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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA, ) No. CR 10-328 JSW  
11 )  
Plaintiff, ) DEFENDANT’S OPPOSITION TO  
12 ) GOVERNMENT’S MOTION TO REVOKE  
v. ) ORDER OF RELEASE  
13 )  
14 [REDACTED] )  
[REDACTED] ) Hearing Date: May 27, 2010  
15 Defendant. ) Time: 11:00 am  
Court: The Honorable Jeffrey S. White  
16 )

17 **INTRODUCTION**

18 When the Court cuts through the rhetoric of the government’s motion, what becomes  
19 apparent is that the government is seeking to have defendant [REDACTED] [REDACTED] detained simply  
20 because he is charged with serious crimes that involve serious punishments. The government  
21 thus seeks to turn the Bail Reform Act’s “presumption” for detention into a mandate for  
22 detention. No such mandate exists under the law. Instead, the Court must look at Mr.  
23 [REDACTED] individual circumstances to determine whether any combination of conditions will  
24 reasonably assure the appearance of Mr. [REDACTED] and the safety of the community. As both  
25 the U.S. Pretrial Services Office and the Honorable Josesph C. Spero determined after thoughtful  
26 consideration and evaluation of the Mr. [REDACTED] particular circumstances, there are

1 conditions that can be imposed to do just that.

2 Mr. [REDACTED] has been diligently working in a union job for four years. His employer  
3 has explicitly stated that he can return to that job if released. He has family members who have  
4 scraped together cash to post a secured bond. His mother is willing to be his custodian, and Mr.  
5 [REDACTED] has agreed to be on electronic monitoring. These stringent conditions, combined with  
6 several other standard conditions of release and regular supervision by Pretrial Service, are  
7 certainly adequate to assure Mr. [REDACTED] appearance in court and the safety of the  
8 community. Accordingly, the Court should deny the government's motion.

### 9 ARGUMENT

#### 10 **I. STANDARD OF REVIEW FOR MAGISTRATE JUDGE'S RELEASE ORDER**

11 If a defendant is ordered released by a magistrate judge, the government may seek review  
12 of that release order by filing, with the Court having original jurisdiction over the offense, a  
13 motion to revoke the order or amend the conditions of release. 18 U.S.C. § 3145(a)(1). That  
14 Court's review of the magistrate judge's order is "de novo." *United States v. Koenig*, 912 F.2d  
15 1190, 1192 (9th Cir. 1990). As such, the Court is to "review the evidence before the magistrate  
16 and make its own independent determination whether the magistrate's findings are correct, with  
17 no deference." *Id.* at 1193.

#### 18 **II. THIS COURT SHOULD DENY THE MOTION TO REVOKE RELEASE**

19 Mr. [REDACTED] respectfully opposes the government's motion to revoke Judge Spero's  
20 carefully considered release order, since he has rebutted the statutory presumption of detention,  
21 and the government has not met its burden of demonstrating that no combination of release  
22 conditions would reasonably assure his appearance and the safety of the community.

##### 23 **A. MR. [REDACTED] HAS REBUTTED THE PRESUMPTION**

24 The charge against Mr. [REDACTED] raises a *rebuttable* presumption of detention under the  
25 Bail Reform Act. *See* 18 U.S.C. § 3142(e). However, it has long been held, notwithstanding  
26 this provision, that, as to whether a defendant should be detained, "[t]he ultimate burden of

1 persuasion remains on the government and the burden placed on the defendant to rebut the  
2 presumption is small.” *United States v. Chen*, 820 F. Supp. 1205, 1207 (N.D. Cal. 1992)  
3 (citations omitted); *see also United States v. Moore*, 607 F. Supp. 489, 497 (N.D. Cal. 1985)  
4 (“the rebuttable presumption shifts only a burden of production to defendant”). Accordingly, the  
5 government “retains the burden throughout the proceeding” of proving that no combination of  
6 conditions would reasonably assure the defendant’s appearance at trial or the safety of the  
7 community. *Moore*, 607 F. Supp. at 497. “The defendant need only produce some credible  
8 evidence forming a basis for his contention that he will appear and not pose a threat to the  
9 community in order to rebut the presumption.” *Chen*, 820 F. Supp. at 1207 (N.D. Cal. 1992)  
10 (citation and internal quotation marks omitted); *see also United States v. Youngblood*, 2009 WL  
11 773539 (N.D. Cal. Mar. 23, 2009) at \*2 (quoting *Chen* in explaining that the burden on the  
12 defendant to rebut a presumption of detention “is not onerous”).

13 Mr. [REDACTED] has rebutted the presumption of detention in this case. As an initial  
14 matter, the Pretrial Services report recommending his release on conditions itself serves as  
15 “some credible evidence” rebutting the presumption. *See, e.g., United States v. Nicholas*, 681 F.  
16 Supp. 527, 529 (N.D. Ill. 1988). Moreover, Mr. [REDACTED] willingness to submit to electronic  
17 monitoring as a condition of his release also rebuts the presumption, as does his family’s  
18 willingness to secure a bond with \$10,000 cash, and his mother’s willingness to serve as  
19 custodian. *See, e.g., United States v. O’Brien*, 895 F.2d 810, 816 (1st Cir. 1990) (presumption  
20 rebutted by electronic monitoring and real property); *see also United States v. Leyba*, 104 F.  
21 Supp.2d 1182, 1183-84 (S.D. Iowa 2000) (presumption rebutted by electronic monitoring and  
22 third-party custodian).

23 Specifically, Mr. [REDACTED] proffered the following facts and circumstances in support of  
24 his motion for pretrial release, which more than meet his burden of rebutting the presumption:

25 First, Mr. [REDACTED] has been working for Los Gatos Construction for four years (since  
26 April 2006). During that time he has worked full-time as a carpenter earning approximately

1 \$4000 per month. He has full medical benefits from his employment. He has used that money to  
2 help support his mother and his children. This long-term stable employment history is not  
3 regularly seen in cases of this nature and exemplifies Mr. [REDACTED] diligence in working hard  
4 to support his family. Most importantly, Pretrial Services has verified that Mr. [REDACTED] can  
5 return to his employment if released from custody.

6 Second, Mr. [REDACTED] has been a member in good standing with the United Brotherhood  
7 of Carpenters and Joiners of America Local Union 22 since 2006. As was also verified by  
8 Pretrial Services, he has been actively participating in the Northern California Carpenter's  
9 Apprenticeship Program in Pleasanton, California through the Union. He is just months away  
10 from graduating from the program. It would be extremely beneficial to Mr. [REDACTED] long-  
11 term prospects for gainful employment – regardless of the outcome of this case – if he were to be  
12 released so that he can graduate from this program.

13 Third, Mr. [REDACTED] has serious ties to the community and no desire to leave his family.  
14 Mr. [REDACTED] has lived in San Francisco since 1981 when his family permanently relocated  
15 here when he was approximately ten years old. He has not lived anywhere but San Francisco  
16 since 1981 and does not even own a passport. His mother and four siblings all live in San  
17 Francisco and have regular contact with Mr. [REDACTED] His two sisters live with him and his  
18 mother. Mr. [REDACTED] also has five children living in the Bay Area. He maintains regular  
19 contact and support of all of them, and the Pretrial Service report verifies that he is a responsible  
20 and actively involved parent. His two oldest children have come to Court in support of their  
21 father. He is not court-ordered to pay child support because he voluntarily supports his children  
22 with the salary he makes at Los Gatos Construction.

23 Fourth, Mr. [REDACTED] brother, James Watts, and sister-in-law, Pamela Elzie, appeared  
24 in court on his behalf and offered to sign the bond and post \$10,000 cash to secure his release.  
25 While no one in the family owns any real property to post, this is a significant amount cash that  
26 will ensure Mr. [REDACTED] compliance with the conditions of his release. Mr. Watts is

1 employed full time by the San Francisco Department of Parking and Transportation as a parking  
2 enforcement officer. Ms. Elzie works as a teacher at City College of San Francisco and the  
3 University of Phoenix. Pretrial Serviced determined that they are both suitable sureties.

4 Fifth, Mr. [REDACTED] criminal history is unique and does not suggest the blatant  
5 disregard for the law that the government so aggressively argues. Instead, as discussed at the  
6 detention hearing in the magistrate court, what it evidences is an individual who had a clear and  
7 devastating addiction to alcohol, but who has had no arrests since 1998. Notably, Mr. [REDACTED]  
8 has only one felony conviction on his record. As the government is forced to concede, his 1991  
9 drug conviction – from *nineteen years ago* – was expunged because it was such a minor offense.  
10 *See Gov't Motion at p. 9* (“ ... the weight involved was such that this conviction was later set  
11 aside.”). His only remaining felony conviction is that for vehicular manslaughter where two of  
12 his own friends died when he was driving under the influence of alcohol. One of the officers  
13 who interviewed Mr. [REDACTED] upon his arrest for the instant offense recognized how different  
14 in nature that conviction was and called it “accidental freakish type shit.” While clearly  
15 accidental and freakish, Mr. [REDACTED] was sentenced to six years in prison for that. But worse  
16 than his time in custody has been the emotional struggle in knowing that his own reckless actions  
17 led to the death of two of his close friends. No amount of time in custody will take that pain  
18 away.

19 Regardless, for purposes of his release, the most relevant aspect of his criminal history is  
20 the clear evidence of his exceptional performance while on release. Mr. [REDACTED] was released  
21 from his prison sentence in 2005 and served three years on parole. During that three year period,  
22 he did not have *any* violations or allegations of violations. Nor has he had a single failure to  
23 appear in his entire record. Indeed, since his release in 2005, he has spent the last five years  
24 without any police contact whatsoever. That is the strongest evidence of how Mr. [REDACTED]  
25 would preform on Pretrial Release: without incident.

26 Fifth, Mr. [REDACTED] agreed – without any objection – to be on all of the conditions

1 recommended by Pretrial Services, one of which is electronic monitoring. Accordingly, if  
2 released, Mr. [REDACTED] must not travel outside the Northern District of California; must report  
3 to Pretrial Services; must refrain from the use of any alcohol; must participate in drug, alcohol  
4 and/or mental health treatment as directed by Pretrial Services; must maintain current  
5 employment; must not change his residence without prior approval; and must be limited in his  
6 movement as directed by Pretrial Services and as overseen by electronic monitoring.

7 Sixth, the Pretrial Services Office, which is the office that would be tasked with  
8 supervising Mr. [REDACTED] should he be released, determined after it had interviewed Mr.  
9 [REDACTED] that he would be amenable to supervision under these very restrictive conditions of  
10 release.

11 Thus, Mr. [REDACTED] has more than rebutted the statutory presumption for detention, and  
12 the burden remains on the government to prove that no combination of conditions will  
13 adequately assure [REDACTED] appearance in court and the safety of the community.

14 **B. THE GOVERNMENT HAS NOT MET ITS BURDEN FOR DETENTION**

15 Under the terms of the Bail Reform Act, an accused person shall be released pretrial on  
16 the “least restrictive” combination of conditions that “will reasonably assure the appearance of  
17 the person as required and the safety of any other person and the community.” 18 U.S.C.  
18 § 3142(c)(1)(B). For the accused person instead to be detained pretrial, the government bears  
19 the burden of first proving by a “clear preponderance” of the evidence that the person is a  
20 “serious” flight risk or by “clear and convincing evidence” that the person poses a danger to the  
21 community, and then demonstrating that there is no combination of conditions that will  
22 reasonably assure the appearance of the person and the safety of the community. *See id.* §  
23 3142(e)-(f); *see also United States v. Motamedi*, 767 F.2d 1403, 1405-07 (9th Cir. 1985)

1 (Kennedy, J.).<sup>1</sup>

2 Pretrial release in non-capital cases “should be denied only for the strongest of reasons.”  
3 *Motamedi*, 767 F.2d at 1407 (citation omitted). Under the Bail Reform Act, the “weight of the  
4 evidence” in support of the charge against the defendant “is the least important of the various  
5 factors.” *Id.* at 1408. Moreover, “[a]lthough the statute permits the court to consider the nature  
6 of the offense and the evidence of guilt, the statute neither requires nor permits a pretrial  
7 determination that the person is guilty.” *Id.* (citation omitted). Finally, the Act “does not seek  
8 ironclad guarantees, and the requirement that the conditions of release ‘reasonably assure’ a  
9 defendant’s appearance cannot be read to require guarantees against flight.” *Chen*, 820 F.Supp.  
10 at 1208.

11 To meet its burden here, while the statute describes four factors to be considered by the  
12 Court, *see* 18 U.S.C. § 3142(g), the government relies almost exclusively on the weight of the  
13 evidence against Mr. [REDACTED] and the serious punishment that he is facing if convicted to try to  
14 meet each of those four factors. As the magistrate judge found, however, the government cannot  
15 meet its burden in this case. The defense concedes that the charges against Mr. [REDACTED] are  
16 serious and the potential punishments are correspondingly severe. Mr. [REDACTED] appropriately  
17 takes these charges and potential penalties seriously and looks forward to fighting the case  
18 through a fair and meaningful judicial process.

19 In its summary of the facts of this case, however, the government leaves out several  
20 relevant facts. Among other things, the government fails to indicate that this entire case is  
21 centered on a tip from a confidential *paid* informant working for the San Francisco Police

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23 <sup>1</sup> Although the burden of proof with regard to risk of flight is not as heavy as the “clear  
24 and convincing evidence” standard applicable with regard to danger to the community, it has  
25 been emphasized that the “‘preponderance of the evidence’ standard in pretrial detention matters  
26 is more than the usual ‘tips the scales slightly’ test applied in civil cases.” *Chen*, 820 F. Supp. at  
1208. “To give effect to the principle that doubts regarding the propriety of release be resolved  
in favor of the defendant, the court is to rule against detention in close cases, applying a ‘clear  
preponderance’ test.” *Id.* (quoting *Motamedi*, 767 F.2d at 1405-06).

1 Department. The government also simply quotes snippets of an approximately 35-minute  
2 interrogation between San Francisco Police Department officers and Mr. [REDACTED] immediately  
3 following his arrest. These quotes are completely taken out of context and disregard other  
4 extremely relevant statements made by Mr. [REDACTED] during the interrogation. Most strikingly,  
5 when one listens to the audio recording of the interview, there are large portions where it is  
6 nearly impossible to distinguish who is saying what and in response to what. They are all talking  
7 over one another in a non-linear banter.

8 Moreover, despite the government's assertions that this case is "not a circumstance where  
9 the defendant made a fateful choice to hold drugs temporarily for a friend," that is precisely what  
10 the officers discuss at length with Mr. [REDACTED]. He states repeatedly, "That ain't my shit," but  
11 after repeated questioning by officers, refuses to disclose any other person's involvement and  
12 states: "I'm not a rat, so it's over for me." As the weight of the evidence is the least important  
13 factor in this analysis, it is simply important for the Court to recognize that this case is not the  
14 slam-dunk that the government suggests.

15 In addressing Mr. [REDACTED] history and characteristics, *see* 18 U.S.C. § 3142(g)(3), the  
16 government focuses entirely on Mr. [REDACTED] prior conviction(s) and seeks to spin Mr.  
17 [REDACTED] gainful employment into a critical aspect of his criminal activity. The government  
18 suggests that Mr. [REDACTED] hard labor as a construction worker for four years was simply a  
19 rouse to allow him to engage in the sale of drugs. If Mr. [REDACTED] was the big time  
20 "sophisticated criminal" that the government suggests, it's hard to imagine why – or how – he  
21 would be working forty hours a week at his construction job, completing his necessary hours in  
22 his apprentice program for the Union, and attending to the care and needs of his children. The  
23 history and characteristics of Mr. [REDACTED] are more accurately described in the Pretrial  
24 Services report, and as summarized above. He has been working hard for four years without any  
25 police contact. As the Pretrial Services report indicates, his last police contact was for his arrest  
26 over 12 years ago for vehicular manslaughter.

1 Finally, the government argues that because Mr. ██████ mom could not, in 1998,  
2 prevent him from getting in a drunk driving accident where two of his friends died, she cannot  
3 prevent him from “amassing an arsenal of firearms” while on pretrial release. Conveniently, the  
4 government has completely distorted the issue for the Court. The burden is on the government to  
5 show by clear and convincing evidence that Mr. ██████ poses a danger to the community and  
6 that there is no combination of conditions that will reasonably assure the safety of the  
7 community. On this issue, the government again points to Mr. ██████ prior *expunged*  
8 conviction in 1991, his vehicular manslaughter conviction, and his arrest for the instant offense  
9 conduct. The government then concludes – without explanation – that Mr. ██████ poses a  
10 particular danger to law enforcement officers should he fail to appear in court. Govt Motion, p.  
11 11.

12 The government has conflated multiple issues. There has been no showing that Mr.  
13 ██████ is a risk of flight such that the conditions recommended by Pretrial Services would be  
14 inadequate to assure his appearance. Mr. ██████ family is here, the only life he knows is  
15 hear, he will be on electronic monitoring, he has performed exceptionally well on release, and he  
16 has not a single failure to appear on his record. Yet, the government is bootstrapping it’s danger  
17 to the community argument by stating that Mr. ██████ risk of flight will result in a danger  
18 to the community, particularly a danger to law enforcement. There is absolutely nothing to  
19 suggest that Mr. ██████ would be a danger to law enforcement. He fully and completely  
20 cooperated with law enforcement upon his arrest, was interrogated by law enforcement after his  
21 arrest, and has shown absolutely no hostility to law enforcement at any time. The government’s  
22 alarmist view that he would pose a particular danger to law enforcement if released is utterly  
23 without merit.

24 In short, the government is attempting to circumvent the clear dictates of the Bail Reform  
25 Act by relying almost exclusively on the charges and evidence against Mr. ██████ and the  
26 serious punishment he would face if convicted. When the Court looks at all of the relevant

1 factors under the law, including Mr. [REDACTED] steady work history, strong ties to the  
2 community, unique criminal history, and exceptional performance on probation and parole in the  
3 past, it is clear why both Judge Spero and Pretrial Services found that the combination of  
4 conditions recommended by Pretrial Services are reasonable and appropriate in this case.

5 **CONCLUSION**

6 The government argues that, contrary to the informed recommendation of Pretrial  
7 Services and the careful findings of Judge Spero regarding his suitability for release on  
8 conditions, Mr. [REDACTED] should be detained pretrial, on the grounds there is no condition or  
9 combination of conditions that will reasonably assure Mr. [REDACTED] appearance in court and  
10 the safety of the community. In moving here to revoke the magistrate judge's release  
11 order—which followed a thorough hearing in which the magistrate judge considered all of the  
12 information in the case and included all of the stringent conditions recommended by Pretrial  
13 Services, such as a bond secured by \$10,000 cash and electronic monitoring with a custodian—the  
14 government relies primarily, if not solely, upon the weight of the allegations of the instant  
15 offense, which is the least relevant consideration under the law. As Mr. [REDACTED] has rebutted  
16 the statutory presumption of detention, and the government has not met its burden of  
17 demonstrating that no combination of release conditions would reasonably assure his appearance  
18 and the safety of the community, for the aforementioned reasons, the Court should deny the  
19 government's motion to revoke the Judge Spero's release order for Mr. [REDACTED]

20 Dated: May 24, 2010

Respectfully submitted,

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23 /s/

24 JODI LINKER  
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