

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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| UNITED STATES OF AMERICA, Plaintiff, vs. KIMBERLEE PITAWANAKWAT, a/k/a "Stormy," Defendant. | CR. 20-50122-02-JLV ORDER |
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A grand jury charged defendant Kimberlee Pitawanakwat with making false statements in violation of 18 U.S.C. § 1001(a)(2) and being an accessory after the fact in violation of 18 U.S.C. § 3. (Docket 1). Now pending before the court is defendant's pro se motion to dismiss the indictment. (Docket 29). However, defendant is represented by counsel. "[A] district court has no obligation to entertain pro se motions filed by a represented party." United States v. Pate, 754 F.3d 550, 553 (8th Cir. 2014) (quoting Abdullah v. United States, 240 F.3d 683, 686 (8th Cir. 2001)). The court will only accept motions filed by counsel. In the event defendant is permitted to proceed pro se, she may refile her motion. No good cause shown, it is

ORDERED that defendant's motion to dismiss the indictment (Docket 29) is denied.

Dated December 4, 2020.

BY THE COURT:

/s/ Jeffrey L. Viken

JEFFREY L. VIKEN

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs.

KIMBERLEE PITAWANAKWAT,
Defendant

5:20-cr-50122

MEMORANDUM OPINION
AND ORDER DENYING
MOTIONS TO DISMISS
AND MOTION TO EXCUSE
STANDBY COUNSEL

Pending before the Court are several pretrial motions filed by Defendant.

First is her motion for continuance, (Doc. 237), rendered moot by the scheduling order which sets her trial for October 16, 2023. (Doc. 239). The remaining motions include her Motion to Dismiss and for Alternative Relief, (Doc. 238); a second motion to dismiss, (Doc. 253); a third motion to dismiss, (Doc. 260); and a motion to dismiss her standby counsel, (Doc. 261). The Government has responded, (Doc. 255, 257), and Defendant has filed replies, (Doc. 256, 258), and a supplement, (260).

Defendant filed a pro se motion to dismiss previously, in which she raised issues of discrimination, lack of jurisdiction, and other matters similar to what she raises in her current motions. (Doc. 29). The district court did not consider her

motion because Defendant was represented by counsel. (Doc. 32). The court's order indicated Defendant could refile her motion if she were permitted to proceed pro se, (id.), which she has done.

BACKGROUND

Defendant was indicted for making materially false statements in violation of 18 U.S.C. § 1001(a)(2) and as an accessory to George Dull Knife in connection with a shooting in violation of 18 U.S.C. § 3. (Doc. 1). Defendant was released with conditions pending trial, (Doc. 18), and currently resides in the State of Oregon. Dull Knife pleaded guilty to the charges against him and was sentenced to 72 months imprisonment. (Doc. 179, 216). Defendant is proceeding pro se, having become dissatisfied with the attorneys assigned to represent her. She has maintained her innocence in her many filings with the court.

MOTIONS TO DISMISS

1. Legal Standard for Dismissal

Defendant invokes F.R.Cr.P. 12 as the basis for her motions to dismiss. Fed. R. Crim. P. 12. The district court has the authority to dismiss an indictment pursuant to its supervisory powers as follows: “[T]o implement a remedy for violation of recognized rights; to preserve judicial integrity by insuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct.” *United States v. Elmardoudi*, 611 F.

Supp.2d 872, 878 (N.D. Iowa 2007) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1974)). The court may dismiss an indictment for outrageous government conduct “only if the conduct falls within the narrow band of the most intolerable government conduct.” *United States v. Boone*, 437 F.3d 829, 841 (8th Cir. 2006). See also *United States v. Jones*, 70 F.4th 1109, 1112 (8th Cir. 2023) (to warrant dismissal, Government conduct must “shock the conscience”).

The jury is given the task of evaluating the credibility of witnesses. *United States v. Dowty*, 37 F.4th 489, 494 (8th Cir. 2022); *United States v. Never Misses A Shot*, 781 F.3d 1017, 1025 (8th Cir. 2015). As *Never Misses A Shot* reinforced, the jury weighs the testimony of witnesses, including any impeaching evidence. *Id.*

2. Defendant’s allegations (Doc. 238, expanded upon by Doc. 253, 260).

A. Defendant’s account of “background of the case”—Defendant provides a lengthy statement of her view of pertinent “background information,” alleging incompetence of counsel, (Doc. 238., PgID 1173), asserting the lack of factual basis for the charges, (id., PgID 1174-75), discussing a felony conviction for failure to register as a sex offender of one of the victims in the case, (id., PgID 1176), and complaints that she has not received sufficient evidence of this witness’s background. The Court notes that Defendant’s motions to compel discovery, (Doc. 240, 247), were resolved in a separate order.

Defendant's first motion to dismiss continues with an allegation that a witness lied to investigators about the shooting incident and seeks to test a bullet found in the victims' car. (Doc. 238, PgID 1177). She challenges the credibility of an investigating officer, accuses the Government of violating its treaty obligations in its hiring of "allegedly corrupt tribal police," (id.), and repeats rumors about an officer. (Id., PgID 1177-78). She accuses prior judges assigned to the case of failing to assist her in "establishing the truth" and of treating her "as barely human." (Id., PgID 1178).

Defendant's additional filings include allegations that jurisdiction is lacking, (Doc. 253, PgID 1375), the Government has engaged in misconduct, (id., PgID 1371), and the Government has perpetrated lies, (id. PgID 1373, 1377). She adds to her third motion to dismiss a motion that the prosecutor in the case be referred to the Department of Justice for investigation and includes unfounded personal attacks on the prosecutor, (Doc. 260, PgID 1483).

B. Defendant's allegation of "failure to state an evidentiary basis for Count V"—Defendant asserts that she "understands that the Government has no factual evidence" to support Count V. (Doc. 238, PgID 1178-79). She asserts the prosecutor admitted this to one of her prior defense counsel, and seeks to subpoena him and to delay the case so she can conduct more research.

The Court notes that the case has been delayed rendering Defendant's request for delay moot. Defendant is free to subpoena witnesses for trial if she so desires.

The Government responds that Defendant's allegation concerning lack of support for Count V is in essence an allegation of error in the Grand Jury proceedings. The Court discerns no such error in Defendant's unsupported allegation about her "understanding" of a lack of evidence, and denies the motion to dismiss on this basis. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1987); *United States v. McKie*, 831 F.2d 819, 821 (8th Cir.1987). See also *United States v. Stewart*, 2021 WL 2948547, *2 (D.S.D. 2021).

C. Defendant's allegation that "without an evidentiary basis for Count V, jurisdiction is lacking for a charge under the Major Crimes Act for an alleged violation of 18 U.S.C. § 1001" (Doc. 238, PgID 1179)— Defendant also renews her claims of lack of jurisdiction in her subsequent filings, as noted above. (Doc. 253, PgID 1375; Doc. 256, PgID 1458; Doc. 258).

The evidence at trial will establish whether and where an offense occurred, and what role Defendant is alleged to have played in it. The Court will not grant a motion to dismiss unless "the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense."

United States v. Covington, 395 U.S. 57, 60 (1969). See also *United States v.*

Turner, 842 F.3d 602, 604-05 (8th Cir. 2016). It is true that the court can rule on an issue of law presented in a case, but that is permitted only when consideration of evidence outside the indictment is “undisputed and agreed to by the parties.” *United States v. Pope*, 613 F.3d 1255, 1261 (10th Cir. 2010).

The allegations in the indictment supply sufficient evidence for the Court to exercise jurisdiction in this case. (Doc. 1). The evidence at trial will determine what occurred and where. The Court denies the motion to dismiss based on this allegation.

D. Defendant’s allegation that a law enforcement officer was not a federal law enforcement officer, and if he was, he acted “ultra vires” (Doc. 238, PgID 1179)—The evidence at trial will establish the facts surrounding the allegation that Defendant made false statements within the purview of 18 U.S.C. § 1001(a). The Court denies Defendant’s motion to dismiss on this basis. Her later filings continue to allege misconduct and corrupt actions on the part of an officer who may be a witness in the case. (Doc. 253, 258). Her allegations are speculative; they cannot and do not form the basis for a dismissal of the charges against the Defendant. The Court denies her motions to dismiss on this basis.

E. Defendant’s allegation that “the Government’s own witnesses concede no shooting took place at the Dull Knife residence” (Doc. 238, PgID 1179)—The evidence at trial will determine what the witnesses’ accounts are and the jury will

be instructed to evaluate their credibility. *Never Misses A Shot*, 781 F.3d at 1025.

The Court denies the motion to dismiss on this basis.

F. Defendant's allegation that the Government has failed in its obligation to provide *Brady* information and that a law enforcement officer "is a corrupt officer and his corruption is being protected from *Brady* disclosure"—This issue has been resolved in connection with the resolution of Defendant's motions to compel, (Docs. 240, 247, 252). The issue is moot and the Court denies the motion to dismiss on this basis.

G. Defendant's allegation that the Government is in violation of the Fort Laramie Treaty of 1868 and other treaties (Doc. 238, PgID1180; Doc. 256, PgID 1467; Doc. 258, PgID 1474)—Defendant invokes the recent decision in *Oglala Sioux Tribe v. United States*, ___ F.Supp.3d ___, 2023 WL 3606098 (D.S.D. 2023), as authority for her claim in Doc. 238. The lawsuit she references was filed by the Oglala Sioux Tribe to address funding of law enforcement on the reservation. It does not apply to Defendant's criminal case pending in this Court. Defendant's motion to dismiss or for additional time to do research is denied.

Defendant also claims she may have treaty rights based upon the "bad man" clauses of the treaty. The Court can find no basis for her claim of "treaty rights," particularly because she is not an Indian for purposes of claiming such rights. (Doc. 255, PgID 1452). See generally *United States v. Stymiest*, 581 F.3d 759, 763-

64 (8th Cir. 2009) (discussing factors to determine status as Indian); *United States v. Driver*, 755 F.Supp. 885, 888 & n. 7 (D.S.D.) aff'd 945 F.2d 1410 (8th Cir. 1991) cert. denied 502 U.S. 1109 (1992); *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988). Her motion to dismiss on this basis is denied.

H. Defendant's allegation that "previous court actions against Defendant have been prejudiced, unjust and likely are founded upon racist activity" (Doc. 238, PgID 1181)—Defendant supports her allegation by referencing "historical precedents regarding atrocities against Native Americans," "white supremacy," and several more descriptions of historical events. She claims a "racist and biased approach" to her case, (id., PgID 1182, ¶ 25). The Court finds there is nothing to support her allegation of racism or mistreatment in this case and denies her motion on this basis. *Jones*, 70 F.4th at 1112; *Boone*, 437 F.3d at 841.

J. Defendant's allegation of "onerous conditions of release, precluding contact with her daughter for over two years" (Doc. 238, PgID 1183)—Defendant claims this condition of release is part of a "pattern" of pressure to have her plead guilty and "further evidences a pattern of treating Native Americans as non-humans." (Id.). The Court recognizes that Defendant's daughter is a potential witness for the Government in the case. (Doc. 240).

Pursuant to 18 U.S.C. § 3142, the court may consider whether in lieu of detention, release on conditions is practicable. Previous rulings have addressed

Defendant's possible detention and release with conditions. (Doc. 10, 11, 18, 124, 132). One of the conditions authorized by statute is that a defendant "avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense." 18 U.S.C. § 3142(c)(B)(v). This is the apparent basis for imposing the condition pertaining to Defendant's daughter. The Court finds no reason to disturb previous rulings with respect to Defendant's release with this condition. The Court denies Defendant's motion to dismiss on this basis.

K. Defendant's assertion that the Court should exercise its "inherent supervisory authority" to dismiss the case-- The Court rejects Defendant's assertion that dismissal is required because of "misconduct," "false accusations," and other issues, (Doc. 238, PgID 1183; Docs. 253, 258, 260).

Defendant alleges the prosecutor has forged a document in connection with Defendant's arrest. (Doc. 253, PgID 1377-79; Doc. 253-1; Doc. 260, PgID 1479). Apparently, Defendant's standby counsel asked the prosecutor about the matter. The prosecutor replied that the issue involved a "paperwork chain" and that she had no information about the circumstances of Defendant's arrest in Oregon. (Doc. 260, PgID 1480). Defendant alleges a conspiracy, withholding of exculpatory evidence under *Brady*, and violations of federal law. Apparently, Defendant's counsel was satisfied with the prosecutor's response and did not perceive there to be any misconduct, much less a violation of federal law.

At this time, the Court finds there has not been misconduct justifying dismissal and, therefore, declines to dismiss the indictment. *Jones*, 70 F.4th at 1112.

Furthermore, the Court has considered the documents filed by both Parties. The Court declines to grant Defendant's motion to dismiss based on her theory the Government has waived various arguments and that therefore, she is entitled to dismissal. (Doc. 258, PgID 274). Defendant's motion to dismiss on the grounds of waiver by the Government is denied.

3. MOTION FOR THE COURT TO DISMISS STANDBY COUNSEL

Defendant has moved for the Court to issue an Order excusing standby counsel from participating in her representation. Given that the Federal Rules of Evidence and Federal Rules of Criminal Procedure apply at Defendant's criminal trial, the Court will require standby counsel to be available. The Court denies Defendant's motion to dismiss standby counsel. (Doc. 261).

CONCLUSION

Defendant's motions to dismiss and for alternative relief make allegations that are unsupported by the facts. She urges dismissal by invoking matters that will be determined based on evidence introduced at trial. Her motions concerning discovery are rendered moot based on the order resolving such issues. For these

reasons, the Court denies Defendant's motions to dismiss in their entirety. (Doc. 238, 253, 260).

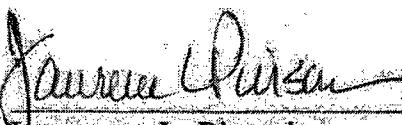
Given the nature of federal criminal proceedings and the applicability of the Federal Rules of Evidence and Federal Rules of Criminal Procedure in Defendant's upcoming criminal trial, the Court denies Defendant's motion to excuse her standby counsel. (Doc. 261).

Accordingly, IT IS ORDERED that

1. Defendant's motions to dismiss or for alternative relief are denied. (Doc. 238, 253, 258, 260);
2. Defendant's motion to excuse her standby counsel is denied. (Doc. 261).

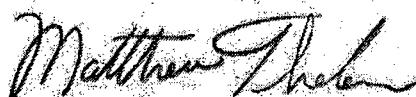
Dated this 23rd day of August, 2023.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK



Matthew W. Thelen

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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| UNITED STATES OF AMERICA, Plaintiff, vs. KIMBERLEE PITAWANAKWAT, Defendant. | 5:20-CR-50122-RAL ORDER ON PRETRIAL MOTIONS |
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This Court heard argument on pretrial motions at a hearing on October 11, 2023. The Government filed motions in limine, Doc. 292, standby counsel filed a motion for discovery, Doc. 296, and the Defendant filed a motion to dismiss the superseding indictment, Doc. 300, a motion for recusal, Doc. 302, and a request for a continuance within a prior response to a prior pleading, Doc. 280. The granting of a motion in limine precludes certain matters from being presented to the jury—whether in voir dire, opening statements, questioning of witnesses, statements by witnesses, or closing argument—unless this Court rules otherwise after discussion with counsel outside the hearing of the jury. For the reasons discussed on the record during the pretrial conference, it is

ORDERED that Defendant's motion for recusal, Doc. 302, is denied. Defendant has not met the substantial burden necessary to justify recusal of the undersigned. It is further

ORDERED that Defendant's motion to dismiss the superseding indictment, Doc. 300, is denied. Defendant's charges for false statements and being an accessory after the fact are general

crimes that do not depend on whether the Defendant is an Indian or whether the alleged crimes occurred in Indian country, and the Defendant's pretrial challenge to the Government's evidence does not warrant dismissing the superseding indictment. It is further

ORDERED that Defendant's request for a continuance, Doc. 280, is denied. Judge Lawrence L. Piersol already denied her recent request for a continuance. This case has been pending for over three years and since September 2020 and Defendant has received seven continuances of the trial date. This trial date was set as a firm trial date by a prior judge, and the parties have had ample notice that the case is going to trial next week. It is further

ORDERED that standby counsel's motion for discovery, Doc. 296, is granted in part to the extent that this pro se Defendant shall receive direct access to the discovery that she previously viewed at the Federal Public Defender's Office in Oregon in a form redacted of personal identifying information such as addresses and social security numbers, in addition to the discovery Judge Piersol ordered be sent to her directly. Counsel for the United States and Defendant shall coordinate on how best to deliver the hard copies of discovery to Defendant so that she can be assured that she has seen all the discovery. It is further

ORDERED that the Government's motions in limine, Doc. 292, are granted in part and denied in part to the extent that (1) no reference to the possible penalty or punishment of Defendant shall be made during trial; (2) no reference to plea discussions or offers of pretrial diversion shall be made during trial; (3) no mention of how conviction of a felony might affect Defendant's career, education, or future plans is allowed; (4) no witness may opine on the truthfulness of the allegations or on whether Defendant is guilty or innocent at any time during trial, but Defendant acting pro se and counsel of course remain free to argue whether the evidence does or does not prove guilt beyond a reasonable doubt and argue from the evidence whether Defendant is guilty

or innocent; (5) subject to potential rule of completeness issues, hearsay statements made by Defendant and being offered by Defendant to exculpate herself generally are inadmissible; (6) any impeachment of witnesses must comply with the Federal Rules of Evidence in that a witness can be cross-examined only on matters relevant to credibility or the facts of the case and not on scandalous allegations that cannot be proven up or are unrelated or inadmissible; (7) no mention of possible jury nullification (arguing that the jury can disregard the instructions of law to reach a verdict) is permitted; (8) speaking objections will not be allowed, meaning a party objecting to a question must state "Objection" and then briefly state the grounds rather than seeking to interject argument before the jury during the opposing party's examination of a witness; and (9) other than the primary case agent, FBI Special Agent Kevin Seymore, fact witnesses shall be sequestered until both sides agree to release any such witnesses from subpoena. It is finally

ORDERED that the Clerk of Court immediately email the pro se Defendant a copy and notify the Defendant of entry of this order and that if Defendant has any questions about these rulings, they can be addressed at the final pretrial conference at 11:00 a.m. on Monday, October 16, 2023, in Courtroom 1 of the United States Courthouse in Rapid City.

DATED this 13th day of October, 2023.

BY THE COURT:



ROBERTO A. LANGE
CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3250

In re: Kimberlee Spring Pitawanakwat

Petitioner

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50122-LLP-2)

JUDGMENT

Before GRUENDER, ERICKSON, and KOBES, Circuit Judges.

Petition for writ of mandamus has been considered by the court and is denied.

Petitioner's remaining pending motions are denied as moot.

Mandate shall issue forthwith.

October 12, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3295

United States of America

Appellee

v.

Kimberlee Spring Pitawanakwat

Appellant

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50122-RAL-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 27, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3295

United States of America

Plaintiff - Appellee

v.

Kimberlee Spring Pitawanakwat

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50122-RAL-2)

JUDGMENT

Before GRUENDER, ERICKSON, and KOBES, Circuit Judges.

This matter comes before the court on the original record of the district court. After a review of that record and the appellant's Notice of Appeal, it is hereby ordered that the portion of the appeal that challenges the denial of the appellant's motion to dismiss is dismissed as moot. It is further ordered that the remainder of the appeal, which concerns the denial of motions to recuse and for a continuance, is dismissed for lack of jurisdiction, as it is premature.

October 25, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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| UNITED STATES OF AMERICA, Plaintiff, vs. GEORGE DULL KNIFE, Defendant. | CR. 20-50122-01-JLV ORDER |
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Defendant George Dull Knife is charged with the discharge of a firearm during and in relation to a crime of violence, assault with intent to commit murder and assault with a dangerous weapon. See Docket 1. He was arrested on the pending charges in Oregon and appeared for a detention hearing in the District of Oregon on September 30, 2020. See Docket 57-1. At the conclusion of that hearing, the magistrate judge ordered Mr. Dull Knife to be detained “without prejudice so that the matter [could] be considered again with new information once Mr. Dull Knife return[ed] to South Dakota,” where the charged offenses allegedly occurred. Id. at p. 13. On November 30, 2020, after returning to the District of South Dakota, Mr. Dull Knife made his initial appearance before Magistrate Judge Daneta Wollmann. See Docket 43.

On March 18, 2021, defense counsel filed a motion seeking pretrial release from custody for Mr. Dull Knife. (Docket 57). Counsel stated Mr. Dull Knife “proposes to reside with his sister . . . in Rapid City, SD, to be closer to court. He agrees to all the proposed conditions listed in the pretrial services

report." Id. at p. 1. On March 22, 2021, Magistrate Judge Wollmann held a hearing on the motion. See Docket 60. She subsequently entered an order finding a serious risk Mr. Dull Knife would endanger the safety of another person or the community and ordered him detained pending trial. (Docket 61). Now pending is Mr. Dull Knife's appeal from that order. (Docket 68). Also pending is a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 previously filed by Mr. Dull Knife on February 10, 2021. (Docket 42). The court takes up the appeal and *pro se* petition in turn.

I. Appeal from Order Denying Pretrial Release

A. Facts

This preliminary factual recitation is based on the allegations in the indictment (Docket 1), information contained in the pretrial services report (Docket 25) and addendum (Docket 26), Mr. Dull Knife's motion for release (Docket 57) and the attached transcript of the hearing in the District of Oregon (Docket 57-1), and the transcript of his reopened detention hearing before Magistrate Judge Wollmann (Docket 64).

The charges against Mr. Dull Knife stem from an incident in August 2020 involving the shooting of a vehicle. See Docket 1; Docket 57-1 at p. 4. Multiple witnesses identified Mr. Dull Knife as the alleged shooter. (Docket 64 at p. 5). Two individuals arrived in the vehicle at the residence Mr. Dull Knife shared with his partner, the co-defendant in this case. Id. at p. 8. They were there to pick up another individual who was at the residence, but that person was not

ready to leave so the vehicle's occupants decided to come back later. Id. As they left, Mr. Dull Knife allegedly pursued the vehicle, shooting multiple rounds into it. Id.; see also Docket 57-1 at p. 4. The shooting caused significant property damage to the vehicle, and one of the vehicle's occupants was struck, causing serious injury to her hand. (Dockets 57-1 at p. 4 & 64 at pp. 4-5). Within days of the incident and after having been in contact with law enforcement related to the investigation of this case, Mr. Dull Knife and his partner, the co-defendant in this case, left South Dakota with their infant child and travelled to Oregon. See Dockets 57-1 at p. 4 & 64 at pp. 5-6. They stayed with family of Mr. Dull Knife's partner for several weeks until his arrest on the instant charges. (Docket 25 at p. 2). The government contends Mr. Dull Knife's move to Oregon was an attempt to elude arrest. See Dockets 57-1 at p. 4 & 64 at pp. 5-6. However, Mr. Dull Knife contends the purpose of the family's move was to live with and provide care for his partner's ailing mother. See Docket 57-1 at pp. 5-6.

Prior to the incident alleged in this case, Mr. Dull Knife was a lifelong resident of South Dakota, living in Rapid City and the Pine Ridge Reservation. (Docket 25 at p. 2). He has a history of employment working for the Oglala Sioux Tribe's Border Patrol during the COVID-19 pandemic and as a wood vendor on the reservation. Id. He has negligible criminal history according to state and federal records. (Dockets 26 at p. 1 & 64 at p. 5). However, his tribal criminal record indicates past arrests for child endangerment, disorderly

conduct, elder abuse, breaking and entering, a weapons offense and multiple assaults. See Docket 64 at pp. 5, 14-15.

If released from pretrial custody, Mr. Dull Knife proposes to live with his sister in Rapid City. Id. at p. 3. His sister has represented she is willing and prepared to have Mr. Dull Knife live with her and ensure his appearance in court. Id. The United States Probation Office recommended Mr. Dull Knife be released on his own recognizance with conditions of release, including that he shall not have any contact with the alleged victim in this case, witnesses or the co-defendant. See Docket 26 at pp. 1-2.

B. Legal Standard

A person “ordered detained by a magistrate judge . . . may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order.” 18 U.S.C. § 3145(b). The district court reviews a detention order entered by a magistrate judge *de novo*. See United States v. Maull, 773 F.2d 1479, 1481 (8th Cir. 1985) (*en banc*). “To engage in a meaningful *de novo* review, the district court must have available the options open to the magistrate” under the Bail Reform Act, 18 U.S.C. § 3142. Maull, 773 F.2d at 1482 (referencing United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1987) (*en banc*)). The district court “shall order the pretrial release of the person on personal recognizance, or upon execution of an 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.” 18 U.S.C. § 3142(b). If the

court determines release upon personal recognizance or an unsecured appearance bond will not reasonably assure appearance or will endanger the safety of others, it must next consider whether release on conditions will. See id. § 3142(c). If so, the court “shall order the pretrial release of the person” subject to the conditions that the person “not commit a Federal, State, or local crime during the period of release and . . . cooperate in the collection of a DNA sample,” if authorized under 42 U.S.C. § 14135a, as well as the “least restrictive further condition, or combination of conditions.” 18 U.S.C. § 3142(c)(1)(A)-(B).

In determining whether release on conditions is appropriate, the court considers:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence . . . ;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including—
 - (A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial . . . ; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.

Id. § 3142(g).

However, for certain enumerated offenses, for example if the court “finds that there is probable cause to believe that the person committed . . . an offense under section 924(c) [of title 18],” a rebuttable presumption applies “that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community.” Id. § 3142(e)(3). “In a presumption case . . . a defendant bears a limited burden of production – not a burden of persuasion – to rebut that presumption by coming forward with evidence he does not pose a danger to the community or a risk of flight.” United States v. Abad, 350 F.3d 793, 797 (8th Cir. 2003) (quoting United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001)). “Once a defendant has met his burden of production relating to these two factors, the presumption favoring detention does not disappear entirely, but remains a factor to be considered among those weighed by the district court.” Id.

If the presumption is rebutted, “[a] defendant may be detained before trial ‘[o]nly if the government shows by clear and convincing evidence that no release condition or set of conditions will *reasonably assure* the safety of the community and by a preponderance of the evidence that no condition or set of conditions . . . will *reasonably assure* the defendant’s appearance’” Id. (quoting United States v. Kisling, 334 F.3d 734, 735 (8th Cir. 2003) (emphasis in original)).

C. Analysis

Mr. Dull Knife is charged with an offense to which the rebuttable presumption applies—discharge of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). See Docket 1. He bears the burden of production to present evidence he does not pose a flight risk or danger to the safety of another person or the community. In determining whether Mr. Dull Knife produced sufficient evidence to rebut the presumption of detention, the court looks to the Bail Reform Act factors. See United States v. Cantu, 935 F.2d 950, 951 (8th Cir. 1991).

i. Nature of the offenses charged

The serious nature of the offenses charged weigh against a finding that the detention presumption is rebutted. Mr. Dull Knife is charged with assault with intent to commit murder and assault with a dangerous weapon, as well as with discharging a firearm during those alleged assaults. The alleged victim of the shooting suffered a significant injury to her hand. Based on the circumstances of the incident known to the court at this time—specifically, that Mr. Dull Knife allegedly pursued and fired multiple unsolicited rounds into a vehicle leaving his property—it seems fortunate for Mr. Dull Knife and the occupants of the vehicle that the outcomes for everyone involved were not more severe.

element of Mr. Dull Knife's history that gives the court pause and weighs against a finding that the detention presumption is rebutted.

iv. Danger to Any Person or the Community

The violent nature of the offenses charged, the highly dangerous conduct that is the basis of those charges and Mr. Dull Knife's tribal record indicating at least some history of violent behavior, taken together, weigh against a finding that the detention presumption is rebutted.

Having considered the facts of this case as they are known at this time and the Bail Reform Act factors, the court finds Mr. Dull Knife has not presented sufficient evidence that he does not pose a danger to the community or a risk of flight to rebut the presumption of pretrial detention.

II. Petition for Writ of Habeas Corpus

On February 10, 2021, Mr. Dull Knife filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging his pretrial detention in this case. See Docket 42. Having now received a hearing on the matter of his pretrial detention and the opportunity to be fully heard at the hearing and on appeal from Magistrate Judge Wollmann's detention order, the court finds Mr. Dull Knife's *pro se* petition for a writ of habeas corpus moot.

Accordingly, it is

ORDERED that defendant's appeal from the Magistrate Judge's order denying his motion for release (Docket 68) is denied.

IT IS FURTHER ORDERED that defendant's *pro se* petition for a writ of habeas corpus (Docket 42) is denied as moot.

Dated June 14, 2021.

BY THE COURT:

/s/ Jeffrey L. Viken

JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2456

United States of America

Appellee

v.

George Dull Knife

Appellant

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50122-JLV-1)

MANDATE

In accordance with the judgment of 07/19/2021, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

July 19, 2021

Clerk, U.S. Court of Appeals, Eighth Circuit