
Case No. 20-5548

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

MICHAEL FOSTER
Defendant-Appellant

On Appeal from the United States Court of Appeals
for the Sixth Circuit

**PETITION OF THE DEFENDANT-APPELLANT
FOR REHEARING AND REHEARING *EN BANC***

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STATEMENT FOR REHEARING AND REHEARING EN BANC

The panel decision conflicts with the decisions in *United States v. Salerno*, 481 U.S. 739, 742 (1987), and *United States v. Stone*, 608 F.3d 939, 946 (6th Cir. 2010), in that pretrial detention comports with constitutional protections if an individualized determination is made by clear and convincing evidence, with the government having the ultimate burden of proof, that no reasonable condition can assure community safety, and for mixed questions of law and fact on that detention decision being subject to *de novo* review on appeal. The panel did not conduct *de novo* review. By reviewing for clear error, and relying on two unpublished district court decisions from Kentucky, the panel determined that the district court in Mr. Foster's case was not clearly erroneous in finding that Mr. Foster should be detained because his alleged crimes involve the internet and there is no fail-safe way to prevent any and all access to the internet. The panel did not address, at all, the internet restrictions, electronic monitoring, and third-party custodians proposed by Mr. Foster as reasonable conditions to assure community safety. Consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. Fed. R. App. P. 35(b)(1)(A). Panel rehearing is necessary to address these points of law and fact overlooked. Fed. R. App. P. 40(a)(2).

Additionally, this case involves multiple questions of exceptional importance. Given the pervasiveness of the internet in modern society, and the fact that internet-

connected devices will only continue to expand into the functioning of our daily lives, pretrial detention decisions premised on general ubiquitousness of the internet rendering *any* reasonable conditions of pretrial release unavailable have far-reaching consequences and are inconsistent with liberty being the norm. *United States v. Salerno*, 481 U.S. 739, 755 (1984). Evidencing the importance of this issue is the conflict of the panel's decision, and the its cited unpublished district court decisions from Kentucky, with decisions of other federal courts about the reasonableness of internet restrictions in assuring community safety, even in cases where child pornography crimes are alleged. Further, federal and state courts throughout the United States are grappling with pretrial release issues related to the COVID-19 pandemic, to include specific health concerns of persons detained and defense counsel's inability to effectively represent the person accused with severe limitations on contact and communication. Consideration by the full court is necessary to address these issues of exceptional importance. Fed. R. App. P. 35(b)(1)(A).

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH *UNITED STATES V. SALERNO*, 481 U.S. 739, 742 (1987), AND *UNITED STATES V. STONE*, 608 F.3D 939, 946 (6TH CIR. 2010), AND THIS CASE INVOLVES ISSUES OF EXCEPTIONAL IMPORTANCE, GIVEN THE PERVASIVENESS OF THE INTERNET, CONCERNING REASONABLE PRETRIAL RELEASE CONDITIONS WITH ALLEGATIONS OF INTERNET-BASED CRIMES.

The panel in this case reviewed the mixed question of law and fact concerning Mr. Foster's proposed conditions for pretrial release, to include internet restrictions, electronic monitoring, and third-party custodians, for *clear error* as opposed to giving *de novo* review, inconsistent with *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010) (stating standard of review for pretrial detention decisions is clear error for factual determinations but *de novo* review for mixed questions of law and fact).

In finding that no set of conditions would reasonably assure community safety because of the pervasiveness of the internet and the inability to effectively police or monitor Mr. Foster's usage - without discussing the internet restrictions, electronic monitoring and third-party custodians proposed by Mr. Foster - the panel determined that "the district court's conclusion that the weight of the evidence supported finding that no condition would protect others was not clearly erroneous." *Foster*, slip op. at 5. The panel supported this result with two unpublished pretrial detention decisions from the Eastern District of Kentucky. *Id.* (quoting *United States v. Tang*, No. 3:19-

CR-00014, 2019 U.S. Dist. LEXIS 98602, at *11 (E.D. Ky. June 12, 2019) (“[T]here is simply no failsafe way to prevent any and all exposure.”) and *United States v. Cornish*, No. 3:20-CR-00003, 2020 U.S. Dist. LEXIS 54398, at *11 (E.D. Ky. Mar. 30, 2020) (“The myriad of Internet-capable devices available, including those that work with data plans rather than wifi access, render policing [the defendant’s] Internet use almost impossible.”). The defendant in *Tang* had a criminal history and a propensity for violence. *See Tang*, 2019 U.S. Dist. LEXIS 98602, at *3-4. The *Cornish* defendant lived with a teenager who “is the exact profile of the fictional victim [he] attempted to have sex with at the hotel[,]” a risk that could not be mitigated by placing the defendant in the same home as that child. *See Cornish*, 2020 U.S. Dist. LEXIS 54398, at *11-12.

In contrast, there is no evidence that Mr. Foster has a propensity for violence, he has no criminal history, and he would not be living with a minor upon his release, but instead with his wife and adult daughter, who testified below and offered to serve as third-party custodians. *Foster*, slip op. at 4. Moreover, under either a *de novo* or clear error standard of review, the panel did not consider and address the release conditions specific to Mr. Foster other than endorse the district court’s decision that since Mr. Foster is charged with internet-based crimes, and given the pervasiveness of the internet in society, restricting or policing internet use is impossible, and therefore no conditions or combination of conditions of release – electronic

monitoring, internet restrictions, and third-party custodians - exist to reasonably assure community safety. *Id.*

Basing pretrial detention on the fact that the internet is pervasive in society, with the defendant being charged with offenses involving the internet, is in contravention of the Bail Reform Act and the Eighth Amendment. Pretrial release is favored *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)); *United States v. Stone*, 608 F.3d 939, 946 (6th Cir. 2010) (“Regardless of whether the presumption [of detention] applies, the government’s ultimate burden is to prove that *no* conditions of release can assure that the defendant will appear and to assure the safety of the community.”) (emphasis added). “[T]he safety of the community can be reasonably assured without being absolutely guaranteed. Requiring that release conditions guarantee the community’s safety would fly in the teeth of Congress’s clear intent that only a limited number of defendants be subject to pretrial detention.” *United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990) (citing *United States v. Orta*, 760 F.2d 887, 891-92 (8th Cir. 1985) (*en banc*)).

Other courts have found internet restrictions to be appropriate conditions of release to assure community safety, including for persons charged with crimes

related to child pornography. *United States v. Harris*, 2020 U.S. Dist. LEXIS 55339 (D. D.C., May 26, 2020) (ordering presentence release of defendant previously subjected to pretrial detention, who was found guilty of child pornography charges involving the internet, because “it is extremely unlikely the defendant would attempt to access or distribute child pornography while on release pending sentencing, and that conclusion is reinforced by the strict measures that Defendant’s counsel has proposed[.]”); *United States v. Harris*, 2020 U.S. Dist. LEXIS 53632 (D. D.C., Mar, 27, 2020) (opinion explaining reasons for pre-sentencing release order of Mar. 26, 2020); *United States v. Browder*, 866 F.3d 504, 506 (2d Cir. 2017) (affirming the conditions for special release for a defendant who was convicted on child pornography charges); *United States v. Gonzalez*, No. 12-0128, 2013 U.S. Dist. LEXIS 10677 (D. N.M. Jan. 17, 2013) (reversing detention order of magistrate judge following defendant’s online solicitation of a prostitute via the internet while on pretrial release for drug trafficking, money laundering, and telephone crimes involving an alleged drug cartel, and conditioning defendant’s continued pretrial release on denying him access to any devices that can connect to the internet or send electronic communications); *United States v. Moe*, No. 12-MJ-01100, 2012 U.S. Dist. LEXIS 111110 (D. Co. Aug. 8, 2012) (ordering the defendant, who faced child pornography charges, to be released pending trial with the condition that he is prohibited from accessing the internet and to cancel any internet services at his

home); *United States v. Pullen*, No. 12-0829, 2012 U.S. Dist. LEXIS 179593 (N.D. Cal. Dec. 18, 2012) (ordering the defendant, who faced child pornography charges, to be released pretrial provided any danger to the community is mitigated on the conditions that he is “confined to his home, on electronic monitoring, without internet access,” and without contact to minors); *United States v. Monfre*, No. 09-CR-30075, 2009 U.S. Dist. LEXIS 56440 (S.D. Ill. July 1, 2009) (prohibiting the defendant, who was charged with child pornography, with using the internet as a condition of pretrial release); *United States v. Brown*, No. 08-489, 2008 U.S. Dist. LEXIS 73715 (D. Az. July 14, 2008) (affirming defendant’s pretrial release because the condition that he “shall not access via computer or possess any photographs or videos of sexually explicit conduct” will reasonably protect the public); *United States v. Thomas*, No. CCB-03-0150, 2006 U.S. Dist. LEXIS 3266 (D. Md. Jan. 13, 2006) (ordering the defendant, who faced child pornography charges, to be released pretrial with the reasonable condition that he have no access to minors or a computer).

Accordingly, the panel decision conflicts with the decisions in *United States v. Salerno*, 481 U.S. 739, 742 (1987), and *United States v. Stone*, 608 F.3d 939, 946 (6th Cir. 2010), in that pretrial detention comports with constitutional protections if an individualized determination is made by clear and convincing evidence, with the government having the ultimate burden of proof, that no reasonable condition can

assure community safety, and for mixed questions of law and fact on that detention decision being subject to *de novo* review on appeal. The panel did not conduct *de novo* review. By instead reviewing for clear error, the panel determined that the district court in Mr. Foster's case was not clearly erroneous in finding that Mr. Foster should be detained because his alleged crimes involve the internet and there is no fail-safe way to prevent any and all access to the internet. The panel did not address, at all, the internet restrictions, electronic monitoring, and third-party custodians proposed by Mr. Foster as reasonable conditions to assure community safety. Consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. Fed. R. App. P. 35(b)(1)(A). Panel rehearing is necessary to address these points of law and fact overlooked. Fed. R. App. P. 40(a)(2).

Additionally, this case involves questions of exceptional importance. Given the pervasiveness of the internet in modern society, and the fact that internet-connected devices will only continue to expand into the functioning of our daily lives, pretrial detention decisions premised on general ubiquitousness of the internet rendering *any* reasonable conditions of pretrial release unavailable have far-reaching consequences and is inconsistent with liberty being the norm. *Salerno*, 481 U.S. at 755. Evidencing the importance of this issue is the conflict of the panel's decision, and the two unpublished district court decisions from Kentucky, with decisions of other federal courts about the reasonableness of internet restrictions in assuring

community safety, even in cases where child pornography crimes are alleged. Consideration by the full court is necessary to address these issues of exceptional importance. Fed. R. App. P. 35(b)(1)(A).

II. CONSIDERATION BY THE FULL COURT IS NECESSARY TO ADDRESS ISSUES OF EXCEPTIONAL IMPORTANCE RELATED TO PRETRIAL DETENTION AND THE COVID-19 PANDEMIC, TO INCLUDE SPECIFIC HEALTH CONCERNS OF PERSONS DETAINED AND EFFECTIVE REPRESENTATION WITH SEVERE LIMITATIONS ON CONTACT WITH COUNSEL.

The conditions of Mr. Foster's confinement during the COVID-19 pandemic have impeded Mr. Foster's Sixth Amendment right to effective assistance of counsel. The jail restrictions have unduly burdened Mr. Foster's ability to effectively confer with counsel and review the voluminous discovery in this case. (Br. of Appellant, Doc. 12, pp. 37-40, ECF pp. 46-49; Reply Br., Doc. 15, p. 21, ECF p. 25.) The panel decision dismisses this concern because the assistance of counsel "does not have any impact on the determination of whether conditions of release would assure his appearance or protect the public." *Foster*, slip op. at 5. The panel further dismissed these arguments because "[Mr.] Foster's trial has been continued to October 2020, giving him ample time to consult with counsel." *Foster*, slip op. at 5. The delayed trial date cannot absolve Mr. Foster's immediate concern with his right to effective assistance of counsel, particularly because the end of the COVID-19 pandemic is nowhere in sight and there is no indication that the present restrictions on attorney-client contact will lift in the foreseeable future.

When considering temporary pretrial release based on defense preparation, another panel of this court has determined that it should consider: “(1) the time and opportunity the defendant had to prepare for the trial and participate in his defense, (2) the complexity of the case and volume of information, and (3) the expense and inconvenience associated with preparing while incarcerated.” *United States v. Bothra*, No. 20-1364, 2020 U.S. App. LEXIS 16383, at *6 (6th Cir. May 21, 2020). In *Bothra*, a panel for this circuit denied the defendant’s request for pretrial release because his restricted access to in-person meetings with counsel were only recently limited, and such restrictions were temporary. *See Bothra*, 2020 U.S. App. LEXIS 16383, at *7. In contrast, Mr. Foster’s ability to confer with counsel has been limited for several months and will continue to be restricted for the foreseeable future. The COVID-19 situation has changed since *Bothra*’s writing and it has become clear that these “temporary restrictions” are far more burdensome than anticipated.

Mr. Foster raised the issue of his detention amounting to punishment in violation of constitutional due process. (Br. of Appellant, Doc. 12, p. 41, ECF p. 50.) The conditions inside the detention facility can render a regulatory detention unconstitutionally punitive. *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (“[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.”). The panel incorrectly construed this argument as one of procedural due process because Mr. Foster’s detention was the

result of “full due process” of law. *Foster*, slip op. at 5. This misconstrues Mr. Foster’s argument that the conditions inside the jail, not the process of his detention *per se*, support a due process claim. (Br. of Appellant, Doc. 12, pp. 40-42, ECF pp. 49-51.) The constitutional issues surrounding a pretrial detention decision necessarily are part of the overall determination of the lawfulness of pretrial detention. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

Pretrial detention decisions must be sensitive to accused persons who are medically vulnerable during the COVID-19 pandemic because of the especially dangerous conditions in jails, where social distancing and other CDC guidelines are not feasible. (Br. of Appellant, Doc. 12, pp. 22-23, ECF pp. 31 – 32.) Courts in this circuit have generally focused on the defendant’s individual risk for contracting COVID-19 and rejected generalized fears. *See Bothra*, 2020 U.S. App. LEXIS 16383, at *5. In his briefing to the panel, Mr. Foster urged the court to adopt the balancing test iterated by the District of Kansas to provide more complete guidance to the lower court regarding the distinction between a generalized fear and an individual concern. *See United States v. Clark*, No. 19-40068-01, 2020 U.S. Dist. LEXIS 51390, at *10 (D. Kan. Mar. 25, 2020). The *Clark* factors are:

- (1) the original grounds for the defendant’s pretrial detention,
- (2) the specificity of the defendant's stated COVID-19 concerns,

- (3) the extent to which the proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendant, and
- (4) the likelihood that the defendant's proposed release would increase COVID-19 risks to others.

Clark, 2020 U.S. Dist. LEXIS 51390, at *10. *Clark* articulated its test in the context of a request for temporary release under 18 U.S.C. § 3142(i). The defendant urged the panel to adopt these factors for determinations under § 3142(f) and (g) because they provide a legal metric for the impact of a defendant's health concerns on the detention analysis and would therefore be a valuable addition to the preexisting statutory factors, which were not written in contemplation of a pandemic. (Br. of Appellant, Doc. 12, p. 35, ECF p. 44.) The panel decision dismissed the *Clark* factors because it addressed a different subpart of § 3142 and the other factors "encompass the considerations outlined in *Clark*." *Foster*, slip op. at 2.

Another panel of this Circuit has cited *Clark* with approval, however, regarding temporary release. See *United States v. McGowan*, No. 20-1617, 2020 U.S. App. LEXIS 21242, at *5-8 (July 8, 2020) (denying the defendant temporary release based on the factors outlined in *Clark*).

The panel decision notes that "there are no reported cases of COVID-19 at his facility" and states that Mr. Foster's medical conditions "do not render him uniquely vulnerable to COVID-19[.]" *Foster*, slip op. at 4. Courts "must take into consideration the new public health challenges posed by COVID-19 when making

bail decisions under the Bail Reform Act.” *United States v. Grimes*, No. 16-59, 2020 U.S. Dist. LEXIS 100614, at *17 (E.D. Penn. June 9, 2020). Jails and prisons are especially at risk for the rapid spread of COVID-19. *See Ruderman v. Kolutwenzew*, No. 20-CV-2082, 2020 U.S. Dist. LEXIS 83163, at *7-10 (C.D. Ill. May 12, 2020). The novel circumstances of COVID-19 warrant revisiting pretrial detention decisions in consideration of individual health concerns. *See Grimes*, 2020 U.S. Dist. LEXIS 100614, at *14-15 (granting the defendant’s motion for pretrial release because his individual COVID-19 risks and proposed conditions of release overcome the presumption of detention).

The lack of reported cases of COVID-19 at the jail is not dispositive because the jail refuses to test its inmates for COVID-19. (Br. of Appellant, Doc. 12, pp. 41-42, ECF pp. 50-51; Response Br., Doc. 14, p. 21, ECF p. 25; Reply Br., Doc. 15, p. 16, ECF p. 20.) Mr. Foster’s well-documented health concerns put him at a heightened risk for COVID-19. Mr. Foster suffers from Meniere’s disease and gastroesophageal reflux (GERD), has had precancerous polyps removed, and is at high risk for colon cancer. (Reply Br., Doc. 15, p. 11, ECF p. 15.) People with underlying medical conditions have a higher risk of serious illness if they contract COVID-19. (*Id.* at p. 11-12, ECF pp. 15-16.) Were Mr. Foster to contract COVID-19, it would foreseeably be complicated by his preexisting conditions because of an uncontrollable immune response. (*Id.* at p. 14, ECF p. 18.) The government has not

provided any contrary evidence that Mr. Foster is *not* a high risk for serious illness from COVID-19. (*Id.* at p. 13, ECF p. 17.)

Federal and state courts throughout the United States are grappling with pretrial release issues related to the COVID-19 pandemic, to include specific health concerns of persons detained and defense counsel's inability to effectively represent the person accused with severe limitations on contact and communication with counsel. Consideration by the full court is necessary to address these issues of exceptional importance. Fed. R. App. P. 35(b)(1)(A). Panel rehearing is necessary to address these points of law and fact overlooked. Fed. R. App. P. 40(a)(2).

CONCLUSION

The panel's decision conflicts with Supreme Court and Sixth Circuit authority, and rehearing and rehearing *en banc* is necessary to secure uniformity of decision and address questions of exceptional importance. *See* Fed. R. App. P. 35(a)(1); (b)(1)(A)-(B); Fed. R. App. P. 40(a)(2); 6th Cir. I.O.P. 35(a).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), 35(b)(2)(A), and 40(b), I hereby certify that this brief complies with the type-volume limitation. I have checked the number of words in the applicable portion of this petition using the word count of the word-processing system used to prepare the document, and the report indicates that the countable portions under Rule 32(f) contain 3,272 words and do not exceed 15 pages.

/s/ Stephen Ross Johnson
STEPHEN ROSS JOHNSON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that a true and exact copy of the foregoing was forwarded, via the Court's electronic filing system, this 3rd day of August 2020, to:

Emily Swecker
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220 W. Depot Street, Suite 423
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/s/ Stephen Ross Johnson
STEPHEN ROSS JOHNSON

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Re: Case No. 20-5548, *USA v. Michael Foster*
Originating Case No. : 2:19-cr-00193-1

Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. John L. Medearis

Enclosure

Mandate to issue

No. 20-5548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Jul 20, 2020 DEBORAH S. HUNT, Clerk
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UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
MICHAEL LEE FOSTER,)
)
Defendant-Appellant.)

ORDER

Before: CLAY, ROGERS, and MURPHY, Circuit Judges.

Defendant Michael Lee Foster appeals an order of the district court detaining him pending trial. Generally, he argues that in addition to addressing the statutory factors governing detention, courts should adopt a four-factor test to consider COVID-19's impact. Specifically, he argues that the district court erred in finding that no condition(s) would assure he would not endanger the community if released; and that his detention violates his constitutional rights to due process, to counsel, and to be free from cruel and unusual punishment. The government opposes reversal, and Foster replies. Foster also moves to take judicial notice of COVID-19 restrictions and testing at his facility, and of his physician's interpretation of his recent prison medical tests. Foster requests oral argument, and the government waives oral argument. We conclude that the facts and legal arguments are adequately presented on the briefs; thus, we unanimously agree that oral argument is not necessary. Fed. R. App. P. 34(a)(2)(C).

No. 20-5548

-2-

We first address Foster's motion to take judicial notice. We find that the facts Foster seeks to notice are not generally known and are subject to reasonable question. *See* Fed. R. Evid. 201(b)(1), (2). But we may supplement the appellate record in the exercise of our equitable powers. *Thompson v. Bell*, 373 F.3d 688, 690–91 (6th Cir. 2004), *rev'd on other grounds*, 545 U.S. 794 (2005). We find that appropriate here, given that it would be inefficient to remand, and the government had notice of and responded to the facts.

A defendant may be detained pretrial if, after conducting a hearing, a judicial officer determines 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.” 18 U.S.C. § 3142(e)(1), (f)(1)(E). We review a district court's factual determinations for clear error and review mixed questions of law and fact (including whether detention is warranted) *de novo*. *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010).

Foster first generally argues that special consideration should be given to the medically vulnerable during a pandemic and thus urges the court to adopt the four-factor test articulated in *United States v. Clark*, No. 19-40068-01, 2020 WL 1446895, at *3 (D. Kan. Mar. 25, 2020), to balance a defendant's health concerns against the government's interest in detention. We need not add the *Clark* factors to the statutorily-required review of the § 3142(f) and (g) factors, however, because those factors encompass the considerations outlined in *Clark*.¹

A statutory rebuttable presumption of detention arises when there is probable cause to believe that the defendant committed an offense involving a minor victim under 18 U.S.C. §§ 2251, 2422, or 2252A(a)(2). 18 U.S.C. § 3142(e)(3)(E). Foster's first, third, and fourth counts alleged violations of these statutes. A grand jury indictment, standing alone, establishes probable cause to believe that a defendant committed the offenses with which he is charged. *Stone*, 608

¹ Moreover, the court in *Clark* was concerned only with § 3142(i), *see Clark*, 2020 WL 1446895 at *3, but that subsection is not relevant to the present appeal which arises only under subsection (f).

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F.3d at 945. Thus, the rebuttable presumption of detention applies to Foster on three of his four counts.

If this presumption applies, then the defendant must produce evidence that he is neither a danger to the community nor a flight risk. *Id.* While this “burden of production is not heavy, [the defendant] must introduce at least some evidence.” *Id.* (internal citation omitted). Although the district court arguably erred in finding that Foster presented insufficient evidence to rebut the presumption, it did not err in alternatively finding that detention was appropriate even after consideration of all the relevant factors.

If a defendant satisfies his burden of production, the presumption becomes one of several other factors that must be weighed by the district court under § 3142(g). *Id.* at 946. “Congress, in enacting § 2251(a), emphasized that ‘the use of children in the production of sexually explicit materials, including photographs . . . , is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved . . . and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years.’” *United States v. Champion*, 248 F.3d 502, 506 (6th Cir. 2001) (quoting Pub. L. No. 104-208, Div. A, Title I, § 101(a)). Thus, the district court did not clearly err in determining the presumption weighed in favor of detention.

The remaining factors a district court considers are: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant’s release. 18 U.S.C. § 3142(g)(1)–(4). The nature and circumstances of the offense include whether it involved a minor victim. 18 U.S.C. § 3142(g)(1). The factor involving the weight of the evidence only goes to the likelihood that the defendant will pose a danger to the community and is not a pretrial determination of guilt. *Stone*, 608 F.3d at 948. In weighing the strength of the evidence, the district court may not modify or limit the

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defendant's presumption of innocence. 18 U.S.C. § 3142(j). The history and characteristics of a defendant include "the person'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).

Foster allegedly reached out to a fourteen-year old girl, and he used multiple Snapchat accounts to entice, extort, and threaten her and possibly numerous others to provide him with nude photographs. In at least two cases, Foster allegedly turned his threats into reality. When challenged, he revealed that he had encrypted the files and they were on the dark web. Further, he did not curb his conduct, even after discovery. Foster's offenses also carry substantial sentences. *See* 18 U.S.C. §§ 2251(a), (e), 2252A(a)(2)(A),(a)(5)(B), (b)(1), (b)(2), § 2422(b). Foster's family and community ties, long-term employment, and lack of criminal history all weigh in favor of his release. But his deceptive conduct and unwillingness or inability to change or stop his behavior even after being alerted that it had been discovered, does not speak to his strength of character. And, while Foster has several health conditions, including the prior removal of precancerous colon polyps, he has not been diagnosed with cancer, he is receiving medical care, his conditions do not render him uniquely vulnerable to COVID-19, and there are no reported cases of COVID-19 at his facility.

His offenses are also serious in nature. "Receipt, distribution, and possession of child pornography are extremely dangerous to the community, particularly because such activities are often hidden from a defendant's closest friends and family members." *United States v. Tang*, No. 3:19-cr-00014, 2019 WL 2453655, at *4 (E.D. Ky. June 12, 2019). "Each download and view of a child-pornographic image or film exacerbates the harm to the child involved in its production." *United States v. Mobasseri*, No. 1:17CR138, 2020 WL 3026070, at *3 (N.D. Ohio June 5, 2020). "Allegations of enticing a child to engage in sexual activity are particularly dangerous and pose a

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threat [not] easily mitigate[d]. . . .” *United States v. Cornish*, No. 3:20-CR-00003, 2020 WL 1498841, at *4 (E.D. Mar. 30, 2020). “[T]here is simply no failsafe way to prevent any and all exposure,” even if a defendant forfeits all electronic devices and is denied access to the Internet. *United States v. Tang*, No. 3:19-cr-00014, 2019 WL 2453655, at *4 (E.D. Ky. June 12, 2019); *see United States v. Cornish*, No. 3:20-CR-00003, 2020 WL 1498841, at *4 (E.D. Mar. 30, 2020) (“The myriad of Internet-capable devices available, including those that work with data plans rather than wifi access, render policing [defendant’s] Internet use almost impossible.”). Evaluated in this context, the district court’s conclusion that the weight of the evidence supported finding that no condition would protect others is not clearly erroneous.

Next, Foster argues that his detention violates his right to due process and constitutes punishment. The Bail Reform Act is regulatory, not punitive, because it “carefully limits the circumstances under which detention may be sought to the most serious of crimes.” *United States v. Salerno*, 481 U.S. 739, 747 (1987). Foster received full due process, and the district court did not clearly err in ordering him detained. Thus, his detention does not constitute punishment. *See id.* at 747–48.

Foster also argues that his detention violates his right to counsel. Whether Foster can assist in his defense does not have any impact on the determination of whether conditions of release would assure his appearance or protect the public. *See United States v. Petters*, No. 08-364, 2009 WL 205188, at *2 (D. Minn. Jan. 28, 2009). In any event, limited contact with counsel due to COVID-19 concerns is not sufficient to violate this right if there are still opportunities for significant trial preparation. *See United States v. Persico*, No. S 84 Cr. 809, 1986 WL 3793, at *2 (S.D.N.Y. Mar. 27, 1986). Foster’s trial has been continued to October 2020, giving him ample time to consult with counsel.

Finally, Foster asserts that his right, under the Eighth Amendment, to be free from cruel and unusual punishment has been violated given that he has not received a colonoscopy. In

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evaluating Foster's motion for release, the district court considered Foster's medical history, including that he had precancerous polyps and had been scheduled for a colonoscopy that he had not received. Whether Foster can otherwise state a claim for deliberate indifference to his serious medical needs is better raised in a civil rights action under 42 U.S.C. § 1983.

The motion to take judicial notice is **GRANTED** to the extent we exercise our equitable powers to supplement the record with his proffered information. The district court's pretrial detention order is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk