

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TROY EUGENE FULKERSON,

Defendant.

No. CR12-3049-MWB

**ORDER**

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This case is before me on a petition (Doc. No. 17) filed by plaintiff (the “Government”) to revoke the pretrial release of defendant Troy Fulkerson. The petition alleges he violated the conditions of his release (Doc. No. 14) by attempting to tamper with mandatory drug testing via use of a “wizinator type device” to provide a urine sample.

I conducted a hearing on November 19, 2012. Defendant appeared personally and with his attorney, Assistant Federal Defender Max Wolson. The Government appeared via Assistant United States Attorney Shawn Wehde. The Government offered testimony from Officer Michael Halligan and Deputy United States Marshal Jamey Dickson. The Government also offered Government Exhibit 1, which is a printout of defendant’s criminal record according to the National Crime Information Center.

Defendant admitted to the violation described in the Government’s petition but asserted relevancy objections with regard to Government Exhibit 1 and testimony concerning defendant’s conduct at the time of his arrest on the pending petition. I admitted all of the challenged evidence subject to my consideration of defendant’s objections. I invited both parties to submit legal authorities to my chambers concerning defendant’s relevancy objections. I received a letter from Mr. Wolson on November

19, 2012, and a memorandum from Mr. Wehde the following day. The matter is now fully submitted.

### ***BACKGROUND AND FACTUAL OVERVIEW***

On October 24, 2012, the Grand Jury returned an indictment charging defendant with six counts including conspiracy to distribute methamphetamine, distribution of methamphetamine and possession with intent to distribute methamphetamine. At the initial appearance on October 31, 2012, the Government announced that it did not seek pretrial detention. As such, and after consultation with Probation and Pretrial Services, I entered a release order placing defendant on pretrial supervision and imposing certain conditions, including no use of alcohol and random testing for the use of illegal controlled substances. Defendant was released the same day. Five days later, he engaged in his admitted conduct of attempting to tamper with drug testing by using a wizinator type device. The Government then filed its present petition and requested an arrest warrant, which I issued.

At the November 19 hearing, Halligan testified that he was dispatched (with other officers) to defendant's home in response to a report by Christina Fulkerson, defendant's wife and a co-defendant in this case. Ms. Fulkerson reported that defendant was "acting crazy" and requested police intervention. Halligan was aware that defendant was subject to an arrest warrant.

When Halligan arrived at defendant's residence, Ms. Fulkerson was standing outside and advised that the defendant was inside. Halligan and other officers entered the home and announced themselves. Halligan saw defendant come around a corner with a razor blade. Halligan told defendant to drop the blade and surrender, but defendant instead began cutting his own arm with the blade and retreated back around the corner. Halligan and other officers pursued defendant and repeatedly ordered him to

drop the blade, but defendant continued to refuse compliance and slash at his own arm. Defendant was told he would be tasered if he did not comply. Ultimately, he had to be tasered two times before the officers could subdue him and take him into custody. Halligan testified that defendant smelled strongly of alcohol when he was arrested. An ambulance was called and defendant was transported to an area hospital.

Dickson testified that he arrived at defendant's home after he had been placed in handcuffs. Dickson accompanied defendant to the hospital. He observed defendant to be highly intoxicated. Defendant refused treatment and was ultimately discharged, at which time he was transported to the local jail.

Government Exhibit 1 reflects a lengthy criminal record, with much of it relating to alcohol and drug use. Some of defendant's prior convictions reflect violent behavior, including domestic abuse assault in 2009, assault causing bodily injury in 2006, disorderly conduct (fighting or violent behavior) in 2005 and 2006, and harassment (3rd degree) in 1996 and 1997. Defendant does not challenge the factual accuracy of Government Exhibit 1 but, as noted above, objects on grounds of relevance.

### *ANALYSIS*

Revocation of pretrial release is governed by the Bail Reform Act which directs, in relevant part, that I "shall enter an order of revocation and detention if, after a hearing," I find that there is either:

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release;

or

(B) clear and convincing evidence that the person has violated any other condition of release;

and I also find that either:

(A) based on the factors set forth in [18 U.S.C. § 3142(g)], there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community;

or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

*See* 18 U.S.C. § 3148(b). In other words, I “shall” order detention if I make at least one finding from the first group and at least one finding from the second group.

The first finding is easy. Defendant admits the violation alleged in the petition – tampering with a random drug test by using a wizinator. Moreover, there is uncontroverted evidence that defendant was intoxicated at the time of his arrest on the Government’s pending petition. One condition of his release was no use of alcohol (Special Condition (p)). As such, I find clear and convincing evidence that defendant violated two conditions of his release.

As for the second finding, defendant’s relevancy objection applies to the first prong (risk of flight or danger to the community). While the Government does not argue risk of flight, it does contend no condition or combination of conditions will reasonably assure that defendant will not pose a danger to the community. Among other things, the Government relies on defendant’s conduct at the time of his arrest and his prior criminal record as evidence upon which I should make that finding. I will first address defendant’s relevancy objection before analyzing the two “second group” factors.

***A. Relevance Of Unrelated “Dangerousness” Evidence***

Defendant argues that evidence of his alleged dangerousness is relevant only to the extent that it relates to the charges against him in this case. In other words, since

defendant is charged with possession and distribution of methamphetamine, the only evidence I may consider with regard to dangerousness is evidence that relates to those charges. In support of this position, defendant cites *United States v. Byrd*, 969 F.2d 106 (5th Cir. 1992), and *United States v. Ploof*, 851 F.2d 7 (1st Cir. 1988). While defendant acknowledges that neither case is binding authority, he contends they support the proposition that evidence of dangerousness cannot be considered if it does not relate to the charged offenses.

Having carefully reviewed both cases, I disagree. At the outset, and as defendant concedes, both cases address a court's initial consideration of pretrial detention pursuant to 18 U.S.C. Section 3142, not revocation of pretrial release under 18 U.S.C. Section 3148. As such, even if those cases support the proposition that unrelated dangerousness evidence is irrelevant to an initial detention decision, it would not automatically follow that the same rule applies in a revocation hearing after a finding that a defendant violated a condition of release.

This distinction is moot, however, because the cited cases do not support defendant's argument. Both cases recognize that Congress, in enacting the Bail Reform Act, decided to make pretrial detention an option only under limited circumstances. *See Byrd*, 969 F.2d at 109-10; *Ploof*, 851 F.2d at 10 (both citing 18 U.S.C. § 3142(f)). The Fifth Circuit explained:

A [detention] hearing can be held only if one of the six circumstances listed in (f)(1) and (2) is present; detention can be ordered only after a hearing is held pursuant to § 3142(f). Detention can be ordered, therefore, only "in a case that involves" one of the six circumstances listed in (f), and in which the judicial officer finds, after a hearing, that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.

*Byrd*, 969 F.2d at 109 [emphasis added]. In other words, the court cannot even consider pretrial detention unless, as a threshold matter, one of the circumstances listed

in Section 3142(f) is present. If none are, then the defendant must be released regardless of his or her dangerousness. *Id.* at 110; *see also Ploof*, 851 F.2d at 11 (“Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists.”).

In this case, there is no doubt that at least one circumstance listed in Section 3142(f) is present, as defendant is charged with an offense (actually multiple offenses) “for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 *et seq.*).” *See* Indictment (Doc. No. 1); *see also* 18 U.S.C. § 3142(f)(1)(C). Thus, this case is not akin to *Byrd* or *Ploof*, wherein the defendants were detained on grounds of general dangerousness despite the fact that none of the 3142(f) factors were present. However, defendant argues that because general dangerousness alone cannot justify detention, it logically follows that general dangerousness cannot justify detention even when one of the 3142(f) factors is present. Instead, he asserts, evidence of alleged dangerousness must relate, somehow, to the 3142(f) factor that gives rise to the detention issue. Here, that would mean the evidence must relate to the defendant’s alleged violations of the Controlled Substances Act.

While I appreciate defendant’s advancement of a novel argument, I do not buy it. First, he has not directed me to any case, anywhere, adopting this significant limitation on the evidence a court may consider in determining whether a defendant poses a danger to any other person and the community. Second, even if some court (other than the Eighth Circuit Court of Appeals, of course) had reached such a conclusion, I would not accept it as an accurate interpretation of the Bail Reform Act. Nothing in the text of Section 3142 (or Section 3148) states that consideration of a defendant’s dangerousness is limited to evidence that relates to the pending charges against that defendant. Indeed, Section 3142(g) states exactly the opposite:

**Factors To Be Considered.**— The judicial officer shall, 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, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(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. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

18 U.S.C. § 3142(g) [emphasis added]. The first factor expressly references “the nature and circumstances of the offense charged.” If that was the only factor, defendant would have a valid argument. However, Section 3142(g) does not stop there.

Instead, once the Government has shown that one or more of the 3142(f) factors is present, as in this case, Section 3142(g) opens the door to an almost-unlimited scope of evidence on the issues of dangerousness and risk of flight. A court may consider such things as a defendant's "character," "physical and mental condition," "past conduct" and "criminal history." *Id.* In no way does Section 3142(g) even purport to limit the scope of relevant evidence to evidence that bears some kind of direct relationship to the pending charges.

This makes perfect sense. Congress made a policy decision as to when the Government is entitled to seek pretrial detention. When one of those circumstances exists and the defendant poses a danger to another person, or to the community at large, the potential victims of that danger do not care whether the danger somehow relates to the pending charge. Whether governed by Section 3142 or 3148, I am not required to ignore evidence concerning defendant's dangerousness simply because that evidence does not arise from the current charges. As such, I hereby overrule defendant's objections to Government Exhibit 1 and the testimony concerning the circumstances of his arrest. With this ruling I mind, I will now address the two alternative questions posed by Section 3148(b)(2).

***B. Is There A Condition Or Combination Of Conditions Of Release That Will Assure That The Defendant Will Not Pose A Danger To The Safety Of Any Other Person Or The Community?***

Based on the evidence presented, I find that the answer is "no." Defendant's conduct at the time of his arrest, as described in Halligan's testimony, is extremely troubling. He was armed with a razor blade, ignored multiple demands to drop the blade and surrender, and repeatedly cut his own arm. He ultimately had to be tasered twice before the arresting officers were able to control him. While defendant notes that he has a substance abuse problem and that this contributed to his behavior, his conduct

during the few days he was on pretrial release makes it likely that he will use alcohol or controlled substances again if not detained. That, in turn, would simply enhance his propensity toward dangerousness.

Further support for this finding comes from defendant's criminal record which, as noted above, includes multiple convictions for acts of violence. The nature and circumstances of the offenses charged also weigh in favor of my finding. As the Eighth Circuit has observed, Congress has found drug trafficking to be a serious danger to the community. *See United States v. Sazenski*, 806 F.2d 846, 848 (8th Cir. 1986). Here, the Grand Jury found probable cause to charge defendant with six counts relating to the distribution of methamphetamine, including four counts of distributing it near a school. While the nature of the charges, standing alone, would not cause me to detain the defendant, this is a nonetheless a significant factor. Based on all of the Section 3142(g) factors (as incorporated by Section 3148(b)), and in light of the evidence presented by the Government, I find that no condition or combination of conditions could reasonably assure the safety of any other person or the community.

***C. Is Defendant Unlikely To Abide By Any Condition Or Combination Of Conditions Of Release?***

Having made the finding discussed above, I must revoke defendant's pretrial release and order his detention regardless of the answer to this question. *See* 18 U.S.C. § 3148(b)(2). Nonetheless, I note that the evidence presented by the Government also causes me to find that defendant would be unlikely to abide by any condition or combination of conditions of release. Defendant committed two serious violations of the special conditions of his release within a matter of a few days after being released. Both violations were acts of commission, not omission. For example, he did not simply fail to appear for random drug testing. He appeared with a wizinator device in an

obvious attempt to defeat detection of illegal controlled substances. Likewise, he used alcohol to the point of serious intoxication despite a direct prohibition against the use of any alcohol.

If defendant would have established a commendable track record of compliance before engaging in this behavior, it would be easier to find that he may abide by conditions of release in the future. Instead, he went from release to serious violations almost immediately. As such, even if I did not find against defendant on the dangerousness issue, I would grant the Government's petition and revoke pretrial release based on my finding that defendant is unlikely to abide by any condition or combination of conditions of release.

### *CONCLUSION*

Based on the foregoing, and pursuant to 18 U.S.C. § 3148(b), I hereby **grant** the Government's petition to revoke the pretrial release of defendant Troy Fulkerson (Doc. No. 17), as follows:

1. Defendant's pretrial release is **revoked**. Defendant is committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.
2. The Attorney General shall afford defendant reasonable opportunity for private consultation with counsel while detained.
3. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver defendant to the United States Marshal for the purpose of an appearance in connection with a court proceeding.

4. If a “review” motion for revocation or amendment is filed, pursuant to 28 U.S.C. § 3145(a) or (b), the party requesting a change in the original order must:

- (a) Attach a copy of the release/detention order to the appeal;
- (b) Promptly secure a transcript.

5. There is *no automatic stay* of this Order. Therefore, defendant must request such relief from the court.

**IT IS SO ORDERED.**

**DATED** this 21st day of November, 2012.



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LEONARD T. STRAND  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT