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**Case No. 20-5548**

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**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*

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**BRIEF OF APPELLANT**

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**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Defendant-Appellant Michael Foster respectfully requests oral argument pursuant to Sixth Circuit Rule 34(a). This appeal includes an important pretrial detention issue of first impression in this Circuit. The other issue presented is fact specific to this case, and oral argument will be helpful in clarifying any question the Court may have about the underlying factual background and may assist the Court in reaching its decision.

**STATEMENT OF JURISDICTION**

This matter concerns an appeal as of right in a criminal case by the defendant pursuant to Fed. R. App. P. 9 from an Order denying the defendant's Motion for Revocation of Detention Order resulting in Mr. Foster's confinement pending trial by the United States District Court for the Eastern District of Tennessee at Greenville. (Order Den. Mot. Rev., R. 32.) The district court entered the Order on May 22, 2020. (*Id.*) The defendant timely filed a notice of appeal on May 22, 2020. (Notice of Appeal, R. 33.) The district court had jurisdiction to hear the pretrial detention issue pursuant to 18 U.S.C. § 3142.

**ISSUES PRESENTED FOR REVIEW**

- I. IN LIGHT OF THE COVID-19 PANDEMIC, PRETRIAL DETENTION DETERMINATIONS MUST BE SENSITIVE TO THE LEGITIMATE HEALTH CONCERNS OF PERSONS ACCUSED OF CRIMINAL CONDUCT.**
  
- II. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO REVOKE PRETRIAL DETENTION.**
  
- III. MR. FOSTER'S DETENTION VIOLATES U.S. CONST. AMEND. V, VI, AND VIII.**

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

On November 5, 2019, the United States brought a Criminal Complaint against Michael Lee Foster accusing him of receiving child pornography by enticing minor females to send him sexually explicit photographs and videos through the cellular phone application Snapchat. (Crim. Compl., R. 1, Page ID ## 1 – 26.) A search warrant was executed at Mr. Foster’s house on November 6, 2019, just before his arrest on that same day in the Northern District of Indiana, where he was away on business.

On November 26, 2019, a Grand Jury for the Eastern District of Tennessee returned a four count Indictment against Mr. Foster for enticing a minor to produce child pornography, possessing child pornography, knowingly or attempting to knowingly use means of interstate commerce to persuade, induce or entice a minor to engage in sexual activity, and knowingly receiving any child pornography that has been transported, shipped or mailed in interstate or foreign commerce including by computer. (Indictment, R. 2, Page ID ## 27 – 31.) Mr. Foster was transferred to multiple jails throughout the next month, and his initial appearance and arraignment before the Eastern District of Tennessee were not until January 3, 2020. Mr. Foster initially waived his detention hearing without prejudice to later requesting one. (Order of Det., R. 8, Page ID # 55.)

On March 17, 2020, Mr. Foster filed a Motion for Release Pending Trial and for a Hearing with a written proffer that included multiple sworn declarations from family members and those in the local community supporting Mr. Foster's release, medical records and letters from Mr. Foster's primary care provider and gastrointestinal specialist documenting his medical conditions, a report from a technology expert regarding computer and internet software and hardware restrictions that could be placed on Mr. Foster, and medical and other information concerning the local jail where Mr. Foster is currently detained. (Mot. to Release, R. 19, Page ID ## 78 – 81; Mem. in Supp., R. 20, Page ID ## 82 – 138.) The United States responded in opposition, relying on the Criminal Complaint and the Indictment. (Resp. in Opp'n, R. 22, Page ID ## 140 – 176.) Mr. Foster filed a reply on March 29, 2020 and argued that the government failed to address its high burden of proof. (Reply, R. 23, Page ID ## 177 – 183.) A limited in-person hearing was held before a magistrate judge on March 30, 2020, in which the defendant was present remotely via video, and the court later entered an Order of Detention on April 2, 2020. (Tr. of Mot. Hr'g, R. 28, Page ID ## 192 – 257; Order of Det., R. 27; Page ID ## 187 – 190.)

Mr. Foster moved the district court to revoke the detention order on April 17, 2020. (Mot. for Rev. of Det. Order, R. 29, Page ID ## 258 – 276.) In its two-page response, the government relied on its response in opposition to the defendant's

motion for release from custody, the hearing transcript, and the Magistrate Judge's Order of Detention. (U.S. Resp. in Opp'n, R. 30, Page ID ## 277 – 278.)

On May 18, 2020 Mr. Foster moved to Continue the Pretrial Motions Deadline because the COVID-19 pandemic coupled with Mr. Foster's detention in a local jail prevented his defense counsel from conducting in-person meetings to discuss the case and review the discovery materials, hindered the production of additional discovery, and prevented defense counsel from effectively developing and investigating leads, determining pretrial motions to file, and otherwise performing the defense function. (Mot. to Continue, R. 31, Page ID ## 279 – 281.) The motion was granted on May 29, 2020. (Order Granting Mot. to Continue, R. 41, Page ID ## 307 – 308.)

## **II. STATEMENT OF FACTS**

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 and friends submitted declarations in support of Mr. Foster's pretrial release, which were made exhibits at the hearing in the court below. (Mem. in Supp., R. 20, Page ID ## 82 – 138.)

- A. Mr. Foster’s background and circumstances reveal he has no prior criminal history, has an excellent work ethic and good reputation in his community, and enjoys strong family and community support.**

Mr. Foster was adopted and raised in Dubuque, Iowa, along with his sister, Tina. (Decl. Shirley Foster, R. 20-1, Page ID ## 97 – 98.) He was involved in sports, became an eagle scout, and started working at a young age. (Decl. Tina Foster, R. 20-2, Page ID ## 99 – 100.) When Mr. Foster was 19 years old, his adoptive father passed away, and Mr. Foster worked to help provide for his mother and sister. *Id.* A year after his father’s passing, he met his wife, Lisa Foster, and they dated until Mr. Foster’s graduation from Iowa State University, where he earned his degree in Industrial Occupation and Education. Mr. Foster and Lisa married in October of 1990, and afterward they had their two children, Justin and Ashley. (Mem. in Supp., R. 20, Page ID ## 84 – 85.)

The Fosters lived in Arkansas for five years while Mr. Foster was working as an engineer for First Brands. 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, Mr. and Mrs. Foster moved their family to Gilbert, Iowa, where Mr. Foster worked at American Packaging Corporation as a project engineer. The Foster family was in Iowa for another 5 years before Mr. Foster was offered a position at Petoskey Plastics, Inc, located in Petoskey, Michigan, in 2000. (Mem. in Supp., R. 20, Page ID ## 85 – 86.)

Petoskey Plastics is a plastic manufacturing and recycling company that was founded in 1970 by Paul Keiswetter, current Chairman and CEO of the company. (Mem. in Supp., R. 20, Page ID # 86.) Mr. Foster was hired as a plant engineer. Shortly after Mr. Foster was hired at Petoskey, the company expanded to Morristown, Tennessee, and Mr. Foster was given the responsibility of getting the new manufacturing facility operational. The company moved Mr. Foster and his family to Morristown, Tennessee in 2002, where they have resided ever since. (Mem. in Supp., R. 20, Page ID # 86.)

Prior to his arrest in this case, Mr. Foster was the Director of Engineering and Maintenance for Petoskey Plastics. CEO Paul Keiswetter stated in a written declaration that, “Mike has been a wonderful employee through the years and has contributed substantially to the success of the company.” (Mem. in Supp., R. 20, Page ID # 86; Decl. Paul Keiswetter, R. 20-3, # 101 – 102.) He further provided that “should Mike be granted pretrial release by the court, I would gladly try to re-employ Mike with Petoskey Plastics in some capacity.” *Id.* Mr. Tony Watkins, an employee with Cherokee Millwright that has done contract work with Petoskey Plastics for over 15 years, stated, “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.” (Mem. in Supp., R. 20, Page ID # 86; Decl. Tony Watkins, R. 20-4, ## 103 – 105.)

Upon moving to Morristown in 2002, Mr. Foster involved his children in local soccer clubs. His son Justin stated, “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.” (Mem. in Supp., R. 20, Page ID # 86.) Mr. Foster coached his children’s soccer teams through throughout their adolescence. *Id.*

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. (Mem. in Supp., R. 20, Page ID ## 87 – 88.) 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. *Id.* He also made it a priority to come home every weekend to be with his family. His daughter, Ashley, stated 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.” (Mem. in Supp., R. 20, Page ID ## 87 – 88.)

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 stated, “After I got out of the hospital, he came to every monthly follow-up appointment with me until his arrest in November 2019.” (Mem. in Supp., R. 20, Page ID ## 88 – 89.)

Mr. Foster’s son, Justin, also has a close relationship with his father. Justin stated, “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.” (Mem. in Supp., R. 20, Page ID # 89.) 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 stated that Mr. Foster has “never given me any indication that he is a danger to the community.” (Mem. in Supp., R. 20, Page ID # 86.) He further said, “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.” (Mem. in Supp., R. 20, Page ID ## 89 – 90.)

**B. Mr. Foster’s wife, Lisa Foster, and adult daughter, Ashley Foster, submitted written declarations to the court below and testified at the hearing on their willingness to be third-party custodians if Mr. Foster was released on conditions.**

Lisa Foster, Mr. Foster’s wife for 29 years, testified at the hearing on Mr. Foster’s Motion for Pretrial Release. (Tr. of Mot. Hr’g, R. 28, Page ID ## 208 – 227.) Mrs. Foster met Mr. Foster when she was 17 years old in Dubuque, Iowa. (*Id.* at 212.) They moved around the Midwest for several years following employment opportunities for Mr. Foster. They ended up in Morristown, Tennessee, after Mr. Foster’s employer, Petoskey Plastics, relocated him and his family. Mrs. Foster also testified to Mr. Foster’s involvement in the local soccer community while his children were in middle through high school, and that he was even president of the soccer club for several years. (*Id.* at 213.)

Mrs. Foster shared the close relationship between Mr. Foster and their daughter, Ashley Foster. (Tr. of Mot. Hr’g, R. 28, Page ID ## 213 – 215.) Ashley suffered a 6-month battle with Leukemia several years ago, and Mr. Foster did not miss a single appointment until his arrest. (*Id.* at 214.) Around the time Ashley’s medical issues began, Mr. Foster also learned that he was suffering from precancerous polyps in his colon. He had surgery to remove the polyps and is now

considered a high-risk individual for colon cancer. Mr. Foster was due for a repeat colonoscopy in November, several days after his arrest. (*Id.* at 215.)

Since Mr. Foster's arrest, his family has suffered financial hardship, and Mrs. Foster has been left to attempt to manage the family's debts and finances alone. (Tr. of Mot. Hr'g, R. 28, Page ID # 216.) She shared her struggles to maintain the finances at the hearing and of her desire for him to be able to return to work to support the family. Mrs. Foster has known her husband for 34 years and shared that she has no concern that he would be a danger to anyone in the community if released. (Tr. of Mot. Hr'g, R. 28, Page ID # 211.) Mrs. Foster agreed to serve as a third-party custodian for Mr. Foster and testified that if she saw or had suspicion that he was acting inappropriately or disobeying the court's orders, she would notify authorities. (*Id.* at 217.) Mrs. Foster also testified that, if it were a condition of Mr. Foster's release, she would be agreeable to removing all internet connection and internet capable devices from her home. (*Id.* at 227.)

Mr. Foster's adult daughter, Ashley Foster, also testified at Mr. Foster's hearing on his Motion for Pretrial Release. (Tr. of Mot. Hr'g, R. 28, Page ID ## 228 – 233.) Ms. Foster currently lives in the home in Morristown with her mother, is engaged to a school resource officer in Jefferson County, Tennessee, and works at the Jefferson County Animal Shelter. (*Id.* at 229.) Ms. Foster also testified to the closeness she has with her father and how he has been involved of every aspect of

her life, to include her months long battle with leukemia and her remission period. (*Id.* at 231.)

Ms. Foster shared that she is aware of the allegations against her father and assured the court that her father was never inappropriate with her. She stated she had no concerns that her father would be a danger to the community if released, and that she was willing to report if he failed to abide by any order of the court. She also testified that she would be willing to forego internet access in her home if her dad were released, to include getting rid of her smart phone and other internet capable devices. (Tr. of Mot. Hr'g, R. 28, Page ID # 233.)

During the cross-examination of Ashley Foster, the government questioned Ms. Foster about the statements she made on the day the FBI raided the family home. (Tr. of Mot. Hr'g, R. 28, Page ID ## 235 – 238.) Counsel for the government asked Ms. Foster if she recalled telling the agents that her fiancé thought Mr. Foster was doing something suspicious. (*Id.* at 236.) Ms. Foster stated that she could not recall much of what she said on that stressful day. (*Id.* at 237.)

**C. Reasonable conditions for release were proposed by Mr. Foster, such as internet restrictions and electronic monitoring.**

Several conditions of release were proposed for 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 agreed to work with a computer expert in installing any necessary internet restrictive devices and programs to all 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, 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. (Decl. Rob Glass, R. 20-11, Page ID # 122 – 131). Mr. Foster's family agreed to siphoning or cutting off entirely any internet connection inside their home. (Tr. of Mot. Hr'g, R. 28, Page ID ## 198 – 199.)

**D. Mr. Foster suffers from several chronic medical conditions, is high-risk for serious illness from COVID-19, and the local county jail where he is detained is not conducting COVID-19 testing and not providing Mr. Foster with necessary medical testing for colon cancer.**

Mr. Foster has several chronic medical conditions and is high risk for colon cancer, and due to his detention, he has not received a medically necessary colonoscopy. (Tr. of Mot. Hr'g, R. 28, Page ID # 202.) According to medical records received from the Southwest Virginia Regional Jail Authority, Mr. Foster noted on his intake to the jail not only that he needed a colonoscopy, but also that he is at a high risk for colon cancer and had suffered from precancerous polyps on his colon. The jail, only after receiving letters from Mr. Foster's primary care physician and

his colon cancer specialist submitted by defense counsel, reviewed his medical records and medical requests and declined his request for a colonoscopy. (Southwest Va. Regional Jail Authority Medical Records, R. 20-10, Page ID ## 119 – 121.) In addition, Mr. Foster suffers from Meniere’s Disease and GERD. (Tr. of Mot. Hr’g, R. 28, Page ID ## 202 – 203; Ltr. Dr. Kraus, R. 20-8, Page ID #114; Ltr. Dr. Haydek, R. 20-9, Page ID # 115.)

Mr. Foster is in the high-risk category for COVID-19 under the Centers for Disease Control and Prevention (“CDC”) guidelines. (Tr. of Mot. Hr’g, R. 28, Page ID # 204.) Meniere’s disease is a chronic illness that often stems from an autoimmune issue. (Mem. in Supp., R. 20, Page ID # 92.) The jail records received from Southwest Virginia Regional Jail Authority reveal that Mr. Foster has been diagnosed with chronic diarrhea while incarcerated pretrial, and – despite having been provided letters from Mr. Foster’s primary care and specialist physicians – the jail determined that it would not have a coloscopy performed on Mr. Foster, but instead would conduct a blood test. (Southwest Va. Regional Jail Authority Medical Records, R. 20-10, Page ID # 121.) The jail, also in receipt of the letters from Mr. Foster’s physicians, declined a colonoscopy and instead diagnosed Mr. Foster with chronic diarrhea and recommended the alternative of a blood and stool sample. (Mem. in Supp., R. 20, Page ID # 92; 20-10, Page ID # 121.)

After Mr. Foster's detention hearing, defense counsel made a further request for Mr. Foster's medical records from the Southwest Virginia Regional Jail Authority and received the results of the blood test the jail provided in lieu of a colonoscopy. Defense counsel forwarded the results to Mathew Kraus, M.D., Mr. Foster's primary care physician, and requested his analysis of the results. Dr. Kraus responded via letter on May 18, 2020 that there is nothing in the blood tests that can adequately screen for colon cancer. (Letter of Matthew Kraus, M.D., May 18, 2020, Doc. 6-2, pg. 2.)<sup>1</sup>

At the hearing, the government orally proffered to the court that no new inmates were being brought into the Southwest Virginia Regional Jail Authority to protect the inmates from COVID-19 (Tr. of Mot. Hr'g., R. 28, Page ID # 251.) However, evidence was presented to the district court following the hearing – that the government conceded in responding to the Motion to Revoke the Detention Order – that multiple new inmates were being brought into the jail daily. (Mot. for Rev. of Det. Order, R. 29, Page ID ## 260 – 261; SW Va. Regional Jail Auth. Jail Records, R. 29-2, Page ID ## 270 – 274; U.S. Resp. in Opp'n, R. 30, Page ID ## 277 – 278.) Further, there is no evidence in the record that the jail has tested any

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<sup>1</sup> The appellant has moved this Court to take judicial notice on appeal of Dr. Kraus' letter of May 18, 2020, the underlying medical information from the jail reviewed by Dr. Kraus obtained after the detention hearing in this matter, and the fact that the local jail in Abingdon, VA, is still not conducting testing of inmates for COVID-19. *See* Motion to Take Judicial Notice on Appeal, Doc. 6-1, filed June 4, 2020.



inmates for COVID-19. In the course of preparing this brief, defense counsel's office called the jail on June 3, 2020, and medical staff at the jail informed counsel's office that the jail still has not tested *any* inmates for COVID-19.<sup>2</sup>

**E. The court below found Mr. Foster to not be a flight risk, but found Mr. Foster to be a danger to the community given the pervasiveness of the internet in general in society and a lack of assurance that Mr. Foster could not gain access in some way to the internet if released.**

At the hearing, the government relied on the Criminal Complaint and the Indictment. (Tr. of Mot. Hr'g, R. 28, Page ID ## 249 – 251.) The magistrate judge entered an Order of Detention after the hearing. (Order of Det., R. 27, Page ID ## 187 – 190.) In the Order of Detention Pending Trial, the magistrate judge noted that Mr. Foster's case is particularly challenging regarding the issue of pretrial detention. (*Id.* at 189.) The magistrate judge expressed concerns that Mr. Foster's wife and adult daughter would report him if he violated his conditions of release. (Order of Det., R. 27, Page ID # 189.) The magistrate judge noted that Mr. Foster has a very close relationship with his children, has strong ties to the community, and that he is not a flight risk. (Order of Det., R. 27, Page ID # 189.)

The court noted in its order that because Mr. Foster allegedly used the internet as the mechanism for committing the charged crimes, and because of how prevalent the internet is in society, the court would have to be convinced that Mr. Foster would

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<sup>2</sup> *See supra* note 1.

not have access to the internet at all if released. (Order of Det., R. 27, Page ID # 190.)

On April 17, 2020, Mr. Foster filed a timely Motion for Revocation of Detention Order. (Mot. for Rev. of Det. Order, R. 29, Page ID ## 258 – 276.) The government filed their Response in Opposition on April 27, 2020, and the district court issued an order denying Mr. Foster’s motion on May 22, 2020, without a hearing. (U.S. Resp. in Opp’n, R. 30, Page ID ## 277 – 278; Order Den. Mot. Rev., R. 32, Page ID ## 282 – 291.) The district court order provides that “A defendant cannot overcome the presumption by proposing a third-party custodian who the Court finds utterly incredible.” (*Id.* at 286.) The magistrate judge’s order does not state that she found the proposed third-party custodians “utterly incredible,” but instead that the court found “lack of faith” in the witnesses in their ability to serve as third-party custodians. (Order of Det., R. 27, Page ID # 190.) The district court’s order also provided that the magistrate judge found that Mr. Foster’s witnesses “would not report any violations committed by Defendant.” (Order Den. Mot. Rev., R. 32, Page ID # 287.) The magistrate judge’s order states, however, that the court feels Mr. Foster’s witnesses “would be unlikely to report Defendant if he violated his conditions of release,” but that “they would sincerely attempt to prevent Defendant from accessing the Internet.” (Order of Det., R. 27, Page ID ## 189 – 190.)

Regarding the second factor, the weight of the evidence against the person, the court below stated that “Defendant initially admitted ownership of these Snapchat accounts to the investigating agents[.]” (*Id.* at 288.) However, counsel for Mr. Foster, in Mr. Foster’s Reply to the Response to Motion for Release, proffered to the court only after two hours into an aggressive three hour recorded custodial interrogation immediately following Mr. Foster’s arrest did he make any sort of partial admission to the ownership of the Snapchat accounts. Further, “Mr. Foster indicates connection to the accounts while mentioning a desire to go home, yet again when directly and aggressively questioned, he states he didn’t make the accounts.” (Reply, R. 23, Page ID # 179.) There are numerous issues with the “admissions” the government claims Mr. Foster is making, but the magistrate judge noted “that is an issue for another day.” (Order of Det., R. 27, Page ID # 189.) After the district court’s de novo review of the transcript of the hearing held before the magistrate judge, the court found by clear and convincing evidence that Mr. Foster poses a danger to the safety of the community, and that no conditions of release would reasonably assure the safety of the community. (*Id.* at 291.) This timely appeal follows.

## **SUMMARY OF THE ARGUMENT**

The district court erred when it dismissed Mr. Foster's Motion to Revoke the Detention Order because the government did not prove by clear and convincing evidence that there were no set of conditions that could be placed on Mr. Foster to reasonably assure community safety.

The defendant's health concerns are not being adequately addressed inside the jail, and his pre-existing medical conditions make him high-risk for COVID-19. Mr. Foster's pretrial detention, combined with the existing COVID-19 pandemic, his medical conditions, and the hindrances on his ability to confer in person with counsel, review discovery materials, and participate in his defense unconstitutionally hinder the presumption of innocence, prohibition against pretrial punishment, right to counsel, and right to due process. U.S. Const. amend. V, VI, and VIII.

## ARGUMENT

### **I. PRETRIAL RELEASE IS FAVORED BY U.S. CONST. AMEND. VIII AND 18 U.S.C. § 3142, PARTICULARLY DURING A PANDEMIC.**

The United States Constitution, 18 U.S.C. § 3142, and the United States Supreme Court clearly favor pretrial release of criminal defendants *unless* “the judicial officer finds that *no* condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community[.]” *United States v. Salerno*, 481 U.S. 739, 743 (1987) (citing 18 U.S.C. § 3142(e)); U.S. Const. amend. VIII. This determination must be made by considering “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release.” *Salerno*, 481 U.S. at 742-43 (citing 18 U.S.C. § 3142(g)). “The default position of the law, therefore, is that a defendant should be released pending trial.” *United States v. Stone*, 608 F.3d 939 (6th Cir. 2010).

The government must show “by clear and convincing evidence that *no* conditions of release can reasonably assure the safety of the community or any person.” *Id.* at 750 (citing 18 U.S.C. § 3142(f)) (emphasis added). The government’s interest in preventing crime must sufficiently overcome the defendant’s “strong interest in liberty.” *Id.* 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). The proffering of proof alone is sufficient to meet the defendant’s burden of production and rebut the presumption of dangerousness. *See United States v. Gourley*, 936 F. Supp. 412, 416 (S.D. Tex. 1996) (citing *United States v. Hare*, 873 F.2d 786, 798-99 (5th Cir. 1989) and *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985)).

**A. The COVID-19 pandemic warrants special consideration for individuals with relevant health conditions.**

While Mr. Foster is charged in the Eastern District of Tennessee, Mr. Foster is housed in the Southwest Virginia Jail Authority in Abingdon, Virginia. The State of Virginia declared a State of Emergency due to COVID-19 on March 12, 2020. *See* Office of the Governor of the Commonwealth of Virginia, Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19) (Mar. 12, 2020).<sup>3</sup> The following day, a National Emergency was declared. *See* Proclamation on Declaring

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<sup>3</sup> <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/VA%20Governor%20Northam%203%2012%202020%20Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-%28COVID-19%29.pdf> (last visited June 4, 2020).

a National Emergency Concerning the Novel Coronavirus (COVID-19) Outbreak (Mar. 13, 2020).<sup>4</sup>

Even the U.S. Department of Justice has advised that “appropriate weight” be given “to the potential risks facing certain individuals” subject to pretrial detention. *See Litigating Pretrial Detention Issues During the COVID-19 Pandemic*, Memorandum for All Heads of Department Components and All United States Attorneys from the Attorney General, Dep’t. of Justice (Apr. 6, 2020).<sup>5</sup> Under DOJ policy, crimes subject to the presumption of detention should still be subject to scrutiny by the statutory factors. *See id.* at 1. The DOJ recommends that the defendant’s “physical and mental condition” warrants consideration of “the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic.” *Id.* at 2. The defendant’s “risk of flight and seriousness of the offense must be weighed against the defendant’s vulnerability to COVID-19.” *Id.*

Incarcerated people have a “greater risk of transmission” than the general population because of “the highly congregational environment, the limited ability of incarcerated persons to exercise effective disease prevention measures (e.g., social

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<sup>4</sup> <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited June 4, 2020).

<sup>5</sup> <https://www.justice.gov/file/1266901/download> (last visited June 4, 2020).

distancing and frequent handwashing), and potentially limited onsite healthcare services.” *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). The court should consider the defendant’s specific COVID-19 concerns against the preventative measures taken by the detention facility. *See id.* at \*10-11 (noting in favor of the government that the detention facility is “screening for symptoms and risk factors for all inmates, staff, visitors, and vendors” and following CDC COVID-19 protocols). The defendant should show that he has a specific risk of contracting COVID-19 and that the control measures at the detention facility are insufficient. *See id.* at \*13; *United States v. Pridemore*, No. 3:19-CR-208-TAV-HBG-3, 2020 U.S. Dist. LEXIS 66261, at \*8 (E.D. Tenn. Apr. 15, 2020) (denying the defendant’s motion for release because she “failed to set forth a specific risk of exposure or that the measures in place during her detention are insufficient to mitigate any such risk.”). Several federal courts have incorporated a four-factor test articulated by the U.S. District Court for the District of Kansas to balance legitimate health concerns with the pandemic with the government’s interest in detention:

- (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.

*United States v. Clark*, No. 19-40068-01-HLT, 2020 U.S. Dist. LEXIS 51390 (D. Kan. Mar. 25, 2020), at \*10; *see also United States v. Williams*, No. 18-cr-00631-PX-1, 2020 U.S. Dist. LEXIS 93351, at \*17 (D. Md. May 28, 2020) (adopting the *Clark* reasoning); *United States v. Rivera*, No. 1:19-CR-82-01, 2020 U.S. Dist. LEXIS 92048, at \*14 (M.D. Penn. May 27, 2020) (adopting the *Clark* reasoning); *United States v. Brown*, No. 13-20337, 2020 U.S. Dist. LEXIS 76563, at \*14-15 (E.D. Mich. May 1, 2020) (adopting the *Clark* reasoning); *United States v. Reyos*, No. 2:18-CR-265, 2020 U.S. Dist. LEXIS 93424, at \*5 (D. Utah May 26, 2020) (adopting the *Clark* reasoning); *United States v. Sumbry*, No. 2:20-CR-35-PPS-JPK, 2020 U.S. Dist. LEXIS 77042, at \*20 (N.D. Ind. May 1, 2020) (adopting the *Clark* reasoning); *United States v. Hill*, No. 2:20-CR-00031-APG-DJA, 2020 U.S. Dist. LEXIS 73859, at \*13 (D. Nev. Apr. 27, 2020) (adopting the *Clark* reasoning); *United States v. Crandell*, No. 19-cr-255, 2020 U.S. Dist. LEXIS 65634, at \*5 (D. Minn. Apr. 15, 2020) (adopting the *Clark* reasoning); *United States v. Hernandez*, No. 3:19-CR-346-K, 2020 U.S. Dist. LEXIS 65361, at \*7 (N.D. Tex. Apr. 14, 2020) (adopting the *Clark* reasoning); *United States v. Oury*, No. CR419-080, 2020 U.S. Dist. LEXIS 61131, at \*4-5 (S.D. Ga. Apr. 7, 2020) (adopting the *Clark* reasoning).

Mr. Foster is detained at a local county jail in Abingdon, Virginia, within the federal Western District of Virginia. The United States District Court for the

Western District of Virginia, in its Second Amended Standing Order issued April 16, 2020 states: “The exigent circumstances identified in the court’s previous standing orders have worsened, with Virginia reporting over 6,500 positive cases of COVID-19 and 200 deaths as a result of COVID-19.” Second Amended Standing Order No. 2020-5 (USDC WDVA, Apr. 16, 2020).<sup>6</sup> As of June 4, 2020, the total number of reported cases in Virginia rose to 47,856 with 1,445 deaths. *See* COVID-19 Cases in Virginia, Virginia Dep’t of Health.<sup>7</sup> According to a recent CDC study, at least 4,893 detainees have been diagnosed with COVID-19 with 88 resulting deaths. *See* Megan Wallace, et al., *COVID-19 in Correctional and Detention Facilities – United States, February-April 2020*, Morbidity and Mortality Weekly Report, Center for Disease Control, (May 15, 2020).<sup>8</sup> The CDC estimates that the true number of cases and related deaths is higher than reported. *See* Wallace, et al., at 588.

**B. Detention is only necessary if the court finds that 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.**

For offenses involving a minor victim, there is a rebuttal presumption that “no condition or combination of conditions will reasonably assure the appearance of the

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<sup>6</sup> <http://www.vawd.uscourts.gov/media/31965437/courtoperationscovid19-amended-2.pdf> (last accessed June 4, 2020).

<sup>7</sup> <https://www.vdh.virginia.gov/coronavirus/> (last accessed June 4, 2020).

<sup>8</sup> <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e1-H.pdf> (last accessed June 4, 2020).

person as required and the safety of the community.” 18 U.S.C. § 3142 (e) (3). Charging an offense against a minor is enough “to establish the presumption in favor of detention[,]” which the defendant can then rebut. *Stone*, 608 F.3d at 945 (citing 18 U.S.C. 3142(e)(3)). After the “defendant satisfies his burden of production,” the presumption of detention remains a factor for consideration by the court but is not dispositive. *See Stone*, 608 F.3d at 945. The defendant may rebut the presumption by presenting “all the special features of his case” that distinguish it from the congressional judgment that “particular classes of offenders should ordinarily be detained prior to trial.” *Id.* at 945-46 (quoting *United States v. Jessup*, 757 F.2d 378, 384, 387 (1st Cir. 1985)). The defendant’s burden is only one of production. The government *always* carries the burden of persuasion and the ultimate burden of proof. The government bears the very high burden of proving, by clear and convincing evidence, 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 946.

The government’s burden to show dangerousness requires an analysis of the nature and circumstances of the charged offense, the weight of the evidence, “the history and characteristics” of the defendant, and the “nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” 18 U.S.C. § 3142(g). Charges involving a minor victim cut against the defendant per the statutory presumption. 18 U.S.C. § 3142(g)(1). The weight of the evidence prong

goes to evidence of dangerousness, not the weight of evidence as to the defendant's guilt. *See Stone*, 608 F.3d at 948. The "history and characteristics" prong should consider the defendant's "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings." 18 U.S.C. § 3142(g)(3)(A). The nature and seriousness of danger upon release should be weighed against reasonable restrictions that can be imposed on the defendant. 18 U.S.C. § 3142(g)(4).

**i. The realities of COVID-19 must be weighed in the detention analysis.**

The COVID-19 pandemic must be an additional factor in this analysis. *See United States v. McLean*, No. 19-380, 2020 U.S. Dist. LEXIS 90690, at \*1 (D. D.C. Mar. 28, 2020). COVID-19 "not only rebuts the statutory presumption of dangerousness [...] but tilts the balance in favor of release." *McLean*, 2020 U.S. Dist. 90690, at \*1. If the detainee has a medical condition that makes him more susceptible to COVID-19, the character of the defendant factor may lean in favor of release. *See id.* at \*3-5. The pandemic may increase the rate of compliance because the fear of contracting the virus should encourage defendants to stay "at home to avoid contracting or spreading the disease." *Id.* at \*5. Courts have generally required a showing that the detainee is especially vulnerable to the disease such that it is sufficiently compelling to warrant release. *See United States v. Maldonado*, No.

1:20-CR-28, 2020 U.S. Dist. LEXIS 64968, at \*12-13 (M.D. Penn. Apr. 14, 2020) (internal citations omitted); *see also United States v. Davis*, No. 19-292-1, 2020 U.S. Dist. LEXIS 68317, at \*11-12 (D. D.C. Apr. 6, 2020) (holding that “despite the serious charge” the defendant “faces, the compelling reasons for” the defendant’s “release to home incarceration counterbalance the findings that originally justified his pretrial detention.”).

**ii. The decisions of the court below concerning Mr. Foster’s detention are reviewed de novo by this Court.**

Findings of fact are reviewable for clear error, but “mixed questions of law and fact—including the ultimate issue whether detention is warranted” is reviewed de novo. *Stone*, 608 F.3d at 945 (citing *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985)). The district court judge affirmed the magistrate’s ruling that denied the defendant’s motion for release. This ruling was based in two apparent findings by the magistrate judge, which the defendant here contests: first, that the proposed third-party custodian witnesses – Mr. Foster’s wife and his adult daughter who live in the same household – who testified at the pretrial detention hearing were not credible on the issue of willingness to report the defendant if he violated a condition of pretrial release; and second, that the danger to the community “could not be mitigated through conditions.” (Order Den. Mot. Rev., R. 32, Page ID ## 285 – 286.)

**C. Pretrial detention is inappropriate because the government failed to prove by clear and convincing evidence that no set of conditions could reasonably ensure the safety of the community if Mr. Foster were released pending trial.**

The defendant at a detention hearing “shall be afforded an opportunity ... to present evidence by proffer or otherwise.” 18 U.S.C. § 3142(f)(2). The defendant proffered evidence that disputed the government’s allegations of flight risk and dangerousness, supported by no evidence other than the charging documents. (Mem. in Supp., R. 20, Page ID # 84.) At the hearing, in addition to multiple declarations under penalty of perjury from family members of Mr. Foster and members of the community on the issues of flight risk and dangerousness, Mr. Foster’s wife and adult daughter testified about Mr. Foster’s background and character. The court below concluded that Mr. Foster was not a flight risk but maintained that the government met its burden of proof on the dangerousness prong necessary for pretrial detention. (Order Den. Mot. Rev., R. 32, Page ID # 285.)

Mr. Foster’s history and characteristics lean against pretrial detention. Mr. Foster has no criminal history and maintains strong ties to his community despite the charges against him. He has an excellent employment history and the potential to return to his former company if he is released pending trial. Mr. Foster’s reputation was vouched for by several sworn declarations by his family, employer, neighbors, and members of the community. The charges against Mr. Foster are

serious, but that alone is insufficient to order detention. Reasonable restrictions must be considered. 18 U.S.C. § 3142(g)(4).

The government rested its case on the original criminal complaint, indictment, and an oral proffer that the jail in Abingdon was not accepting new inmates in order to protect the current ones from potential further exposure to COVID-19. There was *no* additional evidence presented that contradicted the defense's proposed internet and device limits as conditions of release. To give meaning to the presumption of innocence, something more should be required of the government to meet its high burden. *See Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (finding that unless the "right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

**D. The district court failed to consider reasonable conditions for release.**

A person accused should be released pretrial if a condition or combination of conditions "will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B). If the charges involve a minor victim, the release order must include "a condition of electronic monitoring" and the following statutory conditions:

- (iv) abide by specified restrictions on personal associations, place of abode, or travel;
- (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

- (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- (vii) comply with a specified curfew;
- (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

18 U.S.C. § 3142(c)(B)(iv)-(viii). The court should impose “the *least restrictive* [...] condition, or combination of conditions[.]” 18 U.S.C. § 3142(c)(1)(B) (emphasis added).

**i. Reasonable internet restrictions can be placed on Mr. Foster and the other residents of his household if necessary.**

At the detention hearing, the defense was prepared to present testimony from Mr. Rob Glass, an expert in computer security, to testify about electronic monitoring and other measures that could “be put in place with the home internet” and any devices at the Foster residence that would restrict devices within the home from connecting to any other internet access by blocking external networks and regularly reporting on the internet use inside the house. (Tr. of Mot. Hr’g, R. 28, Page ID # 207.) Mr. Glass would be able “to set up a secure router within a tamperproof box that only” Mr. Glass could access and “install a firewall” that would allow Mr. Glass “to monitor and block any inappropriate internet traffic[.]” (Decl. Rob Glass, R. 20-11, at Page ID ## 122 – 123.) Moreover, the court could order a detailed report of “the internet traffic within the home” at any time. (Decl. Rob Glass, R. 20-11, at



Page ID # 123.) “*All* wireless access” can “be filtered and controlled by the same firewalled access.” (Decl. Rob Glass, R. 20-11, at Page ID # 125 (emphasis added).)

At the outset of the detention hearing, the court noted that if it were “inclined to release” Mr. Foster, it “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.” (Tr. of Mot. Hr’g, R. 28, Page ID # 206.) The court stated it “certainly would not release him with internet access.” (*Id.*) Mr. Glass would have testified consistent with his declaration that was entered into evidence at the hearing, and it was proffered to the court for purposes of the hearing, that measures could be put in place that would block outside devices from accessing certain websites, and also that measures could be placed on any devices in the Foster home from being capable of accessing any other internet access, such as that of a neighbor’s open wireless network. (*Id.* at 207.)

**ii. The lower court wrongly characterized the instrumentality of the alleged crime as the Internet at-large rather than the specific mobile device application Snapchat.**

The criminal complaint alleges that Mr. Foster used the smartphone application Snapchat to coerce teenage children to produce pornography for him. (Crim. Compl., R. 1, Page ID ## 3, 9 – 25.) No other computer software or application is alleged in the complaint. (*Id.*) The magistrate judge’s order of detention broadened the scope of the allegations against Mr. Foster to the internet at large. (Order of Det., R. 27, Page ID # 190 (“[H]e used the internet as the mechanism

for committing these crimes.”); Mot. for Rev. of Det. Order, R. 29, Page ID # 259 – 260.) As part of its reasoning, the lower court noted that the internet is “an essential part” of life and any job would have “Internet access available on the premises[.]” (Order of Det., R. 27, Page ID # 190.) She dismissed the promises from the proposed third-party custodians – Mrs. Lisa Foster and Ms. Ashley Foster – based on Mr. Foster’s ability to use the internet:

While the Court believes that they would sincerely attempt to prevent Defendant from accessing the Internet, given the widespread availability of the Internet, his purported sophistication in using it, his alleged skill at deception and the Court’s lack of faith in the willingness of Defendant’s family to report violations to probation, the Court simply cannot find that any combinations of conditions exist which can reasonably ensure that the public will be safe if Defendant is released.

(Order of Det., R. 27, Page ID # 190.) If everything in the criminal complaint is assumed to be true, there remains no basis for the claim that Mr. Foster is particularly technologically sophisticated in using the Internet outside of being able to create and use accounts using the Snapchat mobile device application.

Monitored, limited internet access is a recognized form of supervised release. *See, e.g., United States v. Browder*, 866 F.3d 504, 506 (2d Cir. 2017) (affirming the *convicted* defendant’s special condition of computer and internet monitoring because it was reasonably related to his conviction for “possessing over 462 digital images of child pornography that he received (and shared) on internet exchanges”).

In *United States v. Harris*, the district court found that although the defendant *was found guilty* of accessing and distributing child pornography, “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, and that the Court will accept, to ensure that Defendant does not have access to an internet-capable device.” Order, *United States v. Harris*, No. 19-356 (D. D.C. May 26, 2020) *reproduced in the record* (Mot. for Rev. Det. Order, Doc. 29-1, Page ID # 262 – 269). Mr. Foster has been found guilty of nothing and is presumed innocent. The government made no showing that these measures were somehow inadequate. The internet in general is ubiquitous in modern society, but Mr. Foster’s alleged crime involved a specific mobile device internet application, Snapchat. Reasonable measures were proposed by Mr. Foster to assure community safety should he be released, including but not limited to either no internet access at all in the residence he shares with his wife and adult daughter or internet access with severe restrictions and real-time monitoring and reporting.

Even if this is a close case otherwise, the COVID-19 pandemic tilts the scale in favor of release because “[t]hese [...] are not ordinary times” and the court must adjust accordingly. *United States v. Dhavale*, No. 19-MJ-00092, 2020 U.S. Dist. LEXIS 69800, at \*13 (D. D.C. Apr. 21, 2020). Removing all internet and internet-

connected devices from the home or severely restricting and monitoring all online access, proposing multiple third-party custodians, and the other statutory release conditions of electronic monitoring are an appropriate method of conditional release. *See Dhavale*, 2020 U.S. Dist. LEXIS 69800, at \*13-15.

**II. THIS COURT SHOULD ADOPT A FOUR-FACTOR BALANCING TEST TO DETERMINE THE EFFECT OF COVID-19 ON PRETRIAL RELEASE DECISIONS FOR PERSONS ACCUSED WHO ARE HIGH RISK FOR SERIOUS ILLNESS.**

The Sixth Circuit should adopt the four-factor test articulated by the United States District Court for the District of Kansas when evaluating the effect of COVID-19 on pretrial detention determinations. *See Clark*, 2020 U.S. Dist. LEXIS 51390, at \*10. The decision has already proven influential: it was published on March 25, 2020 and was already cited 177 times by June 3, 2020. More importantly, the rule is specific, workable, and respectful of the statutory factors in 18 U.S.C. § 3142. This issue has not yet been addressed by any of the courts of appeals.

First, the original grounds for Mr. Foster's detention were unsupported by the record. *See Clark*, 2020 U.S. Dist. LEXIS 51390, at \*10. The government failed to show by clear and convincing evidence that *no* reasonable set of conditions could alleviate the potential harm to the community and the district court failed to consider those conditions proffered by the defense. The court focused on the substance of the indictment to find that Mr. Foster was too dangerous to be released. Even if the

original grounds for detention were sufficient, the other three factors still cut in favor of Mr. Foster's release.

Mr. Foster has proven with much specificity his concerns regarding COVID-19. *See Clark*, 2020 U.S. Dist. LEXIS 51390, at \*10. Mr. Foster's medical conditions include Meniere's disease and GERD. The specifics of these issues have been expressed at the hearing and in letters from his doctors. (Ltr. Dr. Kraus, R. 20-8, Page ID #114.) (Ltr. Dr. Haydek, R. 20-9, Page ID #115.) Mr. Foster's diagnosis for Meniere's disease places him within the "high-risk" category for COVID-19 because it stems from autoimmunity deficiencies. *See People Who Are at Higher Risk for Severe Illness*, Centers for Disease Control & Prevention, Center for Disease Control (last accessed June 4, 2020).<sup>9</sup> His specific concern regarding COVID-19 is simple: Mr. Foster is a high-risk person for COVID-19 because of his chronic Meniere's disease and other pre-existing conditions, such as high-risk for colon cancer, and he would be safer at home. This also shifts the burden of care (and associated expenses) for Mr. Foster's medical expenses related to both his pre-existing conditions and, if necessary, COVID-19, from the jail to the private sector.

Third, releasing Mr. Foster would mitigate his COVID-19 risk. *See Clark*, 2020 U.S. Dist. LEXIS 51390, at \*10. Once released, Mr. Foster would be able to

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<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>/ (last access June 4, 2020).

practice social distancing, which is impossible in a detention facility. He would have more ready access to COVID-19 testing because there is no evidence in the record that the Abingdon jail has tested its inmates, and as of June 3, 2020, the jail reported that it had still not conducted any COVID-19 testing. If released and Mr. Foster did contract COVID-19, his primary care and specialist physicians would be able to advise on proper care to mitigate his risk.

Finally, the likelihood that Mr. Foster's release would increase the risk of COVID-19 to others is minimal. *See Clark*, 2020 U.S. Dist. LEXIS 51390, at \*10. Upon release, Mr. Foster would go to his established home in Morristown, Tennessee, to live with his wife and daughter, where he would be able to stay at home and practice social distancing.

### **III. MR. FOSTER'S DETENTION VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

#### **A. Mr. Foster's right to counsel is being infringed in violation of the Sixth Amendment of the United States Constitution.**

The circumstances surrounding Mr. Foster's pretrial detention are infringing on his right to the effective assistance of counsel, specifically to meaningfully confer with counsel and participate in his defense and for counsel to be able to engage in the necessary defense functions of a federal criminal case. The right to counsel is preserved for all persons accused of crimes. *See* U.S. Const. amend. VI; *Powell v. Alabama*, 287 U.S. 45, 66 (1932). Inherent within the right to counsel is the duty of

trial counsel to conduct pre-trial investigation and meaningfully consult with the person accused.

The pre-trial period constitutes a “critical period” because it encompasses counsel’s constitutionally imposed duty to investigate the case. In *Strickland*, the Supreme Court explicitly found that trial counsel has a “duty to investigate” and that to discharge that duty, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. The Supreme Court also recognized that without pre-trial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate. The Court stated that “the reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Id.* The Court went on to emphasize further the significance of the defendant's input into trial counsel's investigation:

In particular, what investigation decisions are reasonable depends critically on such information [provided by defendant]. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

*Id.* Because the Supreme Court has repeatedly made clear that there is a duty incumbent on trial counsel to conduct pre-trial investigation, it necessarily follows that trial counsel cannot discharge this duty if he or she fails to consult with his or her client.

*Mitchell v. Mason*, 325 F.3d 732, 743-44 (6th Cir. 2003) (citing and quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

Due to COVID-19 restrictions and Mr. Foster's pretrial detention in a local county jail in Virginia that is not allowing contact attorney visits due to the pandemic, Mr. Foster has not been able to meet with his defense counsel in person to discuss his case since the pandemic was declared, review the initial electronic discovery materials provided, consult with counsel about the discovery and on issues of defense investigation, and otherwise have the assistance of counsel who can fully engage in the constitutionally and ethically necessary defense functions in a felony criminal case. (Mot. to Continue, R. 31, Page ID # 280.) The court below continued the pretrial motions deadline and trial in Mr. Foster's case, determining:

The discovery already produced contains voluminous electronic material and due to restrictions in place on communication with Defendant because of the COVID-19 pandemic, review of this discovery with Defendant has been complicated. Further, the pandemic has made it difficult for counsel to conduct necessary investigation and discuss filing pretrial motions with Defendant.

...

Given the inability of counsel to effectively communicate with Defendant as a result of the pandemic, it is impossible for Defendant and his counsel to determine what motions may need to be filed and to prepare for trial. The Court offered to schedule a new trial date within the confines of the Speedy Trial Act, specifically in September 2020, but Defendant's counsel requested that the Court continue the trial date beyond this date due to the reasons set forth in the motion, the pending appeal of Defendant's detention order [Doc. 33], and the uncertainty related to the COVID-19 pandemic. The Court finds that, based upon the foregoing, both Defendant's Motion to Continue and the oral motion to set outside the Act are well supported and are GRANTED.



(Order Granting Mot. to Continue, R. 41, Page ID ## 307 – 308.)

Given the complexity of the case, the volume of materials that need to be reviewed with Mr. Foster and the manner in which they need to be reviewed (in person on an electronic device or otherwise in a fashion technologically that cannot be conducted in a jail setting in the middle of a pandemic), and the other essential functions of defense counsel surrounding the attorney-client relationship, Mr. Foster has been and is effectively denied the effective assistance of counsel and the meaningful opportunity to work with and consult with counsel in investigating and making his defense to meet the government's allegations, which should be factored in to whether pretrial detention is absolutely necessary in his particular case, tipping the scales further on the side of his pretrial release upon reasonable conditions.

**B. Mr. Foster's right to due process has been denied in violation of the Fifth Amendment of the United States Constitution.**

“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979). Pretrial detention may include “the restrictions and conditions of the detention facility” but it must not “amount to punishment, or otherwise violate the Constitution” because the defendant is presumed innocent before adjudication. *Bell*, 441 U.S. at 536-37.

Due process challenges to pretrial detention during the COVID-19 pandemic have largely been rejected because the facilities at issue have had adequate safety measure to contain and control the virus. *See, e.g., United States v. Villegas*, No. 2:19-CR-568-AB, 2020 U.S. Dist. LEXIS 62276, at \*8 (C.D. Cal. Apr. 3, 2020) (“[T]he Bureau of Prisons is by all objective accounts responding to the COVID-19 pandemic as any reasonable observer could expect under the circumstances to prevent infectious outbreak, protect inmate health, and preserve internal order[.]”); *United States v. Preston*, No. 3:19-CR-651-K, 2020 U.S. Dist. LEXIS 63774, at \*10 (N.D. Tex. Apr. 11, 2020) (commenting that the defendant did not allege that the prison “is not taking reasonable measures to prevent the spread of COVID-19 or to protect” the inmates from the disease); *United States v. Qazi*, No. 16-20437, 2020 U.S. Dist. LEXIS 86566, at \*8-9 (E.D. Mich. May 18, 2020) (“Defendant’s detention in a facility that has implemented extensive precautions to mitigate the spread of COVID-19 and has no confirmed cases of COVID-19 does not violate ‘contemporary standards of decency’ and does not pose ‘substantial risk of serious harm.’”) (internal citations omitted).

In contrast, there is no evidence in the record below that the Southwest Virginia Regional Jail Authority in Abingdon has tested a *single* inmate for COVID-19, it is still accepting inmates, and it has informed defense counsel’s office as of June 3, 2020, that it has not conducted any COVID-19 testing. Mr. Foster is in the

high-risk category for contracting serious illness from COVID-19 per CDC guidance. The local jail's lack of testing for COVID-19, combined with Mr. Foster's well-documented pre-existing medical conditions and the jail's refusal to conduct recommended and overdue cancer screening, raises the pretrial detention in this case to the level of pretrial punishment, not only physical in nature but also psychological. *See* Coping with Stress, Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention (stating that fear and anxiety concerning the outbreak of COVID-19 "can be overwhelming and cause strong emotions in adults and children" and "[p]eople who may respond more strongly to the stress of a crisis include: [o]lder people and people with chronic diseases who are at higher risk for severe illness from COVID-19").<sup>10</sup> In Mr. Foster's case, given the circumstances of his specific situation, it is not unreasonable for him and his family to have a legitimate fear of his pretrial detention turning into a death sentence in the absence of a trial for a non-capital crime.

**C. Mr. Foster's right to be free from cruel and unusual punishment has been denied in violation of the Eighth Amendment of the United States Constitution.**

"The Eighth Amendment protects prison inmates against deliberate indifference to their serious medical needs, regardless of how that deliberate

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<sup>10</sup> <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html> (last visited June 4, 2020).

indifference is evidenced.” *Dodson v. Wilkinson*, 304 Fed. Appx. 434, 439 (6th Cir. 2008) (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)). The source of substantive protection for the denial of medical care rests primarily in the Eighth Amendment. *See Dodson*, 304 Fed. Appx. at 438 (citing *Whitley v. Albers*, 510 U.S. 266, 273 (1994)).

**i. An Eighth Amendment claim for denial of medical care requires a showing of deliberate indifference to the detainee’s serious medical needs.**

A denial of medical care claim has two parts: (1) “proof of a sufficiently serious medical need,” and (2) “proof of a sufficiently culpable state of mind in denying medical care.” *Dodson*, 304 Fed. Appx. at 439 (citing *Estelle*, 429 U.S. at 104; *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 895 (6th Cir. 2004); and *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000)) (internal quotations omitted).

The first prong is objective and can be met by a diagnosis “by a physician as mandating treatment *or* one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Id.* at 439 (quoting *Blackmore*, 390 F.3d at 897) (emphasis in original).

The second prong is subjective:

[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs is essential to a finding of deliberate indifference.

*Id.* (quoting *Blackmore*, 390 F.3d at 837). It can be shown by evidence that the jail officials were directly informed of the detainee’s medical condition and “did not act upon that information to ensure the provision of adequate medical care[.]” *Adkins v. Morgan Cty.*, 798 Fed. Appx. 858, 862 (6th Cir. 2020). The “provision of medical care to an inmate in one instance” does not shield the official for deliberate indifference to a separate medical need for the same detainee. *Adkins*, 798 Fed. Appx. at 863.

The detainee may base his claim on “deliberate indifference to exposing an inmate to an unreasonable risk of serious harm in the future.” *Id.* (citing *Helling v. McKinney*, 509 U.S. 25, 36 (1993)). A complaint that delayed medical treatment “rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay” to prevail. *Id.* (quoting *Napier v. Madison Cty.*, 238 F.3d 739, 742 (6th Cir. 2001)).

This violation is not premised upon the ‘detrimental effect’ of the delay, but rather that the delay alone in providing medical care creates a substantial risk of serious harm. When prison officials are aware of a prisoner's obvious and serious need for medical treatment and delay medical treatment of that condition for non-medical reasons, their conduct in causing the delay creates the constitutional infirmity.

*Blackmore*, 390 F.3d at 899.

**ii. The Southwest Virginia Regional Jail Authority in Abingdon has been deliberately indifferent to Mr. Foster's serious medical needs.**

Mr. Foster is past due for a colonoscopy because he is a high risk for developing colon cancer. The jail has diagnosed him with chronic diarrhea and has not given him the colonoscopy but rather only a blood test that is not medically adequate. The jail has intentionally delayed Mr. Foster's necessary medical care.

The issue of lack of required medical care for Mr. Foster's high risk for colon cancer – particularly when it is undisputed and documented in his jail medical records that he is suffering from chronic diarrhea while in jail - cannot be viewed in isolation from the COVID-19 pandemic, and the inherent physical and psychological impact. *See* § III(B), *supra*.

**CONCLUSION**

For the foregoing reasons, defendant respectfully requests this Honorable Court of Appeals to reverse the order of the district court below subjecting him to pretrial detention.<sup>11</sup>

Respectfully submitted,

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<sup>11</sup> Appellant's counsel acknowledges recent Vanderbilt University Law School graduate Catalina Caldwell, who is scheduled to take the Tennessee bar exam, for her assistance with this brief.

**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 portions of this brief using Microsoft Word, and the report indicates that the total word count of this brief contains 12,717 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 electrical filing ("ECF") system, on the 4th day of June, 2020, and with a corrected brief on the 10th day of June, 2020, to:

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**ADDENDUM:****DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

<b>ENTRY No.</b>	<b>DESCRIPTION OF ENTRY</b>	<b>DATE</b>	<b>PAGE ID # RANGE</b>
1	Criminal Complaint	11/05/19	1 - 25
2	Indictment	11/26/19	27 – 31
8	Order of Detention	1/3/20	55
19	Motion to Release Defendant Pending Trial and for a Hearing	3/17/20	78 – 81
20-0	Memorandum in Support of R.19	3/17/20	82 – 96
20-1	Exhibit to R. 20, Declaration of Shirley Foster	3/17/20	97 - 98
20-2	Exhibit to R. 20, Declaration of Tina Foster	3/17/20	99 -100
20-3	Exhibit to R. 20, Declaration of Paul Keiswetter	3/17/20	101 - 102
20-4	Exhibit to R. 20, Declaration of Tony Watkins	3/17/20	103 - 105
20-8	Exhibit to R. 20, Letter from Dr. Kraus	3/17/20	114
20-9	Exhibit to R. 20, Letter from Dr. Haydek	3/17/20	115
20-10	Exhibit to R. 20, SWVRJA Jail Records	3/17/20	119 - 121
20-11	Exhibit to R. 20, Declaration of Rob Glass	3/17/20	122 – 131
22	United States Response in Opposition to Defendant's Motion for Release	3/25/20	140 – 146
23	Reply to Response to Motion to Release Defendant Pending Trial and for a Hearing	3/29/20	177 – 183
27	Order of Detention Pending Trial	4/2/20	187 – 190
28	Transcript of Motion Hearing	4/16/20	191 – 257
29-0	Motion for Revocation of Detention Order	4/17/20	258 – 261
29-1	Exhibit to R. 29, <i>United States v. Harris</i> , No. 19-356 (D. D.C. May 26, 2020)	4/17/20	262 - 269
29-2	Exhibit to R. 29, SWVRJA Jail Records	4/17/20	270 – 274
30	United States Response in Opposition to Defendant's Motion for Revocation	4/27/20	277 – 278

<b>ENTRY No.</b>	<b>DESCRIPTION OF ENTRY</b>	<b>DATE</b>	<b>PAGE ID # RANGE</b>
31	Motion to Continue Pretrial Motions Deadline	5/18/20	279 – 281
32	Order Denying Motion for Revocation	5/22/20	282 - 291
33	Notice of Appeal	5/22/20	292
41	Order Granting Motion to Continue	5/29/20	307 - 308