Case No. 20-5548

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

MICHAEL FOSTER
Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of Tennessee

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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I. THE GOVERNMENT ATTEMPTS TO SHIFT ITS BURDEN OF PROOF ON DANGEROUSNESS AND LACK OF ANY CONDITIONS TO ASSURE COMMUNITY SAFETY.

A. The government presumes the defendant's guilt, ignores the presumption of innocence, and fails to establish that there are no conditions that can reasonably assure community safety.

The government relies on the statutory presumption of dangerousness. (Response Brief, Doc. 14, pp. 14 – 15, ECF pp. 18 – 19.); (Tr. of Mot. Hr'g, R. 28, Page ID ## 247 – 248.) The government argues that the allegations in the criminal complaint and indictment show Mr. Foster's "capacity for deceit[.]" (Response Brief, Doc. 14, p. 15, ECF p. 19.) The government has directed its energy toward the seriousness of the charges, rather than the other statutory factors. (Tr. of Mot. Hr'g, R. 28, Page ID ## 248 – 249.)

The government's arguments are, in effect, an attempt to shift the burden of *proof* onto the defendant. This disregards the appropriate pre-trial detention analysis. While the government is correct that the charges against Mr. Foster create a presumption of dangerousness, the defendant can rebut this presumption by satisfying the burden of *production* to the contrary; the government still holds the burden of *proof* by clear and convincing evidence that the defendant should nonetheless be detained. *See United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010).

> As our sister circuits have found, section 3142(e)(3)'s presumption in favor of detention imposes *only* a "burden of production" on the defendant, and the government retains the "burden of persuasion." *A defendant satisfies his burden of production when he "com[es] forward with evidence that he does not pose a danger to the community or a risk of flight."* Although a defendant's burden of production "is not heavy," he must introduce at least some evidence.
> …
>
> Regardless of whether the presumption applies, the government's ultimate burden is to prove that *no conditions of release* can assure that the defendant will appear and to assure the safety of the community.

Stone, 608 F.3d at 945-46 (internal citations omitted) (emphasis added).

The government relies heavily on portions of the magistrate judge's order below stating that Mr. Foster's wife and adult daughter may not report any wrongdoing by Mr. Foster if he were released because they were previously unaware of Mr. Foster's online presence, seemed unwilling to acknowledge he could be guilty of the government's allegations, and were motivated in part by financial needs given Mr. Foster was in jail and not working. (Response Brief, Doc. 14, p. 17, ECF p. 21); (Order of Detention Pending Trial, R. 27, Page ID # 189.)

The government overstates the magistrate judge's factual findings about Lisa Foster and Ashley Foster. (Response Brief, Doc. 14, p. 17, ECF p. 21). The magistrate judge did not find the witnesses wholly incredible, but instead the magistrate judge stated she did not have a "level of comfort that they would actually

be diligent in ensuring that Defendant followed conditions of release" given that the witnesses did not "seem[] willing to acknowledge the possibility that Defendant was guilty…[.]" (Order of Detention Pending Trial, R. 27, Page ID # 189.) Conversely, later the magistrate judge's detention order states, "[t]he Court believes that they [Ashley and Lisa Foster] would sincerely attempt to prevent Defendant from accessing the Internet…[.]" (Order of Detention Pending Trial, R. 27, Page ID # 190.) The order provides, "The totality of their testimony also indicates to the Court that they would be unlikely to report Defendant if he violated his conditions of release." (*Id*. at Page ID # 189.)

First, to the extent the magistrate judge's determinations constitute a credibility finding as to the testimony of Ashley Foster and Lisa Foster on the narrow issue of whether either would ensure Mr. Foster followed conditions of release and would report him, the finding is clearly erroneous. The government cites a portion of *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984), for the proposition that reviewing courts should give "special deference" to credibility determinations of lower courts that turn on oral testimony instead of documentary evidence. (Response Brief, Doc. 14, p. 17, ECF p. 21). *Bose* dealt with an interpretation of Federal Rule of Civil Procedure 52(a) in the context of a defamation action, not a pretrial release or detention issue in a criminal case, but nevertheless the Supreme Court in *Bose* explained "a finding is clearly erroneous when *although*

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Bose*, 466 U.S. at 499 (emphasis added) (internal quotations and citation omitted). Neither of the other cases cited by the government – with "e.g." cites - on this point deal with review of detention decisions. (Response Brief, Doc. 14, p. 17, ECF p. 21). In the context of review of a detention order, *de novo* review by the district court is required of the magistrate judge's detention order, *see United States v. Yamini*, 91 F. Supp. 2d 1125, 1130 (S.D. Ohio 2000) (analyzing legislative history and interpreting authorities to decide *de novo* review was required of magistrate judge's detention or pretrial release decisions, even if magistrate heard the testimony in the first instance), and the government cannot so cleanly argue that "special deference" should be given because the magistrate judge heard the live witness testimony. A review of the entire evidence before this Court reveals a mistake was committed concerning the issue of whether Lisa Foster and Ashley Foster could serve as reliable third-party custodians.

The allegations, if provable by the government beyond a reasonable doubt at trial, may indicate that Mr. Foster hid his activity on the mobile device application Snapchat from his wife and daughter *before* being charged. That is an entirely different situation from the combined set of pretrial conditions proposed by Mr. Foster, one of which being released to the third-party custody of Lisa Foster and Ashley Foster. With them knowing the allegations involving Snapchat and being put

in the position of third-party custodians, along with the other reasonable conditions proposed by the defendant, to include internet restrictions, online device monitoring and blocking, electronic monitoring of the defendant's whereabouts, and any other reasonable restrictions available to the court, Lisa and Ashley Foster as third-party custodians are not inherently unreasonable or unreliable under the totality of the circumstances. They are the two other adults residing in the Foster household with whom Mr. Foster would live if released to his family home. This discussion by the court below, and advanced on appeal by the government, in effect shifts the burden of proof to the defendant. If the presumption of innocence is to have meaning, Mr. Foster, constitutionally and statutorily, need not bear the burden of proving a negative – that he will *not* violate conditions imposed on him - but instead the burden of proof must be on the government by clear and convincing evidence that *no* conditions of release can reasonably assure community safety.

Additionally, Mr. Foster's production at the detention hearing below was not limited just to the testimony of Lisa and Ashley Foster as proposed third-party custodians. Mr. Foster submitted declarations under penalty of perjury from many respected members of the local community and others who know him well – family members, neighbors, his employer, a technology security expert, and others. If Lisa Foster's and Ashley Foster's testimony as proposed third-party custodians is wholly disregarded, the remaining production by Mr. Foster, coupled with the written

proffer filed with the lower court before the detention hearing, more than satisfies the defendant's burden of production to rebut the statutory presumption of dangerousness. (Mem. in Support of Mot. to Release Def. Pending Trial & for a Hr'g Pursuant to 18 U.S.C. § 3142(f), R. 20; Decl's, R. 20-1 – 20-7, 20-12 – 20-14.) This significant production of evidence surely satisfies the requirement for "at least some evidence." *Stone*, 608 F.3d at 945. The government should have been required to carry the "ultimate burden [...] to prove that no conditions of release can assure that the defendant will appear and to assure the safety of the community." *Id.* at 946.

B. The government did not prove by clear and convincing evidence that no set of conditions could reasonably ensure the safety of the community upon Mr. Foster's release.

The defendant has repeatedly asserted feasible technological restrictions that can be placed on Mr. Foster, including a firewall that monitors and controls *all* internet traffic within the house – via WiFi or otherwise – and even restrictions on any devices in the house to be able to connect to an external internet source such as a cellular device or open WiFi network at a neighbor's house. (Br. of Appellant, Doc. 12, pp. 12 – 13, ECF pp. 21 – 22); (Tr. of Mot. Hr'g, R. 28, Page ID # 197 – 199; Decl. of Rob Glass, R. 20-11, Page ID ## 122 – 131.) The lower court and the government did not address these specific restrictions. The government asserts that Mr. Foster "could undoubtedly find a way to access the internet if he chose to do so." (Response Brief, Doc. 14, p. 18, ECF p. 22.) In fact, the government

superficially analogizes the situation to "[a]ny parent who has tried to limit a teenager's internet access[.]" (*Id.* at 21 – 22.)

Much unlike a grounded teenager, Mr. Foster's internet restrictions would be significantly more restrictive than merely "tak[ing] the mobile phone away[.]" (*Id.* at 22.) The sophistication of the restrictions and monitoring proposed are much different, and the stakes are also much higher. Violating the terms of any pretrial conditions on internet access or internet restrictions would be of enormous consequence, further assuring Mr. Foster's compliance. *See United States v. Harris*, 2020 U.S. Dist. LEXIS 53632 (D. D.C., Mar, 27, 2020) (opinion explaining reasons for pre-sentencing release order of Mar. 26, 2020); *United States v. Harris*, 2020 U.S. Dist. LEXIS 55339 (D. D.C., May 26, 2020) (ordering presentence release of defendant previously subjected to pretrial detention, who was found guilty of child pornography charges involving the internet, because "it is extremely unlikely the defendant would attempt to access or distribute child pornography while on release pending sentencing, and that conclusion is reinforced by the strict measures that Defendant's counsel has proposed[.]"); *United States v. Browder*, 866 F.3d 504, 506 (2d Cir. 2017) (affirming the conditions for special release for a defendant who was convicted on child pornography charges).

The government argues Mr. Foster cannot be trusted with *any* internet access because it is alleged that he threated to post photographs on the social media

application Instagram and the "dark web." (Response Brief, Doc. 14, p. 18, ECF p. 22.) The government argues that *the mere reference* of "encrypted photos and the dark web imply a degree of technological sophistication beyond that of the average person." (*Id.*) The government also notes that Mr. Foster allegedly threatened to send the nude photographs through the mail. (*Id.* at 23.)

General knowledge of encryption and the dark web should not be equated with particular "sophistication" on the internet—especially where there is no evidence that Mr. Foster is capable of this kind of sophistication. The allegations in the criminal complaint belie that Mr. Foster is an internet mastermind; there is no allegation in the complaint that the messages or images were actually encrypted, that his internet protocol (IP) address location or devices were hidden or disguised by using a firewall or a virtual private network (VPN), or that specialized software was used to communicate other than the free mobile application Snapchat. *See*, *e.g.*, *United States v. Cox*, No. 1:18-CR-00083-HAB-SLC, 2019 U.S. Dist. LEXIS 206681, at *3-4 (N.D. Ind. Oct. 10, 2019) (describing alleged scheme where individuals were being extorted for sexually explicit material via Facebook accounts, and target of FBI investigation had used a virtual private network, or VPN, in an attempt to hide his IP address, encrypted messaging apps, and had reactivated dormant Yahoo email accounts for use in scheme); *United States v. Fisher*, No. 2:17-cr-00073-APG-GWF, 2019 U.S. Dist. LEXIS 97833, at *9-10 (D. Nev. Mar. 28,

2019) (summarizing detective's testimony during suppression hearing about training and experience on internet crimes against children task force and detective's analysis of IP addresses he determined to be from a VPN and encryption allegedly used by target of investigation to mask actual IP address); *United States v. Kight*, No. 1:18-cr-00169-TWT-RGV, 2019 U.S. Dist. LEXIS 68619, at *4 (N.D. Ga. Mar. 11, 2019) (describing in case alleging violations of wire fraud, computer fraud and abuse, and extortion how defendant utilized a VPN to obscure his true location); *United States v. Workman*, 205 F. Supp. 3d 1256, 1260 (D. Colo. 2016) (describing government investigation of a child pornography website and defendant's use of a VPN to hide his true location when on the internet in order to engage in illicit child pornography downloads).

The affidavit in support of the complaint details how the messaging at issue was easily obtained by the agents, and the legal process issued to Snapchat and the internet service providers easily revealed account and other information. This is anything but sophisticated internet usage. If taken at face value, the allegations in the criminal complaint and indictment show that Mr. Foster can create multiple accounts on Snapchat using a mobile device and can use Snapchat to send and receive messages, videos and images, but he did not attempt – much less is there any evidence he even knows how – to engage in technological efforts to cover his tracks with encryption, firewalls, or otherwise. Snapchat is the lynchpin of the charges

against Mr. Foster. Preventing access to this mobile application along with blocking and monitoring of internet usage and device access are certainly reasonable conditions of release in concert with others that can be put in place. By focusing on (1) the internet in general as the instrumentality of the alleged offense instead of the specific mobile application Snapchat, (2) the fact the internet is so pervasive and dangerous in society that there is no effective way to ban or regulate one's access to it in modern society if Mr. Foster is out on pretrial release, and (3) an argument unmet by the record that Mr. Foster is somehow an internet mastermind, both the government and the court below back into the incorrect determination that no set of conditions can protect society from Mr. Foster on pretrial release and he should be locked up. This is irrespective of the fact that he isn't convicted of anything and is presumed innocent.

The government has not attempted to challenge the defendant's proposed internet restrictions, much less introduce or submit any evidence to sustain its burden of proof on the efficacy of the conditions, beyond the above blanket assertions. The government did not meet its burden of showing "by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *See United States v. Solerno*, 481 U.S. 739, 750 (1987) (citing 18 U.S.C. § 3142(f)).

Nor did the lower court adequately consider the restrictions offered by Mr. Foster. (Tr. of Mot. Hr'g, R. 28, Page ID # 206 ("[W]hat I do know is if I am inclined to release him, I would not do that with internet access available to that home or devices that have a means to connect via cellular data to the internet.") Evidence was presented via declaration and proffer that explained that measures can be put in place that would "actually block what networks they could connect to on the software on the devices themselves" and the internet that the devices could access would be subject to "regular reports" about the internet use in the house, and internet could be blocked even from open networks at a neighbor's home. (*Id.* at 207.) There is no evidence of actual consideration of these safety mechanisms, much less the government's presentation of any evidence at the hearing below as to lack of effectiveness at ensuring community safety.

C. Mr. Foster's specific concerns about the COVID-19 pandemic warrant pre-trial release.

The government argues that Mr. Foster's medical diagnoses are not recognized by the CDC for "increasing the risk of incurring serious complications from COVID-19." (Response Brief, Doc. 14, pp. 20 – 21, ECF pp. 24 - 25.) Mr. Foster suffers from Meniere disease, gastroesophageal reflux (GERD), had precancerous polyps removed, and is high risk for colon cancer. (Br. of Appellant, Doc. 12, p. 36, ECF p. 45.) According to CDC guidance, persons with underlying medical conditions, to include but not limited to genetic immune deficiencies, are

higher risk for serious illness if exposed to and contract COVID-19.[1] Meniere's disease is a disorder of the inner ear causing episodes of extreme dizziness, roaring sound in the ears, pressure in the ears, and hearing loss, and episodes of Meniere disease are often associated with nausea and vomiting.[2] While researchers have studied abnormal immune system responses as one of many potential factors, the ultimate cause is still unknown, "although it probably results from a combination of environmental and genetic factors." *Id*. "Approximately one-third of Meniere disease cases seem to be of an autoimmune origin although the immunological mechanisms involved are not clear."[3] Several articles from the U.S. National Library of Medicine, part of the National Center for Biotechnology Information within the U.S. Department of Health and Human Services, discuss Meniere disease in the autoimmune context. *Id*.

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[1] Coronavirus Disease 2019 (COVID-19), If You Are Immunocompromised, Protect Yourself from COVID-19, located at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/immunocompromised.html (last visited June 15, 2020); *see also* Coronavirus Disease 2019 (COVID-19), People Who Are at a Higher Risk for Severe Illness, located at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited June 15, 2020).

[2] Meniere disease, NIH U.S. National Library of Medicine, located at https://ghr.nlm.nih.gov/condition/meniere-disease#definition (last visited June 15, 2020).

[3] Meniere Disease Might Be an Autoimmune Condition? Article Abstract dated Jan. 4, 2012, U.S. National Library of Medicine, National Institutes of Health, U.S. Department of Health and Human Services, located at https://pubmed.ncbi.nlm.nih.gov/22306860/ (last visited June 15, 2020).

In any event, it was proffered below by the defendant in his written submissions through counsel prior to the detention hearing and at the hearing, and uncontroverted by the government with *any* evidence, that Mr. Foster is high risk for serious illness from COVID-19 due to his medical conditions. (Mot. to Release Def., R. 19, Page ID # 80; Memo and Proffer of Def., R. 20, Page ID ## 92 – 93; R. 28, Tr., lns. 9-14, Page ID ## 205; R. 28, Tr., Testimony of Lisa Foster, Page ID #214, lns. 17-25, Page ID # 215, lns. 1-6; R. 20-8, Letter of Matthew Kraus, M.D., Page ID # 114.) In addition to the documentation submitted below, Mr. Foster's wife, Lisa Foster, testified at the hearing about Mr. Foster's medical conditions:

> He has Meniere's disease, which he gets vertigo, which makes him sick and he throws up and ends up getting dehydrated, we have to take him to the hospital and get fluids. We try to control it with a low salt diet and reducing his stress as much as possible. He has Gerds where he has some, I think, allergies to some foods which we try to keep tomato-based foods away from him and have a gluten diet to make it not so, you know, the heartburn be so bad. He was having a lot of problems. He went to the doctor and had a colonoscopy done, and they found a polyp which they removed, and later we found out it was cancerous, so he's high risk at cancer. He has to be seen by a colonoscopy, has to have a colonoscopy like every couple of years, which he was due in November.

(R. 28, Tr., Testimony of Lisa Foster, Page ID #214, lns. 17-25, Page ID # 215, lns. 1-6). The government's own official publications, to include those cited and referenced by the defendant in the filings below and those in the briefing on appeal, belie its argument. Mr. Foster's immune response to a COVID-19 viral infection

could affect a Meniere episode, resulting in nausea and vomiting and other symptoms on top of those resultant from COVID-19. With respect to the high risk for colon cancer and other medical issues, the record is clear that at minimum Mr. Foster is experiencing chronic diarrhea while incarcerated. A COVID-19 infection on top of his other issues puts him at high risk for serious illness. While the magistrate judge below noted that Mr. Foster wasn't "in the population particularly vulnerable to Coronavirus[,]" (R. 27, Order of Detention, Page ID # 189), the court did so in the context of discussing and dismissing out of hand Mr. Foster's prior precancerous polyp removal, with no discussion of his other medical issues, to include Meniere disease and the fact in many cases it can stem from an autoimmune issue, which had been raised in defendant's written memorandum and proffer submitted prior to the hearing. (R. 20, Memo., Page ID ## 92-93).

The government correctly notes that the Abingdon jail has not reported any positive cases of COVID-19. (Response Brief, Doc. 14, p. 21, ECF p. 25.) The lack of positive COVID-19 tests within the jail is misleading, though. The jail has *not* tested *any* of its inmates and has continued to admit new inmates. (Resp. in Opp'n to Def's Mot. for Rev. Det. Order, R. 30, Page ID # 277.) The government argues that Washington County, Virginia, where the jail is located, has relatively few cases of COVID-19. (Response Brief, Doc. 14, p. 21, ECF p. 25.) However, just looking at the total population for Washington County is also misleading. The inmates at the

jail are not all residents of Washington County, Virginia. On June 12, 2020, more than half of the most recent inmates admitted into the jail were from outside Washington County, Virginia. *See* Southwest Va. Regional Jail Authority, Current Facility Inmates.[4] Thus, the state-wide COVID-19 rates for Virginia can provide better understanding of the risk that the pandemic will spread into the jail. After all, a single case of COVID-19 can spread like wildfire in the petri dish of confinement. (Br. of Appellant, Doc. 12, pp. 27 – 28, ECF pp. 36-37.) The number of COVID-19 cases in Virginia has continued to rise since the filing of Mr. Foster's brief on appeal, with 54,886 reported cases and 1,552 deaths.[5] But even that doesn't truly represent the risk. The jail in Abingdon is also contracted by the U.S. Marshals Service to house pretrial detainees from Tennessee, thus Mr. Foster is detained in a local county jail in Virginia in this federal case out of the Eastern District of Tennessee. The number of COVID-19 cases in Tennessee, at the time of filing this reply brief, in a single day has risen by 728 persons to 31,160 cases with 483 deaths.[6] And like Mr. Foster, who was transported ultimately to Virginia from detention in Indiana upon

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[4] Just the twenty most recently admitted inmates come from Washington, Smyth, Tazewell, Scott, and Russell counties. Available online at: https://omsweb.public-safety-cloud.com/jtclientweb/(S(sqqmtasjfxi5jzozfcsqx3hn))/jailtracker/index/Southwest_VA (last accessed June 12, 2020).

[5] COVID-19 Cases in Virginia, Va. Dep't of Health, located at https://www.vdh.virginia.gov/coronavirus/ (last accessed June 15, 2020).

[6] Tennessee Department of Health, Coronavirus Disease (COVID-19), located at https://www.tn.gov/health/cedep/ncov.html (last visited June 15, 2020).

initial arrest there in this case, inmates at a local county jail often travel from local facility to local facility, sometimes across the country while in transport pursuant to state or federal extradition. The bottom line is that just focusing on the number of COVID-19 cases in the county in Virginia where the local jail resides is wholly unrepresentative of the rotating inmate population and the risk of infection.

The government excuses the jail's lack "of widespread testing" based on the COVID-19 rates in the county where the jail is located without acknowledging the complete absence of *a single test* of the jail's inmates. As discussed in the Mr. Foster's initial brief on appeal, the risk of transmission of COVID-19 is heightened in confinement because of "the highly congregational environment, the limited ability of incarcerated persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing), and potentially limited onsite healthcare services." (Br. of Appellant, Doc. 12, pp. 22-23, 27-28, ECF pp. 31-32, 36-37) (citing *United States v. Haun*, No. 3:20-CR-024-PLR-DCP, 2020 U.S. Dist. LEXIS 63904, at *9-10 (E.D. Tenn. Apr. 10, 2020)).

Mr. Foster, in his opening brief on appeal, asked this Court to adopt a four-factor test when analyzing pre-trial detention issues that are entwined with COVID-19 concerns. (Br. of Appellant, Doc. 12, p. 35, ECF p. 44.) This test is not addressed in the government's brief. Instead, the government recycled its arguments made in the lower court. (Response Brief, Doc. 14, p. 14 – 24, ECF pp. 18 - 28.) The four-

factor test articulated by the district court in *United States v. Clark*, No. 19-40068-01-HLT, 2020 U.S. Dist. LEXIS 51390 (D. Kan. Mar. 25, 2020), provides a valuable analytical framework to weigh an accused's specific concerns during the COVID-19 pandemic against the government's interests in pretrial detention. (Br. of Appellant, Doc. 12, pp. 35-37, ECF pp. 44-46.)

The *Clark* test is used to "make an individualized determination as to whether COVID-19 concerns present such a compelling reason in a particular case that temporary release is necessary[.]" *United States v. Clark*, No. 19-40068-01-HLT, 2020 U.S. Dist. LEXIS 51390, at *10 (D. Kans. Mar. 25, 2020). Four factors are then used to guide this determination:

> (1) the original grounds for the defendant's pretrial detention,
> (2) the specificity of the defendant's stated COVID-19 concerns,
> (3) the extent to which the proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendant, and
> (4) the likelihood that the defendant's proposed release would increase COVID-19 risks to others.

Clark, 2020 U.S. Dist. LEXIS 51390, at *10. The government has devoted its argument to the original grounds for detention and the specificity of Mr. Foster's health concerns.

As discussed more fully above, Mr. Foster has contested the original grounds of detention, and it is respectfully submitted that Mr. Foster satisfied his burden of

production and the government did not meet its burden of proof to show the absence of any conditions or combination of conditions that can assure community safety in this case. Mr. Foster has specific health concerns during the pandemic because of his preexisting medical conditions. The proposed release plan will mitigate his COVID-19 risk because he would be removed from the jail. Lastly, his proposed release would put him in the custody of his wife and adult daughter, severely limiting the risk that he would carry COVID-19 from the jail and into the community. Mr. Foster's medical needs can be better addressed by his primary care and specialist physicians.

The government cites the unpublished decision in *United States v. Sykes*, No. 20-1300, 2020 WL 2991351, at *2 (6th Cir. June 3, 2020). (Response Brief, Doc. 14, p. 22 – 23, ECF pp. 26 - 27.) Unlike the *pretrial* detention issue presented here, the panel in *Sykes* was dealing with *presentencing detention following a determination of guilt* governed by the provisions of 18 U.S.C. § 3143(a)(2), in which the defendant bears the burden of proof of lack of flight risk and danger to the community if the defendant is facing a term of imprisonment. *United States v. Sykes*, No. 20-1300, 2020 WL 2991351, at *1 (6th Cir. June 3, 2020). Even under that burden of proof, the court determined that the exceptional circumstances requirement can be met for *presentence* release due to the COVID-19 pandemic, but the defendant in *Sykes* produced no evidence he was higher risk for COVID-19. *Id*.

There is no indication from the decision that *Sykes* presented anything other than allegations in a *pro se* filing. *Id*. For the reasons stated above, quite the opposite is the situation presented to this Court in Mr. Foster's case.

II. THE GOVERNMENT CURSORILY ADDRESSED THE DEFENDANT'S CONSTITUTIONAL ARGUMENTS, WHICH WERE RAISED BELOW AND ARE ENTWINED WITH THE PRE-TRIAL DETENTION ISSUE.

The government wrongly states that Mr. Foster's constitutional arguments are beyond the scope of appellate review in this case. (Response Brief, Doc. 14, pp. 23-24, ECF pp. 27-28.) Mr. Foster raised these constitutional issues in his initial motion, supporting memorandum, and written proffer submitted to the lower court prior to the detention hearing, and counsel argued these issues at the hearing. (R. 20, Memo., Page ID ## 82-83, 93-95; R. Tr., R. 28, Page ID # 202, lns. 4-17; R. 29, Mot. to Revoke Det. Order, Page ID ## 258). Further, these issues are inherent when dealing with pretrial release and the right to bail. (R. 20, Memo., Page ID # 82) (citing and quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). The government's arguments that these issues were not raised below, and fairly encompassed in the defendant's written arguments and proffer, arguments by counsel and presentation of evidence at the hearing before the magistrate judge, and filings with the district court, are erroneous.

> In our judgment the issue was "fairly raised" below and the trial court given an opportunity to address it. It would be unfortunate and unfaithful to the meaning of the law, in

> our view, to rule otherwise. To so hold would render unreviewable any argument which was not completely articulated in the court below, leaving us to decide the issues, not as finally and most maturely expressed, but tightly confined to the form in which they were presented to the district court. Were this the rule, there would be little reason indeed to require fresh briefing and oral argument in this court. There is more substance than this in the appellate process.

Vaughn v. United States SBA, 65 F.3d 1322, 1325 (6th Cir. 1995).

"From the passage of the Judiciary Act of 1789 … to the present … federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Id*. "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id*. (R. 20, Memo., Page ID # 82) (citing and quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). These constitutional protections that are aided by the right to freedom before conviction at trial encompasses the Fifth Amendment protection of due process, the Sixth Amendment right to counsel and meaningful participation in one's defense, and Eighth Amendment right to bail and prohibition on cruel punishments, and it is why they are referenced in *Stack* in discussing the right to bail and the importance of the presumption of innocence. As a result, the presumption of innocence is specifically

referenced in the statute on pretrial release. *See* 18 U.S.C. § 3142(j) ("Nothing in this section shall be construed as modifying or limiting the presumption of innocence.").

The government argues that Mr. Foster's right to counsel has not been impaired because he still has some access to his attorney. (Response Brief, Doc. 14, p. 23, ECF p. 27.) This misconstrues and avoids the heart of the defendant's argument. While the defendant acknowledges that he can speak with his attorney in some fashion over the phone at the Virginia facility, this is not an adequate substitute for effective attorney-client communications and the ability of defense counsel to satisfy the defense function. *Mitchell v. Mason*, 325 F.3d 732, 743-44 (6th Cir. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). Given the volume of discovery materials, the manner in which they should be reviewed, and other essential functions of the attorney-client relationship, Mr. Foster continues to be denied the effective assistance of counsel which should be factored into the pretrial detention analysis. (Br. of Appellant, Doc. 12, pp. 37-40, ECF pp. 46-49.) The government cites and partially quotes the unpublished panel decision in *United States v. You*, No. 20-5390, 2020 U.S. App. LEXIS 15809, at *7 (6th Cir. May 15, 2020), for the proposition that lack of ability to fully assist in one's defense doesn't impact the determination of whether condition of release would assure community safety. (Response Brief, Doc. 14, p. 23, ECF p. 27.) The portion of the decision the

government cites in *You* procedurally concerned the new information standard for a motion to reopen a detention decision, not an initial determination of pretrial release. The portion of the panel decision cited by the government deals with restrictions put in place by the jail to prevent COVID-19's spread impairing adequate assistance in the accused's defense, and the full sentence partially quoted by the government reveals it dealt specifically with the issue of flight risk and not dangerousness. *United States v. You*, No. 20-5390, 2020 U.S. App. LEXIS 15809, at *7 (6th Cir. May 15, 2020). On the COVID-19 pandemic issues, the court found the defendant in *You* had not alleged she was at greater risk if she contracted the virus, and a generalized fear of contracting the virus, absent more, does not otherwise support release. *Id*. at 6 (citing *Wilson v. Williams*, No. 4:20-CV-00794, 2020 U.S. Dist. LEXIS 70674, 2020 WL 1940882, at *1 (N.D. Ohio Apr. 22, 2020), and *Perez-Perez v. Adducci*, No. 20-10833, 2020 U.S. Dist. LEXIS 81912, 2020 WL 2305276, at *8 (E.D. Mich. May 9, 2020)).

CONCLUSION

For these reasons, and those more fully discussed in his Opening Brief, Mr. Foster respectfully requests that this Court reverse the pre-trial detention order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation. I have checked the number of words in the applicable portion of this brief using Microsoft Word, and the report indicates that the countable portions of this brief under Rule 32(a)(7) contains 5,596 words.

/s/ Stephen Ross Johnson
STEPHEN ROSS JOHNSON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that a true and exact copy of the foregoing was forwarded, via the Court's electronic filing system, this 15th day of June 2020 to:

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/s/ Stephen Ross Johnson
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ADDENDUM:

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

ENTRY NO.	DESCRIPTION OF ENTRY	PAGE ID # RANGE
1	Criminal Complaint	1 - 25
2	Indictment	27 – 31
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22	United States Response in Opposition to Defendant's Motion for Release	140 – 146
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27	Order of Detention Pending Trial	187 – 190
28	Transcript of Motion Hearing	191 – 257
29-0	Motion for Revocation of Detention Order	258 – 261
29-1	Exhibit to R. 29, *United States v. Harris*, No. 19-356 (D. D.C. May 26, 2020)	262 - 269
29-2	Exhibit to R. 29, SWVRJA Jail Records	270 – 274

30	United States Response in Opposition to Defendant's Motion for Revocation	277 – 278
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32	Order Denying Motion for Revocation	282 - 291
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