

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES,

v.

MELVIN MCLEAN,

Defendant.

Criminal Action No. 19-380

ORDER

Taking into consideration all of the factors specified in 18 U.S.C. § 3142(g), and, in particular the overall safety of the community, the Court concludes that it is appropriate to release the Defendant to home confinement on high intensity supervision. As counsel for the Defendant candidly concedes, the facts and evidence that the Court previously weighed in concluding that Defendant posed a danger to the community have not changed—with one exception. That one exception—COVID-19—however, not only rebuts the statutory presumption of dangerousness, *see* 18 U.S.C. § 3142(e), but tilts the balance in favor of release.

The evidence relating to first two factors—the nature and circumstances of the offense charged and the weight of the evidence—are unchanged, and, as the Court previously held, both of those factors weigh in favor of pretrial detention. The calculus relevant to the third and fourth factors, in contrast, have changed. For the same reason COVID-19 tips the scales in Defendant’s favor on those two factors, it also provides a “basis to conclude that the case falls ‘outside the congressional paradigm’ giving rise to the presumption” that Defendant poses a danger to the community. *United States v. Taylor*, 289 F. Supp. 55, 63 (D.D.C. 2018) (quoting *United States v. Stone*, 608 F.3d 939, 945–46 (6th Cir. 2010)).

The third factor requires the Court to consider “(1) the defendant’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 (2) whether, at the time of the current offense or arrest, the defendant 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.” *Taylor*, 289 F. Supp. 3d at 69 (citing 18 U.S.C. § 3142(g)(3)). As the Court previously explained, Defendant’s criminal history is lengthy, although much of that history is stale, Dkt. 10 at 7, and none of it involves acts of violence, *see* Dkt. 5 at 4–9. What previously persuaded the Court that this factor weighed in favor of detention was the fact that Defendant was on supervised release at the time he was arrested on the current charges. *Id.* In the Court’s view, Defendant’s “pattern of disregard for court-ordered conditions of his release” raised serious concerns about whether he would, if released, refrain from engaging in further criminal conduct. *Id.*

The fourth factor requires the Court to consider the “nature and seriousness of the danger to . . . the community that would be posed by [Defendant’s] release.” 18 U.S.C. § 3142(g). As the Court previously explained, the “harm” it must evaluate is not merely physical harm, but also “the risk that a defendant will continue to engage in drug trafficking.” *Id.* (quoting *Taylor*, 289 F. Supp. 3d at 71 (quoting 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 766 (4th ed. 2013))). Because there is probable cause to believe not only that Defendant distributed drugs but that he used, carried, or possessed a firearm in doing so, as with the third factor, the Court previously found that the fourth factor weighed in favor of pretrial detention. *Id.* at 7–8.

The COVID-19 pandemic affects the calculus under both of these factors (and application of the presumption of dangerousness) because Defendant is especially at risk: he has diabetes and is 55 years old. According to Defendant’s un rebutted evidence, the mortality rate for diabetics infected with COVID 19 is approximately 9.2%. Dkt. 16 at 6 (citing World Health Organization, Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19) at 12 (Feb. 28, 2020), <https://www.who.int/docs/defaultsource/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>). When combined with increased mortality rates for those over 50 and the fact that Defendant also suffers from sleep apnea, Defendant is undeniably at risk. *See* Dkt. 16-1 (Beyrer Decl. ¶ 6). The Government, at first, expressed some skepticism that Defendant has diabetes, because he apparently did not disclose his condition to pretrial services, Dkt. 17 at 5, and counsel for the Defendant has—in light of the ongoing medical crisis—been unable to obtain a medical release and the relevant records, *see* Dkt. 18 at 2. All doubt was put to rest, however, when the Court convened a hearing on Defendant’s emergency motion, and he did not appear from the videoconference because he had been rushed to the medical unit with an acute diabetic attack. *See* Minute Entry (Mar. 27, 2020). At the time of hearing, the medical unit was considering whether it was necessary to rush Defendant to a hospital, but they hoped that his condition could stabilize at the jail in 2-3 hours’ time. (The jail subsequently informed the Court that Defendant’s condition has, in fact, stabilized).

This matters for at least two reasons. First, Defendant has asked that the Court release him on home confinement under the High Intensity Supervision Program (“HISP”). By violating the terms of that condition, Defendant would face two distinct risks—the risk that he would be sent back to the D.C. jail, where he might be unable to distance himself from others in the manner urged by the CDC, and the risk that he would come into contact with someone while

outside his home, who could infect him. At a time at which much of the population of the District of Columbia is remaining at home to avoid contracting or spreading the disease, those at high risk—like Defendant—have compelling reason to stay at home. In Defendant’s case, his reason to stay home is overwhelming. The fact that Defendant was on HISP supervision for approximately four weeks after his arrest, moreover, with no evidence of any violation, provides the Court with further comfort that he will abide by the terms of his release. If he does not, the Court will have little choice but to issue a warrant for his arrest and to return him to the D.C. Jail.

Second, Defendant’s continued pretrial detention poses a risk to community safety, which the Court must weigh against the risk posed by his release to home confinement under HISP. The responsible government agencies have all advised of the risk of transmission posed by large gatherings, and the Court understands the Defendant is housed in a unit with dozens other detained individuals. Since the filing of Defendant’s motion, two individuals detained at the D.C. jail has tested positive and at least 36 others have been quarantined as a result. As this Court has previously explained, “the risk of the spread of the virus in the jail is palpable, and the risk of overburdening the jail’s healthcare resources and, consequently, the healthcare resources of the surrounding community is real.” *United States v. Harris*, 19-cr-356, Minute Order (D.D.C. Mar. 27, 2020). Given Defendant’s age and underlying medical conditions, if infected, he is especially likely to require substantial healthcare resources and to contribute to the burden put on the community’s healthcare system. If Defendant is confined to his home, the risk to him is substantially reduced and the risk to others—both based on possible transmission of the virus by Defendant and based on the burden on the healthcare system that may be felt if he falls ill—will be similarly diminished.

Two judicial officers previously concluded that Defendant could be released under HISP without posing a risk of flight or a danger to the community. This Court disagreed with those assessments, principally because—while on supervised release—Defendant committed the present offenses, allegedly committed another offense in Maryland, and allegedly committed other violations of the terms of his supervised release. *See United States v. McLean*, 10-cr-50 (D.D.C. 2010), ECF No. 54 at 1–7. Given the seriousness of the charges against him, his history, and his failure to abide by the court-ordered terms of his release, the Court found by clear and convincing evidence that “no conditions or combination of conditions will reasonably assure . . . the safety of the any other person and the community.” 18 U.S.C. § 3142(e); *see* Dkt. 10. The Court concludes that the calculus has now changed and that Defendant is likely to abide by the terms of his release. This is a close case and the pandemic may not play such a decisive role for less vulnerable individuals. As someone at high risk if infected with the virus, however, he has compelling reason to stay at home in any event, and that incentive will be compounded by the fact that, if he violates the terms of his release, he risks returning to the D.C. Jail.

For all of these reasons, the Court hereby orders that the defendant be released on home confinement, subject to the following terms:

Defendant is **ORDERED** to report to 633 Indiana Avenue, NW, 9th Floor, in Washington, D.C. on the day he is released or on the next business day after his release if he is released after 4:00 p.m. for the installation of the ankle bracelet, and he must follow the instructions he receives there concerning orientation. He must report immediately after that to the Pretrial Services Agency (“PSA”) for the United States District Court at 333 Constitution Avenue, NW, Office 2507 in Washington, D.C., and he must sign the orientation contract.

Defendant is **ORDERED** to follow all of the rules, regulations, and requirement of the Program listed in the orientation contract, which is incorporated herein by reference. He must maintain reporting requirements as directed by PSA, abide by an electronically-monitored curfew, participate in all drug testing / drug program requirements, and abide by all other conditions imposed by the Court and as directed by PSA. Defendant's failure to refrain from illegal drug use or to comply with the drug testing condition will result in an assessment for his placement into the Sanction-Based Treatment Program. Any other violation of his program requirements will subject him, at a minimum, to administrative sanctions. Defendant will be supervised by a type of electronic monitoring device to be determined by PSA. He is required to properly maintain and charge the monitoring device each day. Any attempt to tamper with or mask the devices monitoring capability may result in removal from the program and/or additional criminal charges. As a condition of his release, may not leave the address verified by PSA without pre-approval from PSA, except in the case of a medical emergency. Defendant must maintain his residence at that address and may not change his residence without prior notification to, and approval of, the Court or PSA. Defendant shall not engage in any illegal conduct during this period of time.

The Court is to be promptly notified of any violations of this Order.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: March 28, 2020