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

UNITED STATES OF AMERICA,	)	
	)	
P1aintiff,	)	
	)	**No. 2:10 -CR-186-MHT**
v.	)	
	)	**ORAL ARGUMENT REQUESTED**
RONALD E. GILLEY,	)	
	)	
Defendant.	)	

DEFENDANT RONALD E. GILLEY'S SUPPLEMENT AND REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER DETENTION ORDER

COMES NOW, the Defendant, RONALD E. GILLEY ("Defendant" or "Mr. Gilley"), by and through the undersigned counsel and hereby supplements his Motion to Reconsider and replies to the Government's Response to the Motion to Reconsider as follows:

I. Facts Relevant to Reconsideration

As the Court did in open court at oral arguments on March 7, 2011, the Court's Order of March 10, 2011 expressed "serious concern" that the underlying facts were not being moved forward to the grand jury for either a no-bill or indictment, either of which would move the underlying witness tampering charges towards resolution. (Doc. 763 at 25, 26).

Defendant Gilley is aware that witnesses appeared before a grand jury last Thursday, March 24, 2011, presumably on this very issue as one of the witnesses who appeared was one of the witnesses that testified at the February 7, 2011, revocation hearing. Based on the views expressed by the Court, however, it would not appear that merely calling a couple of witnesses to testify at grand jury would satisfy the Court that the underlying charges were moving toward resolution. The Government established probable cause to the satisfaction of the Court by

initially calling only five witnesses, all of whom were subject to cross-examination. Surely it would not take the Government more than day, or less, to establish probable cause to a grand jury where there is no cross-examination and no duty to present exculpatory information. Yet as of the date of the Government's response and the filing of this supplement and reply, another grand jury has come and gone with no indication that any action was taken. This grand jury session would be at least the third since the Government first learned of Defendant's December, 2011, contacts with Massey. The only conclusion reached by the lack of any indictment is that

1. The Government decided to not seek an indictment; or

2. The grand jury no-billed a requested indictment; or

3. An indictment exists that for some inexplicable or bad-faith reason is under seal

In any event, the underlying criminal offense for which the Defendant has been detained appears to be nowhere closer to ultimate resolution than it was in January, 2011. Yet Mr. Gilley is still in jail. Moreover, even if an indictment is returned, the Court's analysis for detention is the same in the indictment would merely establish a rebuttable presumption.

II. Reply to Government's Response

Defendant respectfully submits that the response by the Government to Defendant's Motion to Reconsider demonstrates that Defendant has in fact overcome the presumption of detention and that conditions or a combination of conditions would assuage the Court of any concerns regarding Defendant's release. In that respect Defendant submits the following:

A) While giving lip service to Congressional mandate creating a "rebuttable presumption," the Government essentially argues the opposite: that once probable cause exists to believe that the Defendant committed a crime while on bond then an "irrebuttable" presumption exists that the Defendant must be detained. For instance:

1. The Government states that…"[F]urthermore, in light of the presumption in favor of pre-trial detention which arises when there is 'double probable cause'…Defendant Gilley's pre-trial detention was appropriate." (Doc. 833 at 3). "Double probable cause" is purely a made-up term by the Government and their premise is not consistent with the law. To begin with every case involving more than one-count would involve double, triple, quadruple, etc. probable cause. If "double probable cause" was the standard as suggested by the Government then every multi-count indictment would not only carry a presumption of detention, but would in fact result in detention. Second, even if the Government is using this term to refer to a case, as is here, in which probable cause has been found for an offense committed while the Defendant was on bond, the same is still true. The Government apparently believes that detention is "appropriate" upon the second finding of probable cause regardless of the other factors that the Court is required by law to consider. Thus, in any case where the Government's made up term "double probable cause" exists, a Defendant would always be detained. This is absolutely contrary to the rebuttable presumption and statutory framework Congress created in 18 U.S.C. 3141, *et seq*.

2. The Government further states:

> However, Defendant Gilley contends that he met his burden of production to rebut the presumption in favor of detention and that the 18 U.S.C. § 3142(g) factors further militate in his favor. This contention is flawed. First and foremost, even if the defendant met his burden of production with respect to the presumption, the presumption survives and remains a factor to be considered.

Doc 833 at 4.

It is the Government's analysis of the law in this case that has been, and continues to be, flawed in that the Government simply ignores their burden of proof as required by statute. It appears clear that contrary to the statute and case law, it is the Government's belief that once they

put forth evidence supporting probable cause the detention inquiry for the court essentially ends and the Defendant should be detained. The Defendant, on the other hand, has not only repeatedly acknowledged the creation of a rebuttable presumption of detention upon a finding of probable cause, but also that the "statutory presumption only shifts the burden of production" while emphasizing that the burden of "persuasion" concerning risk of flight and dangerousness" remains with the Government. *See* United States v. King, 849 F.2d 485, 488 (11th Circuit , 1988) citing U.S. v. Hurtado, 779 F.2d 1467, 1478 and U.S. v. Jessup, 757 F.2d 378 at 381-84 (1st Cir. 1985). *See also* Doc. 815 at 2,3. Even more significant, the Government continues to ignore the fact that their burden of persuasion that the Defendant is a danger is by clear and convincing evidence. (Doc. 815 at 3, citing U.S. v. Portes, 786 F.2d 758, 764 (7th Cir. 1986); *see also* U.S. v. King at 489, fn 3, and 18 U.S.C. 3142(f). As more fully outlined below, the Government has offered only meager, certainly not clear and convincing, evidence that the Defendant would be a non-physical danger to the community if released on any of the conditions suggested by the Defendant.

It is respectfully suggested that the clear and convincing standard for providing dangerousness was also overlooked by this Honorable Court in its order of March 10, 2011. There the Court goes to great lengths to express the concern that the Defendant might be detained indefinitely upon only the Court's finding of probable cause (Doc. 763 at 25-28). In fact the Court invited the parties to:

> look into this matter, not only from the perspective of whether the Bail Reform Act allows him indefinite detention without any good-faith effort at final resolution of the obstruction-of-justice charge, and not only from the perspective of whether the Constitution allows this result as well, but also from the human perspective of whether it is simply the fair thing to allow to happen, thereby

> pretermitting any need to reach the statutory and constitutional questions.

Doc. 763 at 28.

But in the Bail Reform Act, Congress did not create a statutory framework that allowed pre-trial detention based solely on probable cause, whether the probable cause finding was made by a grand jury or Court. Rather, Congress kept the burden of proving that the Defendant is dangerous and should be detained, with Government and set that burden with proof by clear and convincing evidence, a much higher bar than probable cause, thus avoiding 8th Amendment excessive bail implications. 18 U.S.C. § 3142 (f)[1]The clear and convincing standard is the check on the Government's power that could turn any case into "The Inquisition," where a Defendant can be held upon a mere showing of probable cause, as the Court implied at oral argument. It is thus only logical that the cases generally cited by the Government involve detention of murderers, drug dealers and leaders of organized crime. Those Defendants had virtually no chance of overcoming the rebuttable presumption of dangerousness and the clear and convincing evidence presented by the Government at the detention hearing. *See* for example King. No such evidence is present here. A review of the Government's arguments and evidence in this case reveals that the Government clearly does not understand the law and the burden they have or they just choose to ignore it. In any event, the Government's theory of an irrebuttable presumption should not be allowed to stand.

B) Contrary to the assertion that "the record is full of evidence which demonstrates that Defendant Gilley is an individual who simply is not amenable to supervision of any kind,"

[1] 18 U.S.C. § 3142(f) states in part that "[T]he facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any person and the community shall be supported by clear and convincing evidence.

the Government only offers only two (2) very meager examples to support their position (Doc. 833 at 5).

1. The Government first argues that "it is noteworthy that Defendant Gilley's unlawful contacts with Massey occurred after his (Gilley's) attorney told him to stop contacting Massey" and that the "evidence before the Court demonstrates that Defendant Gilley did not follow the advice of his attorney and he did not abide by the pre-trial conditions imposed on him by the Court on October 4, 2010." It is the Government, not the Defendant, who with these statements is attempting to muddy the waters. Mere contact with Massey did not violate any condition of bond regardless of the advice of the Defendant's attorney. Moreover, the only attorney advice referred to by the Government occurred in the days following his arrest when the conditions of bond regarding contacts with co-defendants were unclear. (*See* Doc. 35). That condition of bond was changed in November, 2010 (Doc. 201), and it was only recently that the Government recognized the change. The record is clear that Mr. Gilley in fact followed his attorney's advice and had no further contact with Mr. Massey until after the Court's modification of the conditions of bond applicable to all defendants went into effect. After the November modification it was perfectly permissible for there to be mere contact between defendants. There is nothing in the record to support the Government's assertion that Defendant Gilley did not follow his attorney's advice with the mere contact with Massey, in December, 2010 after the bond condition was modified. This is especially significant in light of the overwhelming evidence of contact by Massey, directly and indirectly, to Mr. Gilley throughout the course of the fall, 2010, to collect payment on legitimate business invoices. The contacts by Massey followed his indictment and continued throughout this cooperation and debriefings with the Government (See Def. Ex. 2). After considerable prompting by the Court at oral argument, the Government

abandoned any allegation that the mere contact with Massey was a violation of Defendant's bond. The Government is now attempting to come in through the back door with this argument after realizing the front door is locked.

2. The Government's continued attempts to characterize Mr. Gilley's efforts to seek an audience with Sonny Reagan, a lawyer with the Alabama Attorney General's Public Corruption Unit as being " nefarious " or "clandestine" is nothing more than a red herring and indicative of the weakness of the Government's position. It is certainly not "nefarious" for a Defendant or anyone else to want an introduction to an individual they might know but do not have a relationship with, by someone who does. Moreover, the evidence is undisputed that the purpose of the contact was to offer an "olive branch" to someone opposed to electronic bingo. (Tr. 140, 142, 143). The innocence of this contact was made clear by the evidence that the Defendant explained this contact in the logs he was required to maintain of his phone calls (Tr. 212). If this contact was truly nefarious he would not have explained the substance of the call in his logs. Moreover, it is significant to remember that this contact was made by an individual indicted in a public corruption case to a lawyer working for the Attorney General's office assigned to Public Corruption (Tr. 143). Can it really be argued that the Defendant expected a meeting with Mr. Reagan at the Defendant's home while Defendant was confined to his home by Court order in one of the highest profile public corruption cases in the country to be "clandestine" and kept secret and hidden from the Government? The notion is absurd. The Government has produced no evidence whatsoever that Mr. Reagan is expected to be a witness against the Defendant much less any evidence that the meeting was going to involve anything illegal. The Government's efforts to use this contact to suggest that the Defendant might use a

"human conduit" to set-up meetings at his home with witnesses in this case goes beyond speculation and into the realm of grasping at straws.

C) Defendant Gilley has not ignored "the legal standard in this case" as the Government states in its response. (Doc 833 at 6). Defendant has merely noted that there has never been a suggestion that there is a danger to do physical harm to an individual or the community in the same sense that a defendant charged with drug dealing is likely to commit non-physical harm to the community at large. The Defendant understands the language cited by the Court and by the Government in U.S. v. King, 849 F.2d at 497 n.2 (11th Cir. 1988) (Doc. 763 at 11, 12)(Doc. 833 at 6,7). As previously stated, however, it is the Government that has ignored the legal standard and burden of proof that King and other cases also stand for. In this regard, the Defendant respectfully suggests that the Court consider that in King the Court was faced with a defendant who was alleged "to be the leader of a high volume and extremely profitable cocaine distribution scheme which delivered multi-kilogram quantities of cocaine between various points in the United States," and that evidence including bank records, photos, testimony and toll records proved that he was "directing several drug couriers who participated in the distribution scheme." King at 488. The point to be made by the King case is thus not simply that danger to the community may be non-physical harm (like drug dealing), but that the Government still maintains the burden of proof by clear and convincing evidence that the Defendant is in fact a danger and should be detained. King at 489. Every case has a different set of underlying facts and thus some cases require more production than others for the Defendant to overcome the presumption of detention. Such is the case with the Defendant in King, not Ronnie Gilley. In King the Government clearly produced sufficient evidence to prove that the defendant was both a

danger and a flight risk, but in this case the Government has not as their evidence falls way short of clear and convincing.

D) The Government simply dismisses the Defendant's suggested conditions of release without even attempting to explain why they would not be sufficient. The Defendant has put forth numerous conditions that would address every concern that the Court may have. It is conceded that there are "no condition or combination of conditions" that would guarantee that the Defendant's release would not pose a non-physical danger to the community. But a guarantee is not the standard by which the Court's determination is to be made. Rather, the Court must simply have some assurance that the conditions will prevent the Defendant from posing a non-physical danger. 18 U.S.C. § 3148 (b)(2)(A). The Government dismisses the conditions suggested by the Defendant by the mere suggestion that the Defendant is "not amenable to supervision." (Doc 833 at 5). In fact, the Government all but ignores the possibility of a third party custodian. Clearly, circumstances for this Defendant are incredibly different now and in and of themselves provide assurances that he is more than simply "amenable" to supervision and in fact will work hard to abide by supervision terms. In that regard, it is respectfully submitted that the following give more than adequate assurances that the Defendant will not be a non-physical danger to the community and that he will faithfully abide by any condition that the Court imposes:

- The Defendant has now been incarcerated for nearly sixty (60) days upon a finding of probable cause, even though his offered explanation was considered plausible by the Court;

- The Defendant has now been incarcerated for nearly sixty (60) days in part because the Government incorrectly alleged that he violated a condition of his bond by the mere contact with Massey;
- An innocent effort to extend an olive branch to an adversary of electronic bingo was reported and distorted by the Government to appear to be nefarious and clandestine;
- The Defendant has now been incarcerated for nearly sixty (60) days despite the fact that he was demonstrating his willingness and ability to abide by stricter conditions of bond by maintaining telephone logs and surrendering them to his probation officer;
- Defendant's personal circumstances have changed with the diagnosis of his wife's illness;
- Defendant's ability to communicate with counsel and fully prepare for a lengthy, complex trial is hampered by his detention;
- Third parties, family members and friends who know whether or not the Defendant is amenable to supervision far better than the Government, have come forward to offer themselves up as third-party custodians of the Defendant, risking contempt of court charges if the Defendant fails to abide by release conditions.

With regard to third party custodians, undersigned counsel represents to the Court that since the filing of Defendant's Motion to Reconsider on March 24, 2011, over thirty-five people have come forward to offer themselves as third party custodians, and the number continues to grow. These individuals include the Defendant's real estate attorney who has represented Mr. Gilley for many years and other business leaders prominent in the Dothan/Enterprise, Alabama

area. These individuals know the character of the Defendant. The Government does not. These individuals are stepping forward as evidence that the Defendant is not a danger to the community and that it is highly unlikely that Defendant will violate any condition of bond if released. Counsel represents that affidavits for these individuals are being executed and can be presented as additional evidence in a supplemental pleading and if necessary they will appear in Court on the Defendant's behalf.

In light of the Defendant's suggestions regarding bond conditions, including third party custodians who believe that the Defendant will go to any length necessary to abide by his conditions of release so as to not put them in harm's way, the Government has failed in their burden of proving by clear and convincing evidence that the Defendant would pose a non-physical danger to the community.

III. CONCLUSION

It is respectfully submitted that the Defendant has produced evidence and arguments to rebut the presumption that he, if released, would pose a non-physical danger to the community and that the Government has failed to present clear and convincing evidence that the Defendant would pose a non-physical danger. Accordingly, it is respectfully requested that this Honorable Court reconsider the March 10, 2011, order detaining the Defendant and order his release on any condition or combination of conditions that the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 30th day of March, 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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