UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 3:19-cr-00192-HES-JRK

UNITED STATES OF AMERICA,

Plaintiff,
v.

GE SONGTAO,

Defendant.
_____//

OBJECTIONS TO ORDER OF MAGISTRATE JUDGE DENYING DEFENDANT GE SONGTAO'S MOTION FOR TEMPORARY RELEASE PURSUANT TO THE SIXTH AMENDMENT AND THE BAIL REFORM ACT OR, IN THE ALTERNATIVE, BECAUSE THE BAIL REFORM ACT IS UNCONSTITUTIONAL AS APPLIED AND INCORPORATED MEMORANDUM OF LAW

Defendant, Ge Songtao ("Mr. Ge"), through counsel, respectfully files these objections[1] to the Order of the Magistrate-Judge (D.E. 229, the "Order") denying his Motion for Temporary Release pursuant to the Sixth Amendment to the Constitution of the United States, and the Bail Reform Act of 1984 or, in the alternative, because the Bail Reform Act is unconstitutional as applied (D.E. 190, the "Motion"), and states:

1. Congress intended to insure that the conditions of pretrial detention guarantee the Sixth Amendment right to effective trial preparation through private consultation with counsel is clear because that right is built into the Bail Reform Act ("BRA") itself. *See* 18 U.S.C. § 3142

[1] This Court has jurisdiction to consider objections to the Magistrate Judge's denial of the defendant's motion for temporary release pursuant to Federal Rule Criminal Procedure 59 and 18 U.S.C. § 3145(c). This Court's review of the Magistrate Judge's order is *de novo*. *United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987). We contend that the Magistrate Judge's factual findings as to our present ability to meet with Mr. Ge and prepare or trial are "clearly erroneous" within the meaning of Rule 59.

(i)(3) (In a detention order, "the judicial officer shall [. . .] (3) direct that the person be afforded reasonable opportunity for private consultation with counsel."). Two of the four recognized components of the Sixth Amendment's Right to Counsel are the right to the effective assistance of counsel as well as the right to a preparation period sufficient to assure a minimum level of quality of counsel. *United States v. McCutcheon*, 86 F.3d 187 (11th Cir. 1996). In *United States v. Salerno,* 107 S. Ct. 2095 (1987), one of the reasons the Supreme Court upheld the Bail Reform Act against a facial challenge to its constitutionality was its finding that "[. . .] the conditions of confinement envisioned by the Act appear to reflect the regulatory purposes relied upon by the Government." *Id.,* at 747 (internal citations omitted). This surely includes the right to private consultation with counsel built into the act by Congress. The pandemic has destroyed this right along with his Fifth Amendment right to due process of law while Mr. Ge is pretrial detained at the Baker County Detention Center ("BCDC").

2. The most frustrating aspect of the situation in which we, as defense counsel for Mr. Ge, with a combined experience of over 100 years defending persons accused of crime, find ourselves is the apparent discounting by both a prosecutor and Magistrate Judge who have *never* to our knowledge had to prepare a criminal defense case, of our claims, made as officers of the Court, that the pandemic has stifled our already difficult task of preparing for this kind of trial with a detained defendant-effectively preventing the kind of close contact preparation necessary. Lest it be lost in the process of these objections, we are prepared, if need be, to go under oath, testify and be cross examined on record as to the impact of the pandemic on our ability to properly prepare this case for trial and why we believe that temporary release on conditions with home confinement, electronic monitoring and private security paid for by Mr. Ge, which has for months now been good enough for the Chinese non-immigrant codefendant Zeng Yan, will work

to resolve the problems. The Declaration of Charlie Lembcke, Esq., who is our co-counsel in Jacksonville, attesting under penalty of perjury to the problems we have identified is Exhibit "A" hereto. Aside from argument, the government has presented no countervailing evidence from experienced defense counsel.

3. The BCDC has been effectively off-limits for face-to-face attorney visits since 'stay at home' became the required COVID-19 avoidance practice starting in mid-March, 2020. Prior to the pandemic, counsel met with Mr. Ge in person in a conference room inside the institution. Early in March, shortly before going to the BCDC became out of the question, the institution advised counsel that the conference room could no longer be used because of the pandemic. Shortly thereafter even the two small glass enclosed visiting rooms became unavailable. But even in those small room there is a glass wall separating the inmate from counsel (and the interpreter) and only a single telephone for communication. Even if counsel could go to the institution, which they cannot, effective, long-term communication in this setting and with the demands of this particular case, is impractical. There is no effective social distancing between counsel and the interpreter who would be using the phone receiver. More importantly, there is no way at all to review literally thousands of tapes, transcripts and documents which are included in the government's discovery and which form an essential part of the preparation for the trial of the case.[2] Effective consultation between Mr. Ge and his counsel during the pandemic while he is detained is impossible.

4. Even if the conference room were to again become available from the standpoint of the BCDC, given the medical realities surrounding the pandemic, counsel cannot safely go to

[2] Upon inquiry, we have now been advised that the small cubicles are again available for attorney-visits but not the conference room. However, for the reasons stated in the text and by Mr. Lembcke in Exhibit "A", these rooms are insufficient even if counsel could safely use them.

the BCDC or to the conference room to meet with Mr. Ge because counsel are currently taking all precautions recommended by the CDC, WHO, and the Presidential Task Force and those precautions effectively preclude such visitation. All counsel are vulnerable to serious illness and death if they are exposed to the virus. Consider the following:

a. Lead counsel, Edward R. Shohat, is 73 years old and is diabetic. He has a wife at home who is asthmatic and suffers from Alzheimer's disease. Because of her conditions, the risks of infecting her are enormous and effective social distancing at home is not possible.

b. Local counsel, attorney Charles B. Lembcke, is 76 years old and has atrial fibrillation. His wife has pulmonary and autoimmune conditions that put her at greater risk. Mr. Lembcke is an invaluable member of the defense legal team as he resides in Jacksonville, whereas the remainder of the lawyers on the team all reside in Miami. For several reasons, among them financial, Mr. Lembcke has not and does not intend to formally appear as counsel in or to try the case.

c. Attorney Jon May of Mr. Shohat's firm, Jones Walker LLP, is 65 years old and is diabetic.

d. While Attorney Monique Garcia, also of Jones Walker LLP, is not in any category that makes her particularly susceptible to Covid 19, she has a three-year old child at home which means that social distancing within her family would be very difficult. Also, the previously held belief that children are not susceptible to the virus is incorrect. Ms. Garcia, cannot be expected to risk infection.[3]

[3] *United States v. Davis*, No. ELH-20-09, 2020 U.S. Dist. LEXIS 55310, at *20 (D. Md. Mar. 30, 2020) the Court recognized that defense counsel may not want to enter the institution for fear of catching the Covid-19 virus.

5. In his Order, Magistrate Judge Klindt found that the measures taken by the Baker County Detention Center were "adequate at this time to ensure meaningful access to counsel." Order p. 3. In fact, these measures fall miles short of ensuring meaningful access to counsel. Magistrate Judge Klindt's finding is clearly erroneous.

6. First, there are hundreds of tape recordings and zero way to go over them in person with the client. If, on the other hand, Mr. Ge is temporarily released, Zoom or Lifesizecloud meetings can be arranged with his laptop in front of him and counsel simultaneously with the recordings, the transcripts of the recordings which exist, and the documents all accessible while he is on the video. At the BCDC he does not have computer access while he has video access to counsel. Moreover, to date, August 13, 2020, the video conferencing system has not worked even one time.

7. Second, defense counsel and/or the interpreter are permitted only one hour a day on the phone with Mr. Ge. This is inadequate now and will become more inadequate as trial approaches. This is particularly true regarding documents, tapes and transcripts which cannot be effectively reviewed this way.

8. The discovery in this case is voluminous. The government has provided the defense with over 1,600 gigabytes of data. Even before the pandemic, there has never really been an effective way to review discovery with Mr. Ge while he is detained. Computers are essential and computers cannot be used during attorney visits. Plus, Mr. Ge has not had access to in-person review and consultation with counsel's assistance about the government's discovery since early March 2020. Because of the rolling nature and lack of effective indexing of the discovery, there are many thousands of documents, recordings and other evidence still to be located and reviewed with Mr. Ge, most of which is in Mandarin. The government has only recently started providing

the specific recorded evidence with translated transcripts, which it says it intends to use at trial. Only a few have so far been produced and only since the pandemic BCDC-lock-out started, so we have not been able to review them with Mr. Ge in a confidential personal setting.

9. Mr. Ge has been able to communicate in a limited fashion through attorney/client conversations with our Mandarin speaking paralegal and, as needed, with counsel through the paralegal/interpreter, by using the inmate telephone inside the BCDC. Although defense counsel recently learned of, and has been making use of this unmonitored line to communicate with Mr. Ge, those meetings have been limited to one hour per day and Mr. Ge has no access to a computer to review documents, transcripts, and recordings during the discussions. Thus, this method of communication is so limited as to be a virtually impossible vehicle for actually preparing this case for trial. Judge Klindt's finding amounts to this: "one hour or so a day on the phone and some additional time on a video conference (which has yet to materialize) is enough." This is clearly erroneous.

10. Magistrate Judge Klindt's findings regarding video conferencing, *See* Order p. 3, is in error for the following reasons. First, the video conference equipment has been continuously broken since we were informed that it was available to us to use. Having been advised that the video system had been repaired we attempted our first conference yesterday, August 12, 2020 but it did, despite the undersigned signing in and waiting for Mr. Ge to join, it did not happen for unknown reasons. Second, as the equipment has been broken, we have not been able to determine whether it is possible for the interpreter to translate for counsel and the defendant with a telephone placed next to our computer. We do know that no third person can be joined into the conference so, at best, we are consigned to an adjacent telephone for interpretation. This is no way to work effectively. Third, even if it were possible for the interpreter to listen in to the conference, we

don't know if Mr. Ge will be able to hear her interpretation of our statements to him. Fourth, we cannot show Mr. Ge documents over video conference and we don't know if he will be able to hear recordings. Fifth, he is not permitted to have use of the computer while he is one a video conference with us. Consequently, he cannot review documents and listen to recordings while we speak to him. Magistrate Judge Klindt's finding here is also clearly erroneous.

11. In sum, the pandemic has literally shut down effective trial preparation with counsel while Mr. Ge is pretrial detained, a situation which will continue for the indefinite future. The only way to ensure a fair trial through the effective assistance of counsel is to temporarily release Mr. Ge on conditions so that counsel may have unfettered access to meet with him via computer and video technology (Zoom or Lifesizecloud) in order to effectively review the myriad of documents, tapes and transcripts in this case, and to prepare him to testify should he elect to do so.[4] Anything else would, in effect, impose punishment on Mr. Ge as a result of the pandemic (apart and aside from the risk of infection) by forcing even longer delays in the trial to wait-out the pandemic while he remains detained, delays that may well exceed any sentence to be imposed upon conviction. In *Salerno, supra,* the Supreme Court reasoned that "the maximum length of pretrial detention is limited by the stringent time limits of the Speedy Trial Act" is an important factor in the BRA's facial constitutionality.[5] *Salerno,* 107 S. Ct. at 2101. Should the Court decline to release Mr. Ge temporarily based on this motion, we contend, based on the language of the BRA itself and the case law cited herein, that the BRA is unconstitutional as applied to Mr. Ge to

[4] Mr. Ge is allowed to access a laptop computer at the BCDC which he was permitted to load traunches of the discovery provided via thumb drive. However, there is no web or internet access allowed. Mr. Ge and his counsel could not share tapes or documents or translations of them for all-important simultaneous, line by line review and understanding. Second, when counsel visited Mr. Ge, neither he nor counsel were permitted computer access inside of the BCDC. Given the nature and volume of the discovery in this case, use of computers with internet video conferencing is the only viable way to prepare.

[5] *See* 18 U.S.C. § 3161 et seq.

the point of denying him his Fifth Amendment right to due process of law, the Sixth Amendment right to the effective assistance of counsel, as well as his right not to be punished without conviction.

12. Although defendants are not entitled to a perfect trial, they are entitled to a fair trial. *See Lutwak* v. *United States*, 344 U.S. 604, 619 (1953) *cited* in *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 1627 (1968). They are entitled to be informed of the charges against them. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018). They are entitled to an unbiased trier-of-fact. *See Batson v. Kentucky*, 476 U.S. 79, 91, 106 S. Ct. 1712, 1720 (1986). They are entitled to the assistance of counsel and if they cannot afford counsel, counsel will be provided to them by the government. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). If needed, they can be provided the assistance of investigators and expert witnesses. *See* 18 U.S.C. § 3006A(e)(1). They have the right to testify, *see Rock v. Arkansas*, 483 U.S. 44 (1987), and the right to call and confront witnesses. *See* U.S. Const. amend. VI. And finally, they have the right to a unanimous verdict. *See Ramos v. Louisiana*, 206 L.Ed.2d 583, 585 (2020).

13. None of these rights matter if the accused is denied meaningful access to counsel. Indeed, the utter absence of counsel is deemed a structural defect entitling a defendant to reversal of his conviction though no objection is made or prejudice shown.

> [T]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis* v. *Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id*., at 318 (citing *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966)).

United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984) (*cited* in *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038-39 (2000)) (presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. *See Strickland*, 466 U.S. at 493-496; *Cronic*, 466 U.S. at 658659; *Robbins*, 528 U.S. at (slip op., at 24-25)). The pandemic has eliminated the effective assistance of counsel for Mr. Ge, essentially rendering counsel completely absent in any real sense, insofar as the substantive, direct and private consultation between counsel and client are built into the "regulatory scheme" of the BRA. *See, Salerno supra,* 107 S. Ct. at 747.

14. It is not simply the presence of counsel but the effective assistance of counsel that is required by the Sixth Amendment,

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970).

Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063-64 (1984). This Court has the authority under the Bail Reform Act to ensure that this mandate be carried out. Under § 3142(i):

> The 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. I*d.* This provision applies to pretrial detained defendants who, like Mr. Ge, have already been

> adjudged to be a flight risk. Despite such findings, Congress mandated that the Court can release the defendant where **necessary for preparation of the person's defense.** As we demonstrate below, even a dangerous person may be released for the purpose of trial preparation. The circumstances presented here are precisely the circumstances contemplated by the law.[6]

15. In its Response (D.E. 206), the government cited the Court to cases where other courts had exercised their discretion to deny the defendant temporary release. In none of the cases cited by the government were the circumstances denying the accused his Sixth amendment right to effective assistance of counsel and his Fifth Amendment right to due process of law as compelling as presented herein. We will discuss these cases in turn but we ask this Court to consider the affidavit of local counsel Charles Lembcke (Exhibit "A") that attests to the facts that:

> 5. Defendant Ge Songtao has been detained at the Baker County Detention Center ("BCDC ") for the last 10 months.
>
> 6. BCDC has arranged for counsel or their interpreter to speak to Mr. Ge one hour each weekday on an unmonitored line. This is grossly insufficient for a case wherein counsel and client cannot communicate without a translator and a large amount of the 1,600 plus gigs of discovery consisting of a large number of documents and multiple hours of recorded conversations almost all in Mandarin. The need for translation services increases significantly the time with the client to prepare for trial.
>
> 7. Because our client Ge Songtao speaks no English, attorney visits require an interpreter. The glass enclosed visiting room at the BCDC is available, but it has no windows and is too small for social distancing consistent with CDC guidelines between the attorney and the interpreter. The room has only a single telephone receiver, which does not work with a translator. The translator and I must have a separate receiver to communicate with Mr. Ge. Mr. Ge would need a computer for use during the meetings. Masks alone are not sufficient to prevent infection which is why CDC says that both social distancing and masks are required. I was told by the receptionist that the room and the phone receiver are cleaned only once at the beginning of each day even though the room is used throughout the day by

[6] To the extent necessary, a custodian will be provided for Mr. Ge's temporary release just as was done for the codefendant Zheng Yan.

multiple attorneys and other persons. Plus attending and speaking extensively on a single phone through glass during meetings lasting for hours at a time wearing masks is impractical.

8. In this case, the reality is that more than one attorney is needed to attend client meetings, and meetings without use of a computer are a major disability with 1,600 plus gigs of discovery. This is because one lawyer is needed to work the computer to locate relevant items and another to conduct the conversation and take notes. Taking time to search for documents which interrupts the flow of discussion creates serious time impediments.

9. There is no food at the BCDC. No machines or beverages and counsel are not allowed to bring them. This means we have to leave to eat, even to drink. The BCDC is a long distance from a food establishment and requires diving. Leaving for food also risks losing the room. Getting food cannot be done in shifts because communication without the interpreter is impossible.

10. I do not feel safe and would not go to the BCDC. My wife strenuously objects to me going to the BCDC. We are both in multiple risk categories (age and health issues) and have essentially self-quarantined since early March.

11. BCDC is approximately a 45-50-minute drive from my home in Jacksonville. There is no assurance that a room will even be available when you get there or within a reasonable time. There are only two rooms which are now used by family and lawyer visits on a first come first serve basis.

16. The Magistrate Judge cites to no cases in his Order. We therefore turn to the cases cited by the government (D.E. 206), none which are on point. As this Court will see, while some of the government's cases involve voluminous discovery, none involve discovery that is mostly in a foreign language or a defendant that does not speak the same language as counsel. This greatly limits counsels' ability to review that discovery themselves and severely limits counsels' ability to review that discovery with their client, particularly time limited to one hour or so per day. Moreover, none involve the same degree of impediments to communication between counsel and their clients as present herein.

In neither *United States v. Villegas*, No. 2:19-CR-568-AB, 2020 U.S. Dist. LEXIS 62276 (C.D. Cal. Apr. 3, 2020), *United States v. Leake*, No. 19-cr-194 (KBJ), 2020 U.S. Dist. LEXIS 67769 (D.D.C. Apr. 17, 2020) nor *United States v. Trillo-Gelpi*, No. 1:19-CR-00083, 2020 U.S. Dist. LEXIS 73624 (M.D. Pa. Apr. 27, 2020) did the defendants demonstrate that the conditions imposed by the detention facilities coupled with the dangers caused by the COVID-19 virus so impeded counsel's ability to prepare the defense as to deny him his Fifth and Sixth Amendment rights to effective assistance of counsel and a fair trial.

17. Citing *Villegas,* the government attempts to dismiss Mr. Ge's argument, stating:

> Section "3142(i) authorizes no temporary release of pretrial detainees just because it would be helpful, preferable, or even ideal for a defendant's trial preparations." *Id*

(D.E. 206, p. 4).

18. But we are not talking about the hypothetical or the preferable. **We are talking about the real and essential.** And not one of the cases cited by the government deal with the circumstances facing Mr. Ge or deny that temporary detention is unwarranted under the circumstances presented herein.

19. Moreover, in *Villegas*, the Magistrate expressly commented on the defendant's failure to identify any impediments to his Sixth Amendment rights.

> At a minimum, detained defendants seeking temporary release under section 3142(i) for "necessary" trial preparations must show why less drastic measures—such as requests to continue the trial date (consistent with the Speedy Trial Act) or alternative means of communication (including in writing or by available remote conferences)—would be inadequate for their specific defense needs. Defendant Villegas has not met that burden.

United States v. Villegas, No. 2:19-cr-568-AB, 2020 U.S. Dist. LEXIS 62276, at *5 (C.D. Cal. Apr. 3, 2020). Here we have.

20. In *Leake*, the defendant similarly failed to show how his rights were compromised by the limitations on contact imposed by the prison. Indeed, the record before that court demonstrated that Leake had likely reviewed all the government's evidence with his attorney prior to the outbreak of COVID-19 and had participated with his counsel in the preparation and presentation of a an extensive hearing to suppress that evidence where he had access to most of the government's evidence. *United States v. Leake*, 2020 U.S. Dist. LEXIS 67769, *9-10.

21. In *Trillo*, the defendant complained that he was only permitted fifteen-minute phone calls with his attorney. The court cited to *Villegas* and found that the defendant had not shown that he could not have non-contact visits with his counsel at the prison. A review of the decision shows that there was no contention that his ability to review tapes with his attorney was not possible under the circumstances he faced with the jails restrictions. *United States v. Trillo-Gelpi*, No. 1:19-cr-00083, 2020 U.S. Dist. LEXIS 73624, at *8 (M.D. Pa. Apr. 27, 2020).

22. In *United States v. Landji*, 2020 U.S. Dist. LEXIS 59954 (S.D. N.Y. April 5, 2020) the defendant was charged with being the head of a large drug trafficking organization. He was facing a mandatory minimum sentence of ten years and maximum sentence of 25. He sought temporary release, arguing that he was at risk based upon the COVID-19 virus and that the prison's order to suspend legal visits for 30 days denied him his Sixth Amendment right to counsel. Unlike the instant case, *Landji* did not suffer from any medical conditions that would make him particularly susceptible to the virus nor did he present any facts in support of an argument that the accommodations made by the institution (an increase in minutes allowed for telephone calls and private attorney client calls) were not sufficient for counsel to prepare given the short length of the shut-down. *Id.* at 17-18. Nor did counsel and the defendant speak different languages, nor was the discovery voluminous, nor was most of that discovery in Mandarin.

Finally, *Landji* did not identify anyone who could be responsible for him if he were released. *Id.* Each of these factors distinguish Mr. Ge's case from *Landji's*.

23. The other cases cited by the government are equally inapposite to the argument the government advances. For instance in *United States v. West*, D Md. Case No. ELH-19-364 Civ. 2020 U.S. Dist. LEXIS 65482* (April 10, 2020) a grand jury indicted Terrell West for unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). He faced 10 years in prison if convicted. Unlike the instant case, that was a simple case to try. As noted in footnote 3, at *7. West did not invoke 18 U.S.C. § 3142(j), so he did not argue that he was entitled to temporary release pending trial based upon a "compelling reason". The Court found that "[o]nce Court is fully operational, however, West and his attorney will be afforded adequate opportunities to confer, to review discovery, and to prepare a defense." Again no evidence that he was facing the impediments to effective representation present herein. In the instant case, we have a trial scheduled for February 2021 with no serious expectation that the conditions at BCDC or the pandemic will have changed by that time.[7]

24. In *United States v. Mukhtar.* 2013 Case No. 2:12-cr-00004-MMD-GWF, 2013 U.S. Dist. LEXIS 203169, *27 (D. Nv., Jan. 13 2013), a pre-Covid case, the defendant, unlike the case herein, failed to demonstrate a violation of his Sixth Amendment rights. As the court

[7] *See e.g., Miami Herald,* Tuesday, August 11, 2020, "Most Americans won't be able to get a coronavirus vaccine until well into 2021" in which Dr. Anthony Fauci says even a vaccine approved by November will not be available generally until the second half of 2021 at best. https://eedition.miamiherald.com/ccidist-replica-reader/?epub=https://eedition.miamiherald.com/ccidist-ws/mcclatchy/mcclatchy_mia_newsbroad/issues/34329/&token=eyJhbGciOiJIUzI1NiIsInR5cCI6IkpXVCJ9.eyJwdWJzIjp7Im1pYW1pX21pYV9uZXdzYnJvYWQiOlsiQWxsTUlBLTUwMDUiLCJBbGxNSUEtNTAwNSIsIkFsbE1JQS01MDA1IiwiZWVkaXRpb24iXX0sImlzcyI6Ik1jQ2xhdGNoeSIsInN1YiI6IjUwMDc1NDcyOSIsInNlc3Npb24iOjE1OTk3NzgzNjAsImlhdCI6MTU5NzE4NjM2MCwiZXhwIjoxNTk3MTg3MjYwfQ.Ggj96syfBk7Hq9YoBT6g-fSKc_L9Kb6AQ2V84xksXtQ#/articles/21

found, Mukhtar had access to computers and staff. And according to the court "Defendant has not demonstrated that his pretrial detention so substantially impairs his ability to communicate with his counsel and examine discovery, that he and his lawyers cannot adequately prepare his defense." *Id.* But that is precisely what has been demonstrated herein.

25. Consider next the decision in *United States v. Lucas*, 873 F.2d 1279 (9th Cir. 1989), a pre-Covid case. In that case, the Defendant sought review of a conviction for escaping from a federal correctional institution located in Arizona, in violation of 18 U.S.C. § 751. The defendant contended that he was denied his Sixth Amendment right to the effective assistance of counsel due to his pretrial detention in a facility located in Phoenix, approximately 120 miles away from his court-appointed counsel in Tucson. The Ninth Circuit disagreed. Defendant failed to show how the distance between Phoenix and Tucson prevented or impaired the quality of his representation. The Court held that the defendant failed to meet his burden of proving that his detention in Phoenix prejudiced his defense Here we have met that burden by demonstrating that the Mr. Ge and his attorneys cannot effectively mount a defense under the circumstances presented them. It is simply irrelevant that defense counsel has been otherwise vigorously representing Mr. Ge. This is our job.

26. In *United States v. Jett*, 18 Fed. Appx. 224* (4th Cir. 2001), a pre-Covid case, the impediments to effective defense were indeed severe. At Jett's detention center, he was not allowed contact visits with counsel. And, because of a malfunctioning telephone system in the visiting area, counsel sometimes was forced to shout through a plexiglass partition in order to communicate with Jett. Additionally, counsel's repeated requests that Jett be allowed to listen to and discuss with counsel a tape that would be introduced at trial were denied. Jett maintained

that these difficulties were so severe as to constitute a violation of his *Sixth Amendment* right to counsel.

27. But in Jett, like in Lucas, the defense failed to demonstrate how counsel's effectiveness at trial was impaired. And in that case, counsel was not even impeded from seeing his client by a pandemic! There was one recording, not dozens, and there is nothing in the decision that show that this was a critical piece of evidence. Nor is there anything in the appeal to show how often counsel was forced to shout questions to his client. Moreover, as the Eighth Circuit found, "[t]he record demonstrates that Jett's counsel vigorously defended him throughout the trial." And, Jett points to no specific prejudice arising from the problems he had communicating with counsel.

28. *In McMaster v. Pung,* 984 F.2d 948* (8th Cir. 1993), a pre-Covid case, the defendant was allowed contact visits with his male attorney. He was denied contact visits with his female attorney because he had plotted to have sex with her. It is not at all clear what this decision has to do with the case at bar. There was no contention that the defendant was not able to effectively prepare for trial with his male attorney, or that the restrictions on access to his female attorney prejudiced him.

29. In *Ingram v. Ault,* 50 F.3d 898* (11th Cir. 1995), a pre-Covid case, the Defendant was denied contact with counsel three hours before execution. But he could speak to counsel by telephone and there was no showing of prejudice to any of his legal rights. Again, the government does not explain how this case is relevant. There was no issue that these circumstances interfered with the defendant's ability to prepare for trial or that it anyway affected his lawyers ability to represent him in efforts to save is live from execution.

30. In *Morris v. Slappy*, 461 U.S. 1 (1983), a pre-Covid case, senior trial deputy public defender took over the case six days before trial and informed the court that he was ready. Defendant asked for a continuance but the court denied the motion. The Supreme Court held no ineffectiveness shown. Unlike the instant case, there was no demonstration that the last minute substitution of counsel interfered with the defendant's Sixth Amendment right to effective assistance of counsel. It is questionable whether the Supreme Court would have reached the same result if the senior public defender was faced with reviewing voluminous discovery, mostly in another language, with a defendant who spoke only the foreign language and could not meet with his client in person to review that discovery because of a pandemic that threatened the lawyers life.

31. *United States v Peters*, Case No. 08-364 (RHK/AJB) 2009 U.S. Dist. LEXIS 6489 (D. Minn., Jan. 28, 2009), a pre-Covid case, does not support the government in the least. First, the detention facility was not dealing with a pandemic and counsel could have contact visits. Moreover, in that case special arrangements were made:

> The Government has represented that it has made special arrangements with the Sherburne County Jail, where Defendant is currently being housed, to permit his counsel to meet with him seven days per week, from 8 a.m. until 10 p.m., with certain limited exceptions (meal times, a one-hour jail headcount, etc.). The Jail also has set up a dedicated conference room for defense counsel to meet with him, into which a laptop computer may be brought. In addition, Defendant is permitted to retain documents in his cell overnight.

Id. at *8.

32. Because of the pandemic, even if the circumstances of Mr. Ge's access to his counsel were the same as that in *Peter*, counsel still could not enter the prison safely. *See Davis infra.*

33. In *United States v. Dupree*, 833 F.Supp.2d 241 (E.D. N.Y. 2011), a pre-Covid case, the institution and the court bent over backwards to ensure that Dupree had access to effective representation. The court first noted that "up to the present time, Dupree has been able to meet with counsel, has had access to telephones, computers, email, and the library, and has been able to review documents in prison, albeit in a more limited fashion." *Id.* at 249. The court found that Dupree had adequate time – nearly fourteen months - since the original indictment was returned to prepare with all of the aforementioned sources.

34. But the court went further. The court directed the detention facility to:

> [A]rrange for the following to be provided to Dupree at MDC so that he can adequately prepare for and participate in his defense with counsel: (1) access to an attorneys' visiting room with a computer that can read DVDs from 9:00 a.m. to 3:30 p.m., with or without counsel, beginning on November 7, 2011 and until the start of trial on December 5, 2011; (2) Dupree's access to the aforementioned attorneys' visiting room can be extended from 3:30 p.m. to 9:30 p.m., provided Dupree is with counsel during this time and twenty-four hour notice is given to MDC for each day an extension is requested; (3) access to counsel and agents of his counsel in an attorneys' visiting room with a computer that can read DVDs following each trial day until 9:30 p.m., provided that twenty-four hour notice is provided to MDC for each day such access is requested; and (4) access to a locked storage area for the storage of documents so that Dupree has additional space other than his detention cell to store documents.
>
> *Id. at* 244.

35. Like *Peters*, *Dupree* was a pre-COVID-19 case. But both cases reflect the court's understanding of what conditions are necessary to ensure that an accused has adequate access to counsel and to those materials necessary for his defense. Again, like *Peters*, even if the circumstances presented Mr. Ge were the same because of the COVID-19 virus, counsel still could not enter the institution.

36. This dilemma was recognized in the case of *United States v. Davis*, No. ELH-20-09, 2020 U.S. Dist. LEXIS 55310, at *20 (D. Md. Mar. 30, 2020). In that case the court released the defendant over government objection in a narcotics case, in part because of "the disruption to the attorney-client relationship caused by this public health crisis," including the inability of counsel to meaningfully meet with a detained defendant to prepare for trial. *Id.* at p. 14. The court concluded: "Even though access to counsel is not a specified factor in the Bail Reform Act, the Court has considered it in its decision." *Id.*

37. The Court recognized that defense counsel may not want to enter the institution for fear of catching the COVID-19 virus. Moreover, the real consequences of the pandemic of defendants' rights and the court-system were highlighted by the this district court:

> The disruption to the attorney-client relationship caused by this public health crisis likely will have broader implications for the Court and the administration **[*21]** of justice. If attorneys cannot regularly have meaningful in-person meetings with their clients, regularly review discovery with them, or thoroughly advise them about the consequences of going to trial, the number of jury trials may increase. This will strain Court and prosecutorial resources and may result in unnecessarily longer prison sentences. The extent of the disruption of the attorney-client relationship and the strain on the Court depends on how long this crisis lasts and how many people are detained pending trial. Even though access to counsel is not a specified factor in the Bail Reform Act, the Court has considered it in its decision.
>
> *Id. at* *21.

38. The government's reliance on the decision by Magistrate Judge Richardson of this Court, in *United States v. Chad Richard Johnson*, Case No. 3:20-cr-59-J-32MCR attached to the government's response, is particularly misplaced. As this Court will see from a cursory review of the Order, counsel for the defendant were offered the opportunity to meet with their client at a non-contact visitor room between the hours of 8:30 a.m. to 5:00 p.m. from Monday through

Friday. But the Court found that they had not attempted to do so or provided any reason why they could not meet their client in these circumstances. Here we have demonstrated compelling circumstances why we cannot do the same. The evidence in *Johnson* was not voluminous, the evidence in *Johnson* was not in a foreign language, Johnson and his lawyers did not speak different languages, Johnson and his lawyers did not need to contend with the logistics of involving an interpreter in their conversations, and there was no evidence that Johnson's lawyers were particularly vulnerable to Covid-19. Thus, the court's finding in *Johnson*, that, "In the absence of such information and considering the reasonable accommodations that are in place at the detention center, Defendant's Motion is due to be denied," is inapposite precisely because we have made the demonstration Magistrate Judge Richardson found lacking in *Johnson*.

39. In contrast to the government's cases are those cases where the court exercised its discretion to grant release.

40. In *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 U.S. Dist. LEXIS 47846, at *7 (S.D.N.Y. Mar. 18, 2020) the District Court ordered detention for a defendant accused of possession of a firearm in proximity to drugs, based upon a finding that the defendant was a danger to the community. Subsequently, the court reversed itself and released the defendant to the custody of his mother. In so ordering, the court found that the actions of the Bureau of Prisons in banning all visits with counsel so severely impacted the defendant's preparation that release was necessary to preserve his constitutional rights:

> The Court concludes that the Defendant has met his burden by demonstrating at least one compelling reason that also necessitates his release under this provision. **Namely, the obstacles the current public health crisis poses to the preparation of the Defendant's defense constitute a compelling reason under 18 U.S.C. § 3142(i)**. *See id.* (providing that the Court "may . . . permit the temporary release of [a] person, in the custody of a United States

> marshal or another appropriate person, to the extent [it] determines such release to be necessary for preparation of the person's defense"). The spread of COVID-19 throughout New York State—and the country—has compelled the BOP to suspend all visits—including legal visits, except as allowed on a case-by-case basis—until further notice. *See* Federal Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp (explaining that "legal visits will be suspended for 30 days" nationwide and that "case-by-case accommodation will be accomplished at the local level"). This suspension impacts the Defendant's ability to prepare the merits hearing scheduled for March 25, 2020.

Id. at *8-9 (emphasis added). *See e.g. United States v. Chandler*, No. 1:19-cr-867 (PAC), 2020 U.S. Dist. LEXIS 56240, at *5 (S.D.N.Y. Mar. 31, 2020) ("The extraordinary burdens imposed by the coronavirus pandemic, in conjunction with Chandler's right to prepare for his defense, certainly constitute a "compelling reason" that permits this Court to order the temporary release of Chandler pursuant to 18 U.S.C. § 3142(i)"). The *Chandler* court also dismissed the government's attempt to distinguish from *Stephens:*

> The Government distinguishes Judge Nathan's opinion in *Stephens*, in which the court found that the information relied upon by the Government to establish dangerousness under 18 U.S.C. § 3142(g) at the prior bail hearing had since "been undermined by new information." *Stephens*, 2020 U.S. Dist. LEXIS 47846, 2020 WL 1295155, at *1. The Government argues that no such change has occurred in Chandler's case. The citation is misleading, however, because the *Stephens* court was explicit that even if it had "conclude[d] that changed circumstances did not compel reconsideration [under 18 U.S.C. § 3142(g)]" the "separate statutory ground" provided by 18 U.S.C. § 3142(i) would nevertheless and on its own "require [the defendant's] release." 2020 U.S. Dist. LEXIS 47846, [WL] at *2. **This Court agrees with the *Stephens* court that 18 U.S.C. § 3142(i) provides a sufficient and independent ground for granting temporary release.** The language of 18 U.S.C. § 3142(i) that the court "may . . . permit" the detainee's temporary release "to the extent that the judicial officer determines such release to be necessary" underscores the discretionary nature of relief under the subsection.

Id. at, *4-5 (emphasis added).

41. Finally the government argues that Mr. Ge remains a "serious risk of flight." (D.E. 206, p. 10). And that this Court must balance the defendant's reasons for temporary release against that risk, relying on *United States v. Gumora,* No. 20-CR-144 (VSB), 2020 WL 1862361, at *5 (S.D.N.Y. Apr. 14, 2020). But § 3142(i) contemplates that the defendant has already been detained because he was deemed a risk of flight or a danger to the community. Thus Congress provided a means for release despite such findings. To the extent any balancing is required, the circumstance presented herein greatly outweigh the danger of flight found by this Court. We have suggested measures to ensure Mr. Ge cannot "escape". He is to have electronic monitoring, limitation of movement to his abode, and a retired deputy sheriff check on him 2x/day. In addition, Ge has an expired Chinese passport that is in the possession of the government. On balance, his Sixth Amendment rights outweigh any risk of flight. [8]

CONCLUSION

To be sure, we do not blame the Baker County Detention Center for its inability to make its facility sufficiently safe for counsel to visit our client in a manner consistent with his constitutional rights. Plus, the pandemic itself prevents counsel from even going there. The circumstances facing Mr. Ge raise serious questions about whether he can obtain a fair trial. Without direct access to counsel, to the discovery with assistance, and to effective communication, he simply cannot. The Magistrate Judge's findings to the contrary are clearly

[8] Before Magistrate Judge Klindt, the government argued, that our recommended third party custodian has a conflict of interest and that as a result or motion really seeks Mr. Ge's "outright release for an indefinite period. Footnote 2. Judge Klindt's Order did not address that contention. Should this Court find that Mr. Ge's temporary release is warranted, but is not satisfied with the custodian we proposed, we reserve the right to suggest an alternate custodian.

erroneous. This Court has the authority under the Bail Reform Act to ensure that he does receive effective preparation, representation and a fair trial. This Court should exercise that authority.

Respectfully submitted,

JONES WALKER LLP
201 S. Biscayne Blvd.
Twenty Sixth Floor
Miami, Florida 33131
Telephone: 305-679-5700
Facsimile: 305-679-5710
Email: eshohat@joneswalker.com
/s/ Edward R. Shohat
Florida Bar No. 152634
Email: mgarcia@joneswalker.com
/s/ Monique Garcia
Monique Garcia
Florida Bar No. 0085004
Email: jmay@joneswalker.com
/s/ Jon May
Florida Bar No. 276571

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 13th day of August, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record either via transmission of Notices of Electronic Filing generated by CM/ECF or in another authorized manner for those counsel or parties not authorized to receive electronically Notices of Electronic Filing.

Michael Coolican, AUSA
US Attorney's Office - FLM*
Suite 700, 300 N Hogan St
Jacksonville, FL 32202
Email: michael.coolican@usdoj.gov

/s/ Edward R. Shohat
Edward R. Shohat, Esq.