Ryan Bundy, *Pro Se*
Inmate: Swis #795070
11540 NE Inverness Drive
Portland, OR 97220
Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RYAN BUNDY, *et al.*,

Defendants.

CASE NO.: 2:16-CR-00046-GMN-PAL

DEFENDANT RYAN BUNDY'S OBJECTION TO MAGISTRATE JUDGE'S FINDINGS AND ORDER [DKT. NO. 288 AND 298]

Certification: Defendant Ryan Bundy certifies that these objections are timely filed.

Defendant Ryan Bundy (sometimes "Defendant") is filing this objection to the Magistrate's April 20, 2016 order, (Dkt. No. 288) denying his oral motion for a continuance and ordering his detention (Dkt. No. 298). As argued below, the Magistrate erroneously denied Defendant's motion despite the plain language of the governing statute. This error constitutes a denial of due process based upon binding Ninth Circuit and United States Supreme Court precedent. Further, the Magistrate committed legal error in how the Bail Reform Act was considered and applied, given clear and binding precedent. Defendant therefore requests that this Court reconsider and reverse the Magistrate's order, or alternatively, for "good cause," vacate the detention order, and order that a new detention hearing be conducted.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After being transferred over his objection from Oregon, Defendant Ryan Bundy was arraigned in this matter on April 15, 2016. *See* Minutes of Proceedings, Dkt. No. 247, and is currently proceeding *pro se*. From the time of his arraignment until the "detention" hearing on April 20, 2016 Defendant was held in custody, and without explanation to him was kept in administrative segregation / solitary confinement. Prior to the "detention" hearing Defendant was denied (despite his request) access to materials to prepare a written motion (such as a usable pen and paper) and was not provided access to any discovery or notice as to what would be referenced at the "detention" hearing other than the text of the present indictment.

At the detention hearing, Defendant made an oral motion, based upon these circumstances (lack of access to the court, lack of access to materials to write, lack of access to any discovery or evidence, lack of notice of any proffered evidence to be provided by the government at the hearing) that good cause existed to continue the hearing so that in fairness he might prepare to present evidence, call witnesses, and otherwise fully participate, make argument and a showing of evidence as provided in the Bail Reform Act ("BRA"). Dkt. No. 288. The Magistrate Judge denied the oral motion and proceeded with the detention hearing.

At the hearing, Mr. Bundy was functionally ambushed with the government's proffer of specific evidence, without advance notice. Specifically, the government also presented evidence related to the allegations in Oregon, and Mr. Bundy's papers and information and legal notes related to that case had been confiscated by the U.S. Marshall's office or delivered (as per Oregon court order) to his standby counsel there. The court ordered detention despite its own notation of "significant family and community ties in Nevada" and "a history of employment" and despite a minor "criminal record…[which] by itself would not support a finding that Defendant poses a substantial risk of danger to the community." Dkt. No. 298, p. 2. The court found that the prior history shows "that Defendant will not obey court orders." *Id.* But, as argued below, that is not a permissible factor under the BRA, and other factors were slighted and ignored. Nevertheless, the proceeding was not fair because Defendant was not given time to obtain documents or witnesses

related to this supposed "criminal history" to rebut the government's proffer which was made with the benefit of years of investigation and a bound and tabbed volume of pictures and transcribed witness testimony.

After ordering Defendant's detention the court referenced Defendant's argument that "he has not had sufficient time to assemble evidence or information to dispute the allegations in the Superseding Indictment and the government's proffer, and to show that conditions of pretrial release can be fashioned." *Id.* Apparently acknowledging this significant unfairness, the court stated, "This order of detention is therefore without prejudice to Defendant's right to move to reopen the detention hearing based on material facts or information that was not available to him at the time of the detention hearing." *Id.*

Due to his pretrial detention conditions in Nevada and now in Oregon, Defendant Ryan Bundy was only able to reach his standby counsel today, regarding assistance in filing this motion, for the first time, through a third party legal secretary hired by his Oregon standby counsel.

II. ARGUMENT

Defendant Ryan Bundy appeals the Magistrate Judge's order denying his request for continuance, and the Magistrate's order finding "There is a serious risk that the defendant will not appear" and "there is a serious risk that the defendant will endanger the safety of another person or the community." This appeal is pursuant to Local Rule IB 3-1(a), which states that the "district judge may reconsider any pretrial matter…when it has been shown the magistrate judge's order is clearly erroneous or contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A). "The district judge may affirm, reverse, or modify, in whole or in part, the magistrate judge's order." LR IB 3-1(b). The Magistrate Judge erred by failing to continue the hearing as required by the plain language of the BRA and basic principles of due process, and the Magistrate Judge erred by failing to properly apply the statutory factors required by the BRA.

A. Defendant was entitled to additional time to prepare for his detention hearing

As the court understands, when Congress passed the Bail Reform Act ("BRA") it reaffirmed the "traditional presumption favoring pretrial release for the majority of Federal defendants." *United States v. Berrios–Berrios*, 791 F.2d 246, 250 (2d Cir.) (internal quotation marks and citation omitted),

cert. dismissed, 479 U.S. 978, 107 S.Ct. 562 (1986). Therefore, the general expectation is that a defendant shall be released on his own recognizance or unsecured bond, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. §§ 3142(a)(1) & 3142(b). When a court determines that a release on recognizance will not assure a defendant's appearance or ameliorate any danger, it may release the accused, nonetheless, on the "least restrictive" condition or combination of conditions. *Id*. at §§ 3142(a)(2) & 3142(c).

Thus, pre-trial detention is limited. As the United States Supreme Court has made clear, it is only after "a full-blown adversary hearing" where the government proves to a "neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person" that pre-trial detention is allowed. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103 (1987). Under the BRA, a defendant may request a continuance of his detention hearing beyond his first appearance. *See* 18 U.S.C. § 3142(f)(2)(B). Typically, "a continuance on motion of such person may not exceed five days (*not including* any intermediate Saturday, Sunday, or legal holiday)," but the continuance may be longer "for good cause." *Id.* (emphasis supplied).

A full-blown adversary hearing can hardly comport with due process when Defendant had not had any significant time with his attorney; had not been provided with any materials to research, draft, write; and had not been given any discovery or other notice of the government's intended proffer. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Due process means that fairness must be provided "before" an individual is deprived of a fundamental right or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333–34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citations omitted). Here, the Magistrate apparently recognized the problem of fairness, but rather than ensuring it in advance, instead chose to proceed and instead leave open "without prejudice" the opportunity for fairness at some point in the future.

Further, without providing Defendant with these basic requirements, the hearing became a sort of charade – and the court thereby unmistakably, and impermissibly slighted Defendant's presumption

of innocence – which is an essential and fundamental principle implicit within our concept of ordered liberty, particularly at this state in legal proceedings. The "presumption of innocence ... is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (*quoting Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895)). Because it is so ingrained within our history and national psyche, courts have been warned to "be alert to factors that may undermine the fairness of the fact-finding process" and to "place out of bounds practices that threaten to dilute the presumption of innocence." *United States v. Brutus*, 505 F.3d 80, 85 (2007) (quoting in part, *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) & *United States v. Gaines*, 457 F.3d 238, 245–46 (2d Cir.2006)). In this case however, the court's almost exclusive reliance upon the allegations in the superseding indictment and the allegations in the Oregon case – without given Defendant the necessary accoutrements of due process – ***could not avoid*** slighting his presumption of innocence. In fact, the court has essentially done the opposite, presuming guilt and simply confessing that the court would remain open, "without prejudice" if Defendant wanted to come back under more fair circumstances. This is particularly problematic because which heightened aegis, Congress, no less, enacted into the fabric of the Bail Reform Act: "Nothing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j).

For these reasons it was error to proceed prior to Defendant having access to the most basic tools and information necessary to make the "full adversary hearing" to which he is entitled, lawful and permissible.

B. **The Magistrate Committed Legal Error in Weighing the Statutory Factors**

The Magistrate committed legal error in how the Bail Reform Act factors were considered and applied, given clear and binding precedent.

First, the court's order begins with the conclusory statement that, "Based on the allegations in the Superseding Indictment, there is a rebuttable presumption that the defendant poses a substantial risk of nonappearance and a danger to the community." It is true that in cases involving crimes designated as violent, there is a rebuttable presumption that the defendant presents a danger to the

community, 18 U.S.C. § 3142(e)(2), yet the burden of persuasion rests always with the Government. And, at the very least, the court needs to specify which "crimes" are at issue as being considered "violent." This is no uncontroversial omission by the Magistrate. There is no reference in the record by the government or the Magistrate to any evidence that Defendant ever had the "intent" to harm anyone. This is significant. As noted above, the government has the "burden of persuasion" by "clear and convincing evidence." *See e.g. United States v. Montoya*, 486 F. Supp. 2d 996, 1005 (D. Ariz. 2007)(Holding that "manufacturing a fake bomb and placing the device in a mailbox to be found by a United States Postal Service employee" was not a "crime of violence" under the BRA due to lack of "intent to harm.") In the Ninth Circuit it is also not enough to reference the presence, transport or possession of firearms. *United States v. Serna*, 435 F.3d 1046, 1047 (9th Cir. 2006)("Were an object's potential for causing physical injury enough to render illegal possession thereof a crime of violence, almost all possessory crimes would be crimes of violence" which they are not); *United States v. Twine*, 344 F.3d 987, 987-88 (9th Cir. 2003)("[W]e are bound by our holding in *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir.1993) [and] we hold that…felon in possession of a firearm-is not a crime of violence for purposes of the Bail Reform Act.") Thus, based upon Defendant's presumption (as outlined above), and the government's burden of persuasion (as also outlined above) the court has no legal basis upon which to presume, or to invoke without specific reference, the "rebuttable presumption" at issue. Instead, the court must reference factual allegations of "intent to harm" which did not take place here and represents an improper slighting and weighing of the BRA statutory factors and the court's decisions based thereupon are therefore clearly erroneous.

Second, the Magistrate's order finds that Defendant Ryan Bundy is a flight risk, without reference to any facts or articulated explanation. The court references minor criminal history, but doesn't explain why this would either a) constitute a flight risk, or b) overcome other restrictions available such as electronic monitoring, travel conditions, etc. This is particularly troubling in light of the court's acknowledgment of Defendant's family ties and history of employment. Risk of flight has to be shown by "a clear preponderance of the evidence." *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990). Besides its conclusory statement about past minor criminal history, there is no reference to any evidence showing a serious risk of flight, let alone a clear preponderance. Section

3142 "does not seek ironclad guarantees, and the requirement that the conditions of release "reasonably assure" a defendant's appearance cannot be read to require guarantees against flight." *United States v. Portes*, 786 F.2d 758, 764 n. 7 (7th Cir.1985); *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir.1985); *United States v. Orta*, 760 F.2d 887, 890–92 (8th Cir.1985). *See also United States v. Tortora*, 922 F.2d 880, 884 (1st Cir.1990) (even where the issue is the safety of the community, Congress did not require guarantees in enacting the Bail Reform Act). Thus, if the Magistrate is going to include risk of flight as a basis for detention – it must articulate the finding, in light of the circumstances, and in light of alternatives and restrictions. "The government's burden of proof is not trivial...[it] must prove that no combination of conditions can reasonably assure the safety of the community and the appearance of the defendant." It must also be a "serious risk." *United States v. Motamedi*, 767 F.2d 1403, 1409 (9th Cir. 1985).

Third, the Magistrate's finding related to "danger" is legally insufficient. When detention is based wholly or in part on a determination of dangerousness, such finding must be supported by clear and convincing evidence. 18 U.S.C. § 3142(f)(2)(B). And, alleged dangerousness or the theoretical "threat" of danger, by itself, is not sufficient to justify detention. *United States v. Byrd*, 969 F.2d 106, 109-10 (5th Cir. 1992)("[W]e find ourselves in agreement with the First and Third Circuits: a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention."); *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003)("We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2). Our interpretation is in accord with our sister circuits who have ruled on this issue. See United *States v. Byrd*, 969 F.2d 106 (5th Cir.1992); *United States v. Ploof*, 851 F.2d 7 (1st Cir.1988); *United States v. Himler*, 797 F.2d 156 (3d Cir.1986). This is significant, because neither the court nor the government addresses any specific danger posed by Defendant, only that his conduct – as alleged – suggests a theory or possibility of dangerousness. In fact, the government admits, and the court ignores, that the present case (and detention) were delayed, by the government, for several years without any alleged concern of actual dangerousness or intent to harm. This is further insufficient because, it is not past dangerous acts but real "future dangerousness" that must be considered in light

of conditions of release that the court could impose. *See e.g. Salerno*, 481 U.S. at 748-750 ("a judicial officer [must] independently evaluat[e] the likelihood of future dangerousness.") Here, no explanation is given of actual dangerousness, let alone in light of release conditions. Finally, in determining "dangerousness" the court states it gave great weight to the allegations and alleged nature of the offenses – while at the same time only lightly considering the other required factors. This is impermissible. "The court must take into account available information concerning the nature and circumstances of the offense charged, the weight of the evidence against the person, the history and characteristics of the person, including his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug and alcohol abuse, criminal history, record concerning appearance at court proceedings, and 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) (1984)." *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985)(Holding "weight of the evidence is the least important of the various factors.") The Magistrate's order was respectfully, but frankly, backwards. The magistrate did not outline any "risk of flight" factors, but used the "nature of the offense" and "weight of the evidence" to justify a dangerousness finding. This is error. *United States v. Edson*, 487 F.2d 370, 372 (1st Cir. 1973)(" The seriousness of the crime…may have distracted the magistrate's attention from the priorities established by Congress by the Bail Reform Act. Until a defendant has been convicted, the nature of the offense, as well as the evidence of guilt, is to be considered ***only*** in terms of the likelihood of his making himself unavailable for trial.")(Emphasis added.)

III. CONCLUSION

Defendant did not receive a detention hearing compliant with due process. The Magistrate appears to have acknowledged this by stating that the order was "without prejudice to Defendant's right to move to reopen" but that is not the legal standard. Due process must be afforded "before" liberty is infringed. Further, by improperly weighing the statutory factors – and failing to specifically articulate findings on the record, the Magistrate further violated due process.

> Under the Bail Reform Act, the **procedures by which a judicial officer evaluates the likelihood of future dangerousness** are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U.S.C.

> § 3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid*. The judicial officer charged with the responsibility of determining the appropriateness of detention ***is guided by statutorily enumerated factors***, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. § 3142(g). The Government must prove its case by clear and convincing evidence. § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i).

Salerno, 481 U.S. at 751-52. It is only under these conditions that the United States Supreme Court upheld the constitutionality of pretrial detention hearings. And, as the Ninth Circuit has cautioned, "As a matter of constitutional significance, the mere fact that a person is charged with a crime, does not "give rise to any inference that he is more likely than any other citizen to commit a crime if released from custody." *United States v. Scott*, 450 F.3d 863, 874 (9th Cir.2006)., 107 S. Ct. 2095, 2104, 95 L. Ed. 2d 697 (1987).

For the above reasons the Magistrate's order of detention should be reversed. Alternatively, it is clear that Defendant Ryan Bundy was unable to adequately prepare by gathering and confirming information and material to fully rebut the government's proffer and the conclusory findings relied upon by the Magistrate. Thus, Ryan Bundy respectfully requests that if the court does not simply reverse the detention order, it reverse the Magistrate Judge's denial of his oral motion for a continuance based upon "good cause" and remand the matter for a new detention hearing.

Respectfully submitted this 4th day of May 2016.

By: /s/ *Ryan Bundy* *
Pro Se Defendant

* Filed on behalf of Mr. Bundy by standby counsel.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 2016, a true and correct copy of **DEFENDANT RYAN BUNDY'S OBJECTION TO MAGISTRATE JUDGE'S FINDINGS AND ORDER [DKT. NO. 288 AND 298]** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By /s/
Angela H. Dows,
Standby Counsel for Mr. Bundy