UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, Plaintiff, v. RICHARD WINSTON WEST II, Defendant.	Case No. 3:16-cr-00029-MMD-WGC ORDER

I. SUMMARY

The Magistrate Judge ordered Defendant Richard Winston West III ("West" or "Defendant") to be detained following a detention hearing. West appeals the Magistrate Judge's Order, contending that his deteriorating physical condition caused by the lack of medical treatment demands his release. The Court has reviewed Defendant's Amended Motion for Review and Appeal of Detention Order (Emergency Hearing) (ECF No. 97) ("Motion"), the government's response (ECF No. 103) and Defendant's supplement (ECF No. 109). The Court has also considered the evidence and arguments presented at the May 19, 2016, hearing on the Motion. Because the Court agrees with the Magistrate Judge that West presents a flight risk and a danger to the community, and that no conditions or combinations of conditions of release will reasonably ensure his appearance and safety of the community, the Court denies West's Motion. However, the Court will order the Washoe County Detention Facility ("the Facility") to coordinate West's treatment with his outside physician to ensure that West receives treatment necessitated by his medical condition.

II. BACKGROUND

On April 27, 2016, the United States filed a criminal complaint against West and eight other defendants. The complaint asserts the following counts against West: one count of conspiracy to distribute and possess with intent to distribute controlled substances, one count of continuing criminal enterprise, three counts of distribution of a controlled substance, and one count of illegal use of a communication facility. (ECF No. 2.) On April 29, 2015, at West's initial appearance and after a hearing, the Magistrate Judge ordered West to be detained. (ECF Nos. 27, 53.)

West has since been indicted on twelve counts — one count of conspiracy to distribute and possess with intent to distribute controlled substances (count one), three counts of distribution of a controlled substance (counts two, three and four), two counts of possession of firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (counts six and ten),[1] and six counts of possession with intent to distribute a controlled substance (counts seven, eight, nine, eleven, twelve and thirteen). (ECF No. 55.) The conspiracy count alleges that between no later than November 13, 2012, and April 28, 2016, West and his eight co-defendants conspired with each other and other persons to distribute and possess with intent to distribute controlled substances, such as oxycodone, a Scheduled II controlled substance, which were not prescribed for legitimate medical use. (*Id.* at 1-2.) The two § 924(c)(1)(A) counts allege that West possessed firearms in furtherance of a drug trafficking crime for which he may be prosecuted. (*Id.* at 4-5.) West's physician, Robert Gene Rand,[2] is indicted on two counts, one of which involves distribution of a controlled substance, subsys, to West "not for a legitimate medical purpose and by an individual practitioner not acting in the usual course of professional practice." (*Id.* at 3.)

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[1]Count ten charges that one of the firearms, a Sig Sauer .9 millimeter caliber pistol had a suppressor. (ECF No. 55 at 5.)

[2]The medical documents offered in support of the Motion include three pages of documents from Robert Rand and Rand Family Care. (ECF No. 97-1 at 76-79.)

III. DISCUSSION

The Court reviews the Magistrate Judge's Order under 18 U.S.C. § 3142(e) *de novo*. *United States v. Koenig*, 912 F.2d 1190, 1192-93 (9th Cir.1990). This standard requires the district court to review the evidence presented to the magistrate judge, and any additional evidence presented, to "make its own independent determination whether the magistrate's findings are correct, with no deference." *Id.* at 1193.

The Bail Reform Act of 1984 "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." *United States v. Gerbo*, 948 F.2d 1118, 1121 (9th Cir. 1991). A court may detain a defendant if it finds that there are no conditions or combination of conditions that will "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e). "Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in [the] defendant's favor." *Gerbo*, 948 F.2d at 1121 (citations omitted). Where, as here, the defendant is charged with multiple offenses "for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act" or § 924(c) offenses, there is a rebuttable presumption that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). "Although the presumption shifts a burden of production to the defendant, the burden of persuasion remains with the government." *United States v. Hir,* 517 F.3d 1081, 1086 (9th Cir. 2008). A finding that a defendant is a flight risk must be supported by a preponderance of the evidence, *United States v Aitken,* 898 F.2d 104, 107 (9th Cir 1990), and that "a defendant is a danger to any other person or the community must be supported by 'clear and convincing evidence,'" *Hir,* 517 F.3d at 1086 (quoting 18 U.S.C. § 3142(f)(2)(B)).

Where a defendant presents evidence to rebut the presumption of flight risk or dangerousness, § 3142(g) requires the court to consider available information

concerning the following four factors in determining whether to detain or release a defendant: "(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community should the person be released." 18 U.S.C. § 3142(g); *Hir,* 517 F.3d at 1086. West's appeal of the Magistrate Judge's Order primarily addresses one item under the third factor in focusing on his history and characteristics — West's physical and mental condition. Because the Court is required to consider all four factors in evaluating whether to detain or release Defendant pretrial, the Court will address each factor in turn.

A. Nature and Circumstances of Offense Charged

The charged offenses are premised on West's alleged deceptive conduct — he allegedly trafficked in analgesic medications which were not prescribed for a legitimate purpose. (ECF No. 55.) The conspiracy count alleges the trafficking conduct spanned a period of over three years, from November 13, 2012, to April 28, 2016 (*id.* at 2.), and the government represents that the distribution occurred in part out of West's truck at his place of employment and involved a significant amount of medications, such as oxycodone. (ECF No. 103 at 13.) The Indictment charges West with two counts of possession of firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). (ECF No. 55.)

"Consideration of the nature of the offenses charged involves consideration of the penalties." *United States v. Townsend,* 897 F.2d 989, 995 (9th Cir. 1990). Here, West faces a possible mandatory minimum sentence of thirty (30) years for counts six and ten — a 5-year consecutive sentence for the first § 924(c)(1)(A) count and a 25-year consecutive sentence for the second § 924(c)(1)(A) count. 18 U.S.C. §§ 924(c)(1)(A) & 924(c)(1)(C). The length of West's potential sentence increases the risk that he will flee because the possibility of a lengthy sentence incentivizes fleeing where a shorter potential sentence might not. *See Townsend* (finding that the district court

reasonably determined that defendants' lengthy sentence provided them with greater incentive to flee).

The nature and circumstances of the charged offenses weighs against release.

B. Weight of Evidence Against Defendant

This factor "is the least important of the various factors." *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). Thus, "[a]lthough the [bail reform] statute permits the court to consider the nature of the offense and the evidence of guilt, the statute neither requires nor permits a pretrial determination that the person is guilty." *Id.* (citations omitted). "[I]f the court impermissibly makes a preliminary determination of guilt, the refusal to grant release could become in substance a matter of punishment." *Id.* Accordingly, factor two "may be considered only in terms of the likelihood that the person will fail to appear or will pose a danger to any person or to the community." *Id.* (citing 18 U.S.C. § 3142(g) (remaining citation omitted)).

The Indictment charges West with twelve counts, including one count of conspiracy to distribute and two § 924(c)(1)(A) counts occurring on April 28, 2016. (ECF No. 55.) West's Motion challenges the grounds for the § 924(c)(1)(A) counts, contending the firearms were kept in his vehicle "in a locked case and in a seat storage area." (ECF No. 97 at 3-4.) The government counters that a loaded Sig Sauer was found in the driver's side door pocket of the vehicle next to prescription bottles with a number of pills, an STI Tactical pistol was in a backpack in the rear seat and a third firearm — "a combat-like rifle" — was under the back seat. (ECF No. 103 at 2, 19; ECF No. 103-1.) West further argues that the Indictment does not allege a "drug distribution" occurring on the day of his arrest on April 28, 2016, when the FBI seized a number of firearms from his vehicle, making tenuous any nexus between the alleged distribution of drugs with the possession of firearms. (ECF No. 97 at 3-6.) However, the Indictment alleges three counts (counts seven, eight, and nine) of possession with intent to distribute a controlled substance on or about April 28, 2016, that occurred out of a white Ford pickup truck. (ECF. No. 55 at 5.) The government also asserts that agents

recovered 61 firearms and 74 magazines during a search of West's home. (ECF 103 at 3.) West explains the reasons for the number of firearms, including the fact that he has a concealed weapon permit and is an avid gun collector. (ECF 97 at 3; ECF No 54 at 27.) He may have legitimate reasons for having the firearms, but his reasons do not undermine that his possession of a significant number of firearms may be a factor in the Court's evaluation of the danger to the community, even though the firearms have been confiscated.

This factor is at best neutral.

C. History and Characteristics of Defendant

Under 18 U.S.C. § 3142(g), courts may consider "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, [and] record concerning appearance at court proceedings." *Motamedi*, 767 F.2d at 1407. Steady employment and financial resources demonstrate a tie to one's community, and weigh in favor of pretrial release. *See United States v. Honeyman*, 470 F.2d 473, 475 (9th Cir. 1972) (finding that the accused's steady employment and substantial financial resources, including real property, weighed in favor of pretrial release).

There is no dispute that West has strong family and community ties. West is 39 years old, has resided in Reno his entire life, has no criminal history, and was employed as the general manager of his family's auto-dealership. West is married and has two young children and, by all accounts, he is a good father and close to his children. The letters of support attached to Defendant's Motion describe West as an individual who is "good to his word" (ECF No. 97-4 at 2), "loves his community, family, and friends" (*id.* at 8), is of "strong moral character" (*id.* at 3), is "full of ambition, respect, integrity and honesty" (*id.* at 9), "has a heart of gold" (*id.* at 13), and loves his wife and adores his two children and nieces and nephews (*id.* at 15, 18, 26, 30-31, 34, 35). In fact, one of the letters expresses that "[t]he charges presented against Mr. West are frankly a complete

uncharacteristic aberration." (*Id.* at 9.) Several letters recount his medical history and express that West needs specialized treatment. (*Id.* at 8, 15; ECF No.106.) The authors describe the son, brother, and friend that they see in West and the Court has no reason to doubt the sincerity of the sentiments expressed in these letters.

However, the charges and public records reveal a different individual who may not be recognizable to West's family and friends. The Indictment charges West with serious drug trafficking offenses and offenses involving possession of firearms during and in relation to a drug trafficking crime. To his family and friends, West may be a victim of our opiate epidemic; to the Grand Jury, West conspired with others to traffic in the distribution and sale of opiates for at least the last three (3) years. In terms of the public records, records from the Nevada Department of Motor Vehicles show that West's driver's license was suspended on two occasions for failure to appear on traffic tickets. Reno Police Department records show three incidents of domestic battery reports by West's wife in June 2005 (before they were married), July 2007 and April 2010. (ECF No. 103-3) West's wife expressed to the FBI agents who were conducting the search of West's home that she wonders what he will do if released. (ECF No. 15.) She also expressed to the pretrial services officer that she could not say whether West would be a danger to the community. In an emailed dated May 18, 2016, offered in support of the Motion, Mrs. West explained that the statements she made to the federal agents were given while she was experiencing distress and were taken out of context. (ECF No. 109-3.) She assured that the domestic incidents previously reported were no longer an issue. (*Id.*) Even with this latest communication, the Court agrees with the Magistrate Judge that Mrs. West remains "mixed." (ECF No. 54 at 16.)

Defendant relies extensively on his medical condition in seeking release. West has had multiple lumbar fusions and abdominal surgeries.[3] (ECF No. 97 at 10; ECF No.

[3]Defendant's Motion makes statements about West's medical history and in most instances, does not cite to any of the supporting exhibits. Even when the Motion cites to a particular exhibit, no pin cite is offered. For example, counsel cites to Exhibit 1 to show West's medical history, including references to his back surgeries. However, Exhibit 1 is 79 pages in length. (ECF No. 97-1.)

97-1 at 16.) He has had a history of degenerative disc disease and has tried a number of therapies and procedures that have not been effective. (*Id.)* According to West, based on metabolization tests conducted by Dr. Snow, he has to take "three pills of average-strength oxycodone to give him pain relief relative to what one pill of oxycodone would bring for the 'average pain-riddled patient.'"[4] (ECF No. 97 at 11.) Based on Dr. Song's testimony at the May 19, 2016, hearing, he has not formally treated West since his surgery at UCSF in 2012. Since then, the extent of his treatment of West involved ordering imagings on a periodic basis to monitor West's condition. Because these imaging results were stable, Dr. Song determined that no follow-up was needed other than continuing monitoring. Dr. Song did reiterate that he is not a pain management specialist and is not familiar with West's medication regimen. Nevertheless, he is of the opinion that the current care West receives based on information he learned secondhand, where West is not given analgesic medications, poses a threat to West's health. West also offers a letter from Dr. DiMuro, who is Board Certified in Anesthesiology and Pain Medicine. Dr. DiMuro opined that, based on his review of West's medical records, "[t]he initiation of opiate therapy would be very appropriate for the chronicity of his condition as well as his unique musculoskeletal pain syndrome." (ECF No. 109-1 at 3.) Dr. Hahn, who is a Board eligible internist at the Facility, testified that West has undergone detox, has not been prescribed opiates because of his detox regimen even though West has complained of pain, and the Facility does not have a policy against prescribing opiates if such medication is deemed medically necessary.

There is no dispute that West is addicted to his pain medications. West reported to the pretrial services officer that he has used opiates for about 19 years and acknowledges that he is dependent on his prescription medications. West's family

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[4]Again, the Motion does not cite to any exhibits to verify Dr. Snow's tests. (ECF No. 97 at 11.) At the May 19, 2016, hearing, counsel clarified that West is the source of this information.

members and friends expressed in their letters that they believed West's physician mismanaged his pain medication, resulting in West's addiction and current withdrawal. Even West's counsel argues at the detention hearing that this is not a case where West is "out buying drugs . . . These drugs, as the government well knows, were prescribed to him." (ECF No. 54 at 24.) West's addiction makes him a potential flight risk and danger to the community.

West also has the financial means to enable him to flee. *See United States v. Aitken*, 898 F.2d 104, 107 (9th Cir. 1990) (access to large sums of cash relevant to determination of flight risk.) There is no dispute that West has assets that may be utilized (i.e., $100,000 in his 401k account, $30,000 in his savings account and equity in his home). (ECF No. 103 at 10; ECF No. 103-4.) West also believed he could borrow money from his friend.[5] (ECF No. 103 at 6; ECF No. 103-4.)

This factor — the history and characteristic of the defendant — weighs against release.

D. Nature and Seriousness of Danger to any Person or the Community that would be Posed by Defendant's Release

West poses a danger to the community based on the alleged deceptive nature of the charged offenses where he was trafficking in prescribed pain medications, his possession of firearms in furtherance of a drug trafficking crime as charged, his dependency on pain medications, the history of domestic disturbance and the large number of firearms found in West's home. This factor too weighs against release.

E. Weighing the Bail Reform Act Factors

The Bail Reform Act factors, 18 U.S.C. § 3142(g), favor affirming the Magistrate Judge's Order.[6] The factors discussed above tip the scales against pretrial release.

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[5]West suggests that he cannot flee because his physical condition makes it difficult for him to even walk. (ECF No. 97 at 2.) The Court agrees with the government that West physical condition by no means renders him less of a flight risk.

[6]Defendant complains that he was ordered detained when his co-defendants were not. (ECF No. 97 at 1-2.) However, as discussed here, whether to detain a defendant involves an individualized inquiry of the relevant factors under 18 U.S.C. § 3142(g).

West contends that he should be released because his physical condition has deteriorated as a result of "the jail's failure to appropriately treat and medicate." (ECF No. 97 at 8.) West offers Dr. Song's letter to argue that "[a]bsent appropriate follow-through treatment, that effort becomes somewhat in jeopardy by virtue of the muscle constrictis that are now occurring due to the pain that Mr. West endures." (*Id.* at 10.) Defense counsel offers his own observation that West "is having a much greater difficulty ambulating and holding his body and head upright." (*Id.*) Yet, at the hearing, defense counsel admits that, based on medical advice from physicians, West may be undergoing this experience with pain in part because he is going through withdrawal. Dr. Hahn's testimony shows Defendant has been properly detoxed, a fact which West does not appear to dispute. Moreover, Dr. Hahn testified that he is experimenting with administering pain management, albeit not as timely as West may be accustomed to receiving. Importantly, the medical information submitted in support of the Motion, including Dr. Song's testimony at the May 19, 2016, hearing, does not show that West was under any proper medical care to manage his pain medication. Aside from Dr. Song's monitoring of West post his 2012 surgery, there is no evidence that West was receiving proper pain management or care under the direction of any physician other than co-defendant Dr. Rand, let alone a pain management specialist. West appears to have taken numerous pain medications that have resulted in his physical dependency. Thus, West requests to be released to obtain treatment for his pain but offers no evidence that the pain medication regimen he was on pre-detention was appropriate or medically necessary. In fact, the evidence suggests it was not.

Nevertheless, given West's medical history and in light of Dr. Song and Dr. DiMuro's opinions, the Court finds that the Facility should coordinate West's evaluation by Dr. DiMuro and administer treatment as recommended by Dr. DiMuro, which may include pain medication management.

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IV. CONCLUSION

It is therefore ordered that Defendant's Amended Motion for Review and Appeal of Detention Order (Emergency Hearing) (ECF No. 97) is denied. However, the Court directs the Washoe County Detention Facility to: (1) promptly permit and coordinate West's evaluation by Dr. DiMuro for him to provide a recommended course of pain management regimen due to West's specific medical condition; and (2) to administer and manage the medication prescribed pursuant to such regimen. West will be responsible for the expenses associated with Dr. DiMuro's services and for the medications, to the extent they are not of the kind that are typically prescribed at the Facility. Whether West's evaluation by Dr. DiMuro should be conducted at the Facility or at an offsite location will be up to the Facility's discretion. The Court refers any dispute as to the coordination of treatment by Dr. DiMuro to the presiding Magistrate Judge, William G. Cobb.

DATED THIS 19th day of May 2016.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE