IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30875

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID WARREN,

Defendant-Appellant

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

UNITED STATES' OPPOSITION TO DEFENDANT'S APPEAL FROM DETENTION ORDER

Pursuant to Federal Rule of Appellate Procedure 9(a) and Fifth Circuit Rule 9.5, the United States respectfully submits this Memorandum Brief in Opposition to Defendant's Appeal from Detention Order. The defendant, David Warren, is charged with willfully depriving Henry Glover of the right to be free from the use of unreasonable force, resulting in bodily injury and death, by a law enforcement officer under 18 U.S.C. 242, and carrying, using, and discharging a firearm in furtherance of a felony crime of violence resulting in an individual's death under 18 U.S.C. 924(c) and (j). The United States has sought to keep Warren in custody

pending trial,[1] both because he is a flight risk, and because he is a danger to the community. The evidence presented in the district court in support of his detention includes the fact that Warren has been accused of shooting Glover, an unarmed civilian, while acting under color of law, based upon an unexplained "fear" of Glover; that he has a significant cache of firearms at home; that, without authorization, he distributed his personal weapons to members of the National Guard; and that he has substantial assets available to aid his avoidance of trial.

A statutory presumption applies to offenses under Section 924(c), that: "no condition or combination of conditions [could] reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. 3142(e)(3). Although the defendant presented witness testimony in support of his contention that he is neither a flight risk nor a danger to the community, in light of the seriousness of the crime and other evidence presented, the district court appropriately ruled that such evidence was insufficient to overcome the presumption. A "trial court's pretrial detention order must be sustained 'if it is supported by the proceedings' in that court." *United States* v. *McConnell*, 842 F.2d 105, 108 n.3 (5th Cir. 1988) (quoting *United States* v. *Fortna*, 769 F.2d 243, 250 (5th Cir. 1985)). Because the district court's detention order here is amply

[1] Trial in this case has been set for November 8, 2010. See district court docket number 127 (Doc. 127). Hereinafter, "Doc. __" refers to documents filed in the district court.

supported by the evidence, the United States respectfully requests that this Court affirm the trial court's order denying pretrial release.

BACKGROUND

On June 11, 2010, a federal grand jury in the Eastern District of Louisiana returned an indictment charging Warren with depriving Henry Glover of his right to be free of unreasonable force from a law enforcement officer under 18 U.S.C. 242, and carrying, using, and discharging a firearm in furtherance of a felony crime resulting in an individual's death in violation of 18 U.S.C. 924(c) and (j). A superseding indictment was filed on August 6, 2010. It alleged that on September 2, 2005, while acting as a police officer with the New Orleans Police Department, Warren shot Glover "without legal justification, willfully depriving him of the right" to be free from unreasonable force by a law enforcement officer. See Indictment 1.[2] The indictment alleged that Warren shot Glover with his personal .223 caliber rifle, in circumstances constituting murder. See Indictment 2.

Pursuant to 18 U.S.C. 3142(f), the district court held an initial detention hearing on June 17, 2010. During that hearing, Warren stipulated to the contents of a report prepared by Pretrial Services but reserved the right to reopen the hearing. See July 2, 2010, Tr. (July Tr.) 5.[3] The district court ordered him

[2] The superseding indictment is attached hereto as Exhibit A.

[3] The transcript of the July 2, 2010, hearing is attached hereto as Exhibit B.

detained. After Warren moved to reopen the hearing and for the court to set bond, two further hearings were held before a magistrate judge, the first on July 2, 2010, and the second on August 23, 2010.[4]

During the July hearing, the United States presented oral arguments regarding both the defendant's dangerousness to the community and his risk of flight. As to Warren's risk of flight, the United States cited the pretrial report in arguing that the defendant had over $400,000 in equity in his home. July Tr. 40. The United States also pointed out that the indictment set forth circumstances describing a violent act, that Warren possessed numerous weapons, and that the rifle used in connection with the offense was not a police-issued rifle. July Tr. 41.

Warren presented three witnesses in support of his good character: his pastor; his employer;[5] and a neighbor. Warren's pastor testified that he was a regular church attendant, that he had never seen Warren lose his temper, or known him to lie, and that Warren was a good father and husband. July Tr. 10-13. Warren's employer testified that Warren had worked for him for two years, and that Warren had never lost his temper, lied or broken a promise. July Tr. 17, 19. Warren's neighbor testified as to his good character, as well as to the fact that Warren had told him to leave the city after Hurricane Katrina because, in Warren's

[4] The transcript of the August 23, 2010 (Aug. Tr.), hearing is attached hereto as Exhibit C.

[5] In addition to his law enforcement work, Warren was also employed as an engineer for GenSouth, see July Tr. 16-17.

words, the city "ha[s] no effective law enforcement here now." July Tr. 29-31, 36. In rebuttal of the presumption that the defendant might be a flight risk, his counsel noted that Warren had not fled despite being informed in October 2009 that the United States would be seeking an indictment for murder. July Tr. 42.

At the conclusion of the July hearing, the magistrate found that "[w]ith such serious charges, what I've heard today does not overcome the statutory presumption of danger as well as flight risk." July Tr. 51. The court acknowledged that under the statute there were a number of factors to be considered as they applied in this case. July Tr. 51, 53. In response to Warren's argument that he would have already fled if he were going to, the court noted that the relevant date was the date of the formal indictment in June 2010. July Tr. 51. The court found that considering that Warren had $400,000 of equity in his home, the "nature of the crime," and the "possible exposure if a conviction would take place," he should remain in detention. July Tr. 52-53.

After the July hearing, Warren again moved the court to revoke the detention order, and requested that the hearing be reopened so that he could present additional witness testimony. On August 23, the magistrate heard testimony from Warren's wife that they had $150,000 of equity in their home. Aug. Tr. 15. She also testified that Warren owned about ten handguns and possibly five rifles, along with scopes for the rifles. Aug. Tr. 19-20.

The magistrate heard further testimony from a friend of Warren's, Wade Schindler, a forensic criminologist at Tulane and an instructor for a State Police concealed hand gun permit program. Aug. Tr. 23-24. On cross-examination, the United States elicited testimony from Schindler that Warren "is an excellent shot with a hand gun," and that he has a "vast knowledge of hand guns." Aug. Tr. 30. Schindler stated that after Hurricane Katrina, Warren told him that he had "shot somebody" or "shot at somebody" during the storm, stating that he "shot at the individual because * * * he was frightened by the individual." Aug. Tr. 27. Warren also told Schindler that he was on the second floor of a building behind a gate while the person he shot at was on the first floor. Aug. Tr. 29. Schindler further testified that the defendant told him that during the storm he gave out at least three of his personal rifles, along with ammunition, to members of the National Guard, and that he had also provided two police officers with his personal handguns. Aug. Tr. 30-31, 33.

The United States again argued that detention was warranted. The United States noted that the grand jury had made a probable cause determination that Warren shot an unarmed man, that he was facing two life sentences for crimes of violence, that he owned numerous firearms, and that he was passing out firearms to other officers during Hurricane Katrina. Aug. Tr. 45-48. The United States observed that, based upon that evidence, it could be presumed that Warren was a

danger to the community. Aug. Tr. 48. Moreover, the United States noted that as the trial got closer, the stress over the charges and outcome would certainly increase, and that Warren had the financial ability to leave the jurisdiction if released. Aug. Tr. 48.

At the conclusion of the hearing, the magistrate again found that there were no conditions of release that would reasonably assure Warren's appearance and protect the safety of the community. Aug. Tr. 52. The court gave weight to the testimony that Warren had $150,000 of equity in his home, as well as the fact that there were two possible life sentences at stake, and held that it could not reasonably assure Warren's appearance. Aug. Tr. 50, 52, 54. With regard to Warren's dangerousness to the community, the court stated that it could not understand the defendant's "passing out of guns to other so called law enforcement officers," noting that there were "certain rules of engagement that have to be followed." Aug. Tr. 53. The court observed that nobody had explained why Warren was afraid of the victim, and that nobody had alleged that the victim was armed, and found that the circumstances of the killing appeared to be "in cold blood." Aug. Tr. 52-53. The court concluded that electronic monitoring and home incarceration would not suffice to "protect this community from the danger that is presented here." Aug. Tr. 54.

After reviewing the transcripts of the proceedings held before the magistrate judge, and making a *de novo* review of all the evidence presented, the district court issued a written order stating that, "[h]aving * * * reviewed and considered the factors set forth in 18 U.S.C. 3142(g), as well as the penalties faced by Warren if convicted and the nature of those offenses, the Court finds that the government has satisfied its burden of proof regarding the detention issue[.]" Doc. 175 1-2.

DISCUSSION

The charges alleged in the indictment, coupled with the evidence elicited at the two detention hearings, amply support the continued detention of the defendant in this case. A strong presumption in favor of detention applies in this matter. Pursuant to 18 U.S.C. 3142(e)(3)(B), if a court finds probable cause that a defendant committed a violation of 18 U.S.C. 924(c), it shall be presumed that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." Moreover, "[o]nce the district court has determined that pretrial detention is necessary," as occurred here, "this Court's review is limited." *United States* v. *Westbrook*, 780 F.2d 1185, 1189 (5th Cir. 1986). This Court has held that, "[a]bsent an error of law, we must uphold a district court order if it is supported by the proceedings below, a deferential standard of review that we equate to the abuse-of-discretion standard."

United States v. *Rueben*, 974 F.2d 580, 586 (5th Cir. 1992) (citation and internal quotation marks omitted).

Warren appears to make three related arguments before this court: 1) that there was insufficient evidence to support a probable cause finding for purposes of applying 18 U.S.C. 3142(e)(3)(B)'s rebuttable presumption against release; 2) that the United States failed to offer any evidence that would satisfy 18 U.S.C. 3142(g)(2)'s command that a trial court take into account the weight of the evidence in determining whether adequate conditions of release exist; and 3) that the magistrate judge and district court failed to justify why the evidence presented was insufficient to rebut the presumption that no condition of release would be satisfactory. See Def's Appeal from Detention Order (Det. Order App.) 3-4, 8, 11. For the reasons explained below, each of these arguments is unavailing.

A. Because Ample Evidence Supports A Finding Of Probable Cause To Believe That Warren Committed The Charged Offenses, The Magistrate Judge And District Court Did Not Err In Applying The Statutory Presumption Against Release

Warren argues that the magistrate judge and district court erred in applying 18 U.S.C. 3142(e)(3)'s rebuttable presumption without first finding that probable cause existed to believe that he committed a violation of 18 U.S.C. 924(c). See Det. Order App. 3-4, 11. He further argues that the magistrate and district court could not have found probable cause because the United States presented no evidence to support such a finding. Det. Order App. 4. The defendant is correct

that a "'probable cause' determination * * * is the necessary predicate of the * * * provided for presumption." See *United States* v. *Fortna*, 769 F.2d 243, 251 (5th Cir. 1985). The defendant errs, however, in arguing that the United States presented no evidence upon which the district court could have found probable cause. Because the United States presented ample evidence that Warren committed the charged offenses, 18 U.S.C. 3142(e)(3)'s presumption against release applies.

As a primary matter, it must be noted that the indictment handed down by the grand jury itself embodies a probable cause finding that there was sufficient evidence to support the charges against the defendant. See *United States* v. *Jackson*, 845 F.2d 1262, 1264 (5th Cir. 1988) (noting in a pretrial detention matter that the "court did find * * * that the defendant had not rebutted the evidence of probable cause *embodied in * * * the indictment*") (emphasis added); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975) ("[A]n indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause.") (citation omitted); but see *Fortna*, 769 F.2d at 252 (observing that, "[t]he predicate finding for the section 3142(e) presumption, namely, probable cause to believe that [the defendant] committed one of the listed * * * offenses * * * is adequately supported," and discussing evidence presented in support of the probable cause finding).

Beyond the indictment, the magistrate and district court in this case also had before them critical testimony providing probable cause to believe that Warren committed the charged offense. The testimony the United States elicited from the defendant's witness, Wade Schindler, directly supports the accusation contained in the indictment: that Warren, without legal justification and while acting under color of law, used a weapon in the course of committing a crime of violence, causing the death of Henry Glover. On cross-examination, Schindler testified that Warren told him that he had "shot somebody or shot at somebody" while he was standing behind a gate on the second floor of a building, and the victim was on the ground floor. Aug. Tr. 27, 29. Schindler stated that Warren had said that he was "frightened" by the victim (Aug. Tr. 27) but, as the court observed, there was no evidence presented to explain that fear, and no allegation that the victim was armed (Aug. Tr. 52). Such testimony supports the grand jury's finding that there was sufficient evidence to indict the defendant.

The case of *United States* v. *Jackson*, 845 F.2d 1262 (5th Cir. 1988), is inapposite. The defendant cites *Jackson* in support of the notion that the United States' evidence against him was insufficient to support a finding of probable cause. Det. Order App. 2-3. In *Jackson*, the defendant challenged the district court's conclusion that there were no conditions that could secure his appearance at trial. This Court vacated the detention order after finding that although the district

court was required to take into account the weight of the evidence against a defendant in determining whether there were any satisfactory conditions of release, "[t]he government made *no effort* to advise the trial court concerning the 'weight of the evidence' against Jackson." 845 F.2d at 1265 (emphasis added). *Jackson* did not turn, however, on a lack of evidence regarding probable cause to *apply* the presumption; the court recognized that such probable cause was "embodied in * * * the indictment." *Id.* at 1264.

In any event, Schindler's testimony, that Warren had admitted to shooting someone from the second floor of a building while standing behind a gate, coupled with the facts alleged in the indictment, provided ample support for the magistrate's finding that the circumstances of the killing appeared to be in "cold blood." Aug. Tr. 53; cf. *United States* v. *Cantu-Salinas*, 789 F.2d 1145, 1146 (5th Cir. 1986) (upholding bail denial where the "government ha[d] produced credible evidence" regarding the charge in question). The magistrate and district court thus did not err in applying the presumption against release in this case.

B. The Magistrate Judge And District Court Properly Weighed The Factors Required By 18 U.S.C. 3142(g) In Finding That No Conditions Of Release Could Reasonably Assure The Defendant's Appearance Or The Safety Of The Community; The United States Presented Ample Evidence To Allow The Court To Consider The Weight Of The Evidence Against The Defendant

The defendant argues that, even if probable cause existed to apply the presumption, the district court failed to properly explain why the presumption was

not rebutted by the evidence presented. See Det. Order App. 11. In addition, he argues that the district court failed to properly analyze the four factors, set forth in 18 U.S.C. 3142(g), that a court must take into account in determining "whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." See Det. Order App. 11. Warren also argues that the United States failed to present any evidence regarding Section 3142(g)(2), which commands a court to take into account the weight of the evidence against the person charged. See Det. Order App. 8. The record, however, fully supports the district court's decision, and that decision therefore must be upheld. See *Rueben*, 974 F.2d at 586.

The federal statute governing the release of a defendant pending trial, 18 U.S.C. 3142(g), directs the judicial officer to take into account the following four factors in determining whether an individual is suited for pretrial release:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence; * * *
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including –
>
> > (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. 3142(g); see also *Fortna*, 769 U.S. at 252 (reciting these factors).

The defendant claims that each of the "history and characteristics" factors in 18 U.S.C. 3142(g)(3)(A) and (B) weigh in favor of his release and that the evidence he presented regarding these factors was sufficient to rebut the presumption in favor of his detention. See Det. Order App. 11-12. Specifically, Warren argues that he has good character, strong ties to the community, and no past criminal record, and therefore qualifies for release pre-trial. See Det. Order App. 11-12. The magistrate judge recognized that some of these factors weighed in the defendant's favor. At the July hearing, the court found that the defendant is a "family person, [has] children and a wife, [and is] a homeowner." July Tr. 50. The court also noted that Warren "has never had a conviction before." July Tr. 53. Again at the August hearing, the magistrate recognized that Warren's witnesses described him as being a good employee, faithful church attendee, and good and devoted family man. Aug. Tr. 49, 51. Yet, the court appropriately found that these factors did not outweigh the defendant's risk of flight or his dangerousness to the community. Aug. Tr. 52. Given the record evidence, this finding was wholly

appropriate; certainly, reviewed under an abuse of discretion standard, there was sufficient evidence to support the magistrate judge and district court's decisions.

In its September 9, 2010, Order denying Warren's request for pretrial release, the district court stated that it had "reviewed the transcripts of proceedings held before" the magistrate judge, made a "*de novo* review of all the evidence presented," and "reviewed and considered the factors set forth in 18 U.S.C. §3142(g)." See Doc. 175 1-2. Although the court did not detail its findings in this written order, the evidence presented before the magistrate judge plainly supports the district court's holding.

As to the first factor set forth in 18 U.S.C. 3142(g), the nature and circumstances of the offense charged, the magistrate judge had repeatedly noted that the charges against the defendant were extremely serious, were for a crime of violence, and that a life sentence was a possible consequence of the crime. See July Tr. 51; see also Aug. Tr. 54 ("[W]hat we're looking at here is a very, very serious allegation."). The court found that, given the lack of evidence that the victim was armed, the circumstances of the shooting appeared to be "in cold blood." Aug. Tr. 53. The court found that the serious nature of the crime and the attendant penalties also went to the issue of the defendant's risk of flight, noting that although Warren had not fled after being informed in 2009 of the possibility of

a murder charge, the real risk of flight did not come into play until after the defendant's formal indictment in June 2010. See July Tr. 51.

Warren argues at length that the United States presented no evidence supporting the second 18 U.S.C. 3142(g) factor, the weight of the evidence against him. For the reasons discussed *supra*, this argument must also fail. The United States elicited evidence from the defendant's own witness that the defendant admitted to shooting at a person on the ground from the second floor of a building, while standing behind a gate. The magistrate cited this description of the building in its findings at the conclusion of the August hearing, and also noted that no one had explained why the defendant claimed to be afraid of the victim. Aug. Tr. 51-52. Unlike *Jackson*, which the defendant cites for support, it cannot be said that the United States here offered no "extrinsic incriminatory evidence" regarding the defendant's commission of the charged crime.[6] *Jackson*, 845 F.2d at 1266. Moreover, unlike *Jackson*, where the defendant offered rebuttal evidence going specifically to the issue of the risk of flight, none of Warren's character evidence contradicted the notion that he shot an unarmed civilian based upon an unexplained "fear," and was therefore a danger to the community. Cf. *Fortna*, 769 F.2d at 252-

[6] Although the defendant argues that a comment made by the United States regarding the possibility that the victim was running away at the time of the crime was the only comment on the weight of the evidence (Det. Order App. 8-10) this assertion is plainly contradicted by the record. Moreover, the court made clear that it would not rely on hearsay from the United States Attorney, but would rather consult the Pretrial Officer or report. See Aug. Tr. 46.

253 & n.8 (noting that "three very general character reference letters, and testimony from [the defendant's] father… relating to [his] finances" did not constitute "significant information" contradicting evidence of his participation in the charged crimes).

Regarding the third factor – the history and characteristics of the defendant – while the magistrate credited the testimony regarding the defendant's character and lack of an arrest record, the court did not find that all of the Section 3142(g)(3)(A) and (B) factors weighed in the defendant's favor. Rather, both the magistrate judge and district court had before them information from pretrial services that Warren had over $400,000 worth of equity in his home. Moreover, the magistrate specifically found that "it's not money all the time that would keep a person from [fleeing]." July Tr. 52.

Finally, as to the fourth factor, the nature and seriousness of the danger to the community, the magistrate cited a number of facts militating against Warren's release. Again, the court referred to the description of the location of the shooting, observed that there was "[n]othing said from any witness that the [victim] was armed," and that the circumstances of the killing "appear[ed] to be * * * in cold blood." Aug. Tr. 51, 53. The court also focused extensively on the evidence elicited by the United States that Warren had, without following any apparent protocols or keeping any records, handed out both his personal rifles and handguns

to law enforcement officers and members of the National Guard. With regard to this evidence, the court stated, "[w]hat concerns me as well is the danger part. * * * I just can't understand how one would give weapons and there be no record of it. * * * [T]his is a grave situation that we're looking at." Aug. Tr. 52.

Taken together, this evidence more than supports the district court's denial of the defendant's motion to revoke the detention order, and the magistrate's conclusion that no conditions of release could assure the defendant's appearance or keep the community safe.[7] See *Fortna*, 769 U.S. at 250 ("[O]ur scope of review is limited, and the order is to be sustained 'if it is supported by the proceedings below.'") (citation omitted). The ample evidence cited by the magistrate and reviewed by the district court in reaching its decision also refutes Warren's suggestion that the district court somehow shifted the ultimate burden of persuasion from the United States to the defense. See Det. Order App. 11. Indeed, the district court explicitly stated that the "rebuttable presumption * * * *does not* shift the burden of persuasion." Doc. 175 1 (emphasis added). And to the extent that the defendant's argument rests upon the notion that *any* evidence presented by a defendant overcomes the statutory presumption against release, the defendant is

[7] In any event, only one of those factors need be supported to uphold the decision. See *Fortna*, 769 U.S. at 249 (holding that for purposes of sustaining a district court's detention order, "the lack of reasonable assurance of *either* the defendant's appearance *or* the safety of others or the community is sufficient; both are not required").

plainly mistaken. This Court has held that although "[t]he presumption shifts to the defendant only the burden of producing rebutting evidence, not the burden of persuasion," the "presumption is not a mere 'bursting bubble' that totally disappears from the judge's consideration after the defendant comes forward with evidence." *United States* v. *Hare*, 873 F.2d 796, 798 (5th Cir. 1989). Rather, "Congress intended that the presumption remain in the case as a factor to be considered by the judicial officer." *Ibid*. (internal quotation marks, citation, and alterations omitted).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2010, I electronically filed the foregoing United States' Opposition to Defendant's Appeal from Detention Order with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

I certify that the following counsel of record is a registered ECF Filer and that service will be accomplished by the CM/ECF system:

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