

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

*

THE UNITED STATES OF AMERICA

*

v.

*

Criminal No. AMD-99-73

DONTE H.

*

* * * * *

**DEFENDANT'S BRIEF IN OPPOSITION
TO THE GOVERNMENT'S MOTION FOR PRETRIAL DETENTION**

The Defendant, Donte H., through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Gary W. Christopher, Assistant Federal Public Defender, respectfully submits his brief to the Court setting forth the legal and factual reasons which should compel the Court to deny the motion of the government that Mr. H. be detained pending trial pursuant to 18 U.S.C. § 3142.

STATEMENT OF FACTS

On February 25, 1999, an indictment was returned charging that the Defendant, Donte H., on January 16, 1999, unlawfully possessed a firearm in violation of 18 U.S.C. § 922(g). February 26, 1999, a bench warrant issued authorizing Mr. H.'s arrest on the indictment. On March 12, 1999, Mr. H. appeared before the Court pursuant to FRCrP Rule 5. The government moved for detention pursuant to 18 U.S.C. § 3142(f)(1)(D) and (f)(2)(A).

On March 17, 1999, a hearing was convened before Hon. James K. Bredar pursuant to 18 U.S.C. § 3142(f). The Court received the report of the United States Pretrial Services Office, which summarized Mr. H.'s personal and family history and criminal history. The report recounted the U.S. Pretrial Services Officer's contact with Mr. H.'s mother, Z T, who confirmed

that Mr. H. could reside with her pending trial “as long as he was willing to abide by her ‘rules.’ . . . Ms. Turnquist indicated she will not tolerate drug use or unlawful behavior by the defendant in her home” Later in the hearing, the Court heard the testimony of Mr. H.’s father, Keith H., who is a civilian employee with the United States Air Force in Boston. Mr. H. suggested that requiring his son to live with him pending trial and requiring him to work as a janitor on the Air Force base (which Mr. H. could arrange) would remove him from the unwholesome influences which the son encounters in Baltimore.

The defense agreed that the government was legally entitled to move for detention on both the “danger” and “flight” prongs of § 3142(f). The government, in turn, acknowledged that it did not enjoy the rebuttable presumption under § 3142(e) and consequently that they bore the burden to establish by clear and convincing evidence that no combination of conditions would reasonably assure the safety of other persons and the community or, by a preponderance of the evidence, that Mr. H. posed a serious risk of flight. The Court concluded that Mr. H. was not a flight risk.

The government maintained that the factors set forth in sec. 3142(g), including the nature and circumstances of the offense and the weight of the evidence, established clearly and convincingly that Mr. H. would be a danger to others. In support of this contention, the government offered a verbal summary of the facts underlying the charged offense as follows:

“The government’s evidence would be that on January 16, 1999, officers were in the 2700 block of Spelman Road, which is in the Southern District of Baltimore City. Officers approached H. about loitering in the area, intending to arrest him. However, he ran.

With the officers in pursuit, H. removed a gun from his waistband area and dropped it to the ground. The gun was recovered, it was a Lorcin .9mm semiautomatic, loaded with ten rounds of ammunition. And that weapon is not

made in the State of Maryland.”

T.5, Proceedings of March 17, 1999.

The defendant objected to the Court’s consideration of the proffer, contending that it constituted uncorroborated “drowsy” allegation and that “the court [should] give no weight to the proffer or, in the alternative, require that the Government proceed by live testimony, which Mr. H. could confront through cross examination.” T.10, Proceedings of March 17, 1999. The defense maintained that the uncontradicted evidence that both parents were independently capable of strict third-party supervision, in the absence of any credible indicia of the nature of the offense or the weight of the evidence, counseled in favor of release.

The Court ruled that Mr. H. did not pose a flight risk and that detaining him on that basis would be inappropriate. T. 15, Proceedings of March 17, 1999. Then focusing on the government’s election to proceed by proffer, the Court ruled:

“What I’m going to do in this case -- and before I enter an order releasing the Defendant -- is give the Government the opportunity to ask for a continuance of this hearing until such time as they could put a live witness before me that might address this concern.”

T. 16, Proceedings of March 17, 1999. The government responded that it “would like to have an opportunity to present the witnesses,” *id.* at T.17, and the matter was continued to the following day, March 18, 1999.

At the continued hearing on March 18, rather than present the testimony it had promised, the government offered a copy of the District Court of Maryland “Statement of Probable Cause” subscribed by Baltimore City Police Office Jimmy N. Dease, which proffered as follows:

“On 16Jan99 at P/O’s Dease and Wright were in the area of 2700 Spelman Road.

This is a high crime and drug area. At which time the def was loitering in that area. Both officers exited thier [*sic*] vehicles and began to approach the def, later indentified [*sic*] as Donte Dee H., Jr., to affect [*sic*] an arrest. At which time a foot pursuit occured [*sic*] and during same a firearm dropped to the ground¹ from the Def waist area and P/O Wright recovered and secured the weapon and found same to be a Larcin 9mm. Ser. #005903 handgun fully loaded with 10 rounds. Some of the serial numbers slightly obliterated. Def was arrested and transported to CBIF and charged. Weapon was ran [*sic*] via KGA radio and same came back no stolen. All property recovered was submitted to ECU.

Asked to justify the failure to present the promised witness, the government responded that I thought that the Court would accept the sworn statement of a police officer. It thought that that would be adequate.” T. 17, Transcript of March 18, 1999. The Court responded:

“[T]his Court doesn’t automatically believe what is proffered about the statements of police officers, and I think any court that does is placing the citizenry in danger. When there is corroboration, like there frequently is, then yes, those proffers can be relied upon, but this is the sort of case where there needs to be a live presentation.”

T. 19-20, Proceedings of March 18, 1999. The Court thereupon ordered briefing of the matter.

¹ The Defense is constrained to observe the substantial difference between the proffer of March 17 that Mr. H. “removed a gun from his waistband area and dropped it to the ground” and the proffer contained in the affidavit that “a firearm dropped to the ground from the def waist area.”

ARGUMENT

I. THE BAIL REFORM ACT AND PRINCIPLES OF DUE PROCESS FORECLOSE THE DETENTION OF A DEFENDANT BASED UPON THE WEIGHT OF THE EVIDENCE OR THE NATURE AND CIRCUMSTANCES OF THE OFFENSE CHARGED IN THE ABSENCE OF TESTIMONY OR OTHER EVIDENCE WHICH THE DEFENDANT MAY CONFRONT.

None of the reforms implemented by the Bail Reform Act of 1984 (“the Act”) were intended to compromise the defendant’s interest in fair and reliable findings of fact. Indeed, in finding that the Act on its face was consistent with due process requirements, the Court in *United States v. Salerno*, 481 U.S. 739, 750-52 (1987), relied heavily on the “extensive” procedural safeguards afforded by section 3142 which require a “full-blown adversary hearing.” The *Salerno* Court pointedly left open the possibility that the Act could be applied in an unconstitutional manner. *See id.* at 745 n.3 (“We intimate no view on the validity of any aspects of the Act that are not relevant to respondent’s case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.”); *see also, United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (“It is conceivable that some combination of procedural irregularities could render a detention hearing so flawed that it would not constitute” a hearing under the Bail Reform Act). The Defense submits that it would be inconsistent with the Act and the due process principles which it implements to permit detention to be predicated upon the circumstances of the alleged offense or the weight of the evidence, see sec. 3142(g) (1) and (2), where the only “evidence” going to those factors is a proffer of what witnesses who are not present and who cannot be confronted might say.

The terms of the Act spell out explicit procedural rights which attach to a defendant on a

government motion for detention. He has a right to counsel, “an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.” 18 U.S.C. § 3142(f). No corresponding right of the government to proceed by proffer is identified in the Act, but Courts have generally recognized a limited right to proffer hearsay. As Judge Breyer observed for the First Circuit in *United States v. Acevedo-Ramos*, 755 F.2d 203, 207 (1st Cir. 1985), “Congress did not intend to forbid the judicial officer to rely upon investigatory descriptions of evidence (and similar hearsay) *where the judicial officer reasonably concludes that those descriptions, reports, and similar evidence, in the particular circumstances of the hearing, are reliable.*” (Emphasis supplied).

On the other hand, it is equally clear that courts are not “free to detain a defendant by arbitrarily crediting an unpersuasive government proffer The stakes in pretrial detention are too high.” *United States v. Defede*, 7 F. Supp. 390, 394 (SDNY 1998). The right to proffer hearsay is not a blank check. Carried to its logical conclusion, the government’s right to proffer would vitiate the core due process components which the *Salerno* Court regarded as fully preserved.

The Defense suggests that a logical construction of the act would impose a limit on the government’s right to proffer that turns on the § 3142(g) factor² implicated by the proffer. Where,

² The judicial officer is required by §3142(g) to “take into account the available information concerning ----

- (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
- (2) the weight of evidence against the person;
- (3) the history and characteristics of the person, including ---
 - (A) 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

for example, the government grounds its motion on a concern that the defendant will flee or poses a danger because of his extensive record for violence, a proffer of the facts alleged to be underlying the charge might be received for informational purposes precisely because it is irrelevant to the §3142(g) factors animating the motion. Where, as in this case, however, the government wishes to invoke the “circumstances of the offense charged,” § 3142(g)(1), or “the weight of the evidence against the person,” § 3142(g)(2), as bases for a finding by clear and convincing evidence that the defendant poses a danger to the community under § 3142(f), the proffer should not be permitted.

Such a construction fully comports with “the competing demands of speed and of reliability” which inhere in the Act, *United States v. Acevedo-Ramos*, 755 F.2d at 207, while preserving the right of the defendant most implicated by a proffer of hearsay: the Sixth Amendment right of confrontation. These rights are fundamental and essential for a fair trial under the Sixth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 404-05 (1965); *Barber v. Page*, 390 U.S. 719, 721-22 (1968). The Court has applied this right not only under the Sixth Amendment in criminal cases, but also under the Due Process Clause of the Fifth Amendment in administrative and regulatory actions. *See e.g. Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). In particular, due process requires that a defendant have an opportunity to confront and cross-examine adverse witnesses when important decisions turn on questions of fact. *See Chambers v.*

history, and record concerning appearance at court proceedings; and
(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on some other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release”

Mississippi, 410 U.S. 284, 294-95 (1973); *Greene*, 360 U.S. at 496-97; *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). In these situations, the Due Process Clause generally prohibits the use of proffers because such use deprives the defendant of an important opportunity to confront and cross-examine witnesses. See *Vitek v. Jones*, 445 U.S. 480, 495-96 (1980) (right to confrontation and cross-examination at mental commitment proceeding); *Morrissey v. Brewer*, 408 U.S. 471, 486-89 (1972) (right to confrontation and cross-examination at parole revocation proceeding); *In re Winship*, 397 U.S. 358, 368 (1970) (right to confrontation and cross-examination at juvenile delinquency proceeding); *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969) (right to confrontation and cross-examination at probable cause hearing to determine whether criminal laws have been violated); *Specht v. Patterson*, 386 U.S. 605, 608-10 (1967) (right to confrontation and cross-examination at hearing before accused can be detained under sexual offenders law); *Greene*, 360 U.S. at 496-97 (right to confrontation and cross-examination at government security clearance revocation proceeding).

To permit what the government attempted in this case -- to defeat a liberty interest substantially on the basis of proffered “facts” which they would not trust to confrontation -- would be to make of the Act “a scattershot attempt to incapacitate those who are merely suspected of . . . serious crimes.” *United States v. Salerno*, 481 U.S. at 750. If the Act is to extend the core protections intended by Congress, it must certainly forbid detention based upon the facts of the charged offense unless those facts are, on a defendant’s request, presented by witnesses and subjected to cross examination.

II. FEDERAL JUDGES AND MAGISTRATE JUDGES ARE EMPOWERED TO COMPEL THE PRESENTATION OF TESTIMONY IN CONNECTION WITH A GOVERNMENT MOTION FOR DETENTION UNDER THE BAIL REFORM ACT.

Courts have made clear that whatever right the government may have to proceed by proffer under 18 U.S.C. §3142 is “subject to the discretion of the judicial officer presiding at the detention hearing.” *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987). The courts which have allowed the government to proceed by proffer have been careful to underscore the importance of the liberty interests at stake and the corresponding need for reliable factfinding on the § 3142(g) issues.

“[W]hile the Act hence gives courts considerable discretion regarding methods of presenting information about the risk of flight, the exercise of that discretion should reflect an awareness of the high stakes involved. As the Third Circuit observed while discussing the trial court’s power to limit cross-examination ‘to prevent a pretrial hearing from becoming a full-blown trial,’ such power should always be exercised ‘with the recognition that a pretrial detention hearing may restrict for a significant time the liberty of a presumably innocent person. . . . The judge or magistrate accordingly retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof.”

United States v. Martir, 782 F.2d 1141, 1145 (2d Cir. 1986).

The point of these cases that the methods by which information is to be presented at a hearing under § 3142 are ultimately subject to the discretion of the court, and consequently whatever right the government has to proffer is limited by that same discretion. Where the government’s proffer leaves the judicial officer unable to conclude reasonably “that th[e proffered] descriptions, reports, and similar evidence in the particular circumstances of the

hearing, are reliable,” the court is empowered to require the government either to produce a fact witness or lose the motion for detention. *United States v. Acevedo-Ramos*, 755 F.2d 203, 207 (1st Cir. 1985). While permitting proffers in some cases, the Court may “selectively insist[] upon the production of the underlying evidence or evidentiary sources where their accuracy is in question.” *Id.*

In this case, after thoughtful consideration of the Pretrial Services report, the defendant’s evidence, and the parties’ arguments, the Court determined that detention would be considered only if the government produced a witness which the defense could confront. The Court’s demand that the witness be produced on pain of denying the motion for detention could not have been more express. After considering the matter overnight, the Assistant United States Attorney and her supervisors made the calculated decision to flout the Court’s exercise of discretion by not presenting the witness. Denial of the Motion for detention is the appropriate judicial response under the Bail Reform Act, is essential to vindicate the Court’s exercise of discretion, and is precisely what the Court promised to do should the government rest on its proffer.

III. UNDER THE CIRCUMSTANCES PRESENTED BY THIS CASE, INCLUDING THE GOVERNMENT’S REFUSAL TO PRESENT LIVE TESTIMONY, MR. H.’S RELEASE ON APPROPRIATE CONDITIONS IS WARRANTED.

The government urged detention in this case both on the basis that Mr. H. posed a flight risk and on the ground that he posed a danger to the community. See 18 U.S.C. § 3142(f)(1) and (2). Upon a record which established that Mr. H. had never wilfully failed to appear for court,³

³ The Report of the Pretrial Services Officer note failures to appear on November 27, 1995, and on October 29, 1993. The Report makes equally clear, however, that Mr. H. was incarcerated on other charges on both of the dates in question.

that he is a lifelong resident of Baltimore, that his two concerned parents each proposed very strict personal supervision of their son⁴, and that the Pretrial Services Office believed that conditions could be fashioned to assure his appearance, the Court quickly concluded that the government had not established that Mr. H. was a flight risk.

Ultimately, then, the issue narrows to whether the government has persuaded the Court by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person and the community. 18 U.S.C. § 3142(f); *United States v. Clark*, 865 F.2d 1433, 1435-36 (4th Cir. 1989). To resolve that matter, the Court must first determine whether the government’s evidence establishes that the defendant poses a danger, “tak[ing] into account the available information concerning” the nonexclusive list of factors set forth at § 3142(g). Finally, if the Court determines that a danger to the community has been established by clear and convincing evidence, the Court must then determine whether there is a combination of conditions which will reasonably mitigate that danger. *See generally United States v. Williams*, 735 F.2d 329 (4th Cir. 1985).

A. The sec. 3142(g) factors.

The Court must first determine whether “[t]he nature and circumstances of the offense” and the “weight of the evidence” support the government’s contention that Mr. H. poses a danger. Sec. 3142(g)(1) and (2). The Defense has already suggested to the Court in this Memorandum that, because of the government’s unwillingness to offer testimony about the

⁴ The parents are separated. The mother would require Mr. H. “to abide by her ‘rules’” and volunteered that “she will not tolerate drug use or unlawful behavior by the defendant in her home as she has a security clearance at work she does not want to lose.” The father, a civilian employee of the U.S. Air Force in Boston proposed moving him to Boston (away from influences here which he regards as unwholesome) and requiring him to work as a janitor in his office.

alleged offense, these factors as a matter of law should militate against a finding of dangerousness.

Even crediting the government's proffer, however, the Court is left with very little to suggest that the "circumstances" and "weight" factors weigh in favor of detention. The averments contained in the written "sworn affidavit" are among the most transparent and incredible this Court will likely ever see. It describes how a firearm remarkably "dropped⁵ to the ground from the def waist area" as the officer attempted to arrest him for "loitering."⁶ Moreover, even indulging every conceivable negative implication from the proffer, the Court is left with no suggestion that the firearm was used in connection with any other unlawful behavior.

⁵ "Were this the first time a policeman had testified that a defendant dropped a packet of drugs to the ground, the matter would be unremarkable. The extraordinary thing is that each year in our criminal courts policemen give such testimony in hundreds, perhaps thousands, of cases -- and that, in a nutshell, is the problem of 'dropsy' testimony. It disturbs me now, and it disturbed me when I was at the Bar." *People v. McMurty*, 64 Misc.2d 63, 314 N.Y.S.2d 194, 195-96 (Cr.Ct. N. Y. 1970).

⁶ The nature of the "loitering" is not explicated at all. We do not know whether the affiant was referring the elements of a particular loitering ordinance or to the familiar common law implication of the term: "to be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind." *Blacks Law Dictionary* 848 (Fifth Edition 1979). The Officer's invocation of the term "loitering" evokes a suggestion of police work at its poorest and most cynical.

"[T]he design of [the loitering statute at issue] is to give a police officer the right to arrest persons whose appearance or actions arouse the officer's suspicion that the suspect has been or is likely to be involved in some transgression of the law not then specifically identifiable by the officer. In short, the ordinance is designed to permit 'arrests on suspicion.'

City of Portland v. James, 251 Or. 8, 444 P.2d 554 (1968). *See also Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting) (loitering and vagrancy statutes "allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.)"

The § 3142(g)(1) and (2) factors militate against the government's "dangerousness" argument.

Of appropriate concern to the Court on the issue is the § 3142(g)(3) factor -- Mr. H.'s history and characteristics. Mr. H. is a young man who has been convicted twice on three separate charges of drug trafficking, and he was charged with the instant offense while on probation. The record thus arguably suggests a person who might continue to be involved with the drug world in the absence of more stringent conditions than the State courts had imposed.⁷ Whether that would be the consequence of outright release, however, clearly borders on the speculative and for that reason is not clearly and convincingly established, as § 3142(f) requires.

B. Are there conditions which will reasonably address the danger demonstrated?

Even if, however, the Court determines that Mr. H. poses a hypothetical danger to the extent of re-involving himself with drugs if released and left to his devices, the ultimate issue is whether there are conditions which can mitigate the perceived danger. Such conditions clearly exist. While the Court may be appropriately reluctant simply to release Mr. H. to the streets, as the state courts have done, the only danger suggested by the record -- involvement with the drug world of the streets -- can be plainly avoided by any number of conditions available to the Court. The most stringent, perhaps, would be release to the third-party custody of Mr. H.'s father in Boston, where, when not under electronic monitoring and home detention 400 miles from his drug friends, he will be working as a janitor at his father's place of business and will be supervised by the U.S. Pretrial Services Office. The Defense frankly believes that that extreme

⁷ From the PTS Report, it does not appear that electronic monitoring, home detention, urinalysis, third-party custodianship, community confinement, or other strictures available to this Court were utilized in connection with his release by the State courts. This Court is required to consider those alternatives. *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985).

level of structure is unnecessary and that he could be appropriately and more conveniently monitored by the UPS Office here in Baltimore while on electronic monitoring and home detention under the third-party custody of his mother. Though the Defense does not believe release conditioned on community confinement is necessary, that alternative is also clearly available to the Court.

CONCLUSION

In summary, the Court has before it a case where the only cause for concern cognizable under the Act is that this young man, left to his devices, has persisted in involving himself in drugs. Every other factor counsels that he will pose no danger. The structure that can be imposed on that young man's life are substantial and will reasonably vitiate any concern the Court might have. The government has not clearly and convincingly demonstrated that there are no conditions which would reasonably assure the safety of the community. The Motion for Detention should be denied, and Mr. H. should be released on appropriate conditions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 24, 1999, a copy of the foregoing Motion was delivered to Jane M. Erisman, Esquire, Assistant United States Attorney, to John F. Purcell, Esquire, Assistant United State's Attorney, 820 United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201, and to Gina Palmisano, United States Pretrial Services Officer, United States Courthouse, 101 West Lombard Street, Baltimore, MD 21201.

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