

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

DIMITRE HADJIEV,

Defendant.

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Crim. No.: 2:19-cr-00548-CMR

Trial Date: 05/21/2020

**MOTION FOR TEMPORARY RELEASE OF NONVIOLENT, NO
CRIMINAL HISTORY, LOW-RISK DETAINEE BASED ON CHANGED
CIRCUMSTANCES; NEW COVID-19 PUBLIC HEALTH CONCERNS**

CEVALLOS & WONG LLP



Daniel L. Cevallos, Esq.,

Pa. ID: 90293

61 Broadway, Suite 2220

New York, NY 10006

Ph: 917.699.5008

Fx: 215.689.4375

Danny@CevallosWong.com

www.CevallosWong.com

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1. INTRODUCTION

Defendant moves the Court for a bail hearing and an order granting his *temporary* release based on changed circumstances. Dimitre Hadjiev, who is a pretrial defendant currently detained at FDC Philadelphia, is among the group of people the Centers for Disease Control and Prevention (“CDC”) has categorized as at-risk for contracting COVID-19, a dangerous illness spreading rapidly across the world and through Philadelphia, Pennsylvania.

This motion does not argue that *all* pretrial detainees should be released because of the pandemic. Mr. Hadjiev is a unique detainee. He is (1) nonviolent; (2) has no criminal record; (3) is not charged with a drug, gun, or violent crime; (4) who but for his immigration detainer would likely have been released pretrial; and (5) who *may* have a genetic susceptibility to pneumonia and therefore COVID-19. Mr. Hadjiev is among the very few detainees who should be released *temporarily*, pending his fast-approaching trial (5/21/2020), in light of the public health crisis.

The Bail Reform Act provides for the “temporary release” of a person in pretrial custody “to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense *or for another compelling reason.*” 18 U.S.C. § 3142(i) [emphasis added].

The coronavirus pandemic may be the most “compelling” of reasons in modern American history. The health risk to Dimitre Hadjiev may be heightened because of his possible genetic predisposition to pneumonia. Given the conditions at FDC Philadelphia as described in detail below, he should be granted *temporary* release on bail until this pandemic has ended.

2. CHANGED CIRCUMSTANCES: PANDEMIC

On March 11, 2020, the World Health Organization officially classified COVID-19 as a *pandemic*.¹ Health departments in the United States on Monday reported the largest number of coronavirus-related deaths on any one day since the onset of the outbreak. As of Monday evening, officials had reported 18 people dead, bringing the nationwide total to 85, according to a Washington Post tally.²

The novel coronavirus has infected more than 182,400 people and killed over 7,100 worldwide, according to Johns Hopkins University.³ The number of deaths outside China have now surpassed those inside. Millions are under lockdown in Europe as some Asian countries close schools and non-essential businesses, and curb travel.

A. CDC Guidance: Stay Home

The CDC has issued guidance that individuals at higher risk of contracting COVID-19—adults with chronic medical conditions (in Dimitre’s case, a possible genetic predisposition to pneumonia)—take immediate preventative actions, including avoiding crowded areas and staying home as much as possible.⁴ Pennsylvania officials confirmed 13 new cases of the

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

² Derek Hawkins, *et al.*, *U.S. sees largest one-day increase in coronavirus death toll since the outbreak began; San Francisco area asked to shelter at home*, WASHINGTON POST, March 16, 2020, <https://www.washingtonpost.com/world/2020/03/16/coronavirus-latest-news/>.

³ Ben Wescott, *et al.*, *Live updates: Coronavirus cases pass 182,000 as countries go into lockdown*, CNN.com, March 17, 2020. <https://www.cnn.com/world/live-news/coronavirus-outbreak-03-17-20-intl-hnk/index.html>.

⁴ *People at Risk for Serious Illness from COVID-19*, CDC (March 12, 2020) at <https://bit.ly/2vgUt1P>.

coronavirus on Monday, bringing the statewide total up to 76,⁵ which indicates community spread.

B. Pennsylvania is in a State of Emergency

Following a press conference announcing the first two presumptive positive cases of coronavirus, known as COVID-19, Governor Tom Wolf on March 6, 2020, signed an emergency disaster declaration to provide increased support to state agencies involved in the response to the virus.⁶ On Monday afternoon Governor Wolf declared a state of emergency that will close all “nonessential businesses” in the state.⁷

C. Eastern District of Pennsylvania Hit By Crisis

According to the Standing Order in the Eastern District of Pennsylvania signed by Judge Juan R. Sanchez on March 12, 2020, an “increased number of confirmed cases of COVID-19 have been reported in this district in recent days.”⁸ Judge Sanchez recognizes that the Centers for Disease Control and Prevention and State and local public health authorities have advised that precautions be taken to avoid exposure to the virus and prevent its spread, including implementing social distancing measures such as avoiding large gatherings and refraining from non-essential travel.⁹

⁵ <https://whyy.org/articles/coronavirus-update-pa-cases-climb-to-76-all-philly-courts-to-close-tuesday/>.

⁶ <https://www.governor.pa.gov/newsroom/gov-wolf-signs-covid-19-disaster-declaration-to-provide-increased-support-for-state-response/>.

⁷ <https://www.yorkdispatch.com/story/news/local/2020/03/16/york-county-officials-declare-emergency-offices-closed-non-essential-visitors/5058235002/>.

⁸

https://www.paed.uscourts.gov/documents/standord/Standing_Order_Temporary_Continuance.pdf.

⁹ *Id.* Pursuant to the Standing Order, Mr. Hadjiev, reserves his right to seek exception to this

***D. Philadelphia is in a State of
Emergency***

The City of Philadelphia is prohibiting public gatherings of more than 1,000 people for 30 days, starting on March 13, 2020.¹⁰ The City strongly recommends that Philadelphians not be in groups of 250 people.¹¹

***E. Bureau of Prisons Suspends
Legal Visits***

The Bureau of Prisons has suspended legal visits for 30 days, saying only that “case-by-case accommodation will be accomplished at the local level and confidential legal calls will be allowed in order to ensure inmates maintain access to counsel.”¹²

***F. FDC Philadelphia Suspends All
Visits Indefinitely***

All visiting at Federal Detention Center Philadelphia has been suspended “until further notice.”¹³ FDC’s current halt on all visits impacts counsel’s ability to carry out other activities relating to representation including: limitations on legal visitation, inability to secure interpreters, and limitations on attorneys who themselves are at a higher-risk for infection due to age and/or chronic health convictions, or who live with or care for high-risk individuals. As far as the undersigned knows, there are no current facilities at FDC Philadelphia to conduct attorney visits or court dates by videoconference.

Standing Order for the purpose of exercising the defendant’s speedy trial rights.

¹⁰ <https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/>.

¹¹ <https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/>.

¹² https://www.bop.gov/resources/news/20200313_covid-19.jsp.

¹³ <https://www.bop.gov/locations/institutions/phl/>.

3. FDC PHILADELPHIA HISTORY, STATISTICS

A. 972 Inmates in One Building

FDC Philadelphia houses some 972 total inmates in one building at 700 Arch Street in Philadelphia.¹⁴ The design of the building and urban location results in stacking inmates and detainees on top of each other, instead of spread out at a camp or a rural location.¹⁵

B. History of Infectious / Communicable Diseases

FDC Philadelphia has a history of detainees with other communicable diseases: Methicillin-Resistant Staphylococcus Aureus (“MRSA”). *Booker v. BOP*, 3:14-cv-01232-AWT (D.Conn. January 22, 2015).

FDC Philadelphia lacks the resources necessary to engage in screening and testing of inmates, correctional staff, law enforcement officers and other care and service providers who enter the facility.

With each shift, new correctional officers are entering FDC Philadelphia from the outside. As additional people are arrested who have been out in the community as the coronavirus spreads, they will be brought into the population. If these people are not symptomatic, they will be brought into FDC Philadelphia and held with, or in close proximity with, the existing population, potentially bringing COVID-19 into this population held in large numbers, close quarters, and low sanitary conditions.

¹⁴ <https://www.bop.gov/locations/institutions/phl/>.

¹⁵ Apartment style buildings present unique risks, In February, health officials in Hong Kong partially evacuated residents from an apartment block over fears the coronavirus may have been transmitted via the building’s pipes. <https://www.cnn.com/2020/02/12/asia/hong-kong-coronavirus-pipes-intl-hnk/index.html>.

4. CONDITIONS OF CONFINEMENT AND SPREAD OF CORONAVIRUS

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.¹⁶ Prisons and jails are especially vulnerable to COVID-19 outbreaks.¹⁷ Inmates cycle in and out of detention facilities from all over the world and the country, and people who work in the facilities including correctional officers, and care and service providers leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited.¹⁸ Many people who are incarcerated also have chronic conditions, like diabetes or respiratory illness, which makes them vulnerable to severe forms of COVID-19. According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”¹⁹ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.²⁰

¹⁶ Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹⁷ Nicole Wetsman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The Verge (Mar 7, 2020, 8:30am) <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

¹⁸ 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>

¹⁹ “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), at <https://bit.ly/2W9V6oS>.

²⁰ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

5. CRISIS AFFECTING PRISONERS AND DETAINEES WORLDWIDE

In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases as of February 21, 2020.²¹ Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”²² Courts across *Iran* have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.²³ In the U.S. steps are already being taken in some jurisdictions to facilitate the release of elderly and sick prisoners and to reduce jail populations by discouraging the refusing the admission of individuals arrested on non-violent misdemeanor charges.²⁴

²¹ Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

²² Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.

²³ Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020) at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

²⁴ In New York Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked Governor Cuomo to grant emergency clemencies to elderly and sick prisoners (Sarah Lustbader, *Coronavirus: Sentenced to COVID-19*, THE DAILY APPEAL (Mar. 12, 2020) at <https://theappeal.org/sentenced-to-covid-19/>); Cuyahoga County (Ohio) is holding mass pleas and bail hearings to reduce the current jail population (<https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>); Mahoning County (Ohio) jail is refusing all non-violent misdemeanor arrestees (<https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>); see also Collin County (TX) (<https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>);

6. MR. HADJIEV MAY HAVE A GENETIC PREDISPOSITION FOR RESPIRATORY PROBLEMS

Mr. Hadjiev spent most of his young life in Bulgaria. Accordingly, early medical records are difficult to obtain and harder to translate. Family members report a supposedly life-threatening illness that required surgery at the age of six, but more information is being sought about the nature of this illness, and whether it results in a COVID-19 risk factor. On 3/16/2020, however, Mr. Hadjiev's family provided directly to counsel what appear to be treatment records of Mr. Hadjiev's father Dimitar from providers and facilities in Bulgaria (**Exhibit A**).²⁵ Mr. Hadjiev's family somehow obtained a translation from Bulgarian to English, and sent these to the undersigned. From counsel's (nonmedical, non-Bulgarian-speaking) review, Dimitre's father was suffering as recently as last year from bilateral bacterial pneumonia (Exh. A).²⁶

A. Studies Suggest Pneumonia May Be Genetic

Studies suggest that persistent mortality from community-acquired pneumonia may be due to genetic predisposition.²⁷ Medical studies suggest in cases of "infection, host genetic background may be of even *more importance* than in cancer and cardiovascular diseases, which are known to have a *high hereditary component*."²⁸ Dimitre is likely genetically predisposed to

²⁵ These records were provided directly to counsel by a family member and not obtained by counsel from a Bulgarian facility via authorization, as counsel would have preferred. However, counsel would not know how to write to a Bulgarian facility or provider and ask for medical records on such short notice, so counsel is forced for the moment to accept medical records in an evolving, less than ideal situation.

²⁶ The father's personal identifying information is redacted, which appears to be the Bulgarian equivalent of a SSN.

²⁷ Waterer GW, Wunderink RG, *Genetic susceptibility to pneumonia*, Clin Chest Med. (March 2005). <https://www.ncbi.nlm.nih.gov/pubmed/15802163>.

²⁸ Smelaya TV, *et al.*, *Genetic dissection of host immune response in pneumonia development and progression*. Sci Rep. 2016; 6:35021.

catch pneumonia, based on his father’s apparent condition. As of the filing of this motion, as far as counsel knows, Dimitre is asymptomatic—but there is no communication or attorney visits at FDC Philadelphia, so counsel and family do not know for sure.

7. DIMITRE IS NONVIOLENT WITH NO PRIOR RECORD

Defendant was originally detained primarily based on the government’s representation that an immigration detainer would be lodged against him. The government has represented to attorney Scuderi that defendant’s offense guidelines are a level 22. He reportedly has a criminal history category of I. If he pled guilty, his guideline range would be 30 to 37 months. Defendant is not charged with a crime of violence. This is not a “presumption” case. He wishes to stay in this country. Defendant is not a danger to the community. He has an immigration detainer. Defendant’s immigration status should not affect his bail status since the I.N.S. is already aware of his location. Mr. Hadjiev has pleaded not guilty to the charges and is presumed innocent under the law. As such, he is not subject to mandatory detention under the Immigration and Nationality Act, unless it can be shown in Immigration Court, before an Immigration Judge that he has “committed” the crimes as alleged by the government [ECF # 22].

8. THE BAIL REFORM ACT REQUIRES MR. HADJIEV’S RELEASE

A “judicial officer may, by subsequent order, permit the *temporary* release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.” 18 U.S.C. § 3142(i).

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5057148/>. [emphasis added].

The circumstances that existed when Dimitre Hadjiev was ordered detained have now changed. There is a pandemic that poses a direct risk that is far greater if Dimitre Hadjiev continues to be detained during this public health crisis. Dimitre Hadjiev is vulnerable because of his likely genetic disposition to contract pneumonia.

A. Liberty is the Norm

Liberty is the norm and “detention prior to trial or without trials is the carefully limited exception.” *U.S. v. Salerno*, 481 U.S. 739, 755 (1987). One charged with a crime is, after all, presumed innocent. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). A single individual unnecessarily detained before trial is one individual too many, and the increasing use of the practice places tremendous wear on our constitutional system. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 723–24 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). Due to the crucial interests involved, it follows that a “case-by-case” approach is required at any stage of the case in assessing the propriety of pretrial detention. *See, e.g., U.S. v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986) (discussing due process analysis for evaluating propriety of prolonged pretrial detention, and the interests at stake) (citations omitted), *cert. dismissed sub nom., Melendez-Carrion v. United States*, 479 U.S. 978 (1986). The Third Circuit has “[agreed] with the Second Circuit that at some point due process may require a release from pretrial detention or, at a minimum, a fresh proceeding at which more is required of the government than is mandated by section 3142.” *U.S. v. Accetturo*, 783 F.2d 382 (3d Cir. 1986).

B. “No Greater Necessity” than Keeping Mr. Hadjiev Alive

The courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. As Judge Jack Weinstein held in the Eastern District of New York, “We do not punish those who have not been proven guilty. When we do punish, we

do not act cruelly. Continued incarceration of [a] terminally ill defendant threatens both of these fundamental characteristics of our democracy.” *U.S. v. Scarpa*, 815 F.Supp. 88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the “unacceptably high risk of infection and death on a daily basis inside the MCC”).

This Court should consider the “total harm and benefits to prisoner and society” that continued pretrial imprisonment of Dimitre Hadjiev will yield, relative to the heightened health risks posed to Dimitre Hadjiev during this rapidly encroaching pandemic. *See Davis v. Ayala*, 135 S.Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant).

9. THIS COURT: 14TH AMENDMENT PROTECTS PRETRIAL DETAINEES

This Court held just a few months ago that “the Fourteenth Amendment affords pretrial detainees protections at least as great as the Eighth Amendment protections available to a convicted prisoner,” *Warren v. Prime Care Medical, Inc.*, Civ. No. 16-643 (E.D.Pa. December 20, 2019, **Rufe, J.**) (*citations omitted*). Under the Eighth Amendment, when the claim is based on the denial of medical care, this Court considers the *seriousness* of the medical needs.” *Id.* [emphasis added]. When the conditions of confinement claim is “based on a failure to prevent harm,” a detainee meets his burden by showing “that he is incarcerated under conditions posing a substantial risk of serious harm.” *Id.* If the BOP defendants also act with “deliberate indifference” to inmate health,” [*Id.*] then a detainee has essentially satisfied the test.

10. CONDITIONS OF RELEASE PERMIT HUMANE TREATMENT; REDUCE DANGER TO THE COMMUNITY

From Mr. Hadjiev’s perspective his life—not only his liberty—is on the line, creating a powerful incentive to abide by any release conditions the Court may impose and changing the calculus that initially led to the denial of bail in this case, as indicated above. During the period of release conditions could be set, including electronic home monitoring, which would ensure his appearance for trial. He could live in his apartment above his jewelry store at 330 South street in Philadelphia, or in Boyerstown with his sister.

11. TELEPHONE CONFERENCE REQUESTED ON THIS MOTION

A telephonic conference/hearing is respectfully requested on this motion if the courts are not inclined to hold a prompt in-person hearing, in light of the public health crisis. The undersigned *respectfully* submits that he has conflicts on the following days in the immediate future: Unavailable In-Person or Telephone Conference Dates: 3/20/2020; 3/27/2020; 4/9/2020; Unavailable Teleconference Dates: previous plus 3/17/2020, 2p-4p; 3/18/2020 8a-11a.

12. CONCLUSION

This motion is not a “slippery slope” request; it does not herald a nationwide chorus to open *all* jail and prison gates and release *all* custody detainees and offenders. Instead, Mr. Hadjiev’s case is somewhat unique:²⁹ a nonviolent detainee with potential health problems, who, but for his immigration detainer, likely would have been released pretrial. Dimitre Hadjiev is

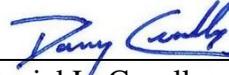
²⁹ Money laundering defendants made up 1.9% of all federal defendants nationwide in 2018. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/3c18.pdf>.

among the vulnerable population at heightened risk of getting very sick from this illness. For all of the above reasons, Dimitre Hadjiev should be granted release on bond pending trial, under monitoring and reporting conditions.

Dated: *March 17, 2020*

Respectfully submitted,

CEVALLOS & WONG LLP



Daniel L. Cevallos, Esq.,

Pa. ID: 90293

61 Broadway, Suite 2220

New York, NY 10006

Ph: 917.699.5008

Fx: 215.689.4375

Danny@CevallosWong.com