

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	Cr. No. 12-132M
	:	
DEVIN SNEAD	:	

MEMORANDUM AND ORDER

Defendant Devin Snead was indicted on September 19, 2012, for opening mail entrusted to him while employed by the U.S. Postal Service in May 2011. For reasons not pertinent to this Motion, a summons directing him to appear did not issue until November 22, 2013.¹ As a result, his arraignment was not conducted until December 10, 2013. At the arraignment, a bail hearing was held – based largely on information provided by, and particularly the recommendation of, Pretrial Services, I determined that Defendant should be released on personal recognizance and basic conditions,² with additional conditions pursuant to 18 U.S.C. § 3142(c) (hereinafter, the “additional conditions”).³ Defendant has moved to amend the additional conditions, arguing that

¹ This delay has led to a separate Motion to Dismiss the Indictment With Prejudice Based on Violation of Defendant’s Sixth Amendment Right to a Speedy or, Alternatively, to Dismiss Pursuant to Rule 48(b). That Motion has not been referred to me and will not be addressed in this memorandum and order.

² The basic conditions are those listed in 18 U.S.C. § 3142(b) and on Form AO 199A (Rev. 12/11) (Order Setting Conditions of Release), which are imposed on every released defendant. As relevant here, they include the requirement that Defendant not violate any laws, advise Pretrial Services in writing before changing his residence or telephone number and appear in court as required. Defendant does not challenge any of these conditions.

³ The additional conditions imposed on Mr. Snead that are challenged by this Motion are:

- Submit to supervision by and report for supervision to the pretrial services office;
- Continue or actively seek employment;
- Abide by a travel restriction to the District of Rhode Island and not obtain a passport;
- Not possess a firearm, destructive device, or other weapon; and
- Not use alcohol excessively, not use or unlawfully possess a narcotic drug or other controlled substance defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner and submit to testing for a prohibited substance if required by the pretrial services office.

all of them should be removed. The Motion to Modify⁴ was referred to me for determination. ECF No. 14. At the hearing held on January 24, 2014, I granted in part and denied in part the Motion to Modify and issued an Amended Order Setting Conditions of Release. ECF No. 17. In this memorandum and order, I explicate the reasons.

I. Background

a. Facts Pertaining to Circumstance of Charge, Weight of Evidence and Defendant's History and Characteristics

The indictment charges Mr. Snead with unlawfully opening mail entrusted to him as a U.S. Postal Service employee in violation of 18 U.S.C. § 1703(a), a felony that carries a maximum penalty of five years.⁵ While working for the Postal Service as a part-time mail sorter at the age of 20, he allegedly opened at least sixty-two greeting cards entrusted to him for handling, removing a \$50 gift card and cash; in all a total of \$130 was stolen.

Additional facts pertaining to the circumstances of the offense and the weight of the evidence as alleged by the Government in its objection to the Motion to Modify supplement the charge with important details. The Government represents that observation of Mr. Snead was initiated by the discovery of sixteen opened greeting cards that had been cancelled when he was working. Three days later, on May 19, 2011, he was videotaped separating greeting cards from other mail and taking them with him on a break; when he returned, U.S. Postal Service agents established that a total of forty-six cards had been opened. When confronted, Mr. Snead

⁴ This Motion to Modify is not an appeal from the original Order Setting Conditions of Release. An appeal must be taken within fourteen days of the Order. DRI LR Cr 57.2(c). In any event, Defendant is specific that his Motion is not an appeal. Rather, it is brought under 18 U.S.C. § 3145(a)(2), which permits a defendant to seek an amendment of the conditions of release.

⁵ The Government asserts that the applicable guidelines range following trial is likely between ten and sixteen months of incarceration and a fine between \$3,000 and \$30,000. If conviction is based on a guilty plea, the range is between six and twelve months of incarceration, with a fine between \$2,000 and \$20,000. Defendant contends that the conduct should have been charged as a misdemeanor and his range would be zero to six months, the lowest possible under the guidelines.

admitted to having opened all the cards and to having taken a total of \$40 in cash; he gave a sworn statement confirming that admission. However, he denied that any of the gift cards in his wallet had been taken from the mail entrusted to him. Mr. Snead was terminated by the Postal Service the same day. Recognizing the seriousness of the situation, he asked if he would be sent to prison.⁶

Two weeks later, the ongoing investigation allegedly put the lie to Mr. Snead's denial of stealing any gift cards. The Government represents that one of the senders of the opened cards was able to provide specific information about the gift card he had put in the envelope and Mr. Snead was videotaped by Best Buy's surveillance cameras using the purloined \$50 gift card as part of the payment for an air conditioner. In all, the Government alleges that sixty-two envelopes in which people entrusted their private communications to friends and loved ones to the U.S. Postal Service were opened by Mr. Snead, stealing anything of value that he found. Further, when confronted, Mr. Snead allegedly made an incomplete and misleading confession that left him in possession of at least some of the ill-gotten gains of his conduct.

As they emerge from the Pretrial Services interview, Mr. Snead's history and characteristics portray an individual who lacks the resources and life experiences to flee the District and whose family ties anchor him here, but who also lacks the stability to assure that he will consistently appear as directed. He is a lifelong Rhode Islander, who has spent all of his 23 years in the District. His parents and three of four siblings live in Rhode Island; one sibling is incarcerated. He did not finish high school, although he did get a GED. He lives in a rented apartment with his five-year-old child – to his credit, he supports her. Also living with him for at least six months is an unemployed girlfriend and her three children. He has no meaningful assets. His job history is spotty. Prior to employment with the U.S. Postal Service, he was a

⁶ The latter fact is drawn from Defendant's Motion to Dismiss the Indictment (ECF No. 12 at 4-5).

grocery cashier for eight months; since, he has worked as an inventory specialist for two months, a cashier for six months and a security guard, his current job, for five months. His income from his current job leaves him eligible for court-appointed counsel.

Apart from a physical condition that is untreated due to the lack of health insurance, Mr. Snead has good physical health and no history of mental health or substance abuse treatment. He used marijuana in November 2013, but claims he does not use it frequently. As expected based on his reported use, he tested positive at his first pretrial visit. He legally owns a Glock 17 9mm handgun. Importantly, Mr. Snead has no criminal history and does not have a passport.

b. The Bail Hearing on December 10, 2013

Immediately prior to his arraignment, Mr. Snead was interviewed by a Pretrial Services officer in the presence of his attorney. Minutes before the arraignment was set to begin, the officer privately provided the Court with an oral summary of the facts learned in the interview, together with his recommendation regarding release and conditions. Specifically, based on Mr. Snead's history and characteristics, the Pretrial Services officer recommended an unsecured bond of \$10,000 and the additional conditions routinely imposed in this District in low risk cases, except for the addition of drug testing, based on Mr. Snead's admission of marijuana use.

At the hearing itself, the Government asked for release on \$10,000 unsecured bond. In stark contrast to its position now, the Government did not ask for additional conditions. When the Court advised that additional conditions would be set, Defendant asked that he be released on personal recognizance instead of an unsecured bond, but did not argue that no additional conditions should be imposed. Each of the proposed conditions was separately reviewed with Mr. Snead, who stated that he could abide by each. During the discussion of the travel restriction to Rhode Island, the Court gave Mr. Snead an opportunity to confer with his counsel about

whether there should be any carve-outs and his attorney said that none was needed, though Defendant maintained his objection to the travel restriction as unduly onerous. At the end of the individualized review of the conditions, the Court asked if Defendant had any issues with any of them and his counsel said that he did not. However, she also noted that conditions should not be imposed simply because they are considered “standard” in this District. After indicating that any reasonable travel request would be considered positively, the Court ordered that Mr. Snead be released on personal recognizance, but otherwise imposed all of the conditions recommended by Pretrial Services.

II. Applicable Law

For a bail hearing,⁷ the Bail Reform Act contemplates a two-step analysis. Step One, at 18 U.S.C. § 3142(b), provides for pretrial release on personal recognizance or unsecured appearance bond unless the court “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.” If the court determines there is “no risk,” United States v. Mantecon-Zayas, 949 F.2d 548, 550 n.3 (1st Cir. 1991) (per curiam), release must be ordered at this step with no additional conditions. 18 U.S.C. § 3142(b).⁸ If the court determines there is “some risk” of danger or failure to appear as required, the court proceeds to Step Two, at 18 U.S.C. 3142(c), and evaluates what are the least restrictive conditions listed in § 3142(c) that will serve as a

⁷ A detention hearing may be conducted only if the case involves one or more of the far more serious factors listed in 18 U.S.C. § 3142(f). None is applicable here.

⁸ 18 U.S.C. § 3142(b) requires that a released defendant not commit a crime and cooperate in the collection of a DNA sample when required by federal law. The form used for the release order is Form AO 199A (Rev. 12/11) (Order Setting Conditions of Release), which adds two additional conditions. They are that a defendant advise Pretrial Services in writing before changing his residence or telephone number and appear in court as required. The Bail Reform Act does not mention these conditions; in practice, however, they are routinely imposed. Bruce D. Pringle, Bail and Detention in Federal Criminal Proceedings, 22 Colo. Law. 913, 918 & n.40 (1993) (although Act only requires avoidance of criminal activity and DNA collection, courts as a matter of course also impose two more). Defendant does not challenge them.

reasonable guard. United States v. Patriarca, 948 F.2d 789, 791 (1st Cir. 1991) (noting “some risk” standard); see also United States v. Neves, 11 F. App’x 6, 8 (1st Cir. 2001) (per curiam) (applying “some risk” standard). See Jonathan Zweig, Extraordinary Conditions of Release Under the Bail Reform Act, 47 Harv. J. on Legis. 555, 558 (2010) (right to pre-trial release under reasonable conditions is a fundamental right).

The court should employ the 18 U.S.C. § 3142(g) factors⁹ in determining if a defendant presents “no risk” or “some risk” at the § 3142(b) Step. See, e.g., United States v. Brown, 13-CR-80S, 2013 WL 5439716, at *2 (W.D.N.Y. Sept. 27, 2013); United States v. Jimenez-Rivera, 761 F. Supp. 2d 3, 5 (D.P.R. 2011); United States v. Karasik, 09-CR-176-01-PB, 2009 WL 3809801, at *1 (D.N.H. Nov. 13, 2009). But see United States v. Santillana, No. 97-CR-108 RSP, 1997 WL 394663, at *2 (N.D.N.Y. July 10, 1997) (§ 3142(g) factors not considered at § 3142(b) stage). The recommendation of Pretrial Services is key to the court’s finding whether “some risk” exists. See 18 U.S.C. § 3154(1)¹⁰ (function of Pretrial Services to report to judicial officer, including to provide recommendation as to whether such individual should be released or detained and, if released, appropriate conditions of release); Pringle, supra note 8, at 914 (Pretrial Services’ investigation is primary source of data regarding defendant’s eligibility for release; Pretrial Services provides court with recommendation to which magistrate judges give strong consideration).

⁹ The § 3142(g) factors are: the nature and circumstances of the offense; the weight of the evidence; the history and characteristics of the person, including character, physical and mental condition, family ties, employment, financial resources, length of residence in community, community ties, past conduct, drug and alcohol use, criminal history and past history in appearing in court and whether the person is currently on probation or parole; and the nature and seriousness of the danger to any person or the community posed by the person’s release.

¹⁰ The federal legislation enacting the Pretrial Services Act was passed in 1982. 18 U.S.C. § 3152. It called for the creation of a separate federal agency designed to oversee the prerelease and detention of the accused as well as other pretrial services. Christopher T. Lowenkamp & Jay Whetzel, The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services, 73-Sep. Fed. Probation 33, 33 (2009). These services were so successful that they were further extended to include a safety of the community component with the Bail Reform Act of 1984. See id.

The case law provides little guidance limning the boundaries of what is enough to constitute “some risk” justifying the imposition of additional discretionary release conditions. There is also little guidance on what constitutes “no risk” at all, so that release on personal recognizance or unsecured bond may not include any additional conditions, as Defendant contends here.¹¹ What does emerge from the cases are a few guiding principles. First, the concept of “dangerousness” that the court should consider is broader than just physical harm. United States v. DeSimone, No. 09-024S, 2009 WL 904688, at *2 (D.R.I. Apr. 1, 2009) (Almond, J.) (economic harm qualifies as danger within contemplation of Bail Reform Act); see United States v. Tortora, 922 F.2d 880, 884 (1st Cir. 1990); Report of the Senate Committee on the Judiciary, Bail Reform Act of 1984, S. Rep. No. 98-225, at 12-13 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3195-96 (concept of dangerousness much broader than physical violence). Relatedly, the risk of “flight” includes not only the risk that the defendant will abscond, but also the risk that he will not appear as required. See 18 U.S.C. § 3142(b). Second, it would appear that moving the meter from “no risk” to “some risk” is a discretionary decision with a low threshold based on little more than a pending indictment and a defendant’s background. Cf. United States v. Carretero, No. 98-CR-418, 1999 WL 1034508, at *3 (N.D.N.Y. Nov. 4, 1999) (“Congress left the post-plea release decision in the discretionary hands of the court”); United States v. Tirado, 912 F. Supp. 273, 276 (N.D. Ohio 1995) (defendant’s “background . . . as well

¹¹ Since this is the vortex of the pending dispute, this dearth of guidance is frustrating. However, the absence of cases is likely based not only on the lack of a requirement of written reasons, but also on the low bar for proceeding to impose additional conditions. Cf. United States v. Jones, CR. 10-50015-01, 2010 WL 4024927, at *3 (D.S.D. Oct. 13, 2010) (“The court has broad discretion in determining which condition or combination of conditions are necessary to ensure the defendant’s appearance and protect the public.”). It is also not surprising because the primary purpose of the Bail Reform Act was to create flexibility between detention and release on conditions. See S. Rep. No. 98-225, at 5, reprinted in 1984 U.S.C.C.A.N. 3182, 3187-88. The Act’s authors did not focus on the distinction between some conditions and no conditions.

as the entire record thus far presented in this case, demonstrate that pretrial release pursuant to § 3142(b) is not warranted.”).

Once a court has made the jump from § 3142(b) to § 3142(c) and decided to impose discretionary release conditions, it must consider the familiar factors laid out in 18 U.S.C. § 3142(g) and impose those that are the least restrictive. United States v. Ploof, 851 F.2d 7, 9 (1st Cir. 1988). This analysis must amount to an individualized bail determination tailored to the facts pertaining to the defendant. Patriarca, 948 F.2d at 794 (detention decision must be made individually based on the evidence regarding the particular defendant); Tortora, 922 F.2d at 889 n.10 (“each bail applicant must be screened individually”); United States v. Rondeau, No. 10-147-S, 2010 WL 5253847, at *1 (D.R.I. Dec. 16, 2010) (generic Adam Walsh Act conditions do not violate due process as long as court exercises some discretion to tailor them to a particular defendant). Thus, while a Pretrial Services office may have “standard” conditions to recommend for defendants assessed as low risk, Defendant correctly points out that such conditions may not be imposed simply because they are “standard” without individualized tailoring to the circumstances of each case. See Rondeau, 2010 WL 5253847, at *2 (mandatory release conditions constitutional as long as they are individualized to specific defendant).

The Bail Reform Act does not require that the reasoning for the court’s bail determination be laid out orally at the bail hearing or in writing after it – this differs from the strict requirement of a written statement of findings following a detention hearing. 18 U.S.C. § 3142(h). By contrast, Fed. R. App. P. 9(a) requires that the “district court must state in writing, or orally on the record, the reasons for an order regarding release or detention.” See Tortora, 922 F.2d at 883 (district court should include statement of reasons for conditions imposed). This tension – no requirement to articulate reasons in the Bail Reform Act and the appellate need for a reviewable

record – may be explained as imposing the requirement on the district judge, who has a more leisurely opportunity to articulate reasons when considering an appeal from the bail order of the magistrate judge, who is required to issue an order in the exigency of the defendant’s initial appearance or arraignment. See United States v. Koenig, 912 F.2d 1190, 1191-93 (9th Cir. 1990) (interpreting 28 U.S.C. § 636 and 18 U.S.C. § 3145 together to mean that a magistrate judge decision must first be reviewed by a district court prior to appeal to the circuit); United States v. Choudhry, 941 F. Supp. 2d 347, 349 (E.D.N.Y. 2013) (district court reviewing magistrate judge’s bail determination should not defer but reach its own independent conclusion). In the First Circuit, the district court’s review of the magistrate judge decision is *de novo*. Tortora, 922 F.2d at 883 n.4. Also in contrast to a detention hearing where, except in limited circumstances, the court may not consider detention unless the Government moves for it, 18 U.S.C. § 3142(f), at the bail hearing, the judicial officer is not constrained by what the Government requests; rather, the judicial officer makes her own determination based on the charge, information about the charge provided by the Government, information from the defendant and the information and recommendation provided by Pretrial Services.

Finally, I note that this issue is properly before me for *de novo* determination in light of all of the facts, both those from the original hearing and those presented in connection with Defendant’s Motion to Modify. See United States v. Lee, No. 13-CR-108(JG), 2013 WL 5327465, at *4 (E.D.N.Y. Sept. 20, 2013) (on motion to modify condition requiring defendant to sign confidentiality waiver of mental health treatment, court performs *de novo* weighing of variety of factors); United States v. Harris, 920 F. Supp. 132, 132-34 (D. Nev. 1996) (on motion to modify release condition limiting employment, court examines all facts presented by both parties). Magistrate judges are empowered to “issue orders pursuant to section 3142 of title 18

concerning release or detention of persons pending trial.” 28 U.S.C. § 636(a)(2). The Bail Reform Act also specifically permits the judicial officer – who may be the magistrate judge – “at any time” to amend the order to impose additional or different conditions of release. 18 U.S.C. § 3142(c)(3).

III. Analysis

Defendant argues that he is neither a danger nor a flight risk and that, at the bail hearing, the Government did not argue for additional conditions. Accordingly, he contends that “[the additional conditions] were merely imposed.” ECF No. 14 at 6. As a result, he asserts, he effectively was not afforded a hearing to determine that the additional conditions were necessary so that all of the additional conditions violate his Fifth Amendment right to Due Process and should be removed. In addition, because none of the additional conditions are necessary based on risk of either danger or flight, they exceed what is permissible under the Bail Reform Act. 18 U.S.C. § 3142(b)-(c). He also asserts his rights under the Second Amendment with respect to the condition restricting him from possessing firearms.

As a threshold matter, Mr. Snead’s argument that he did not have a hearing on the additional conditions so that the Court is now barred from revisiting its determination or considering any new facts is not only illogical but wrong. While the Government did not ask for additional conditions (although it is arguing for them vociferously now), such a request is not necessary at the bail hearing. Rather, Pretrial Services recommended additional conditions based on the officer’s assessment of Defendant. Based on the input from Pretrial Services,¹² the Court determined that Mr. Snead posed “some risk,” justifying additional conditions. At the hearing, each proposed condition was individually reviewed with Defendant and his counsel.

¹² The relevant information from Pretrial Services focused on Defendant’s history and character, including his age, marital status, checkered job history, failure to complete high school, unstable living situation and recent marijuana use.

Importantly, Defendant did not object to the imposition of some additional conditions, arguing only against the travel condition as overly restrictive and against the imposition of any conditions imposed only because they are standard in the District, and not tailored to his individualized circumstances.

Rather than ignoring the facts as Mr. Snead argues, Defendant's Motion to Modify requires me to make a *de novo* determination whether there is "some risk" of either danger or nonappearance, and, if there is, to review the conditions to be sure that they are the least restrictive to address that risk in light of the factors for consideration laid out in 18 U.S.C. § 3142(g). See Lee, 2013 WL 5327465, at *4; Harris, 920 F. Supp. at 133-34. This analysis calls for examination of all of the relevant facts presented by both Defendant and the Government to fashion a release order that appropriately balances whatever risk may be posed by Mr. Snead against his liberty rights, mindful that he enjoys the presumption of innocence.

The first issue for consideration – in reliance on all of the facts to be examined pursuant to 18 U.S.C. § 3142(g) – is whether any additional conditions are called for. I find that they are.

First, the circumstances of the charge, buttressed by the strong weight of the evidence, evinces "some risk" of danger to the community arising from Mr. Snead's alleged conduct in discharging the position of trust he accepted when he went to work for the U.S. Postal Service. See 18 U.S.C. § 3142(g)(1)-(2) (Bail Reform Act directs court to examine circumstances of charge, together with weight of the evidence). As proffered by the Government, Mr. Snead allegedly admitted invading the privacy of senders of sixty-two greeting cards to friends and loved ones by opening their personal communications and pocketing the cash and gift cards that he found; some of his conduct was captured on videotape. Extremely troubling is Mr. Snead's allegedly deliberate evasion about where he had gotten the \$50 gift card when confronted about

his conduct by U.S. Postal Service agents. His use of the stolen card to buy an air conditioner two weeks later suggests an individual who will lie to authorities; it cements the determination that he possesses at least some “propensity to commit further crimes.” See United States v. Madoff, 586 F. Supp. 2d 240, 253 & n.11 (S.D.N.Y. 2009). This danger is certainly neither serious nor great – the total economic losses covered by the indictment amount to a measly \$130. However, these circumstances constitute sufficient risk of danger posed by Mr. Snead’s release as to justify the setting of some conditions to address it. Mr. Snead’s admitted marijuana use also nudges the danger risk meter slightly. Cf. United States v. Garretson, No. 2:13-CR-29, 2013 WL 1405731, at *2 (D. Nev. Apr. 5, 2013) (marijuana use may establish dangerousness).

Second, with respect to risk of nonappearance, Mr. Snead’s history and characteristics reflect an individual whose ties to the community are strong, but who also lacks the maturity and stability to establish that he will consistently appear as directed. He did not finish formal schooling but has a GED. While his support for his daughter is creditable, his living arrangement lacks indicia of stability. Similarly, his employment history reflects short stints at low level jobs each of which ended for reasons unknown to the Court, except for his job with the U.S. Postal Service, which ended when he was fired. While this history does not paint a man likely to flee to Colorado as the Government argued, I find that it compels the determination of “some risk” that he will not appear as required.

In short, I find that Mr. Snead poses “some risk” of both danger and nonappearance, although the nature and seriousness of these risks are not great. 18 U.S.C. § 3142(g)(4) (court must consider “nature and seriousness” of risks posed by the person’s release); cf. 8 Guide to Judiciary Policy, Probation & Pretrial Services pt. C., ch. 5, § 525 (when Pretrial Risk Assessment establishes category 1 or 2, defendant is likely candidate for supervision under

minimal standards). The next inquiry is what are the least restrictive conditions that will reasonably guard the identified risks.

The Bail Reform Act, 18 U.S.C. § 3142(c)(1)(B), provides a laundry list of thirteen additional release conditions and a catch-all provision that allows other conditions not mentioned on the list. All of the conditions specifically challenged by Mr. Snead appear on this list. First, he argues that he should not be subject to any supervision at all, and as corollary to that, should not be required to report to Pretrial Services. Second, he contends that the restriction on the possession of firearms cannot be imposed except where the danger identified relates to the use of firearms; without such a justification, which is absent here, the restriction violates his rights under the Second Amendment as established by District of Columbia v. Heller, 554 U.S. 570 (2008). Third, he challenges the restrictions related to controlled substances, especially testing, and excessive use of alcohol. Fourth, he attacks all restrictions on travel or his ability to apply for a passport. Finally, he challenges the requirement that he either maintain employment or seek new employment.¹³

Basic Supervision and Reporting to Pretrial Services:

Basic supervision keeps the defendant in contact with the Pretrial Services officer as the officer deems necessary to monitor compliance with other conditions. Thomas J. Wolf, What United States Pretrial Services Officers Do, 61-Mar Fed. Probation 19, 21-22 (1997). Here, most importantly, it provides some assurance that Mr. Snead will remain mindful of, and therefore be more likely to abide by, the conditions that he refrain from new criminal behavior and to remind him to appear for court proceedings. See Timothy P. Cadigan et al., The Eastern District of

¹³ A final condition not discussed by the parties is the requirement that he report any contact with law enforcement. This condition is a corollary to basic supervision. At the bail hearing, it was carefully explained to Mr. Snead, who confirmed that he understood and would abide by it. With the determination that basic supervision is appropriate, I leave this condition in place.

Michigan: How Does It Consistently Achieve High Release Rates?, 76-Sep. Fed. Probation 15, 18, 20 (2012) (high success rate in court appearances upon release attributable in part to face to face supervision with pretrial services); Wolf, supra, at 23 (important part of pretrial supervision is to remind defendants of upcoming court dates). The officer is expected to assess the potential risks posed by the defendant – here small – and structure the supervision to achieve those goals while minimizing the intrusion on the defendant. See Marie VanNostrand & Gena Keebler, Pretrial Risk Assessment in the Federal Court, 73-Sep. Fed. Probation 3, 6-7 (2009). In the District of Rhode Island, virtually every defendant facing a felony charge is subject to basic supervision, with the amount and nature of the contact between the Pretrial Services officer and the defendant tailored to the individual’s needs.

I find that placing Mr. Snead on minimal supervision by Pretrial Services with the obligation to report as his officer requires is appropriately tailored to the relatively small risk that he poses of danger and nonappearance. See 8 Guide to Judiciary Policy, Probation & Pretrial Services pt. C., ch. 5, § 525(c) (defendants with low pretrial risk assessment scores are likely candidates for minimal supervision).

Prohibition on Possession of Firearms:

Defendant argues vociferously that he should be allowed to keep his Glock 17 9mm handgun in his home while this indictment is pending, in reliance on Heller, 554 U.S. 770. See also United States v. Arzberger, 592 F. Supp. 2d 590, 602-03 (S.D.N.Y. 2008) (owning a gun is a liberty interest, and the categorical taking away of a gun without a finding of dangerousness runs afoul of due process). However, Heller does not hold that the Second Amendment creates an absolute right. For example, individuals charged with a felony by indictment are subjected to various limitations on their ability to deal with firearms. 18 U.S.C. § 922(d)(1) (prohibits sale of

firearms to a person under felony indictment); 18 U.S.C. § 922(n) (person under felony indictment cannot ship, transport or receive firearms transported in interstate commerce). The constitutionality of these provisions has been upheld in the aftermath of Heller. See United States v. Charlestown, 12-80054-CR, 2012 WL 1952292, at *4-5 (S.D. Fla. May 3, 2012) (§ 922(d)(1) constitutional); United States v. Laurent, 861 F. Supp. 2d 71, 97-105 (E.D.N.Y. 2011) (§ 922(n) constitutional on its face). More importantly, the imposition of a pretrial restriction on the possession of firearms has been found to be critical “in most cases” because it safeguards the Pretrial Services officers who visit the home in the course of supervision. United States v. Smedley, 611 F. Supp. 2d 971, 974 (E.D. Mo. 2009). Further, in this Circuit, to “eschew possession of weapons” is a boilerplate condition. Tortora, 922 F.2d at 882. Importantly, Defendant concedes that, if he is supervised by Pretrial Services at all, it is a reasonable safety measure for the supervising officer to know that all firearms have been removed from the home. In light of the determination that some supervision is called for, I find this condition is appropriate and should remain in place.

Prohibition on Excessive Use of Alcohol or Use of Controlled Substances and Requirement of Random Drug Testing:

Mr. Snead’s reported use of marijuana in the month preceding his arraignment provides the foundation for the imposition of the requirement of testing to screen for controlled substances. It also justified the condition pertaining to abuse of alcohol and use of controlled substances. Such conditions are “run-of-the-mill” and “boilerplate.” Harrington v. City of Nashua, 610 F.3d 24, 32 (1st Cir. 2010) (calling forbearance of controlled substances or excessive alcohol “standard fare – what we have termed ‘run of the mill conditions of pretrial release’”); Tortora, 922 F.2d at 882 (“eschew . . . substance abuse” is a boilerplate condition). If

the testing reveals that the use of controlled substances has ceased, the testing can be reduced or eliminated. For now, however, I find that these are appropriate conditions.

Travel and Passport Restrictions:

Unlike most of the other conditions imposed on Mr. Snead, a travel restriction could constitute a significant deprivation of liberty. See Harrington, 610 F.3d at 32. To avoid a significant liberty deprivation, at the initial bail hearing, Mr. Snead was asked if restriction to Rhode Island would impose any unusual burdens on him and he was given an opportunity to confer privately with his attorney before responding that it would not. Further, in this Circuit, “restrict travel” is a boilerplate condition. Tortora, 922 F.2d at 882. As to the passport restriction, Mr. Snead indicated that he has never had one and accepted without objection the condition that he refrain from applying for one.

Mr. Snead’s history and character do not suggest he has the means, contacts or experiences to flee the District – further, all of his family, including his child, are in Rhode Island. The only risk of non-appearance is based on his lack of stability, which is adequately addressed by the imposition of basic supervision by a Pretrial Services officer. Accordingly, I find that the travel restriction limiting him to this District is not the least restrictive condition that could be imposed and have ordered that it be removed. In its place, I imposed a travel restriction to the continental United States. Further, if Mr. Snead wishes to travel abroad, upon presentation to his Pretrial Services officer of travel plans that are consistent with compliance with his other conditions and that include a return to the United States, he will be granted leave to apply for a passport.

Requirement to Maintain Employment or Seek New Employment:

The employment condition required Mr. Snead either to maintain employment or actively look for employment. Mr. Snead's argument that his firing will lead to a violation of this condition is wide of the mark; however, his contention that the condition strips him of the freedom of quitting is correct. The Government argues that work anchors Defendant to the District, reducing the risk of flight.

In light of the initial determination that his other ties to the community are strong so that the risk that Mr. Snead will flee is very low, this condition is not necessary to address the risk of non-appearance. Rather, Mr. Snead's family in Rhode Island, coupled with his lifelong residence here and his lack of resources to leave are sufficient. Without a link to the risk that Mr. Snead might not appear as required, this condition fails the "least restrictive" yardstick – I have ordered that it be removed.

IV. Conclusion

Pursuant to my ruling from the bench at the January 24, 2014, hearing, the Motion to Modify is granted in part and denied in part. ECF No. 14. For all of the foregoing reasons, Mr. Snead's conditions are revised as follows, as reflected in the Amended Order Setting Conditions of Release entered immediately after the January 24, 2014, hearing (ECF No. 17):

1. The condition that Mr. Snead continue or actively seek employment is removed.
2. The travel condition is revised to state that "travel restricted to the Continental United States."
3. All other conditions remain in place as set forth in the December 10, 2013, Order.

ENTER:

/s/ Patricia A. Sullivan

PATRICIA A. SULLIVAN

United States Magistrate Judge

February 4, 2014