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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SAMUEL NWABUEZE, Defendant.	NO. CR 10-411-MMM **REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S APPLICATION FOR REVIEW OF MAGISTRATE JUDGE'S BAIL ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES RE: LEGAL STANDARD FOR DETENTION UNDER 18 U.S.C. § 3142**

Defendant, Samuel Nwabueze, Jr., through his counsel of record, Deputy Federal Public Defender Carlton F. Gunn, hereby replies to the Government's Response to Defendant's Application for Review of Magistrate Judge's Bail Order and Memorandum of Points and Authorities re: Legal Standard for Detention Under 18 U.S.C. § 3142.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: June 16, 2010

By /S/
CARLTON F. GUNN
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT

A. DETENTION CANNOT BE BASED ON DANGER TO THE COMMUNITY IN A CASE OF THIS TYPE.

The government's attempt to argue that *United States v. Twine*, 344 F.3d 987 (9th Cir. 2003) does not state what the defense suggests and what Magistrate Judge Mumm agreed it stated fails on its face. The opinion, while short (perhaps because it found the analysis of the other courts of appeals sufficient), directly states what the defense is arguing. Specifically, it states: "We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail based solely on a finding of dangerousness." *Id.* at 987.[1] And it gives as its reason the same reason implicitly or explicitly given by the other courts of appeals, to wit, that "[t]his interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2)." *Id.*; *compare United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992); *United States v. Ploof*, 851 F.2d 7, 10-11 (1st Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3rd Cir. 1986).[2]

The other Ninth Circuit cases cited by the government that it claims create a

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[1] The court presumably meant in the type of case before it, *i.e.*, a case that is not one of the types listed in 18 U.S.C. § 3142(f)(1).

[2] The government's suggestion that *Ploof* and *Himler* limit only the grounds upon which a detention hearing can be requested and not the grounds upon which the ultimate decision of detention can be based, *see* Government's Response, at 5 n.1, ignores the plain language of those opinions. *Ploof*, like *Byrd* and *Twine*, specifically states that "where detention is based on dangerousness grounds, it can be ordered only in cases involving one of the circumstances set forth in § 3142(f)(1)." *Ploof*, 851 F.2d at 11. *Himler* similarly states that in the type of case before it, a case not covered by subsection (f)(1), "it is reasonable to interpret the statute as authorizing detention only upon proof of a likelihood of flight, a threatened obstruction of justice or a danger of recidivism in one or more of the crimes actually specified by the bail statute." *Id.* at 160.

conflict with *Twine* did not have the issue considered in *Twine* before them. In *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985), the government had moved for detention based solely on flight risk, not danger to the community. *See id*. at 1404. While the court did loosely state that the Bail Reform Act "permits the pretrial detention of a defendant without bail where it is demonstrated either that there is a risk of flight or no assurance that release is consistent with the safety of another person or the community," *id*. at 1406, *quoted in* Government's Response, at 7, it elsewhere used language suggesting that only flight risk could justify detention in the type of case before it. In the second sentence of the opinion, the Court stated, without mentioning danger to the community: "Because the Government has failed to establish by a preponderance of the evidence that *Motamedi* poses a flight risk, the motion for reconsideration must be denied." *Id* at 1404. Then later, near the beginning of its legal analysis, its stated that the Bail Reform Act "mandates release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required," again without mentioning danger to the community. *Id.* at 1405.

In the other case cited by the government – *United States v. Walker*, 808 F.2d 1309 (9th Cir. 1986) – the charge against the defendant was conspiracy to distribute cocaine, *see id.* at 1310, so the case fell squarely within one category of cases in which detention based on dangerousness is authorized by § 3142(f)(1). *See* 18 U.S.C. § 3142(f)(1)(C) (including drug offenses for which maximum term of imprisonment is 10 years or more). The issue before the court was not whether the statute authorized detention based on danger – it clearly did in that type of case – but whether that statutory authorization violated the Constitution. *See Walker*, 808 F.2d at 1311.

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Limiting detention based on danger to especially serious cases is also not "inconsistent with the goals of the Bail Reform Act and common sense," Government's Response, at 8. The idea of denying bail based on a general danger to the community is a controversial one, which some respected judges, including some Supreme Court justices, have suggested is not even constitutional. *See United States v. Salerno*, 481 U.S. 739 (1987) (holding detention based on dangerousness, but only over dissent); *United States v. Salerno*, 794 F.2d 64, 71-75 (2nd Cir. 1986), (court of appeals holding detention based on dangerousness unconstitutional), *rev'd*, 481 U.S. 739 (1987). *See also Motamedi*, 767 F.2d at 1406 ("Danger to another or to the community is a statutory addition that constitutes a significant departure from the previous law."). Given this, it was perfectly sensible for Congress to allow detention based on dangerousness in only a limited number of particularly serious cases, and the legislative history suggests that is precisely what it intended to do. As noted in *Ploof* and *Himler*, the same Senate report cited by the government states: "[T]he requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial." S. Rep. No. 225, 98th Cong., 1st Sess. 20 (1983), 1984 U.S.C.C.A.N. 3182, 3203 (hereinafter "Senate Report"), *quoted in Himmler*, 797 F.2d at 160. *See also Ploof*, 851 F.2d at 10 (quoting same language); Senate Report, at 21 (noting that "the seriousness of *the offenses described in subsection (f)(1)(A) through (C)* coupled with the government motion is a sufficient basis for requiring an inquiry into whether detention may be necessary to protect the community from the danger that may be posed by *a defendant charged with one of these crimes*" (emphasis added)).

In sum, case law is clear that a defendant can be detained based on danger to the community only when he is charged with one of the offenses listed in subsection (f)(1) of 18 U.S.C. § 3142. Since Mr. Nwabueze is not charged with one of those offenses, the only ground upon which he can be detained is flight risk, and the question the

Court must ask is whether there is some combination of conditions that will reasonably assure his appearance.

B. THE GOVERNMENT HAS NOT SHOWN AND CANNOT SHOW THAT THERE IS NO COMBINATION OF CONDITIONS THAT WILL REASONABLY ASSURE MR. NWABUEZE'S APPEARANCE.

The *Motamedi* case cited by the government, while not relevant to the question of detention based on danger to the community for the reasons discussed *supra* p. 3, does offer two helpful general points about detention that the Court should keep in mind here. First, it states that "[o]nly in rare circumstances should release be denied." *Id.*, 767 F.2d at 1405. Second, it states that "[d]oubts regarding the propriety of release should be resolved in favor of the defendant." *Id.* Finally, *Motamedi* confirms that the burden is on the government to establish flight risk. *See id*. at 1406.

To do that here, the government offers, as to flight risk, three points. First, it points to Mr. Nwabueze's ties to Nigeria, including the fact that he lived there for a number of years as a child. Second, it asserts that he is facing a term of imprisonment if convicted in this case. Finally, it asserts that the bail resources Mr. Nwabueze has offered are insufficient, because he is offering no resources of his own and the resources he offers from family members and his girlfriend include only a cash deposit and several unjustified affidavits of surety.

Especially applying the principle noted in *Motamedi* that "[d]oubts regarding the propriety of release should be resolved in favor of the defendant," but frankly, even without such a presumption, the government's argument should be rejected. With respect to the fact that Mr. Nwabueze lived in Nigeria, his residence there was during childhood, and he has been back in this country and living here for going on 10

years. He is an American citizen and has made the decision to make this country, not Nigeria, his home. This is not surprising, given that most people would probably rather live in the United States than Nigeria, and that most of his family lives here, including his brother, his siblings, and other more distant relatives.

While Mr. Nwabueze's mother does live in Nigeria much of the time, she also spends a significant amount of time in this country, and Mr. Nwabueze has no other close family members who live in Nigeria or spend a significant amount of time there. The government's assertion that Mr. Nwabueze's father "travels with some frequency to Nigeria," Government's Response, at 10, is mistaken; Mr. Nwabueze's father called defense counsel of his own accord after he heard that this claim had been made at the hearing before Magistrate Judge Mumm and told defense counsel that the last time he had traveled to Nigeria was 2003.

With respect to the fact that Mr. Nwabueze is, according to the government, facing a term of imprisonment in this case, that by itself cannot justify the denial of bail, or every defendant facing imprisonment would be detained. The term of imprisonment Mr. Nwabueze is facing is not extraordinary, moreover. The guideline range which is likely applicable to Mr. Nwabueze – and of course, only advisory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) – is in the 1½ to 3 year range, not the 10 years or more which defendants charged with more serious crimes often face. It is noteworthy that this is not a sort of sentence Mr. Nwabueze has never faced before, for he served 32 months in one of his prior state cases. It is also worth noting that Mr. Nwabueze has previously been released on bond, in some of his state cases, and made his court appearances in those cases.

Finally, the defense respectfully disagrees with the government's assertion that the bail resources offered are insufficient. It is true that Mr. Nwabueze is not offering

any resources of his own, but that is simply because he does not have any resources to offer, and a defendant cannot be detained simply because he does not have financial resources of his own. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.") In any event, having parents' and other family members' financial resources on the line is in many ways more significant, for family members, especially parents, are probably the last people a defendant would want to expose to a loss of $5,000 in cash and/or a $100,000 judgment. Such a judgment would not be a mere paper tiger, moreover, as at least Mr. Nwabueze's father and girlfriend are fully employed and so not people who are simply judgment proof.

In sum, none of the government's arguments against bond stand up. The arguments might justify refusing a request for release based on no security at all, but they do not justify refusing a request for release where family members and friends are willing to put up $5,000 in cash and several $100,000 unjustified affidavits of surety. And it is not as if Mr. Nwabueze will be on the street with no restrictions at all; other conditions which the defense is suggesting include intensive Pretrial Services Agency supervision and electronic monitoring through which Pretrial Services Agency can keep close track of Mr. Nwabueze.

II.
CONCLUSION

The Court should set an appearance bond in the amount of $100,000, to be secured by a $5,000 cash deposit and $100,000 affidavits of surety signed by Mr. Nwabueze's father, brother, and girlfriend, and with conditions including intensive

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Pretrial Services Agency supervision, electronic monitoring and any other condition the Court, the government or Pretrial Services Agency believes appropriate.

Respectfully submitted,

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DATED: June 16, 2010

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