AO 472 (Rev. 12/03) Order of Detention Pending Trial

UNITED STATES DISTRICT COURT

WESTERN District of NORTH CAROLINA

UNITED STATES OF AMERICA

V.

BOBBY LEE MEDFORD
Defendant

ORDER OF DETENTION PENDING TRIAL

Case 1:07cr122-1

In accordance with the Bail Reform Act, 18 U.S.C. § 3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I—Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. § 3142(f)(1) and has been convicted of a ☐ federal offense ☐ state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed - that is
- ☐ a crime of violence as defined in 18 U.S.C. § 3156(a)(4).
- ☐ an offense for which the maximum sentence is life imprisonment or death.
- ☐ an offense for which a maximum term of imprisonment of ten years or more is prescribed in _____ *
- ☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. § 3142(f)(1)(A)-(C), or comparable state or local offenses.

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense.

☐ (3) A period of not more than five years has elapsed since the ☐ date of conviction ☐ release of the defendant from imprisonment for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an) other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternative Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in _____
☐ under 18 U.S.C. § 924(c).

(2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternative Findings (B)

☐ (1) There is a serious risk that the defendant will not appear.

X (2) There is a serious risk that the defendant will endanger the safety of another person or the community.

SEE ATTACHED ADDENDUM TO DETENTION ORDER

Part II—Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by X clear and convincing evidence ☐ a preponderance of the evidence that

SEE ATTACHED ADDENDUM TO DETENTION ORDER

Part III—Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a reasonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

December 21, 2007
Date

Dennis L. Howell
Signature of Judge

Dennis L. Howell, United States Magistrate Judge
Name and Title of Judge

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C. § 801 *et seq.*); (b) Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*); or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. § 955a).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:07cr122-1

UNITED STATES OF AMERICA,	)	
	)	
Vs.	)	**ADDENDUM TO**
	)	**DETENTION ORDER**
BOBBY LEE MEDFORD.	)	
	)	

ADDITIONAL FINDINGS AND CONCLUSIONS

I. Factors Considered

In accordance with 18, United States Code, Section 3142(g), in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer considering release must 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 an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed or involves a narcotic drug;
(2) the weight of the 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 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 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.

18 U.S.C. § 3142(g).

As discussed below in the context of 18, United States Code, Section 3142(f)(2), the court has considered each factor and heard evidence and argument from both counsel for the defendant, a witness who gave testimony in support of defendant, and arguments from the government. In addition, the court has considered the allegations of the indictment, as well as the report provided by Pretrial Services.

II. Applicable Standard Under Section 3142(f)(2)

The government has moved for detention under Section 3142(f)(2). The Motion for Detention does not, however, involve the more common grounds for detention found in Section 3142(f)(1).[1] Instead, the government relies exclusively on the provisions of Section 3142(f)(2). Under such provision, detention is warranted where the defendant poses a serious risk of flight or where there is a serious risk that

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[1] Under Section 3142(f)(1), a defendant is eligible for detention in cases involving: (1) a crime of violence (2) an offense with a maximum punishment of life imprisonment or death (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. 18 U.S.C. § 3142(f)(1).

defendant would obstruct or attempt to obstruct justice or threaten, injure or intimidate a perspective witness or juror. Proof of both is not required.

In making either showing, the burden of proof is on the government. As to risk of flight, the government must showing by a preponderance of the evidence that the defendant poses a serious risk of flight. United States v. Portes, 786 F. 2d 758, 765 (7th Cir. 1985). As to the safety of any other person or the community, the government's burden is to make that showing through clear and convincing evidence. Clear and convincing evidence is something more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. Addington v. Texas, 441 U.S. 418 (1979); 18 U.S.C. § 3142(f)(2).

As with Section 3142(f)(1), in considering whether the government has met its burden under Section 3142(f)(2), the court is to apply the factors set forth under Section 3142(g).

III. Definition of Applicable Terms

The term "dangerousness" as used in the Bail Reform Act of 1984 has a much broader construction than its common meaning might suggest. In considering dangerousness of a defendant, the court considers the "safety of any other person or the community."

When such phrase is broken down into its constituent parts, the reference to

"safety of any other person" covers the situation in which the safety of a particularly identifiable individual, perhaps a victim or witness, is of concern. In the second part, the "safety of the community" refers to the danger that the defendant might pose to the community by engaging in criminal activity that would prove detrimental to the community. See United States v Burstyn, 2005 WL 5597605 (S.D. Fla.. 2005).

In determining whether the accused constitutes a danger to the community, each case must be considered on its own merits, and a court must determine whether the need to protect the community becomes so compelling that detention is appropriate. The government is not required to present a record of violence or a history of dangerous physical conduct to justify detention. Applying the broader construction of "safety of the community," mere physical violence is simply a subset of the types of "danger" that a particular defendant might pose to a community. Clearly, where release of a defendant poses a serious risk to the integrity of the trial process, detention of such defendant pending trial is appropriate under the bail Reform Act. United States v. Fernandez-Toledo, 737 F.2d 912 (11th Cir. 1984); Unites States v. Gotti, 794 F.2d 773 (2d Cir. 1986).

IV. Discussion

In considering whether detention is appropriate under Section 3142(f)(2), the court has considered the factors found in Section 3142(g) in conjunction with the

evidence and arguments of respective counsel. Each factor will be addressed *seriatim*.

A. The Nature and Circumstances of the Offenses Charged

The court has carefully considered the allegations of the Grand Jury found in the 19 page Bill of Indictment. Defendant stands charged with the following offenses in the Bill of Indictment:

Count	Charge	Max. Penalty
Count One	*Conspiracy to commit extortion.*	20 years
Count Two	*Conspiracy to commit mail fraud.*	20 years
Counts Three, Four, Five, Six and Seven:	*Mail fraud and depravation of honest services of a public official.*	20 years each
Count Eight	*Conspiracy to commit money laundering.*	20 years
	* * *	
Count Ten	*Conspiracy to obstruct state or local law enforcement.*	5 years

In considering the nature of the charges, the court finds that defendant stands charged along with three co-conspirators as being intimately involved with the management of a criminal organization, that not only allowed the introduction of unlawful gaming devices into Buncombe County, but assisted the purveyors of such unlawful devices with the procuring businesses that would place additional machines in their establishments. In furtherance of such conspiracy, it appears that defendants used their positions as law enforcement officers to not only protect the criminal enterprise, but to further the criminal enterprise by pressuring business owners

through the auspices of their offices and indicia of their authority, to accept placement of such gambling machines. Not only were all of the defendants sworn law enforcement officers, they were the highest ranking law enforcement officers in the county. Not only is it alleged that defendants used their public office to allow such machines into the county and to further such criminal operation by finding more locations, it appears from the allegations of the Bill of Indictment that defendant and his alleged co-conspirators not only received payoffs and extorted bribes, they allegedly offered protection both to the companies that placed the machines and the businesses that agreed to host the machines. Among other methods, it appears that defendants furthered such conspiracy through the unlawful use of official state stickers entrusted to them and through falsification or assistance in falsification of official state forms. The nature of the alleged offenses and the alleged acts which underlay them indicates to this court that despite taking solemn oaths to enforce the laws and protect the Constitution, this defendant was - - while wearing a badge - - willing to ignore and disobey the law, assist others in the commission of crimes, and undermine our system of laws and justice, all for pecuniary gain. Indeed, the nature of the offenses charged is not *just* that defendants looked the other way or aided and abetted organized criminal activity, the nature of the case is that they even extorted money from the citizens of Buncombe County by seeking cash payments or kickbacks

from Buncombe County store owners in exchange for lack of prosecution of the store owners.

By allegedly committing these acts, the nature of the case indicates that defendant and his co-conspirators elected to obstruct justice instead of upholding the law as they had sworn to do. The conspiracy did not stop with the core illegal activity, but spread within the Sheriff's Department by defendant and his co-conspirators hiring and retaining others - - most on public time and at public expense - - to assist them in laundering the cash payments through various artifices, including unlawful conversion of cash into money orders for deposit in defendant's campaign fund. Due to the nature and circumstances of the charges, and the manner in which the offenses were allegedly conducted, there exist many people who participated in this conspiracy and who are now potential witnesses for the government.

Considering all the nature and circumstances of these charges, the court finds that this factors weighs significantly against pretrial release and in favor of detention. Clearly, the allegations of the Indictment indicate that defendant was willing to misuse his office, commit felony criminal offenses, extort money from the people he was elected to protect and serve, and otherwise interfere with the administration of justice, all for pecuniary gain. What is now at stake is defendant's liberty, an interest which is much more valuable than money, and as it stands now under the Guidelines,

defendant is facing at a minimum a sentence that would cause him to be incarcerated without the possibility for parole for a period that exceeds his life expectancy, which does not take into account defendant's obvious poor health.

B. The Weight of the Evidence.

In Government Exhibit 1, which was properly entered into evidence at the hearing, the government tendered a portion of the transcript of testimony provided by criminal defendant Jerry Pennington in a related case. Such testimony was taken as to the factual basis for this court's acceptance of Mr. Pennington's guilty plea to charges of bribery of law enforcement officers. The court conducted the inquiry. In his testimony, Mr. Pennington testified that he personally paid bribes to defendant, which allowed Pennington and his employer, Henderson Amusement, Inc., as well as other persons, to operate an illegal gambling business without fear of being criminally charged by the Sheriff or otherwise interfered with by law enforcement under defendant's control. Mr. Pennington testified that for several years, he would go every six to eight weeks to the office of the defendant and place an envelope containing between $2,000.00 to $3,000.00 in cash, place such envelope on the defendant's desk, and watch as defendant would take the envelope and place it into

a desk drawer. This is just an example of the weight of the government's case,[2] which the undersigned finds compelling not just from a judicial perspective, but from the perspective of a trial lawyer who defended people charged with criminal offenses for nearly 30 years. As a result, the undersigned finds that the weight of the evidence against the defendant is strong, significant, and compelling.

The defendant's counsel has argued that the defendant is entitled to the presumption of innocence. Indeed, the presumption of innocence is set forth and preserved in subsection (j) of 18 U.S.C. § 3142. However, this presumption of innocence does not apply to the detention hearing. In Bell v Wolfish, 441 U.S. 520 (1979), the Supreme Court held that the presumption of innocence plays an important role in the criminal justice system, but it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun. In short, the defendant is entitled to presumption of innocence at trial, but not at the detention hearing. Thus, defendant's argument as to the presumption of innocence -- while appealing -- does not diminish the weight of the evidence against this defendant, which is considerable.

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[2] While the court is not privy to the government's discovery file, the 19 page indictment is a "speaking indictment," which provides the court with additional *indicia* of the weight of the evidence the government has gathered against this defendant.

C. The History and Characteristics of the Defendant.

When the court considered the history and characteristics of the defendant, the report of the Pretrial Services Officer as well as the arguments of defendant's counsel and the testimony of his girlfriend show that defendant is in poor physical condition. The defendant had a kidney operation three years ago; he has had four back operations, with the most recent operation approximately four months previous to the date of the hearing. The defendant introduced into evidence as Defendant's Exhibit D-1 a letter from Dr. Keith M. Maxwell, M.D., which described the back operations and the fact that the defendant is totally disabled and is receiving pain medication. In Defendant's Exhibit D-2, Dr. Gregory L. Lance, M.D., gives his opinion that the defendant has severe low back problems; chronic pain; arthritis; kidney stones and seizure disorder for which the defendant is prescribed Dilantin. In Defendant's Exhibit D-3, the defendant submitted a copy of an award from the Social Security Administration showing that the defendant had recently been found to be disabled from gainful employment effective June 2007. In Defendant's Exhibit D-4, the defendant presented evidence that he had hospitalization insurance coverage and in Defendant's Exhibit D-5, the defendant presented evidence of medical bills and expenses that had been incurred at Pardee Hospital in Hendersonville in June 2007, during which a TENS unit had been implanted to assist in pain management.

Defendant's Exhibit D-6 describes the implant.

Socially, the defendant is single and his girlfriend resides with him and has done so for several years. Cohabitation of a man and woman who are unmarried to each other remains a criminal offense in North Carolina. The defendant has two adult children who reside in Buncombe County. The defendant does not have employment due to his disability. The defendant has income from Social Security, retirement income from the Buncombe County Sheriff's Department and another retirement account for a total income of approximately $5,700.00 per month.

The defendant has a long length of residence in the Buncombe County community and has extensive community ties, as evidenced by his having been elected Sheriff of Buncombe County on several occasions. The defendant was the Sheriff of Buncombe County for 12 years and had an additional 19 years of employment with the Asheville Police Department and the Buncombe County Sheriff's Department.

The defendant's history relating to drug or alcohol abuse shows that a pharmacist refused to fill a prescription for the defendant in 2006 because the prescription had been filled for a full three-month period of time during the previous month. The defendant does not have any convictions involving drug or alcohol abuse and in fact does not have any criminal record at all. As a result, the defendant does

not have any record of failure to appear at any type of court appearance. But for what appears to be an addiction to powerful prescription pain relievers, and what appears to the court to be an abuse of such substances, this factor would weigh in favor of release. The court notes that sub-factor (B) does not apply in this case.

D. The Nature and Seriousness of the Danger to Any Person or the Community.

The court has also considered the nature and seriousness of the danger that defendant's release would pose to any person or the community. As the late Judge H. Brent McKnight, United States District Judge, often posited, the best estimate of future conduct is past performance, because "the past is prologue." Based upon this defendant's previous alleged conduct, which indicates an extensive and systematic conspiracy to obstruct justice for simple pecuniary gain, the court has serious concerns about what additional steps that this defendant might take to secure his liberty and avoid conviction. The evidence of record thus far indicates that the defendant was willing to obstruct justice and foreclose enforcement of the rule of law in exchange for cash bribes; thus, if follows that if the defendant was willing to obstruct justice in exchange for the payment of a bribe, the court believes that he would certainly be willing to obstruct justice to avoid the extensive periods of incarceration which are likely in this case. While it is certainly possible for a defendant to obstruct justice from a detention facility - - and the court has been privy to a number of such cases - -

such detention poses a substantial hurdle to witness intimidation, jury tampering, and other activities that would strike at the heart of judicial process.

In addition, the government has proffered that there are serious concerns for the safety of potential witnesses. The undersigned finds that these concerns have a valid basis. If these witnesses were harmed or their availability as witnesses was adversely affected, then the prosecution in this matter would be adversely affected. The defendant has vast experience as a law enforcement officer and as a result is trained in the use of firearms, methods used by law enforcement to detect perpetrators, and to identify and locate potential witnesses. These skills would certainly be of use to this defendant in obstructing justice and the trial process in this matter.

V. Conclusion

While the defendant does have significant physical disabilities, these disabilities would not prevent the defendant from obstructing or attempting to obstruct justice. Indeed, defendant suffered from most if not all of these disabilities during the time of the alleged criminal conduct in which he purportedly engaged. While his ties to the community weigh in favor of release, the court must note that it was this very community which he allegedly extorted and used his public office for personal gain. The systematic obstruction of justice creates a serious risk that the defendant would obstruct or attempt to obstruct justice prior to trial, which creates a danger to the

community. Further, the weight of the evidence against this defendant is heavy.

As do all public officials, the undersigned swore to uphold the law and protect the Constitution. While defendant's argument as to the presumption of innocence at trial touches on a fundamental concept of law, that concept would be a hollow promise if there existed no mechanism for assuring the fair and impartial administration of justice. In this case, the court has carefully weighed each factor and determined that it must employ detention in this particular case to protect not only this defendant's interest in a fair trial, but also that of the public. The undersigned finds by clear and convincing evidence that the release of the defendant would create a risk of harm or danger to any other person or the community and will enter its Order detaining the defendant. 18 U.S.C. § 3142(f)(2)(B).

Conversely, the undersigned does not find by a preponderance of the evidence that the release of the defendant would create a risk of flight on his part. The defendant is a life-long resident of Buncombe County, does not hold a Passport, and has been aware that there has been an investigation and he has not removed himself from the county. 18 U.S.C. § 3142(f)(2)(A).

ORDER

IT IS, THEREFORE, ORDERED that the defendant be DETAINED pending further proceedings in this matter.

This the 21st day of December, 2007.

DENNIS L. HOWELL
UNITED STATES MAGISTRATE JUDGE