

## APPENDIX

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No. 20-5548

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES  
OF AMERICA,  
Plaintiff-Appellee,

<p><b>FILED</b> Jul 20, 2020 DEBORAH S. HUNT, Clerk</p>
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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 [\*2] are adequately presented on the briefs; thus, we unanimously agree that oral argument is not necessary. Fed. R. App. P. 34(a)(2)(C).

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, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (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 U.S. Dist. LEXIS 51390, 2020 WL 1446895, at \*3 (D. Kan. Mar. 25, 2020), to balance a defendant's health concerns against [\*3] 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*.<sup>1</sup>

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 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

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<sup>1</sup> Moreover, the court in *Clark* was concerned only with § 3142(i), see *Clark*, 2020 U.S. Dist. LEXIS 51390, 2020 WL 1446895 at \*3, but that subsection is not relevant to the present appeal which arises only under subsection (f).

evidence to rebut the presumption, it did not err in alternatively finding that detention was appropriate even after consideration [\*4] 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 [\*5] 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 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 [\*6] 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 U.S. Dist. LEXIS 98602, 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 U.S. Dist. LEXIS 98773, 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 threat [not] easily mitigate[d]. . . .” *United States v. Cornish*, No. 3:20-CR-00003, 2020 U.S. Dist. LEXIS 54398, 2020 WL 1498841, at \*4 (E.D. [Ky.] Mar. 30, 2020). “[T]here is simply no failsafe way to prevent any [\*7] 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 U.S. Dist. LEXIS 98602, 2019 WL 2453655, at \*4 (E.D. Ky. June 12, 2019); *see United States v. Cornish*, No. 3:20-CR-00003, 2020 U.S. Dist. LEXIS 54398, 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, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (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 [\*8] or protect the public. *See United States v. Petters*, No. 08-364, 2009 U.S. Dist. LEXIS 6489, 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 U.S. Dist. LEXIS 27586, 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 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

/s Deborah S. Hunt

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
GREENEVILLE DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

v. No. 2:19-CR-00193-DCLC

MICHAEL LEE FOSTER,  
Defendant.

**ORDER**

Defendant has filed a Motion for Revocation of Detention Order [Doc. 29]. Defendant, through counsel, seeks a reversal of Magistrate Judge Cynthia Richardson Wyrick's decision to detain him pending trial [Doc. 27]. The United States has filed a response in opposition [Doc. 30].

**I. Factual and Procedural Background**

On November 5, 2019, the United States brought a Criminal Complaint against Defendant [Doc. 1]. As detailed in the Criminal Complaint, Defendant is accused of blackmailing and manipulating young girls into sending him sexually explicit photographs and videos through Snapchat. Specifically, Defendant is alleged to have obtained nude photographs of a

fourteen-year old girl and subsequently using those photos to blackmail her into getting one of her friends (“Victim”) to also send Defendant other nude photographs through Snapchat [Doc. 1, ¶ 14]. Using multiple Snapchat accounts, Defendant in turn blackmailed Victim into sending additional nude photos by threatening to send the nude photos she had sent of herself to her friends and family if she did not comply [Doc. 1, ¶ 15-16]. After Victim refused, Defendant allegedly sent Victim’s nude photos to one of her male friends [Doc. 1, ¶ 16].

**[\*2]** Victim and her parents reported this conduct to local authorities, who requested assistance from the FBI [Doc. 1, ¶ 14]. After obtaining search warrants for the various Snapchat accounts used to contact Victim, investigators found that these accounts had been used in soliciting and receiving sexually explicit photographs and videos from at least six other victims [Doc. 1, ¶ 20- 21]. The investigation led authorities to believe that one individual controlled these accounts and that many of the Snapchat accounts had used the same IP address to access the accounts [Doc. 1, ¶ 30, 37]. When investigators traced the IP address, they found it registered to Defendant, Michael Foster, identifying his home address and phone number [Doc. 1, ¶ 32-36]. In further corroboration, investigators matched a photo the victim had received from this individual to Defendant’s driver’s license [Doc. 1, ¶ 38]. Law enforcement obtained a search warrant for Defendant’s residence and during its execution, Defendant’s his wife confirmed Defendant’s cell phone

number, which was also associated with the IP address [Doc. 1, ¶ 40].

A grand jury returned a four-count Indictment, charging Defendant with knowingly enticing a minor to engage in sexually explicit conduct for the purpose of producing child pornography in violation of 18 U.S.C. § 2251(a); possessing child pornography in violation of 18 U.S. § 2252A(a)(5)(B) and (b)(2); knowingly using or attempting to use a means of interstate commerce to entice a minor to engage in any sexual activity in violation of 18 U.S.C. § 2422(b); and receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). A conviction for the Section 2251(a) offense carries a minimum mandatory sentence of fifteen years.

On March 17, 2020, Defendant filed a Motion for Release from Custody [Doc. 19] and supporting memorandum [Doc. 20]. The United States responded in opposition [Doc. 22]. Magistrate Judge Wyrick held a detention hearing on March 30, 2020 and entered an order detaining Defendant [Doc. 27]. This appeal followed.

### **[\*3] II. Standard of Review**

Review of a detention order is governed by 18 U.S.C § 3145(b), which states:

If a person is ordered detained by a magistrate judge ..., the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

This Court shall then conduct a de novo review of the Magistrate Judge's detention order. *See United States v. Romans*, No. 00–5456, 2000 WL 658042, at \*1 (6th Cir. May 9, 2000).

### III. Analysis

A defendant should be detained without bond pending trial if, after a hearing, a “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.” 18 U.S.C. § 3142(e)(1). “The default position of the law is that...a defendant should be released pending trial.” *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010). In making detention decisions, the Court considers the factors enumerated in 18 U.S.C. § 3142(g), such as the nature and circumstances of the offense, including whether the offense involves a minor victim, the weight of the evidence against the person, the defendant's person history and characteristics, and the nature and seriousness of the danger to the community the defendant's release would pose.

While the default position is for release, that changes depending on the crime charged. Crimes against minors is one of those categories where a defendant does not start with the default position. For those crimes, Congress established a rebuttable presumption “that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the

community....” 18 U.S.C. § 3142(e)(3). In this case, defendant does not dispute the applicability of the presumption to his case. *See* [Doc. 28, Transcript of Detention Hearing, 5:12- 13].

**[\*4]** The effect of the presumption is to shift the burden to the defendant to produce some evidence to show there is, in fact, a condition or combination of conditions that will reasonably assure his appearance and the safety of the community. He can meet that burden “when he comes forward with evidence that he does not pose a danger to the community or a risk of flight.” *Stone*, 608 F.3d at 945 (quoting *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001)) (internal quotation marks omitted). The presumption does not change the ultimate burden the government carries to persuade the Court that no conditions of release can assure that the defendant will appear and to assure the safety of the community.

The Magistrate Judge found that Defendant rebutted the presumption that he was a flight risk but found he had failed to rebut the presumption concerning the dangerousness he posed to the community [Doc. 27, pg. 2]. Defendant attempted to rebut the presumption of dangerousness by offering Defendant’s wife and daughter as third-party custodians, who testified they would report to probation and the Court if Defendant violated any of his conditions of release. On this issue, the Magistrate Judge found them incredible and “unlikely to report Defendant if he violated conditions of release.” [Doc. 27, pg. 3]. Magistrate Judge Wyrick found that “[n]either witness seemed willing to acknowledge the

possibility that Defendant was guilty of the crimes with which he has been charged. While that is an understandable position, it does not give the Court a level of comfort that they would actually be diligent in ensuring that Defendant followed conditions of release.” [Doc. 27, pg. 3]. The Magistrate Judge found no appropriate third-party custodian available. She then found that the nature and circumstances of the charges and weight of evidence factored against Defendant when considering the safety of the community. She ordered him detained.

**[\*5]** In his Motion for Revocation of Detention Order, Defendant argues that he satisfied his burden of production through witness testimony, sworn declarations, and proffer [Doc. 29, pg. 2]. He states that while the Magistrate Judge found that he “has not introduced sufficient evidence to rebut the presumption,” his production of some evidence is enough to meet his burden [Doc. 27, pg. 2; Doc. 29, pg. 1].

Defendant argues he successfully rebutted the presumption concerning both risk of flight and dangerousness. Whether Defendant is a flight risk is not at issue. Defendant successfully rebutted the presumption in that regard. The issue is the danger his release poses to the community and whether that danger can be addressed through the imposition of conditions. The Magistrate Judge found that danger could not be mitigated through conditions and detained him. Defendant argues this finding was in error because he proposed conditions that would address the danger Defendant posed. For example, he



argues he offered to remove internet from the home, including his wife's and daughter's smartphones [Doc. 28, 8:11-14]. Defendant presented the testimony of his wife and daughter who both testified they would ensure that Defendant complied with any conditions of release and would report him to probation and the Court if he did not [Doc. 28, 37:7-12, 43:13-22]. Defendant also submitted various declarations of those who know Defendant attesting to his character. See generally [Docs. 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-12, 20-13, 20-14].

To be sure, the Sixth Circuit has held that a defendant's burden of production is not heavy to rebut the statutory presumption. *See Stone*, 608 F.3d at 945 (noting duty to "introduce at least some evidence"). But this presumption is not overcome by any presenting any evidence. If that were the case, the burden would be meaningless. A defendant cannot overcome the presumption by proposing a third-party custodian who the Court finds utterly incredible. *See United States v. [\*6] Hernandez*, No. 1:02-CR-006, 2002 WL 1377911, at \*2 (E.D. Tenn. Feb. 27, 2002) (crafting production burden as "the burden of producing probative, credible evidence to rebut the presumption and support his [defendant's] contention that he will appear ... and he does not pose a danger"). While the burden is not great, the Court has to at least be minimally comfortable with their willingness to actually serve as third-party custodians. That is a credibility judgment incumbent on the Court to make. While Defendant called witnesses to overcome the presumption, the Magistrate Judge found these

individuals would not report any violations committed by Defendant. In other words, the Court found that if Defendant exploited other minors as he is accused of doing here then these proposed third-party custodians would not report those violations. Does presenting incredible testimony from individuals whom the Court finds not suitable third-party custodians rebut the presumption? The answer is obviously no.

While the Court need not address the statutory factors because Defendant has not overcome the presumption of detention, out of an abundance of caution and in the interest of thoroughness, however, the Court will analyze each 3142(g) factor briefly below.

The first factor to consider is the “nature and circumstances of the offense charged, including whether the offense [...] involves a [...] a minor [.]” 18 U.S.C. § 3142(g)(1). Defendant is alleged to have enticed minors into creating child pornography, blackmailed them and threatened them. The Court has already summarized the extent of the evidence against him and finds no need to repeat it. This factor favors detention.

The second factor concerns the “weight of the evidence against the person.” 18 U.S.C. § 3142(g)(2). This “factor goes to the weight of the evidence of dangerousness, not the weight of the evidence of the defendant’s guilt.” *Stone*, 608 F.3d at 948. “The § 3142(g) analysis is concerned with a practical [\*7] adjudication of guilt for a particular offense.” *United*

*States v. Tolbert*, 2017 WL 6003075, at \*5 (E.D. Tenn. Dec. 4, 2017) (citing *Stone*, 608 F.3d at 948).

In addition to the dangerous nature of the current charge, Defendant also engaged in a pattern of conduct that clearly suggests he poses a danger to the community. The United States made an offer of proof that Defendant contacted, enticed, exploited, and threatened multiple girls under the age of 16 into sending him nude photos and videos of themselves. He is alleged to have done so by utilizing multiple Snapchat accounts, in some cases posing as victims to coerce other young girls into participating in his scheme. Defendant initially admitted ownership of these Snapchat accounts to the investigating agents. Not only is Defendant alleged to have tricked young girls, he is accused of openly manipulating, blackmailing and threatening them to continue to send him photos. In at least one case, Defendant turned his threat to reality. When the victim did not comply with his demands, he allegedly sent her photos to her friend and possibly her father. His conduct establishes that the weight of the evidence of his dangerousness is heavy and strongly favors detention.

The third factor, the “history and characteristics of the person,” considers a host of issues. 18 U.S.C. § 3142(g)(3). Defendant argues his personal history and characteristics favor release. He has no criminal record. He has lived in the same community for almost 20 years. He has a family: a wife and daughter, with whom he could live, and a son, who lives in Arizona. Prior to his arrest, Defendant had steady

employment at Petoskey Plastics, Inc. since 2000. His boss states that he would try to employ Defendant if he were released pretrial. Defendant also has several health conditions, including testing positive for precancerous colon polyps, Meniere's disease, which causes episodic dizziness, and Gastroesophageal Reflux Disease (GERD). These diagnoses, Defendant argues, requires ongoing medical care and testing and puts him at higher risk of assessment of the defendant's dangerousness, rather than an [\*8] contracting COVID-19. Defendant's primary care physician, Dr. Mathew Kraus, and Defendant's gastroenterologist, Dr. John Haydek, recommended that Defendant have a follow-up colonoscopy to evaluate for any recurrent issues. Defendant argues he is not receiving the medical care he needs at the detention facility.

Defendant argues his detention would jeopardize his health because of this pandemic. First and foremost, Section 3142(g)(4) focuses on "the nature and seriousness of the danger to any person or the community that would be posed by the person's release," not the danger to the defendant upon his detention. The factor set forth in 3142(g)(3(A) focuses on a defendant's personal characteristics, including his health, but Magistrate Judge Wyrick considered these personal characteristics in balancing the statutory factors. She noted that while Defendant did have precancerous polyps successfully removed, he has never been diagnosed with cancer. She also found that no evidence that healthcare professionals at the jail are simply ignoring Defendant's symptoms and

diagnoses. Instead, she noted that the medical staff ordered testing, just not the testing that Defendant would have preferred. Concerning the risk for developing COVID-19, at the time of filing, Southwest Virginia Regional Jail at Abington does not have any active COVID19 cases among inmates or staff. Defendant does not assert that he is immunocompromised, only that because of his diagnoses, he could be.

Courts are routinely rejecting the possibility of contracting COVID-19 as justification for release. “[T]he Court cannot accept [the] argument that any risk of contracting the coronavirus while incarcerated warrants temporary release.” *United States v. Wilburn*, No. 1:18-cr-115, 2020 WL 1899146, at \*6 (W.D. Penn. Apr. 17, 2020) (emphasis in original). The Court rejects Defendant’s speculative argument that the dangerous nature of the COVID-19 pandemic places him in a unique category.

**[\*9]** Defendant also submitted multiple declarations on his behalf, all stating that he is a good man who is not a danger to the community. These are of limited value. Seldom does a defendant broadcast to the family and friends his intentions to entice or exploit minor children. It is not surprising that both his wife and daughter testified that they simply do not believe Defendant could have done these acts. During an initial interview with investigators, Defendant’s daughter, Ashley Foster, indicated her father was very secretive about his phone [Doc. 28, 45:5-10]. She also stated that her fiancé had previously expressed concerns about Defendant “hiding things.” [Doc. 28,

46:7- 9, 48:1-5]. The United States argued that Defendant's ability to deceive is what makes him so dangerous. In fact, apparently when confronted by a victim's mother, Defendant allegedly claimed to be unafraid of her because his contact was encrypted and he could not be caught [Doc. 28, 60:2- 5]. Some of his personal history favors release and some do not.

The final factor to consider is "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g)(4). In this case, law enforcement discovered that Defendant utilized his phone to contact potentially six other victims. He expressed no fear of being caught to the victim's mother. He allegedly carried through on his threat to humiliate a minor by sending photos of her to her friends when she declined to send any more.

Defendant argues that he is presumed innocent and he can address the purported danger by removing all internet access in the home [Doc. 29, pg. 3]. First, when considering pretrial release, the Bail Reform Act makes clear that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j). In other words, he is presumed innocent from start to finish. But that presumption is not dispositive. In fact, Magistrate Judge Wyrick found that "[w]hile Defendant is certainly entitled to the presumption that he is innocent, [\*10] when considering pre-trial detention, the Court is charged with considering the weight of the evidence." [Doc. 27, pg. 3].

Second, simply removing internet access from the home does not adequately address the danger Defendant poses to the community. The Magistrate Judge was not convinced that this condition could even be achieved with the proposed third-party custodians who were unlikely to report any violations of the court-imposed conditions of release. After a review of the record, the Court comes to the same conclusion. His conduct suggests he poses a serious danger to minor children and this factor favors detention.

Upon de novo review of the transcript, and after weighing all the evidence and reviewing the entire record, this Court finds under the totality of the circumstances that clear and convincing evidence supports the finding that Defendant poses a danger to the safety of the community and that no condition or conditions of release would reasonably assure the safety of the community. This Court agrees with the Magistrate Judge's assessment of Defendant's proposed third-party custodians. They simply appreciate neither the seriousness of these accusations nor the weight of the evidence that suggests Defendant poses a serious danger to the community.

#### **IV. Conclusion**

For the reasons discussed above, the Court **DENIES** Defendant's Motion to Revoke Magistrate Judge's Detention Order [Doc. 29]. Defendant shall

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remain **DETAINED** in the custody of the United States Marshals pending trial.

SO ORDERED:

s/ Clifton L. Corker

United States District Judge

Filed 05/22/20



UNITED STATES DISTRICT COURT  
for the  
Eastern District of Tennessee

United States of America

v.

MICHAEL LEE FOSTER

*Defendant.*

Case No. 2:19-CR-193

**ORDER OF DETENTION PENDING TRIAL**  
**Part I – Eligibility for Detention**

Upon the

- ☒ Motion of the Government attorney pursuant to 18 U.S.C. § 3142(f)(1), or
- ☐ Motion of the Government or Court's own motion pursuant to 18 U.S.C. § 3142(f)(2),

the Court held a hearing and found that detention is warranted. This order sets forth the Court's findings of fact and conclusions of law, as required by 18 U.S.C. § 3142(i), in addition to any other findings made at the hearing.

**Part II – Findings of Face and Law as to  
Presumptions under § 3142(e)**

**□ A. Rebuttable Presumption Arises Under 18 U.S.C. § 3142(e)(2) (*previous violator*):** There is a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community because the following conditions have been met:

**□ (1)** the defendant is charged with one of the following crimes described in 18 U.S.C. § 3142(f)(1):

**□ (a)** a crime of violence, a violation of 18 U.S.C. 1591, or an offense listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;  
**or**

**□ (b)** an offense for which the maximum sentence is life imprisonment or death; **or**

**□ (c)** an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. §§ 801-904), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951-971), or Chapter 705 of Title 46, U.S.C. (46 U.S.C. §§ 70501-70508); **or**

**□ (d)** any felony if such person has been convicted of two or more offenses described in subparagraphs (a) through (c) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (a) through (c) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; **or**

☐ **(e)** any felony that is not otherwise a crime but involves: **(i)** a minor victim; **(ii)** the possession of a firearm or destructive device (as defined in 18 U.S.C. § 921); **(iii)** any other dangerous weapon; or **(iv)** a failure to register under 18 U.S.C. § 2250; **and**

☐ **(2)** the defendant has previously been convicted of a Federal offense that is described in 18 U.S.C. § 3142(f)(1), or of a State or local offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed; **and**

☐ **(3)** the offense described in paragraph (2) above for which the defendant has been convicted was committed while the defendant was on release pending trial for a Federal, State, or local offense; **and**

☐ **(4)** a period of not more than five years has elapsed since the date of conviction, or the release of the defendant from imprisonment, for the offense described in paragraph (2) above, whichever is later.

**[\*2]**

✓ **B. Rebuttable Presumption Arises Under 18 U.S.C. § 3142(e)(3)** (*narcotics, firearm, other offenses*): There is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community because there is probable cause to believe that the defendant committed one or more of the following offenses:

☐ **(1)** an offense for which a maximum term of imprisonment of 10 years or more is prescribed in

the Controlled Substances Act (21 U.S.C. §§ 801-904), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951-971), or Chapter 705 of Title 46, U.S.C. (46 U.S.C. §§ 70501-70508);

☐ **(2)** an offense under 18 U.S.C. §§ 924(c), 956(a), or 2332b;

☐ **(3)** an offense listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

☐ **(4)** an offense under Chapter 77 of Title 18, U.S.C. (18 U.S.C. §§ 1581-1597) for which a maximum term of imprisonment of 20 years or more is prescribed; **or**

✓ **(5)** an offense involving a minor victim under 18 U.S.C. §§ 1201, 1591, 2241, 2242, 2242(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425.

**✓ C. Conclusions Regarding Applicability of Any Presumption Established Above**

✓ The defendant has not introduced sufficient evidence to rebut the presumption above.

**OR**

☐ The defendant has presented evidence sufficient to rebut the presumption, but after considering the

presumption and the other factors discussed below, detention is warranted.

### **Part III – Analysis and Statement of the Reasons for Detention**

After considering the factors set forth in 18 U.S.C. § 3142(g) and the information presented at the detention hearing, the Court concludes that the defendant must be detained pending trial because the government has proven:

- ✓ By clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community.
- ☐ By a preponderance of evidence that no condition or combination of conditions of release will reasonably assure the defendant's appearance as required.

In addition to any findings made on the record at the hearing, the reasons for detention include the following:

- ✓ Weight of evidence against the defendant is strong
- ✓ Subject to lengthy period of incarceration if convicted
- ☐ Prior criminal history

- ☐ Participation in criminal activity while on probation, parole, or supervision
- ☐ History of violence or use of weapons
- ☐ History of alcohol or substance abuse
- ☐ Lack of stable employment
- ☐ Lack of stable residence
- ☐ Lack of financially responsible sureties
- ☐ Lack of significant community or family ties to this district
- ☐ Significant family or other ties outside the United States [\*3]
- ☐ Lack of legal status in the United States
- ☐ Subject to removal or deportation after serving any period of incarceration
- ☐ Prior failure to appear in court as ordered
- ☐ Prior attempt(s) to evade law enforcement
- ☐ Use of alias(es) or false documents
- ☐ Background information unknown or unverified
- ☐ Prior violations of probation, parole, or supervised release

OTHER REASONS OR FURTHER EXPLANATION:

Defendant's case is a particularly challenging one regarding the issue of pre-trial detention. On the one hand, Defendant's counsel has done an excellent job of presenting the side that most of the world knew with regard to Defendant: husband of many years; loving father; coach; well-respected member of his community; and very talented and loyal employee.

Defendant also has no criminal record. Additionally, Defendant had a health scare with precancerous polyps in his colon, and also has GERD and Meniere's disease, with the Meniere's disease causing him extreme dizziness at times. Defendant's counsel also presented statements from a number of people attesting to Defendant's good character and to the fact that they do not believe he would present a danger to the community.

Defendant also called his wife and daughter to testify and offered them as his third-party custodians. They both testified that Defendant was a good husband and father and that he would in no way be a danger to the community. They cited a number of examples of positive and commendable behavior by Defendant through the years. Both also stated that they would be willing to let Probation know if Defendant failed to follow his conditions of release if he was released into their third-party custody. While the Court understands that neither witness had testified before and further acknowledges that Defendant's arrest must have been devastating for both, the Court also did not find either witness to be fully candid in her testimony. Defendant's wife is clearly concerned about how to make ends meet and his daughter seemed intent on testifying in a way that protected her father. Neither witness seemed willing to acknowledge the possibility that Defendant was guilty of the crimes with which he has been charged. While that is an understandable position, it does not give the Court a level of comfort that they would

actually be diligent in ensuring that Defendant followed conditions of release. The totality of their testimony also indicates to the Court that they would be unlikely to report Defendant if he violated his conditions of release.

The Court will first briefly address Defendant's contention that his health conditions particularly compel his release as a result of the COVID-19 epidemic. While Defendant has had a precancerous polyp removed successfully, he has never been diagnosed with cancer. Nothing in the medical documentation he has provided suggests that his immune system is compromised. Defendant's counsel can work with the Marshal's service to have Defendant's request for a colonoscopy reconsidered, but he is being provided with a form of testing to evaluate the issue, such that his health issues have not been ignored. The Court does not find that Defendant has demonstrated himself to be in the population particularly vulnerable to Coronavirus.

The Court now turns its attention to the issues of whether Defendant is a flight risk or unreasonably dangerous to the community if released, and if so, whether any combination of conditions can be imposed to address those risks.

While Defendant does face a lengthy period of incarceration that would present the possibility of him being a flight risk, he has strong ties to the community. He has been married for an extended



period of time to the mother of his children and while testimony is conflicting as to the closeness of their relationship, there is no doubt that Defendant has a very close relationship with his children.

The Court finds that risk of flight is not a compelling reason to detain Defendant.

The Court now turns its attention to whether Defendant is a danger to the community and if so, whether any combination of conditions can be placed upon Defendant to reasonably assure the safety of the community if Defendant is released. While Defendant is certainly entitled to the presumption that he is innocent, when considering pre-trial detention, the Court is charged with considering the weight of the evidence. Here the government notes that Defendant has confessed to being the owner of a number of online accounts which were used to terrorize and victimize young girls. (While Defendant's counsel takes issue with the manner in which the confession was obtained, that is an issue for another day and the Court cannot ignore the confession at this juncture.) This is not a case where Defendant is accused of solely [\*4] possessing pornographic images but also of directly soliciting such images from individuals he knew to be children. The government also alleges that when the children no longer wanted to send him pornographic images, he blackmailed them into sending more and for those that refused, he sent the pornographic images he had already received to their parents, teachers and friends. Because Defendant

had parented a daughter through the same years of age as his alleged victims and had also coached children of the alleged victims' ages, he of all people knew how particularly vulnerable those victims would be. Defendant even is alleged to have posed as a victim himself to obtain pornographic images. If Defendant is guilty of the crimes charged, he has shown himself to be a very dangerous master of deception.

If Defendant did commit the crimes of which he is accused, he used the internet as the mechanism for committing these crimes. He is alleged to have bragged that authorities would be unable to catch him because he encrypted the messages he sent. It is clear that Defendant's wife and daughter never suspected any inappropriate computer activity, whether on a computer, smart phone or otherwise, although apparently his daughter did indicate to the FBI that her fiancé, who is a police officer, had told her that the way Defendant handled his phone was suspicious.

The Internet is an essential part of how almost every aspect of the world operates today. While Defendant's wife understandably wants Defendant home and contributing to the family finances, it is difficult to imagine any job Defendant could perform where there would not be Internet access available on the premises, even if his job didn't require direct Internet access. Because Defendant's alleged conduct involved significant direct and ongoing victimization of young children, even if Defendant was released to home

confinement, the Court would have to be convinced that Defendant would not have access to the Internet in the third-party custody of his wife and daughter in order to reasonably assure the safety of the public. As referenced above, the testimony of Defendant's wife and daughter simply did not provide that assurance. While the Court believes that they would sincerely attempt to prevent Defendant from accessing the Internet, given the widespread availability of the Internet, his purported sophistication in using it, his alleged skill at deception and the Court's lack of faith in the willingness of Defendant's family to report violations to probation, the Court simply cannot find that any combinations of conditions exist which can reasonably ensure that the public will be safe if Defendant is released.

#### Part IV – Directions Regarding Detention

The defendant is remanded to the custody of the Attorney General or to the Attorney General's designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant must be afforded a reasonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility must deliver the defendant to a United States Marshal for the purpose of an appearance in connection with a court proceeding.

34a

Date:

03/30/2020

/s Cynthia Richardson Wyrick  
United States Magistrate Judge

Filed 04/02/20

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
GREENEVILLE DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

v. 2:19-CR-193

MICHAEL LEE FOSTER,  
Defendant.

**ORDER**

At Defendant's initial appearance on **January 3, 2020**, Defendant and counsel conferred, after which Defendant's counsel announced that Defendant wished to waive a detention hearing without prejudice to requesting one subsequently.

If Defendant later files a motion requesting a detention hearing, such a hearing will be scheduled promptly.

SO ORDERED:

/s Cynthia Richardson Wyrick  
United States Magistrate Judge

Filed 01/03/20

36a

No. 20-5548

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES OF  
AMERICA,  
Plaintiff-Appellee,

<p><b>FILED</b> Aug 24, 2020 DEBORAH S. HUNT, Clerk</p>
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v.

MICHAEL LEE FOSTER,  
Defendant-Appellant.

ORDER

**BEFORE:** CLAY, ROGERS, and MURPHY, Circuit  
Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s Deborah S. Hunt

Deborah S. Hunt, Clerk

§ 3142. Release or detention of a defendant pending trial

**(a) In general.** Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

- (1)** Released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
- (2)** released on a condition or combination of conditions under subsection (c) of this section;
- (3)** temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
- (4)** detained under subsection (e) of this section.

**(b) Release on personal recognizance or unsecured appearance bond.** The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of

the person as required or will endanger the safety of any other person or the community.

**(c) Release on conditions.**

**(1)** If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

**(A)** subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

**(B)** subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

**(i)** remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

**(ii)** maintain employment, or, if unemployed, actively seek employment;



- (iii)** maintain or commence an educational program;
- (iv)** abide by specified restrictions on personal associations, place of abode, or travel;
- (v)** avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
- (vi)** report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- (vii)** comply with a specified curfew;
- (viii)** refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (ix)** refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;
- (x)** undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- (xi)** execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;
- (xii)** execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount

as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

**(xiii)** return to custody for specified hours following release for employment, schooling, or other limited purposes; and

**(xiv)** satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USCS § 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251 A, 2252(a)(1), (2), (3), 2252A(a)(1), (2), (3), (4), 2260, 2421, 2422, 2423, or 2425], or a failure to register offense under section 2250 of this title [18 USCS § 2250], any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

**(2)** The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

**(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.** If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines

to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

**(e) Detention.**

**(1)** If, after a hearing pursuant to the provisions of subsection (f) of this section, 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, such judicial officer shall order the detention of the person before trial.

**(2)** In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

**(A)** the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

**(B)** the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

**(C)** a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

**(3)** Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

**(A)** an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS § 70501 et seq.];

**(B)** an offense under section 924(c), 956(a), or 2332b of this title [18 USCS § 924(c), 956(a), or 2332b];

**(C)** an offense listed in section 2332b(g)(5)(B) of title 18, United States Code [18 USCS § 2332b(g)(5)(B)], for which a maximum term of imprisonment of 10 years or more is prescribed;

**(D)** an offense under chapter 77 of this title [18 USCS §§ 1581 et seq.] for which a maximum term of imprisonment of 20 years or more is prescribed; or

**(E)** an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USCS § 1201, 1591, 2241, 2242, 2244, (a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1),

2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425].

**(f) Detention hearing.** The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community—

**(1)** upon motion of the attorney for the Government, in a case that involves—

**(A)** a crime of violence, a violation of section 1591 [18 USCS § 1591], or an offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] for which a maximum term of imprisonment of 10 years or more is prescribed;

**(B)** an offense for which the maximum sentence is life imprisonment or death;

**(C)** an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.];

**(D)** any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

**(E)** any felony that is not otherwise a crime of violence that involves a minor victim or that involves

the possession or use of a firearm or destructive device (as those terms are defined in section 921 [18 USCS § 921]), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code [18 USCS § 2250]; or

**(2)** upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves—

**(A)** a serious risk that such person will flee; or

**(B)** a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, the person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The

person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

**(g) Factors to be considered.** The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

**(1)** the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591 [18 USCS § 1591], a Federal crime of terrorism, or involves a minor



victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) 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; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

**(h) Contents of release order.** In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title [18 USCS § 1503] (relating to intimidation of witnesses, jurors, and officers of the court), 1510 [18 USCS § 1510] (relating to obstruction of criminal investigations), 1512 [18 USCS § 1512] (tampering with a witness, victim, or an informant), and 1513 [18 USCS § 1513] (retaliating against a witness, victim, or an informant).

**(i) Contents of detention order.** In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

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.

**(j) Presumption of innocence.** Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

18 U.S.C. § 3142.