

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 11-2066

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GARY DON DODSON,

Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS

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UNITED STATES' OPPOSITION TO DEFENDANT'S STATEMENT OF THE  
CASE IN SUPPORT OF APPEAL FROM DETENTION ORDER

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Pursuant to Federal Rule of Appellate Procedure 9(a), the United States respectfully submits this Opposition to Defendant's Statement of the Case In Support of Appeal from Detention Order. The defendant, Gary Don Dodson, is charged with conspiring to deprive an African-American individual of his civil rights under 18 U.S.C. 241, criminally interfering with housing rights under 42 U.S.C. 3631, using fire in connection with a felony under 18 U.S.C. 844(h), possessing an unregistered destructive device under 26 U.S.C. 5861(d), and using a destructive device in furtherance of a crime of violence under 18 U.S.C.

924(c)(1)(B)(ii). The United States has sought to keep Dodson in custody pending trial,<sup>1</sup> because he presents an unreasonable risk of danger to the community. The evidence in support of detention includes Dodson's role in an act of violence against an interracial couple; his probable affiliation with white supremacist groups that advocate violence against large segments of the American population, including African-Americans and homosexuals; his prior possession of a firearm as a convicted felon; and his prior attack on an individual he knew to be homosexual.

The district court correctly determined that the government demonstrated by clear and convincing evidence that there are no conditions of Dodson's release that could reasonably assure the safety of the community. The government's evidence, unrebutted in any significant way by Dodson, describes an individual who faces a statutory minimum forty-year prison sentence if convicted on all counts with which he is charged relating to his involvement in the firebombing of an interracial couple's home. This charged offense, and Dodson's prior conduct, is consistent with his affiliation with white supremacist groups that advocate violence against minorities. As a leader of one of these groups, Dodson has actively and successfully recruited others to join his organization and commit acts of violence,

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<sup>1</sup> Trial in this case has been set for October 25, 2011. See district court docket number (Doc.) 88. Hereinafter, this brief uses the following abbreviations: "Doc. \_\_\_" for documents filed in the district court, "Hr'g Tr. \_\_\_" for the March 25, 2011, detention hearing transcript, and "Statement \_\_\_" for Dodson's Statement of the Case.

and likely would not abide by any conditions imposed upon his release for the safety of the community. Because Dodson does not show that the district court clearly erred in its factual findings underlying its determination of dangerousness, or erred in its final determination of dangerousness, the United States respectfully requests that this Court affirm the district court's detention order.

### **BACKGROUND**

1. On March 16, 2011, Dodson was arrested on a criminal complaint charging him with (1) conspiring to deprive Lamar Wright, an African-American man married to a white woman, of his civil rights under 18 U.S.C. 241, (2) criminally interfering with housing rights under 42 U.S.C. 3631, (3) using fire in connection with a felony under 18 U.S.C. 844(h), and (4) possessing an unregistered destructive device under 26 U.S.C. 5861(d). These charges arose out of Dodson's alleged role as a planner of, and getaway driver in, the January 14, 2011, firebombing of the Wrights' home in Hardy, Arkansas.

Pursuant to 18 U.S.C. 3142(f), a magistrate judge held a detention hearing on March 25, 2011, to determine whether Dodson should be released on bond pending trial. At that hearing, FBI Special Agent Charles Kemp testified for the government regarding Dodson's affiliation with white supremacist groups. Kemp testified that Dodson has numerous tattoos affiliated with the skinhead movement, including the word "RACIST" in approximately seven-inch letters across his

stomach, a pair of boots on the side of his head that symbolize such boots worn by skinheads, and a swastika tattooed on his right arm. Hr'g Tr. 18-20. Dodson also has the number "88" tattooed on his neck which, according to Kemp, stands for Heil Hitler. Hr'g Tr. 21. Kemp further testified that Dodson holds a leadership position in a white supremacist group – referred to as a skinhead group – named Smash Team 88. Hr'g Tr. 7, 29. Since moving to Waldron, Arkansas, from California in 2010, Kemp stated, Dodson has recruited for white supremacist organizations and hosted what the Waldron Police Department believes to be white supremacist gatherings at his home. Hr'g Tr. 22, 26. In September 2010, the police department responded to a disturbance at Dodson's home and confiscated his shotgun, which had "Smash Team 88" and a swastika carved into the handle. Hr'g Tr. 22-24.

Kemp presented strong evidence that, consistent with Dodson's affiliation with white supremacist groups, he participated in the crime for which he is going to be tried – the firebombing of Lamar Wright's home on the evening of January 14, 2011. Kemp testified that after identifying Dodson as a suspect in this crime, the FBI developed cooperating witnesses who confirmed Dodson as one of its participants. Hr'g Tr. 28. Kemp also testified that one of the cooperating witnesses stated that Dodson recruited him into Smash Team 88 and directed him to read literature that advocates the use of violence against African-Americans.

Hr'g Tr. 28-30. According to Kemp, after the cooperating witness participated in the firebombing, Dodson rewarded him with enhanced status in Smash Team 88.

Hr'g Tr. 30.

Kemp also testified that Dodson has previously acted unlawfully and consistently with the beliefs of the white supremacist groups with which he is affiliated. Kemp stated that in 2007, the Pottersville Police Department investigated Smash Team 88 and obtained a photograph showing Dodson, a felon with multiple criminal convictions, holding firearms, which resulted in his parole being revoked in July 2007 by the California Department of Corrections. Hr'g Tr. 5-8. In March 2009, Kemp testified, Dodson was arrested in Pottersville for attacking an individual he knew to be homosexual at a bowling alley. Hr'g Tr. 13-15, 17-18. The victim sustained scratches and bruises consistent with a fight on the ground. Hr'g Tr. 16. Kemp further stated that during this assault, Dodson called the victim a "f\*\*king f\*\*got" and yelled "Kick that n\*\*ger's ass!" to an associate who was chasing an African-American friend of the victim. Hr'g Tr. 14, 16. As a result of this incident, Dodson had his parole revoked again, for which he was incarcerated for less than one year. Hr'g Tr. 21.

Dodson's fiancée, Shannon Patarak, testified on his behalf at the detention hearing. Patarak stated that as far as she knew, Dodson was not a member of a skinhead or white supremacist group, but acknowledged that she never asked him

about his tattoos. Hr'g Tr. 65. Patarak also denied ever hearing Dodson discuss such groups, including Smash Team 88, or seeing any white supremacist literature around their house. Hr'g Tr. 66-67, 95. Patarak testified she had never before seen the shotgun with skinhead markings the police confiscated in the September 2010 incident, and speculated that it might have belonged to a neighbor. Hr'g Tr. 72-76. With regard to the 2009 incident at the bowling alley, Patarak stated that she did not see Dodson in any argument, or hear him yelling at his friends as they chased the African-American friend of the victim. Hr'g Tr. 86-88. Finally, regarding the firebombing at issue in this case, Patarak testified that Dodson "laid down" with her on the evening of January 14, but admitted that she did not know whether he got up during the night. Hr'g Tr. 102.

2. At the conclusion of the hearing, the magistrate judge determined that the government had shown by clear and convincing evidence that there are no set of conditions that she could impose on Dodson's release that would reasonably assure public safety. Hr'g Tr. 112. The magistrate judge first observed that the government had introduced "strong evidence" that Dodson "is a member of group or groups that advocate violence" that is "unprovoked [and] motivated by malice toward groups of people, such as African-Americans and homosexuals." Hr'g Tr. 112. The magistrate judge then reasoned that because this malice covers so many people, "there's absolutely no condition that I could possibly set that could

reasonably assure that the public would be protected in this case.” Hr’g Tr. 112-113. Accordingly, the magistrate judge remanded Dodson into the custody of the United States Marshal pending trial. Hr’g Tr. 113. Pursuant to 18 U.S.C. 3142(i), the magistrate judge issued a detention order dated March 28, 2011, memorializing these findings and directive, and also citing the nature of the alleged offenses as reason for finding that Dodson’s release would create an unreasonable risk of danger. See Doc. 25.

3. On April 7, 2011, a federal grand jury in the Eastern District of Arkansas returned an indictment charging Dodson with the aforementioned counts from the criminal complaint, and an additional count of using a destructive device in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(ii).<sup>2</sup> See Doc. 31. On that same date, pursuant to 18 U.S.C. 3145(b), Dodson moved the district court to amend the magistrate judge’s detention order and release him pending trial. The United States opposed this motion on the ground that there is

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<sup>2</sup> Dodson’s indictment for a violation of 18 U.S.C. 924(c) created the rebuttable presumption under 18 U.S.C. 3142(e)(3)(B) that “no condition or combination of conditions will reasonably assure \* \* \* the safety of the community.” See, e.g., *United States v. Stricklin*, 932 F.2d 1353, 1355 (10th Cir. 1991) (holding that grand jury indictment is sufficient evidence to support a finding of probable cause for the purpose of triggering the rebuttable presumption in section 3142(e)). If this Court determines that the district court committed reversible error in affirming the magistrate judge’s detention order, the government respectfully requests that this Court remand the case to the district court for a new determination of Dodson’s pre-trial custody status in which this presumption is applied.

strong evidence that Dodson is guilty of the charged conduct and participated in acts of violence consistent with such conduct, that he is affiliated with white supremacist groups that advocate violence against minorities and is a leader of one such group, and that he has previously violated parole conditions. Doc. 37.

After reviewing the transcript of the detention hearing, and making a *de novo* review of all the evidence presented, the district court issued a written order on May 5, 2011, denying Dodson's motion. See Doc. 67. The district court's order first observed that Dodson offered no evidence in addition to the evidence he presented at the detention hearing. Doc. 67, at 1. The order then concluded that the United States had shown by clear and convincing evidence that Dodson presents an unreasonable risk of danger to the community, based upon "the nature of the alleged offenses and Defendant's apparent affiliation with groups that advocate violence against large segments of the American population." Doc. 67, at 1. In reaching this conclusion, the district court also noted that Dodson "has committed crimes while on supervision for convictions in California, and it seems unlikely that any condition of release would reasonably protect the community if Defendant is released before trial." Doc. 67, at 1.

## DISCUSSION

The charges in the indictment, combined with the evidence adduced at the detention hearing, amply support the district court's order of Dodson's continued detention in this case. This Court reviews the district court's underlying factual findings for clear error and independently reviews the district court's ultimate conclusion that detention is required because no condition or combination of conditions will reasonably assure the safety of the community. See *United States v. Cantu*, 935 F.2d 950, 951 (8th Cir. 1991) (per curiam). Applying this standard of review, it is clear that the district court did not commit reversible error.

1. Section 3142 of the Bail Reform Act of 1984 establishes the standards judicial officers must apply in determining a defendant's pre-trial custody status. The statute provides, in relevant part, that a criminal defendant must be detained pending trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure \* \* \* the safety of any other person and the community." 18 U.S.C. 3142(e)(1). The facts that the judicial officer uses to support this determination must "be supported by clear and convincing evidence." 18 U.S.C. 3142(f). In determining whether any conditions of release can reasonably assure the safety of any other person and the community, the judicial officer should consider (1) the nature and circumstances of the charged offense, (2) the weight of the evidence against the defendant, (3) the history and characteristics

of the defendant, and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. 18 U.S.C. 3142(g).

The government has shown by clear and convincing evidence that no release conditions will reasonably assure the safety of the community. First, the nature and circumstances of the charged offense weighs heavily against release. Dodson has been indicted on five federal criminal charges for his role in the planning and execution of the firebombing of an interracial couple's home. See Doc. 31. These charges possess elements that Congress specifically directed judicial officers to take into account in its section 3142(g) analysis – whether the offense charged is a “crime of violence” and whether it involves a destructive device.<sup>3</sup> See 18 U.S.C. 3142(g)(1). If Dodson is convicted of each of the counts with which he is charged, he faces a statutory mandatory minimum of forty years imprisonment. See 18 U.S.C. 844(h) (providing ten-year sentence for using fire in connection with a felony); 18 U.S.C. 924(c)(1)(B)(ii) (stating that defendant who uses, carries, or possesses destructive device in furtherance of crime of violence shall be sentenced to minimum term of imprisonment of thirty years in addition to punishment provided for such crime of violence). That the section 924(c) charge is an offense to which the statute attaches a presumption of danger to the community upon

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<sup>3</sup> The Bail Reform Act defines “crime of violence” in relevant part as “an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. 3156(a)(4)(A). This definition clearly encompasses the crime at issue in this case.

indictment, see 18 U.S.C. 3142(e)(3)(B), further confirms that the charges against Dodson are sufficiently serious to justify pre-trial detention.

Second, and relatedly, the weight of the evidence against Dodson also counsels against release. On this issue, the government proffered the expected testimony of cooperating witnesses who will confirm Dodson's involvement in the crime with which he is charged. Hr'g Tr. 28-30. Dodson submitted no evidence in response, other than testimony by his fiancée that he "laid down" with her on the night in question. Hr'g Tr. 102. Dodson's fiancée acknowledged, however, that she could not account for his whereabouts for the entire evening. Hr'g Tr. 102. Accordingly, strong evidence exists that Dodson engaged in the alleged offenses.

The third factor – Dodson's history and characteristics – also supports detention. The government's evidence indicates that Dodson has multiple criminal convictions, and has possessed firearms on at least two occasions as a convicted felon. Hr'g Tr. 5-8, 22-24. Dodson is also affiliated with white supremacist organizations that advocate violence against minorities, and is a leader of one of these organizations, Smash Team 88. Hr'g Tr. 7, 22, 26, 29. Consistent with his affiliation with such groups, in March 2009, Dodson assaulted an individual he knew to be homosexual at a bowling alley and encouraged his associates to assault an African-American friend of his assault victim. Hr'g Tr. 13-18. This incident resulted in Dodson's having his parole revoked for the second time and his

incarceration. Hr'g Tr. 21. The testimony of Dodson's fiancée that he is not a white supremacist to her knowledge and that she did not witness him assault anyone at the bowling alley (see Hr'g Tr. 65-67, 86-88, 95) is insufficient to rebut the government's strong evidence to the contrary. Given Dodson's criminal record, and the heinousness of his views and his willingness to act upon them, the district court did not clearly err in citing Dodson's white-supremacist ties as grounds for detention.

Finally, Dodson's pre-trial detention is warranted by the nature and seriousness of the danger to the community that would be posed by his release. FBI Special Agent Kemp testified that Dodson has recruited for white supremacist organizations and hosted what the Waldron Police Department believes to be white supremacist gatherings at his home. Hr'g Tr. 22, 26. As a leader of Smash Team 88, Dodson successfully recruited one of the cooperating witnesses, directed him to read literature that advocates the use of violence against African-Americans, and gave him enhanced status in Smash Team 88 after participating in the firebombing in this case. Hr'g Tr. 28-30. If Dodson is allowed to remain free pending trial, there is good reason to believe that he will continue to recruit individuals into his organization, thus threatening the lives of minority individuals. As the district court correctly pointed out, Dodson's history of violating parole strongly suggests

that he would not follow any conditions imposed upon his release for the safety of the community.

In sum, the government presented clear and convincing evidence, unrebutted to any extent by Dodson, satisfying all four factors necessary for a determination that there are no conditions of Dodson's release that could reasonably assure the safety of the community.

2. Dodson's arguments in his Statement of the Case do not demonstrate any error by the district court in its findings or conclusion. Notably, he does not contend that any of the district court's factual findings are clearly erroneous. Instead, he attacks the credibility of the evidence in an attempt to show that the government failed to carry its burden.<sup>4</sup> None of these arguments possesses any merit.

Dodson first argues that Kemp's testimony regarding the March 2009 assault on an individual Dodson knew to be homosexual constitutes hearsay upon hearsay because it is based upon reports of other law enforcement officers, which in turn are based upon information obtained from witnesses to the events at issue.

Statement 6. This argument fails because, as Dodson acknowledges, a judicial

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<sup>4</sup> Dodson also argues that the government failed to prove by clear and convincing evidence that he is a flight risk. Statement 9. The issue of flight risk is irrelevant because "either danger to the community or risk of flight is sufficient to authorize detention." *United States v. Sazenski*, 806 F.2d 846, 848 (8th Cir. 1986). Accordingly, the district court's determination that Dodson poses a danger to the community is sufficient by itself to order him detained pending trial.

officer may consider in a detention hearing hearsay that it reasonably concludes is reliable. See *United States v. Acevedo-Ramos*, 755 F.2d 203, 208 (1st Cir. 1985); see also 18 U.S.C. 3142(f) (“The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.”). Because the police report was based upon an interview the police conducted with the visibly injured victim shortly after the assault took place (see Hr’g Tr. 13-14, 16), the magistrate judge could have reasonably concluded that the report was sufficiently reliable to consider. See *United States v. Farmer*, 567 F.3d 343, 347-348 (8th Cir. 2009) (district court did not err in admitting domestic abuse victim’s police report in revocation hearing where victim made statement while assault was fresh in her memory and had injuries consistent with assault). In any event, a complete review of the record reveals that, independent of any hearsay testimony, there was clear and convincing evidence of Dodson’s dangerousness that was not based upon hearsay. See pp. 10-13, *supra*.

Dodson’s follow-up argument that the March 2009 assault on a homosexual individual is unrelated to the current charge of violence against an African-American individual (Statement 7-8) is both legally and factually incorrect. With regard to the law, the cases Dodson cites – *United States v. Ploof*, 851 F.2d 7 (1st Cir. 1988), and *United States v. Byrd*, 969 F.2d 106 (5th Cir. 1992) – are inapposite because they addressed the threshold issue of whether pre-trial detention

is limited to the categories of cases set forth in section 3142(f), which specifies the conditions under which a detention hearing must be held. In both cases, the court answered this question in the affirmative, holding that the defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention. See *Ploof*, 851 F.2d at 11-12; *Byrd*, 969 F.2d at 109-110. This holding has no relevance to this case, which indisputably falls within at least one of section 3142(f)'s categories. In any event, the factual basis for Dodson's argument is erroneous as well: far from being unrelated to the firebombing of the Wrights' home, Dodson's assault on a homosexual individual is, like the firebombing, a manifestation of his anti-minorities view that the magistrate judge properly considered in making her dangerousness determination.

Next, Dodson attacks the credibility of the cooperating witnesses that the FBI developed, directing this Court to consider that the witnesses have a strong incentive to minimize their involvement in the crime, and that one of them is facing a state rape charge in Arkansas. Statement 8. It is well-settled in this Court that the credibility of cooperating witnesses is an issue left to the trier of fact that is "virtually unreviewable on appeal." See *United States v. Bowie*, 618 F.3d 802, 814 (8th Cir. 2010), cert. denied, 131 S. Ct. 954 (2011). Dodson raised the background of the cooperating witnesses in the detention hearing (see Hr'g Tr. 35-37), and the magistrate judge nonetheless credited the government's proffer of their expected

testimony anyway. This judgment call by the magistrate judge does not warrant review, particularly in light of Dodson's failure to provide any credible evidence that he was not involved in the firebombing of the Wrights' home.

Finally, Dodson points out that neither the victims to this crime nor any of the cooperating witnesses have reported attempts by Dodson to intimidate or threaten them. Statement 8-9. To the extent that this argument is an attempt to show that Dodson would not be a danger to any other person under section 3142(g)(4) if he was released, it misses the mark. This factor directs the judicial officer at a detention hearing to consider "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)(4) (emphasis added). Because this factor is phrased in the disjunctive, a showing of danger either to any person or to the community is sufficient. As noted above, the government presented clear and convincing evidence that Dodson's release would present a danger to the community. See pp. 12-13, *supra*.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the district court's denial of the defendant's motion for release pending trial.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 3, 2011, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S STATEMENT OF THE CASE IN SUPPORT OF APPEAL FROM DETENTION ORDER with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the Appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and will be served electronically.

s/ Christopher C. Wang  
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