had an intense curiosity and genuine interest in the history curriculum surpassing any student in the class. Otis possessed the unique ability at a young age to see beyond the textbook and connect the material with the world around him. As a student in my class Otis impressed upon me his desire to learn and always took his education seriously. Otis sat in the front of the classroom, intent upon learning the curriculum despite several classroom distractions.

As well as an admirable academic interest in the curriculum, Otis also demonstrated a great deal of maturity and self-control. Otis always treated both adults and peers with respect, even when he did not receive like treatment in turn. I can think of one particular instance where Otis managed to keep his composure while being wrongfully accused of participating in classroom gossip. Despite what other students were saying negatively about him, Otis kept his cool and talked through the situation appropriately with the adults in charge.

I have always known Otis to be a respectable, kind, and intelligent person. In my experience with him, he has demonstrated the clear ability to learn from his mistakes. I am also confident in the support Otis' family is able to provide. He comes from a family intent on helping their children get an education and avoid the perils of life in their community. I hope they are given a chance to help their son learn from the mistakes he may have made and continue to live with them in an environment where he will be able to continue his education.

Respectfully,



Peter MacEwan

Special Project Assistant
Making Waves Education Program
3130 - 20th Street (2nd Flr)
San Francisco, CA 94110
(415) 567-8304

April 3, 2012

Honorable Bernard Zimmerman
U. S. Magistrate – Judge

RE: U. S. V OTIS MOBLEY

Dear Judge Zimmerman:

My name is Madeliene L. Mitchell; I am the paternal grandmother of Otis Mobley. I am 67 years of age, widowed since 1992. I retired from United Airlines after 34 years of service. I was initially hired as a secretary. I became a management employee in 1983. I retired as an Engine Maintenance Planner in 2008. My total work experience in the San Francisco Bay Area, including jobs prior to United Airlines, is 48 years. I am a Christian, Mother of four biological children, foster parent of nine children over the years, grandmother to twenty-two and great-grandmother to three children. Three grandsons and two granddaughters are presently attending college and the rest are in high school (two in the Making Waves Program), middle school, elementary and pre-school, all doing very well.

Otis is my first grandchild of 22. Otis matured early in his young life. He was a leader of the Grandchildren and friends in the neighborhood. He excelled academically, athletically and spiritually. He would always have compassion and patience for the slower cousins and friends and made sure they had an equal opportunity to participate in whatever activity they were engaged in at the time (sports, electronic games, studying, etc). He participated in Christian camps in the summer and was told, early on, that he had a spiritual calling on his life. As he became a teenager, he pulled away from the church and became attached to people of which he was unequally yoked. Otis began to get in trouble due to peer pressure and began following rather than leading. He also became a father at the age of 19, which put more achieve higher goals. He was unprepared to do so because he did not complete high school due to Incarceration as teen.

Page 2 US v Otis D. Mobley, Jr.

However, he never lost his integrity. He vowed to me that he would get his GED and pursue higher education. He joined the Job Corps and received High school accreditation. He was actively looking for employment when this present incident occurred. I have not given up hope for his achieving the Will of God in his life. He is very humbled and repentive and ready to do it God's way. I will do whatever I can in supporting him to that end.

Sincerely yours,

Madeliene L. Mitchell

Madeliene L. Mitchell

[REDACTED]

[REDACTED]

[REDACTED]

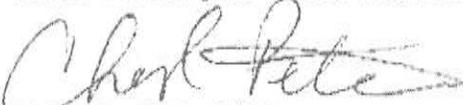
4/12 /12

To: Honorable Bernard Zimmerman
U.S. Magistrate-Judge

From: Cheryl Peterson
882 So. 46th St
Richmond Ca. 94804
Re: Otis Mobley

Dear Judge Benard Zimmerman, my name is Cheryl Peterson. I am 45 years old, married (for 22 years), and I've worked for United Airlines in San Francisco for the past 15 years. I have known Otis all his life, for 23 years. I have been very close to Otis, from time he was born. He was my first nephew, so I informally adopted him as my God son. I would bring him to church with me and look after him whenever his parents needed a babysitter. Otis has always been a leader and a responsible big brother. He helped his mom with his younger siblings and did chores around the house. He was always an outstanding athlete. Otis is a very personable and a respectful young man. Otis is kind and considerate. He has the ability to encourage others to do what is right. Otis now has a son who just turned 4 years old. He is always with his son and loves him dearly. Otis is a great father to his son. I can say all of these things with a sincere heart because it is most definitely true. I know that Otis got in some trouble as a teenager for various reasons; I also know that he worked hard to do what was right after being redeemed. Every time I talk to Otis he tells me of something that he is trying to do positive. I believe that Otis at times gets a little depressed because of his past mistakes, feeling as though he has been labeled a certain way when trying to get a job. However, I always encourage him to never give up and keep trying and let his good outweigh the bad. The most important quality I admire about Otis is that he has a sincere heart. Otis will tell you the truth. He has told me the truth when other youngsters will not say anything. I know he does this because he wants to do what is right and he wants others to do the right the thing. I don't believe incarceration will help Otis or our society. Otis will thrive one day and be a great help to many because his heart says so. He just needs to believe in himself. He also needs others to believe in him, and encourage him. There is no doubt in my mind that with the right resources and support system (for example, counseling, life skills classes and a job), Otis will become an upstanding citizen and a help and a blessing to many. Let's give Otis a chance to thrive with the right resources and strict guidelines and see a success story arise.

Thank You for your careful consideration


Sincerely, Cheryl Peterson

April 16, 2012

The Honorable Judge Zimmerman

U. S. Magistrate – Judge

RE: U. S. v Otis D. Mobley, Jr.

Dear Judge Zimmerman:

I am Tonette Mobley and I am the mother of Otis! I am 47 years of age and a Bay Area Native! I was born and raised in Oakland, California. I was educated in the Alameda County school system. I met and married my husband, Otis Mobley, Sr. of 19 years ago and to this union I have 5 children: Otis D. Jr., Tamanika Z., Akeem S., Kamau L. and Isaiah N. Mobley.

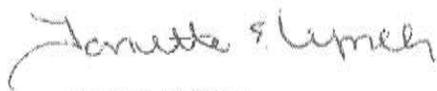
When I gave birth to Otis, I was so delighted. Otis was a beautiful and very happy and healthy baby of whom I am still very proud. Otis was very alert and attentive, never crying, always laughing and smiling. Otis was the first grandchild on his father's side so he received an abundance of love and attention. Otis was fortunate to be surrounded by such a large and well-rounded group of relatives. He was exposed to travel, education, spiritual things and family gatherings on a regular basis.

Due to my husband's academic and athletic endeavors in middle and high school, he had contacts that were instrumental in helping us to enroll our children in some of the best schools in the Bay Area, public and private. Otis teachers always spoke very highly of him as being an asset in his classrooms. Their words always included bright, inspiring, polite and intelligent. In addition, his father always kept him busy in after school programs and activities. His father coached many of the teams on which he played. Otis always excelled in everything attempted to do. My son is such a good-hearted, wonderful person. He is always positive and will warm your heart if you are feeling low. He has the smile and skills to take you to another level.

Page 2 U. S. v. Otis D. Mobley

My favorite memory of Otis is recent, when he received his certificate of completion of the Conservation Corps. He stood up very boldly, even though he was shaking in his boots, and gave a commendable speech thanking the Directors, staff and everyone involved in this innovative program for his success in the completion! He told me after the speech, that he was feeling shy when he started and as the talk progressed he felt better and better and wanted to say more. He felt very good about himself. I felt real good about him too, because this is the Otis I know, respect, trust and love dearly!

Sincerely yours,



Tonette Mobley

April 17, 2012

The Honorable Judge Zimmerman

U. S. Magistrate -- Judge

RE: U. S. v Otis David Mobley, Jr.

Dear Judge Zimmerman:

I, Otis Mobley David Mobley, Sr. am writing this letter of character on behalf of my eldest son

Otis David Mobley, Jr. I was born and raised in San Francisco, attending S. F. Unified School Districts and Sacred Heart elementary schools. In 1973, my mother purchased a home in Richmond, California where I attended Richmond Schools and DVC College. I have worked in various jobs dealing with children and youth. I am presently employed by the West Contra Costa Unified School District as a Behavioral Technician and Instructional Assistance.

I will start by saying, I am disappointed to say that money or the lack there of is a driving force in the decisions of the majority of people in this world. It pains my heart to see

that the choices so many talented youths make, thinking they are taking a short cut to success, or

worst than that, they are trying to please or be accepted by their peers. Most would probably

say, why that's a silly or stupid thing to do! Which, it is, but I've worked with children, the majority

of my adult life and for the past 15 yrs. I've been working with at risk youth. I've learned, that,

the youth are being led, not only by peer pressure, but, by video games, gangs, the neighborhood they are from and the internet! We have come to an age where, parents teaching good morals are being outweighed by social media, gang violence. And, children are trying to be a part of something they see going on daily in the neighborhood or at school.

Otis, Jr. is my first born son and is a bright young man who is definitely a family oriented individual. He has had a wonderful childhood. He is the eldest grandchild of my mom and pop! As a child, Otis excelled at everything he endeavored. The teachers always spoke about how he caught on and learned to adapt to whatever the situation. Otis was introduced to Karate, Soccer, Baseball, Basketball, and Football. His paternal Grandfather introduced him to culture. Granddad practiced extensively, molding the grandkids into great performers. He taught to eat well rounded meals and exercise as they prepared for a performance would be very beneficial. They performed at The University of Santa Clara, at school talent shows, churches and family major gatherings. Otis elementary school years were spent at Castro Elementary in El Cerrito, California. His Junior High years were spent at Sacred Heart Grammar in San Francisco, California. There he was introduced to organized Basketball. His team won the Championship two years in a row. Summers were spent at St. Ignatius summer school also in San Francisco. Plans to go to St. Ignatius were disrupted by a bad grade. Hercules High was the next best thing because I didn't want him going to school in Richmond, California. If you are familiar with this city, you know the propensity for violence there is beyond belief. In the fifteen years

Page 2 U. S. V. Otis D. Mobley

I've worked in Richmond schools I've seen at least 10 youth killed. I pray someday, people will see that it takes a village to raise a child. Otis' Hercules High school team did well. They came in second place. Otis liked Hercules High and was doing well, but, he got jumped by at least 5 people who were called up to the school by another student who was jealous of Otis' relationship with a young lady the other student liked. Instead of pursuing the people that jumped Otis, I decided to send him to school in S.F. To avoid any and all confrontations. This was the best thing to do at the time! Otis went to South San Francisco High, where he did fairly well academically, but, there was a problem with Otis living in Richmond and going to school in S.F. So, back to Richmond schools we go. I put him in El Cerrito High, which is one of the top schools in the area! There, it seemed he was comfortable. However, at El Cerrito someone robbed him at gun point on one occasion and one day on his way to his Aunt Maya's house. He and two cousins were jumped by grown men for no reason, just because! This is just a couple of things that happened that negatively affected Otis. I'm sure there are others! Otis has a son, Otis the third, who is his pride and joy!

In the last four years, Otis has been raising his son with his girlfriend Meliza Contreras. They love each other, but I think they have a little ways to grow to maturity! Otis, for the last eight months, has been training with the California Conservation Corps for a position with them. Otis is a people person. He is loved by all who comes in contact with him. I am asking that the court grant Otis the chance to continue to improve his situation. I thank you in advance for your consideration!

Thank you kindly,



Otis D. Mobley, Sr.

The Honorable Judge Zimmerman

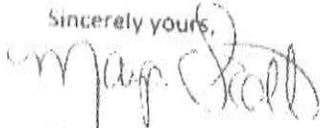
U. S. Magistrate – Judge

Re: US v Otis Mobley

I am a 42 year old woman who works as a Juvenile Supervision Officer at Tarrant County Juvenile Services in Fort Worth, Texas. My husband and I moved our five boys to Texas five years ago in order to offer them a better experience and an attempt to provide a better future with new opportunities. I am Otis' paternal aunt. My siblings and I raised our children pretty close together until we moved to Texas. We try and provide our children with the best opportunities in all areas of life. We always tell them to put God first and treat others the way you want to be treated. I have spent many weekends with Otis and my brothers other children going to birthday parties, sporting events, church, family gatherings, museums, parks and vacations. Otis is like a son to me he has lived with me twice, once as a child and the other as an adult when he was trying to get closer to Lord Jesus. He and I would go to bible study together. Otis often calls me for advice or prayer. Otis has a great love for his family, especially his 4 year old son who reminds me much of him. Recently Otis was working and going to school and was very proud of himself. Otis is the eldest of all my nieces and nephews and all of them always wanted to be like or impress him. Otis always encourages his cousins and siblings to do great things and make our family proud.

I am confident that if you train up a child in the way he should go, and when he is old he will not depart from it. Otis has been instructed from a child, godly principles and strong morals and ethics and I believe that what he has been taught will not be in vain. I believe that Otis is a trustworthy young man and will overcome all obstacles and become the victorious man God has called him to be.

Sincerely yours,



Maya T. Scott

[Redacted]

[Redacted]

[Redacted]

Hello my name Julia Shands, I am the aunt of Otis Mobley. I have known Otis for all of his twenty-three years and from day one he has had a contagious personality as well as the absolute ability to make you smile

My relationship with Otis is close in the regard that he and my son Khusar Mobley are cousins, however they have always been close like brothers, so Otis frequents my house as does my son frequent Otis' home. Every time Otis comes to my home I can be sure to have three things happen, first Otis will come to my room or where ever I am in my house and hug me and say "hi Auntie", second he will ask how I am doing and look in the refrigerator to see what I have to eat, lastly he NEVER leaves my home without again hugging me and saying "I love you Auntie".

The last time Otis was at my house he was talking to my son about joining the school and that that he was involved in in San Francisco, they were making arrangements to get Khusar a job and his High School diploma, I really appreciated Otis for sharing his successes with my son to encourage him in getting through tough times as well, it was obvious that this was Otis' focus. Otis was proud of the direction in which his life was going and he was excited and willing to share the information with my son so that they could both be successful together.

There have been several occasions when Otis has come to my house with his son, or I have visited his parents home and Otis is there taking care of "baby O". Otis' compassion and love for his handsome little son is so sweet it is clear that "baby O" loves his Daddy a lot. Like children do "baby O asks his father question after question after question and Otis just patiently answers them all with a smile. Otis takes his son to the park to run and ride his bike and to the movies to see the latest Disney film, bottom line he makes it his focus to have a hands on relationship with his son, "baby O" and his father have that same half smile and bright eyed personality.

In closing, I would just like to point out that we all have gone through trying times in our lives, some more difficult than others. I know in my heart that Otis does not sit and conjure up havoc to reap. Otis' upbringing can prove that he has a host of accomplished people in his family on both sides his father and mother have always provided him with anything he needs to encourage him when times are hard, so these accusations are totally a blow to us all, certainly his behavior and demeanor do not support them in any way, shape, form or fashion.

I would like to thank you for your time and consideration of my words, please allow Otis the opportunity to continue being the father to his son that "baby O" deserves, Otis is trying and in these times that is all any of us can do. Otis has really make some positive strides toward growth and maturity over the last several months, I would hate to see his efforts go to waste.

Respectfully,



Julia Shands

To whom this letter may find some sincerity in their hearts to know all Youngman are not as bad as they appear to be in some of the choices they choose to take.

Hello my name is Shanelle M. Lynch, known to my nieces and nephew as "Auntie Nell" I'm the eldest of four, I'm a working woman have been on my job 33 years, with some college education background in the special education field. I'm the auntie that always has something to say, wanting the best for my (our) children.

Otis Mobley is my oldest nephew, the oldest child born to my baby sister Tonette and her husband Otis Mobley also. My Nephew known to me as "O" has a beautiful heart; Otis is a family orient young man Otis is a joy to be around. I'm always looking for him at family gatherings. Otis always answer with "yes" when called upon, He will do what's asked of him, from taking garbage out to getting you some water! Our other sister Name Leia Collins know as "Auntie Leia and I took Otis on his first airplane trip oh what a joy, Otis was sitting by the window he looked out and said "I'm in heaven." How I can remember that like it was yesterday. Another trip we also took him was to the snow. Otis stood on top of the mountain we were on and said the same thing only this time he opened his arms looked up to the sky and said "I'm in Heaven".

Otis has a son, His name is also Otis, so as you can see the name goes on and on because of the heart Otis has. Otis is truly loved and he loves. He's a beautiful big brother to his siblings, I enjoy listening to him talk to them. He takes very positive to them giving them the right insight that they need to hear what a joy. I hope and pray I have been of some help.

with warm sincere

Shanelle M Lynch Better known as "Auntie Nell"

Shanelle M Lynch

April 4, 2012

Alameda County Federal Court

RE: U.S vs. Otis Mobley

Dear whomever it may concern,

I am Isaiah Mobley, youngest brother of Otis Mobley. I am fifteen years of age and have known Otis ever since I was born. My brother Otis is a very encouraging and useful person at times. He is uplifting and confident. I see him every weekend and sometimes weekday. If you didn't know I am participating in sports and different activities and before any race, game, or tournament Otis would give a little speech or words of encouragement before I went to play, saying things like "try hard!" and "do good!" And out of my four brothers and sister he is the only one to mention anything to me about doing well. Knowing that this may come to an end because of a mistake is devastating. Just knowing that he cares for me and loves me makes me want to do better not only in sports but in life.

In his adult life he was constantly willing to help people out with problems financially and internally. He was always proactive, asking questions, and laughing. He has a four year old son who loves and adores him and has a family who wants nothing but the best for him and will do anything for him. His favorite saying is "family first" and that is what he shows in his actions and attitude towards the family.

Sincerely,

Isaiah Mobley

April 4, 2012

Alameda County Federal Court

RE: Otis Mobley

Dear Sirs/Madams:

Please accept this as a letter of characterization for Otis Mobley, who is scheduled to be arraigned on Friday, April 6, 2012 in Alameda County Federal Court.

Otis Mobley is the son of my youngest sister, Tonette Mobley. I have known Otis since birth and played an active role in his upbringing. Otis is the oldest of five children, who all look up to him and love him dearly. He was raised in a loving and supportive household by his parents, Tonette and Otis Mobley Sr. During his childhood, Otis was very active with the Baptist church and various athletic programs in school. He has always had a fun loving positive personality that his peers respected and has always been able to maintain a healthy social life.

As an adult, Otis is exceptionally kind, good natured and always willing to help others. He continues to lead an active social life with many close friends. In his spare time, Otis still enjoys playing basketball – one of the various sports he excelled in during his school years. His siblings all admire him as their older brother. He is a wonderful father to his 4 year-old son, also named Otis. Otis is a very hard working individual whose family is his main priority.

Sincerely,

Lela Lynch-Collins

Certificate of Completion

This certifies that

Otis Mobley Jr.

Has successfully completed the seven-week life skills preparatory program:

Ramp SF Academy
with the
San Francisco Conservation Corps



December 16, 2011



[Signature]
James Byrte, Ramp SF Academy Trainer



SAN FRANCISCO
CONSERVATION CORPS

April 10, 2012

Otis Mobley
1601 Ocean Avenue #238
San Francisco, CA 94112

Dear Otis:

Because your violation of the attendance policy which caused your separation was due to incarceration, we have reinstated your employment and are placing you on a continuation of your approved Leave of Absence (LOA).

Your covered LOA runs through May 1, 2012, with you scheduled to return to work on May 2, 2012. If you are able to return before May 2, please contact Chase Torres or your supervisor as soon as you are able to do so.

It is further acknowledged that this will be leave without pay.

Please note you will be required to bring certification upon your return. In addition, if you cannot return May 2, please contact Chase, your supervisor or me no later than May 1.

Thank you.

Sincerely,

Tom Offenbecher, SPHR
Associate Director of Human Resources and Communications
San Francisco Conservation Corps

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 OTIS MOBLEY,)
17 Defendant.)
18)
19)

No. CR-12-00235 YGR

**UNITED STATES' APPEAL OF PRE-
TRIAL RELEASE ORDER FOR
DEFENDANT OTIS MOBLEY**

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TABLE OF CONTENTS

1

2 INTRODUCTION..... 1

3 FACTUAL BACKGROUND. 2

4 A. Defendant’s Negotiations To Sell Firearms Or A Grenade Launcher.. 2

5 B. The Armed Robbery And Defendant’s Flight From Police.. 3

6 C. Detention Hearing And Pre-Trial Release Order.. 4

7 ARGUMENT..... 5

8 A. Standard Of Review Is De Novo... 5

9 B. Defendant Is Presumed A Danger And A Flight Risk As A Matter Of Law.. 5

10 C. Defendant Has Not Rebutted The Presumption That He Is A Danger And
 11 A Flight Risk. 6

12 D. Statutory Factors Requiring Detention.. 7

13 1. Nature and circumstances of the offense charged (18 U.S.C. § 3142(g)(1)).. 8

14 2. Weight of the evidence against defendant (18 U.S.C. § 3142(g)(2)).. 8

15 3. Defendant’s history and characteristics, and the danger he poses to the community
 16 (18 U.S.C. §§ 3142(g)(3) and (g)(4)).. 8

17 September 17, 2011 Arrest With A Firearm (Pinole). 9

18 September 6, 2011 Arrest For Domestic Violence (Napa). 9

19 August 21, 2010 Arrest With Firearm/Resisting (Richmond). 10

20 June 27, 2010 Arrest For Resisting (Berkeley). 10

21 June 5, 2010 Arrest With Firearm (Richmond). 10

22 January 18, 2010 Arrest (Pinole). 10

23 May 19, 2009 Arrest For Homicide (San Pablo). 11

24 October 28, 2008 Arrest For False Impersonation (Pinole). 11

25 September 7, 2007 Arrest For Car Theft (South San Francisco). 12

26 September 26, 2005 Arrest For Possession Of A Firearm
 27 At School (El Cerrito). 12

28 CONCLUSION. 12

TABLE OF AUTHORITIES

CASES

1
2
3 United States v. Contreras, 776 F.2d 51 (2d Cir. 1985). 5
4 United States v. Dominguez, 783 F.2d 702 (7th Cir. 1986). 6
5 United States v. Hare, 873 F.2d 796 (5th Cir. 1989). 6
6 United States v. Hir, 517 F.3d 1081 (9th Cir. 2008). 6, 7
7 United States v. Jessup, 757 F.2d 378 (1st Cir. 1985). 6
8 United States v. King, 849 F.2d 485 (11th Cir. 1988). 6
9 United States v. Koenig, 912 F.2d 1190 (9th Cir. 1990). 5
10 United States v. Motamedi, 767 F.2d 1403 (9th Cir. 1985). 5, 6
11 United States v. Perez-Franco, 839 F.2d 867 (1st Cir. 1988). 6
12 United States v. Suppa, 799 F.2d 115 (3d Cir. 1986). 5
13 United States v. Vargas, 804 F.2d 157 (1st Cir. 1986). 5
14 United States v. Winsor, 785 F.2d 755 (9th Cir. 1986). 6

STATUTES

15
16 18 U.S.C. § 111(b). 1
17 18 U.S.C. § 371. 1
18 18 U.S.C. § 924(c). 5
19 18 U.S.C. § 924(c)(1)(A). 1
20 18 U.S.C. § 2114. 1
21 18 U.S.C. § 3142(e). 5
22 18 U.S.C. § 3142(f). 5
23 18 U.S.C. § 3142(g). 6, 7
24 18 U.S.C. § 3142(g)(1). 8
25 18 U.S.C. § 3142(g)(2). 8
26 18 U.S.C. §§ 3142(g)(3). 8
27 18 U.S.C. §§ 3142(g)(4). 8
28 The Bail Reform Act of 1984. 5, 6

INTRODUCTION

1
2 The United States files this appeal of the Honorable Kandis A. Westmore’s Release Order
3 (“Release Order”) granting pre-trial release to defendant Otis Mobley. Defendant – along with
4 two co-defendants – is charged in an indictment with (1) Conspiracy to Commit Robbery of
5 Mail, Money, or Other Property of United States and Assault on a Federal Officer, in violation of
6 Title 18, United States Code, Section 371; (2) Assault on a Federal Officer, in violation of Title
7 18, United States Code, Section 111(b); (3) Robbery of Mail, Money, or Other Property of the
8 United States, in violation of Title 18, United States Code, Section 2114; and (4) Using,
9 Carrying, Possessing, and Brandishing a Firearm During, in Relation to, and in Furtherance of a
10 Crime of Violence, in violation of Title 18, United States Code, Section 924(c)(1)(A).

11 The charges stem from a violent armed robbery, orchestrated by defendant, of an
12 undercover agent from the Bureau of Alcohol, Tobacco, Firearms, and Explosives. In sum,
13 defendant negotiated the supposed sale of a grenade launcher to a confidential informant (and
14 undercover agent) for \$1,000. The transaction, however, was merely a ruse to set up an armed
15 robbery. During the armed robbery, defendant’s two accomplices held loaded handguns to the
16 head of the undercover agent and demanded that he empty his pockets. The robbery was
17 thwarted only by law enforcement.

18 As a matter of law, defendant is presumed to be both a danger to the community and a
19 flight risk, and has failed to present facts which rebut those presumptions. Defendant must,
20 therefore, be detained pending trial. Even if defendant can rebut the presumptions of danger and
21 flight, the United States has demonstrated by clear and convincing evidence that defendant is a
22 danger to the community and by a preponderance of the evidence that defendant is a flight risk.
23 As explained below, defendant should be detained pending trial because:

- 24 • while on probation, defendant orchestrated the armed robbery in this case and fled
25 into a nearby field to hide, only to remark upon his eventual arrest: “Damn, I
26 should have just stayed in the bushes. You guys wouldn’t have found me, huh?”;

- 1 • after being arrested for murder in 2009, defendant admitted to police that he shot
2 and killed the victim – with a handgun that he always carried for protection –
3 during a marijuana transaction gone awry;
- 4 • defendant admits that he has been a poly-substance abuser since his teenage years,
5 abusing alcohol, marijuana, ecstasy, cocaine, and methamphetamine;
- 6 • defendant’s criminal history reflects multiple failures to appear in misdemeanor
7 and traffic cases, and defendant was on probation at the time of the instant offense
8 (see Pretrial Services Report at p. 8), demonstrating a complete disregard for
9 supervision and orders of the courts;
- 10 • one of defendant’s sureties lied to Pretrial Services about his criminal history and
11 then lied to the Court about his misstatements to Pretrial Services; and
- 12 • even if a secured bond could mitigate the risk of flight, it does nothing to mitigate
13 the danger to the community posed by defendant, especially if he is placed into the
14 custody of his family who has been unable to control defendant’s criminal
15 behavior to date.

16 Consequently, not only does the law presume that defendant is both a danger to the community
17 and a flight risk, but the facts and circumstances of defendant’s criminal conduct also show him
18 to be a danger to the community and a flight risk. Defendant must, therefore, be detained
19 pending trial.

FACTUAL BACKGROUND

A. Defendant’s Negotiations To Sell Firearms Or A Grenade Launcher.

22 In the week prior to the supposed transaction in this case, defendant offered to sell two
23 firearms to an individual for \$1,000. These negotiations took place via telephone and were
24 monitored by an inspector from the Contra Costa County District Attorney’s Office. During the
25 conversation, defendant explained that he could provide additional firearms as well. A few days
26 later, defendant again offered to sell a handgun for \$750. This telephone conversation was again
27 monitored by law enforcement. Later still, defendant offered to sell a grenade launcher and three
28 grenades instead of the previously promised firearms. Indeed, defendant sent a photo of the

1 supposed grenade launcher and grenades. Law enforcement again monitored a telephone
2 conversation during which defendant explained that the items for sale were, in fact, a grenade
3 launcher and grenades. The supposed transaction was then set for March 28, 2012, and the
4 agreed upon price was \$1,000. The telephone number used by defendant during these
5 negotiations was registered to defendant.

6 **B. The Armed Robbery And Defendant's Flight From Police.**

7 On March 28, 2012, defendant drove to the site of the proposed transaction, the Chevy's
8 parking lot in Richmond, at approximately 3:00 p.m. With defendant were his cousin, Khusar
9 Mobley, and friend, D'Marce Hutcherson. Both Khusar Mobley and D'Marce Hutcherson –
10 armed with loaded firearms – got into the rear seat of the undercover agent's car. Defendant
11 remained just outside of the undercover agent's car. Within moments of entering the car, both
12 Khusar Mobley and Hutcherson pulled out loaded firearms and held them to the head of the
13 undercover agent. They demanded: "empty your pockets." As he attempted to push the barrel of
14 Khusar Mobley's firearm away from his head, the undercover agent stated repeatedly: "Don't
15 shoot, don't shoot, I'll give you everything you need. Let me park the car, let me park the car.
16 I'm emptying out my pockets." The violent assault and attempted robbery are captured on video,
17 and Khusar Mobley's finger can be clearly seen on the trigger of the loaded "Tech-9" firearm he
18 held to the agent's head. When the "Tech-9" was later recovered, agents confirmed that it had a
19 live round of ammunition in the firing chamber.

20 Cover teams of agents and officers immediately responded. Indeed, a scuffle ensued
21 during which Khusar Mobley's firearm was ripped from his hands. Seeing the responding law
22 enforcement, D'Marce Hutcherson and Khusar Mobley fled from the undercover agent's vehicle.
23 Hutcherson fled with his loaded firearm raised and was shot by responding agents. Khusar
24 Mobley was detained almost immediately. Defendant, however, fled into a nearby field and
25 attempted to hide from law enforcement.

26 After a lengthy search, involving many police officers, agents, police canines, and a
27 California Highway Patrol helicopter, defendant was spotted by the helicopter in the field.
28 Officers were then able to locate and detain defendant. Upon his detention, defendant quipped:

1 “Damn, I should have just stayed in the bushes. You guys wouldn’t have found me, huh?”
2 Making it abundantly clear that the entire transaction was a ruse orchestrated by defendant to set
3 up the armed robbery, no grenade launcher or grenades were recovered from the scene or
4 defendant’s car.

5 Further, attached hereto as Exhibit A is a screen capture from a video recovered from
6 Khusar Mobley’s mobile telephone. The video is also lodged herewith. The video shows
7 defendant proudly brandishing a “Tech-9” firearm – the same type of firearm used in the instant
8 offense – in a haze of apparent marijuana smoke.

9 **C. Detention Hearing And Pre-Trial Release Order.**

10 On April 18, 2012, defendant appeared for a detention hearing before the Honorable
11 Kandis A. Westmore. The United States moved for detention because defendant is a danger to
12 the community and a flight risk, and is presumed so as a matter of law. In addition to the above
13 information, defendant disclosed to Pretrial Services that he uses alcohol to “get buzzed” on a
14 daily basis, has used marijuana twice per week since the age of 16, uses ecstasy once per week
15 (and has used it since age 18), used cocaine between 2009 and 2011 (on a daily basis for eight or
16 nine months), and uses methamphetamine every few months with his first use at age 18 and last
17 use in February 2012. Defendant’s grandmother – and proposed custodian – admitted that she
18 knew of marijuana’s use, but did not believe that he used any other drugs.

19 Defendant also offered his father as a surety, who lied to Pretrial Services about his own
20 criminal record, claiming that he did not have a criminal history when he, in fact, has a 1990
21 misdemeanor conviction for providing false identification to a peace officer (for which he was
22 sentenced to five days jail and two years of probation). Notably, defendant’s father then told the
23 Court that Pretrial Services never asked about his criminal history, which is belied by the Pretrial
24 Services Officer’s addendum memorandum dated April 23, 2012. In sum, defendant’s father lied
25 to Pretrial Services about his conviction for lying to police, and then lied to the Court about lying
26 to Pretrial Services.

27 After argument, Magistrate Judge Westmore ordered defendant released to his
28 grandmother’s residence on a \$150,000 bond secured by property owned by defendant’s

1 grandmother and the signatures of defendant's mother and father. Defendant is also to be subject
2 to electronic monitoring. The United States requested that the Release Order be stayed to allow
3 for this appeal.

4 ARGUMENT

5 **A. Standard Of Review Is De Novo.**

6 “[A] district court’s review of a magistrate’s detention order is to be conducted without
7 deference to the magistrate’s factual findings.” United States v. Koenig, 912 F.2d 1190, 1192
8 (9th Cir. 1990).

9 **B. Defendant Is Presumed A Danger And A Flight Risk As A Matter Of Law.**

10 The Bail Reform Act of 1984 (“the Act”) permits pretrial detention of a defendant
11 without bail where “no condition or combination of conditions will reasonably assure the
12 appearance of the person as required and the safety of any other person and the community.” 18
13 U.S.C. § 3142(e). Detention is appropriate where a defendant is either a danger to the
14 community or a flight risk; it is not necessary to prove both. United States v. Motamedi, 767
15 F.2d 1403, 1406 (9th Cir. 1985). A finding that a defendant is a danger to the community must
16 be supported by clear and convincing evidence. 18 U.S.C. § 3142(f). A finding that a defendant
17 is a flight risk need only be supported by a preponderance of the evidence. Motamedi, 767 F.2d
18 at 1406.

19 In cases involving violation of Title 18, United States Code, Section 924(c) (use of a
20 firearm during and in relation to a crime of violence), the Act established a rebuttable
21 presumption that a defendant is both a flight risk and a danger to the community. 18 U.S.C. §
22 3142(e). That presumption exists if there is “probable cause” to believe that the defendant
23 committed the violation of Title 18, United States Code, Section 924(c). 18 U.S.C. § 3142(e). A
24 grand jury indictment, as returned in this case, establishes “probable cause” under 18 U.S.C. §
25 3142(e) and gives rise to the Act’s presumptions. United States v. Vargas, 804 F.2d 157, 163 (1st
26 Cir. 1986); United States v. Suppa, 799 F.2d 115, 119 (3^d Cir. 1986); United States v. Contreras,
27 776 F.2d 51, 55 (2^d Cir. 1985). Once the presumption is triggered, the defendant has the burden
28

1 of producing or proffering evidence to rebut the presumption. United States v. Hare, 873 F.2d
2 796, 798 (5th Cir. 1989); United States v. King, 849 F.2d 485, 488 (11th Cir. 1988).

3 If the defendant proffers evidence to rebut the presumption, the Ninth Circuit has
4 identified several relevant statutory factors in determining whether pretrial detention is
5 appropriate: (1) the nature and circumstances of the offense charged; (2) the weight of the
6 evidence against defendant; (3) the defendant's character, physical and mental condition, family
7 and community ties, past conduct, history relating to drug or alcohol abuse, and criminal history;
8 and (4) the nature and seriousness of the danger to any person or to the community that would be
9 posed by the defendant's release. 18 U.S.C. § 3142(g); United States v. Winsor, 785 F.2d 755,
10 757 (9th Cir. 1986); Motamedi, 767 F.2d at 1407.

11 Congress intended that the statutory presumptions would have a practical effect. United
12 States v. Jessup, 757 F.2d 378, 382 (1st Cir. 1985). The presumptions do not disappear when a
13 defendant meets his or her burden of producing rebuttal evidence. United States v. Hir, 517 F.3d
14 1081, 1086 (9th Cir. 2008) (citing United States v. Dominguez, 783 F.2d 702, 707 (7th Cir.
15 1986)). The presumptions remain as evidentiary findings militating against release, to be
16 weighed along with other evidence relevant to the factors listed in Section 3142(g). Id. Indeed,
17 the Act's presumption should be added as a factor that supports pretrial detention under both
18 rationales for detention. See United States v. Perez-Franco, 839 F.2d 867, 870 (1st Cir. 1988)
19 (presumption a factor militating against release).

20 C. **Defendant Has Not Rebutted The Presumption That He Is A Danger And A**
21 **Flight Risk.**

22 Defendant has presented no facts sufficient to rebut the legal presumption that he is a
23 danger and a flight risk. Indeed, defendant offers only that he will be released on electronic
24 monitoring to live at his grandmother's house on a \$150,000 bond secured by his grandmother's
25 property and the signatures of his mother and father (the latter of whom lied to both Pretrial
26 Services and the Court). These conditions are woefully inadequate, however, and do not ensure
27 the safety of the community or defendant's appearance at court appearances in this case.
28

1 The Ninth Circuit has discussed the high-level of trust associated with non-custodial
2 conditions of pre-trial release. Hir, 517 F.3d at 1092-93. The conditions imposed in the Hir case
3 included: (1) a ban on the possession of firearms; (2) a ban on contact with certain individuals;
4 (3) a ban on certain activities such as sending money overseas; and (4) electronic monitoring. Id.
5 at 1092. The Ninth Circuit noted: “Although these proposed conditions of release are strict, they
6 contain one critical flaw. In order to be effective, they depend on [the defendant’s] good faith
7 compliance.”

8 The same is true in the instant case. Once defendant is released, the Court and the
9 community must rely upon defendant’s “good faith compliance” with the conditions of his
10 release. There is no reason to believe that defendant will now comply with the laws he has
11 already violated; nor is there reason to believe that his family will now be able to ensure his
12 compliance with the conditions of his release. The letters of support submitted by defendant’s
13 family detail the loving and supportive environment in which defendant was raised. Defendant
14 enjoyed the support of his immediate and large extended family throughout life, as well as the
15 opportunity to attend prestigious private schools and public schools throughout the Bay Area.
16 Nevertheless, defendant finds himself before this Court charged with a violent armed robbery and
17 with the criminal record detailed below, as well as a lengthy history of drug abuse. Stated
18 differently, defendant’s family has not been able to control defendant’s behavior or drug abuse to
19 date, and there is no reason to believe that will change now. Indeed, defendant’s grandmother
20 and proposed custodian did not even know of his rampant drug abuse.

21 Defendant’s proposed release conditions fail to rebut the presumptions in this case.

22 **D. Statutory Factors Requiring Detention.**

23 Even if defendant has rebutted the presumptions, the statutory factors contained in 18
24 U.S.C. § 3142(g) establish that defendant is a danger and a flight risk and should be detained
25 pending trial.

26 //

27 //

28 //

1 **1. Nature and circumstances of the offense charged (18 U.S.C. §**
2 **3142(g)(1).**

3 Defendant orchestrated a violent armed robbery during which his two accomplices held
4 loaded firearms to the head of the victim while demanding that he empty his pockets. Other than
5 possibly homicide, there can be no more dangerous or violent offense. To avoid arrest, defendant
6 then fled into a nearby field to hide. When he was finally apprehended by law enforcement,
7 defendant expressed his dismay that he had been unable to avoid arrest: “Damn, I should have
8 just stayed in the bushes. You guys wouldn’t have found me, huh?” The nature and
9 circumstances of the offense clearly demonstrate that defendant is both a danger to the
10 community and a flight risk.

11 **2. Weight of the evidence against defendant (18 U.S.C. § 3142(g)(2)).**

12 As set forth above, the communications during which defendant offered to sell firearms
13 and then a grenade launcher – made from a telephone registered to defendant – were monitored
14 by law enforcement. Defendant then drove with his two armed accomplices to the agreed upon
15 parking lot for the transaction. The supposed sale was clearly a ruse, however, and the armed
16 robbery was intended from the start, as defendant brought no grenade launcher to the transaction.
17 Almost immediately upon entering the undercover agent’s car, defendant’s accomplices pulled
18 out loaded firearms and held them to the head of the undercover agent. In short, the weight of
19 the evidence against defendant is strong and weighs in favor of detention.

20 **3. Defendant’s history and characteristics, and the danger he poses to**
21 **the community (18 U.S.C. §§ 3142(g)(3) and (g)(4)).**

22 Defendant has been arrested repeatedly over the last several years after firearms were
23 recovered from vehicles in which he was riding or driving. Most significantly, however, during a
24 post-arrest confession in 2009, defendant admitted that he shot and killed another individual
25 during a marijuana transaction gone awry. Likely because the victim also had a firearm and is
26 alleged to have threatened defendant during the transaction, the case was not prosecuted.
27 Nevertheless, recognizing the danger often associated with drug trafficking, defendant came
28

1 prepared with a loaded firearm, and then demonstrated that he was both capable and willing to
2 take the life of another.

3 September 17, 2011 Arrest With A Firearm (Pinole)

4 According to the police report, defendant was stopped while driving a car with his
5 girlfriend, another woman, and his three year-old son. Defendant's driver license was suspended.
6 When asked if he had ever been arrested before, defendant lied and stated that he had only been
7 arrested for lying to a police officer. As demonstrated below, defendant had actually been
8 arrested multiple times for various crimes, including murder. While searching the car, in the
9 center consol, the officer recovered a stolen, loaded .40 caliber semiautomatic handgun.
10 Defendant denied that the gun belonged to him and stated that he has "not really" been around
11 guns. This, of course, is also belied by the remainder of defendant's criminal history. No
12 charges were filed in this case.

13 September 6, 2011 Arrest For Domestic Violence (Napa)

14 According to the police report, defendant was driving with his girlfriend, child, and two
15 or three other individuals. During an argument, defendant slammed on the brakes of the car and
16 then slapped or punched his girlfriend in the face, cutting her lip. Defendant claimed that he
17 slammed on the brakes during the argument, and that his girlfriend hit her lip on something as a
18 result, but he denied having hit her. While being transported to the jail and discussing the
19 potential penalties for his actions, defendant stated: "I need some counseling to help me with my
20 anger."

21 As a result, defendant was convicted of domestic violence, put on three years of formal
22 probation, and a no harassment order was put into place. Indeed, defendant was on probation
23 when he committed the instant armed robbery. The Release Order states that defendant was not
24 on probation at the time of the instant offense. See Release Order at 8:1-3. The Pretrial Services
25 Report indicates, however, the defendant was, in fact, on probation following his January 2012
26 conviction in this domestic violence case. See Pretrial Services Report at p. 8. The Pretrial
27 Services Officer spoke with defendant's probation officer. Id.

1 August 21, 2010 Arrest With Firearm/Resisting (Richmond)

2 According to the police report, defendant was the rear passenger behind the driver of a car
3 stopped for a traffic violation. During a subsequent search of the car, officers recovered a
4 loaded, semiautomatic handgun with an extended magazine from beneath the driver's seat
5 (immediately in front of defendant). As officers attempted to arrest him, defendant resisted.
6 Even once he was handcuffed, defendant continued to try to escape, and he kicked one of the
7 officers. He stated to one officer: "Man, take these cuffs off and I'll show you what's up." He
8 also yelled: "Fuck you bitch," and "you ain't got shit." Defendant was apparently drunk at the
9 time. Likely because there were four individuals in the car, no charges were filed in this case.

10 June 27, 2010 Arrest For Resisting (Berkeley)

11 According to the police report, defendant was contacted by police while drunk and
12 leaving a bar. He yelled about wanting to fight someone in the bar and resisted his friends'
13 efforts to pull him away from the bar. When officers attempted to arrest defendant for being
14 drunk in public, defendant pulled away and pushed one officer. Defendant resisted the officers'
15 attempts to handcuff him until he was finally taken to the ground by several officers, at which
16 point defendant declared: "You got me, I ain't going to fight no more." As a result of this
17 conduct, defendant sustained a misdemeanor conviction for public intoxication.

18 June 5, 2010 Arrest With Firearm (Richmond)

19 According to the police report, defendant was the passenger in a car that was stopped for
20 a traffic violation. When the car was pulling over, the officer saw defendant make movements
21 that were consistent with an attempt to conceal something. During a subsequent search of the
22 car, the officer recovered a .40 caliber, semiautomatic handgun with a laser sight from beneath
23 defendant's seat. No charges were filed in this case.

24 January 18, 2010 Arrest (Pinole)

25 According to the police report, as an officer was attempting to arrest another individual
26 who was in possession of a firearm, defendant jumped out of a nearby car and started cussing at
27 the officer. No charges were filed in this case, but it again demonstrates defendant's lack of
28 respect for law enforcement.

1 May 19, 2009 Arrest For Homicide (San Pablo)

2 In this case, defendant and his cousin (and co-defendant in the instant armed robbery),
3 Khusar, were arrested for murder. In summary, defendant shot and killed the victim in a
4 marijuana deal gone awry. Defendant then fled the scene and threw his firearm into the San
5 Francisco Bay.

6 After first repeatedly lying to police and claiming that he was not even present for the
7 incident, defendant admitted that he shot and killed the victim. Specifically, defendant stated
8 that Khusar and the victim sold marijuana together, and the victim had threatened Khusar three
9 days before the incident. Nevertheless, on the date of the homicide, defendant and Khusar still
10 decided to meet with the victim to purchase marijuana. During the drug deal, the victim was
11 trying to fight with Khusar, and pulled out a gun at least one time. As defendant and Khusar
12 were leaving, the victim rushed at them with the gun. At that point, defendant pulled his own
13 9mm handgun from his waistband and shot the victim twice. Defendant admitted that “he always
14 has a gun on him for protection.” The Release Order expresses concern about relying on hearsay
15 in some instances. These, however, are defendant’s own admissions. Attached hereto as Exhibit
16 B is the police report detailing defendant’s confession (the victim’s name has been redacted).
17 Khusar’s confession corroborated defendant’s confession, but Khusar stated that defendant
18 traded the 9mm handgun for a .40 caliber handgun after the incident.

19 Likely because of defendant’s claim that he shot the victim in self-defense, no charges
20 were filed in this case. Nevertheless, defendant’s own words demonstrate that he is a danger to
21 the community. Recognizing the dangers often involved with drug dealing, defendant brought a
22 loaded handgun to the drug deal. Indeed, according to defendant, he always carried a firearm.
23 When the victim produced a handgun, defendant drew his own and shot the victim twice, killing
24 him. In sum, defendant has demonstrated his willingness to carry and use a firearm to take the
25 life of another.

26 October 28, 2008 Arrest For False Impersonation (Pinole)

27 According to the police report, defendant was stopped for speeding. Defendant claimed
28 that he did not have his driver license with him and told the police that his name was “Anthony

1 Scott.” Defendant further provided a false date of birth, driver license number, height, weight,
2 and address. When repeatedly confronted by the officer about providing false information,
3 defendant maintained that he was “Anthony Scott.” After being arrested, however, defendant
4 admitted that he had given a false name (his cousin’s name) because he had a suspended driver
5 license. As a result of his conduct, defendant sustained a misdemeanor conviction for providing
6 false identification to a police officer.

7 September 7, 2007 Arrest For Car Theft (South San Francisco)

8 According to the police report, defendant was arrested after 2:30 a.m. while driving a
9 stolen car in South San Francisco. Defendant admitted to police that he stole the car from the
10 driveway of a residence. He stated that he was stopped by police soon after, as he did not know
11 where he was going. As a result, defendant sustained a misdemeanor conviction for vehicle
12 theft.

13 September 26, 2005 Arrest For Possession Of A Firearm At School (El Cerrito)

14 According to the police report, defendant’s cousin was arrested with a loaded handgun at
15 high school. Three days later, defendant came forward and admitted that he had given the
16 handgun to his cousin. Defendant stated that he found the gun on campus when he went to
17 smoke marijuana. He put the gun into his backpack and then gave it to his cousin with plans to
18 get it back later. Defendant further admitted that he previously brought a .22 caliber pistol to
19 school because he was having problems with someone. Again, defendant’s own words
20 demonstrate that he is a danger to the community. When faced with a problem, defendant admits
21 that he will confront it with a firearm.

22 CONCLUSION

23 For these reasons, the United States respectfully requests that this Court find that
24 defendant has failed to rebut the statutory presumptions that he is a danger and a flight risk and
25 order him detained pending trial. Alternatively, the United States asks that this Court find that it
26 has established by clear and convincing evidence that defendant is a danger to the community
27 and by a preponderance of the evidence that he poses a flight risk, and that there are no
28

EXHIBIT A

(CD TO BE MANUALLY FILED)

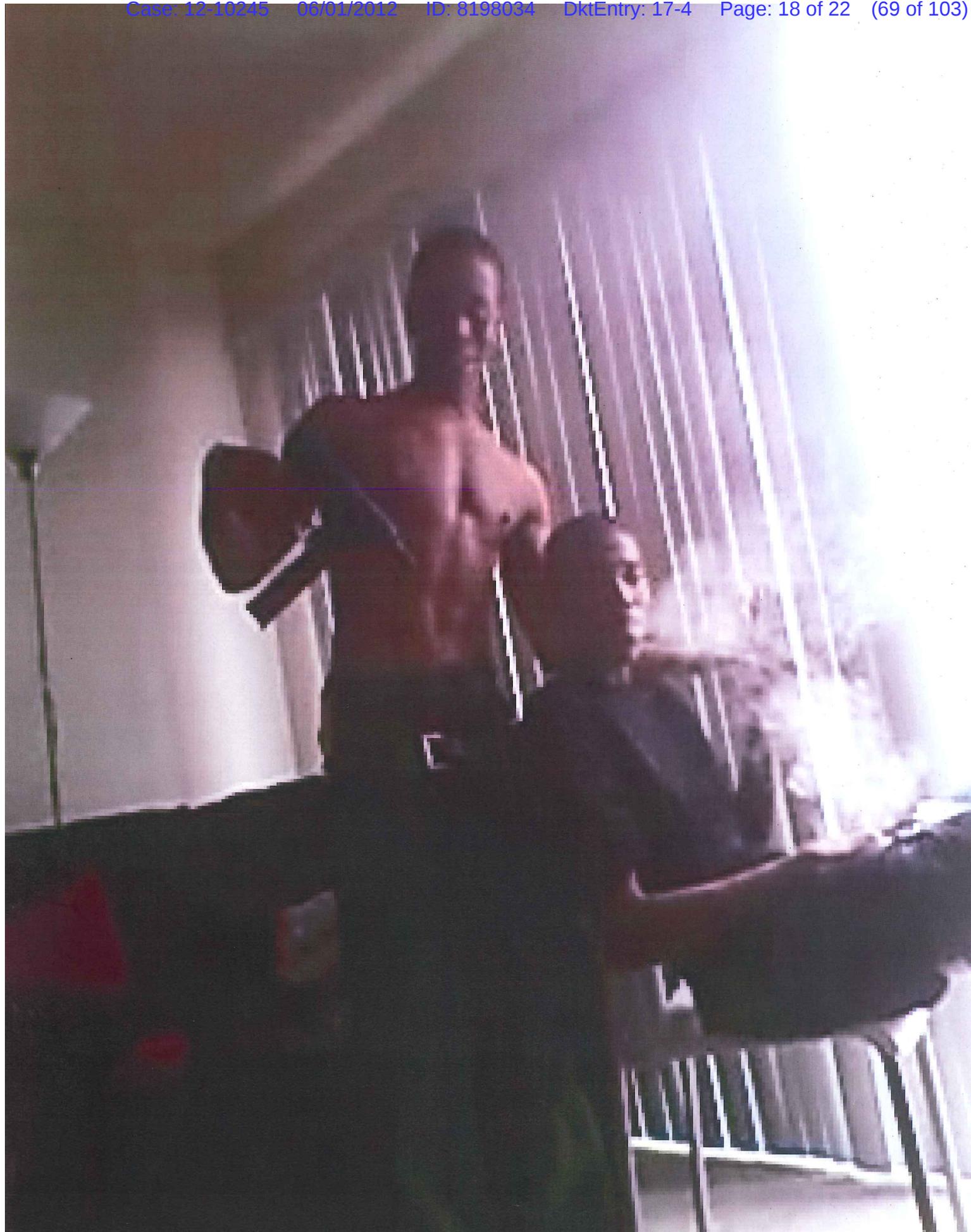


EXHIBIT B

SAN PABLO POLICE DEPARTMENT

NARRATIVE REPORT

Page 11 of 12

Case No
09-12703

White asked Otis if I was not able to convince the sergeant where would we go from here. Otis said we would just have to charge him with murder. White asked if that was the right thing. Otis was about to say something and I open the interview room door. In continuing the ruse, I pretended to be on my cell phone with the supervisor. At one point during the fake phone call I said, he might. I pause for a minute and I again said, he might. I enter the room, still on the phone and said, that is something I have to work out with this kid. I then said, I understand, get a piece and then set it up at the jail or something. I then said well it's negotiable. As if talking to someone I said, well I will see if he will do that. I continue the ruse as if telling the supervisor it is a simple "why" question. Continuing the ruse I pretended to tell the supervisor Otis wanted his cousin in the room. I paused as if the supervisor asked a question and I asked Otis, hey you promise not to swing on him. Otis said he was not going to touch him. I said I will see if it's negotiable. I then end the ruse call.

I walked back into the room and told Otis the simple fact of it is this is a confined space and we can't lock up a juvenile in a room with an adult, because of state regulations. Even with family. I explained to Otis the only time you can do that is when it's the juvenile's momma. I told Otis I thought it would be simple to bring him up and sit him down so they could talk with us in the room, but it was not going to happen, because he was a juvenile and he was an adult. I told Otis that was on me. I told Otis the sergeant said I could set something up for later, but we needed to negotiate some things. I told Otis we needed to negotiate some honesty with him and in return we would give him what he needed referring to the meeting with Khusar. I told Otis that is something he and I had to work out.

I exited the room to get some water as I came back I told Otis I needed some truth from him. Otis asked what Khusar said. I told Otis Khusar placed himself there. I told him the reason Khusar placed himself there was due to the cell phone evidence and his finger print on the bullet and the ID'S from the witnesses. I told Otis my only concern with his cousin is he places himself there, and said he was the one who ran across the park or behind the church to his mom's boyfriend's apartment, but the only thing he was renegeing on is when [redacted] gets shot he starts saying ask Otis. I told Otis that all Khusar said was ask Otis. I told Otis I told Khusar I looked at Otis' criminal history and this is not him, but this had Khusar written all over it. I told Otis Khusar said, fuck you, fuck this, and fuck that, talk to him (Otis). I told Otis I did not think he was capable of this and that was not an insult. Otis said alright, Otis' voice started to crack up and he begins to confess.

X START X

Otis said his cousin, Khusar, had nothing to do with this. I asked Otis what happened. White interjected by telling Otis to get it off his chest. Otis starts to cry. White asked if it just got out of control. I again told Otis to tell us what happened. Otis said if he didn't do what he did he was going to kill us. According to Otis a couple of days prior [redacted] had threatened Khusar. Otis said Khusar and [redacted] were driving to his grandmother's house to drop off some weed and [redacted] asked for some gas money. According to Otis, Khusar gave [redacted] 3 dollars for gas and [redacted] was upset that it was not more money. According to Otis [redacted] threatened to blow Khusar's head off during the argument. Otis believed

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Copies To	<input type="checkbox"/> Chief	<input type="checkbox"/> CII	<input type="checkbox"/> Patrol	<input type="checkbox"/> Det	<input type="checkbox"/> Other Agency	<input type="checkbox"/> Other Routing
	<input type="checkbox"/> DMV	<input type="checkbox"/> CAU	<input type="checkbox"/> ABC	<input checked="" type="checkbox"/> DA	Entered By	
Reporting Officer	ID#	Date	Reviewed By	ID#	Date	Assigned to
BENONE	S957	05-21-09	<i>Ed. Jewell</i>			

SAN PABLO POLICE DEPARTMENT

NARRATIVE REPORT

Page 12 of 14

Case No
09-12703

██████████ was on dope and high. Otis said Khusar told him about the argument. Otis said he told Khusar ██████████ was just properly playing with him.

Otis continued by saying, "this Friday we go to get some weed". Otis said ██████████ came down stairs "trippin" and said you niggas ain't about to do this. Otis said it was like as if we were trying to rob him or something. Otis said he asked ██████████ what he was talking about. Otis said he gave ██████████ they money (for the weed). I asked Otis who ██████████ was swinging on. Otis said ██████████ was trying to fight Khusar the whole time they were there.

According to Otis, ██████████ pulled his gun out and put it back in his pocket. Otis reached for his rear pants pocket simulating pulling out a gun [It should be noted ██████████ had a 38 caliber pistol in his rear pants pocket]. When ██████████ put his gun back in his pocket he told Otis and Khusar he did not need his gun. Otis said he asked ██████████ what he was trippin on, because they were just trying to buy some weed. Otis said ██████████ kept arguing with Khusar.

According to Otis, ██████████ said he was cool with him, but not with Khusar. Otis said he was trying to get Khusar to leave. Otis said as they were getting ready to leave, ██████████ kept on trying to fight Khusar. Otis believed ██████████ had his gun in his back pants pocket. I asked Otis what type of gun ██████████ had. Otis said it was a little 38 or something.

According to Otis he told Khusar to go. As they were walking away he turned around and saw ██████████ had his gun out again. Otis said it looked like ██████████ was trying to kill them. Otis said ██████████ was trying to keep him and Khusar close. Otis said he kept walking away.

At this point Otis and Khusar are walking away and Otis heard ██████████ say he was going to kill them. Otis said he turned around and saw ██████████ rushing towards them. Otis admitted shooting ██████████. He motioned as if loading a gun and shooting. I asked Otis if he had the gun. Otis said, "I did it man it was me". I asked Otis where he had his gun. Otis said on me. I asked him what type of gun. Otis said it was a "9" (9mm). I asked Otis how many times he fired. Otis believed he fired twice. Otis said he and Khusar were 10 to 15 feet away from ██████████. Otis said his gun was in his waist band. I asked Otis where the gun was now. I told Otis I did not want a baby to get it. Otis said the gun was gone. Otis told us he threw the gun in the bay in Emeryville, Ca. I asked Otis what kind of gun he had. Otis said it was a Taurus. White and I exited the room. When we came back I asked Otis if Khusar ever touched the gun. Otis said he had to have since his finger print was on the bullet. I asked Otis if Khusar touched the gun that night. Otis gestured no. Otis said he bought the gun from a crack fiend for \$200.00. I asked Otis where he ran after the shooting. Otis said he ran towards the oil changers. Otis said he met up with Khusar at the Manor. According to Otis, he took a bus out of the area. I asked Otis why he had a gun that night. Otis said he always has a gun on him for protection. I asked Otis when he tossed the gun in the bay. He told me he threw it in the bay on Sunday. I left the room and White asked Otis if ██████████ had the gun out when he was rushing them. Otis demonstrated by simulating reaching for something in his rear pants pocket and running. White asked Otis if ██████████ knew he had a gun. Otis said he was not sure.

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Reporting Officer	ID#	Date	Reviewed By	ID#	Date	Assigned to
BENONE	S957	05-21-09	<i>[Signature]</i>			

SAN PABLO POLICE DEPARTMENT
NARRATIVE REPORT

Page 13 of 13 Case No
09-12703

When I came back to the room, I asked Otis how he and Khusar got to [redacted]'s place. Otis said he they were dropped off by their cousin **Willie Peterson**. According to Otis, Peterson drives a blue dodge. After obtaining this information, I left the interview room (*For further details of Otis' confession see DVD*)

Otis agreed to go back to the crime scene and partake in a reenactment video of the shooting. Detective Hoff conducted the reenactment at the crime scene (*For details see Detective Hoff's supplemental report*).

I was later contacted by Detective Pamplona and informed he and Detective White re contacted Khusar and he admitted being with [redacted] and Otis during the shooting. Pamplona told me Khusar corroborated Otis' story of the shooting. Pamplona told me Khusar said Otis did not throw the gun in the bay, but rather traded the 9mm for a .40 caliber pistol. Due to this I decided to re contact Otis to confirm the location of the gun.

At approximately 1920 hrs, in a ruse I told Otis I was out at Juvenile Hall interviewing Khusar again about the shooting. I told Otis Khusar said he did not toss the gun in the bay, but rather traded the gun for a .40 caliber pistol. Otis denied this and stuck to his story about tossing the gun in the bay in Emeryville (*For further details see DVD*).

I down loaded the interviews with Khusar and Otis on to DVD'S and later gave them to Ross Galay to be logged into evidence.

Recommendations: Case closed – copy to DA for review.

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Copies To	<input type="checkbox"/> Chief <input type="checkbox"/> DMV	<input type="checkbox"/> CII <input type="checkbox"/> CAU	<input type="checkbox"/> Patrol <input type="checkbox"/> ABC	<input type="checkbox"/> Det <input checked="" type="checkbox"/> DA	<input type="checkbox"/> Other Agency	<input type="checkbox"/> Other Routing
Reporting Officer BENONE	ID# S957	Date 05-21-09	Reviewed By <i>[Signature]</i>	ID#	Date	Assigned to

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8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

13	UNITED STATES OF AMERICA)	No. CR 12-00235-YGR
)	
14	Plaintiff,)	DEFENDANT OTIS
)	MOBLEY'S OPPOSITION TO
15	v.)	UNITED STATES' APPEAL OF
)	RELEASE ORDER
16	OTIS MOBLEY, JR.)	
)	
17	Defendant.)	
)	
18)	
)	
19)	

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TABLE OF CONTENTS

INTRODUCTION.....1

PROCEDURAL AND FACTUAL BACKGROUND.....2

 A. The charges and alleged incident giving rise to the indictment.....2

 B. The rebuttable presumption and the conditions of release.....4

ARGUMENT.....6

 A. Applicable Legal Standards.....6

 B. The nature and circumstances of the offense charged and the weight of the evidence....9

 C. Mr. Mobley’s history and characteristics.....11

CONCLUSION.....20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

United States v. Aitken,
898 F.2d 104 (9th Cir. 1990)2, 8

United States v. Hir,
517 F.3d 1081 (9th Cir. 2008)8, 14, 15

United States v. Jessup
(1st Cir. 1985) 757 F.2d 3787

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767 F.2d 1403 (9th Cir. 1985)10, 20

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(1st Cir. 1990) 895 F.2d 8108

STATUTES

18 U.S.C. § 924(c)4, 7, 8

18 U.S.C. § 3142(g)1

18 U.S.C. §3142(c)(1)(B)(i)6

18 U.S.C. § 3142(e)1, 20

18 U.S.C. §3142(f).....7

18 U.S.C. § 3145(a)(1)1, 6

18 U.S.C. § 3145(c)1

18 U.S.C. § 37311

18 USC § 3142 (c)7

18 USC § 3142 (g)(1)-(4)8

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18 USC § 3142(e)(3)(B)4, 7

INTRODUCTION

1
2 On April 18, 2012, defendant Otis Mobley, Jr. appeared before United States Magistrate
3 Judge Kandis A. Westmore for a detention hearing. After listening to the proffers of counsel and
4 weighing the nature and circumstances of the charged offenses, against Mr. Mobley’s prior
5 contacts with law enforcement, personal history and characteristics, his significant ties to the
6 community, strong network of support, the quality of his work with the San Francisco
7 Conservation Corps, and attestations to his character by case workers, teachers and family
8 members; and after questioning and admonishing the surety and co-signors on the bond,
9 Magistrate Judge Westmore soundly concluded that the imposition of restrictive, narrowly tailored
10 conditions, combined with intensive pre-trial supervision will reasonably assure Mr. Mobley’s
11 future appearance and the safety of the community. Exhibit 1, Release Order, pp. 2, 11-13.

12
13
14 The government now “appeals”¹ the magistrate’s order, contending that (1) Mr. Mobley
15 “presented no facts sufficient to rebut the presumption that he is a danger and a flight risk” and (2)
16 if he did rebut the presumption, “the statutory factors set forth in 18 U.S.C. 3142(g) establish that
17 defendant is a danger and a flight risk and should be detained pending trial.” Government Appeal,
18 p. 6. The government fails to adequately address the relevant inquiry, which is not whether Mr.
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22 ¹ The government’s filing is captioned as an “appeal.” What the government actually seeks to do
23 is modify Judge Westmore’s release order by way of *motion* to the district court: “If a person is
24 ordered released by a magistrate judge . . . the attorney for the Government may file, with the
25 court having original jurisdiction over the offense, a *motion* for revocation of the order . . .” 18
26 U.S.C. § 3145(a)(1) (emphasis added). An “appeal” from a release or detention order is governed
27 by the provisions of 18 U.S.C. § 3731, and is heard in the court of appeals, not in the district court.
28 *See* 18 U.S.C. § 3145(c).

² Undersigned counsel has attached a copy of the Magistrate Court’s Release Order as Exhibit 1.
Undersigned counsel has requested preparation of a transcript of the detention hearing and will
lodge a copy of that transcript as exhibit to Defendant Otis Mobley’s Opposition to the
Government’s Appeal, when it becomes available. It is not available at the time of filing this
Opposition.

³ 18 USC § 3142 (c) sets forth various conditions that may be appropriate to reasonably assure

1 Mobley is a flight risk or a danger, but whether any combination of release conditions can mitigate
2 against those dangers and reasonably assure both his appearance and the safety of the community.
3 See 18 U.S.C. § 3142(e). Although the government objects to the adequacy of the release
4 conditions imposed by the court (which will be discussed in detail below), it fails to address in any
5 meaningful way why the restrictive conditions are insufficient to reasonably assure future
6 appearance and safety. Moreover, in its motion, the government largely ignores the myriad of
7 conditions that the magistrate imposed, designed to mitigate against the perceived risks of flight
8 and danger. The government also overlooks the mechanisms put in place by the magistrate court
9 to ensure that Mr. Mobley's compliance is closely monitored and enforced. Thus, as in the initial
10 hearing before Judge Westmore, the government has failed to prove by a preponderance of the
11 evidence that no combination of conditions can reasonably assure Mr. Mobley's future appearance
12 and has failed to prove by clear and convincing evidence that no combination of conditions can
13 reasonably assure the safety of the community. Exhibit 1, Release Order, p. 4; *United States v.*
14 *Aitken*, 898 F.2d 104, 107 (9th Cir. 1990). Accordingly, this court should deny the government's
15 motion to revoke Magistrate Westmore's release order.
16
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19 **PROCEDURAL AND FACTUAL BACKGROUND**

20 **A. The charges and alleged incident giving rise to the indictment.**

21 On April 5, 2012, a federal grand jury indicted Otis Mobley, Jr. on charges of (1) conspiracy
22 to commit robbery of mail, money, or other property of the United States and assault a federal
23 agent in violation of Title 18, United States Code, section 371; (2) assault on a federal officer in
24 violation of Title 18, United States Code, sections 2 and 111(b); (3) robbery of mail, money, or
25 other property of the United States in violation of Title 18, United States Code, sections 2 and
26 2114; and (4) using, carrying, possessing and brandishing a firearm, in violation of Title 18,
27
28

1 United States Code, sections 2 and 924(c)(1)(A). Mr. Mobley is charged with two co-defendants,
2 Khusar Mobley and Dmarce Hutcherson. As to Otis Mobley, the robbery, assault and firearm
3 allegations rely on Title 18, United States Code, section 2, which provides that whoever aids and
4 abets a crime against the United States is punishable as a principle.

5 The government makes the following allegations. In conversations with a confidential
6 informant, Otis Mobley purported to be in possession of illegal weapons for sale. Otis Mobley
7 agreed to meet with the informant and a purported buyer in a public parking lot on March 28, 2012
8 to conduct a transaction. On that date, Otis Mobley arrived with co-defendants Khusar Mobley
9 and Dmarce Hutcherson. At that time, Otis Mobley was not in possession of had no intention of
10 selling any illegal weapons. The three co-defendants met the informant (CI 1), the would-be buyer
11 (an undercover ATF agent) and a third individual (CI 2). Khusar Mobley and Dmarce Hutcherson
12 got into the backseat of the under-cover agent and would-be buyer's car. Otis remained outside of
13 the car, with CI 1 and CI 2. While inside the car, Khusar Mobley pulled a firearm and pointed at
14 the agent. The government further alleges that Dmarce Hutcherson also pointed a firearm at the
15 agent, although that is not clear from the video that has been shown to defense counsel.
16
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19 Complaint, Docket 1; Indictment, Docket 7.

20 After one of the CI's wrestled the gun out of Khusar Mobley's hand, Dmarce got out of the
21 vehicle and attempted to run away. He was shot seconds later by a plain-clothed agent who
22 appears in the video of the incident on foot. Upon seeing this person open fire on Dmarce, Otis
23 Mobley ran away. Shortly thereafter, a police search was underway. Otis was found in a nearby
24 field and surrendered without incident. He was unarmed.
25

26 The government has not alleged by proffer or otherwise that Otis Mobley personally
27 possessed, brandished, or carried a firearm or that he personally assaulted or robbed anyone. The
28

1 government has not alleged that Otis Mobley threatened, used force, or displayed aggressive
2 behavior during or after the alleged incident. However, it is the government's theory that Otis
3 Mobley orchestrated the alleged assault and attempted robbery, though the government proffers no
4 direct evidence to support this theory. The allegations and the version of events proffered by the
5 government will be strongly contested by the defense in future proceedings.
6

7 **B. The rebuttable presumption and the conditions of release**

8 The allegation that Mr. Mobley violated section 924(c)(1)(A), gives rise to a rebuttable
9 presumption under Title 18 United States Code, section 3142(e)(3)(B) that no condition or
10 combination of conditions will reasonably assure the appearance of Mr. Mobley as required and
11 no combination of conditions will reasonably assure the safety of the community. At arraignment,
12 the government invoked the presumption under section 3142(e)(3)(B) and sought detention.
13 Accordingly, Mr. Mobley requested a detention hearing.
14

15 Prior to the detention hearing, pretrial services prepared a full bail study and investigation to
16 assess the risk of flight as to Mr. Mobley and danger to the community and to assess whether any
17 combination of pre-trial release conditions could mitigate such risks. After conducting its
18 investigation, pre-trial services concluded that Mr. Mobley's history and the circumstances of the
19 offense present risks of flight and danger, but concluded that those risks could be mitigated by
20 restrictive release conditions and intensive supervision.
21

22 On April 18, 2012, Magistrate Judge Westmore presided over a lengthy detention hearing.
23 After carefully weighing the proffers by defense counsel and the government, including the
24 government's proffers regarding Mr. Mobley's prior contacts with law enforcement, the weight of
25 the evidence against Mobley, and the nature and circumstances of the current offense, and several
26 letters attesting to Mr. Mobley's character, Magistrate Judge Westmore soundly concluded that a
27
28

1 combination of narrowly drawn and restrictive release conditions could reasonably assure Mr.
2 Mobley's appearance in court and the safety of the community. Release Order, 4-13. Accordingly,
3 Magistrate Westmore ordered that Mr. Mobley be released on a \$150,000 bond, secured by
4 property owned by Madeline Mitchell, Mr. Mobley's grandmother and by the signatures of Mr.
5 Mobley's parents, Tonnette Lynch and Otis Mobley, Sr., on the following conditions.

6
7 Mr. Mobley is ordered to reside with his grandmother, Madeline Mitchell, at 125
8 Montgomery Road, in Sebastopol, California. Mr. Mobley will be required to wear an ankle
9 monitor equipped with GPS tracking so that pre-trial services can monitor his compliance with the
10 restrictions on his movement. Mr. Mobley is prohibited from leaving the house, save for medical
11 appointments and meetings with defense counsel as approved by pretrial services. Release Order,
12 p. 12-13.
13

14 Mr. Mobley is prohibited from consuming alcohol or controlled substances without a valid
15 prescription. He is required to submit to drug and alcohol testing as frequently as pretrial services
16 deems appropriate. He is required to undergo drug and alcohol counseling at the direction of
17 pretrial services. *Ibid.*
18

19 Mr. Mobley is prohibited from having contact or communication with either of his co-
20 defendants outside presence of counsel. He is further prohibited from having any contact or
21 communication with individuals known to him to be involved in criminal activity. He is required
22 to refrain from criminal activity. He shall not possess any firearm or explosive device. He must
23 submit to warrantless search of his person, residence or car at any time with or without probable
24 cause, as directed by pretrial services. Release Order, pp. 12-13.
25

26 Mr. Mobley is prohibited from harassing, threatening, intimidating, injuring, tampering with
27 or retaliating against any witness, victim, informant, juror, or officer of the court, or obstructing
28

1 any criminal investigation. He is also prohibited from committing any other state or federal crime.
2 He is to make all court appearances and surrender himself as ordered by the court. *Ibid.*

3 Finally, Ms. Mitchell will act as Mr. Mobley’s custodian. She has agreed to assume
4 supervision and report any violations to the court. At the detention hearing, she promised the court
5 that she would personally deliver Mr. Mobley to all future court appearances. See 18 U.S.C.
6 §3142(c)(1)(B)(i).
7

8 In Mr. Mobley’s presence, the magistrate court admonished Ms. Mitchell that she could be
9 held in contempt if she failed to report a violation or failed to live up to her custodial obligations.
10 The magistrate court further admonished Ms. Mitchell that in the event that Mr. Mobley fails to
11 comply with the conditions of release, the court could forfeit \$150,000. The magistrate similarly
12 impressed upon Tonnette Lynch and Otis Mobley, Sr. that they would be personally liable for the
13 same as co-signors on the bond and warned them that their wages could be garnished in the event
14 that Mr. Mobley violated the terms of release. Mr. Mobley listened as the court admonished his
15 grandmother and parents of the great financial and personal risk that they were taking and choked
16 back tears as he affirmed that he understood and appreciated the risk that his family members were
17 taking.
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19

20 The government now moves this court to revoke the release order.

21 **ARGUMENT**

22 **A. Applicable Legal Standards**

23 Title 18 United States Code, section 3145 (a)(1) provides: “[i]f a person is ordered released
24 by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over
25 the offense and other than a Federal appellate court . . . the attorney for the Government may file,
26 with the court having original jurisdiction over the offense, a motion for revocation of the order or
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1 amendment of the conditions of release.” 18 U.S.C. § 3145 (a)(1). The motion shall be determined
2 promptly. *Ibid.*

3 In reviewing a magistrate’s release order, the district court applies a *de novo* standard of
4 review. *United States v. Koenig* (9th Cir. 1990) 912 F.2d 1190, 1192. That said, this court’s review
5 does not occur in a vacuum. “[T]he district court is not required to start over in every case, and
6 proceed as if the magistrate's decision and findings did not exist.” *Id.* at pp. 1192-93. Rather, the
7 district court “should review the evidence before the magistrate and make its own independent
8 determination whether the magistrate's findings are correct,” without deference to the magistrate
9 court’s ultimate conclusion. *Ibid.*²

10
11 In this case, the section 924(c) allegation triggers a rebuttable presumption that “no
12 condition or combination of conditions will reasonably assure the appearance of the person as
13 required and the safety of any other person and the community.” 18 U.S.C. §3142(e)(3)(B). Where
14 the rebuttable presumption is triggered, at the request of the defendant, “the judicial officer shall
15 hold a hearing to determine whether any condition or combination of conditions set forth in
16 subsection (c) of this section will reasonably assure the appearance of such person as required and
17 the safety of any other person and the community.” 18 U.S.C. §3142(f).³

18
19 It is the defendant’s burden to rebut the presumption by producing evidence *to establish a*
20 *basis for concluding* that there are conditions of release sufficient to assure that the defendant will
21

22
23 ² Undersigned counsel has attached a copy of the Magistrate Court’s Release Order as Exhibit 1.
24 Undersigned counsel has requested preparation of a transcript of the detention hearing and will
25 lodge a copy of that transcript as exhibit to Defendant Otis Mobley’s Opposition to the
26 Government’s Appeal, when it becomes available. It is not available at the time of filing this
27 Opposition.

28 ³ 18 USC § 3142 (c) sets forth various conditions that may be appropriate to reasonably assure
appearance and the safety of the community and includes a catch-all provision, allowing judicial
officers for fashion any other condition reasonably necessary to assure the appearance of the
person as required and to assure the safety of any other person and the community.

1 not again engage in dangerous criminal activity pending his trial and conditions that will
2 reasonably assure his appearance in court. *United States v. Jessup* (1st Cir. 1985) 757 F.2d 378,
3 381 (abrogated on other grounds by *United States v. O'Brien* (1st Cir. 1990) 895 F.2d 810). Once
4 the defendant rebuts the presumption by producing some basis for concluding that conditions of
5 release may reasonably assure appearance and community safety, the burden shifts to the
6 prosecution to persuade the court that no combination of conditions can accomplish those goals.
7 *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). It is the government's burden to
8 establish by a preponderance of the evidence that no combination of conditions can reasonably
9 assure the defendant's future appearance and by clear and convincing evidence that no
10 combination of conditions can reasonably assure the safety of the community. *United States v.*
11 *Aitken*, 898 F.2d 104, 107 (9th Cir. 1990).

14 In determining whether conditions of release may reasonably assure the appearance of the
15 person as required and the safety of any other person and the community, the court should take
16 into account available information concerning (1) the nature and circumstances of the offense
17 charged, including whether the offense is a crime of violence, a violation of section 1591, a
18 Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm,
19 explosive, or destructive device; (2) the weight of the evidence against the person; (3) the history
20 and characteristics of the person, which includes the person's character, physical and mental
21 condition, family ties, employment, financial resources, length of residence in the community,
22 community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and
23 record concerning appearance at court proceedings; and whether, at the time of the current offense
24 or arrest, the person was on probation, on parole, or on other release pending trial; and (4) the
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1 nature and seriousness of the danger to any person or the community that would be posed by the
2 person's release. 18 USC § 3142 (g)(1)-(4).

3 **B. The nature and circumstances of the offense charged and the weight of the evidence**

4 There is no dispute as to the serious nature and circumstances of the alleged offenses.

5 As to the weight of the evidence, the government contends that Otis Mobley purported to be in
6 possession and control of illegal weapons for sale and agreed to sell an acquaintance of a
7 confidential informant a grenade launcher. Mr. Mobley agreed to meet with the informant and the
8 would-be buyer in a parking lot in Richmond to conduct the transaction. However, when Otis
9 Mobley arrived with co-defendants Khusar Mobley and Dmarce Hutcherson, Otis Mobley was not
10 in possession of had no intention of selling any illegal weapons. Upon meeting the confidential
11 informant (CI 1), the would-be buyer (an undercover ATF agent) and a third individual (CI 2),
12 Khusar Mobley and Dmarce Hutcherson got into the backseat of the undercover agent's car. Both
13 CIs and Otis remained outside of the car. While inside the car, Khusar Mobley and Dmarce
14 allegedly pointed firearms at the undercover agent and demanded money. See Indictment, Docket
15 7.
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19 The government has not alleged by proffer or otherwise that Otis Mobley personally
20 possessed, brandished, or carried a firearm or that he personally assaulted or attempted to rob the
21 agent. The government has not alleged that Otis Mobley threatened, used force, or displayed
22 aggressive behavior during or after the alleged incident. Rather, it is the government's theory that
23 Otis Mobley orchestrated the alleged assault and attempted robbery using the previous
24 conversations with the informant as a ruse. As noted above, the allegations and the version of
25 events proffered by the government will be strongly contested by the defense in future
26 proceedings.
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1 After reviewing video of the incident, Magistrate Westmore aptly noted that the video shows
2 Khusar Mobley brandishing firearm and Hutcherson inside the car but does not show Otis Mobley.
3 Release Order, 5. Noting that the nature of the allegations is extremely serious, the magistrate
4 noted that Otis Mobley is not alleged to have been armed at the time of the offense and is not
5 alleged to have personally brandished a firearm. Moreover, Otis Mobley was outside of the car at
6 the time of the incident. Accordingly, the magistrate correctly notes that the weight of the
7 evidence “is not nearly as great as it is against the two co-defendants.” Magistrate Judge
8 Westmore noted that Otis Mobley’s actions do not convincingly establish that he knew that
9 Khusar Mobley planned to pull a firearm once inside the vehicle. Release Order, p. 6.
10 Nevertheless, the magistrate concluded that the nature of the allegations raises a concern that Otis
11 Mobley is a danger to the community. Ultimately, the court concluded that “the risk is mitigable
12 through the imposition of conditions of release.” *Ibid.*

15 The government relies heavily on the violent nature of the offense and Otis Mobley’s
16 subsequent flight in support of its claim that “the nature and the circumstances of the offense
17 clearly demonstrate that defendant is both a danger to the community and a flight risk.” United
18 States’ Appeal, p. 8. The government overstates the strength of the evidence against Otis Mobley,
19 which should in any event be the least important factor in the court’s calculus given the
20 presumption of innocence. *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985).
21 Moreover, the government fails to address the ability of the release conditions fashioned by the
22 court to mitigate against those risks, which were certainly recognized and addressed by the
23 magistrate judge.
24
25

26 **C. Mr. Mobley’s history and characteristics**
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1 Otis Mobley's history and personal characteristics provide evidence to rebut the presumption
2 that no combination of conditions can reasonably assure appearance and the safety of the
3 community. The magistrate properly considered evidence of Mr. Mobley's character and personal
4 history in combination with the risk factors apparent from his prior contacts with law enforcement,
5 to craft a set of conditions that will reasonably assure the safety of the community and Mr.
6 Mobley's future appearance before the court. The magistrate's release order, while reasonably
7 assuring the safety of the community and future court appearances, provides this young defendant
8 with a stable environment where he may continue working toward his GED, through online
9 coursework if he chooses, and where he will obtain substance abuse counseling. The police reports
10 provided to defense counsel documenting Mr. Mobley's prior law enforcement contacts indicate
11 that marijuana and alcohol appear to accompany, if not underlie, many of Mr. Mobley's prior law
12 enforcement contacts. Certainly, home detention (with adequate assurances of community safety)
13 and treatment is in Mr. Mobley's interest, is in the interest of his child, and is in the interest of
14 society as a whole.
15
16
17

18 Otis Mobley, Jr. is 23 years old. He was born in Oakland and raised in Richmond, California
19 and has lived in the Northern District most of his life. He has no known mental health issues. He
20 appears to be good physical health.
21

22 The oldest of five children, Mr. Mobley was raised by his parents, Tonnette Lynch and
23 Otis Mobley, Sr.. Lynch and Mobley, Sr., who have been married for 19 years. They reside with
24 all of their children in Richmond, California. Also living in the home is O.D. Mobley, Mr.
25 Mobley, Jr.'s grandfather. Mr. Mobley, has a four-year-old son, Otis Mobley, III.
26 Mr. Mobley is raising Otis Mobley, III, with his girlfriend of five and a half years, Meliza
27 Contreras. Ms. Contreras lives in El Cerrito, California. She agreed to act as a surety.
28

1 Prior to the detention hearing, undersigned counsel provided pretrial services and the
2 magistrate court with copies of several letters written by family members, in addition to former
3 teachers and a current case manager. Exhibit 2. In addition to comments regarding Mr. Mobley's
4 love and devotion to his young child, several of the letters reference the struggles of Mr. Mobley's
5 late teenage years, and his recent efforts toward pointing his life in the right direction by earning a
6 high school diploma and seeking job training – a reference to his work with the San Francisco
7 Conservation Corps and RAMP program.
8

9 The letters establish the strength of Mr. Mobley's ties to the community, his broad support
10 network and his deep connection to his family. The letters from his family characterize him,
11 among other things, as loving, compassionate, respectful, patient, protective and having integrity.
12

13 The comments of family members are relevant for a number of reasons. First, the
14 supportive community provides a disincentive to flee. Mr. Mobley's strong ties to the community
15 and support network mitigate against risk of flight, particularly because Mr. Mobley lacks
16 significant ties outside of the district, has no assets, owns no passport, and has never left the
17 country. More importantly, his connection to his family and the characteristics attributed to him
18 provide a basis for concluding that the bond signed by family members to whom he is deeply
19 attached provide strong incentive for Mr. Mobley to comply with the conditions of release just as
20 the characteristics described by case managers and teachers indicate that he has attributes that
21 make it likely that he will comply with the conditions imposed, or risk financial devastation for his
22 entire immediate family.
23
24

25 As previously noted, both of Mr. Mobley's parents have co-signed on a \$150,000 bond.
26 Neither own property and therefore cannot secure a bond with property. However, both parties are
27 reliably employed -- Ms. Lynch full time as a bus driver for AC transit and Mr. Mobley, Sr. full
28

1 time as a teaching assistant at De Anza High School in El Cerrito. Both have held their respective
2 jobs for approximately 14 years.⁴

3 Additionally, Madeline Mitchell, Mr. Mobley's grandmother, will post real property to
4 secure the \$150,000 bond and has agreed to act as Mr. Mobley's custodian. Mr. Mobley will
5 reside with her (on house arrest) in Sebastopol. Ms. Mitchell raised four children and was a foster
6 parent to nine. She does not drink alcohol or use drugs and she keeps neither in her home. She has
7 no criminal record. She is 67 years old and recently retired after 34 years of employment at United
8 Airlines, where she started as a secretary and rose to the ranks of a management employee.
9 Because she is retired, she is available to supervise Mr. Mobley. As his custodian, Ms. Mitchell
10 will be required to report any violations to the court and has personally assured the court that she
11 will deliver Mr. Mobley to all future court appearances. In the presence of Mr. Mobley, Ms.
12 Mitchell was admonished that in addition to jeopardizing her financial security and the security of
13 the co-signors (her son and daughter in law), a failure to report a breach of the conditions of
14 release could result in contempt proceedings being brought against Ms. Mitchell. Ms. Mitchell
15 readily accepted these risks, as did Mr. Mobley's parents, demonstrating their belief that he can
16 and will comply with the terms of pre-trial release. The bond incentive, combined with conditions
17 requiring drug and alcohol testing, removal of Mr. Mobley from Richmond, restriction to house
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22 ⁴ The government contends that Otis Mobley, Sr., one of the proposed sureties "lied" to pretrial
23 services about his criminal record by failing to disclose a 23-year-old misdemeanor conviction for
24 providing false identification to a police officer. Government counsel confronted defense counsel
25 minutes before the detention hearing with this information. Undersigned counsel spoke briefly
26 with Mr. Mobley and inquired about his conversation with pretrial services. Mr. Mobley did not
27 recall being asked about his criminal history, which the undersigned noted during the detention
28 hearing. Undersigned counsel has since spoken with the pre-trial service officer that prepared the
report, who confirms that she did ask whether Mr. Mobley had a criminal history, to which he
replied no. Mr. Mobley has little motive to lie to pretrial services and lie to the court about a 23-
year old petty offense, which he suffered in his twenties. A much more likely explanation is that
there was some kind of miscommunication or misunderstanding.

1 arrest in Sebastopol, supervision through GPS monitoring, substance abuse counseling and a
2 search condition will provide Mr. Mobley with incentive and support that will reasonably assure
3 his compliance with the terms of release. At the same time, the conditions provide the court with
4 several monitoring and enforcement mechanisms.

5 The government notes that in *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008),
6 the Ninth Circuit discussed the high-level of trust associated with certain non-custodial conditions
7 of pre-trial release. There, the court was not satisfied that bans on the possession of firearms, on
8 communications with certain people, and on sending money overseas combined with electronic
9 monitoring would sufficiently assure the safety of the community. The Ninth Circuit noted that
10 “although these proposed conditions of release are strict, they contain one critical flaw. In order to
11 be effective, they depend on [the defendant’s] good faith compliance.” In that case, the defendant
12 was accused of providing support to his brother, a prominent member of an al-Qaeda affiliated
13 foreign terrorist organization operating in the Philippines suspected of carrying out numerous
14 deadly attacks in Southeast Asia, among them, the 2002 bombing of a nightclub in Bali that killed
15 over 200 people and the 2004 bombing of the Australian embassy in Jakarta that killed three
16 people and left more than 100 wounded. *Hir* at p. 1084. The government alleged that between
17 June 2006 and August 2007, Hir and his brother were in regular email contact. Their
18 communications established that Hir knew his brother was wanted by the United States
19 government for terrorist activities and made plain that Hir knew of his brother’s violent activities
20 in the Philippines. Hir consistently responded to his brother requests for money and supplies,
21 sending over \$10,000 to his brother using various bank accounts in the Philippines, sending
22 packages, often using false names and return addresses, which included accessories for guns,
23 backpacks, knives, publications about firearms, and hand-held two-way radios used to make
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1 Improvised Explosive Devices (“IEDs”) which were detonated in a bombing in the Philippines
2 that left five dead and twenty-nine injured. *Ibid.*

3 In that case, the Ninth Circuit concluded that restrictive conditions imposed by the court did
4 not reasonably assure the safety of the community, in particular because of the nature of the
5 charged crimes, which involved communications not readily susceptible to effective monitoring. A
6 pre-trial services officer stated that it would not be feasible to monitor all of Hir’s telephone calls,
7 his use of a laptop brought into his home, and any activity taking place through unknown bank
8 accounts that could be accessed by a phone call or a computer. Moreover, the nature of Hir’s
9 conduct involved manipulation and disregard for restrictions imposed by the U.S. law and the
10 restrictions were subject to easy manipulation. Accordingly, the court found the risk of danger to
11 the community to be unacceptably high. *Id.* at p. 1093.
12
13

14 This case is very different. Here, the risk ostensibly posed by Mr. Mobley is not via
15 surreptitious communications and financial support to a terrorist organization. Any danger to the
16 community can be mitigated with the condition of house arrest. If Mr. Mobley violates that
17 condition by leaving Ms. Mitchell’s home in Sebastopol, pre-trial services will be notified by the
18 GPS device and by Ms. Mitchell and Mr. Mobley will be remanded to custody. Ms. Mitchell will
19 provide an additional level of supervision, acting as Mr. Mobley’s custodian. Finally, risk factors,
20 including substance abuse or the possession of firearms can be also be monitored through drug and
21 alcohol testing and search conditions.
22
23

24 The letters in support of Mr. Mobley, discussing the quality of his participation with the
25 San Francisco Conservation Corps and the RAMP program illustrate that Mr. Mobley is able
26 to comply with rigorous requirements and be responsive to direction and supervision and also
27 indicate that Mr. Mobley has made efforts to obtain his GED and gain employment, with the goal
28

1 of getting himself on the right track. The RAMP program is a seven-week job readiness training
2 program designed for at-risk youth. Successful graduates may apply for acceptance into the San
3 Francisco Conservation Corps (SFCC), a job-training program, which provides Corps members an
4 opportunity to work while earning their high school degree. Otis graduated from the RAMP
5 program and was accepted into the SFCC. While working with SFCC, Mr. Mobley arrived at 7:30
6 am, attended classes for two hours, then worked until 4:30 pm.
7

8 In a letter to the court, Jeff Wolcott, Mr. Mobley's case manager at the SFCC, reported that
9 "Otis received glowing recommendations from the RAMP staff, where he worked on developing
10 his professional skills and behavior as well as starting to create his work portfolio that including
11 [sic] his resume, cover letter and master application; in hopes to begin his career goals and begin a
12 life of dedicated employment." Wolcott described Mr. Mobley as "an extremely polite and kind
13 young man who has a lot of gifts that will help him be successful if he is provided with the right
14 support." He further notes that "Otis is one of the few individuals I work with who readily seeks
15 out my help, continuously looking for ways he can improve himself and his future. Otis has been
16 attending John Muir Charter School and is working hard to obtain his California High School
17 diploma. He has been working with me to gain better conflict resolution skills, increase his
18 parenting skills, as well as developing better ways to appropriately conduct himself as a young
19 adult." See Exhibit 2, letter from Jeff Wolcot, MSW.
20
21

22 Samantha Sassi, Associate Director of Academics at the John Muir Charter School writes,
23 "while attending school, Otis consistently demonstrates very good efforts to progress
24 academically, actively participates in class, and is taking significant steps to overcome some of the
25 barriers to his education, which he had previously experienced. *Otis is a conscientious individual,*
26 *who readily follows the directions of his teachers, listens attentively and complies with requests*
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1 *from his supervisors.*” Exhibit 3, Letter from Samantha Sassi (emphasis added). These comments
2 indicate that Mr. Mobley’s personal character will lend itself to compliance with the conditions of
3 release, particularly in view of the bond, which will provide incentive to comply and in view of
4 the easily monitored restrictions designed to mitigate risk. Moreover, undersigned counsel has
5 been in contact with the classification sergeant at Glenn Dyer jail and is aware of no in custody
6 incidents, behavioral concerns that have arisen while Mr. Mobley has been in custody.
7

8 One concern articulated by the government is Mr. Mobley’s admitted history of drug and
9 alcohol use. The court, pretrial services and the government share a concern that Mr. Mobley’s
10 admitted history of frequent drug and alcohol use increase risk of flight and violation pre-trial
11 release violations. Indeed, a review of incident reports documenting Mr. Mobley’s prior contacts
12 with law enforcement reflect that alcohol and or marijuana factor into to many if not most of his
13 prior contacts with law enforcement, particularly where he is alleged to have behaved combatively
14 or resisted authority. Thus, the condition prohibiting Mr. Mobley from using alcohol or controlled
15 substances without a valid prescription mitigates this risk. The court will not have to rely on Mr.
16 Mobley’s good faith compliance as he is subject to testing by pre-trial services. Moreover, the
17 order that Mr. Mobley to engage in counseling, will provide Mr. Mobley with support to further
18 mitigate risk factors presented by his history of substance use. Additionally, Mr. Mobley will be
19 will be confined to a drug and alcohol free home in a rural area. On house arrest in Sebastopol,
20 there will be little option but to comply with the condition that he refrain from consuming alcohol
21 or any unprescribed controlled substances. As an additional monitoring mechanism of last resort,
22 Ms. Mitchell will be obligated to notify the court if Mr. Mobley uses substances on her watch.
23
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26 An additional concern addressed by the magistrate court is Mr. Mobley’s prior failure to
27 appear, indicating risk of flight. The magistrate notes that it is difficult to ascertain how many
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1 failures to appear are for traffic tickets. It is worth noting that there is a significant distinction
2 between release on one's own recognizance and release under the terms contemplated in this case
3 -- under the strict supervision of the court and under the supervision of a custodian who has
4 promised to personally deliver the defendant to court. Mr. Mobley's family faces dire financial
5 consequences if he fails to appear in light of the \$150,000 bond, which certainly did not exist in
6 prior more prone to neglect traffic or misdemeanor matters. Thus, the risk of non-appearance can
7 be mitigated by the conditions of release and supervision.
8

9 Mr. Mobley has never been convicted of a felony offense. He has four prior misdemeanor
10 convictions, including a misdemeanor conviction for domestic violence in September 2011 (age
11 22); public intoxication and driving on a suspended license in June of 2010 (age 20); providing
12 false identification to a police officer in October 2008 and April 2007 (age 18 and 19); and taking
13 a vehicle without the owner's consent in September 2007 (age 18).
14

15 Appellant was on misdemeanor probation at the time of his arrest. To his credit, he was
16 attending anger management classes and acknowledged at the time of his arrest that he needs to
17 work on his anger. The magistrate court notes that while this offense indicates that Mr. Mobley
18 may present a danger to Ms. Contreras, Ms. Contreras volunteered to act as a surety indicating that
19 she is not afraid of him. Significantly, rather than issue a stay away order commonly issued in
20 domestic violence cases, the court deemed it appropriate to impose a "no harass" order, which
21 prohibits Mr. Mobley from harassing or annoying Ms. Contreras, but does not prevent them from
22 being in contact.
23
24

25 In arguing that Mr. Mobley must be detained because he is a danger to the community, the
26 government details multiple incidents in which Mr. Mobley was detained in a car where a firearm
27 was found. Notably, none of the summarized contacts resulted in conviction. In each case, there
28

1 were multiple people present in or with access to the vehicle. When taken, no forensic evidence
2 linked Mr. Mobley to any of the firearms. As to a juvenile incident in which Mr. Mobley's cousin
3 was arrested in possession of a firearm in school, it is to Mr. Mobley's credit that he came forward
4 to take responsibility for his own actions in that incident.

5 The government further argues that Mr. Mobley must be detained because of an incident that
6 occurred in 2009, when at age 19, Mr. Mobley was arrested in connection with a homicide
7 investigation. After being interviewed by police, Mr. Mobley admitted to carrying a gun for
8 defensive purposes and to shooting a man that had threatened Mr. Mobley's and the life of his
9 cousin by charging at them with a loaded firearm. No charges were ever filed. Presumably, law
10 enforcement concluded that Mr. Mobley acted in reasonable self-defense.
11

12 The prior contacts that did not give rise to a prosecution or conviction should be given little
13 weight. In the absence a conviction establishing that Mr. Mobley committed a criminal offense it
14 amounts to a denial of due process to detain him based solely on uncharged, unproven allegations.
15 That said, the magistrate considered these prior contacts and attributed appropriate weight to them.
16 Given the nature and circumstances of the current allegations and Mr. Mobley's prior contacts
17 with law enforcement charged and uncharged, it is appropriate for the court to be concerned about
18 the safety of the community. However, the issue is not whether Mr. Mobley presents a danger but
19 whether any conditions of release can mitigate that danger. In this case, the restrictive conditions
20 of release have been discussed at length. It is worth noting that Mr. Mobley's removal from
21 Richmond, an extremely high-risk community, and house arrest in Sebastopol will mitigate
22 significant risk. Mr. Mobley's personal characteristics as described by family members and
23 teachers, placement on house arrest in Sebastopol, the conditions of electronic monitoring and
24 strict supervision, including drug testing and warrantless searches, and the condition that Mr.
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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 UNITED STATES OF AMERICA,)
15 Plaintiff,)
16 v.)
17 OTIS MOBLEY,)
18 Defendant.)
19)
20)

No. CR-12-00235 YGR

**UNITED STATES' REPLY IN
SUPPORT OF APPEAL OF PRE-TRIAL
RELEASE ORDER FOR DEFENDANT
OTIS MOBLEY**

21 The United States submits this reply to address the arguments set forth in Defendant Otis
22 Mobley's Opposition To United States' Appeal Of Release Order.

23 **A. The United States Carried Its Burden To Demonstrate That Defendant Is**
24 **Both A Flight Risk And A Danger To The Community.**

25 The United States listed six specific reasons why the conditions imposed are not
26 adequate, and why detention is necessary to both ensure defendant's future appearance and to
27 ensure the safety of the community:

28

- 1 • While on probation, defendant orchestrated the armed robbery in this case and
2 fled into a nearby field to hide, only to remark upon his eventual arrest: “Damn, I
3 should have just stayed in the bushes. You guys wouldn’t have found me, huh?”
4 This demonstrates defendant’s disregard for court imposed supervision and the
5 risk of flight he poses, as well as the obvious danger to the community.
- 6 • After being arrested for murder in 2009, defendant admitted to police that he shot
7 and killed the victim – with a handgun that he always carried for protection –
8 during a marijuana transaction gone awry. If defendant were to merely remove his
9 ankle monitor while on pretrial release, and walk away from his grandmother’s
10 residence, he poses the utmost danger to the community.
- 11 • Defendant admits that he has been a poly-substance abuser since his teenage
12 years, abusing alcohol, marijuana, ecstasy, cocaine, and methamphetamine.
13 Defendant’s long-term drug abuse heightens the risk he will flee and the danger he
14 poses to the community. It further highlights that his family members – who
15 apparently had no knowledge of his rampant drug abuse – are not appropriate
16 sureties or custodians, as they are unable to control his behavior.
- 17 • Defendant’s criminal history reflects multiple failures to appear in misdemeanor
18 and traffic cases, and defendant was on probation at the time of the instant
19 offense, demonstrating a disregard for supervision and orders of the courts.
- 20 • One of defendant’s sureties lied to Pretrial Services about his criminal history and
21 then lied to the Court about his misstatements to Pretrial Services. He is, of
22 course, not an appropriate surety.
- 23 • Even if a secured bond could mitigate the risk of flight, it does nothing to mitigate
24 the danger to the community posed by defendant, especially if he is placed into the
25 custody of his family members who have been unable to control defendant’s
26 criminal behavior and drug abuse to date.

27 To further support the above points, the United States described the violent nature and
28 circumstances of the charged offense, the weight of the evidence against defendant, and

1 defendant's criminal history and characteristics. As further support, the United States provided a
2 police report detailing defendant's confession to shooting and killing another individual during a
3 marijuana transaction gone awry. In response, defendant argues that: "Mr. Mobley admitted to
4 carrying a gun for defensive purposes and to shooting a man that had threatened Mr. Mobley's
5 and the life of his cousin by charging at them with a loaded firearm." Defendant's argument
6 suffers from several glaring omissions: (1) he was carrying the loaded handgun during a drug
7 transaction; (2) he admitted to always carrying a firearm; and (3) it is both unlawful and
8 extremely dangerous for defendant to be carrying a loaded firearm for any reason. Moreover,
9 defendant completely ignores the video (taken from the mobile telephone of defendant's cousin
10 and co-defendant) of defendant proudly brandishing a Tech-9 firearm, the same type of firearm
11 used in the instant offense.

12 **B. The Conditions Imposed In The Release Order Are Insufficient To**
13 **Reasonably Ensure Defendant's Appearance And The Safety Of The**
14 **Community.**

15 The principal condition of the Release Order is that defendant will reside with his
16 grandmother in Sebastopol, and that he will be subject to electronic monitoring. Defendant
17 argues that his living outside of the "extremely high-risk" Richmond community is a factor that
18 will both assure his appearance and the safety of the community. This ignores, however, that
19 defendant has been arrested in nearly every community in which he has been: Pinole, Napa,
20 Richmond, Berkeley, San Pablo, South San Francisco, and El Cerrito. Based upon his track
21 record, there is no reason to believe that defendant will suddenly change his behavior in
22 Sebastopol.

23 Defendant further argues that the use of an electronic monitoring device will also assure
24 both his appearance in court and the safety of the community, because "if Mr. Mobley violates
25 that condition [of house arrest] by leaving Ms. Mitchell's home in Sebastopol, pre-trial services
26 will be notified by the GPS device and by Ms. Mitchell and Mr. Mobley will be remanded to
27 custody." As defendant concedes, the electronic monitoring device does nothing to prevent
28 defendant from absconding and, therefore, from committing further violent crime. At best, it will
notify Pretrial Services that defendant has absconded, and law enforcement will then have to find

1 and arrest defendant (something he has willfully and knowingly avoided in the past). In this
2 regard, if defendant removes the ankle monitor, by simply cutting it off, law enforcement will
3 have no way to track him. Moreover, even if defendant complies with the home confinement, he
4 remains a danger to the community. In the instant case, defendant orchestrated the armed
5 robbery via the telephone. The conditions of release do nothing to prevent such conduct.

6 Additionally, many of the other conditions of release cited by defendant are conditions to
7 which defendant has been subject for his entire life: (1) “he is required to refrain from criminal
8 activity,” (2) “he is also prohibited from committing any other state of federal crime,” and (3) he
9 is prohibited from using “controlled substances without a valid prescription.” Defendant has
10 failed to abide by these laws to date. There is no reason to believe that he will now comply with
11 the Court’s orders to do the same. Furthermore, defendant has admitted to carrying a firearm on
12 a regular basis despite laws prohibiting the same. A condition ordering defendant not to “possess
13 any firearm or explosive device” is of little moment.

14 Finally, defendant focuses on letters of support submitted by family members, close
15 family friends, his 8th Grade teacher, his case manager, and the Associate Director at his current
16 school. His 8th Grade teacher, however, writes about defendant’s character as an 8th grader in
17 2002-2003, well-before defendant’s criminal history and drug abuse began. Additionally,
18 defendant’s case manager and the Associate Director at his current school have only known
19 defendant since December 2011 and January 2012 respectively (approximately three months
20 before defendant was arrested in this case).

21 The remaining letters come from defendant’s family and close family friends. As is to be
22 expected, these letters demonstrate love and unflagging support for defendant. These letters also
23 provide additional relevant information to the inquiry at hand. First, only some of the letters
24 appear to acknowledge defendant’s criminal history (although not its extent): (1) “As he became
25 a teenager, he pulled away from the church and became attached to people of which he was
26 unequally yoked.” Letter of Madeline L. Mitchell; (2) “I know that Otis got in some trouble as a
27 teenager for various reasons.” Letter of Cheryl Peterson; (3) “[A]ll Youngman are not as bad as
28 they appear to be in some of the choices they choose to take.” Letter of Shanelle M. Lynch. The

1 authors of the other letters appear either not to know of defendant's criminal history or drug
2 abuse, or to ignore both. As one would expect of family members, however, none of the letters
3 acknowledge defendant's numerous arrests throughout Northern California for firearms offenses,
4 domestic violence, resisting arrest, false impersonation, theft, and homicide. None of the letters
5 appear to describe the twenty-three year old man wielding a Tech-9 in a haze of apparent
6 marijuana smoke – the image of defendant recovered from his co-defendant's mobile telephone.
7 None of the letters acknowledge that defendant has previously killed a man during a drug deal
8 gone awry. None of the letters acknowledge defendant's serious substance abuse problem,
9 involving the abuse of alcohol, marijuana, ecstasy, cocaine, and methamphetamine. Although,
10 all of the letters express love and support for defendant, and hope for his future, they do not paint
11 an accurate or complete picture of defendant.

12 Furthermore, the letters demonstrate the love, support, and opportunities that defendant
13 has been afforded throughout his life. Defendant's father describes defendant's athletic prowess
14 in "Karate, Soccer, Baseball, Basketball, and Football." He further describes defendant's
15 academic opportunities at "Castro Elementary in El Cerrito," "Sacred Heart Grammar School in
16 San Francisco," "St. Ignatius summer school," "Hercules High," "South San Francisco High,"
17 and "El Cerrito High." Defendant's mother describes how defendant was enrolled "in some of
18 the best schools in the Bay Area, public and private," how defendant was "busy in after school
19 programs and activities," and how defendant's teachers "spoke very highly of him." Defendant's
20 aunt states that defendant has "a host of accomplished people in his family on both sides his
21 father and his mother have always provided him with anything he needs to encourage him when
22 times are hard." Despite all of these opportunities, defendant finds himself with the criminal
23 history detailed in the United States' Appeal, and with a significant poly-substance abuse
24 problem. Furthermore, the letters demonstrate that despite all of their efforts throughout his life,
25 defendant's family has been unable to control defendant's behavior, thus demonstrating the
26 inadequacy of the release conditions, which allow defendant to return to the custody of his
27 family.

1 **C. The United States Proffered Direct Evidence That Defendant Orchestrated**
2 **The Armed Robbery.**

3 Defendant's argument that his actions do "not convincingly establish that he knew that
4 Khusar Mobley planned to pull a firearm once inside the vehicle" is contradicted by the United
5 States' proffer.¹

6 To start, defendant engaged in negotiations to sell firearms to a confidential informant.
7 These negotiations took place over the course of a week and were monitored by law enforcement.
8 The telephone number used by defendant during these negotiations was registered to him. In the
9 final conversation, defendant offered to sell a grenade launcher and three grenades – which we
10 now know he clearly did not have – in exchange for \$1,000. It is now obvious that defendant
11 was arranging a robbery.

12 On March 28, 2012, defendant drove his two co-defendants – both of whom were armed
13 – to the parking lot in Richmond where they had agreed to meet the confidential informant.
14 Defendant got out of his car, walked over to the undercover agent's car with his armed co-
15 defendants, and was introduced as "Otis." Demonstrating that the intent was armed robbery from
16 the start, almost immediately upon the exchange of greetings, the violent assault and attempted
17 robbery occurred. Again, making it abundantly clear that the entire transaction was a ruse
18 orchestrated by defendant to set up the armed robbery, no grenade launcher or grenades were
19 recovered from the scene or defendant's car.

20 It defies logic to suppose that the defendant did not think a firearm would be drawn
21 during a robbery that he orchestrated. The goal from the start was to rob the undercover agent of
22 \$1,000. The defendant and his co-defendants brought two loaded firearms to accomplish that
23 objective. And, one of those firearms was of the same make and model – a Tech-9 – that
24 defendant is holding in a video recovered from his co-defendant's mobile telephone.

25
26 ¹ Defendant also states in his Opposition: "As to Otis Mobley, the robbery, assault and
27 firearm allegations rely on Title 18, United States Code, section 2, which provides that whoever
28 aids and abets a crime against the United States is punishable as a principle." Defendant is, of
course, liable for all of the charged crimes as a co-conspirator as well, pursuant to Pinkerton v.
United States, 328 U.S. 640 (1946). See Ninth Circuit Model Criminal Jury Instruction No. 8.25.

