IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 11-2333

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JASON WALTER BARNWELL,

Defendant-Appellant

_____

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

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UNITED STATES' OPPOSITION TO DEFENDANT'S STATEMENT OF THE CASE IN SUPPORT OF APPEAL FROM DETENTION ORDER

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Pursuant to Federal Rule of Appellate Procedure 9(a), the United States respectfully submits this Opposition to Defendant's Statement of the Case In Support of Appeal from Detention Order. The defendant, Jason Walter Barnwell, is charged with conspiring to deprive an African-American individual of his civil rights under 18 U.S.C. 241; criminally interfering with housing rights under 42 U.S.C. 3631; using fire in connection with a felony under 18 U.S.C. 844(h)(1); possessing an unregistered destructive device under 26 U.S.C. 5861(d); using a destructive device in furtherance of a crime of violence under 18 U.S.C.

924(c)(1)(B)(ii); possessing a firearm as a convicted felon under 18 U.S.C. 922(g)(1); and being an armed career criminal under 18 U.S.C. 924(e)(1). The United States has sought to keep Barnwell in custody pending trial,[1] because he presents an unreasonable risk of danger to the community. The evidence in support of detention includes Barnwell's role in an act of violence against an interracial couple; his probable affiliation with white supremacist groups that advocate violence against large segments of the American population, including African Americans; his extensive criminal history, including numerous felony convictions and possession of an assault rifle as a convicted felon; and his stated intent to commit, and subsequent commission of, acts of violence against African Americans.

The district court correctly determined that the government demonstrated by clear and convincing evidence that there are no conditions of Barnwell's release that could reasonably assure the safety of the community. The government's evidence, unrebutted to any extent by Barnwell, describes an individual who faces a statutory minimum 55-year prison sentence if convicted on all counts with which

[1] Trial in this case has been set for October 25, 2011. See district court docket number (Doc.) 88. Hereinafter, this brief uses the following abbreviations: "Doc. __" for documents filed in the district court; "Hr'g Tr. __" for the March 22, 2011, detention hearing transcript; and "Statement __" for Barnwell's Statement of the Case.

he is charged relating to his role in the firebombing of an interracial couple's home and to his possessing a firearm as a convicted felon and being an armed career criminal. As the last charge indicates, Barnwell has an extensive criminal history, and has demonstrated by his past actions that he would not abide by any conditions a court imposed upon his release for the safety of the community. Barnwell has also in the past acted in furtherance of his white supremacist views, thus posing a serious risk to all minorities in the community, particularly African Americans, if he is released pending trial. Because Barnwell does not show that the district court clearly erred in its factual findings underlying its determination of dangerousness, or erred in its final determination of dangerousness, the United States respectfully requests that this Court affirm the district court's detention order.

BACKGROUND

1. On March 16, 2011, Barnwell was arrested on a criminal complaint charging him with (1) conspiring to deprive Lamar Wright, an African-American man married to a white woman, of his civil rights under 18 U.S.C. 241; (2) criminally interfering with housing rights under 42 U.S.C. 3631; (3) using fire in connection with a felony under 18 U.S.C. 844(h)(1); and (4) possessing an unregistered destructive device under 26 U.S.C. 5861(d). These charges arose out of Barnwell's alleged role in the January 14, 2011, firebombing of the Wrights' home in Hardy, Arkansas.

Pursuant to 18 U.S.C. 3142(f), a magistrate judge held a detention hearing on March 22, 2011, to determine whether Barnwell should be released on bond pending trial. At that hearing, FBI Special Agent Steve Burroughs testified for the government regarding Barnwell's white supremacist views and affiliation with white supremacist groups. Burroughs stated that he first met Barnwell at his home in Evening Shade, Arkansas, in June 2010 after receiving information that a group of skinheads had gathered there. Hr'g Tr. 11. During their conversation, Barnwell told Burroughs that he was a skinhead and a member of Blood and Honor, a white pride group. Hr'g Tr. 12. Burroughs observed on Barnwell's front porch a black Ken-type doll hanging by its neck from a noose. Hr'g Tr. 12. In a subsequent search of Barnwell's home in March 2011, Burroughs discovered several neo-Nazi flags posted on the wall and books pertaining to Hitler, Nazi Germany, and the SS. Hr'g Tr. 18.

Interviews Burroughs conducted with several witnesses confirmed Barnwell's white supremacist views. A wrecker driver who came into contact with Barnwell in late January 2011 when repossessing one of his cars recalled that Barnwell used the term "nigger" to refer to African Americans. Hr'g Tr. 22. According to the driver, Barnwell stated that "the country was in a bad way because it had a nigger president and that something had to be done about him," which the driver interpreted as a reference to assassination. Hr'g Tr. 22.

Burroughs talked to several other people who told him that Barnwell was very proud of being a skinhead and a racist, and possessed an intense dislike for African Americans, Hispanics, and Jews. Hr'g Tr. 22-23.

Burroughs also testified as to Barnwell's extensive criminal history. Barnwell has felony convictions for larceny and obtaining property under false pretenses in North Carolina, and several felony convictions for burglary and a felony conviction for possession of a controlled substance in Texas. Hr'g Tr. 7-8. Most notably, while incarcerated in Texas, Barnwell was charged with and convicted of felony possession of a deadly weapon in a penal institution. Hr'g Tr. 8. Barnwell has also been incarcerated for violating the terms of his probation. Hr'g Tr. 8.

As Burroughs testified, Barnwell's criminal history includes threats and acts of violence against African Americans in furtherance of his white supremacist beliefs. In August 2005, Barnwell – at that time a convicted felon – was arrested in Hendersonville, North Carolina, and found to be in possession of an assault rifle and approximately 400 rounds of ammunition. Hr'g Tr. 9-11. During the arrest, Barnwell repeatedly stated that he was going to kill "niggers" and made several other derogatory comments about African Americans. Hr'g Tr. 9-10. In May 2010, Barnwell, his girlfriend Wendy Treybig, and several associates drove from Barnwell's home to Batesville, Arkansas, where they encountered two African-

American men in a parking lot. Hr'g Tr. 13. One of Barnwell's associates exited the car and struck one of the African-American men from behind, causing his nose to burst and bleed. Hr'g Tr. 13. All five men in the group, including Barnwell, exited the car, surrounded one of the men, and yelled racially derogatory threats. Hr'g Tr. 13-14.

Burroughs also testified as to Barnwell's general penchant for violence. During a January 27, 2011, interview Burroughs held with Barnwell for the purpose of determining Barnwell's whereabouts on the night of the firebombing, Barnwell denied any involvement in the crime and stated that if he had been involved, "someone would have wound up dead." Hr'g Tr. 16-17. Barnwell also told Burroughs during the interview that he knew how to make an improvised explosive device. Hr'g Tr. 17. Burroughs subsequently conducted a search of Barnwell's home in March 2011 and discovered a loaded .22 caliber semiautomatic rifle concealed in the barn behind the residence and seven .22 caliber bullets on the night table in the master bedroom. Hr'g Tr. 18. The search also uncovered a photograph of Barnwell holding an assault rifle, a handwritten list titled "Books to Order" that included books on making homemade weapons, and the 2007 edition of the United States Army Book of Improvised Explosive Munitions. Hr'g Tr. 19-21, 23-24.

The government presented evidence that, consistent with Barnwell's affiliation with white supremacist groups and his prior violent conduct in general, and towards African Americans specifically, he participated in the primary crime for which he is going to be tried – the firebombing of Lamar Wright's home on the evening of January 14, 2011. After identifying Barnwell as a suspect, the FBI developed cooperating witnesses who confirmed Barnwell's participation in the planning, preparation, and execution of this crime. Hr'g Tr. 31-33. As for the subsequently added charges against Barnwell of possessing a firearm as a convicted felon and of being an armed career criminal (see pp. 9-10, *infra*), both of Barnwell's witnesses at the detention hearing confirmed that the .22 caliber rifle Burroughs discovered in his search of Barnwell's home belonged to Barnwell. Hr'g Tr. 42, 69-70.

Jimmy Wayne Eaken, a licensed real estate broker, testified on Barnwell's behalf at the detention hearing. Eaken, who has known Barnwell and Treybig for over two years, testified that he had witnessed the couple stay out of trouble and repair a house they purchased. Hr'g Tr. 36-38. Eaken also stated that Barnwell had assisted him with various tasks he was unable to do himself. Hr'g Tr. 38. On cross-examination, Eaken acknowledged that it was a "shock" to learn of Barnwell's prior criminal history and a "total surprise" to learn of Barnwell's dislike of African Americans, but stated that the hearing's testimony did not

change his opinion of Barnwell. Hr'g Tr. 40-41, 43-44. Eaken also stated on cross-examination that in December 2010, he saw the .22 caliber rifle Burroughs discovered "out there in the barn" and asked Barnwell if he would sell it, to which Barnwell did not respond. Hr'g Tr. 42.

Treybig also testified at Barnwell's detention hearing on his behalf. She testified, in relevant part, that she was willing to serve as a third-party custodian for Barnwell if he is released, which would require her to report to the authorities any violations of release conditions the court imposed upon Barnwell. Hr'g Tr. 52-53. On cross-examination, Treybig admitted that both she and Barnwell are members of Blood and Honor, which she acknowledged to be a racist organization – she for a year and a half, Barnwell for several years. Hr'g Tr. 62-63. According to Treybig, Barnwell is also affiliated with members of the Aryan Terror Brigade. Hr'g Tr. 59. Treybig also testified that both she and Barnwell dislike, but do not hate, African Americans. Hr'g Tr. 71-72. Treybig acknowledged that she knows that Barnwell is a felon and stated that he shoots buzzards "that attack our chickens" using the .22 caliber rifle Burroughs discovered in the barn. Hr'g Tr. 69-70.

2. At the hearing's conclusion, the magistrate judge applied the factors Congress set forth in 18 U.S.C. 3142(g) to determine whether Barnwell should be detained pending trial. First, with regard to the nature of the charged offense, the

magistrate judge observed that throwing an incendiary device into someone's home is a crime of violence akin to firing a gun into that home. Hr'g Tr. 80. Regarding the weight of the evidence against Barnwell, the magistrate judge found that the government has a "very strong case" and noted that she was the judicial officer who signed the criminal complaint and read the supporting affidavit. Hr'g Tr. 80. As to Barnwell's history and characteristics, the magistrate judge observed that he has a criminal history and that she took into account that much of that history is 20 years old. Hr'g Tr. 80. Finally, with regard to the nature and seriousness of the danger to any person in the community, the magistrate judge stated that she did not know of any condition that she could impose that would reasonably assure the safety of African Americans who live in Barnwell's vicinity. Hr'g Tr. 80-81. Accordingly, the magistrate judge found "by clear and convincing evidence that there's no set of conditions I can set that reasonably protect the citizens of this state" from Barnwell, and remanded him into the custody of the United States Marshal pending trial. Hr'g Tr. 81. Pursuant to 18 U.S.C. 3142(i), the magistrate judge issued a detention order dated March 24, 2011, memorializing this conclusion. See Doc. 19.

3. On April 7, 2011, a federal grand jury in the Eastern District of Arkansas returned an indictment charging Barnwell with the aforementioned counts from the criminal complaint, as well as using a destructive device in furtherance of a crime

of violence, in violation of 18 U.S.C. 924(c)(1)(B)(ii); possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1); and being an armed career criminal, in violation of 18 U.S.C. 924(e)(1).[2] See Doc. 31. On May 9, 2011, pursuant to 18 U.S.C. 3145(b), Barnwell moved the district court to amend the magistrate judge's detention order and release him pending trial. Doc. 73, 74. The United States opposed this motion on the grounds that Barnwell has an extensive criminal history that includes numerous convictions for crimes of violence; that he is a member of white supremacist groups that advocate violence against minorities and has taken steps in furtherance of those beliefs on multiple occasions; and that there is strong evidence that he is guilty of the charged conduct. Doc. 89, at 3-5.

After reviewing the transcript of the detention hearing, and making a *de novo* review of all the evidence presented, the district court issued a written order on May 31, 2011, denying Barnwell's motion. See Doc. 90. The district court's

[2] Barnwell's indictment post-hearing for a violation of 18 U.S.C. 924(c) created the rebuttable presumption under 18 U.S.C. 3142(e)(3)(B) that "no condition or combination of conditions will reasonably assure * * * the safety of the community." See, *e.g.*, *United States* v. *Stricklin*, 932 F.2d 1353, 1355 (10th Cir. 1991) (holding that grand jury indictment is sufficient evidence to support a finding of probable cause for the purpose of triggering the rebuttable presumption in section 3142(e)). If this Court should determine that the district court committed reversible error in affirming the magistrate judge's detention order, the government respectfully requests that this Court remand the case to the district court for a new determination of Barnwell's pre-trial custody status in which this presumption is applied.

order determined that the government "carried its burden, by clear and convincing evidence, that Defendant presents an unreasonable risk of danger to the community," based upon "Defendant's criminal history including numerous violent felonies, the nature of the alleged offenses, and Defendant's probable affiliation with groups that advocate violence against large segments of the American population." Doc. 90, at 1. The order elaborated that Barnwell's criminal history included possession of a firearm as a convicted felon, and threats and acts of violence against African Americans, which indicated a disregard for the law and the rights of others. Doc. 90, at 1-2. The order also noted that Barnwell had bragged to FBI agents about his ability to make explosives and his history of violence. Doc. 90, at 2. Based upon this evidence, the court concluded that "it seems unlikely that any conditions of release would reasonably safeguard the community if Defendant is released before trial."[3] Doc. 90, at 2.

DISCUSSION

The charges in the indictment, combined with the evidence adduced at the detention hearing, amply support the district court's order of Barnwell's continued detention in this case. This Court reviews the district court's underlying factual

[3] The district court also issued an order denying the motion of Gary Dodson, Barnwell's co-defendant, to amend the magistrate judge's order of his detention pending trial. On appeal, this Court affirmed the district court's order by judgment dated July 5, 2011. See *United States* v. *Dodson*, No. 11-2066.

findings for clear error, and independently reviews the district court's ultimate conclusion that detention is required because no condition or combination of conditions will reasonably assure the safety of the community. See *United States* v. *Cantu*, 935 F.2d 950, 951 (8th Cir. 1991) (per curiam). Applying this standard of review, it is clear that the district court did not commit reversible error.

1. Section 3142 of the Bail Reform Act of 1984 establishes the standards judicial officers must apply in determining a defendant's pre-trial custody status. The statute provides, in relevant part, that a criminal defendant must be detained pending trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community." 18 U.S.C. 3142(e)(1). The facts that the judicial officer uses to support this determination must "be supported by clear and convincing evidence." 18 U.S.C. 3142(f). In determining whether any conditions of release can reasonably assure the safety of any other person and the community, the judicial officer should consider (1) the nature and circumstances of the charged offense; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. 18 U.S.C. 3142(g).

The government has shown by clear and convincing evidence that no release conditions will reasonably assure the safety of the community. First, the nature

and circumstances of the charged offenses weigh heavily against release. Barnwell has been indicted on five federal criminal charges for his role in the planning and execution of the firebombing of an interracial couple's home and additional charges for possessing a firearm as a convicted felon and being an armed career criminal. See Doc. 31. The charges relating to the firebombing contain elements that Congress specifically directed judicial officers to take into account in its Section 3142(g) analysis – whether the offense charged is "a crime of violence" and whether it involves a destructive device.[4] See 18 U.S.C. 3142(g)(1). If Barnwell is convicted of each of the counts with which he is charged, he faces a statutory mandatory minimum of 55-years' imprisonment and a maximum sentence of life imprisonment. See 18 U.S.C. 844(h) (providing ten-year sentence for using fire in connection with a felony); 18 U.S.C. 924(c)(1)(B)(ii) (stating that defendant who uses, carries, or possesses a destructive device in furtherance of crime of violence shall be sentenced to a minimum term of imprisonment of 30 years in addition to punishment provided for such crime of violence); 18 U.S.C. 924(e)(1) (providing minimum 15-year sentence for conviction of being armed

[4] The Bail Reform Act defines "crime of violence" in relevant part as "an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 3156(a)(4)(A). This definition clearly encompasses the primary crime at issue in this case.

career criminal). That the Section 924(c) charge is an offense to which the statute attaches a presumption of danger to the community upon indictment, see 18 U.S.C. 3142(e)(3)(B), further confirms that the charges against Barnwell are sufficiently serious to justify pre-trial detention.

Second, and relatedly, the weight of the evidence against Barnwell also counsels against release. With regard to the counts relating to the firebombing, the government developed at least two cooperating witnesses who participated in the crime and will provide direct evidence confirming Barnwell's involvement in its planning, preparation, and execution. Hr'g Tr. 31-33. The use of a Molotov cocktail to accomplish the firebombing is consistent with Barnwell's admitted knowledge of how to make improvised explosive devices, and documentation regarding the making of improvised explosive devices that Agent Burroughs discovered in a search of Barnwell's home. Hr'g Tr. 17, 23-24. As to the count charging Barnwell with possessing a firearm as a convicted felon and being an armed career criminal, Burroughs testified that he discovered a loaded .22 caliber semiautomatic rifle concealed in the barn behind the residence and seven .22 caliber bullets on the night table in the master bedroom during that search. Hr'g Tr. 18. Barnwell's own witnesses confirmed that this weapon belonged to Barnwell. Hr'g Tr. 42, 69-70. Barnwell submitted no evidence in response to the

evidence supporting the charges against him. Accordingly, strong evidence exists that Barnwell engaged in the alleged offenses.

The third factor – Barnwell's history and characteristics – also supports detention. The government's evidence indicates that Barnwell has multiple felony criminal convictions in two different states, including a conviction for possessing a deadly weapon in a penal institution. Hr'g Tr. 7-8. Barnwell has also been incarcerated as a result of a parole violation. Hr'g Tr. 8. He has possessed firearms on at least two occasions as a convicted felon. Hr'g Tr. 9-11, 18. Given this extensive history of disregarding the laws of the United States and the authority of its courts, there is good reason to believe that Barnwell would not obey any conditions a court placed upon his release pending trial.

Finally, Barnwell's pre-trial detention is warranted by the nature and seriousness of the danger to the community that would be posed by his release. According to Barnwell, his girlfriend, and several individuals with whom he has interacted, he possesses an intense dislike of minorities and is affiliated with white supremacist organizations that advocate violence against minorities. Hr'g Tr. 12, 22-23, 62-63, 71-72. Barnwell's anti-minorities views were confirmed by Burroughs, who discovered a black doll in a noose and assorted Nazi paraphernalia and literature in visits to Barnwell's home. Hr'g Tr. 12, 18. Consistent with these views, Barnwell repeatedly threatened to kill African Americans during an August

2005 arrest, participated in a May 2010 act of violence against two African-American men, and alluded to President Obama's assassination in casual conversation in January 2011. Hr'g Tr. 13-14, 22. Allowing Barnwell to remain free pending trial thus poses a serious risk to all minorities in the community, particularly African Americans.

In sum, the government presented clear and convincing evidence, unrebutted to any extent by Barnwell, satisfying all four factors necessary for a determination that there are no conditions of Barnwell's release that could reasonably assure the safety of the community.

2. Barnwell's arguments in his Statement of the Case do not demonstrate any error by the district court in its findings or conclusion. Barnwell primarily attacks the credibility of the evidence in an attempt to show that the government failed to carry its burden. He also contends that the district court erred in finding that he poses a danger to the community if released before trial and in failing to address alternatives to detention in its pre-trial detention order. None of these arguments possesses any merit.

Barnwell first argues that Burroughs' testimony on Barnwell's criminal history constitutes hearsay based upon reports of other law enforcement officers, and thus falls short of the "clear and convincing evidence" standard needed for detention. Statement 6. This argument fails because, as Barnwell acknowledges, a

judicial officer may consider in a detention hearing hearsay that it reasonably concludes is reliable. See *United States* v. *Acevedo-Ramos*, 755 F.2d 203, 208 (1st Cir. 1985); see also 18 U.S.C. 3142(f) ("The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."). Neither of the cases Barnwell cites in support of his argument undermines the magistrate judge's decision to credit Burroughs' testimony. In contrast to the "unprecedented" and "unfair[]" tactic the district court disapproved of in *United States* v. *Nicholas*, 750 F. Supp. 931 (N.D. Ill. 1990), a judicial officer properly considers police reports in a detention hearing where, as here, the officer could have reasonably concluded that the reports are sufficiently reliable. See *United States* v. *Farmer*, 567 F.3d 343, 347-348 (8th Cir. 2009) (district court did not err in admitting domestic abuse victim's police report in revocation hearing). And unlike the detention hearing in *United States* v. *Fisher*, 618 F. Supp. 536 (E.D. Pa. 1985), aff'd, 782 F.2d 1032 (3d Cir.), cert. denied, 479 U.S. 868 (1986), where hearsay was the only evidence of the defendant's dangerousness, a complete review of the record reveals that, independent of any hearsay testimony, there was clear and convincing evidence of Barnwell's dangerousness that was not based upon hearsay. See pp. 12-16, *supra*.

Barnwell's follow-up argument that the district court should not have credited the government's evidence of conduct unrelated to the crime charged,

such as his August 2005 arrest for possession of an assault rifle and 400 rounds of ammunition as a felon and his June 2010 involvement in the assault on an African-American man (Statement 7), is both legally and factually incorrect. With regard to the law, the cases Barnwell cites in support of this proposition – *United States* v. *Ploof*, 851 F.2d 7 (1st Cir. 1988), and *United States* v. *Byrd*, 969 F.2d 106 (5th Cir. 1992) – are inapposite because they addressed the threshold question of whether pre-trial detention is limited to the categories of cases set forth in Section 3142(f), which specifies the conditions under which a detention hearing must be held. In both cases, the court answered this question in the affirmative, holding that the defendant's threat to the safety of other persons or to the community, absent any of the situations described in Section 3142(f), will not alone justify pre-trial detention. See *Ploof*, 851 F.2d at 11-12; *Byrd*, 969 F.2d at 109-110. This holding has no relevance to this case, which indisputably falls within Section 3142(f)'s categories – *e.g.*, Section 3142(f)(1)(A)'s requirement that the case involve "a crime of violence." See pp. 12-13 & n.4, *supra*. The factual basis for Barnwell's argument is erroneous as well: far from being unrelated to the firebombing of the Wrights' home, his repeated threats to kill African Americans during his 2005 arrest and his role in the 2010 assault of an African-American individual evince a racist and

violent nature that the magistrate judge properly considered in making her dangerousness determination.[5]

Next, Barnwell attacks the credibility of the cooperating witnesses that the FBI developed, requesting this Court to consider that the witnesses played a more significant role in the crime at issue than Barnwell and have a strong incentive to minimize their involvement and to implicate others. Statement 9. It is well-settled in this Court that the credibility of cooperating witnesses is an issue left to the trier of fact that is "virtually unreviewable on appeal." See *United States* v. *Bowie*, 618 F.3d 802, 814 (8th Cir. 2010) (citation and internal quotation marks omitted), cert. denied, 131 S. Ct. 954 (2011). At the detention hearing, Barnwell raised the roles of the cooperating witnesses in the crime (see Hr'g Tr. 31-33), and the magistrate judge nonetheless credited the government's proffer of their expected testimony. This determination by the magistrate judge was sound, particularly in light of Barnwell's failure to provide any credible evidence that he was not involved in the firebombing of the Wrights' home.

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[5] Barnwell also appears to suggest that his 2005 arrest is not relevant to the determination of dangerousness because he was convicted of only a misdemeanor arising out of this arrest, and not of being a felon in possession of a firearm. Statement 6. This argument finds no support in the statutory language, which directs a judicial officer tasked with determining whether to detain a defendant pending trial to consider the defendant's "criminal history," not just "felony convictions." 18 U.S.C. 3142(g)(3)(A).

Barnwell also contends that his recent conduct undermines the government's argument that he poses a danger to the community. In this regard, Barnwell notes his courteous and respectful behavior toward Agent Burroughs and other FBI agents during the two months Burroughs investigated the crime at issue. Statement 8. Barnwell also asks this Court to consider the hearing testimony of friend Jimmy Wayne Eaken that Barnwell and his girlfriend Wendy Treybig have repaired a house they purchased together and that Barnwell has helped Eaken with certain projects, and Treybig's hearing testimony that she and Barnwell have been living in the area since April 2008 and in their home since September 2009. Statement 9-10. This argument misses the mark. As noted above, the government presented clear and convincing evidence of Barnwell's racist and violent nature, which demonstrated that his release would present a danger to the minority community, particularly African Americans. See pp. 15-16, *supra*. The government's evidence of Barnwell's future danger plainly outweighs his brief period of alleged respectful conduct towards law enforcement officials, his helpfulness to a friend, and his several years of living together with his girlfriend. See *United States* v. *Tortora*, 922 F.2d 880, 886 n.7 (1st Cir. 1990) (noting that the "integers in the section 3142(g) calculus which count in defendant's favor," such as his life with his wife and children, employment in his wife's video store, lack of evidence that he is a substance abuser, and past appearances for court dates on schedule, are "plainly

outweighed by the factors favoring detention" on the ground of future dangerousness).

Finally, Barnwell contends that the district court committed reversible error in failing to address alternatives to pre-trial detention, such as home detention and electronic monitoring, warranting a remand to that court to consider such alternatives. Statement 10-11. Section 3142 contains no requirement that a district court expressly address alternatives to detention in its pre-trial detention order, and this Court has imposed none. See 18 U.S.C. 3142(i) (requiring detention order to include written findings of fact and written statements of the reasons for detention, but not alternatives to detention); *Cantu*, 935 F.2d at 951-952 (affirming district court's pre-trial detention order that concluded that defendant "has failed to rebut the statutory presumption that no condition or combination of conditions of release will reasonably assure [his] appearance at trial and the safety of the community"). Indeed, even the federal court of appeals case Barnwell cites in support of this argument – *United States* v. *Fernandez-Alfonso*, 813 F.2d 1571 (9th Cir. 1987) – imposes no such requirement on the district court. In that case, the panel majority determined that the defendant should be released because the district court had failed to review the defendant's detention order with the promptness required by the statute, and remanded the case to that court with instructions to consider the conditions that would ensure the defendant's appearance at future court

proceedings.[6] *Id.* at 1573-1574. *Fernandez-Alfonso* thus merely mandates that a district court address conditions of release when it releases a defendant from detention – a self-evident requirement – and has no applicability to a district court's decision that a defendant should remain detained pending trial.

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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[6] Only the concurring opinion of one judge on the panel concluded that the district court erred by ordering detention without first examining the release conditions the defendant suggested. See *United States* v. *Fernandez-Alfonso*, 816 F.2d 477, 478 (9th Cir. 1987) (Brunetti, J., concurring). This concurrence has no precedential value. See *Maryland* v. *Wilson*, 519 U.S. 408, 412-413 (1997) (acknowledging that a concurring opinion does not constitute binding precedent).

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2011, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S STATEMENT OF THE CASE IN SUPPORT OF APPEAL FROM DETENTION ORDER with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the Appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and will be served electronically.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney