

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**

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**UNITED STATES**

**VERSUS**

**CRIMINAL ACTION No. 01-105-D-M3**

**KELLY DONALD GOULD**

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**RULING & ORDER**

\_\_\_\_\_ Pending before the court is a motion to reconsider request for bond filed by defendant, Kelly Donald Gould (“Gould”).<sup>1</sup> Gould protests his continued pretrial detention on statutory and constitutional grounds. Gould stands charged of being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). He has been in either state or federal custody awaiting trial on charges arising from the same events for 31 months. The state has dropped all charges originally filed against Gould. This court has ordered suppressed certain crucial evidence related to his federal charge. The Fifth Circuit affirmed that suppression ruling. Now the government seeks to have the Fifth Circuit rehear the suppression matter *en banc* for the purpose of overruling the precedent on which this court relied. Further review threatens to delay Gould’s trial for nearly another year.

Gould makes two arguments for his release. First, he argues that the suppression ruling gives this court a statutory basis for reviewing the detention

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<sup>1</sup> Dkt No. 62.

decision and the evidentiary basis for ruling that Gould's conviction is now too unlikely to warrant his further detention. Second, Gould argues that the Due Process Clause of the Fifth Amendment requires the court to end his pretrial detention. The government seeks to extend custody. The parties have briefed the issues presented and the court held an evidentiary hearing on May 20, 2003.

At the hearing, the court ruled that Gould must be released to afford him due process. The court issues this supplementary ruling to expand on the reasons that it feels compelled to come to this determination. This document also constitutes the order commanding Gould's release from prison, albeit on strict conditions.

## **BACKGROUND**

### **I. Gould's History of Violence**

Kelly Gould is, it can fairly be said, a troubled man. He was arrested for the first time on October 7, 1979 for driving while intoxicated. It is at the scene of that arrest that Gould began building his lengthy résumé of pointless violence, for the arresting officers also charged him with resisting arrest and assault. The court is not aware whether these charges resulted in a conviction.

Ten years and assorted property crimes later, Gould's troubles with violence reached the attention of law enforcement again. This time, Gould inaugurated what would become a pathetic pattern of attacking the women in his life. The record is less than perfect on this matter, but it appears that on November 10, 1989, Gould kidnaped an ex-girlfriend in South Carolina and drove her around for hours until she

finally escaped. Gould avoided capture that day, but was picked up the next for carrying a concealed weapon. While the South Carolina authorities did charge Gould with kidnaping, they dropped the prosecution, presumably because Gould's ex-girlfriend was too afraid to press charges. The police did charge Gould with failing to stop for a blue light and carrying a concealed weapon. Gould was convicted on both of these counts and received a six-year suspended sentence and five years of probation for the former charge and a one-year suspended sentence and five years of probation for the latter. He later broke the terms of his probation by moving to Louisiana.

Gould established himself quickly in Baton Rouge. By January 29, 1992, he had been charged with holding a new girlfriend hostage. The victim of that episode claimed that she had been living with Gould for some six months when things went bad. After Gould hit her, she changed the locks on her apartment. Shortly thereafter, Gould showed up on her doorstep and talked his way inside. Once there, Gould became upset and pulled out a pistol and told her they would either take care of their problems or she would be leaving on a stretcher. Shortly thereafter, the police entered the apartment and, after a brief face-off, took Gould into custody. They charged him with false imprisonment, with being a felon in possession of a firearm, and with misrepresentation during booking. These charges were dropped at the victim's request. Less than a year later, the same victim reported that Gould had again beaten her and held her hostage. As is too frequently the case, both in

general and in Gould's life history, these charges too were dismissed without being prosecuted.

The same victim reported another attack in June of 1993. This time Gould hit his victim and stabbed her with a fork. The authorities arrested Gould in September of 1993 and he was convicted of aggravated battery. He received only a five year suspended sentence and five years of parole.

In 1994, Gould found himself another girlfriend and victim—Tanya Kuhn. In July of 1995 Gould confronted her about some alleged flirtation with a pizza delivery person. The two fell into an unpleasant confrontation largely motivated by Gould's own sexual insecurity. Kuhn reported that Gould held her hostage, forced her to perform oral sex on him, and raped her. The next day she convinced him to allow her to go to work and she escaped. Gould was arrested for false imprisonment, forcible rape, and oral sexual battery. Once again Gould avoided conviction because Ms. Kuhn requested that the charges be dropped. Kuhn claimed at the time that she did so because she was pregnant by Gould.

Sometime in early 1996, Tanya Kuhn gave birth to a daughter, Breea. When Breea was only a few weeks old, Kuhn sought to escape from Gould. She took her daughter and moved in with her aunt, Kathy Vinet, in New Orleans. Gould took this snub badly, wrecked the inside of Kuhn's Baton Rouge apartment, left threatening messages, and assaulted Kuhn's friend with an axe. Once again he was jailed, this time for aggravated assault and public intimidation. Gould was convicted of these

charges and served six months in prison.

In May of 1998, Tanya Kuhn died in an unrelated accident. Gould called the police to the funeral home that was handling Ms. Kuhn's services complaining that Ms. Kuhn's father, H.F. Wilson, and Kathy Vinet were keeping him from his daughter. Informed that Gould was a wanted criminal, the responding police officers discovered that he had violated his probation in South Carolina. They arrested Gould and charged him with parole violation. Presumably because of Ms. Kuhn's death and the fact that Gould never provided care for his daughter, Ms. Vincent was awarded custody of Breea in February of 1999. While this judicial determination was cause for celebration for young Breea, it appears to have precipitated the subsequent events for which Gould now has served 31 months in prison.

## **II. Factual Basis for the Instant Charges**

On October 17, 2000, the Livingston Parish Sheriff's Office received information from John Forehand, who worked for Gould, that Gould had hatched a plot to kill two judges of Louisiana's Nineteenth Judicial District Court in Baton Rouge. Apparently, Gould was motivated to attack by the fact that Ms. Vincent had obtained custody of his daughter through the court. That same evening, detectives from the Livingston and East Baton Rouge Parishes' Sheriffs' Offices went to Gould's residence. They spoke to Gould's roommate and employee, Dennis Cabral, and performed a search of the residence. The detectives did not find Gould in the

trailer, but did find three firearms that they believed belonged to Gould.<sup>2</sup> Later they found Gould in the back yard, hiding behind a log. The detectives took Gould into custody at that time.

### **III. Detention on the Instant Charges**

Gould's detention related to these alleged activities began on October 17, 2000, when he was arrested by the Livingston Parish Sheriff's Office for being a felon in possession of a firearm. Overall, he spent just over 9 months in state custody. On October 18, 2000, East Baton Rouge Parish authorities issued a warrant for Gould's arrest on the charge of soliciting murder. The same day, Livingston Parish transferred Gould to the custody of East Baton Rouge Parish authorities. For reasons not made available to this court, on March 5, 2001, the East Baton Rouge Parish authorities decided that they had no probable cause to hold Gould on that charge and transferred him back to Livingston Parish authorities on the gun charge. On July 25, 2001, a state court granted Gould's motion to suppress

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<sup>2</sup> Gould came into possession of two of the three firearms as a result of a fallout with yet another girlfriend. Gould owned a tree service with a woman named Tracy Geismer. When the two began having some sort of affair, Ms. Geismer moved out of the home she shared with her husband and into Gould's trailer. Gould helped Geismer move her belongings to his home. Among these were the two guns that Gould knew to be in Tracy Geismer's name. The government argues that, in the event Gould is ever sentenced, his sentence should be enhanced because he stole these firearms. The court disagrees with this characterization of these events and finds that Mr. Gould did not steal the firearms. Gould transported the guns from Geismer's home to his own without specifically asking her whether he should do so. But when she discovered the guns in her closet, she did not object. Nor can it be said that Gould was depriving her of her property. On the contrary, it appears that he was helping her maintain possession of her property. After only a couple of weeks, Geismer decided to move back to her husband. She was so anxious to leave that she left many of her belongings behind. Geismer requested that Gould return these, but he responded that she should have taken them when she left. Geismer apparently took no other action to obtain return of her belongings and also never specifically discussed the firearms, according to her testimony. These acts fail to support the claim that Gould stole the firearms, though the story does not undermine the claim that he possessed them.

certain evidence and set bond at \$10,000. Though Gould met his bond obligations the following day, his detention did not come to an end.

Instead, Gould began what would be an even longer period of detention under federal authority.<sup>3</sup> On the day the state court set bond, the United States charged Gould with violating 18 U.S.C. § 922(g)(1) and placed a hold on him in state prison. The next day, after Gould posted bond, the United States took custody.<sup>4</sup> On August 17, 2001, the Magistrate Judge assigned to this case ordered Gould detained pending trial on the basis that he poses a flight risk and a risk of obstructing justice. She wrote, “Although the Court finds that the defendant is violent and would be a danger to the community, the Court does not find that this particular charge is a crime of violence but bases its finding on risk of non-appearance and obstruction of justice.”<sup>5</sup> He has remained in federal custody ever since.

His detention persists despite repeated successes in having the most damaging evidence against him suppressed. On April 2, 2002, this court ruled that the United States could not offer evidence of the guns found in Gould’s possession, nor of statements Gould made at the scene of his arrest.<sup>6</sup> On May 16, 2002, the

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<sup>3</sup> Though Gould is in custody under federal authority, he is currently being held in the West Baton Rouge Prison.

<sup>4</sup> Subsequent to this transfer, Livingston Parish dismissed its gun charge against Gould.

<sup>5</sup> Dkt No. 13.

<sup>6</sup> Ruling on Defendant’s Motion to Suppress and to Dismiss Indictment Based on Multiplicity, Dkt No. 49, published as *United States v. Gould*, 194 F.Supp.2d 482 (M.D. La. 2002).

court, by separate opinion, denied the government's motion to reconsider that earlier ruling.<sup>7</sup> On May 20, 2002, the government informed the court that it would seek permission from the Solicitor General's Office to appeal the suppression ruling.<sup>8</sup> Three days later, Gould submitted a motion seeking reconsideration of his pretrial detention.<sup>9</sup> The court held a detention hearing on June 3, 2002, and denied Gould's motion.<sup>10</sup> On June 14, 2002, the United States noticed its appeal to the Fifth Circuit Court of Appeals.<sup>11</sup>

Nearly a year after the initial suppression ruling, the Fifth Circuit affirmed it.<sup>12</sup> But in that ruling, the Fifth Circuit panel questioned the wisdom of the *per se* rule announced in *United States v. Wilson* that led both this court and the panel to suppress the evidence. The Fifth Circuit wrote:

In our view, this court would be well advised to consider *en banc* whether a reasonableness approach that balances a variety of relevant factors is preferable to the holding in *Wilson*. Nevertheless, this panel is bound to follow *Wilson* and therefore upholds the district court's determination that the evidence at issue here was not obtained

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<sup>7</sup> Ruling on the Government's Motion for Reconsideration of Ruling on Defendant's Motion to Suppress, Dkt. No. 56.

<sup>8</sup> United States' Motion to Continue Trial, Stay Proceedings, and Exclude Period of Delay Under the Speedy Trial Act, Dkt No. 57.

<sup>9</sup> Defendant's Opposition to United States' Motion to Continue Trial and Request to be Released on Bond Pending United States' Appeal, Dkt No. 58.

<sup>10</sup> Dkt No. 60.

<sup>11</sup> Notice of Appeal, Dkt No. 62.

<sup>12</sup> *United States v. Gould*, 326 F.3d 651 (5th Cir. 2003).

pursuant to valid protective sweep.<sup>13</sup>

Taking its cue from the court of appeals, the government began the process of seeking permission to petition the Fifth Circuit for rehearing *en banc* and has now filed its brief seeking rehearing.

Meanwhile, more than 31 months after his initial arrest, Gould remains in prison. This despite the fact that all state charges against him have been dismissed and despite the fact that two courts have ruled three times that essentially all the information against him must be excluded from his trial. Gould now comes before the court again seeking to be released at least until he actually receives a trial on the merits of the government's case against him.

## **ANALYSIS**

### **I. The Bail Reform Act**

Gould first argues the court should reconsider the basis of the decision to keep him in prison pending trial. He argues that the provisions of the Bail Reform Act of 1984, 18 U.S.C. § 3142, *et seq.*, require the court to consider the weight of the evidence against a defendant in deciding whether to impose pretrial incarceration. The same section of the statute allows the defendant to reopen that proceeding and challenge the detention determination at any time before trial "if the judicial officer finds that information exists that was not known to the movant at the time of the

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<sup>13</sup> *Id.* at 659.

hearing.”<sup>14</sup> Gould argues that the weight of the evidence has changed because this court ruled that the government cannot present its gun and statement evidence against him and also because the Fifth Circuit has affirmed that decision. Since a court must consider the weight of the evidence against him in deciding whether he should remain incarcerated, Gould argues, the court should find that it is no longer appropriate to hold Gould in custody.

Gould’s argument is mistaken on two counts. First, though § 3142(f) allows a defendant to reopen a detention hearing, it only provides for review of information “that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.”<sup>15</sup> The new information that Gould wishes the court to consider has little to do with the likelihood he will appear or that he will present a danger to the community. Instead, he wants the court to consider the strength of the government’s case against him.

Second, even if the statute provided for the court to consider the “weight of the evidence” of guilt at the rehearing, it also provides that the court should consider all of the evidence of guilt, not simply the evidence that will be admissible at trial. Section 3142(f) provides that “[t]he rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.” Thus, even were this section the right authority to appeal to for reconsideration, it appears that the statute directs the court to consider the very evidence Gould now wants the court to ignore.

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<sup>14</sup> 18 U.S.C. § 3142(f)(2).

<sup>15</sup> 18 U.S.C. § 3142(f).

Consequently, it appears that Gould is not entitled to release on these statutory grounds. The only change in circumstance that Gould wishes to press has to do with the fact that the best evidence against him has been suppressed. Gould does not claim that he no longer is a flight risk or dangerous to the community. Absent such evidence, the statute does not appear to provide for a fresh determination. In any event, the fact that the evidence has been suppressed would not stop the court from considering that evidence. Hence, the weight of the evidence would appear to be the same as it was at the first detention hearing, even if reconsideration of that evidence were proper.

## **II. Due Process**

The courts have established several principles regarding due process challenges to pretrial incarceration. Pretrial detention under the Bail Reform Act does not on its face violate due process.<sup>16</sup> Hence, the mere fact that Gould has been incarcerated without benefit of trial does not of itself constitute a violation of his rights. Pretrial detention is permissible so long as it is regulatory in nature and not punitive.<sup>17</sup> Length of pretrial detention is a factor relevant to deciding whether continued detention violates due process.<sup>18</sup> Gould's incarceration for 31 months implicates this last principle. The due process limit on the duration of preventive detention requires assessment on a case-by-case basis.<sup>19</sup> In determining whether

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<sup>16</sup> *U.S. v. Salerno*, 481 U.S. 739, 748-51, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 747 n.4; *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989).

<sup>19</sup> *Hare*, 873 F.2d at 801.

due process has been violated, a court must consider the following nine factors:

- (1) the nature and circumstances of the offense charged;
- (2) the weight of the evidence against the accused, including both admissible and inadmissible evidence;
- (3) the history and characteristics of the person;
- (4) the strength of the evidence regarding the nature and seriousness of the danger to the community that release would pose;
- (5) the strength of evidence that the accused poses a risk of flight;
- (6) the length of detention that has occurred;
- (7) the length of detention that may (non-speculatively) yet occur;
- (8) the complexity of the case; and
- (9) whether the strategy of one side or the other has occasioned delay.

These factors are acknowledged in *United States v. Hare* and the decisions of various other courts of appeals.<sup>20</sup> The Fifth Circuit did not apply the factors in *Hare*, but remanded the case to the district court.<sup>21</sup> Various other courts have applied these factors, but all of them agree that they are not exhaustive.<sup>22</sup> In the remainder of this opinion, the court will discuss how these and two additional factors apply to Gould's circumstances. The court concludes that these factors require the court to order Gould's release. The court also concludes that, in the peculiar facts of this case, one of these factors alone suffices to require that result.

#### **A. *Hare* Factors**

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<sup>20</sup> *Id.*; *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988); *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988); *United States v. Zannino*, 798 F.2d 544, 547 (1st Cir. 1986); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986).

<sup>21</sup> *Hare*, 873 F.2d at 801.

<sup>22</sup> *See, e.g., Id.*

As might be expected, in applying these multiple factors courts have come to differing results. Several have ordered detention to continue despite the fact that the defendant has already spent a considerable amount of time in prison.<sup>23</sup> Still others have ordered defendants released pending their trials.<sup>24</sup> And a couple of courts of appeals have remanded cases without deciding the issue of continued detention, while recognizing the principles at work.<sup>25</sup> The court will now turn to consider these same factors.

### **1. The nature and circumstances of the offense charged**

The offense with which Gould stands charged is not extraordinarily serious. Gould faces only a felon in possession charge in federal court. That charge is not itself a crime of violence. The more serious allegation is that he was conspiring to murder state court judges. There is no evidence to support that allegation in the record. As it stands the court can only confidently say that the state accused him

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<sup>23</sup> *United States v. Vondette*, 2001 WL 253109 (2d Cir. 2001)(unpublished); *United States v. Gonzales*, 1998 WL 321218 (10th Cir. 1998)(unpublished); *United States v. Orena*, 986 F.2d 628 (2d Cir. 1993); *United States v. Millan*, 4 F.2d 1038, 1040-41 (2d Cir. 1993); *Gelfuso*, 838 F.2d 358; *United States v. Melendez-Carrion*, 820 F.2d 56, 57 (2d Cir. 1987); *Zannino*, 798 F.2d 544; *United States v. Gines Perez*, 152 F.Supp. 137, 138 (D. P.R. 2001); *United States v. Streater*, 1999 WL 1067837, \*1 (D. Conn. 1999); *United States v. Shareef*, 907 F.Supp. 1481 (D. Kan. 1995)(releasing one defendant and detaining two).

<sup>24</sup> *Ojeda Rios*, 846 F.2d 167; *United States v. Gonzales Claudio*, 806 F.2d 334 (2d Cir. 1986); *Theron*, 782 F.2d 1510; *United States v. Archambault*, 240 F.Supp.2d 1082 (D. S.D. 2002); *United States v. Daniels*, 2000 WL 1611124 (D. Mass. 2000); *United States v. Ailemen*, 165 F.R.D. 571 (N.D. Cal. 1996); *Shareef*, 907 F.Supp. 1481 (D. Kan. 1995)(detaining two defendants and releasing one); *United States v. Chen*, 820 F.Supp. 1205 (N.D. Cal. 1992); *United States v. Gatto*, 750 F.Supp. 664 (D. N.J. 1990); *United States v. Estrada*, 1987 WL 9454 (S.D. Fla. 1987); *United States v. Gallo*, 653 F.Supp. 320 (E.D. N.Y. 1986).

<sup>25</sup> *Hare*, 873 F.2d 796; *Accetturo*, 783 F.2d 382.

based on the allegation of an acquaintance of Gould. The state charge was dismissed for lack of probable cause. As far as the court is aware, Gould spoke with two acquaintances of his regarding a plan to kill two state judges who it appears were involved in the decision to give custody of his daughter to Ms. Vinet. Mr. Forehand informed the authorities of this plan. The authorities responded immediately, resulting in Gould's arrest and subsequent incarceration. What the court is unable to determine is whether Gould's designs were an actual plan or, instead, mere venting due to frustration with the custody decision. Since the state court dismissed the solicitation of murder charge for lack of probable cause, the court finds that it cannot give the solicitation allegation serious weight in this balancing, and cannot regard it as a "characteristic" of the offense charged.

Gould is charged with being a felon in possession of three firearms. While serious, the charge is minor compared with the offenses of the accused whom the courts have been willing to order incarcerated in the past. In *United States v. Vondette*, the Second Circuit allowed pretrial detention to continue beyond 40 months, the longest period any court has allowed. The defendant in that case was charged with being the leader of a multi-million dollar drug ring.<sup>26</sup> All other long-term pretrial imprisonment has involved very serious crimes. In *United States v. Gonzales*, the Tenth Circuit allowed pretrial incarceration to go beyond 32 months

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<sup>26</sup> *Vondette*, 2001 WL 253109. Beyond the seriousness of the charge, other factors weighed in the government's favor as well. These are discussed below.

for a defendant who faced RICO charges whose predicate acts included murder.<sup>27</sup> The First Circuit allowed pretrial detention of 13 months and the Second Circuit allowed detention beyond 6 months under the same circumstances.<sup>28</sup> Other crimes that warranted longer pretrial detention include large-scale heroin trafficking,<sup>29</sup> participation in a \$7.6 million bank robbery that aimed to finance a terrorist organization,<sup>30</sup> a combination of racketeering and drug trafficking charges,<sup>31</sup> and heroin trafficking that involved murder.<sup>32</sup> Compared to these characters, Gould is a petty thug.

## **2. The weight of all admissible and inadmissible evidence**

This factor appears in the Bail Reform Act, which specifically provides that the court should consider all the evidence, not only evidence that is admissible at trial.<sup>33</sup> Consequently, the court may consider the firearms and Gould's statements that are excluded from trial. Including these, the court finds that the evidence against Gould on the felon-in-possession charge is very strong. This factor favors the government.

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<sup>27</sup> *Gonzales*, 1998 WL 321218.

<sup>28</sup> *Zannino*, 798 F.2d at 549; *Orena*, 986 F.2d 628.

<sup>29</sup> *Millan*, 4 F.2d at 1040-41 (24 months).

<sup>30</sup> *Melendez-Carrion*, 820 F.2d at 57 (19 months).

<sup>31</sup> *Gelfuso*, 838 F.2d at 359 (9 months).

<sup>32</sup> *Gines Perez*, 152 F.Supp.2d at 138 (35 months).

<sup>33</sup> 18 U.S.C. § 3142(f)(2) ("The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing").

### **3. Gould's history and characteristics**

Under this factor, Gould's history of violence toward women is relevant, though unrelated to these charges. Gould has a sordid 15-year history of holding his girlfriends hostage and abusing them physically. In one such episode, he was accused of raping a girlfriend. As is so often the case with abused women, she later dropped the charges and the state authorities did not pursue the prosecution. Gould clearly is capable of violence when provoked by slights, whether real or imagined. In this regard, he poses a danger to persons in the community, though especially so for any women unfortunate enough to get tangled up in his web. This factor favors the government, although there must be limits to the courts' ability to hold individuals based on past allegations, untested by trial. If Louisiana authorities want to incarcerate their domestic abusers, they should improve their outreach to the abused and rethink their response to victim requests to drop charges, rather than shunt their cases over to federal court.<sup>34</sup>

### **4. The nature and seriousness of the danger to any person or the community**

There are three identifiable sets of person whose members could be put in

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<sup>34</sup> The court notes, however, that federal law presently has two excellent, if little-used, shunting devices in 18 U.S.C. § 922(g)(8) and (9). Gould himself could have been charged with violating § 922(g)(9)—for possessing firearms after being convicted “in any court of a misdemeanor crime of domestic violence.” A rough search of Westlaw turns up no published opinions discussing these provisions within the district courts of Louisiana and only seven Fifth Circuit opinions regarding convictions under these provisions. A similar search for mentions of 18 U.S.C. § 922(g)(1) turns up 141 decisions in the Fifth Circuit and 17 in the district courts in Louisiana.

physical danger were Gould released: (1) the state judges against whom Gould allegedly conspired; (2) Ms. Vincent and young Breea; and (3) any women with whom Gould might become involved. It is difficult to tell how serious a danger Gould poses to the state judges because the court does not have information regarding that charge. It is clear from various of Gould's written communications with Tanya Kuhn that he has a bizarre fixation on his rights to have custody over his daughter. Indeed, since Gould has provided this little girl very little care during her lifetime, his obsession appears more proprietary than parental. The court believes that releasing Gould poses some risk to Ms. Vincent and Breea. With respect to the danger he poses to women in general, there is little doubt that one exists. This factor favors continued detention.

***5. The strength of evidence that the accused poses a risk of flight***

At the present time, the court does not believe Gould poses the same risk of flight that he posed at the time of his original detention hearing. Gould does have a history of flight. He moved to Louisiana originally while under probation in South Carolina. He also has few connections to the community that will keep him here now that he has lost custody of his child. Gould once operated a tree cutting service, but that business no longer exists due to his incarceration. He is not originally from Louisiana and has in the past expressed a desire to get out of the state. These features of the case provide some evidence that Gould may attempt to flee.

Other features reduce the likelihood. First, it must be admitted that Gould's

obsession with his daughter should be viewed as a motivation for him to remain in the area. Also counseling against flight is the fact, discussed in detail below, that Gould already has served the lion's share of any sentence he might eventually have to serve. Finally, Gould has so far been successful at having the evidence against him suppressed. Though the Fifth Circuit might overrule circuit precedent and this court might, on remand, determine that under a new reasonableness standard the evidence against Gould should be admitted, as the case now stands, the evidence against him is not strong, and his likelihood of conviction similarly weak. The court finds that Gould remains a flight risk at this time, but less so than originally. This factor favors the government slightly.

#### **6. Length of detention that has occurred**

Gould has already been incarcerated for 31 months, including the time he served on related state charges. In every case where the courts allowed pretrial detention to exceed six month the defendant faced very serious charges, as noted above. Those cases also included other factors that heavily favored the government. As the Second Circuit wrote in *Zannino*, "in many, perhaps most, cases, sixteen months [pretrial incarceration] would be found to exceed the due process limitations on the duration of pretrial confinement."<sup>35</sup> Gould has almost doubled Zannino's 16 months. For continued detention to be supportable, his case

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<sup>35</sup> *Zannino*, 798 F.2d at 548.

must, like *Zannino*, feature circumstances that are very unusual.<sup>36</sup> This factor favors Gould heavily.

### **7. Length of detention that may (non-speculatively) yet occur**

Gould faces several more months before his trial. The government has petitioned for *en banc* review. The parties agree that eight months is a reasonable estimate of the time it will take to get a decision. If the Fifth Circuit reverses and remands the suppression ruling, it will probably take this court about three months to hold a new suppression hearing and move on to trial. So, by a conservative estimate, Gould faces another 11 months in prison before his trial is complete. This additional pretrial detention would bring Gould's total time served to 42 months.

Only one case has allowed such an extended period of pretrial detention and in that case trial was imminent. In *Vondette*, the Second Circuit refused to release a defendant accused of leading a multi-million dollar drug ring (as well as the obligatory related money laundering charges) who had been in pretrial detention for 40 months. Weighing in the government's favor in that case, in addition to the seriousness of the charges, was the fact that the defendant was set to go to trial in only two months.<sup>37</sup> Likewise, four of the other courts that countenanced extended

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<sup>36</sup> *Id.* at 547 (“We need not quarrel with the above-cited decisions to observe that this case presents unusual circumstances not present in any of them: a palpably dangerous defendant, whose continued detention is the result of prolonged physical inability to stand trial, whose inability nevertheless does not prevent his continuing dangerousness, and who faces an imminent determination of his present medical fitness for trial”).

<sup>37</sup> *Vondette*, 2001 WL at \*2.

pretrial detention specifically noted that the defendants were due to have their trials in a matter of a very few months.<sup>38</sup>

The resolution of the charges against Gould is not imminent. If the court orders his detention until he goes to trial, then he realistically faces an additional 11 months in prison. The court finds that the factor heavily counsels in favor of his release.

#### **8. *The complexity of the case***

The complexity factor is seldom discussed. It appears that the more complex a case is, the more acceptable the delay. If delay is warranted by the complexity, then longer pretrial detention will be acceptable. This case is not complex on its merits. The only complexity involved has to do with the matter of suppression. The difficulty that the courts have with administering and revising their own precedents should not count against Gould. This factor favors Gould's release slightly.

#### **9. *Whether the strategy of one side or the other occasioned the delay***

If one party or another has caused the delay by its tactics it counts against that party at the detention hearing and in favor of the other party. The question appears to be whether pretrial tactics aim at delaying the trial. It does not matter, for

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<sup>38</sup> *Orena*, 986 F.2d at 630 (3 months to trial); *Gelfuso*, 838 F.2d at 359 (1 month to trial); *Zannino*, 798 F.2d at 549 (1 month till defendant's fitness to stand trial would be determined); *Gines Perez*, 152 F.Supp.2d at 153 (1 month to trial).

example, that Gould “delayed” trial by filing a meritorious motion to suppress. Nor can the fact that the government chose to appeal and seek rehearing on the suppression ruling be considered a tactic aimed at delay merely because it in fact drags out the proceedings. Only if the court had reason to believe that the government took the appeal or sought a rehearing with a purpose of delaying trial would this factor count in Gould’s favor. The court does not suspect the government’s motives. This factor is neutral.

### ***B. Two Additional Factors***

Most courts have held that the factors listed above are not exhaustive. In *Hare*, the Fifth Circuit wrote that “a court must consider . . . factors . . . such as . . .” those discussed above, which indicates its acceptance that additional factors may be relevant.<sup>39</sup> The following two factors have been considered by other courts as relevant to the due process analysis. Both were broached by district courts in cases that presented unusual circumstances not presented by the cases elaborating the usual factors. Both these circumstances play a role in Gould’s case. Consequently, the court will consider these factors too. They are:

- (1) the proportion of pretrial detention to the possible sentence; and
- (2) the strength of the government’s admissible evidence alone, taking into account that evidence has been suppressed.

#### ***1. The proportion of pretrial detention to the possible sentence***

Gould already has served 31 months and, practically speaking, faces serving

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<sup>39</sup> *Hare*, 873 F.2d at 801.

42 months before being tried on the merits of the charge against him. The parties disagree on the sentence Gould faces. Gould says he faces 46 to 57 months. The government says he faces 70 to 87 months. The pretrial services office splits the difference and projects his sentence as between 57 and 71 months. These differences of opinion obtain because the parties differ over whether certain sentencing enhancements should be applied to Gould. The government seeks to take advantage of enhancements for possessing stolen weapons and for aiding and abetting obstruction of justice. Pretrial services provisionally accepted the obstruction enhancement, but rejected the stolen weapon enhancement. Gould opposes application of both enhancements.

The government's proposed enhancements are not warranted by the facts. It seeks to raise the offense level based on the claim that two of the firearms in Gould's possession were stolen. In fact, Gould brought the guns to his house, along with other property belonging to Tracy Geismer, when he helped move her into his house. She did not object to the transportation and in fact left the guns where Gould had placed them. Later, when the girlfriend moved out, she left the guns in Gould's home. Gould merely refused to return any of her property when she asked generally for things she had left behind. Judging by Geismer's testimony, she did not specifically request the guns. Nor did she report them stolen until she heard of Gould's arrest on gun charges. Pretrial services does not think this is a credible enhancement and has not used it in making its calculations and the court agrees.

The government also seeks to increase Gould's offense level based on the claim that he presented false testimony from Dennis Cabral at the suppression hearing. In its earlier ruling, the court wrote, "this court believes that Mr. Cabral was attempting to cast doubt over whether the firearms were actually in the defendant's possession by falsely stating that the defendant did not live in the master bedroom."<sup>40</sup> It does not appear that these false statements can be attributed to Gould. The government appears to claim that he should get an obstruction of justice enhancement under 3C1.1 because he "aided and abetted" perjury by omitting to tell the court that Cabral lied. Aiding and abetting requires an affirmative act. The government has provided no evidence that Gould took any affirmative act. To get this enhancement, the government would have to show some involvement by Gould. It has not shown this connection and the evidence is too weak for the court to infer it.

If the government's proposed enhancements are not correct, then Gould would have a criminal history level of III and a criminal offense level of 21. The Guidelines sentencing range in that event would be 46 to 57 months, as Gould advocates. If Gould pled guilty, then his offense level would be reduced by 3 points to 18 and his sentencing range would be 33 to 41 months.<sup>41</sup> As the court has already noted, if left

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<sup>40</sup> *United States v. Gould*, 194 F.Supp.2d 482, 491 (M.D. La. 2002).

<sup>41</sup> All of these calculations are based on the 1998 Guidelines, which were in effect at the time that Gould committed his offense. The parties and pretrial services agree that the 1998 Guidelines apply.

in pretrial detention, everyone can be assured that Gould will serve between 33 and 42 months. Hence, Gould faces serving his sentence without benefit of trial.

In *United States v. Shareef*, the district court wrote that “fundamental fairness requires that defendants, presumed innocent, not be required to serve a major portion of the sentence to which he or she would be subject prior to a determination of guilt.”<sup>42</sup> The court ordered one defendant released based in part on the fact that he had served 9 months of a possible 18 to 24 month sentence and faced several more months pending an appeal of a suppression order. The court also refused to release two other defendants who had served 9 months out of their longer (37 to 46 month) sentences based in large part on the fact that both had failed to appear on multiple prior occasions. No court of appeals opinion has allowed continued detention when the accused has served as great a proportion of his potential sentence as has Gould. The court believes that this factor must play in the calculation demanded by *Hare*. If it does, then it weighs heavily in Gould’s favor.

## **2. The strength of the government’s admissible evidence alone**

Gould prevailed on a motion to suppress, a reconsideration of that ruling, and on an appeal of the ruling. He now faces the possibility that the Fifth Circuit will overrule circuit precedent and allow the suppressed evidence against him at trial. As the case now stands, the government has very little evidence against Gould. If the ruling stands, it likely would be forced to dismiss the charges against him.

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<sup>42</sup> *United States v. Shareef*, 907 F.Supp. 1481, 1484 (D. Kan. 1995).

Gould is being incarcerated despite a lack of admissible evidence against him. The status quo could change, depending on the Fifth Circuit's ruling, but that is speculative at the present time. The court in *Shareef* considered the effect of a suppression ruling on the weight of the evidence pending an appeal and held that it weighed in the defendants' favor because "[t]he court must seek to avoid the likelihood that a defendant would be required to serve nearly as long a period of imprisonment through pretrial detention as he would if found guilty of the offense, when it appears to the court that the quantity and/or quality of the evidence is problematic."<sup>43</sup>

This court agrees that the fact of suppression is relevant to these considerations and will consider it in the instant case.

### ***C. Balancing the Factors***

Considering all eleven factors enumerated above, the court finds that it is necessary to release Gould subject to stringent conditions. While the evidence of Gould's guilt is strong, his history of violence favors detention, and there is solid evidence that he poses a flight risk and a danger to the community, the remaining factors weigh too heavily in Gould's favor. The offense charged is relatively minor compared to other similar cases. Gould already has spent an incredible amount of time in prison and faces perhaps another year before he would be tried. Moreover, the length of detention Gould realistically faces will certainly take him deep into his

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<sup>43</sup> *Shareef*, 907 F.Supp. 1481, 1485.

potential sentence and may exceed it. All this, despite the fact that the case against him is not complex and the evidence admissible against him is, at the present time, inconsequential. In these circumstances, the court believes that it must release Gould, notwithstanding the fact that he is likely to prove an unwanted force in the community at large.

***D. Per Se Rule***

The circumstances presented by this case call for an even stronger pronouncement, they are so egregious. If the court were to order that Gould remain in pretrial custody, there is a very real chance that he will end up serving as much time—without benefit of a trial—as he would if he had simply pled guilty. There is even a chance that his pretrial detention could exceed his potential sentence. This feature takes Gould’s case out of the normal range of pretrial detention due process cases. It is the court’s opinion that continued detention under these circumstances is fundamentally unfair and violates the Due Process Clause of the Fifth Amendment regardless whether all the other factors weigh heavily in favor of detention.

Consequently, the court bases its decision on the following rule:

It offends due process for an accused to remain in pretrial detention when the sum of the time he already has served and the additional time he realistically faces serving before trial falls within the range of sentences he would face if he pled guilty to the charge immediately.

The court believes that this rule better captures the problems with this particular case than the case-by-case, factor-based analysis other courts have used. In a

case like this one, the various factors actually obscure what is wrong with continuing to detain Gould. The *per se* rule the court here announces establishes a clear standard that will help ensure that no one is detained so unfairly in the future. The rule is also entirely consistent with the factor-based analysis. Only extreme cases like this one will implicate it.

The rule applies to this case because the court finds that, under the 1998 version of the United States Sentencing Guidelines, Gould has a criminal history level of III and a criminal offense level of 21. This finding places his potential sentence at anywhere from 45 to 57 months. The court bases this determination on the following two findings, discussed more completely above:

- (1) Gould did not steal the firearms found in his possession; and
- (2) Gould did not aid and abet or otherwise engage in the obstruction of justice.

Thus, the court finds that neither of the sentencing enhancements requested by the government can apply to Gould. All parties agree that he has a base offense level of 20. And he receives a one level enhancement for possession 3 firearms. The court also finds that Gould would qualify for a three level reduction for acceptance of responsibility if he pled guilty to the charges today. In that case, his sentencing range would be 33 to 41 months.

Mr. Gould has already spent 31 months in prison. The government now seeks *en banc* review by the Fifth Circuit of this court's earlier suppression ruling. The court estimates that the rehearing process will take approximately 8 months.

Assuming the Fifth Circuit overrules its own precedent and remands the case to this court, it will take approximately 3 months to bring this case to trial. These are conservative estimates.

So, all together Gould is looking at 42 months in prison on a gun possession charge, without benefit of a trial. If Gould pled guilty today, the court could sentence him to only 41 months. In these unusual circumstances, the court cannot allow pretrial detention to continue, notwithstanding any of the other factors courts normally consider.

#### **CONDITIONS OF RELEASE**

The risk that Kelly Gould will flee or present danger to members of our community remains high. Of greater “gravity[, however,] is the preventive detention for [thirty-one] months of [a] defendant[] who [is] presumed innocent and whose trial to determine guilt or innocence will not even begin until detention has lasted” beyond the length of incarceration he would face if convicted. It is the opinion of the court that the following conditions will provide reasonable assurance that Gould will not flee or engage in criminal activity while he awaits trial. It is a lesser modicum of control than imprisonment. The conditions under which Kelly Gould is released are as follows:

The Defendant, Kelly Donald Gould, must:

- (1) identify an acceptable residence prior to release;
- (2) forego all contact with Dennis Cabral;
- (3) appear at all proceedings as required and surrender for service of any sentence imposed;

- (4) execute an unsecured bond binding defendant to pay the United States the sum of ten thousand dollars [\$10,000] in the event that he fails to appear or surrender for service of sentence;
- (5) report to pretrial services as required;
- (6) maintain or actively seek employment;
- (7) surrender any passport to pretrial services;
- (8) abstain from obtaining a passport;
- (9) undergo medical or psychiatric treatment and/or remain in an institution as directed by pretrial services;
- (10) refrain from possessing a firearm, destructive device, or other dangerous weapons;
- (11) refrain from excessive use of alcohol;
- (12) refrain from the use or unlawful possession of a narcotic drug or other controlled substances defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner;
- (13) submit to any method of testing required by the pretrial services office or the supervising officer for determining whether the defendant is using a prohibited substance;
- (14) report as soon as possible, to the pretrial services office or supervising officer any contact with any law enforcement personnel, including, but not limited to, any arrest, questioning, or traffic stop;
- (15) report to pretrial services as directed, on a frequent basis;
- (16) avoid all contact, direct or indirect, with the following persons: his child, Kathy Vinet, H.F. Wilson, Tracy Geismer, William Geismer, and any relatives of the foregoing;
- (17) stay at least 100 yards from the courthouse for the 19th Judicial District Court and from any employees or officials of the court;
- (18) allow pretrial services or other law enforcement officers to search his residence, vehicles, and any other property under his control for firearms and other dangerous weapons and illegal drugs at any time without probable cause or reasonable suspicion;
- (19) avoid all contact, direct or indirect, with any witnesses or other persons involved in any way with this case, except Michael Bumgardner, with whom he may have such contact as allowed by pretrial services;
- (20) remain at all times within the Middle District of Louisiana, unless he has permission of his pretrial services officer to leave.
- (21) be placed under electronic surveillance by pretrial services.

## **CONCLUSION**

Accordingly and for the reasons assigned above, defendant's motion to reconsider request for bond (Dkt No. 62) is **GRANTED**.

**IT IS ORDERED** that defendant, Kelly Donald Gould, be released from prison subject to the conditions imposed above.

**IT IS FURTHER ORDERED** that counsel for defendant contact the court when defendant has identified a place to live. At that time the court will schedule a hearing to obtain defendant's consent to these conditions and to order his final release.

Baton Rouge, Louisiana, June \_\_\_\_, 2003.

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JAMES J. BRADY, DISTRICT JUDGE  
MIDDLE DISTRICT OF LOUISIANA