

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT GREENEVILLE**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 2:19-CR-193
	)	JUDGES CORKER / WYRICK
MICHAEL LEE FOSTER	)	
	)	
Defendant.	)	

**MEMORANDUM IN SUPPORT OF MOTION TO RELEASE DEFENDANT  
PENDING TRIAL AND FOR A HEARING PURSUANT TO 18 U.S.C. § 3142(f)**

The defendant, MICHAEL LEE FOSTER, has moved this Court pursuant to 18 U.S.C. § 3142, the Eighth Amendment to the United States Constitution, Stack v. Boyle, 342 U.S. 1 (1951), and their progeny, to enter an Order releasing the defendant upon any conditions the Court deems necessary.

The following memorandum of law and proffer of facts are respectfully submitted in support of the defendant’s motion for release.

**I. PRETRIAL RELEASE IS CLEARLY FAVORED BY U.S. CONST. AMEND. VIII AND 18 U.S.C. § 3142.**

“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.

18 U.S.C. § 3142 and the United States Constitution clearly favor pre-trial release upon

“the least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of the community.” 18 U.S.C. § 3142(c)(1)(B); Stack v. Boyle, 342 U.S. 1, 4-5 (1951). An exception to the “traditional right to freedom” is found in 18 U.S.C. § 3142(e). Subject to rebuttal by the defendant, it is presumed that no condition or combination of conditions will reasonably assure community safety and the appearance of a defendant when the defendant is charged with an offense involving a minor victim. See 18 U.S.C. § 3142(e)(3); United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985) (holding that an indictment alone is sufficient to support a finding of probable cause triggering the rebuttable presumption).

**II. DETENTION IS ONLY NECESSARY IF THE COURT FINDS THERE IS CLEAR AND CONVINCING EVIDENCE THAT MR. FOSTER IS A DANGER TO THE COMMUNITY AND NO SET OF CONDITIONS CAN REASONABLY ASSURE COMMUNITY SAFETY.**

The presumption shifts the burden of production to the defendant to show that his release would not pose a flight risk or a danger to any person or the community. The presumption “imposes only the burden of production on the defendant and does not shift the burden of persuasion concerning the risk of flight or dangerousness.” United States v. Travis, 129 F.3d 1266 (Table), No. 97-6102, 1997 WL 678524, \*1 (6th Cir. 1997). In order for the defendant to be subject to detention, and the constitutional right to bail to be denied, the Court must find either the risk of flight by a preponderance of the evidence or that there is dangerousness to any other person or the community “**by clear and convincing evidence.**” United States v. Hinton, 113 Fed.Appx. 76, 77 (6th Cir. 2004) (emphasis added); see also United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985). Furthermore, even just the proffering of proof by the defendant is sufficient to rebut the presumption of dangerousness. United States v. Gourley, 936 F.Supp. 412, 416 (S.D.Tex. 1996) (citing United States v. Hare, 873 F.2d 796, 798-99 (5th Cir.1989); and United States v. Fortna,

769 F.2d 243, 251 (5th Cir.1985)). The defendant only has the burden of production with respect to the rebuttable presumption, yet the defendant never has to carry the burden of persuasion. Otherwise, the Eighth Amendment right to bail would be eviscerated.

The factors to be considered in determining whether a defendant has shown that his release will not pose a flight risk or a danger to any person or the community are set out in 18 U.S.C. § 3142(g) and include: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

### **III. PROFFER AND DISCUSSION OF 18 U.S.C. § 3142(G) CONSIDERATIONS APPLICABLE TO MR. FOSTER'S CASE.**

18 U.S.C. § 3142(f)(2) states, in relevant part, that the defendant at a detention hearing "shall be afforded an opportunity ... to present evidence by proffer or otherwise." The following facts are proffered to the Court in support of the instant motion.

The nature and circumstances of the offense charged are the reason that the statutory presumption applies to Mr. Foster. Despite the rebuttable presumption, Mr. Foster is not a flight risk or a danger to the community. Mr. Foster's history and characteristics lend support to a finding that conditions can be placed upon him that will assure his appearance and the safety of the community. Several of Mr. Foster's family, friends, and co-workers have submitted declarations in support of Mr. Foster's pretrial release. *See Exhibits 1-13.*

#### **A. Background**

Mr. Foster was adopted as an infant, and raised in Dubuque, Iowa, along with his sister, Tina. Mr. Foster's mother, Shirley, states that "[e]ven as a baby, Mike was sweet and caring. He has never changed." *See* Declaration of Shirley Foster, Exhibit 1. His sister says, "He was involved

in sports, became an eagle scout, and started working before he went to college.” When Mr. Foster was only 19 years old, his adoptive father passed away, and Mr. Foster became the head of household for his mother and sister. His sister states that “even though Mike was away at college, he always made sure my mother and I were taken care of.” See Declaration of Tina Foster, Exhibit 2. A year after his father’s passing, he met his wife, Lisa Foster, and they dated until Michael’s graduation from Iowa State University, where he earned his degree in Industrial Occupation and Education. Michael and Lisa married in October of 1990, where they had their two children, Justin and Ashley.

Below is a picture of Mr. and Mrs. Foster on their wedding day, and a picture of young Mr. and Mrs. Foster with their children, Ashley and Justin.



The Fosters lived in Arkansas for five years while Michael was working for First Brands, a company that manufactured well-known products such as Glad trash bags and Scoop Away cat litter. While in Arkansas, Mr. Foster also attended continuing education classes at the University of Arkansas focusing on mechanical engineering. After the birth of their second child, Ashley,

Michael and Lisa Foster moved their family to Gilbert, Iowa, where Mr. Foster had accepted a position at American Packaging Corporation as a project engineer. The Foster family was only back in Iowa for another 5 years before Mr. Foster was offered a position at Petoskey Plastics, Inc, located in Petoskey, Michigan, in 2000.

### **B. Excellent Employment History and Potential for Employment Upon Release**

Petoskey Plastics is a plastic manufacturing and recycling company that was founded in 1970 by Paul Keiswetter, current Chairman and CEO of the company. Mr. Foster was hired as a plant engineer, but quickly proved his worth and began moving up the ladder. Around the same time Mr. Foster was hired at Petoskey Plastics, the company began their expansion to Morristown, Tennessee, and Mr. Foster was given the responsibility of getting the new plant up and running. The company moved Mr. Foster and his family to Morristown, Tennessee in 2002, and they have resided there since. Prior to his arrest, Mr. Foster was the Director of Engineering and Maintenance for the company. CEO Paul Keiswetter states, “Mike has been a wonderful employee through the years and has contributed substantially to the success of the company.” He further provides that “should Mike be granted pretrial release by the court, I would gladly try to re-employ Mike with Petoskey Plastics in some capacity.” *See* Declaration of Paul Keiswetter, Exhibit 3. Mr. Tony Watkins, an employee with Cherokee Millwright that has done contract work with Petoskey Plastics for over 15 years, feels that he has gotten to know Mike very well. He says, “Mike is a good, responsible member of society and has had a significant impact on the Morristown community through his devotion and commitment to his career with Petoskey Plastics. He has helped make Petoskey Plastics one of the best companies that my company works with.” *See* Declaration of Tony Watkins, Exhibit 4.

### **C. Substantial Ties and Contributions to the Community**

Upon moving to Morristown in 2002, Michael involved his children in local soccer clubs.

His son Justin states, “although he never formally played soccer when he was a kid, [Michael] learned everything about the sport so he could coach me and my sister and be involved as much as possible.” Mr. Foster coached his children’s soccer teams through throughout their adolescence. Justin states “He always wanted to give my sister and I the best experiences, never asking anything in return.” *See* Declaration of Justin Foster, Exhibit 5.

Below is a picture from 2005 of Mr. Foster (top row, far right) and his son Justin’s soccer team. Justin is the second from the left on the bottom row.



Mr. Foster’s involvement in his children’s soccer teams eventually led to him being President of the local soccer club, where he organized soccer club events, tournaments, and scheduled practices. Even though Mr. Foster traveled for work for most of his children’s lives and had a demanding job, he would spend his spare time volunteering for the soccer club. His devotion to the community soccer club has made him well-known in the community for his commitment and reliability. He was never paid for the time he spent devoting to the soccer club, and always worked hard to provide the best experience for the children involved in the soccer community. He



also made it a priority to come home every weekend to be with his family. His daughter, Ashley, states that “My father and I have always been very close ...[e]ven though my father had a demanding job and traveled often with work, he never missed a single one of my soccer games and would even rearrange his work schedule to be present for practices and games.” *See* Declaration of Ashley Foster, Exhibit 6.

Below is Mr. Foster (far left) and his daughter, Ashley’s, soccer team when he was a coach. Ashley is the third person from the left on the top row.



#### **D. Family Support**

Mr. Foster formed strong bonds with his children through soccer and is still close with his children, who are now adults. Three years ago, Ashley was diagnosed with a rare form of leukemia and was in treatment for nearly 6 months. Mr. Foster and his wife were at the hospital every single

day during Ashley's inpatient treatment, and Mr. Foster went with Ashley to her outpatient treatments. Ashley states, "After I got out of the hospital, he came to every monthly follow-up appointment with me until his arrest in November 2019." See Declaration of Ashley Foster, Exhibit 6. Below is a picture of Michael and Ashley Foster.



Mr. Foster's son, Justin, also has a close relationship with his father. Justin went away to college at Tennessee Tech University in Cookeville but was continually encouraged by his father to play sports, further his studies, and enhance his career with specialized skills classes. Justin says, "I have always looked up to my dad, and still look up to my dad, because he is such a hard worker and caring father." Ashley is now engaged to Andrew Miller, a school resource officer from New Market, Tennessee. He and Ashley have been together for the past two years, and he has gotten to know Mr. Foster during that time. He is still at the Foster house almost every night, and states that Mr. Foster has "never given me any indication that he is a danger to the community." He further says, "I have witnessed Ashley and Mr. Foster's close relationship. I have also

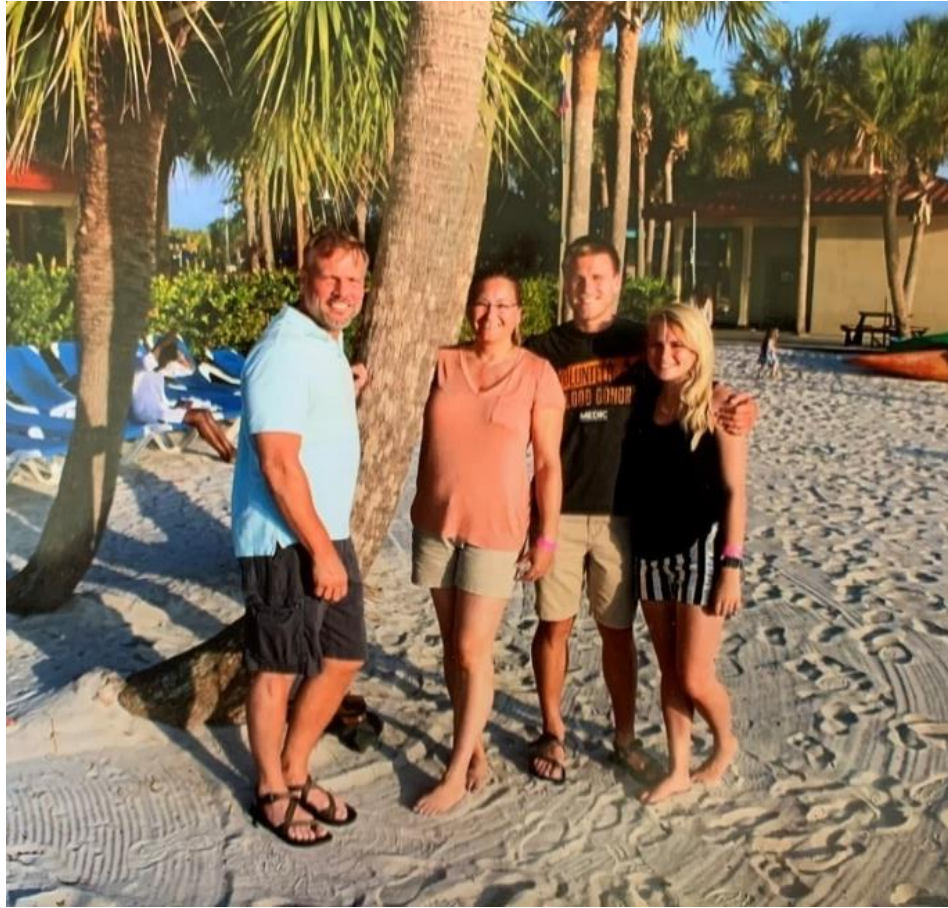


witnessed the hard work Mr. Foster put into his career with Petoskey Plastics. I have never witnessed Mr. Foster mistreat or harm anyone.” See Declaration of Andrew Miller, Exhibit 7.

Mr. Foster and his wife, Lisa, have been together over 30 years. Despite the traveling required of Michael due to his career, he and Lisa have continued to be each other’s strongest support system, always working to put their family first. Starting when Lisa and Michael were dating, Lisa began creating scrapbooks and photo albums of the activities she and Michael, and eventually their children, did together. A picture of Ashley and Lisa with the scrapbooks is below.



Michael and Lisa have always worked to provide the best lives for their children, and the family is close-knit and supportive.



#### **E. Health Concerns**

Mr. Foster has several health issues. Three years ago, Michael Foster tested positive for precancerous colon polyps. They were successfully removed surgically, but he is now considered a high-risk for colon cancer. His return appointment for preventative testing was scheduled for November of 2019, just after Mr. Foster was arrested. It is important that he receive testing to ensure that the cancer cells have not returned. A letter from Mr. Foster's primary care physician, Dr. Mathew Kraus, is attached as Exhibit 8, and the letter lists Mr. Foster's medical history and his need for preventative testing. Also attached as Exhibit 9 is a letter from Mr. Foster's gastrointestinal physician, Dr. John M. Haydek, which explains Mr. Foster's need for preventative

testing to screen for colon cancer. On behalf of Mr. Foster, counsel has contacted the Southwest Virginia Regional Jail Authority in Abingdon to gather information about how Mr. Foster can obtain preventative testing and to request Mr. Foster's medical records. Counsel forwarded the letters from Mr. Foster's physicians to the jail and spoke with medical personnel at the jail. Mr. Foster's jail medical records were requested on February 27, 2020, and were provided via facsimile to counsel's office on today's date – March 17, 2020. Those records reveal that Mr. Foster's gastrointestinal issues – to include his colon cancer issues and scheduled medical appointment in January 2020 with his gastroenterologist - were reported upon his initial intake screening. The records also reveal that while Mr. Foster's gastroenterologist and primary care provider *both* recommend a colonoscopy due to Mr. Foster's high risk for colon cancer, the contract medical provider for the jail instead has recently just recommended a blood and stool analysis and diagnosed Mr. Foster with chronic diarrhea. Redacted portions of the jail records, with relevant portions highlighted, are attached hereto as Exhibit 10.

In addition to his need for preventative colon cancer testing, Mr. Foster has Meniere's disease, which has resulted in several trips to the hospital throughout the last few years. He also struggles with GERD and has been prescribed medication for it. He has requested, and it is counsel's understanding he has been denied, this medication since being incarcerated in this matter.

On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.<sup>1</sup> Additionally, the CDC has issued guidance that individuals at higher risk of contracting COVID-19 – adults over 60 years and people with chronic medical conditions, such as Meniere's disease, which in many cases stems from an autoimmune issue, should take immediate

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<sup>1</sup> *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (March 11, 2020) at <https://bit.ly/2W8dwpS>.

preventative actions, including avoiding crowded areas and staying home as much as possible.<sup>2</sup> Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited.<sup>3</sup> Mr. Foster is a high-risk individual, and his risk of contracting COVID-19 should be considered in his request for pretrial release. Notably, according to Mr. Foster's jail medical records, despite his medical conditions he apparently has not been screened for COVID-19. *See Exhibit 10.*

#### **F. Need to Provide for Family and Defense**

Unfortunately, since Mr. Foster's arrest, his wife has struggled to maintain their home and bills, where both she and Ashley live with their pets. Mr. Foster has always been the main source of financial support for his family, and they continue to need his support. Mr. Foster has job potential if he is granted pretrial release, and he needs the ability to have employment income to assist in his defense.

#### **G. Conditions of Release**

There are several conditions of release that could be placed upon Mr. Foster that would ensure the safety of the community. In addition to electronic monitoring, the Court could require regular reporting by Mr. Foster and any other conditions to reasonably assure his safety and that of the community. Should the Court find that internet or computer restrictions are necessary to ensure the safety of the community, Mr. Foster's wife and daughter have agreed to work with a computer expert in installing any necessary internet restrictive devices and programs to all

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<sup>2</sup> *People at Risk for Serious Illness from COVID-19*, CDC (March 12, 2020) at <https://bit.ly/2vgUt1P>.

<sup>3</sup> Laura M. Maruschak et al. (2015). *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>



computers, phones, and internet connecting devices within Mr. Foster's home, which he has lived in for almost 20 years with his family. Rob Glass, a technology consultant, has visited the Foster home and is prepared to implement any internet security protocols required by the court to ensure the safety of the community at the defendant's expense. His declaration and report are attached hereto collectively as Exhibit 11. Mr. Glass describes the hardware and firewall involved in securing the family's internet and devices. This firewall also can generate reports of the internet traffic in the household, which can be reviewed and monitored by the appropriate personnel.

This is a picture of Mr. Foster's home in Morristown where he has lived with his wife and children for almost 20 years, and it is where he would reside upon release:



In addition, Mr. Foster's wife and daughter have both offered to serve as third-party custodians for Michael. Lisa Foster states, "Should he violate the court's order in any way, I agree to notify the proper persons. I have no concerns, however, that my husband would violate the court's order, be a flight risk, or be a danger to the community. I have never seen Mike be violent. I have never known Mike to disobey the authorities, and I know he would never abandon our

family.” See Declaration of Lisa Foster, Exhibit 11. Further, Ashley states, “I have never seen my father act violently, and I was never treated badly or mistreated at all by him growing up...I have no concerns that he is a danger to the community or a flight risk.” See Declaration of Ashley Foster, Exhibit 6. Paul “Ed” Byrd, who has lived across the street from the Foster family for almost 20 years along with his wife, Kim, says, “I am aware of the current allegations against Mike Foster, and I have no concerns about the safety of the community if Mike is released from jail on bond.” See Declaration of Paul E. Byrd, Exhibit 12, and Declaration of Kim Byrd, Exhibit 13.

Incarceration is the most onerous form of ensuring community safety, and it is unnecessary in Mr. Foster’s case. Mr. Foster has never been convicted of a crime and has no previous arrests. Incarceration is an unnecessary hardship not only on him but also on his family who depends on him. Incarceration is also an impediment to Mr. Foster’s ability to effectively participate in his defense. His Sixth Amendment counsel of choice is in Knoxville, Tennessee, while he is incarcerated in a local county jail in Abingdon, Virginia. This case is complex and requires much interaction between the client and counsel.

#### **IV. CONCLUSION**

Mr. Foster is not a risk to flee or fail to appear at any future proceedings. There is no clear and convincing evidence that Mr. Foster is a danger to the community and that a condition or combination of conditions could not alleviate any safety concerns. Therefore, his continued detention is unnecessary.

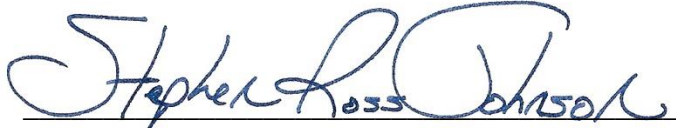
18 U.S.C. § 3142 and the United States Constitution clearly favor pre-trial release upon “the least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of the community.” 18 U.S.C. § 3142(c)(1)(B); Stack v. Boyle, 342 U.S. 1, 4-5 (1951). The evidence proffered rebuts any statutory presumption in favor of detention, and there are certainly conditions



this Court can impose that will satisfy the goals of 18 U.S.C. § 3142 and the Eighth Amendment right to bail.

Respectfully submitted by:

**RITCHIE, DILLARD, DAVIES & JOHNSON, P.C.**

A handwritten signature in blue ink that reads "Stephen Ross Johnson". The signature is written in a cursive style with a large, stylized "S" and "J".

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