

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

§

Plaintiff,

§

§

v.

§

Cause No. CR 06-538 JH

§

DANUEL DEAN QUAINANCE,

§

§

Defendant.

§

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**MR. QUAINANCE’S SUPPLEMENT TO HIS RESPONSE [DOC. 116] TO
GOVERNMENT’S APPEAL OF ORDER AMENDING CONDITIONS OF
RELEASE [DOC. 92] AND MOTION TO STAY AMENDMENT OF CONDITIONS
OF RELEASE [DOC. 93]**

DANUEL DEAN QUAINANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, submits the following supplemental response to the government’s Notice of Appeal [Doc. 92] of the order amending Mr. Quaintance’s conditions of release [Doc. 101] and Motion to Stay implementation of that order [Doc. 93], and in support of his position would respectfully show the Court as follows:

1. Mr. Quaintance has filed a response [Doc. 116] to the government’s appeal of the Magistrate Judge’s Order Amending Conditions of Release. Mr. Quaintance wishes to present additional authority to the Court in support of his position.

2. The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. *Bandy v. United States*, 81 S.Ct. 197, 5 L.Ed.2d 218 (1960), quoting *Reynolds v. United States*, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (1959); *Cohen v. United States*, 82 S.Ct. 526, 7 L.Ed.2d 518 (1962). The conditions set for release should constitute

no greater deprivation of liberty than is reasonably necessary. *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004). Impositions of conditions of release must be supported by reasons that the conditions are necessary to reasonably assure a defendant's appearance or the community's safety. *United States v. Spilotro*, 786 F.2d 808 (8th Cir. 1986). Conditions of release that "reasonably assure" a defendant's appearance and the safety of the community are sufficient; it is not necessary that the conditions *guarantee* those things. *United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990); *United States v. Fortna*, 769 F.2d 243 (5th Cir. 1985).

3. Although there is no constitutional right to bail, application of the statutes and rules relating to bail must be applied fairly and reasonably in order to assure due process. *United States ex rel. Means v. Solem*, 440 F. Supp. 544, 548 (D.S.D. 1977).

4. The conditions imposed by the initial order setting conditions violated Mr. Quaintance's First Amendment rights to speech and association. While those rights are not absolute, *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Means*, 440 F.Supp at 550, a high constitutional standard must be met before those rights are infringed. The government (including the courts) must demonstrate that the restriction of constitutional rights must further a compelling government interest, and that the restriction is no greater than necessary to achieve that compelling government interest. *Procunier v. Martinez*, 416 U.S. 396, 427, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Buckley*, 424 U.S. at 25; *Means*, 440 F.Supp. at 551.

5. None of the restrictions placed on Mr. Quaintance's exercise of his constitutional rights to speech and association could possibly relate to any concern that he might not appear

for court. In the first place, Mr. Quaintance has always appeared for court (or made appropriate arrangements where appearance could be waived). In the second, the kinds of restrictions placed on him have little or nothing to do with appearance in court. The government's claimed concern is for the safety of the community.

6. “[A]n invasion of First Amendment rights can not be predicated on a speculative concern of danger.” *Means*, 440 F.Supp. at 551, citing *Procunier v. Martinez*, 416 U.S. at 420. Here, the government suggests no factual basis for its claim that permitting Mr. Quaintance to talk to members of his spiritual community (or, for that matter, members of his temporal community) could pose a danger to any community.

7. In *Leary v. United States*, 431 F.2d 85 (5th Cir.1970), the court addressed similar issues. In that case, the defendant was on record as advocating the use of narcotic drugs. The defendant, Timothy Leary, was well known, and his views were also well known and widely disseminated. The district court decided that such advocacy made Leary a threat to the community. The Fifth Circuit, speaking through Judge Wisdom, rejected that notion. “The district court’s holding raises a serious constitutional question. If the ‘danger’ referred to in [18 U.S.C.] § 3148 includes mere ‘advocacy’ of the use of illegal drugs or of other law violations, the section offends the constitutional guaranty of freedom of speech.” *Leary*, 431 F.2d at 89. The court went on to conclude that if bond could be revoked by the exercise of Leary’s rights to freedom of speech and freedom of the press, 18 U.S.C. § 3146 imposed an unconstitutional condition. *Id.* “To avoid holding the statute unconstitutional, one must

construe the term ‘danger’ as conduct, not advocacy falling short of actual incitement to imminent unlawful conduct.” *Id.*

8. Similarly, in *Williamson v. United States*, 184 F.2d 280 (2nd Cir. 1050), the court considered the government’s application to revoke bond for defendants appealing their convictions. The government said that the defendants were dangerous because of their penchant for making speeches and writing articles in support of the communist party which did not advocate the violent overthrow of the government. Rejecting the government’s argument, the court said:

Courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press or free speech is as evil as direct punishment of it. Judge Cardozo wisely warned of ‘the tendency of a principle to expand itself to the limit of its logic.’ (Cardoza, *Nature of the Judicial Process* 51). If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition.”

Williamson, 184 F.2d at 283.

9. The Magistrate Judge amended Mr. Quaintance’s conditions of release to permit him to have contact with the members of his church and others, but prohibited him from advocating the use of cannabis, or talking about its acquisition or distribution. Even those restrictions violate the Constitution. The government, however, thinks the amended conditions insufficiently restrictive. The Constitution stands between the government and the unsupportable restrictions it seeks.

WHEREFORE, for the foregoing reasons, DANUEL DEAN QUAINANCE, Defendant, respectfully prays that the Court enter an order denying the government's appeal of the order amending conditions of release, vacating the stay of that order, amending the conditions of release to permit Mr. Quaintance to have contact with all those with whom he would have contact and to speak as he would, short of incitement to imminent criminal conduct; and providing such other and further relief to which the Court may find Mr. Quaintance to be justly entitled.

Respectfully Submitted,

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filed electronically on July 18, 2006
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Response to Government's Appeal was served on Assistant United States Attorney Amanda Gould, 555 Telshor, Suite 300, Las Cruces, New Mexico, 88011, by placing it in the box designated for the United States Attorney's Office at the United States District Court Clerk's office; Mr. Mario A. Esparza, P.O. Box 2468, Las Cruces, New Mexico 88004; and Mr. Leon Schydlower, 210 N. Campbell, El Paso, Texas 79901-1406 on July 18, 2006.

filed electronically on July 18, 2006
MARC H. ROBERT

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