

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|----------------------------------|---|------------------------|
| UNITED STATES OF AMERICA, | : | |
| | : | CRIMINAL ACTION |
| v. | : | No. 19-371 |
| | : | |
| DAWUD ROBINSON, et al. | : | |

McHUGH, J.

APRIL 21, 2020

MEMORANDUM

Presently before the Court is a Motion by Dawud Robinson seeking temporary pretrial release from the Federal Detention Center (FDC) in Philadelphia pursuant to 18 U.S.C. § 3142(i), which provides that, where a detention order has been issued, “a judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.”

Mr. Robinson urges that he “is at particularly high risk of severe illness or death should he become infected [with the COVID-19 virus],” and argues that such risk is a sufficient “compelling reason” to justify his temporary release pretrial. ECF 45, at 1. Robinson further suggests that the safety protocols meant to prevent the spread of the virus have significantly limited his ability to confer with counsel. For the reasons that follow, I will deny Robinson’s motion.

I. Background

A. Robinson’s indictments

The Government alleges that Robinson sold substantial quantities of methamphetamine to an undercover ATF special agent and a cooperating informant over the course of seven

transactions, each of which was monitored and recorded by the authorities. ECF 46, at 1-2; *see also* Government Motion for Pretrial Detention, ECF 5, at 1-2; Criminal Complaint, ECF 1, ¶¶ 6-14. The total amount of drugs sold in these transactions was approximately one kilogram. ECF 46, at 1. The Government further represents that Robinson sold two handguns to the same undercover agent during other transactions, which also were recorded. *Id.* at 1-2. As a result, Robinson stands indicted for possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and (b)(1)(B), and as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). ECF 8.

B. Robinson’s charges create a rebuttable presumption that he be detained pretrial

Persons charged with federal offenses should be released on bail unless it is determined 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.” 18 U.S.C. § 3142(b). However, if the person committed “an offense for which a maximum term of imprisonment of ten years or more is prescribed,” then the judge must presume 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)(A).

That presumption is rebuttable. *Id.* § 3142(e). To determine whether the defendant has rebutted presumptive pretrial detention and shown that “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,” the judge looks to various factors outlined in Section 3142(g). The judge may consider the nature and circumstances of the offense charged, the weight of the evidence against the person, the history and characteristics of the person, and the nature and seriousness of the danger to any person or the community that would be posed by the person’s release. *Id.* § 3142(g); *see also United States v. Carbone*, 793 F.2d 559, 560 (3d Cir. 1986) (noting that a

defendant subject to presumptive pretrial detention may rebut that presumption by “produc[ing] some credible evidence forming a basis that he will appear and will not pose a threat to the community”). The statute offers additional detail on each factor.

Here, Robinson’s drug trafficking indictments carry with them a maximum possible penalty in excess of ten years in prison. Thus, Robinson was subject to presumptive pretrial detention. *Id.* § 3142(e)(3)(A). On June 14, 2019, after an evidentiary hearing, Magistrate Judge Lloret found that the Government had proved by clear and convincing evidence that no condition or combination of conditions would reasonably assure the safety of other persons and the community and ordered Robinson to be detained prior to his trial. ECF 7.

C. Robinson seeks temporary pretrial release

Robinson now requests a “temporary release” pursuant to 18 U.S.C. § 3142(i), arguing that the changed circumstances brought on by COVID-19 pose a particular threat to him given his unique risk factors, and that the virus has limited his ability to confer with counsel.

The text of Section 3142(i) provides that the Court may temporarily release a detained defendant to the custody of an “appropriate person” where a “compelling reason” necessitates such release. Compelling reasons may exist where release is necessary for the preparation of the defendant’s defense, *see* 18 U.S.C. § 3142(i), or where the defendant’s serious medical conditions warrant release, *see, e.g., United States v. Rebollo-Andino*, 312 F. App’x 346, 348 (1st Cir. 2009) (non-precedential) (explaining that defendants denied bail who develop medical conditions “retain[] the ability to request[,] . . . in extraordinary circumstances, . . . temporary release under § 3142(i)”); *see also United States v. Stephens*, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020). A defendant bears the burden to show that temporary release is necessary under Section 3142(i). *Stephens*, 2020 WL 1295155, at *2.

Since Robinson's June 2019 detention hearing, the dangers of the COVID-19 pandemic have become apparent. Although the FDC has not yet suffered a known outbreak among its prison population, inmates understandably may be at a heightened risk of contracting the virus should an outbreak develop. *See, e.g.,* Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007) (noting "[t]he probability of transmission of potentially pathogenic organisms [in prisons] is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise"); *see also Stephens*, 2020 WL 1295155, at *2 (citing same).

As of April 1, 2020, the Bureau of Prisons (BOP) has implemented virus transmission mitigation measures, including quarantine procedures and strict social distancing policies. *See* Federal Bureau of Prisons, Federal Bureau of Prisons COVID-19 Action Plan (accessed online).

II. Discussion

A fundamental underlying issue presented by this Motion is the interplay between Section 3142(i), which appears to grant district courts a fair degree of discretion in determining what constitutes a "compelling" reason for relief, and Section 3142(e)(3)(A), which strongly favors detention. Petitioner focuses principally on the former, and the Government the latter. I follow the lead of those district judges that have held that the court "must balance the reasons advanced for such release against the risks that were previously identified and resulted in an order of detention." *United States v. Gumora*, 2020 WL 1862361, at *5 (S.D.N.Y. Apr. 14, 2020) (citing cases). I begin with an independent analysis of the factors that Robinson advances under subsection (i), and then further consider his Motion under the standards established by subsection (e).

A. Robinson offers reasonable but not dispositive grounds for granting him temporary release

Robinson contends that he “is at particularly high risk of severe illness or death should he become infected [with COVID-19],” and argues that such risk is a sufficient “compelling reason” to justify his temporary release pretrial.¹ ECF 45, at 1. I have no doubt that the risks suggested by Robinson are significant. Nevertheless, a thorough and proper analysis of Robinson’s request to be released prior to his trial requires me to examine whether the reasons offered by Robinson are compelling enough to offset Congress’s determination that the crimes with which he has been charged make him a presumptive danger to the community. I conclude that Mr. Robinson’s stated reasons for seeking relief—inaccessibility to counsel and vulnerability to COVID 19—though substantial, are not enough under the controlling legal principles.

¹ Robinson also contends that restrictions imposed at the FDC due to COVID-19 have made it difficult for him to prepare for trial. ECF 45, at 1. He argues that those difficulties provide a separate ground for temporary pretrial release under 18 U.S.C. § 3142(i), which permits a court to order the temporary release of a detainee when “necessary for preparation of the person’s defense.” At least as of this juncture, I disagree. Beginning on March 13, 2020, the FDC was closed to all social and legal visits excepting lawyers with active cases in certain circumstances. However, it seems that “[n]o lawyers are permitted inside the building without prior approval and without a showing of an imminent court date that necessitates an in-person interview.” ECF 45, at 10. Robinson’s counsel does not include much detail about their ongoing communication with him. But, if Robinson’s situation matches those of other inmates in BOP custody, Robinson’s counsel likely has been unable to communicate with Robinson in person or by video conference, and any phone conversations have been limited in time and not private. In part for these reasons, on April 1, 2020, this Court continued Robinson’s trial indefinitely. ECF 42. The rights of presumptively innocent criminal defendants subject to the weight of federal power are a special concern of the judiciary. Indeed, “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). One such exception, it seems, is Congress’s conclusion that individuals charged with certain crimes be detained prior to their trial. *See* 18 U.S.C. § 3142(e)(3)(A). The continuance of Robinson’s trial should, hopefully, mitigate some difficulty counsel has had in preparing his defense. The Court will continue to monitor the ability of counsel to prepare their defense and reserves the ability to release Robinson to prepare his defense if the BOP or FDC are unable to create an environment for Robinson to do so. For now, however, the nature of Robinson’s charged crimes, the presumption detailed by Congress that Robinson be detained prior to trial, and the continuance of his trial outweigh the current difficulty he and his counsel undoubtedly face in preparing his defense.

Defendant—who is very capably represented by the Office of the Federal Defender—has submitted multiple statements from highly qualified physicians in various specialties, including infectious disease, epidemiology, and medical practice in a correctional setting. For the most part, these submissions do not address the particular situation at the FDC in Philadelphia; rather, they address in broad terms the challenge in managing a highly contagious infectious disease in confined settings. I will nevertheless accept as true the proposition advanced by Defendant’s experts—that imprisonment presents unique public health risks and challenges. In a similar vein, although Robinson has not submitted medical reports analyzing his specific condition as it relates to COVID-19, I will assume for purposes of this Motion that by virtue of obesity, asthma that requires the consistent use of an inhaler, and lesions on his liver of unknown origin, he falls within the category of individuals who face enhanced and potentially serious risks if they are infected by the virus.

Nevertheless, even accepting Robinson’s medical assertions as true, I am mindful that in the related context of compassionate release under the First Step Act, the Court of Appeals recently cautioned courts evaluating requests for release:

We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates [with certain preexisting conditions]. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread.”

United States v. Raia, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020).

Accepting that the risks presented by the virus are real, the BOP has taken substantial steps to mitigate them. And this Court, through its Criminal Business Committee, remains in close communication with the FDC, which has assured that it will advise the Court of any

positive case.² As of April 1, 2020, the BOP implemented Phase Five of its pandemic action plan, putting into place quarantine procedures and strict social distancing policies. *See* BOP Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012) (accessed online). The plan introduces a series of measures aimed at preventing an incursion by the virus:

- **Every newly admitted inmate is screened for COVID-19 exposure risk factors and for symptoms.** An inmate who is asymptomatic but has a risk of exposure prior to incarceration is placed in quarantine for a minimum of 14 days or until cleared by medical staff. Inmates who are symptomatic are placed in isolation until they test negative for COVID-19 or are cleared by medical staff, and such clearance requires meeting CDC criteria.
- **In areas where sustained community transmission has been reported, such as Philadelphia, all facility staff are screened for symptoms.** Staff registering a temperature of 100.4°F or higher are barred from the facility on that basis alone. And staff members with a stuffy or runny nose can be placed on leave by a medical officer.
- **All official staff travel has been cancelled, as has most staff training.** In addition, access by contractors is limited to those performing essential services only—for example, medical or mental health care, maintenance, religious, or the like. Contractors who require access will be screened for symptoms and risk factors.
- **Limitation on social and legal visits.** Social and legal visits were stopped as of March 13, and remain suspended, to limit the number of people entering the facility and interacting with detainees.
- **Reduction of inmate population.** The inmate population is being screened for potential release to reduce the population and thus the spread of the infection.

It should be noted that staff at the FDC has their own incentive to minimize infection and spread, as they, too, would be placed at risk by any outbreak. That risk is graphically

² Although I have confidence in the reliability of the FDC's ongoing communications with this Court, I note that they are informal in nature. I have therefore reviewed the sworn declaration submitted by Warden Sean Marler in *Brown v. Marler*, Civil Action 20-1914, ECF 12-5, with accompanying exhibits. That declaration is consistent with the representations made to this Court about the FDC's efforts to protect both inmate population and staff.

demonstrated by data from the New York State Department of Corrections, which show that in state-run institutions there are currently 211 confirmed cases among inmates as compared to 794 among staff.³ The statistics for staff infections undoubtedly reflect a certain number of community-acquired infections. But that, too, underscores the related point—there is a meaningful risk in community settings as well. To date, though no inmate or staff at the FDC has tested positive for COVID-19, several Eastern District of Pennsylvania defendants serving pretrial supervision in the community have.

Although the limitation on social and legal visits is certainly relevant to Robinson's contention that he cannot prepare a defense, I conclude it does not ultimately support a compelling reason for release, at least at this point. As explained previously, Robinson's trial has been continued until such time as the Court is satisfied that conditions at the FDC facilitate his ability to confer with counsel inside the facility or a pressing need for consultation weighs in favor of a temporary release. Even beyond that, the limitation has not persisted long enough to be a controlling factor, and the BOP has taken steps to facilitate outside communication by increasing detainees' telephone allowance to 500 minutes per month.

Taking the record as a whole, the arguments advanced by Robinson are offset by meaningful efforts at protecting the health of detainees,⁴ and the inherent risks of the disease even in a community setting. But even if I found them sufficiently compelling, Robinson's arguments would still need to be evaluated through the prism of Section 3142(e)(3)(A). *See*

³ *See* Daily Update of April 20, 2020, DOCCS COVID-19 Report, Department of Corrections and Community Supervision of New York State, available at <https://doccs.ny.gov/doccs-covid-19-report>.

⁴ I have not convened a hearing in this case, as Mr. Robinson has not alleged any particularized facts about breaches in safety protocol but relies instead on the inherent risks presented by his situation, and I have accepted the propositions he advances as true.

Gumora, 2020 WL 1862361, at *5; *see also United States v. Hernandez*, 2020 WL 1684062, at *2 (S.D.N.Y. Apr. 2, 2020) (assessing risk inherent in granting defendant’s analogous request for compassionate release by looking to enumerated statutory factors for sentencing).

B. Robinson has not offered sufficiently compelling reasons when weighed against all relevant factors

As noted above, the parties have framed the issue differently. Taking the Government’s construct, the relevant question would be whether petitioner can rebut the presumption of detention by “produc[ing] some credible evidence forming a basis for his contention that he will appear and will not pose a threat to the community.” *Carbone*, 793 F.2d at 560. Most of the arguments advanced by Robinson do not directly address the showing typically required to overcome the presumption of pretrial detention. But even if I assume they suffice to shift the burden, the Government can still prevail by establishing he presents a danger by clear and convincing evidence.⁵

In deciding presumption cases, the Court of Appeals has counseled district courts to use the factors set forth in Section 3142(g).

1. The nature and circumstances of the offense charged. The charges against Robinson are unquestionably serious. He was indicted for possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and (b)(1)(B). The quantity of methamphetamine totaled approximately one kilogram, and Robinson sold that amount to an undercover ATF special agent and a cooperating informant in seven different transactions. He

⁵ In the final analysis, the Government retains the burden of persuasion, and must establish Robinson’s dangerousness by clear and convincing evidence. *United States v. Perry*, 788 F.2d 100, 114-15 (3d Cir. 1986).

was also indicted as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) after also selling two firearms to the undercover agents.

2. *The weight of the evidence against the person.* The evidence against Robinson is strong in that, according to the Government, all of the transactions were recorded, and it has significant physical evidence regarding each transaction. Robinson has not, in his current Motion, disputed these assertions.

3. *The history and characteristics of the person.* Robinson has significant criminal history. The Government represents that Robinson has one prior offense for drug trafficking, one for unlawful possession of a firearm, and one for negligent operation of a motor vehicle resulting in a fatality, each of which resulted in a prison sentence. My independent review of the Pretrial Services Report reveals a fourth conviction, for maintaining a vehicle for the purpose of keeping controlled substances.

Robinson is now age 42, and the first three convictions were in his early twenties, making them somewhat remote in time. Robinson also has long-standing ties to the community, including his mother and an eight-year old son. But Robinson's means of supporting himself are opaque, and although he admitted using marijuana, he did not reveal the use of opioids, for which he then tested positive.

4. *The nature and seriousness of the danger posed by the person's release.* The nature of Robinson's indictment for drug and firearms offenses suggests that he presents a danger to the community. The drug charge concerns a dangerous drug, methamphetamine, trafficked in large amounts. Methamphetamines as a class of drug are particularly dangerous, because they are

stimulants, not sedatives, and can induce paranoia, hallucinations, and violent behavior.⁶ And Robinson's trafficking in firearms against the backdrop of a previous weapons offense is another strong indicator of a danger to the community. The defense is technically correct that Robinson is not charged with violent crimes. But the charges represent conduct that can fairly be categorized as fomenting violence.

In the final analysis, I conclude that under the factors enumerated in Section 3142(g), there is clear and convincing evidence of Robinson's dangerousness, and that the risk is not offset by the health considerations he advances under Section 3142(i).

I have reviewed the cases submitted by the defense in support of release, and find material differences. As to those cases that involve immigrant detention, *see e.g., Thakker v. Doll*, No. 19-CV-664 (M.D. Pa. Mar. 31, 2020), the nature of the charges cannot be meaningfully equated with the far more serious charges here. As to Judge Brody's elegantly reasoned opinion in *United States v. Jeremy Rodriguez*, No. 03-CR-271 (E.D. Pa. Apr. 1, 2020), the defendant there had served 17 years of a 20-year sentence and presented strong evidence of rehabilitation based on his record in prison.

Robinson misplaces reliance upon *United States v. Stephens*, 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020), where Judge Nathan vacated an earlier order of pretrial confinement. In that case, evidence that the Defendant possessed a firearm proved far more tenuous than the prosecution originally had represented. *Id.* at *1. Here, in contrast, the Government has not retreated from its representation that the Defendant was recorded engaging in two unlawful sales of handguns. It is true that the *Stephens* Court noted there that even without changed

⁶ National Institute on Drug Abuse, Drug Facts, Revised May 2019, <https://www.drugabuse.gov/publications/drugfacts/methamphetamine>

circumstances, the “separate statutory ground” provided by 18 U.S.C. § 3142(i) would nevertheless, and on its own, “require [the defendant’s] release.” *Id.* at *2. But I am persuaded I am still required to balance the risk that Robinson would be dangerous if released into the community with the unique threat posed by COVID-19, and Robinson’s charges and criminal history heavily favor detention under the framework adopted by Congress.

Finally, I cannot assign significant weight to *United States v. Perez*, No. 19-CR-297 (S.D.N.Y. Mar. 19, 2020) (ECF 62), as it is an order providing comparatively few details. I note, however, that the petitioner there was 65 years old with “serious progressive lung disease,” and the Court emphasized that its order “should not be construed as a determination by this Court that pretrial detention is unsafe or otherwise inappropriate as a general matter or in any other specific case.” *Id.*

III. Conclusion

In order to resolve motions such as this one, it is necessary to perform an “individualized assessment of the facts of each case.” *Gumora*, 2020 WL 1862361, at *5. Having done that here, through consideration of both relevant provisions of the controlling statute, Mr. Robinson has not persuaded me that his release is appropriate.

For the reasons set forth above, Defendant’s Motion for Pretrial Release will be **DENIED**. An appropriate order follows.

/s/Gerald Austin McHugh
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

v.

DAWUD ROBINSON, et al.

:
:
:
:
:

**CRIMINAL ACTION
No. 19-371**

ORDER

This 21st day of April, 2020, upon consideration of Defendant's Motion for Release from Custody (ECF 45) and the Government's Response in Opposition to Motion for Release (ECF 46), for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that the Motion is **DENIED** without prejudice to Defendant's resubmission if circumstances materially change.

/s/ Gerald Austin McHugh
United States District Judge