UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 19 mj 13

BRYAN D. ROGERS,

Defendant.

BRYAN ROGERS' MEMORANDUM IN SUPPORT OF RELEASE PENDING TRIAL

I.

SUMMARY

Bryan Rogers has been charged by criminal complaint with a violation of 18 U.S. Code § 2251(a). At the initial appearance, the government moved for detention. Given the statutory presumption in favor of detention, 18 U.S. Code § 3142(e)(3)(E), Magistrate Judge Stephen L. Crocker ordered detention. Bryan Rogers now moves for release pending trial. He also requests a preliminary hearing.

This brief is offered in support of Rogers' request that he be released under specific and numerous conditions pending trial. He explains that his release is

appropriate and would not create an untoward risk of flight or danger to the community; his release plan rebuts the presumption in favor of detention. In this brief Rogers further outlines his view of the evidence presented insofar as it affects the Court's evaluation of the strength of the evidence.

Rogers believes the evidence that will be elicited at the preliminary hearing will show he acted under a belief that he was acting in the minor's best interest to save her from her adoptive father's continued sexual abuse. Rogers did not obtain the recording that is the subject of the criminal charge for the purpose of sexual exploitation—although this is what the recording allegedly evinces. The exploiter was the minor's father—not Rogers. His purpose in obtaining the video recording was to obtain evidence that was to be used against the minor's father and would allow for her to be safe. That the recording was sent by Bryan Rogers (and the minor) to the FBI is the clearest indication of his (and her) intent in possessing the recording. The recording was not further distributed.

Rogers' alleged conduct reflects a flawed understanding of the law, and may have resulted in him violating a number of state and, possibly, federal laws. While Rogers' conduct, as alleged by the criminal complaint, may allow the

Court to conclude that Rogers violated 18 U.S. Code § 2251, the circumstances of the alleged offense conduct are mitigating, within the continuum of conduct punished by that statute. *See* 18 U.S. Code § 2252(c). And, as explained below, the statute under which he has been charged might not even apply.

II.

FACTUAL BACKGROUND

Facts Leading to Arrest. KV is 14 years old.[1] At the time relevant to the criminal complaint she resided in Madisonville, Tennessee with her mother and adoptive father. Rogers and KV became acquainted through a gaming website, and subsequently communicated using various electronic media, including Facebook Messenger, email and a communications app.

KV revealed to Rogers that her adoptive father had been raping her for some time. KV further revealed to Rogers that she wanted to kill herself because of the on-going sexual abuse. Her adoptive father, KV told Rogers, had threatened to kill her if she disclosed the sexual assaults. While she told her mother about the rapes, KV's mother took no action, either because she couldn't

[1] KV is a pseudonym used by the government in the criminal complaint. Rogers adopts it here. While the media has reported KV's adoptive father's name, Rogers does not join this practice.

or, perhaps, because she didn't want to believe KV. Desperate, KV asked Rogers to help her.

Rogers wanted to help KV. In their online chats, Roger and KV discussed what could be done to help her escape from the terror she faced at home and to find a safe place where her adoptive father couldn't harm her.

In an attempt to collect evidence against her adoptive father, KV attempted to record her adoptive father raping her. Her first recording was an audio-only recording; there was no video content. KV can be heard talking to her adoptive father, trying to elicit an admission about the rapes. Her adoptive father can be heard talking about their "encounters," but he never directly admits to sexually abusing KV. She did mention that she was afraid of him, but he replied (with words to the effect) that if KV chose to go off with someone else, he would no longer force himself on her.

KV and Rogers discussed that the evidence against her father had to be clear and strong in order for the authorities to believe her claims. KV and Rogers discussed how best to create clear evidence. KV also told Rogers that her adoptive father had spoken to her about wanting to impregnate her, and he forbade her to take birth control pills. KV remained in grave danger, and Rogers

was aware of her dire predicament. Rogers expressed to KV that he, too, could be in legal peril if he helped KV escape from her home without evidence documenting the sexual abuse at the hands of her father.

Using the dates alleged in the criminal complaint as guideposts, some exchanges on Facebook Messenger between KV and Rogers lay out their discussion, which forms the crux of the government's charge that Rogers "persuaded, induced or coerced" KV to produce child pornography. But the context shows that Rogers wanted KV to produce ***evidence*** that would be used to prosecute KV's father.

The complaint does not provide all of the messages between KV and Rogers. Notably, the complaint omits Rogers telling KV to run away to a friend's home, to go to the police, or to go to a hospital for a forensic sexual assault examination. His comments about KV recording her adoptive father's assault were then, in context, only one other way to collect evidence and to protect her. Rogers' wanting to help KV was not contingent on her sending him a video showing her sexual exploitation. There was no *quid pro quo*. The following conversations occurred on the dates noted:

December 27, 2018

Bryan: *I didn't hang up the call got dropped*
And I know you don't want to do it but I don't exactly want to see your dad rape you either
But we need clear video evidence

KV: *Bryan do u understand how hard that would be though*

Bryan: *yes*
But understand that I can get in a hell of a lot of trouble for harboring you
Unless you can prove what he did they will just release you back to him if we get caught

KV: *I understand bryan I guess*
As far as needing the evidence goes and u getting in trouble

Bryan: *ok*

KV: *I just can't promise I'll get the evidence…*

Bryan: *Then I can't promise I can get you away from that*
I hate to say it but I can't risk getting trouble for you. If you can get that video I can get you out of there but without it you will just wind up back with your dad and I'll be in trouble

KV: *… I'll try to get it*

January 4, 2019

KV: *I don't have the mental strength or confidence enough to get the video…*
I'm so sorry

Bryan: *Then I can't come get you*
I'm sorry but I cannot risk prison time for you

KV: *Bryan plz*
There has to be some fucking way

Bryan: *Just out of curiosity why can't you just stay in your room and wait for him to get you?*
He's going to rape you anyway, might as well have the phone recording

KV: *Bryan I can't stand it I'll have a fucking mental breakdown… idfk how*

Bryan: *ok*

KV: *There has to be a way*
I can't just stay here bryan I'm begging u plz

Bryan: *There is. Be in your room when he comes home and have the phone recording. That way when he comes for you it's already recording and you don't have to worry about anything*
And I can't help you if we don't have foolproof leverage against your dad
He's been molesting you for 12 years, KV. If that' not enough of a reason to get the video then idk what else to tell you

KV: *Bryan ur such a fucking asshole if u don't help me somehow I might as well kill my fucking self like I've been planning to do*
I can't get the video
I just can't

Bryan: *So I'm an asshole for not risking going to prison for someone I haven't even met?*

KV: *IDFK ANYMORE! But u can't just leave me here!*
If u don't help me I'll either kill myself or just run away to a friends house cause I can't deal with this shit but I can't get the video either
Idfk what to do anymore

Bryan: *"And I know you don't want to do it but I don't exactly want to see your dad rape you either"*

KV: *If u don't help me I'll either kill myself or just run away to a friends house cause I can't deal with this shit but I can't get the video either*
Idfk what to do anymore

Bryan: *Good. Run away to a friends house*

KV: *Damn u bryan*

Bryan: *At least they can't be charged with kidnaping if you go to them*

KV: *I'll just kill myself*

Bryan: *Just do not kill yourself*
KV if you know someone else you can run away to, do that instead
Show them the recording you got earlier. That at least will give them reason to hide you

KV: *Bryan plz don't leave me like this…*
My friends will eventually rat me out to the cops

[…]

Bryan: *And I think some of the laws are messed up too but my opinion isn't going to matter if they come looking for you and we get caught*
Run to a friends house and hope for the best

KV: *… That's all the fucking advice u have for me*

Bryan: *That's all I can offer*
If I knew something else I would tell you

KV: *I'm just gonna kill myself*

Bryan: *so don't let him take you anywhere*
KV if you're just going to kill yourself you might as well try running away to a friends house
you have nothing to lose

Bryan: *Then I guess your only option is to run away and show the people you run to the recording and tell them he's sexually abusing you*

KV: *So what's happens between us now bryan*

Bryan: *Then go to a hospital and get a rape kit*

Bryan: *KV hell you could just go to the police after he rapes you and get a rape kit done on you*
It's only a few miles to town

KV: *Bryan…*

Bryan: *Then they will have DNA evidence that he raped you and since you're a minor it won't matter if he forced himself on you or not*
Between the rape charged and having all those guns as a s convicted felon he will be put away for a long f ing time

The plan that KV and Rogers decided on was that KV would attempt to video record the next time her adoptive father raped her. If she was not successful, or if the danger became to grave, then KV and Rogers agreed that he would come to Tennessee and take her to safety.

KV was terrified of her adoptive father. She feared that he would kill her when he learned that she had reported his sexual assaults to the police. Her fear affected what she saw as the reasonable options available to her.

KV had good reason for her fear. Her adoptive father, KV told Rogers, was a convicted felon, who still possessed firearms. Not long before she left with Rogers, because her adoptive father was upset about something trivial, he shot

KV's dog, skinned it and left its body on the family property. And, more recently, KV told Rogers that when a visitor came to the door, her adoptive father had pointed a shotgun at the person. KV feared that if she went to the police, her adoptive father might be arrested, but he would be released, and her life would be in danger. Her fear was a filter that affected the manner in which both KV (and Rogers) made choices about what needed to be done to rescue KV.

In early January, or thereabout, KV's adoptive father came to her room. Again, as before, he sexually assaulted her. But this time KV was able to make a video recording of the ensuing sexual assault using her phone. The recording is graphic. It is described in the criminal complaint. *See* Complaint at ¶ 8. The complaint's clinical summary shows the video to be powerful evidence supporting KV's claim of sexual assault by her adoptive father. KV sent the recording to Rogers. The purpose of the video was evidentiary. It was not sexually motivated. After KV sent Rogers the recording, he believed KV to still be in great danger, so Rogers traveled to Tennessee to bring KV to safety.

On or about January 14, 2019, KV left her parents' home during the night. Rogers was waiting for her, having travelled from his home in Madison. KV and Rogers had planned that, until her father was arrested, she would stay with

Rogers—away from Tennessee. In driving away from KV's home, Rogers' only motivation for taking KV to another state was to make sure that she remained safe until her adoptive father was arrested.

KV's parents reported her missing to police the next morning. KV's adoptive father was interviewed by media on Friday, January 25. He said, "It's like having your soul ripped out of your body. You can't think. You can't eat. You can't sleep. Life has just ceased for us since the day she left." During that same interview, KV's mother sent a message to KV, that: "You are my sunshine, and will always be my sunshine. No matter what, I love you. Please come home."

Rogers brought KV to his mother's home in Madison. She remained in the basement where his room is located. During her time in the basement, KV composed a six page letter that she addressed to the FBI. In the letter she described the years of abuse. Rogers and KV made a package to send to the FBI. The package included KV's letter, and an SD card containing the audio-recording, the later video-recording, and photos of KV's adoptive father. The SD card also contained a video that KV made using a burner phone—the purpose of which was to assure her family that she was alive and well. On the next day that

Rogers had off of work, they drove to St. Louis, Missouri, to mail the package. It was addressed to the FBI's St. Louis field office. The package was mailed on or about January 27 or 28, 2019.[2]

After mailing the package, the two of them then returned to Madison, Wisconsin. KV stayed the next days in Rogers' basement while he went to work.

Rogers and KV did not and could not know whether the FBI had received the package, or what the FBI did with the information contained in the package. Unknown to them, KV's adoptive father was arrested, presumably based on the evidence Rogers and KV sent to the FBI.[3] Local media reported that he was arrested and charged with sexually abusing KV on January 31, 2019.

The investigation presumably caused the FBI to examine KV's social media. This led investigators to Rogers' home on January 31, 2019. Rogers was interviewed by the FBI. Foolishly, he lied to the agents about KV's presence in

[2] *See* 18 U.S. Code § 2252(c). This section provides for an affirmative defense to the possession of child pornography if the defendant—(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—(A) took reasonable steps to destroy each such visual depiction; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

[3] *Adoptive father arrested; Missing teen found safe*, WKYT, January 31, 2019, available at https://www.wkyt.com/content/news/*******-******-Arrest-made-in-Tennessee-teens-disappearance-505160471.html (last visited February 8, 2019) [redacted to remove KV's name].

the residence. But, during this interview he was not told about the arrest of KV's adoptive father. After the interview terminated, Rogers left for work.

As more evidence became available to investigators over the course of the afternoon on January 31, 2019, they returned to the residence and performed a warrantless "exigent circumstances" search of the residence. Complaint at ¶ 5. KV was found in the basement, hiding in a closet.[4] Rogers was arrested without incident at his place of employment. He was interviewed at the Dane County Jail, where the described the above facts to investigators. Law enforcement later obtained a search warrant from the Dane County Circuit Court to search Rogers' residence and car.

There is no evidence that Bryan Rogers attempted to distribute the recording that KV sent him to anyone other than the FBI.

Bryan Rogers' Background. Nothing in his past would foretell that Bryan Rogers would be arrested for the alleged violation of 18 U.S. Code § 2251(a). At 31 years old, he has no prior record of criminal conduct. He has deep roots in the community, having graduated from Lodi High School in 2005. After high school, Bryan remained working in the area and living on his own, mainly in the Wisconsin Dells for the next years. Rogers returned to live with his mother in

[4] There is no evidence that Rogers' mother (Anna) knew of KV's presence in her residence. By all indications, Anna Rogers was surprised when she saw police remove KV from the residence.

about 2013, when he began to pursue a college degree, first taking classes at Madison College, then transferring to the University of Wisconsin—Madison. He lived with his mother in Sun Prairie, then in Madison.

In December, 2018, Bryan Rogers graduated from the University of Wisconsin with a bachelor's degree in Atmospheric and Oceanic Sciences. The degree was the culmination of a lifetime passion for "storm chasing." Every year Bryan would regularly travel to Oklahoma to chase severe weather systems, hoping to spot and photograph tornados. Bryan Rogers is a trained weather-spotter, and was an intern in the meteorology department of a Milwaukee television station in 2017. His photographs were regularly seen on local television and on the Weather Channel.

Bryan has supported himself through college by working part-time, at UPS, then at Fleet Farm. He had started a new job at FedEx to save money to begin the next phase of his adult-life, after college, on the day of his arrest. His employment records shows that he is reliable, dependable and a contributing member of society.

Bryan Rogers' parents divorced when he was in high school. He describes a good relationship with his father, but has always been closer to his mother,

with whom he lived after the divorce. His mother, Anna Rogers, works as an insurance underwriter for a small insurance brokerage located in Sun Prairie. It's a job she has held for about 20 years. His father, Keith Rogers, drives tractor-trailer for FedEx, and lives in Mauston. His parents are supportive of their son and are willing to accommodate any conditions the Court may order to ensure that Bryan returns home pending trial.

To be clear, Bryan Rogers accepts any condition requiring him to be subject to location monitoring by GPS device, rules restricting his movement outside of his mother's residence, rules prohibiting his use or possession of computers or other devices that are connected to the internet, rules restricting his contact with any minors, rules restricting his use of alcohol or any restricted controlled substance (though there is no indication that he has an issue with the same), and rules permitting searches of his residence.

Bryan Rogers' history of residence, family ties, employment history, financial resources, health and prior record all serve to rebut the presumption in favor of detention. His characteristics demonstrate that there are conditions the Court can impose that protect the community from danger and control the risk of flight.

III.

LEGAL BACKGROUND

A. *Pretrial Release*

The presumption of innocence applies to Bryan Rogers. When taken in conjunction with the rules that require the Court to assess his risk of flight and risk to the community, the balance tips in favor of release pending trial. Neither any emotional reaction evoked by the criminal charge, nor the weight of the evidence should be relied on to block Bryan Rogers' release pending trial. Indeed, the weight of the evidence is the least important of the various factors to be considered in determining whether pretrial release is appropriate. *See United States v. Townsend*, 897 F.2d 989 (9th Cir. 1990). Rogers' constitutional rights, founded on the Fifth, Eighth and Fourteenth Amendments' prohibitions of deprivation of liberty without due process and of excessive bail require careful review of pretrial detention orders to ensure that the mandate of the Bail Reform Act of 1984, for release under the least restrictive conditions that will reasonably assure appearance has been respected. *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985), cited with approval by *Townsend*, *supra*.

When the court has determined that a detention hearing is warranted—and Bryan Rogers acknowledges that it is warranted in this case—the Court may consider evidence relating to a defendant's danger to the community. Detention considerations are then guided by the factors set forth in 18 U.S.C. § 3142(g), and the specific consideration of "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *United States* v. *Butler*, 165 F.R.D. 68, 71 (N.D. Ohio 1996); 18 U.S.C. § 3142(g)(4). Accordingly, the government must first prove one or more of the grounds listed in 3142(f)(1) or (2) *as a prerequisite* to the court considering the factor of danger to the community whether there exist appropriate conditions of release in the case.

"Detention hearings are an informal proceeding, and the evidence presented is not governed by the Federal Rules of Evidence." *United States v. Duncan*, 897 F. Supp. 688, 690 (N.D. N.Y. 1988); 18 U.S.C. § 3142(f)(2). The government may proceed in a detention hearing by way of proffer. *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987); *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986); *United States v. Winsor*, 785 F.2d 755, 756 (9th Cir. 1986); and *United States v. Acevedo-Ramos*, 755 F.2d 203, 206-07 (1st Cir. 1985)).

The government bears the burden to establish, by clear and convincing evidence, that no conditions of release will reasonably assure the safety of the community. *United States v. Orta*, 760 F.2d 887 (8th Cir. 1985); *see also United States v. Arena*, 894 F. Supp. 580, 585-86 (N.D.N.Y. 1995) (*citing United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985). "The issue in such a hearing is whether releasing a defendant would pose a danger to the community that would not exist were [the defendant] detained." *United States v. Phillips*, 732 F. Supp. 255, 267 (D. Mass. 1990), *reh'g denied*, 952 F.2d 591 (1st Cir.), *cert. denied*, 113 S. Ct. 113 (1992); *see also United States v. Smith*, 79 F.3d 1208, 1209 (D.C. Cir.1996) (*per curiam*); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985); *United States v. Orta*, 760 F.2d 887 (8th Cir. 1985).

The standard is different when the issue is whether any conditions of release will reasonably assure the defendant's attendance at trial (*i.e.*, his risk of flight); the government need only prove that there are no such conditions by a "preponderance of the evidence." *See United States v. Tedder*, 903 F. Supp. 344, 345 (N.D. N.Y. 1995) (*citing United States v. Martir*, 782 F.2d 1141, 1146 (2d Cir. 1986)); 18 U.S.C. § 3142(c). But the mere opportunity to flee is not enough to justify detention. *United States v. Himler*, 797 F.2d 156 (3d Cir. 1986); *United States*

v. Chen, 820 F.Supp. 1205, 1208 (N.D. Cal. 1992). "Section 3142 does not seek ironclad guarantees, and the requirement that the conditions of release 'reasonably assure' a defendant's appearance cannot be read to require guarantees against flight." *Id.* (citing *United States v. Portes*, 786 F.2d 758, 764 n. 7 (7th Cir. 1986)); *United States v. Hammond*, 204 F.Supp. 2d 1157, 1166 (E.D. Wis. 2002). Indeed, a number of courts have noted that they "require more than evidence of the commission of a serious crime and the fact of a potentially long sentence to support a finding of risk of flight." *United States v. Friedman*, 837 F.2d 48, 50 (2d Cir. 1988); *United States v. Carter*, 996 F.Supp. 260 (W.D. NY 1998). The standard is thus "reasonable assurance."

It is not necessary that the government prove both flight risk and danger to the community to warrant detention. *See United States v. Flores*, 856 F. Supp. 1400, 1401 (E.D. Cal. 1994). Rogers' release may be denied only when there are no conditions that will reasonably assure his appearance and the safety of the community. 18 U.S. Code § 3142(e). "Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in favor of release." *United States v. Chen*, 820 F.Supp. 1205, 1207 (N.D. Cal. 1992). Because the criminal complaint alleges an offense that Congress has deemed to

be a violent offense, a rebuttable presumption arises that no conditions will reasonably assure the appearance of the defendant and the safety of the community. 18 U.S.C. § 3142(e); *United States v. Dominguez*, 783 F.2d 702, 706 n. 7 (7th Cir. 1986) (indictment is sufficient to trigger the presumption).

The presumption shifts the burden of production to the defendant to come forward with some evidence that if released he will not flee or endanger the community. *United States v. Portes*, 786 F.2d 758, 764 (7th Cir. 1985). "The burden of production is not a heavy one to meet . . ." *Dominguez*, 783 F.2d at 707. "Any evidence favorable to a defendant that comes within a category listed in § 3142(g)" can suffice. *Id.*

"The wide range of restrictions available ensures, as Congress intended, that very few defendants will be subject to pretrial detention." *Orta*, 760 F.2d at 891. Only after a hearing and a finding that "no condition or combination of conditions will reasonably assure the appearance" of the defendant, can the judge order a defendant's pretrial detention. 18 U.S. Code § 3142(e). A finding against release must be supported by clear and convincing evidence. 18 U.S. Code § 3142(f).

B. ***Preliminary Hearings.***

Rule 5.1, Fed. R. Crim. P., provides the substantive standard to be applied at a preliminary hearing:

> If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings. * * * If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant.

Rule 5.1(e) and (f), Fed. R. Crim. P.

Probable cause has been defined as "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" The rule of probable cause is a "practical, nontechnical conception" that affords the "best compromise" between the interests of individual liberty and effective law enforcement. Contrary to what its name might seem to suggest, probable cause "demands even less than 'probability,'"; it "requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false." *Woods v. City of Chicago*, 234 F.3d 979, 996 (7th Cir. 2000) (citations omitted).

The purpose of a preliminary hearing is to afford the accused an opportunity to challenge the existence of probable cause to hold him for trial. *United States v. Foster*, 440 F.2d 390, 392 (7th Cir. 1971). Therefore, unlike the *ex parte* probable-cause determinations that a judge makes when reviewing warrant applications, and that the Fourth Amendment requires after the warrantless arrest of a suspect. *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). The Rule 5.1 probable-cause determination is an adversarial proceeding where the defendant may have the assistance of counsel, cross-examine the government's witnesses, introduce his own evidence, and present his legal arguments directly to the judge. *United States v. Rodriguez*, 460 F. Supp. 2d 902, 906–07 (S.D. Ind. 2006). Under Rule 5.1, Fed. R. Crim. P., the magistrate judge makes a *de novo* determination of probable cause based on the facts and circumstances as they exist and are presented at the time of the preliminary hearing and for the purpose of determining only whether the accused may be held to answer at trial. The preliminary hearing does not consider whether probable cause supported the issuance of an arrest warrant or whether officers had probable cause at the time of an arrest, inquiries for which a less-stringent standard of probable cause accommodates the different contexts of facts, circumstances, and balancing of

interests that occur at the time those decisions are made. *Id.; see, e.g., Gerstein*, 420 U.S. at 112 (reasonable margins of error are allowed for arresting officers confronting ambiguous circumstances); *Williams v. Kobel*, 789 F.2d 463, 468–69 (7th Cir. 1986).

IV.

DISCUSSION

A. Pretrial Release

Bryan Rogers has been charged with an offense that Congress has deemed to be a crime of violence, even if he did not engage in violent behavior. Consequently, there exists a presumption in favor of detention.

Bryan Rogers has strong family and community ties. He has resided in South-Central Wisconsin for most of his life. His ties to the community reach beyond his family and include education and employment. These are sufficient bonds to the community to show that there are, in fact, conditions that will reasonably assure his appearance in court. *See United States v. Lopez*, 827 F.Supp. 1107, 1109-11 (D.N.J. 1993) (allowing release of alleged drug trafficker on posting of property from five families where defendant had strong family and community connections, was long time resident of the state, and would be

subjected to home detention and monitoring). *See also Hammond*, 204 F. Supp. 2d 1157, 1165 (E.D. Wis. 2002).

Nor is Rogers a risk of flight. To assure his appearance, electronic monitoring, restrictions on travel, and reporting to Pre-trial Services, among other conditions can be imposed (and regularly are for such cases). *See United States v. O'Brien*, 895 F.2d 810, 815 (1st Cir. 1990) (discussing effectiveness of electronic monitoring), cited with approval in *United States v. Hammond*, 204 F. Supp. 2d 1157, 1165 (E.D. Wis. 2002).

As to dangerousness, given Bryan Rogers' lack of prior criminal record, and the unique facts of this case, the government's argument is general in scope. Unlike the district court's opinion in *United States v. Dominguez*, 629 F. Supp. 701, 711 (N.D. Ind. 1986), where the court discussed the dangers posed by drug traffickers in general. However, "defendant can hardly be expected, after all, to demonstrate that narcotics trafficking is not dangerous to the community." *Id.*, 783 F.2d at 706. But, on the record here, the government offers nothing more concerning Bryan Rogers that his offense presents a risk to the community. The government's position does not consider that Rogers intent was to save KV from

her adoptive father. In light of the government's burden and given the evidence presented by defendant, this is insufficient.

Here, Bryan Rogers has proffered evidence concerning his family, employment, and substantial ties to Madison. He has no prior criminal record. "This evidence of economic and social stability, coupled with the absence of any [recent] criminal record, at least suggests that defendant [ ] would be less likely to continue to engage in criminal activity while on pretrial release." *Id.* The defendant's burden "is not a heavy one." *Dominguez*, 783 F.2d at 707.

Based on all of the information available to this Court, Rogers' risk does not support his detention pending trial. He is not likely to flee or pose a danger to the safety of any other person or the community if released. The Court may make such a finding based on "legal" reasons, "factual" reasons, or some combination of both.

Here, conditions of release can adequately protect the community and minimize the risk of flight. The conditions that may be imposed are numerous and specific to address risks, including prohibitions on computer use, contact with children, and travel. Bryan Rogers should be monitored by GPS, and could

even by monitored by his family when he is restricted to his residence. Abundant modalities to assure appearance and community safety exist.

B. Was a Crime Committed?

Bryan Rogers wanted to help KV escape the home in which she was being sexually assaulted by her adoptive father. He proposed a number of ways to leave and to preserve evidence of the crimes being committed against her. Rogers reasoned that, if there was a recording that clearly showed KV's father sexually assaulting her, law enforcement (and her family) would have to take her claims seriously. Their communications also show that Roger suggested that KV run away, go to the police, or go to the hospital for a forensic sexual assault examination.

What Rogers failed to understand was that if KV made a recording of her father assaulting her, and if she sent a copy of the same to Rogers (rather than to law enforcement), then Rogers could be charged with a crime (even though possession of the same recording by law enforcement transformed that which is contraband into demonstrative evidence).[4] That his possession of evidence of a

[4] Rogers has been charged by criminal complaint with a violation of 18 U.S. Code § 2251(a), which provides that "Any person who … persuades, induces … or coerces any minor to engage in … with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct … shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or

serious crime could create criminal liability for him was not understood by Rogers. That he helped KV send evidence to the FBI is a good measure as to his intent. This perspective should affect the manner in which the Court evaluates the strength of the government's case. Rogers did not possess the recording made by KV for purposes of sexual exploitation. This is not the conduct that the Congress was seeking to punish so harshly. This is not a mill-run case.

The issue for purposes of § 2251(a) when the defendant and a minor engage in the sexually explicit conduct with the dominant purpose of producing the visual depiction, he violates § 2251(a); but when he and the minor engage in the sexually explicit conduct and incidental to that conduct a visual depiction is produced, then he may have committed a crime, but he hasn't violated § 2251(a). The Supreme Court explained that for a conviction the government has to show that engaging in forbidden sexual activity "must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result." *United States v. Mortensen*, 322 U.S. 368, 374 (1944). After *Mortensen*, the inquiry in cases (especially travel cases) focused on whether the proscribed

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affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

act was a dominant purpose or merely incidental. *See United States v. Vang*, 128 F.3d 1065, 1068 (7th Cir. 1997) (Although sex didn't have to be "the sole purpose" of the travel, it did have to be "a dominant purpose, as opposed to an incidental one. A person may have more than one dominant purpose for traveling across a state line."). Other courts have defined a dominant purpose to mean "efficient," "compelling," "significant," or "motivating," not "incidental," or not "an incident" to the defendant's purpose in traveling.[5] While it can be difficult to capture the dividing line between what's dominant and what's incidental, it can be done. *See Mortensen*, 322 U.S. at 377; *see also Hansen v. Haff*, 291 U.S. 559, 563 (1934) (noting "if the purpose of the journey was not sexual intercourse, though that be contemplated, the statute is not violated"); *United States v. Mancuso*, 718 F.3d 781, 794 (9th Cir. 2013). And the Seventh Circuit's discussion in *United States v. McGuire*, provides a good overview of how courts have struggled with

[5] *See United States v. Julian*, 427 F.3d 471, 485 (7th Cir. 2005) (holding that purpose of facilitating international travel for prostitution must be "significant" purpose); *United States v. Hitt*, 473 F.3d 146, 152 (5th Cir. 2006) (holding that Mann Act violation requires showing that illicit sexual activity was among "efficient and compelling purposes of the travel"); *United States v. Hayward*, 359 F.3d 631, 637–38 (3d Cir. 2004) (holding that purpose of interstate transportation of minor for sex must be more than incidental); *United States v. Meacham*, 115 F.3d 1488, 1495–96 (10th Cir. 1997) (holding that transportation of minor for sex violation requires that sexual activity be "efficient and compelling purpose"); *United States v. Campbell*, 49 F.3d 1079, 1083–84 (5th Cir. 1995) (applying "efficient and compelling" standard to Mann Act violation); *United States v. Ellis*, 935 F.2d 385, 390 (1st Cir. 1991) (same).

the phrase, even though the discussion in *McGuire*, is, at times, in tension with the Supreme Court's own renderings. 627 F.3d 622, 624–26 (7th Cir. 2010).

While most of the cases constructing an argument around "for the purpose of" arise in the context of travel-act crimes, other courts have had to confront the issue. *See United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015); *United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir. 2012); *United States v. Morales-de Jesus*, 372 F.3d 6, 21–22 (1st Cir. 2004) (noting the statute's specific intent element).

The temptation in reading the production of child pornography statute is to read the specific intent as being aimed at the taking of the pictures—that is, the defendant purposefully took the photos. But courts have adamantly rejected that reading of the statute, and in doing so, these courts have made two important observations. First, when it comes to the statute's specific-intent language, "a defendant must engage in the sexual activity with the specific intent to produce a visual depiction; it is not sufficient simply to prove that the defendant purposefully took a picture." *Palomino-Coronado*, 805 F.3d at 131. So there has to be a plan and purpose to the sex—that is to produce an image. Second, the production of the image can't just be incidental to the sex. *See United States v.*

Sirois, 87 F.3d 34, 39 (2d Cir. 1996) (noting that the government must prove that producing visual depictions of sexual activity was one of the defendant's dominant motives).

Those two points undergird a proper reading of the statute. The purpose element has to be proven in some manner other than simply showing that a picture was taken of the sexual abuse. As one court put it in discussing the same language but in relation to the Guidelines' cross-reference: "It is simply not enough to say 'the photo speaks for itself and for the defendant and that is the end of the matter,"' rather, "it is critically important to be certain that the defendant's purpose was, in fact, to create pornographic pictures." *United States v. Crandon*, 173 F.3d 122, 129 (3d Cir. 1999). Cases come in all kinds along this spectrum. *See, e.g., United States v. Ortiz–Graulau*, 526 F.3d 16, 19 (1st Cir. 2008) (noting the "number of photographs, many of sexually explicit poses, permit[ted] a strong inference that some of the conduct occurred in order to make the photographs"). In the Fourth Circuit's case, the defendant had sex with the victim on other occasions, and there was one depiction and deleted that would be considered child pornography. *Palomino-Coronado*, 805 F.3d at 129. There, the court overturned the conviction and found that no reasonable juror could find

that the sexual activity was for the purpose of producing a visual depiction. *Id.* at 133.

There are cases on the opposite end of the spectrum too. For example, in *United States v. Morales-de Jesus*, the defendant argued that the video he produced "was the result of, not the motive behind, his sex acts with the minor." 372 F.3d at 21. In rejecting this argument, the court cited the defendant's active concealment from the minor of the videotaping, that he instructed the minor regarding positions he wanted her to assume relative to the camera, and he told her what to say while the camera recorded their activities, and zoomed the camera in and out during sex. *Id.* at 21–22. And in *United States v. Wallace*, the court relied on the fact that the defendant had more than one videotape of himself abusing numerous sleeping minor females, in addition to other sexually explicit images of minors. 713 F.3d 422, 425 (8th Cir. 2013); *see also United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir. 2012) (holding that taking the camera to boy's room, because it wouldn't fit in the car where they normally had sex amounted to "purposeful conduct" and that the videotaping of the boy could not "be described as incidental").

At the initial appearance the government indicated that it intends to present evidence to the Grand Jury of an additional violation—a violation of 18 U.S. Code § 2423.[6] This offense seeks to punish interstate travel for the purpose of unlawful sexual activity. Rogers does not know whether the government will offer evidence regarding this possible charge at the preliminary hearing. In the event evidence or argument relating to the charge is offered, he points out that he believes that the evidence will show that his travel was not motivated by sexual exploitation. Rather, his intent when he crossed state lines was to save KV from further sexual exploitation; that intent does not prove the commission of a violation of 18 U.S. Code § 2423. Again, Roger's motive in transporting KV shows that this is not a mill-run case. And his arguments against (or mitigating) a violation of § 2423 mirror those previously made.

[6] This section of the code criminalizes taking a minor across state lines for unlawful sexual activity; too, it criminalizes an adults' interstate travel for the purpose of unlawful sexual activity:

(a) Transportation With Intent To Engage in Criminal Sexual Activity.—
A person who knowingly transports an individual who has not attained the age of 18 years in interstate … with intent that the individual engage … in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) Travel With Intent To Engage in Illicit Sexual Conduct.—
A person who travels in interstate commerce … for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

While the preliminary hearing is not a time to raise a legal challenge to the criminal charges, a full evaluation of the charge requires the Court to consider the strength of the evidence and where on the continuum of conduct the statute prohibits, the defendant's conduct falls.

V.

CONCLUSION

On the specific facts of this case, and this defendant, release pending trial should be ordered. Any specific risks can be appropriately addressed through conditions established by the Court and monitored by U.S. Pretrial Services. Continued detention would only serve a retributive purpose. For the reasons he explains here, Bryan Rogers respectfully requests that this Court order his release pending trial.

Dated this 11th day of February, 2019.

Respectfully submitted,

BRYAN D. ROGERS, *Defendant*

Electronically signed by Marcus J. Berghahn

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, I electronically filed **BRYAN ROGERS' MEMORANDUM IN SUPPORT OF RELEASE PENDING TRIAL** with the Clerk of Court using the ECF system which will send notification of such filing to the following:

Julie Pfluger
Assistant United States Attorney
United States Attorney's Office
Western District of Wisconsin
660 W. Washington Avenue
Madison, WI 53703

Dated this 11th day of February, 2019.

Electronically signed by Marcus J. Berghahn

Marcus J. Berghahn

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