

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No. 2:10 -CR-186-MHT
v.)	
)	ORAL ARGUMENT REQUESTED
RONALD E. GILLEY, et. al.,)	
)	
Defendants.)	

**DEFENDANT RONALD E. GILLEY'S MOTION
FOR REVOCATION OF DETENTION ORDER**

COMES NOW, Defendant RONALD E. GILLEY ("Mr. Gilley" or the "Defendant") and pursuant to 18 U.S.C. § 3145(b), makes this motion for revocation of Judge Moorer's detention order (the "Order") (Ct. Doc. 597). Mr. Gilley moves this Court to enter an order: (1) revoking the Order (Ct. Doc. 597); (2) releasing him from pretrial detention; and (3) setting forth appropriate conditions of bond. In the alternative, Mr. Gilley hereby moves this Honorable Court to exercise its discretion in setting a *de novo* hearing on this issue, in order to hear oral argument on this Motion. In doing so, Mr. Gilley hereby incorporates the transcript of his revocation hearing and all exhibits admitted therein.

As Mr. Gilley's specific objections outlined below make clear, Judge Moorer's Order reflects a perfunctory and poorly supported review of the evidence that even ignores his own previous order. Thus, a *de novo* review and/or hearing is the only way to protect fully Mr. Gilley's right not to be detained prior to trial unless the specific and narrow requirements of 18 U.S.C. § 3142 are met. In fact, § 3142 specifically provides that "Nothing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j). The Order reflects a fundamental failure to recognize that the principles of due process, as well as the

text and structure of § 3142, require that, "Prior to adjudication of guilt, 'the judicial officer must maintain the presumption of innocence' in determining the conditions of release." *Dawson v. Scott*, 50 F.3d 884, 894 (11th Cir. 1995) (internal quotations omitted). In other words, both in his oral order and written order Judge Moorer apparently found Mr. Gilley guilty of crimes alleged in the Indictment rather than an act that violated a condition of bond.

I. STANDARD OF REVIEW

Under 18 U.S.C. § 1345(b), "If a person is ordered detained [prior to trial] by a magistrate judge, . . . the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order." In *United States v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), the Eleventh Circuit held that, when a defendant challenges the order of a magistrate to detain him prior to trial under § 3145, "the district court must undertake a de novo review of the factual posture of the case and provide its own findings of fact and statement of reasons for its decision." *United States v. Hurtado*, 779 F.2d 1467, 1480 (11th Cir. 1985); *U.S. v. King*, 849 F.2d 485, 490 (11th Cir. 1988) (a district court may adopt the findings of the magistrate, but must do so explicitly and only after its own independent review); *see also*, *United States v. Hanson*, 613 F.Supp.2d 85, 87-88 (D.C. Cir. 2009) ("[District] Court's review of the magistrate judge's bail determination is de novo. [District] Court is free to use in its analysis any evidence or reasons relied on by the magistrate judge, but it may also hear additional evidence and rely on its own reasons.").

II. BACKGROUND AND CONDITIONS OF RELEASE

The Government's investigation into alleged corruption involving the Alabama Legislature's consideration of electronic bingo legislation became public on March 31, 2010. *See* Transcript of Hearing on Mot. to Revoke Bond at 10, *United States v. Ronald E. Gilley, et. al.*,

(M.D. Ala. 2010) (10-cr-186).¹ Subsequently, Mr. Gilley and ten (10) other defendants, including Mr. Massey, were indicted on October 1, 2010. (Ct. Doc. 3).

Mr. Gilley, Mr. Massey and their Co-Defendants made their initial appearance before Magistrate Judge Moorer on October 4, 2010, at which time Mr. Gilley was released on bond subject to the conditions set forth in the Magistrate's Order Setting Conditions of Release ("Original Conditional Release"). (Ct. Doc. 35). Significantly, for the purposes of the instant Motion for Revocation, the Original Conditional Release contained the following provision:

(8) The defendant must: [(8)](j) avoid all contact, directly or indirectly, with any person who is or may become a victim or potential witness in the investigation or prosecution, including but not limited to: [space left blank].

See Original Conditional Release at 2. (Ct. Doc. 35).

Motions to amend the above stated condition of release, as well as at least one other condition, were filed by Defendants Ross and Coker (Ct. Doc. Nos. 117 and 135). The motions were denied by Judge Moorer and appeals to the District Court followed (Ct. Doc. Nos. 179 and 190) The District Court referred the matters back to Judge Moorer for reconsideration. (Ct. Doc. No. 191).

On November 10, 2010, Judge Moorer entered an Order amending the conditions of release stating:

Further the Court directs that the Order Setting Conditions of Release (Ct. Doc. [35], filed 10/4/10 **for each defendant indicted in this cause** be revised to remove condition (w) in its entirety and to amend condition (j) to state: the defendant must avoid all contact, directly or indirectly, with any witness related to the subject matter of the indictment with the intent to discuss matters contained in the indictment, unless the communication is made in the presence of defendant's counsel and in preparation for trial. *The defendant may engage in communications with any person regarding matters not alleged in the pending indictment.*

¹ Hereinafter, the transcript of the revocation hearing will be referenced simply as "Tr. at ____."

See Amended Conditional Release at 2 (bold in original, italics added). (Ct. Doc. 201).

On December 20, 2010, Jarrod Massey, who previously had been one of ten (10) other Co-Defendants in this matter, changed his plea to guilty and entered into a plea agreement with the Government. (Ct. Doc. 301).

The Government filed a Motion to Revoke the Order of Pre-Trial Release on January 6, 2011, alleging: (1) that Mr. Gilley violated "condition one" of his release, in that he violated federal law by knowingly offering a thing of value to his Co-Defendant Jarrod Massey, with the intent to influence, delay, prevent, or withhold the testimony of Jarrod Massey in an official proceeding in violation of 18 USC § 1512 (b)(1) and (2)(A); and (2) that Mr. Gilley violated the original October 4, 2010, condition of release "(8)(j)," that had been modified subsequently on November 10, 2010, in that he "failed to avoid all contact, directly or indirectly, with any person who is or may become a potential witness in the investigation or prosecution[.]" *See* Gov't Mot. at 2. (Ct. Doc. 322). Judge Moorer held a telephone conference, (Ct. Doc. 323), with the Parties on January 6, 2011, regarding the Motion and scheduled the Government's Motion to Revoke for a hearing on January 12, 2011. (Ct. Doc. 326).

Due to inclement winter weather, that was expected to interfere with preparation for and travel to the revocation hearing set for January 12, 2011, Mr. Gilley requested a continuance of the hearing. Judge Moorer entered an order resetting the hearing for January 31, 2011. (Ct. Doc. 337).

Judge Moorer also modified the Defendant's condition of bond by placing him on home detention with GPS monitoring, restricted Defendant's phone use to his personal cell phone and requires Defendant to maintain a log of all his telephone calls and to provide said logs to his probation officer no later than February 4, 2011. (Ct. Doc. 338).

Subsequently, as discussed below in Section IV.A.3., Mr. Gilley's wife was scheduled for an emergency cancer screening in Birmingham, Alabama, the week prior to the January 31, 2011, hearing. *See* Tr. at 218 – 221. Because of this unforeseen, emergency circumstance, Mr. Gilley again moved for a continuance of the revocation hearing. (Ct. Doc. 382). Judge Moorer held a telephone conference on Mr. Gilley's emergency motion to continue the hearing on January 28, 2011, (Ct. Doc. 384), and granted Mr. Gilley's request the same day continuing the revocation hearing to February 7, 2011. (Ct. Ct. Doc. 385).

In order to permit his attendance at his wife's side during her cancer screening in Birmingham, Mr. Gilley filed a Motion for Medical Exception to Conditions of Release, (Ct. Doc. 367), on January 24, 2011, which Judge Moorer granted the following day. (Ct. Doc. 370). This permitted exception to his conditions of release, per Judge Moorer's January 12, 2011, order, allowed Mr. Gilley to travel from home confinement in Enterprise, Alabama, to Birmingham, Alabama, to meet with physicians at the University of Alabama at Birmingham Hospital, and to meet with his counsel to prepare for the revocation hearing.

Judge Moorer held a hearing on the Government's revocation motion on February 7, 2011. At the close of the hearing, Judge Moorer revoked Mr. Gilley's bond and remanded him to custody. *See* Tr. at 264 – 267. One week later, Judge Moorer entered a written Order "more fully set[ting] out the Court's reasoning" for the decision to revoke Mr. Gilley's bond and remand him to custody. *See* Order at 1. (Ct. Doc. 597). It is that Order which Mr. Gilley moves this Court to revoke.

III. SPECIFIC OBJECTIONS TO THE MAGISTRATE'S ORDER

A. Statement of Facts Supporting Specific Objections.

Testimony at the hearing established that Mr. Gilley entered into a contract for lobbying services with Mr. Massey in approximately 2007. Tr. at 5 – 6. Mr. Massey testified that even though most of his lobbying efforts would be in the early part of the year when the legislature is in session, payments on his contract would be spread over a twelve month period. Tr. at 57.

As of December, 2010, Mr. Gilley owed Mr. Massey approximately \$90,000 for payment of outstanding invoices. Tr. at 95. It is undisputed that the \$90,000 owed to Mr. Massey was for legitimate work pursuant to his written contract. Tr. at 70. Further, it is undisputed that throughout the summer and fall of 2010, including the period of time following his arrest, Mr. Massey had begged Mr. Gilley to try to get those invoices paid, especially in light of legal expenses piling up on Mr. Massey. Tr. at 58, 60, & 70; *see also* DX 2.

Jennifer Pouncy was an employee of Mr. Massey's lobbying firm, Mantra Governmental. Tr. at 101 – 102. Mr. Massey terminated Ms. Pouncy in June 2010, and emailed clients of his lobbying firm to inform them that Ms. Pouncy no longer worked at Mantra Governmental as of July 1, 2010. Tr. at 102; *see also* DX 2 at Tab D.

The evidence showed Mr. Massey had the following communications with Mr. Gilley, his agents, or employees of his business, Ronnie Gilley Properties, regarding payment owed to Mr. Massey on outstanding invoices for work performed for Mr. Gilley and his business.

- June 9, 2010 – Mr. Massey has an email exchange with Billy Graham regarding payment of his invoices. *See* DX 2 at Tab A.
- June 15, 2010 – Mr. Massey has an email exchange with Heather Cauley regarding "May invoices." *See* DX 2 at Tab B.
- June 23, 2010 – Mr. Massey has an email exchange with Billy Graham regarding "invoice payments from May." *See* DX 2 at Tab C.

- September 1, 2010 – Billy Graham receives an email from Mantra Governmental regarding the company's August invoices. *See* DX 2 at Tab R.

(Note: Mr. Gilley and Mr. Massey are arrested on the Indictment on October 4, 2010.)

- October 16, 2010 – Mr. Massey copies Mr. Gilley on an email inquiring about payment on his outstanding invoices and explaining that he had lost 75 percent of his clients and expected to pay between \$250,000 and \$500,000 in legal fees. *See* DX 2 at Tab T.
- October 19, 2010 – Mr. Massey has an email exchange with Billy Graham and Mr. Gilley, regarding his invoices in which he notes that he needs to know something about payment of his invoices "ASAP." Mr. Massey received a reply stating that Mr. Gilley was seeking investors which would provide an influx of cash into his company to help with payment of Mr. Massey's outstanding invoices. *See* DX 2 at Tab U.
- October 19, 2010 – Mantra Governmental receives a wire transfer of \$10,000.00 from RGP for payment of outstanding invoices. *See* DX 2 at Tabs V, W, & X.
- October 27, 2010 – Mr. Massey has an email exchange with Billy Graham, in which Mr. Massey inquires about the status of payment on his invoices and indicates that he might have to "sell my plasma" to raise funds. *See* DX 2 at Tabs Z & AA.
- November 1, 2010 – Mr. Massey has an email exchange with Billy Graham asking for an update on payment of his invoices. *See* DX 2 at Tabs BB & CC.
- November 3, 2010 – Mr. Massey sends an email to Billy Graham again inquiring about payment of his invoices. *See* DX 2 at Tab DD.
- November 4, 2010 – Mr. Massey writes an email to Billy Graham asking if there is "[a]nything positive?" regarding payment of his outstanding invoices. *See* DX 2 at Tabs EE & FF.
- November 6, 2010 – Mr. Massey sends an email to Billy Graham inquiring about payment of his outstanding invoices. *See* DX 2 at Tab HH.
- November 9, 2010 – Mr. Massey has an email exchange with Billy Graham inquiring about payment of his invoices. *See* DX 2 at Tabs II & JJ.
- November 15, 2010 – Mr. Massey sends an email to Billy Graham inquiring about payment of his invoices. *See* DX 2 at Tab KK.
- November 17, 2010 – Mr. Massey sends an email to Mr. Gilley and Billy Graham, inquiring about payment of his invoices and lamenting that his clients had left his lobbying firm. *See* DX 2 at MM.

- November 19, 2010 – Mr. Massey sends an email to Billy Graham inquiring about payment of his invoices. *See* DX 2 at OO.
- November 22, 2010 – Mantra Governmental receives a wire transfer of \$2,000.00 from RGP for payment on its outstanding invoices. *See* DX 2 at QQ.
- December 3, 2010 – Mr. Massey sends an email to Billy Graham which reads, "Can you get me any financial relief on any of the outstanding invoices? I'm in a major crunch brother. I'm bleeding." *See* DX 2 at Tab SS.²

Mr. Massey testified that following the public announcement of this investigation and an approach to him by FBI agents, Mr. Gilley offered him an equity interest in his County Crossing project and an equity interest in a project in Mississippi if Mr. Massey would not cooperate with federal authorities in the investigation and/or stick to a story regarding Sen. Scott Beason. Tr. at 13 – 15. Massey alleges that this account of the interaction with Sen. Beason was fabricated. Tr. at 15. Mr. Massey also testified that Mr. Gilley made the same offer to Jennifer Pouncy, who worked for Mr. Massey and who was thought to be cooperating with federal authorities. Tr. at 13 – 15, 16 – 17.

With regard to his contacts with Mr. Gilley following their indictment, Mr. Massey testified that Mr. Gilley told him at their arraignment on October 14, 2010, that "the eagle was about to land" which Mr. Massey said he believed referred to the earlier, pre-indictment for an equity interest in Mr. Gilley's development projects. Tr. at 24. Mr. Massey also testified to a second contact that occurred on December 14, 2010, at a hearing on motions to continue the trial. Tr. at 27 – 28. A third contact occurred when Mr. Gilley called Mr. Massey from a prepaid cellular telephone following the hearing on December 14, 2010. Tr. at 29 – 30.

² Defendant respectfully requests that the Court carefully review the content of all e-mails Mr. Massey sent to either Mr. Gilley directly and/or Billy Graham, an employee of Ronnie Gilley Properties. The e-mails reflect the air of desperation that Mr. Massey had for payment of his invoices and the consistent inquiries regarding when he could expect payment, even after he and Mr. Gilley were indicted.

Thus, the central question in contention at the revocation hearing was not whether the contacts occurred or even what was said, but what Mr. Gilley *meant* by what was said. Tr. at 265. Mr. Massey claimed that it was his opinion whenever Mr. Gilley talked to Mr. Massey about paying him, Mr. Gilley was actually referring back to an offer that Mr. Gilley allegedly made to Mr. Massey prior to the Indictment – an offer to give Mr. Massey an equity interest in Mr. Gilley's Mississippi project. *See e.g.* Tr. at 32. However, the evidence also established that positive updates about the Mississippi project and other projects was a necessary precondition to Mr. Gilley being able to pay Mr. Massey on the legitimate invoices for services rendered that Mr. Massey had been inquiring about regularly throughout the summer and fall. *See* Tr. at 87; *see also* DX 2. Thus, as a factual matter, it was perfectly reasonable for Mr. Gilley to refer to Mississippi or any other project without the reference being any sort of code for a corrupt agreement.

B. Specific Objections and Argument in Support Thereof.

1. The Order caused Mr. Gilley to be detained for violation of a bond condition which was no longer in force at the time of the alleged violation.

The Order is based in part on Judge Moorer's conclusion that Mr. Gilley violated condition of bond (8)(j), which required Mr. Gilley to "avoid all contact, directly or indirectly, with any person who is or may become a victim of potential witness in the investigation or prosecution." Order at 4. *But this condition was no longer in effect when Mr. Gilley allegedly violated it.* The condition had been changed from prohibiting any contact with any potential witness to only prohibiting such contact with a witness "related to the subject matter of the indictment with the intent to discuss matters contained in the indictment, unless the communication is made in the presence of defendant's counsel and in preparation for trial. The defendant was allowed to engage in communications with any person *regarding matters not*

alleged in the pending indictment.” See Amended Conditional Release at 2 (italics added). (Ct. Doc. 201).

Both Judge Moorers Order and the Government's Motion to Revoke cite the original condition of release as having been violated, but neither the Order nor the Motion give any specifics as to date, time and place of the violation. Given the timing of the Government's Motion, January 6, 2011, it has to be assumed that the alleged violation occurred at the courthouse during the December 14, 2010, hearing. Mr. Gilley assumes that the alleged violation occurred during the December 14, 2010, hearing because it is the only logical assumption to make.

The Government elicited testimony from Mr. Massey about three (3) post-indictment contacts with Mr. Gilley – first at arraignment on October 4, 2010, a second during the hearing on December 14, 2010, and a third in a telephone call on December 14, 2010. Tr. at 23, 27 – 28, & 29 – 30. Judge Moorers Order, however, makes no reference to the December 14th telephone call. Instead Judge Moorers "Findings of Fact" include only brief discussions regarding statements made by Mr. Gilley at arraignment when both defendants were under the original conditions that prohibited contact with any potential witness, and the December 14, 2010 hearing, which occurred after the condition had been modified, simply to prohibit contact with any witness. It would be illogical for the Magistrate to detain the Defendant because of an uncorroborated contact with a Co-Defendant, in violation of an expired bond condition that the very same Magistrate later modified as being too broad.

However, nothing in the Amended Conditional Release of November 10, 2010, prohibited any Defendant from having mere contact with any Co-Defendant who the Defendant did not know to be a Government witness. It is undisputed that Mr. Massey's status as a

Government witness was not known until a week after the December 14, 2010, hearing. Moreover, Mr. Gilley was not in any way restricted from talking to Mr. Massey about paying money Mr. Gilley legitimately owed Mr. Massey and which Mr. Massey had been requesting. Thus, the Court's finding that Mr. Gilley violated a condition of bond by his mere contact on December 14, 2010, is without merit.

2. The Order fails to specifically identify what crime Mr. Gilley has been found to have committed.

The Order does not identify any specific federal or state statute that Mr. Gilley violated, but merely says that Mr. Gilley “attempted to bribe Mr. Massey to testify falsely.” Order at 6. Although under such grave circumstances as the deprivation of one's liberty, Mr. Gilley should not have to continue to make assumptions regarding a court order, Mr. Gilley once again has to assume that the Magistrate found that there was probable cause to believe the Defendant violated 18 USC § 1512(b)(1)(A) as alleged in the Government's Motion. The alleged violation is significant because it is undisputed that there were no allegations or evidence of threats, violence or even intimidation which are important to the Court's consideration of the safety of the community. Again, however, the Court's order purports to find probable cause to believe that the Mr. Gilley violated an unspecified crime while on release.

3. The Order fails to make any distinction between Mr. Massey's credibility and the correctness of Massey's admitted speculation.

The crux of the entire hearing was not what was said, but what Mr. Gilley *meant by what was said*. The Order nowhere acknowledges that its conclusion is based not only on Mr. Massey's factual statements but on his admitted *speculation* about what Mr. Gilley's statements meant to him. Where Mr. Gilley's liberty is at stake prior to any adjudication of guilt or innocence of any crime, detaining him in custody based on Mr. Massey's interpretation of what

the Defendant said, even if Mr. Massey truly believed his opinion is correct, without any extrinsic corroboration is an insufficient protection of the presumption of innocence.

It is undisputed that none of the contacts between Mr. Gilley and Mr. Massey on December 14, 2010, contained any mention of a bribe, or quid pro quo, or any language to suggest that the discussion was about an alleged bribe made some eight (8) months earlier. For example, under cross-examination by counsel for Mr. Gilley, Mr. Massey admitted that Mr. Gilley did not say anything to Mr. Massey that was inconsistent with Mr. Gilley's merely referencing finally being able to pay Mr. Massey the \$90,000 that Mr. Gilley owed Mr. Massey and for which Mr. Massey had been pleading with Mr. Gilley in emails. Tr. at 43 – 48.

Q. Mr. Massey, before we start going backwards I want to make sure that I understand your testimony with regard to the December fourteenth conversation in court. Mr. Gilley never said anything about continued silence, bogus stories, false statements or anything like that. He simply talked about deals coming in, and he was going to try to get you paid and Mississippi was looking good, isn't that right?

A. I don't recall him using the words "trying to get you paid," but he did not expressly say what you said.

Q. He didn't refer back to any conversation that you may have had in March, April, May, or any time in the summer. He didn't refer back to that at all, did he?

A. Yes, he did. He referenced Mississippi.

Q. But he didn't reference your equity interest. He just referenced his Mississippi deal was proceeding nicely. Isn't that right?

A. Yes. It was not a specific use of the word "equity" in that conversation.

Q. All right. And also when he called you from this phone that you didn't recognize, he also didn't say anything in that conversation except the fact that he was going to get some money in, he was going to try to get you paid, Mississippi was looking

good. There was nothing about any alleged agreement for silence, was there?

A. Not specifically, no.

Q. All right. So what your testimony is that even though nothing was said, it's your opinion that he was referencing that fact, isn't that true?

A. I have been around Mr. Gilley enough to know what he means.

Q. Maybe you didn't understand my question. My question was, isn't it true that that is your opinion that that's what he was referencing, correct?

A. That is my understanding.

Q. All right. And even though it was not said, that was your understanding, correct?

A. That is my understanding.

Tr. at 39-40.

The testimony of Special Agent Baker is also consistent with the fact that the alleged bond violation was based on Mr. Massey's opinion about what Mr. Gilley meant, not what he actually said. *See* Tr. at 188-189; *see also* DX 3, Massey 302, Jan. 6, 2011. Even if the Court "credits" Mr. Massey's testimony that an effort to bribe him took place months before he was indicted and further credits Mr. Massey's testimony that he actually believed the December 14, 2010, contact referred back to the alleged pre-indictment bribe, there was absolutely no corroboration to suggest that Mr. Massey's "understanding" or "opinion" was correct. On the other hand, there was overwhelming evidence, as discussed more fully below, that Mr. Gilley was only attempting to assure Mr. Massey that he was making efforts to pay him for the legitimate services he had rendered. Faced with uncontroverted evidence that is counter to the Government's uncorroborated theory, probable cause fails.

4. The Order fails to acknowledge the evidence presented at the hearing regarding the legitimate invoices for services and Mr. Massey's admission that he had in fact been attempting to collect on those invoices, which rebuts Mr. Massey's opinion regarding the meaning of Mr. Gilley's words.

At the hearing the Government went to great lengths to attempt to prove that Mr. Gilley attempted to bribe Mr. Massey months before being indicted. However, no evidence whatsoever was presented to bolster the opinion of Mr. Massey about Mr. Gilley's words. Yet there was undisputed evidence that a) Mr. Gilley owed Mr. Massey for legitimate invoices, b) that following the return of the Indictment, Mr. Gilley had in fact paid Mr. Massey approximately \$12,000 on his balance, c) that Mr. Massey was regularly (almost weekly) e-mailing Mr. Gilley or others in Mr. Gilley's company begging for payment on the invoices, and d) that Mr. Massey had simply not related any information about these invoices in his six (6) "proffers" with the Government between October 12th and December 2nd. The complete absence of such undisputed evidence in Judge Moorer's "Findings of Fact" demonstrates that the Order was simply conclusory with virtually no support.

It is important to note that Mr. Massey admitted that, even while he was under bond conditions which prohibited him from having direct or indirect contact with Mr. Gilley, Mr. Massey sent Mr. Gilley several emails begging Mr. Gilley to pay Mr. Massey the money Mr. Gilley owed Mr. Massey. Tr. at 43-48. Neither the Government nor the Order acknowledges that Mr. Massey may have violated his bond conditions all the while cooperating with the Government.

5. The Order fails to recognize that counsel for Mr. Gilley elicited testimony from the Government's witnesses that was contrary to the Government's claims.

Judge Moorer's Order appears to be based on the incorrect assumption that the only evidence to be weighed against the Government's argument was the testimony presented by the

two witnesses presented by Mr. Gilley, which the Court seems to give little, if any, credence. This is, however, certainly not the case. As with most criminal trials and hearings, the strongest evidence for the defense on the issues of whether the defendant violated a condition of his bond came through the cross-examination of witnesses called by the government. Judge Moorer simply ignored such evidence in his Order. For example:

- Mr. Massey admitted that not one time in his six proffers prior to December 14, 2010, did he ever mention to the Government the money Mr. Gilley owed him as payment for legitimate invoices. Tr. at 68-69; *see also* DX 3.
- Accompanied by his lawyers, Mr. Massey pled guilty the week after his December 14th contact with Mr. Gilley, but did not mention the fact to the Government. Tr. at 43.

(Note: If Mr. Massey had actually believed that Mr. Gilley was attempting to get him to testify falsely on December 14, 2010, then Mr. Massey would have said so at the time. This is evidence of a story developed by the Government and told, or at least suggested, to Mr. Massey instead of the other way around.)

- Mr. Massey admits that, even though he had been cooperating with prosecutors for over two months, it did not occur to him to mention his conversation with Mr. Gilley on December 14th until several weeks later. Tr. at 43.

Q. Right. You were pleading guilty and, in fact, as part of your guilty plea Ms. Morris read some statements of fact about these previous conversations in which Mr. Gilley had allegedly offered you some type of equity interest for your silence. Do you remember that part of your guilty plea?

A. Yes, I did share that with prosecutors, the previous conversations about that.

Q. Right. And, again, on December the twentieth or the twenty-first, that was repeated in open court by Ms. Morris, isn't that right, and you acknowledged it, correct?

A. Yes.

Q. Now following that guilty plea, did you or your lawyers ever talk to the Government that day and say oh, by the way, let me

tell you something, let me tell you what Mr. Gilley said, you know, now you've reminded me what he said on December the fourteenth. Did that come up?

A. I don't recall if we discussed it that day or not.

Q. In fact, it passed without comment from anyone, either you or your lawyers, until around January the fifth or sixth, some three weeks after that conversation may have taken place, isn't that right? Tr. at 42. *See also* DX 2 and DX 3.

- Mr. Massey had been bribing State Rep. Terry Spicer with monthly cash payments since as early as 2001 or 2002. Tr. at 52-53. Yet in the privacy of an automobile while the two were at the BamaJam music festival in June 2010, over three (3) months before the indictment, Mr. Massey tells Rep. Spicer that he had been "cut in" on the Country Crossing deal because he had worked so hard for Gilley, but then added that he "believed" that Mr. Gilley was really trying to keep him from cooperating with the ongoing federal investigation. Tr. at 61 – 64, 193 – 194.

This point is especially significant in that the Government made no attempt to elicit this testimony from Mr. Massey or Special Agent Baker, presumably because it bolstered the defense arguments that Mr. Gilley never made any such agreement or offer to Mr. Massey and that the reasons for Mr. Gilley's alleged offer of an equity interest in any venture was simply based on Massey's subjective "belief" or "opinion" of what was in Mr. Gilley's mind and not based on what he actually said.

6. Based on the evidence presented at the hearing, the Order appears to be based in part on Judge Moorer's improper conclusion that Mr. Gilley is guilty of the underlying offenses contained in the Indictment.

The Order is impermissibly based on "bootstrapping" of evidence involving the underlying charges. Over the objections of the Defendant, the Government was allowed to play six (6) recorded telephone conversations of the Defendant. *See* GX 1 – GX 6. Of these only GX 1, a conversation between Mr. Massey and Mr. Gilley after Massey was interviewed by FBI agents last March 2010, was played in an effort to corroborate Mr. Massey's statement that Mr. Gilley attempted to bribe him to maintain his silence. The others were purportedly offered to

demonstrate that Mr. Gilley used prepaid cellular telephones to commit the crimes charged in the Indictment. But yet in his oral findings Judge Moorer stated:

Some phone conversations I heard were very troubling. I don't know if I could go back in time and have heard this during the initial hearing that I might have reached a different conclusion altogether about your release, Mr. Gilley.

Tr. at 267.

The above quote clearly demonstrates that Judge Moorer gave undue weight to what he perceived to be the strength of the Government's case on the underlying charges rather than evidence of Mr. Gilley's contact with Mr. Massey in December 2010. This undue weight ignores the statutory language of the Bail Reform Act and other evidence elicited at the hearing, including the following:

- The six (6) recorded conversations were known to the Government at the time of the initial appearance, but the Government expressed no concern about them.
- Most of the conversations were in some way quoted in the Indictment that was before Judge Moorer when he set the conditions of release.
- The conversations were but 6 out of approximately 3,000 designated as pertinent by agents monitoring the wiretap, thus not even scratching the surface of either the Government's case or the Defendant's case.

The fact that Judge Moorer placed such weight on this evidence at the hearing is demonstrated by the conclusory nature of his written order. As such the order is inconsistent with the mandate of the Bail Reform Act and should be revoked.

7. **The Order references Mr. Gilley's use of prepaid cellular telephones, which are not illegal and possession of which was not prohibited by the Amended Conditional Release (Ct. Doc. 201), as an attempt to circumvent law enforcement.**

Even though the Order did not refer to the December 14th telephone call, Judge Moorer's findings of fact also state, "Agent Doell testified that Gilley used these ['disposable pre-paid cell

phones, also referred to as tracphones'] in an attempt to circumvent law enforcement." *See* Order at 5. The Government's introduction of evidence regarding Mr. Gilley's use of prepaid cellular telephones was a red herring at the revocation hearing and irrelevant to Judge Moorer's determination as to whether Mr. Gilley violated the conditions of his bond and whether any conditions or combination of conditions could assure Mr. Gilley's appearance in Court and safety to the community. As an initial matter, it is axiomatic that there is absolutely nothing illegal about purchasing, possessing, and/or using a prepaid cellular telephone, and the Government's intimation that Mr. Gilley's usage of prepaid cellular telephones is "nefarious" misconstrues the facts and the law. Tr. at 239. Although there are numerous reasons one might use a prepaid phone, the Court need look no further than the Government's own evidence through Special Agent Doell that in the four day period surrounding the December 14th call to Mr. Massey, Mr. Gilley made a total of 103 other calls to lawyers, his office and others. Tr. at 122 – 123. It can thus hardly be argued that the primary or even secondary reason that Mr. Gilley used a prepaid cellular telephone phone was to conduct criminal activity.

A second, significant initial consideration regarding Mr. Gilley's use of prepaid cellular telephones is that nowhere in any of his conditions of bond, prior to January 12, 2011, was Mr. Gilley prohibited from using a prepaid cellular telephone. Thus, not only is there nothing illegal about usage of a cellular telephone, Mr. Gilley was allowed to do so under his conditions of bond until Judge Moorer added condition (8)(w) on January 12, 2011.³

Despite these obvious points regarding Mr. Gilley's permitted conduct, the Government nevertheless, focused a significant portion of its case on Mr. Gilley's usage of prepaid cellular

³ Judge Moorer's Order on January 12, 2011, amended Mr. Gilley's conditional release "to include additional condition (8)(w) in that defendant Gilley refrain from the use of any telephone other than the cellular telephone whose number he will provide to his supervising Pretrial Services Officer." *See* Order, January 12, 2011, at 2. (Ct. Ct. Doc. 338).

telephones. The Government would contend, and wrongly so, that it had to develop this irrelevant evidence regarding prepaid cellular telephones at length in support of its request to revoke Mr. Gilley's bond. The supposed basis for this evidence was to establish Mr. Gilley's usage of a prepaid cellular telephone to call Mr. Massey on December 14, 2010. Tr. at 163 – 164. As the hearing progressed, it became clear that the real reason for the Government's introduction of this evidence was to focus Judge Moorer on conduct predating and subject to the Indictment in an effort to confuse the issues at hand and partially try its case in chief to sully Mr. Gilley's presumption of innocence.

In support of this assertion, Mr. Gilley respectfully submits that he stipulated to his use of a prepaid cellular telephone early in the hearing during Special Agent Doell's testimony. Tr. at 117. Secondly, the alleged violation of his conditional release relating to this call was not the manner of the call itself via prepaid cellular telephone, but the alleged content of the call – Mr. Massey's allegation that Mr. Gilley offered to bribe him during the call. Mr. Massey had already testified to the content of the call, rendering Special Agent Doell's testimony utterly irrelevant to the issue before Judge Moorer. In spite of the uselessness of this issue, the Government continued to pursue it throughout the course of the hearing over Mr. Gilley's objections in an effort to further pollute the hearing and Mr. Gilley's right to a fair trial on the case in chief in the future. *See e.g.* Tr. at 163 – 164. To wit: the Government played audio of the wiretap recordings during Special Agent Baker's testimony for the sole and express purpose of establishing the fact that Mr. Gilley used prepaid cellular telephones earlier in 2010, prior to the return of the Indictment, and as stated in the Indictment. *See* Tr. at 163 – 164; *see also* Indictment at ¶¶ 183 – 188. The evidence regarding Mr. Gilley's use of cellular telephones was irrelevant, unduly prejudicial, and should be stricken from the record of the hearing.

Finally, as further evidence of the complete lack of relevance to the revocation hearing, nowhere either in his oral order, Tr. 264 – 267, or written Order (Ct. Doc. 597) does Judge Moorer reference Mr. Gilley's call from a prepaid cellular telephone to Mr. Massey on December 14, 2010. Thus, that call forms no basis of the Judge Moorer's factual findings pertaining to his decision to revoke Mr. Gilley's bond.

8. **Judge Moorer appears to have improperly juxtaposed the credibility of Mr. Massey against the credibility of Mr. Seldon in determining the ultimate issue – revocation of Mr. Gilley's bond – when on its face, Mr. Seldon's testimony was immaterial.**

Judge Moorer attacked the testimony of one of the IT employees for Ronnie Gilley Properties, Kelvin Seldon, stating in open court: "I don't find it credible some of the things that he said that he could not recall. I actually think he probably has significant information that he could offer but did not...I think some of the testimony that he could give were he to, might be very damaging to the defendant, Mr. Gilley, either in this proceeding and/or in other proceedings." Tr. at 265. With all due respect to Judge Moorer, and these proceedings, the entire line of inquiry relating to Mr. Seldon was patently absurd and borders on an abuse of process on the part of the Government. As the transcript of his testimony plainly evidences, there was nothing in Mr. Seldon's testimony that shows he was being anything less than completely truthful.

The apparent sole purpose of the Government subpoenaing Mr. Seldon's testimony was to enter the facts into the record that Mr. Seldon purchased the prepaid cellular telephone from which Mr. Gilley placed the call to Mr. Massey on December 14, 2010, and that a Mr. Courtney Samson activated the same phone. The Government then argued in closing that these innocuous facts were in fact "nefarious." Tr. at 239. The Government's characterization of Mr. Seldon's testimony as evidence of "nefarious" conduct was groundless and irresponsible. The

Government's posture is rendered even more absurd in light of the fact, as discussed *supra*, Mr. Gilley stipulated to using the very prepaid cellular telephone at issue prior to Mr. Seldon's testimony about the same.

Mr. Seldon testified that he is an employee of Ronnie Gilley Properties ("RGP"), and one of two (2) employees who works in the IT department of the company. Tr. at 124 & 130. Mr. Seldon's co-employee in the IT department is Mr. Courtney Samson, who is Mr. Seldon's supervisor and has a higher level of expertise than Mr. Seldon. Tr. at 130. Mr. Gilley asked Mr. Seldon to purchase a cellular telephone for him. Tr. at 126. Mr. Seldon, in his capacity as an employee of RGP working in the IT department, obtained petty cash from someone in accounting in order to make the purchase, and then purchased a prepaid cellular telephone from Wal-Mart on his way to lunch with the other member of the 2-person IT department, Mr. Samson. Tr. at 126 – 130. Mr. Samson then activated the telephone, because as Mr. Seldon explained, "I asked him if he activated it because I was driving over to McDonald's so we could get lunch." Tr. at 130. That the Government labeled this set of innocuous facts "nefarious" indicates that the Government is capable of deeming any set of facts relating to Mr. Gilley nefarious.⁴

Mr. Gilley respectfully submits that there is not a more unremarkable fact than IT personnel in an office obtaining and installing IT equipment at the workplace, whether it be a monitor, a telephone, a projector, or any other piece of electronic equipment. The fact that Mr. Seldon performing an ordinary job function in the ordinary course of his employment with RGP drew the Government's scorn and the Magistrate's wary eye, is wholly unjustified.

⁴ To further taint this entire line of inquiry, the Government adopted an insulting and condescending tone in its questioning of Mr. Seldon. In drilling Mr. Seldon over why Mr. Gilley asked one of his IT personnel to purchase him a piece of IT equipment, the Government belittled Mr. Seldon following his response, "He [Mr. Gilley] asked me to get him a phone," by coarsely belaboring, "Was he in a wheelchair?" and "Was he limping?" Tr. at 129.

9. **The Order makes the conclusory statement that Mr. Gilley did not rebut the presumption that "no conditions or combination of conditions will assure he will not pose a danger to the safety of another person in the community."**

The dearth of reasoning underlying the critical conclusion regarding denial of conditional release, which is one of the two (2) ultimate issues in the hearing (i.e., (1) Did Mr. Gilley's conduct break the law and/or violate a condition of release, and (2) what conditions of release, if any, can be imposed short of detention), is symptomatic of these entire proceedings. The Order summarily concludes that there are no conditions of release that can be imposed to meet the important objective of protecting the community without setting forth the specific factors that statutorily undergird such a conclusion, and accordingly fails to apply any facts to these auspiciously omitted factors. Had the Order applied the facts to these factors, it would have been evident that there are conditions and combinations of conditions that may be imposed to assure Mr. Gilley's appearance in these proceedings and protect the community from danger. This very analysis in support of Mr. Gilley's request for his conditional release is contained in the section that immediately follows.

IV. THIS COURT CAN IMPOSE BOND CONDITIONS THAT WILL ASSURE MR. GILLEY DOES NOT POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY.

As articulated in the preceding sections, Mr. Gilley submits that the Government did not show probable cause that he violated the law since his release on bond in this matter on October 5, 2010, nor did the Government show that Mr. Gilley violated the condition of his release regarding witness contact. Accordingly, as Mr. Gilley argues throughout the instant Motion, his present detention is contrary to law. However, should the Court find probable cause that Mr. Gilley did violate the law and/or that he violated conditions of his release, Mr. Gilley submits that there was more than sufficient evidence that conditions or combinations of conditions exist

to assure his appearance at trial and to protect the community from danger. Judge Moorer merely concluded that no conditions or combination of conditions would assure Mr. Gilley's attendance at trial and the safety of the community without articulating a specific analysis of the applicable "[f]actors to be considered" found at 18 U.S.C. § 3142(g) and without acknowledging any of Mr. Gilley's specific evidence that conditions or combinations of conditions of release, including the more stringent conditions imposed by Judge Moorer himself that were fully complied with by the Defendant, would be sufficient to assure Mr. Gilley's attendance at trial and protect the community. *See* Tr. at 264 – 267; *see also* Order at 6 – 7. (Ct. Doc. 597).

A. Factors to Be Considered under 18 U.S.C. § 3142(g).

In determining whether such conditions or combinations of conditions of release are viable, § 3142(g) requires the court "take into account the available information concerning" the four factors outlined therein, which are: (1) the nature and circumstances of the offenses charged, (2) the weight of the evidence against the defendant, (3) the defendant's history and characteristics, and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. In the sections below, Mr. Gilley discusses why an analysis of each factor militates in favor of conditions or combinations of conditions of release rather than detention. At the outset, however, it should be emphasized that there is no allegation that Mr. Gilley is a flight risk. Detention in this case is ostensibly based solely on a perceived danger to the safety of the community.

1. § 3142(g)(1): The Nature and Circumstances of the Offenses Charged.

Mr. Gilley is not charged with any of the crimes enumerated at § 3142(g)(1) (e.g., crime of violence, sex trafficking, federal crime of terrorism, a crime involving a minor victim, or a crime involving a controlled substance, firearm, explosive, or destructive device) that would

indicate a threat to the safety of any individual or the community. Furthermore, the Government did not allege that Mr. Gilley committed any of the crimes listed at § 3142(g)(1) as the basis for its Motion to Revoke Pretrial Release. (Ct. Ct. Doc. 322). The crimes with which Mr. Gilley is charged are non-violent, white-collar crimes that have no hint of violence, threats, or intimidation. As such, this factor is weighed in Mr. Gilley's favor.

2. § 3142(g)(2): The Weight of the Evidence against Mr. Gilley.

Mr. Gilley respectfully submits that the weight of the Government's evidence against him is no different than that of his remaining nine (9) Co-Defendants charged in the Indictment who remain out on bond pending trial. Despite oral statements of Judge Moorer that he might have reached a different conclusion regarding Mr. Gilley's release at his initial appearance, nothing has changed with regard to the weight of the evidence against Mr. Gilley or his Co-Defendants. Tr. at 266 -267. Because this factor does not weigh in favor of the detention of his Co-Defendants, Mr. Gilley submits that this factor cannot weigh in favor of his pretrial detention. Importantly, in relation to non-violent crimes such as those alleged against Mr. Gilley, the weight of the evidence factor is geared towards the defendant's risk of flight from possible incarceration and not the threat a defendant may pose to the community.

3. § 3142(g)(3): Mr. Gilley's History and Characteristics.

As was the case when pre-trial services did their initial assessment of Mr. Gilley following his arrest in October, Mr. Gilley has no criminal record, deep family, social, and business ties to the community in which he resides, and is active in the lives of his wife and children. None of that has changed and certainly weighs in favor of Mr. Gilley's release. It was undisputed, however, that since the time of his home confinement that followed the Government's motion to revoke his bond, Mr. Gilley's personal and family circumstances have

changed dramatically in a way that gives even greater assurance that he will abide by the conditions of his release.

Specifically, evidence was adduced at the revocation hearing that Mr. Gilley's wife had recently undergone a battery of tests to determine whether a recent mass discovered in her lungs may be cancerous. Tr. 220 – 227. Mrs. Gilley's primary treating physician, Dr. Michael McQueen, testified that after discovering the mass in her lungs via x-ray, he referred her to a thoracic surgeon in Birmingham, Alabama, for additional tests and evaluation. Tr. at 217 – 219. The surgeon in Birmingham concluded that the mass in Mrs. Gilley's lungs was not cancerous, but instead was evidence of some chronic lung disease, including the possibility of cystic fibrosis. Tr. 220 – 227. Dr. McQueen and Mr. Conoly, Mr. Gilley's pre-trial services officer, both testified that Mr. Gilley had been involved in his wife's medical appointments and provided her support in the midst of her sudden illness. Tr. at 209 – 210, 226 – 227. Significantly, Dr. McQueen testified that it would be weeks before a final diagnosis and treatment plan could be established for Mrs. Gilley and that support would be critical to her well being. Tr. at 224, 226 – 227. For a man already heavily involved in the lives of his wife and children, the trauma of having an otherwise healthy, 36 year old wife and mother diagnosed with a lung illness that is undefined to date, with all of the care and nurturing that will be required in the coming weeks and months as she begins her as of yet uncharted course of treatment, grounds him even deeper into the roots of his family obligations thereby assuring that he will be ever more conscious of any bond conditions that are imposed that will allow him to meet those family obligations, whether in whole or in part, pending trial. *See* 18 U.S.C. § 3142(g)(3)(A).

In addition to Mrs. Gilley's condition, evidence was adduced at the revocation hearing that Mr. Gilley had severely injured his ankle in the week prior to the hearing. Tr. a 233; *see*

also DX 9. Evidence was introduced that Mr. Gilley's ankle had been severely sprained with multiple ligament tears and that it was too swollen prior to the hearing for a physician to evaluate whether or not his ankle injury would require surgery or a course of intense physical therapy. Tr. at 211 – 212. Mr. Gilley's ankle monitoring bracelet had to be moved from his injured left ankle to his right ankle to accommodate an orthopedic boot on his right ankle. *Id.* Mr. Gilley's physical condition and the need for future medical attention related to his ankle is another factor that will reasonably assure his appearance in these proceedings and makes him conscious of his bond conditions. No one would want to risk medical treatment in a city or county jail versus the care of one's own primary or orthopedic physician. *See* 18 U.S.C. § 3142(g)(3)(A).

Lastly, at the time of his indictment, Mr. Gilley was not on probation, parole, or release pending trial, sentencing, appeal, or completion of a sentence for any Federal, State, or local law. *See* 18 U.S.C. § 3142(g)(3)(B). There was no evidence introduced at the revocation hearing that Mr. Gilley has a history relating to drug and alcohol abuse or a criminal history, and accordingly, Mr. Gilley is not a danger to the community for these reasons. *See* 18 U.S.C. § 3142(g)(3)(A).

4. § 3142(g)(4): The Nature and Seriousness of the Danger to Any Person or the Community that Would Be Posed by Mr. Gilley's Release.

The Government presented no evidence that Mr. Gilley threatened, injured, intimidated, or even attempted to threaten, injure, or intimidate any witness or prospective witness in this case, and it is undisputed that Mr. Gilley is not a danger to the safety of the community in this regard. The Government's argument, and presumably Judge Moorer's Order, that Mr. Gilley presents a danger to the community rests solely on the allegation that Mr. Gilley sought to influence a Government witness's (Jarrod Massey's) testimony on December 14, 2011.⁵ Given

⁵ Keeping in mind, as discussed herein, Mr. Massey was not identified as a Government witness on December 14, 2010. Mr. Massey appeared at the hearing on December 14, 2010, as one of eleven (11) Co-Defendants in the above-captioned matter, and changed his plea the following week.

the lengthy discussion of the unreliability of Mr. Massey's testimony discussed herein, the same will not be repeated here. However, for the reasons stated in Section III of this Motion, Mr. Gilley respectfully submits that this single instance of alleged misconduct during his conditional release, based exclusively on a Government witness's opinion about what Mr. Gilley really meant when he talked to him about the status of certain legitimate business projects, does not make him a danger to the community. Despite the six (6) wire recordings introduced at the revocation hearing, GX 1 – GX 6, which were made months before the Indictment, and despite Mr. Gilley's use of prepaid cellular telephones, the evidence presented by the Government to deny Mr. Gilley his liberty until a jury has had an opportunity to evaluate the underlying facts pertaining to the charges against him, boils down to the uncorroborated opinion of Mr. Massey, a Government witness eager to get the best deal he can, but who failed to disclose his contacts with Mr. Gilley and his efforts to collect legitimate funds he is owed until almost a month after the December 14th contact. The weakness of the Government's case alone belies a finding that Mr. Gilley is somehow a danger to the community.

B. Conditions of Detention⁶

In addition to the factors set forth in 18 U.S.C. § 3142(g), stated *supra*, Mr. Gilley respectfully submits that this Court should also consider the detention conditions that Mr. Gilley is currently enduring which will have a dramatic and negative impact on his ability to prepare for trial.

⁶ At the outset of this argument, and for purposes of clarification, Mr. Gilley's concerns regarding the conditions of his detention relate exclusively to the facility itself and the circumstances surrounding his condition, but in no way relate to the personnel of the Montgomery City Jail. To date, the personnel of the Montgomery City Jail have been extremely helpful, informative, and accommodating to Mr. Gilley and his counsel. On several occasions, the personnel of the Montgomery City Jail have explained to counsel that they will be as accommodating as possible given the limited conferencing space to facilitate attorney-client meetings with Mr. Gilley.

Mr. Gilley's current conditions simply do not allow him an opportunity to prepare for any trial, much less one scheduled only some 3 ½ months away. Mr. Gilley's current confinement is in a 15' x 18' cell, which is subdivided into two smaller cells, 6' x 8', which includes four bunks and a toilet. A large portion of his day is spent in the 6' x 8' cell with three (3) or more other prisoners. In such cramped quarters, hygiene conditions are deplorable and unsanitary. As of Monday, February 14, 2011, one week into his incarceration, Mr. Gilley estimated he had slept a total of four (4) hours over a seven (7) day period as a result of the conditions of his confinement and the constant noise in the facility. The problems associated with Mr. Gilley being sleep deprived have been compounded by the fact that the jail's rules and restrictions will not allow him to take numerous prescription medications he had been taking for years immediately up until the time of his detention, and that it can even take days, if not weeks, to obtain something as simple as Tylenol for pain relief in his ankle. There is simply no way for a person in Mr. Gilley's current circumstances to maintain a frame of mind that would reasonably allow him to be prepared for a trial of this magnitude requiring intense preparation.

While the actual living conditions alone make it impossible for Mr. Gilley to prepare for trial, the visitation environment at the facility exacerbates the problem. Foremost, as this Court is aware and the Government has admitted, a large portion of this case will be premised upon consensual and wiretap recordings. With respect to Mr. Gilley alone,⁷ the Government has identified over 900 pertinent calls and more than 2000 non-pertinent calls. Under his current situation, Mr. Gilley cannot listen to, much less analyze, any of the recordings of these calls. Mr. Gilley is prohibited from having any type of electronic device in his cell that would allow him to review the recordings. Further compounding the problem is the fact that even if Mr. Gilley's

⁷ Of course, because of the conspiracy allegations, Mr. Gilley will also have to review and listen to hundreds of telephone recordings of Mr. Massey and Mr. McGregor.

counsel were allowed to bring such a recording device to the facility, the jail does not have adequate space for a substantive attorney-client meeting to listen to the recordings. In particular, one attorney-client meeting room is the same room that contains the telephones prisoners use to talk with attorneys or visitors and the others are so small that any ability to review trial materials within their confines is impossible. Counsel also has been advised that the jail typically limits attorney-client meetings to less than two hours in order to accommodate the inmates' needs for attorney-client communication equally and fairly. Obviously, none of these conditions are conducive to reviewing and analyzing hundreds of recordings accompanied by hundreds pages of transcripts. In reality, there is simply no way for such necessary meetings to take place.

The inability to listen to wire recordings is not the only problem Mr. Gilley faces in preparing for trial while in the Montgomery City Jail. There is also no reasonable way for him to review the documentary evidence in this case. Mr. Gilley's counsel was informed by personnel at the jail that while he is able have the opportunity to take written materials into his cell relating to his case, it is inevitable that such materials would be stolen by other prisoners almost instantly. According to jail personnel, none of the detainees, including Mr. Gilley, have the ability to secure any personal affects on the cell block including legal documents. Thus, there is no way to ensure that sensitive items such as grand jury testimony transcripts, FBI 302s, transcripts of wire recordings, affidavits in support of the Government wiretap applications, and financial/bank records would not end up in the wrong hands of other inmates. Surely, no one involved in this case, including the Government, want such sensitive materials getting into the wrong hands. Under Mr. Gilley's current situation, there is no way to ensure that this will not happen.

Even if he was able to maintain the documents, the overall jail environment makes it impossible for Mr. Gilley to substantively review such material. As set forth above, in large part,

Mr. Gilley's preparation area is limited to a 6' x 8' foot cell he shares with other inmates. Furthermore, the noise level in the cell area from television, music, the constant din of conversation and shouting, kicking and banging on bars, as well as the routine interruptions from jail employees who call roll and transport inmates to meals, showers, and transfers, does not provide an atmosphere in which Mr. Gilley can actually review and study the discovery, assuming it were otherwise possible. To make matters worse, Mr. Gilley has had almost no access to writing utensils, other than a small piece of lead. Thus, Mr. Gilley is barely able to record his own thoughts to forward to his counsel, when he is basically limited to the use of a piece of a lead.

V. CONDITIONS OR COMBINATIONS OF CONDITIONS OF RELEASE UNDER WHICH MR. GILLEY'S APPEARANCE AND LACK OF DANGEROUSNESS CAN BE REASONABLY ASSURED.

The undisputed evidence presented at hearing was that, Mr. Gilley had complied with the additional conditions of release Judge Moorer imposed in his Order dated January 12, 2011. As his probation officer, Mr. Conoly, testified, Mr. Gilley was placed under house arrest pending the revocation hearing. Tr. at 209. Mr. Gilley did not violate the terms of the house arrest. *Id.* Mr. Gilley was also prohibited from using any phone other than his personal cell phone and he was required to log all of his calls from his cellular telephone and submit those logs to Mr. Conoly by February 4, 2011. *Id.* Mr. Conoly testified that Mr. Gilley submitted the logs to him on an ongoing basis prior to February 4, 2011, although he was under no obligation to do so. *Id.*

Mr. Gilley fully complied with these more restrictive conditions as set January 12, 2011. The Government offered no evidence that he violated any condition, including making calls from any other phone, since the conditions were set on January 12, 2011. His probation officer gave no testimony regarding any violations of conditions, thus proving these conditions or some

combination of these conditions and others will reasonably assure the appearance of Mr. Gilley at trial and protect the community from danger.

Even though there was no evidence that the more restrictive conditions were not working as intended, the Government argued several reasons why these restrictive conditions would not suffice in the future. For instance, the Government argued that it would not have a record of Mr. Gilley's calls from his home telephone. The Government also argued it would not have a record of the visitors to Mr. Gilley's home. The Government's two concerns in this regard can be remedied easily.

First, in addition to house arrest and maintaining a call log for his cellular telephone, the Court can also set conditions requiring Mr. Gilley to maintain a call log for his home telephone. As an alternative, Mr. Gilley is willing to simply disconnect his home phone and continue to agree not to use any other telephone other than his personal cellular telephone. Mr. Gilley has demonstrated that he can and will comply with conditions requiring him to log and report his communications as he did from January 12, 2011, through the date of the hearing.

Secondly, if the Government is concerned about Mr. Gilley improperly contacting its witnesses in this matter, the Government has an obvious remedy for this concern. The Government obviously can and will be informed by any of its witnesses that they had contact with Mr. Gilley, should Mr. Gilley make an attempt to contact them.

Third, Mr. Gilley can maintain a log of all visitors in and out of his property and provide said log to his probation officer. Mr. Gilley has twenty-four (24) hour video surveillance of his property which can also be turned over to the Probation Office to verify the accuracy of the logs.

Finally, while the more stringent conditions imposed by Judge Moorer required Mr. Gilley to turn over his cellular telephone logs to his probation officer, Mr. Gilley would agree

that any future logs of phone calls or visitors can be turned over directly to the prosecutors or case agents for their review. In short, although having government agents verifying your every telephone call and visitor is an incredibly strong incentive to abide by the conditions of bond, the fact is that Mr. Gilley has nothing to hide relating to who he talks on the telephone with or who visits him.

Thus, if the Court is not satisfied that the conditions of release articulated in January 12, 2011, Order (or the prior Amended Order of Conditional Release) will suffice, there are other combinations of conditions the Court can impose to reasonably assure Mr. Gilley's appearance and protect the community.

VI. CONCLUSION

The American criminal justice system has always recognized that "federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* (internal citation omitted).

As noted above, § 3142 specifically provides that "Nothing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j). Thus, § 3142 is weighted in favor of the pretrial release of defendants. *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985); *United States v. Lee*, 79 F.Supp.2d 1280, 1283 (D. N.M. 1999).

As demonstrated above, the Magistrate's Order is completely inadequate to protect the presumption of innocence, is without foundation, is contrary to law and is due to be revoked. Accordingly, Mr. Gilley moves this Court to enter an order: (1) revoking the Order of Detention

(2) releasing Mr. Gilley from custody; and (3) setting forth appropriate conditions of bond. In the alternative, Mr. Gilley hereby moves this Honorable Court to exercise its discretion in setting a *de novo* hearing on this issue.

Respectfully submitted,

/s/ G. Douglas Jones
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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 18th day of February, 2011, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

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