UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 21-3029

UNITED STATES OF AMERICA

Appellee,

v.

TIMOTHY HALE-CUSANELLI,

Appellant.

APPELLANT'S REPLY MEMORANDUM OF LAW AND FACTS

There is no rebuttable presumption against release in this case. Accordingly, the government had the burden of proving by clear and convincing evidence that no conditions of release could reasonably assure the safety of the community. See, *United States v. Munchel*, 991 F.3d 1273, 1282–83 (D.C. Cir. 2021). Because the government failed to produce any evidence of past violence or threatened violence and the district court failed to identify an articulable threat posed by the defendant to the confidential informant or to the community, the court clearly erred in detaining defendant pending trial.

Appellant does not dispute that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

Opposition, at 17 (quoting *Anderson v. City of Bessemer City*, 470 U.S 564, 574 (1985). Here, however, the district court's choice was not fully informed with respect to two findings that were critical to its ruling which the court considered to be a "close case in terms of the government meeting its burden." Supp. 28.

Specifically, the district court found that defendant's decade old arrest was "some evidence of defendant actually acting out on" a white supremacist ideology. Supp. 27. That finding, however, is clearly erroneous because the court was misled by omissions. To be sure, in 2010 the defendant was arrested after a report that a house had been shot with a piece of frozen corn causing minor damage. Defendant was a rear seat passenger in a vehicle with three others that was stopped by police. In the trunk of the vehicle police recovered a "potato gun" that had written on it "white is right" and a drawing of a confederate flag.[1]

The government maintained that this incident was evidence of defendant acting on his racist views, despite the investigating officer reporting that it "does not appear that there was any bias related intent involved in this particular incident." Supp. 59. All facts supporting the officers' conclusion were withheld from the court. Those facts include that that there was residue of corn on the window beside the rear passenger who admitted he had shot the gun as another

[1] There is no allegation that the "potato gun" was used or attempted to be used to injure a person.

codefendant drove by the house. He told police he did so because he was mad at the homeowner's son due to a prior dispute over stolen bicycles. Supp. 59. Additionally, the officer found that no one residing in the house was of African American descent. The omission of this critical information misled the district court to incorrectly conclude that this incident was evidence of defendant acting on a white supremacist ideology.

The government contends that this court should not consider this evidence because defendant did not raise it below. *Appellee's Memorandum of Law and Fact*, 21. This court, however, should not overlook that the government had an obligation to not mislead the district court into believing that this incident was "some evidence of defendant acting on his ideology" when, in fact, the evidence is to the contrary. Pretrial detention of a man presumed to be innocent, should not depend on such gamesmanship

Additionally, the district court was "very concerned" about defendant's "civil war" statement, as represented by the government. Supp. 28. The broader context of the conversation, however, was omitted. The statement was an expression of defendant's belief that civil war was the simplest and "inevitable" outcome of the political divide in this county. He specifically stated that it is "not that I actually want that" and that the simplest solutions are not always the best solutions. Because defendant's recorded statement was not provided to the defense

until after the court's detention rulings, the court was only informed of the government's interpretation of his statement.

The government presented no additional evidence of defendant's alleged dangerousness. It did not present a single instance where defendant physically injured another person or attempted to injure another person. There is no evidence that defendant ever committed a violent or destructive act or threatened to commit a violent act against another person. And, there is no evidence that defendant ever threatened or attempted to threaten or intimidate any witness in this or any other case.

To the contrary, defendant has lived as a law-abiding productive citizen. He has served his country as an army reservist without any incidence of violence or dereliction of duty. Similarly, he has worked as a private security guard, with a security clearance, at a military installation without any instance of violence or misuse of his power. In both work situations he had daily ongoing possession of firearms yet there has never been reported any instance of his abuse of those firearms or his position of authority. Aside from possessing those firearms that defendant was issued while on duty, there is no claim that he possessed any other firearms. All this evidence suggests that defendant abides by rules and would comply with conditions of release. The district court, however, did not expressly consider this as evidence of defendant's potential compliance with

conditions of release. *U.S. v. Munchel*, 991 F.3d at 1281(a court may consider whether it believes the defendant will actually abide by its conditions when making the release determination in the first instance.)

Despite defendant's beliefs that he has held for a prolonged period, he has never committed a violent or destructive act, let alone having done so in connection with those beliefs. Given the complete lack of violence in defendant's past it cannot be honestly maintained that his release presents such a high risk of danger that it cannot be adequately addressed by restrictive conditions of release. The defendant is not being preventively detained because his release presents such an unmanageable risk of danger. He is being detained because he espouses reprehensible beliefs.

Apparently for that reason, neither the government nor the district court have articulated why it believes conditions of release would not assure the safety of others. Neither does the government nor the district court identify an articulable threat defendant presents to others.

CONCLUSION

For the foregoing reasons and those set forth in defendant's opening memorandum, defendant respectfully requests that the court reverse the district court's order overruling the magistrate judge's order releasing him with conditions. Alternatively, defendant requests that the case be remanded so that the district

court may reconsider its ruling in light of the 2010 police report and the full context of his post January 6th civil war statements.

Respectfully submitted,

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Certificate of Word Count

I certify that the foregoing Reply Memorandum of Law and Facts is prepared in Times New Roman 14 point font and contains 1221 words.

/s/
Jonathan Zucker

Certificate of Service

I certify that on this 14th day of June, 2021 I caused the foregoing to be electronically filed with the court using the CM/ECF system that will electronically serve the following registered user:

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/s/