

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

21 CR 247 (PAE)

5 AMOS MUNDENDI,

6 Defendant.

Hearing

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7
8 New York, N.Y.
9 October 14, 2022
10 10:10 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

18 BY: DINA McLEOD

19 Assistant United States Attorney

20 FEDERAL DEFENDERS OF NEW YORK, INC.

21 Attorneys for Defendant

22 BY: TAMARA GIWA

23 Also Present:

24 Joshua Rothman, U.S. Pretrial Services (SDNY)

25 Lauren Flood, U.S. Pretrial Services (NDTX)

Sofia Rao, Paralegal

1 (Case called)

2 MS. McLEOD: Good morning, your Honor, Dina McLeod for
3 the government. With me at counsel table is Joshua Rothman
4 from U.S. Pretrial Services.

5 THE COURT: Good morning, Ms. McLeod, and good morning
6 to you, Mr. Rothman.

7 For the defense.

8 MS. GIWA: Federal Defenders of New York by Tamara
9 Giwa for Mr. Mundendi. Also at counsel table is my paralegal,
10 Sofia Rao. Good morning, your Honor.

11 THE COURT: Good morning, Ms. Giwa; good morning,
12 Ms. Rao; and good morning, of course to you, Mr. Mundendi.
13 Good morning as well to our court reporter.

14 I understand as well that on the phone from Texas is
15 Pretrial Officer Lauren Flood.

16 Ms. Flood, are you there?

17 MS. FLOOD: Yes, your Honor.

18 THE COURT: Good morning to you.

19 Counsel, I understand that this is a bail review
20 hearing, and I have reviewed the following materials in advance
21 of it.

22 I have reviewed in detail the transcripts of both the
23 bail arguments before Judge Netburn and before this Court from
24 2021. You should assume detailed familiarity by the Court with
25 everything that happened at that hearing, including, relevant

1 here, the admonition that I gave to the defendant on page 47
2 that "if there is one misstep, if you breach your conditions of
3 bail in the slightest way, you can expect that the government
4 will be before me asking for you to be detained, and you can
5 expect that I will do so. I'm just saying that left out to me
6 on my review.

7 I have also reviewed the reports from Mr. Rothman,
8 dated September 14 and September 29 of this year. And, most
9 recently, the police reports were handed up to me literally as
10 I was leaving chambers to head downstairs. I can't tell
11 offhand how much they reproduce what Officer Rothman had
12 previously provided or whether they are fresh. I will ask
13 counsel to alert me to that when they speak.

14 With that preface, I'll turn the floor first to
15 Ms. McLeod.

16 MS. McLEOD: Yes, your Honor. We are here for a bail
17 review at the request of pretrial, but certainly the government
18 concurs in the need for a bail review.

19 We are seeking remand at this point. Our
20 understanding is that pretrial services is also seeking remand.

21 THE COURT: May I ask you, back in the day, last year,
22 pretrial services in Texas favored detention and pretrial
23 services in New York favored release on the muscular conditions
24 of bail that Judge Netburn put in place. Your representation
25 to me is that both pretrial services agencies now favor remand.

1 MS. McLEOD: I should clarify. My understanding, from
2 speaking with Ms. Flood, was that Ms. Flood was in favor of
3 remand.

4 THE COURT: Let me just ask a yes or no. I'll come to
5 you later on.

6 Mr. Rothman, does pretrial in New York favor remand?

7 MR. ROTHMAN: Yes, your Honor.

8 MS. McLEOD: I am not sure if you want to hear
9 argument at this point, but that is the position of the
10 parties.

11 THE COURT: I would welcome brief argument, but you
12 can incorporate by reference the fact pattern as set out at the
13 prior hearing.

14 MS. McLEOD: As your Honor is well familiar, the
15 government argued for detention originally on somewhat
16 different grounds, primarily flight, and also concern about the
17 defendant's willingness to submit to government authority.

18 In recent months, after the defendant has pleaded
19 guilty, the defendant has been arrested a number of times.

20 In July, he was arrested for stealing iPhones from his
21 place of employment, which was UPS.

22 THE COURT: Tell me, just briefly -- what is most
23 important to me is what's new. I'm happy for you to unpack
24 those factually.

25 MS. McLEOD: In September --

1 THE COURT: Sorry. You said July.

2 MS. McLEOD: Yes.

3 THE COURT: He was arrested for stealing iPhones from
4 his place of business.

5 MS. McLEOD: In July 2022.

6 THE COURT: What became of that charge?

7 MS. McLEOD: I believe all of the charges to which
8 there have actually been arrests are still pending.

9 THE COURT: Do you know anything more about those
10 events?

11 MS. McLEOD: Yes. Based on reading the police report,
12 essentially Mr. Mundendi was caught on camera putting an Apple
13 watch or Apple product in his backpack. He went through the
14 x-ray and was seen carrying it through the x-ray. I believe he
15 was stopped at that point. They also -- he admitted only to
16 taking one or two Apple products. UPS believed it was much
17 more, based on other empty boxes that were lying around.

18 THE COURT: You said his place of business or place of
19 employment.

20 MS. McLEOD: I'm sorry. His place of employment.

21 THE COURT: He had a job at this point.

22 MS. McLEOD: Yes. He worked at UPS.

23 THE COURT: You are saying he apparently admitted
24 taking one to two, but the employer felt it was more.

25 MS. McLEOD: Yes. He said -- he admitted to taking an

1 iPhone and an Apple watch and said he sold both of them at a
2 phone store. UPS believed he was responsible for others that
3 he did not admit to.

4 I assume, as a result of that, he was -- I know he was
5 terminated. I assume it was as a result of this.

6 One of the reasons, I think, among others, for seeking
7 remand is the fact that at this point he is not employed. He
8 has no verifiable employment. There is sort of no stable
9 employment. That's justifying keeping him out, given these
10 other things that have happened.

11 Then, in September, on September 22, in quick
12 succession, September 22 and September 27, so within five days,
13 there were two assaults.

14 The first assault, which was September 22, involved
15 the defendant at a hookah lounge. The defendant was very
16 intoxicated, and he walked inside without, I think, paying the
17 cover charge, so security approached him. He punched the
18 bouncer with a closed fist, went into the bathroom, broke a
19 bathroom mirror and then was just very intoxicated, so he was
20 arrested for public intoxication and class C assaults of the
21 bouncer.

22 THE COURT: I'm sorry. Public intoxication. What was
23 the second?

24 MS. McLEOD: Class C assault of the bouncer.

25 THE COURT: Those are also pending?

1 MS. McLEOD: I believe that's pending, although at any
2 point Ms. Flood can correct me, but my understanding that's all
3 pending.

4 THE COURT: Later I'll call on her, but go ahead.

5 MS. McLEOD: Then, on September 27, the defendant
6 showed up at a restaurant called Kiss, and he entered the
7 restaurant. He's apparently a regular at this restaurant. He
8 walked straight up to a person who was, I guess, a patron at
9 the restaurant, said: Keep my name out of your mouth, and then
10 punched him in the face.

11 THE COURT: Punched the patron?

12 MS. McLEOD: The patron with a closed fist and then
13 left, so was not arrested at the scene, because he had left by
14 the time the responding officers arrived.

15 THE COURT: Were charges eventually brought arising
16 out of that?

17 MS. McLEOD: I believe that might have been the one to
18 which they are still considering charges, because I think they
19 might still be sort of maybe pulling up video, or something
20 like that.

21 Then the final report that I have is -- I don't think
22 that there was an arrest related to this, but there is a
23 September 28 report where essentially the defendant's friend or
24 acquaintance let the defendant borrow his car, which is a 2015
25 Mercedes, and he asked him to borrow his car on September 25

1 for a quick errand. The defendant said it would take ten
2 minutes. The defendant then just kept his car for, I think, a
3 number of days. It wasn't recovered until September 29. For
4 four days he kept his friend or acquaintance's car, despite the
5 acquaintance, the owner of the car, repeatedly saying, I want
6 my car back. Eventually, the defendant was, I think,
7 confronted by the police and gave the keys back and identified
8 where the car was.

9 Separately, speaking to Ms. Flood, he also apparently
10 took his exgirlfriend's car without permission and then
11 eventually returned it.

12 THE COURT: Is that the exgirlfriend who was at the
13 time of the hearing in 2021 the girlfriend?

14 MS. McLEOD: I don't know the answer.

15 THE COURT: I see Ms. Giwa nodding. Is that the same
16 person?

17 MS. GIWA: Yes. I think we are referring to Charisma
18 Iwu, who was Mr. Mundendi's fiancé.

19 THE COURT: Thank you.

20 MS. McLEOD: She did not file a police report for the
21 taking of that car, but I believe reported that to pretrial.

22 Obviously, there are a number of sort of involvements
23 with the criminal justice system that are concerning.

24 In addition to that, my understanding, from speaking
25 to Ms. Flood, is that there have been other issues of

1 noncompliance where the defendant, for example, has left the
2 Northern District of Texas without permission a number of
3 times. Just to give total context, the Northern District of
4 Texas does have close borders with other districts.

5 So after a couple of these things happened, a couple
6 of this sort of leaving without permission happened, Ms. Flood
7 gave him a map and said, these are the borders of the Northern
8 District of Texas. You have to stay within these borders. He
9 told her that he like couldn't read a map, and he still has had
10 issues, I think, staying within the boundaries of the Northern
11 District of Texas.

12 In addition, there have been a number of sort of
13 domestic disturbances at the exgirlfriend's apartment that have
14 involved Mr. Mundendi. This is based on what police officers
15 told Ms. Flood, that they had told her we had a number of these
16 issues at the exgirlfriend's apartment, and Mr. Mundendi has
17 been identified. Because of that, Ms. Flood told him, don't
18 go -- I am going to draw a little zone around the
19 exgirlfriend's apartment. You are not to go into this zone.

20 He was noncompliant with that. On September 27, he
21 did go to the exgirlfriend's apartment. He said he had a
22 package. He had a communication with Ms. Flood where she told
23 him to leave, to have a friend who is there get the package for
24 him. He did leave.

25 However, there have been concerns on the

1 exgirlfriend's part that he has been sort of showing up at her
2 family's businesses. He has been sort of popping up where her
3 friends are around. Sort of the spirit, I think, of what
4 Ms. Flood was trying to do is perhaps also not being complied
5 with.

6 I think, in totality, I think what we are seeing here
7 is the defendant -- in addition, in terms of atmospherics, in a
8 number of the reports I have seen he has appeared to have been
9 sort of shouting at Ms. Flood and has been not respectful of
10 her, yelling at her, hanging up on her. It doesn't seem at
11 this point that he is amenable to supervision. So that's one
12 issue.

13 The other issues are just at this point he is also
14 posing a danger to society. He is punching people in the face.
15 That's not something that can be tolerated.

16 He does not have a job. So in terms of -- often, I
17 think, one important reason for someone to remain on bail
18 conditions is so they can maintain stable employment. That is
19 an important good.

20 He lost his job because he stole from his employer.
21 So that aspect is out the window.

22 He is apparently -- he is behaving erratically and he
23 is not complying with supervision. So, in the government's
24 mind, especially with sentencing so close and a number of these
25 things happening in close succession, it just does not seem

possible for him to remain out, given his track record.

THE COURT: Sentencing is November 9?

MS. McLEOD: Yes, your Honor.

THE COURT: Is the guideline range calculated in the PSR consistent with the parties' plea agreement?

MS. McLEOD: I believe so. I have the PSR here. But I believe so.

THE COURT: Thank you, Ms. McLeod.

Let me just briefly go to the two pretrial officers, and then I'll turn to the defense.

Ms. Flood, yes or no, were you able to hear Ms. McLeod?

MS. FLOOD: For the most part, yes. It kind of went in and out, but I could hear.

THE COURT: No need to reprise what she said, but is there anything you would like to add?

MS. FLOOD: I would like to add that it's not just with me that he has been like that towards. He has also been like that towards my supervisor. I think it's kind of his consistent pattern of behavior recently. I agree with everything that's been said.

He does state that he is working as a solar salesperson. However, that's unverified, and I have not been able to get any documents from him to verify that employment.

THE COURT: Is it your view that he is both a danger

1 to the community and a risk of flight, or just a danger to the
2 community?

3 MS. FLOOD: A danger to the community. The only
4 instance where he has not appeared to me as directed was
5 Wednesday, where he was apparently in the hospital, and he was
6 to supposed to report to me at 1 p.m. but he did not.

7 THE COURT: Other than that, though, how often has he
8 supposed to appear and how often has he appeared?

9 MS. FLOOD: I've been reporting to him, making contact
10 in the field, and every time I have even asked him to meet me
11 somewhere, he has done that.

12 THE COURT: As to flight, that had been the primary
13 argument for his detention a year ago. It seems to have
14 flipped now, given recent events. At this point the central
15 issue is, as to flight, is he going to show up for sentencing
16 on November 9? Realistically, I think you are saying to me you
17 don't have factual basis to seriously doubt that he would show
18 up for sentencing. Is that correct?

19 MS. FLOOD: That is correct, your Honor.

20 THE COURT: Ms. McLeod, back to you to clarify. The
21 spirit of your remarks was aimed at the danger to the
22 community. Is that the basis on which you are moving for
23 detention?

24 MS. McLEOD: Yes. Danger to the community and
25 noncompliance with supervision.

1 THE COURT: Thank you.

2 Mr. Rothman, I'm happy to hear from you if you have
3 something to add.

4 MR. ROTHMAN: Sure. I just want to clarify what AUSA
5 McLeod had said with regards to the UPS theft. The incident is
6 alleged to have occurred in July. The arrest on that did not
7 occur until September 14, when local authorities were called to
8 respond to an incident between Mr. Mundendi and his
9 exgirlfriend, or exfiancé, and a record check was run and the
10 warrant showed up.

11 THE COURT: I see. Is it your understanding that that
12 charge is still pending?

13 MR. ROTHMAN: Yes.

14 THE COURT: Do you know whether other charges arising
15 out of the incidents that Ms. McLeod set out, if any other
16 charges are pending?

17 MR. ROTHMAN: I believe so. But Officer Flood may
18 have some better knowledge of the local court calendars.

19 THE COURT: Anything else you want to add?

20 MR. ROTHMAN: No, your Honor.

21 THE COURT: Officer Flood, let me just ask you, to
22 your knowledge, as the person locally on the scene, what, if
23 any, charges are pending against Mr. Mundendi in Texas?

24 MS. FLOOD: All of the charges are pending at this
25 time. When he was arrested on the 29th, that was due to his

1 probation violation warrant out of Tarrant County. The most
2 recent assault on the 27th, I spoke with the detective
3 yesterday, and charges for a class A misdemeanor and assault
4 are most likely forthcoming. If those are filed, then a
5 warrant will be issued for his arrest.

6 THE COURT: I just want to make sure I have a list of
7 what's pending. There is a charge pending, I gather, with
8 respect to the UPS theft, right?

9 MS. FLOOD: Yes, your Honor.

10 THE COURT: Just list for me what other charges are
11 either pending or, as you understand it, soon to be filed.

12 MS. FLOOD: The theft charges out of Tarrant County
13 from UPS are pending, the assault from Irving City in Dallas
14 County are pending. There is an investigation into the most
15 recent assault. That is also pending. And I believe Hertz is
16 pending for the theft of the vehicle. I have not heard back
17 from Hertz, but it is my understanding that those charges are
18 pending as well.

19 THE COURT: There are at least two that are pending.
20 There is one that is thought by you to be imminent and another
21 one that may or may not be pending.

22 MS. FLOOD: Yes, your Honor.

23 THE COURT: In effect, four incidents of which at
24 least two have resulted in pending charges.

25 MS. FLOOD: That's correct.

1 THE COURT: Mr. Mundendi, apart from being under
2 supervision from this Court during the period of the recent
3 charges, was he on some form of supervision for a state
4 offense? I would welcome clarity on that.

5 MS. FLOOD: Yes. He was on probation out of Tarrant
6 County, an 18-month term for an assault that I believe happened
7 either at the beginning of his pretrial or before he was
8 initially arrested on this case.

9 THE COURT: Thank you very much.

10 Ms. Giwa.

11 MS. GIWA: Your Honor, there really does exist here a
12 combination of conditions that the Court can impose to ensure
13 both that Mr. Mundendi return to court for his sentencing and
14 to mitigate any concerns about danger. It seems to clear that
15 I don't really need to talk about the concerns about the risk
16 of flight. Mr. Mundendi appeared voluntarily from Texas. He
17 arrived last night. He came to our office and came to court
18 with us. It sounds like there is no issue there.

19 I really do just want to spend some time talking about
20 the concerns about danger. I understand that your Honor is
21 familiar with the record here. But there has been a
22 significant period of time in which you haven't really heard
23 anything about Mr. Mundendi because in fact he was doing quite
24 well under supervision.

25 Your Honor ordered his release on bail in May of 2021,

1 so for almost a year and a half he really was thriving on
2 supervision. I think that Officer Flood would say the same.
3 In that time Mr. Mundendi was working. He became engaged to
4 the woman who was his girlfriend at the time of the initial
5 bail hearing, Ms. Ewu. That engagement was a big deal. We
6 were all sort of involved in hearing about that and sort of
7 helping him prepare for that. That was an important thing for
8 him and his family to get to a place where he could now think
9 about spending the rest of his life --

10 THE COURT: Is he still engaged to her?

11 MS. GIWA: No. We speak to his former fiancé a lot.
12 She called us even yesterday. The relationship is a bit in
13 flux. Frankly, I think that is part of what's happening here.

14 Mr. Mundendi, as your Honor also knows, also has a
15 nine-year-old son, and for the last year and a half he spent a
16 lot of time with his son. Mr. Mundendi's son has his own sort
17 of cognitive issues, and Mr. Mundendi is a very active parent
18 and coparents with his son's mother.

19 As Officer Flood noted, he was reporting. He has been
20 in regular, sometimes excessive communication with my office.
21 He really has -- he took the mandates of the supervision and
22 tried to make the most of it by really engaging in a productive
23 life. I am not going to sort of review all of Mr. Mundendi's
24 history, especially since your Honor has recently read the bail
25 transcripts, but your Honor knows that Mr. Mundendi overcame a

1 lot to be in this position.

2 He was a refugee from the Democratic Republic of the
3 Congo. He fled war and came to this country. He didn't speak
4 English. In fact, he didn't speak for many years. He was moot
5 as a result of the trauma that he endured. So to get to a
6 place where he could be working and parenting and then become
7 engaged to somebody, I really can't overstate what that means
8 for him. He really did overcome a lot to be here.

9 I certainly don't want to minimize the concerns about
10 what's happened. The police contacts certainly are serious and
11 are concerning. I do just want to really make clear that all
12 of these incidences have occurred in the last, I guess, maybe
13 month and a half.

14 THE COURT: The July one, the alleged theft occurred
15 in July. The other three occur in September, right?

16 MS. GIWA: That's right. The police contact, the
17 arrests have all occurred in September.

18 THE COURT: Right. But one of them arises out of a
19 July incident.

20 MS. GIWA: That's right, your Honor.

21 The facts there are still disputed. Mr. Mundendi
22 resigned from his job as a result of extensive communications
23 between his union and his employer, so that really hasn't been
24 resolved.

25 THE COURT: May I ask you, though, putting aside the

1 quantity, is it correct that Mr. Mundendi acknowledged taking a
2 couple of Apple products?

3 Mr. Mundendi is nodding vigorously.

4 MS. GIWA: I think that's right, your Honor. Yes, he
5 did. But I think the circumstances under which that happened
6 are somewhat complicated. Given that there are pending charges
7 related to that, I am not really in a position to state much
8 more --

9 THE COURT: I don't mean for you to impede his
10 defense. At the same time, the government made factual
11 representations about what happened. For the purposes of this
12 proceeding, can I infer that what the government has said is
13 undisputed, even though you are not conceding it for the
14 purposes of proceeding in Texas?

15 MS. GIWA: I would say that all of the facts are
16 undisputed, given those charges are pending. But certainly
17 Mr. Mundendi has honestly indicated, with regards to the UPS,
18 there were some items that were taken from his place of
19 employment. He is no longer working there. He certainly is
20 somebody who has been employed for his adult life, and I
21 understand the government has concerns that he is not currently
22 employed. But that's certainly something that he could change.
23 He would be happy to be employed.

24 THE COURT: Tell me about the two assaults, alleged
25 assaults.

MS. GIWA: Your Honor, the truth is that I am not a mental health expert, and I don't want to opine. What I think really is happening here is there has been some sort of mental health crisis or break. I am not sure really what the appropriate terminology is.

And I say that based on my conversations initially with Officer Flood, who has said the same thing to me. She has said that Mr. Mundendi is doing quite well and then something happened, and she now has serious concerns about his mental health. We have spoken extensively with his fiancé, who has said the same thing.

On top of that, we retained an expert, a psychologist who specializes in working with refugees from West Africa. She specializes in trauma. She is preparing our mitigation materials for sentencing. She is perfectly suited for Mr. Mundendi's needs. She has met with him eight times in order to prepare her mitigation materials. As soon as we were notified of the first arrest, we contacted her, she reached out to Mr. Mundendi, and she really, the expert has also relayed to me that she is very concerned --

THE COURT: Is there a working theory as to what has gone wrong recently?

MS. GIWA: I think part of it is the impending sentencing has -- I think Mr. Mundendi is just terrified. His fiancé told me that in the lead-up to the sentencing he just

1 was not sleeping. He was not eating. I do see that that is
2 reflected in his face and in his body. I saw him today after
3 not seeing him for several months, and he physically looks
4 different. My understanding is that he went to the hospital
5 because he collapsed, also because he wasn't eating and wasn't
6 drinking water and was not sleeping.

7 There is something going on here. There is some sort
8 of crisis happening. What Mr. Mundendi really needs is
9 treatment. So our expert, Dr. Akinsulure-Smith, she has put us
10 in contact with a psychologist in Austin who is in the process
11 of making a referral for Mr. Mundendi to receive treatment
12 virtually because he is now on home incarceration. I think
13 really that is what he needs, coupled, certainly with some sort
14 of substance abuse and alcohol treatment.

15 Really what I'm proposing, your Honor, is that the
16 Court continue, rather, Mr. Mundendi's home incarceration. He
17 has been on home incarceration now since the beginning of this
18 month. My understanding is there have not been any issues
19 there. Being confined to his home means that he does not
20 present any risk of danger to the community. And while he is
21 at home, not employed during this period, he can participate in
22 therapy over Zoom, virtually, and he can engage in treatment,
23 as so many of my clients have during the pandemic, virtually,
24 and really try to address the issues that have led to this
25 destabilization, frankly, that really is confined to quite

1 short periods of time, given the length of time that he has
2 been under supervision.

3 THE COURT: Pretrial Officer Flood indicated that
4 there were circumstances in which he violated conditions of
5 release, not merely by the alleged assaults and the alleged
6 theft, and the alleged use of alcohol, but going beyond
7 geographic restrictions.

8 First of all, is that disputed?

9 MS. GIWA: It's not disputed. Officer Flood can
10 correct me on the facts. My understanding is that Mr. Mundendi
11 went to Plano, which, according to Google Maps, is about 50
12 minutes, actually, north of where he lives. He lives -- he is
13 supervised in the Northern District of Texas. I think he drove
14 north in a way that, I guess, to me even was not immediately
15 clear. I went onto the Court's website and looked at the map
16 itself. It was not immediately clear to me that Plano was not
17 in the Northern District. My understanding is that Plano is in
18 fact part of the Dallas metro area.

19 Yes, it is not disputed that he did leave his
20 district. I think, even as Ms. McLeod noted, the borders -- he
21 does live on the border, and he did go just past --

22 THE COURT: Your perspective on that one, it's a
23 misapprehension as to the border.

24 MS. GIWA: Yes, your Honor.

25 THE COURT: May I ask you, though, Officer Flood

1 indicated that she, as part of her supervision, admonished
2 Mr. Mundendi not to go near what's being referred to as the
3 exgirlfriend's house and that apparently on multiple occasions
4 he breached that. Factually, is any of that disputed?

5 MS. GIWA: No, your Honor. The breakup, or whatever
6 is happening, has been very complicated. And the engagement
7 involved Mr. McLeod's family, his fiancé's family, us, our
8 expert that we retained. It really was, sort of in a really
9 cultural way, bringing together these two families.

10 THE COURT: As it relates to today, what you are
11 saying is, he can be trusted to comply with the home
12 incarceration terms because he hasn't breached them in the
13 short period of time that they have been in place, but the
14 record appears to reflect that putting aside the assault and
15 the drinking and the theft, that on several occasions he has
16 breached other terms put in place by pretrial, including recent
17 ones instructing him not to get near the exgirlfriend's house.

18 Short question is, what's the reason to be confident
19 that he will abide between now and sentencing with the home
20 incarceration terms, given that the very same pretrial officer
21 recently put in place a clearer red line as to the
22 exgirlfriend's house and he breached that?

23 MS. GIWA: Your Honor, it wasn't clear to me that that
24 actually was a clear red line as much as advice to Mr. Mundendi
25 to stay out of trouble. He should stay away from her, from

1 Ms. Ewu, because of their relationship. Certainly if there
2 were a condition imposed by the Court that he is to stay away
3 from her, he certainly will.

4 We have spoken to Ms. Ewu about whether she has called
5 the police, whether or not she wants an order of protection.
6 That's not something she wants.

7 She was considering coming today. She is certainly
8 coming to the sentencing. The relationship really is very
9 complicated. But certainly if your Honor told Mr. Mundendi
10 that he is not to go anywhere near her house or her family, he
11 would comply with that, and certainly if he were on home
12 incarceration, he couldn't.

13 THE COURT: Anything further?

14 MS. GIWA: Nothing, your Honor.

15 THE COURT: I'm mindful that for a variety of reasons
16 it may be against Mr. Mundendi's interest to speak,
17 particularly with a variety of other matters pending and with
18 his sentencing here pending. But have you conferred with him
19 about his speaking here is something he would like to do?

20 MS. GIWA: Could I just have a minute?

21 THE COURT: Of course.

22 Look. I will allow him to speak, if you ask me to do
23 so, but I'm also mindful that his legal interests may be
24 adversely affected by speaking, so I just want to extend the
25 opportunity.

1 MS. GIWA: Thank you.

2 Your Honor, Mr. Mundendi would like to address the
3 Court very briefly.

4 THE COURT: Have you reviewed with him what he is
5 going to say, just to make sure he doesn't inadvertently do
6 something against his legal interests?

7 MS. GIWA: I have, your Honor, and I certainly will
8 interrupt, if necessary.

9 THE COURT: Mr. Mundendi, I'm happy to hear from you,
10 but I want to emphasize what I know Ms. Giwa has emphasized.
11 You've got a sentencing coming up before this Court, and you
12 have apparently some proceedings in Texas. There is some
13 danger that anything you say here might be unhelpful to you in
14 any of those proceedings. If you see Ms. Giwa trying to stop
15 you, please stop and confer with her.

16 Go ahead, Mr. Mundendi.

17 THE DEFENDANT: Good morning, Judge.

18 THE COURT: Good morning.

19 THE DEFENDANT: I'm sorry for crying in your
20 courtroom. I learned one thing, that in the heat of the moment
21 a man who keep his calm has figured life out.

22 And I'm a fan of you, Judge. I did some reading, very
23 interesting. I'm touched.

24 UPS, I never got fired.

25 Judge, I have a nine-year-old son. I'm his hero. He

1 asked me: Can you take me to the state fair? Something I
2 can't even do because of the home arrest.

3 I'm no threat to society. I have a family of 50
4 people back home in my country that I support, and the
5 government said that I'm wiring money to Africa.

6 My son just want me to take him to the state fair.

7 I will follow your rules. You give me a chance, and I
8 show you I came back twice already. Why would I mess it up the
9 third time.

10 I don't have no other family here, I mean outside of
11 America. America gave me a chance.

12 I didn't know how to read and write until the age of
13 19, and I taught myself how to do that. I speak six different
14 languages fluently. I'm a philanthropist.

15 I give my life to God. And the moment I did that, I
16 do have a living trust that control the holding company that
17 manage ten of my (unintelligible).

18 I never ran out of job. You asked me to get a job. I
19 went and got UPS, very hard labor. Never complained. I worked
20 so hard to the point they off me a supervisor position. They
21 wanted to do an extensive background, and I knew this stuff was
22 going to come up. So I said no. I resign that job. I left
23 that job.

24 But I do sell solar systems to homeowners. And my
25 first commission was \$11,000. My second was \$25,000. That is

1 how I got money to propose to somebody that I thought I loved,
2 but come to find out they was just there for money. I am not
3 going to go in details. It's my past.

4 I just want to take my son to the state fair. Then
5 I'll remain in home incarceration until whatever, Judge, you
6 want me to do. I'm not a threat to society. I'm not. I give
7 my life to God, and I walk according to the Bible.

8 I'm not a flight risk. They removed the ankle
9 monitor. I came over there. Nobody knew where I reside and I
10 came here.

11 I know my mistakes, my involvement in this whole
12 scheme, and I accept it. I just want you to give me a chance
13 to go save another human being, because I try to kill myself
14 more than ten times before. When I was in Essex County, one of
15 the worst time in my life.

16 THE COURT: Thank you, Mr. Mundendi. Anything
17 further?

18 THE DEFENDANT: Thank you.

19 THE COURT: Ms. McLeod, let me just ask you something
20 I neglected to. The earlier bail proceedings were governed by
21 the statute governing presentence determinations as to release
22 or detention. We are now at a different stage of the case.

23 To make sure I'm on the right page, am I right that at
24 this point, under 3143(a), the presumption is different, that
25 the standard here is that, in effect, unless the government is

1 recommending a nonprison -- unless the government is
2 recommending against imprisonment, as I understand it, I need
3 here to find, by clear and convincing evidence, that, as
4 relevant here, Mr. Mundendi does not pose a danger to society.

5 MS. McLEOD: Yes, your Honor.

6 THE COURT: Ms. Giwa, is that correct?

7 MS. GIWA: That is correct, yes, your Honor.

8 THE COURT: In other words, at this point the onus, in
9 effect, is on the defense to establish, by clear and convincing
10 evidence, the absence of a danger.

11 MS. GIWA: Yes, your Honor.

12 THE COURT: Ms. McLeod, at the time of the plea I left
13 the bail conditions in place. Refresh my memory whether that
14 was a debated issue or whether, on consent, we continued the
15 conditions in place in light of Mr. Mundendi's then compliance.

16 MS. McLEOD: It was not a debated issue, and we agreed
17 to continue the conditions.

18 THE COURT: Thank you.

19 I just need a minute. Thank you. I am ready to rule.

20 The standard governing this bail application is set by
21 Title 18, United States Code, Section 3143(a), which governs
22 the release or detention of a defendant pending a sentence.

23 The defendant, prior to trial, is to be detained if no
24 condition or combination of conditions will reasonably assure
25 his appearance as required and the safety of any other person

1 or the community.

2 Under 3143(a), the presumptions that earlier applied
3 shift. And whereas at an earlier stage it was the government's
4 burden to show by a preponderance of the evidence that the
5 defendant posed a risk of flight and by clear and convincing
6 evidence that the defendant posed a danger to the community,
7 such that no condition or combination of conditions could
8 satisfactorily address that risk, the burden shifts now.

9 Under 3143(a), unless no term of imprisonment is being
10 recommended by the government, which is not the case here, the
11 burden is on the defense. It needs to be established by clear
12 and convincing evidence that the defendant is not likely to
13 flee and that the defendant is not likely to pose a danger to
14 the community that can't be contained reasonably by the
15 imposition of conditions or a combination of conditions. And
16 both parties have agreed just now that that is in fact the
17 governing standard.

18 I would note that, according to Mr. Smallman, the
19 presentence report here in fact recommends a term of
20 imprisonment of between 63 and 78 months. The plea agreement
21 recommended one between 57 and 71 months.

22 The government, just to confirm, will you be
23 recommending a term of imprisonment?

24 MS. McLEOD: Yes, your Honor.

25 THE COURT: In determining bail, I am required to

1 consider a number of factors. These include the nature and
2 circumstances of the offense charged, including whether the
3 offense is a crime of violence, the weight of the evidence
4 against the defendant, the history and characteristics of the
5 defendant, the nature and seriousness of the danger presented
6 to any person or the community that would be posed by the
7 defendant's release, and whether or not the defendant was on
8 probation at the time of the offense.

9 At the time of Mr. Mundendi's arrest, the government
10 pursued detention. Judge Netburn imposed a muscular set of
11 bail conditions. The government appealed, and I held a lengthy
12 conference on the government's appeal, held on May 18, 2021. I
13 incorporate by reference everything that was said there.

14 Although the focus there was flight, not danger, I
15 pronounced ultimately the decision to affirm the magistrate
16 judge and keep Mr. Mundendi out on conditions as a very, very
17 close call. I put it that way. And I warned Mr. Mundendi,
18 after telling him how close the question was of the following:
19 "If there is one misstep, if you breach your conditions of bail
20 in the slightest way, you can expect that the government will
21 be before me asking for you to be detained, and you can expect
22 that I will do so."

23 That was, in part, based on the considerable criminal
24 history that Mr. Mundendi had developed and the government's
25 well-founded concerns, based on that history, that he would be

1 undeterred by this pending case and might commit additional
2 offenses.

3 I ultimately relied on the strength of the bail
4 package and the recommendation of pretrial in Manhattan, in the
5 Southern District, to allow Mr. Mundendi out. But I pronounced
6 it, as I said, a very, very close call.

7 Several things have changed since. One is, of course,
8 that the presumption has shifted by virtue of Mr. Mundendi's
9 guilty plea. But much more to the point, recent events have
10 been alarming. I recognize in saying what I'm about to say
11 that Mr. Mundendi has not been adjudged guilty of any of the
12 criminal conduct that has been proffered to me today, but I am
13 mindful that charges are pending on at least several of the
14 incidents, and where charges are pending it bespeaks a
15 determination of probable cause in the event that the offense
16 was committed.

17 I also note that in significant measure, as
18 represented to me by counsel, Mr. Mundendi, either on the scene
19 or at the time of the events or back in Texas, admitted
20 elements of what he had done wrong, if not the entire thing, or
21 today has admitted dimensions or elements of the offenses.

22 But one of them involves a theft from his then
23 employer, UPS, apparently as admitted by Mr. Mundendi, of at
24 least a couple of Apple items and, as alleged by the employer,
25 more than that.

1 There have also been two incidents in which, in an
2 apparently aggrieved state and in at least one instance in an
3 alcohol-fueled state, Mr. Mundendi is alleged to have swung his
4 fist and hit somebody, one person at least, the bouncer in the
5 face. And then there is a separate incident, facts of which
6 are somewhat murkier, involving his ex-fiancé.

7 In these events are described a number of clear
8 violations of the conditions of release. By definition, any
9 state offense, including hitting somebody in the face or
10 stealing property, is a violation of release because the
11 conditions of release preclude violations of law. Being
12 inebriated as described in the bouncer incident is a violation
13 of release, and there have also been an instance in which
14 Mr. Mundendi left the district, although I understand that
15 there is an argument that it was an inadvertent mistake and an
16 incident or two in which he disobeyed the directives of the
17 pretrial officer to stay away from his ex-fiancé.

18 More broadly, counsel have described and defense
19 counsel have candidly described erratic behavior in the last
20 month in particular and perhaps going back to the theft. It
21 may be that these are brought about by the pending sentencing
22 here. It may be that these are brought about by the breakup
23 with the girlfriend. It may be that the breakup with the
24 girlfriend itself is a product of the erratic behavior or the
25 impending sentencing.

1 I can't today unpack causation, but the fact of the
2 degree of erratic behavior recently is alarming. It may be
3 that that's what led two people to get punched in the face and
4 four breaches with respect to the girlfriend and her zone of
5 privacy, and the alcohol to take place. But, at the end of the
6 day, all of this bespeaks a danger. There is a danger to the
7 next person who might get hit in the face. There is a danger
8 to a person who might be a victim of theft. Insofar as
9 Mr. Mundendi has a prior history of a range of offenses that
10 include assault, I don't think that the recent events can be
11 treated as so singular that we can be confident they are not
12 going to happen again.

13 Bottom line is, I perceive a very real and present
14 danger that Mr. Mundendi, if at liberty, would potentially hurt
15 somebody, particularly given the erratic and aroused state that
16 he has been described as being in.

17 I appreciate the vigor of the advocacy, as always, by
18 Ms. Giwa, and she has made the best argument possible, which is
19 that conditions can be intensified, including through home
20 incarceration, that would tide Mr. Mundendi through between now
21 and sentencing, on November 9, which is a little under four
22 weeks away.

23 The problem is that, at the end of the day, experience
24 teaches that a defendant who wants to breach home incarceration
25 can easily breach it. It has happened many times. Home

1 incarceration does not mean having bars around one's home.
2 It's ultimately still a matter of the will of the defendant.

3 Mr. Mundendi has, in recent weeks and going back to
4 July, months, violated conditions also set by the Court and
5 pretrial, and he disregarded what the diligent Officer Flood
6 directed him to do, wisely, in staying away from the
7 exgirlfriend for her interests, as well as presumably
8 Mr. Mundendi's.

9 Under those circumstances, where the existing
10 conditions just simply have not been abided by Mr. Mundendi, I
11 simply have lost confidence that Mr. Mundendi will abide by the
12 conditions of pretrial, and I'm quite alarmed that in his
13 present state -- I'm quite worried that if he isn't
14 incarcerated, somebody is going to get hurt between now and
15 sentencing.

16 Put in legal terms, I do not find that the defense has
17 carried its burden at this point to propose conditions that can
18 reasonably assure the safety of the community. I am not
19 relying on risk of flight. That hasn't been argued today. I
20 am relying solely on danger. But I do not find that the
21 defense has met its burden, indeed, under the circumstances.
22 Even if the burden had been what it was between indictment and
23 plea, I would find that the government has met the burden it
24 would have then borne to establish, by clear and convincing
25 evidence, an unsolvable danger to the community.

1 With regret, I am going to order the defendant's
2 detention effective immediately.

3 In saying that, I want to emphasize to you,
4 Mr. Mundendi, that I have a very open mind as to the sentencing
5 in this case. I was obliged to engage with this set of
6 problems now and have done so.

7 I'm mindful there is a lot more to you, Mr. Mundendi,
8 than has been proffered here today, and I'm eager to hear what
9 the mitigation specialist and other persons on your behalf say
10 about you in connection with sentencing.

11 But my charge here, as relevant, is to protect the
12 safety of the community, and I am alas convinced that there is
13 no combination of conditions that can reasonably assure the
14 safety of the community with you in your present state.

15 I'm signing an order that remands Mr. Mundendi to the
16 custody of the United States Marshals.

17 Anything further from the government?

18 MS. McLEOD: No, your Honor.

19 THE COURT: Anything further from the defendant?

20 MS. GIWA: Your Honor, would you consider the remand
21 going into effect this evening? Mr. Mundendi flew to New York
22 last night. He was in a hotel last night with all of his
23 property. I would just ask that he be allowed to return back
24 to Dallas and then surrender himself -- self-surrender tonight
25 when he gets back to Dallas.

1 Part of the reason for that is that, in my experience,
2 the transport of people from one district to the other is
3 arduous and takes a long time.

4 THE COURT: He is going to be sentenced here on
5 November 9. I assume he will stay here through -- at this
6 point there is no purpose in going back to Dallas. He is going
7 to be sentenced here in 25 days.

8 To the extent there is an issue about him retrieving
9 material from the hotel, I hope that there is a way in which he
10 can authorize you or somebody on his behalf to pick it up, but
11 I don't see any value in his going back to Dallas. He is only
12 going to have to appear here again.

13 Insofar as he is being remanded, what you're
14 effectively proposing is that he goes back to Dallas for no
15 apparent reason, and then returns here. I don't see that.
16 Only bad things can happen in Dallas.

17 To the extent the issue is his getting stuff from the
18 hotel, I encourage you to see what you can do on his behalf to
19 retrieve his materials. If unexpectedly you need some
20 certification from the Court that I am authorizing you as his
21 counsel to retrieve that, I will be happy to do that.

22 MS. GIWA: Thank you, your Honor.

23 THE COURT: We stand adjourned.

24 (Adjourned)
25