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March 17, 2017

Hon. Thomas J. McAvoy, Senior U.S. District Judge  
Federal Building and U.S. Courthouse  
15 Henry Street  
Binghamton, New York 13901

**Re: United States v. Robert Twiss  
Case No. 16-MJ-529 (CFH)**

Dear Judge McAvoy:

Robert Twiss is scheduled to appear before you on Monday, March 20, 2017 at 3:00 p.m. to waive indictment and plead guilty to an information in relation to the criminal complaint with the above case number. The information will charge Mr. Twiss with the offense of possession of a firearm by a prohibited person in violation of 18 U.S.C. §922(g)(1). I submit this letter asking the Court to order Mr. Twiss's release pending sentencing.

Background and prior proceedings:

While at his work place on October 24, 2016, Mr. Twiss was arrested in connection with an indictment filed on or about October 19, 2016 in Greene County Court. That indictment charged Mr. Twiss with two state firearms offenses (class D felonies) relating to the identical firearm at issue in this federal case. The state court indictment was based on allegations relating the characteristics of the firearm and Mr. Twiss's status as a person with a prior felony conviction<sup>1</sup>. Upon information and belief, the Greene County

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<sup>1</sup> Mr. Twiss has one prior felony conviction (from 1981) of Burglary in the Third Degree in Warren County, New York.

indictment arose from a lengthy federal investigation into suspicions that Mr. Twiss might be engaged in particular, more serious crimes.<sup>2</sup> On October 25, 2017, Mr. Twiss was ordered released from state custody upon the posting of a bond.

After he was ordered released from state custody, Mr. Twiss was immediately taken into federal custody in relation to the criminal complaint in this case, executed and filed on October 25, 2017, charging the violation of 18 U.S.C. §922(g)(1). ECF Docket No. 1. It appears the timing of the filing of the criminal complaint was designed to bring about Mr. Twiss's continuing detention, notwithstanding the state court's release order. The criminal complaint contained allegations substantially beyond Mr. Twiss's perceived possession of a rifle as a person previously convicted of a felony, including allegations that Mr. Twiss "was forming, or had formed, a militia based in Greene County that had plans to engage in acts of violence," ECF Docket No. 1, relating to the now largely dispelled suspicions that Mr. Twiss had might have been engaged in other crimes.

Mr. Twiss made an initial appearance in federal court on October 25, 2017. A detention hearing was conducted on October 26, 2017.<sup>3</sup> At the detention hearing, the government moved for detention. The government asserted as its basis for detention that Mr. Twiss was a danger to the community, citing the allegations in the criminal complaint. The allegations proffered by the government and references to the criminal complaint's allegations suggested there is proof that Mr. Twiss had planned to engage in acts of violence.

At the detention hearing, Mr. Twiss, through counsel, argued for release. The defense cited the circumstance that the offense conduct did not include problematic use of a firearm or even the apparent discussion by Mr. Twiss of problematic use of a firearm, but simply the alleged possession of a firearm by a prohibited person in and around his rural home. The defense also cited Mr. Twiss's long-standing ties to the community; his absence of problematic physical or mental health problems; his absence of the type of substance or alcohol abuse which could not be addressed with common supervision conditions; and the fact that his criminal history is substantially in the past (his prior felony conviction is 36 years old; his last conviction of any kind is 16 years old). Regarding the most inflammatory allegations, the defense conceded having had limited opportunity at that stage of the case to scrutinize the government's evidence but argued that the information in the complaint appeared to suggest bluster on Mr. Twiss's part without any indications that he had designs on committing acts of violence.

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<sup>2</sup> That months-long investigation involved hours of recorded encounters between Mr. Twiss and others (recorded by an FBI cooperator). The suspicions of the existence of evidence of other criminal activity ultimately were dispelled by the continuing investigation which apparently concluded at some time after Mr. Twiss's arrest.

<sup>3</sup> The transcript of the detention hearing has been filed at ECF Docket Entry 12.

U.S. Magistrate Judge Hummel denied Mr. Twiss's release based upon the government's proffer.

Nature of the instant application:

Mr. Twiss seeks presentence release. Under 18 U.S.C. §3143(a), a person (other than an individual found guilty of particular enumerated offenses which, the defense submits, would not be at issue here<sup>4</sup>) may be released pending sentencing if

the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

18 U.S.C. §3143(a)(1). Mr. Twiss asks this Court to release him post-plea on the grounds that he is not a risk of flight and is not a danger to the community.

*Risk of Flight*

On the issue of flight, the government did not contend at the detention hearing that Mr. Twiss presents a serious risk of flight and did not seek detention on that ground. Mr. Twiss's aged criminal history reflects that he has no history of non-appearance or of revocations. Mr. Twiss would present no risk of flight even after a plea, particularly considering his absence of such a history, his strong ties to the community, and the low sentencing exposure in this case.

Regarding sentencing exposure, the defense conservatively estimates that a sentencing guidelines computation might yield a range of 24 to 30 months imprisonment, based on a U.S.S.G. §2K2.1 base offense level of 20, less 3 levels for acceptance of responsibility, at criminal history category I.

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<sup>4</sup> The Second Circuit in United States v. Dillard, 214 F.3d 88 (2d. Cir. 2000) held that felony-in-possession is an enumerated offense under §3142(f)(1) because it fell under the definition of "crime of violence", specifically within the residual clause, in 18 U.S.C. §3156(a)(4)(B), arguably triggering the elevated presentence release standard of §3143(b). Although Dillard has not been challenged directly, the residual clause in §3156 is bound to be held unconstitutional under the Due Process clause of the 5<sup>th</sup> amendment for the same reasons that the residual clause in 18 U.S.C. §16(b)'s definition of "crime of violence", with identical language, has been held unconstitutional. See, Baptiste v. Attorney General, 841 F.3d 601 (3d Cir. 2016); Golicov v. Lynch, 837 F.3d 1065 (10<sup>th</sup> Cir. 2016); Shuti v. Lynch, 828 F.3d 440 (6<sup>th</sup> Cir. 2016); United States v. Vivas-Ceja, 808 F.3d 719 (7<sup>th</sup> Cir. 2015).

*Dangerousness*

Mr. Twiss does not present a danger to the community for which there could be no ameliorative conditions set.

Facts and inferences relating to the perception of dangerousness have changed since the October 26, 2016 detention hearing. At that earlier time, the government cited in the criminal complaint an investigation into a suspicion that Mr. Twiss “had plans to engage in acts of violence.” The government’s more complete investigation—and the defense’s review of the information underlying that investigation—reveal the absence of evidence of planning of any particular acts. The law enforcement search of Mr. Twiss’s premises uncovered no significant evidence of any criminality or planning of crimes. The evidence supports the allegation only of Mr. Twiss’s alleged possession of a rifle at his rural home.

Much of the government’s evidence arising from its months-long investigation and hours of surreptitious recordings of small gatherings suggest that Mr. Twiss might enjoy hanging around other people outdoors, near his barbeque grill, and talking to those people about views that people would be wise to prepare for the decline of civilization. The government’s cooperator appears to have gone to Mr. Twiss’s home on multiple occasions. The gatherings apparently never involved more people than can be counted on one hand. Discussions in which statements are attributed to Mr. Twiss included his explanations about preparing for scenarios involving the take-over of the government by other tyrannical forces, not his own actions against the government. Such discussions also include statements attributed to Mr. Twiss, perceived objectively as bragging to a large extent, in which he professes to have broad knowledge of how to invent things, including defenses, to be able to survive in the event the government fails, the electrical grid fails, and marauders roam the countryside; in other words, in an “Armageddon-like” scenario. The statements attributed to him suggest a survivalist mindset. The information developed does not establish planning of overt acts of violence, contrary to the suspicions apparently prompting the government’s investigation.

*Other circumstances*

Mr. Twiss also asks for release on grounds including that he suffered a fire at his home recently, and the need to repair the damage is urgent. He has no one to repair it for him. He is able to repair it himself. Without repairs to the home, which is his fiancée’s primary residence, his fiancée is unable to live there and has limited other residence options. Mr. Twiss also has learned that his mother has fallen ill. He would like to

attend to her before a sentencing proceeding. He also seeks to marry his fiancée before sentencing.

Conditions to be imposed:

Mr. Twiss has no bail resources. He would comply with conditions restricting and monitoring his movements, along with other conditions which might be typical under the circumstances.

Based on the foregoing, which I submit establishes by clear and convincing evidence that Mr. Twiss is not a risk of flight or danger to the community, I ask the Court to grant Mr. Twiss presentence release on conditions. I thank the Court for its consideration.

Very truly yours,

*/s/Timothy E. Austin*

Timothy E. Austin  
Assistant Federal Public Defender

Cc: AUSA Richard Belliss  
USPO Joan Fahey

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**Re: United States v. Robert Twiss  
Case No. 16-MJ-529 (CFH)**

**CERTIFICATE OF SERVICE**

**I hereby certify that on March 17, 2017, I electronically filed the foregoing letter request with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:**

**AUSA Richard Belliss**

**I also served the upon USPO Joan Fahey by emailing a .pdf copy to  
Joan\_B\_Fahey@nynp.uscourts.gov.**

**/s/Timothy E. Austin**  
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