

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

Dante Stephens,

Defendant.

No. 15 CR 95 (AJN)

**DEFENDANT DANTE STEPHENS'S EMERGENCY MOTION FOR
RECONSIDERATION OF BAIL CONDITIONS**

Defendant, Dante Stephens, moves the Court for an order, and a bail hearing if necessary, granting his release pending his violation of supervised release (“VOSR”) hearing, initially scheduled for March 13, 2020, but now rescheduled for March 25, 2020. As Your Honor is aware, Mr. Stephens has been incarcerated since February 6, first in the state system and since March 6 at the Metropolitan Correctional Center (“MCC”). The Bail Reform Act provides for the “temporary release” of a person in pretrial custody “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.” 18 U.S.C. § 3142(i). Since Mr. Stephens’s bail appeal hearing on March 6, the new coronavirus strain COVID-19 has spread rapidly across the world, through New York State, and within New York City.¹ At the MCC, Mr. Stephens is at much graver risk of contracting this dangerous disease than if released to home confinement, and his detention at the MCC has become tantamount to a cruel and potentially health-threatening or life-threatening punishment.²

¹ E.g., *Coronavirus Map: Tracking the Spread of the Outbreak*, N.Y. Times (Mar. 12, 2020), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> (updating regularly).

² See Emily Bazelon, *Our Courts and Jails Are Putting Lives at Risk*, N.Y. Times (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/opinion/coronavirus-courts-jails.html>; Premal Dharia, *The Coronavirus Could Spark a Humanitarian Disaster in Jails and Prisons*, Slate (Mar. 11, 2020),

At the March 6 bail appeal hearing, the defense sought a VOSR hearing at the Court's earliest availability, and the Government made clear that scheduling the hearing as quickly as possible was the solution to addressing the conditions Mr. Stephens would be subject to at the MCC. *See* Hr'g Tr. 26:25–27:1; 27:8–9; 32:2–33:14 (Mar. 6, 2020). The VOSR hearing was initially set for March 13, but is now set for March 25, and even that date is in doubt in light of the COVID-19 situation and the Chief Judge's recent order staying all civil and criminal trials until April 27, 2020. *See* Standing Order, *In re Coronavirus/Covid-19 Pandemic*, No. 20-misc-00154 (S.D.N.Y. Mar. 13, 2020) (C.J. McMahon) at ¶ 2 (“The Court may issue other orders concerning future continuances as necessary and appropriate.”). The rescheduling of the VOSR hearing, the new developments surrounding COVID-19, and MCC's cancellation of attorney visitation—as well as significant weaknesses in the Government's case of which the defense has recently learned, most notably that *law enforcement initially identified an individual other than Mr. Stephens as the person allegedly holding the bag containing a gun*—necessitates Mr. Stephens's release from custody. The defense requests that the Court order Mr. Stephens's release and transfer to home confinement, in addition to any conditions the Court deems necessary and appropriate, and is prepared for a bail hearing if necessary. The Government and Probation do not consent to this request. If bail is not granted, and in the event the VOSR hearing can be expedited, defense counsel is now available for such a hearing the week of March 16, 2020, although as noted, it is highly questionable whether holding such a hearing (with the need for in person testimony) is advisable or safe.³

<https://slate.com/news-and-politics/2020/03/coronavirus-civil-rights-jails-and-prisons.html>; Noah Goldberg, *NYC's Federal Jails Not Prepared for Coronavirus, Says Defense Attorney Group*, N.Y. Daily News (Mar. 9, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-federal-jails-disease-unprepared-20200309-3wrmfwrh7zed7iene3ikyrxeze-story.html>.

³ Defense counsel questions whether it is safe for attorneys go to court, now or on March 25, 2020. Like most employees in New York City, defense counsel is currently working remotely. *See also* Marcia

For the health of all involved, defense counsel further respectfully requests that any hearing on this emergency motion for reconsideration of bail conditions be conducted by telephone or video conferencing if at all possible. *See* Standing Order, *In re Coronavirus/Covid-19 Pandemic*, No. 20-misc-00154 (S.D.N.Y. Mar. 13, 2020) (C.J. McMahon) at ¶ 10. At such a hearing, the defense would waive Mr. Stephens’s presence for efficiency and speed, and to protect the safety of the attorneys, U.S. Probation, MCC personnel, and Court personnel. *See* Fed. R. Crim. P. 32.1(b)(1)(B); *see also* Fed. R. Crim. P. 43.

I. The Government’s Case is Weak.

First and foremost, the Government’s case is weak—and much weaker than the Government knew at the March 6 bail appeal hearing, which therefore affected how the case was depicted on March 6. ***Critically, NYPD initially identified a different person, not Mr. Stephens, as the person allegedly holding the bag containing a gun.*** On March 10, evidently as part of its obligation to disclose *Brady* information, the Government so advised the defense. On March 11, the Government further advised the defense that the arresting officer, who identified a different person than Mr. Stephens as the perpetrator, apparently now will not testify for the Government at the VOSR hearing. Also significantly, the Government (which had not viewed the video at the time of the bail hearing) has since produced the video to the defense. ***The defense has repeatedly viewed the video and is strongly of the view that Mr. Stephens is not identifiable as the individual holding the bag.*** Thus, the Government’s case is weak, dramatically affecting the determination of dangerousness that underlays the Court’s decision to detain Mr. Stephens and

Coyle, *US Supreme Court Postpones Upcoming Arguments Amid Coronavirus Threat*, Law.com (Mar. 16, 2020), <https://www.law.com/nationallawjournal/2020/03/16/us-supreme-court-postpones-upcoming-arguments-amid-coronavirus-threat/>; *New York City to Close Schools, Restaurants and Bars*, N.Y. Times (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/new-york-coronavirus.html>.

the balancing of considerations including the abhorrent conditions at the MCC and the COVID-19 situation.

II. The Bail Reform Act Requires Mr. Stephens's Release.

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.” 18 U.S.C. § 3142(i). The circumstances that existed when Mr. Stephens was ordered detained have changed. There is a pandemic that poses a direct risk to Mr. Stephens that is far greater if he continues to be detained during this public health crisis. Additionally, there is no greater necessity for the preparation of a “person’s defense” than access to counsel. The MCC’s canceling of all social visits constitute “another compelling reason” for temporary release within the language of § 3142(i).

As an initial matter, the Bail Reform Act requires that a court should “bear in mind that it is only a ‘limited group of offenders’ who should be denied bail pending trial.” *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987) (quoting S. Rep. No. 98-225 at 7, as reprinted in 1984 U.S.C.A.N. 3182, 3189); *see United States v. Salerno*, 481 U.S. 739, 755 (1987) (suggesting that “detention prior to trial or without trial is the carefully limited exception” to liberty before trial). One charged with a crime is, after all, presumed innocent. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). A single individual unnecessarily detained before trial or VOSR hearing is one individual too many, and the increasing use of the practice places tremendous wear on our constitutional system. *United States v. Montalvo-Murillo*, 495 U.S. 711, 723–24 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). Due to the crucial interests involved, it follows that a “case-by-case” approach is required at any stage of the case in assessing the propriety of pretrial/prehearing detention. *See United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986) (discussing

due process analysis for evaluating propriety of prolonged pretrial detention, and the interests at stake) (citations omitted), *cert. dismissed sub nom., Melendez-Carrion v. United States*, 479 U.S. 978 (1986).

This Court should consider the “total harm and benefits to prisoner and society” that continued prehearing imprisonment of Mr. Stephens will yield, relative to the heightened health risks posed to Mr. Stephens during this rapidly encroaching pandemic. *See United States v. D.W.*, 198 F. Supp. 3d 18, 23 (E.D.N.Y. 2016); *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”); *United States v. Francis*, 129 F. Supp. 2d 612, 619-20 (S.D.N.Y. 2001) (reducing sentence in acknowledgment of “the qualitatively different, substandard conditions to which the Defendant was subjected” in pretrial detention).

III. Inmates Are at Heightened Risk of Contracting COVID-19.

Conditions of pretrial/prehearing confinement create the ideal environment for the transmission of contagious disease.⁴ Inmates cycle in and out of the Federal Bureau of Prison (“BOP”) pretrial facilities from all over the world and the country, and people who work in the facilities leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited in federal pretrial

⁴ Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047 (Oct. 2007), <https://doi.org/10.1086/521910>.

detention centers.⁵ According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe,” which means “infection control is challenging in these settings.”⁶ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.⁷ In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.⁸ Even Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”⁹ Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.¹⁰

IV. The MCC Is Failing to Protect Defendants From COVID-19.

The MCC has proven—recently and repeatedly in the past—that it is unable to protect the health and safety of defendants in its custody. The MCC is a massive pretrial detention facility,

⁵ Laura M. Maruschak et al., U.S. Dep’t of Just., Bureau of Just. Stat., *Medical Problems of State and Federal Prisoners and Jail Inmates*, 2011-12 (rev. Oct. 2016), <https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf>.

⁶ Letter, Achieving a Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States (March 2, 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf.

⁷ Nicole Wetsman, *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, Verge (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

⁸ Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Bus. Insider (Feb. 21, 2020), <https://www.businessinsider.com/500-coronavirus-cases-reported-in-jails-in-china-2020-2>.

⁹ Jennifer Hansler & Kylie Atwood, *Pompeo Calls for Humanitarian Release of Wrongfully Detained Americans in Iran Amid Coronavirus Outbreak*, CNN (Mar. 10, 2020), <https://www.cnn.com/2020/03/10/politics/mike-pompeo-iran-release-detained-americans-coronavirus/index.html>.

¹⁰ Claudia Lauer & Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, Associated Press (Mar. 7, 2020), <https://apnews.com/af98b0a38aaabedbc059092db356697>.

housing approximately 700 people. The majority of the people detained are housed in small two-man cells with a shared toilet and sink, and eat meals and have recreation in groups of 70 or more. Other units are open dormitories that house 70 or more inmates without the ability to separate. The medical care at both facilities has repeatedly failed to adequately address even routine medical conditions such as diabetes, pregnancy, and anemia.¹¹ In times of crisis, the medical care has halted entirely.

MCC demonstrated an inability to appropriately care for defendants just less than two weeks ago. For eight days, every inmate endured a full lockdown, without access to family members or attorneys, while law enforcement searched for a loaded gun brought into the facility by a correctional officer.¹² Inmates on one unit were forced to share one toilet among twenty-six people, and were prevented from washing their clothing: prime conditions for the spread, rather than containment, of infectious disease.¹³ Federal Defenders of New York clients reported to attorneys that mice and water bugs ran through the units as guards unblocked holes in walls and vents that inmates had stuffed with clothing to prevent pests. On other units, toilets overflowed in two-man cells, spreading raw sewage. Inmates with serious medical conditions, including AIDS and anemia, were denied medications or medical care. Female inmates were denied feminine hygiene supplies. No clean drinking water was provided; inmates were forced to drink from their bathroom sinks, from which brown water often ran.

¹¹ *E.g.*, Press Release, National Association of Women Judges Women in Prison Committee Second Visit to BOP's Metropolitan Detention Center (June 3, 2016), https://www.nawj.org/uploads/files/monthly_update/referenced_docs/july_2016/bop_nawj_june_3_2016_visit_metropolitan_detention_center_ny.pdf.

¹² See Stephen Rex Brown, *Strip Searches, Frozen Bologna Sandwiches and Wrecked Cells: MCC Inmates Detail Lockdown Due to Smuggled Gun*, N.Y. Daily News (Mar. 6, 2020), <https://www.nydailynews.com/new-york/ny-mcc-lockdown-accounts-20200306-aws7qoa7ejcozai3i64hms73qi-story.html>.

¹³ *Id.*

Defense counsel's communications with the Federal Defenders of New York reveal that to date, the MCC has not met even the most basic recommendations of the CDC for preventing the spread of the coronavirus. It is still waiting for guidance from the BOP on screening and treatment. In the meantime, neither facility has a screening mechanism in place for staff, other than self-reporting. As of March 13, staff are not wearing face masks or gloves. The MCC does not have hand sanitizer available.¹⁴ MCC does not have any testing for COVID-19 available, and does not know when, if ever, it will have tests. There is no medical ward or facility in place at the MCC.

Reviewing the Metropolitan Detention Center's ("MDC") management of the 2019 "Polar Vortex" is instructive for evaluating how COVID-19 may unfold in BOP facilities and in the MCC. For an entire week in January and February 2019, during the sub-zero temperatures of the "Polar Vortex," MDC Brooklyn went without power and heat, and inmates were locked down for days at a time.¹⁵ Inmates were denied hot food or additional blankets or warm clothing, despite the frigid air inside the facility. Inmates with serious pre-existing physical and mental illnesses received no care.¹⁶ Even the most basic efforts, such as moving inmates requiring sleep apnea machines to breathe to the available floors with electricity, were not taken.¹⁷

In granting downward sentencing variances in a series of cases after the blackout, Judge Chen noted that inmates at the MDC were "subjected to very cruel conditions," and that "there

¹⁴ Per communications with the Federal Defenders of New York, defense counsel understands that on March 12, 2020, the Warden of the MCC advised that the MCC is seeking to order hand sanitizer, and that the BOP has relaxed its strictures on hand sanitizer during this period. The Warden had no information as to when hand sanitizer might arrive at the facility.

¹⁵ See Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and "Frantic,"* N.Y. Times (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html>; Complaint, *Scott v. Quay*, 19-CV-1075 (MKB), ECF No. 1 (E.D.N.Y. Feb. 22, 2019).

¹⁶ Complaint, *Scott v. Quay*, 19-CV-1075 (MKB), ECF No. 1 (E.D.N.Y. Feb. 22, 2019).

¹⁷ Office of the Inspector Gen., U.S. Dep't of Just., *Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impacts on Inmates*, 29 (September 2019), <https://oig.justice.gov/reports/2019/e1904.pdf>.

was a reluctance of the part of the officials [at MDC Brooklyn] to correct the conditions or even to disclose them timely.”¹⁸ Judge Furman reached the same conclusion: “It’s pretty clear to me . . . that steps could have been taken, and taken more quickly, to address the problems [at the MDC]. And the bottom line is, the conditions that I read about are the conditions that one associates with a third world country and not a country like this, and nobody in detention . . . should have to endure that as the detainees did at the MDC.”¹⁹

As additional people are arrested who have been out in the community as the coronavirus spreads, if they are not symptomatic, they will be brought into the MCC, and held with the existing population, potentially bringing COVID-19 into this population held in large numbers, close quarters, and low sanitary conditions. On March 12, 2020, Magistrate Judge Orenstein denied a remand application, holding that increasing the population of the Metropolitan Detention Center (MDC) could present a “danger to the community”—the staff and inmates inside the jail—by potentially bringing the virus into the facility. *United States v. Raihan*, 20-CR-68 (BMC) (Mar. 12, 2020).

V. The Conditions at the MCC and the Postponement of the Violation of Supervised Release Hearing Necessitate Mr. Stephens’s Release to Home Confinement Pending the Hearing.

As defense counsel previously represented to the Court, the MCC was in lockdown mode the week that Mr. Stephens was detained at the MCC. Since Mr. Stephens entered the MCC on March 6, conditions have further deteriorated. Mr. Stephens reported on March 13 that he had not

¹⁸ Tr. of Sent. Hr’g. at 12, *United States v. Acosta De La Rosa*, 18-CR-667 (PKC), ECF No. 16 (E.D.N.Y. Jun. 4, 2019); see also *United States v. Bruney*, 18-CR-542 (PKC) (E.D.N.Y. 2019); *United States v. Douglas*, 18-CR-554 (PKC) (E.D.N.Y. 2019).

¹⁹ Tr. of Sent. Hr’g. at 31, *United States v. Ozols*, No. 16-CR-692 (JMF), ECF No. 234 (S.D.N.Y. Feb. 12, 2019).

yet been permitted to shower, seven days after he entered the MCC, and had only just that day received fresh underwear. He has not had any access to soap or hand sanitizer.

Moreover, Mr. Stephens cannot adequately prepare his defense in either his current VOSR case or his state case because on Friday, March 13, the BOP formally suspended all legal visits for 30 days due to COVID-19, with accommodations allowed only on a case-by-case basis.²⁰ While the BOP claims that confidential legal calls will be allowed, defense counsel is unconvinced that the MCC will implement measures such that Mr. Stephens can receive the legal representation to which he is entitled.²¹ Counsel was in contact with the MCC Legal Department last week regarding arranging legal calls with Mr. Stephens, and the MCC did not permit a legal call to Mr. Stephens. Since Friday, attorneys in other cases have been asking the MCC legal department to set up legal calls and visits with clients, and not one has been scheduled.²² During the MCC lockdown this month, inmates were unable to make phone calls or send emails related to their cases.²³ In normal circumstances, MCC inmates may not place legal calls to non-Federal Defender attorneys and the MCC prohibits all attorneys from calling inmate clients at the MCC.²⁴ Additionally, the MCC has at most only the most minimal provisions for remote access. The MCC has one video-conference setup available for all 700 inmates that, as of March 13, has not yet been

²⁰ Associated Press, *Visits Halted in Fed Prisons, Immigration Centers Over Virus*, N.Y. Times (Mar. 13, 2020), <https://www.nytimes.com/aponline/2020/03/13/us/politics/ap-us-virus-outbreak-federal-prisons.html>.

²¹ Fed. Bureau of Prisons, U.S. Dep't. of Just., *Federal Bureau of Prisons COVID-19 Action Plan* (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp.

²² Sean Hecker (@hecker_sean), Twitter (Mar. 15, 2020, 6:20 PM), https://twitter.com/hecker_sean/status/1239320630853537792 (citing and attaching a March 15, 2020 letter from the Federal Defenders of New York to Chief Judges Katzmann, Mauskopf, and McMahon regarding COVID-19).

²³ Tom McParland, *Federal Defenders Protest Cutoff of Access to Clients Amid MCC Lockdown*, N.Y.L.J. (Mar. 3, 2020), <https://www.law.com/newyorklawjournal/2020/03/03/federal-defenders-protest-cutoff-of-access-to-clients-amid-mcc-lockdown/>.

²⁴ Fed. Bureau of Prisons, U.S. Dep't of Just., *Attorney's Guide to the Metropolitan Correctional Center 10-11* (Apr. 2008), https://www.bop.gov/locations/institutions/nym/mcc_ny_attny_guide_april_2008.pdf.

tested to see if it connects with the courthouse or Probation. Moreover, even if visits were permitted, counsel is hesitant to visit the MCC or have attorneys from counsel's law firm visit the MCC, given the significant health risk of the transmission and spread of COVID-19.

When last incarcerated at the MCC for his underlying conviction, Mr. Stephens endured harsh conditions and exhibited symptoms of post-traumatic stress disorder. Sent'g. Submission by Dante Stephens, 6, ECF No. 1705 (Sept. 15, 2017). With regard to Mr. Stephens's past medical treatment at the MCC, Mr. Stephens sought medical attention for severe tooth pain in August 2016 but did not receive an appointment until November 2016, and his tooth was not extracted until April 2017, eight months after he initially sought care. *Id.*, at Exhibit 14. Further, as referenced in Mr. Stephens's January 15 VOSR sentencing submission, Mr. Stephens has a long history of trauma and anxiety. Sent'g. Submission by Dante Stephens, 3, ECF No. 2747 (Jan. 15, 2020). During his present incarceration at the MCC, Mr. Stephens has been in a state of extreme distress and has been suffering from prolonged insomnia.

During the March 6 hearing, defense counsel raised the issue of MCC conditions during the then-ongoing lockdown. Hr'g Tr. 21:23–22:9 (Mar. 6, 2020). The Court noted that it was “deeply troubled by what’s going on at the MCC” and stated, “I think we do have a responsibility to take it into account.” *Id.* at 26:2–6. In response, the Government proposed, “[W]e should have the hearing as quickly as possible.” *Id.* at 26:25–27:1; see also *id.* at 27:8–9 (“So I think the answer to that is let’s have a hearing quickly. Let’s not wait on this.”). Accordingly, the parties and the Court scheduled the hearing for the following week. Although Mr. Stephens appreciates that the Court’s current trial and defense counsel’s schedule necessitated the 13-day postponement of his VOSR hearing, the worsening conditions in the MCC and the delay in the hearing necessitates Mr. Stephens’s release.

On March 6, the Court raised the possibility of home detention in lieu of incarceration at the MCC. *Id.* at 26:11–14. The Government opposed this proposal, noting that Mr. Stephens’s current residence in the Bronx where he lives with his mother is close to the location where the alleged events occurred and that “[i]t’s very easy to leave home detention and not get caught.” *Id.* at 27:10–20. Mr. Stephens expects that during his time on home confinement, he would in fact be supported and monitored by Probation and/or Pretrial Services. Since 2009, Pretrial Services’ data has found that only 2.9% of defendants in the highest risk category were re-arrested for a violent crime while on release.²⁵ In the Eastern District of New York, Chief U.S. Pretrial Services Officer Roberto Cordeiro reports that in Fiscal Year 2019, only six of 1,300 defendants (0.5%) under Pretrial Services’ supervision failed to appear in court; only 2.8% were rearrested. However, Mr. Stephens submits that, if as the Government alleges, there are insufficiencies with Probation or Pre-trial Service’s supervision of its home confinement participants, Mr. Stephens should not be further punished as a result of these departments’ failures to operate its programs—and continued detention is indeed punitive and poses a significant danger to Mr. Stephens’s physical and mental health.

If the Court has concerns about Mr. Stephens returning to his home in the Bronx, defense counsel alternatively proposes that Mr. Stephens be released to home confinement in Mount Vernon, New York at the residence of his girlfriend Destinee Stewart. Ms. Stewart was prepared to be the co-signer on Mr. Stephens’s bond on March 6, and she was present in court at the March 6 hearing. Mount Vernon is in Westchester County and is thus within this Court’s jurisdiction. Additionally, Mount Vernon is sufficiently far from the site of the alleged events. Further, Ms. Stewart lives with other members of her family—an aunt, a grandmother, and cousins who know

²⁵ Thomas H. Cohen et al., *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary* 26 (Sept. 2018), https://www.uscourts.gov/sites/default/files/82_2_3_0.pdf.

Mr. Stephens well and could provide constructive social support. Ms. Stewart herself is a stable force in Mr. Stephens's life. For example, for more than four years, Ms. Stewart has worked as a Direct Support Professional for children and adults with autism, cerebral palsy, and other disabilities.

VI. Conclusion

At the March 6 bail appeal hearing, the prosecutor told the Court, “[I]f I had not appealed, I would never forgive myself.” Hr’g Tr. 13:4-5 (Mar. 6, 2020). Defense counsel feels the same way now. Our client is grave danger. Mr. Stephens is housed in unsanitary and inhumane conditions, with no ability to self-isolate or engage in even basic hygiene, much less assist in the preparation of his defense. These circumstances compel his release to home confinement. For the foregoing reasons, we respectfully move that Mr. Stephens be released from custody to remain in home confinement until his hearing on March 25, 2020.

Dated: March 16, 2020

Respectfully submitted,

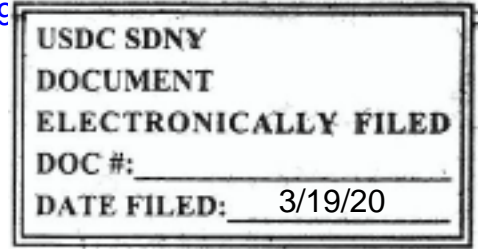
JENNER & BLOCK LLP

By: /s/ Anthony S. Barkow

Anthony S. Barkow
JENNER & BLOCK LLP
919 Third Avenue
New York, New York 10022-3908
Telephone: (212) 891-1600
Facsimile: (212) 891-1699
abarkow@jenner.com

Attorney for Dante Stephens

cc: AUSA Jessica Feinstein (via ECF and email)
AUSA Jamie Bagliebter (via ECF and email)
Probation Officer Lauren Blackford (via ECF and email)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Dante Stephens,

Defendant.

15-cr-95 (AJN)

OPINION & ORDER

ALISON J. NATHAN, District Judge:

At the hearing on March 6, 2020, the Court reviewed Magistrate Judge Fox’s bail determination *de novo* and concluded that the Defendant failed to establish by clear and convincing evidence that he did not pose a danger to the community. *See* March 6 Hr’g Tr. at 31:11–32:1; *see also* 18 U.S.C. § 3143(a)(1); Fed. R. Crim. P. 32.1(a); 18 U.S.C. § 3142. Accordingly, the Court ordered him remanded to the custody of the Bureau of Prisons (“BOP”).

On March 16, 2020, the Defendant filed an emergency motion for reconsideration of his bail conditions. *See* Dkt. No. 2789-1. The Court GRANTS that motion and orders the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department.

The Court concludes that reconsidering the Defendant’s bail conditions is appropriate in light of circumstances that have changed since the March 6 hearing. *Cf.* 18 U.S.C. § 3142(f) (A detention hearing under 18 U.S.C. § 3142 “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 such person as required and the safety of any other person and the community.”). These changed circumstances are two-fold. First, the strength of the primary evidence relied upon by the Government to demonstrate the danger the Defendant poses to the community has been

undermined by new information not available to either party at the time of the March 6 hearing. Indeed, while the Government argued at the hearing that the Defendant’s “possession of a loaded firearm in proximity to drugs . . . is an inherently dangerous activity” that weighed in favor of his detention, *see* March 6 Hr’g Tr. at 8:23–9:3, the Court has since learned that the arresting officer—who will not testify for the Government at the hearing on the Defendant’s alleged violation of supervised release—initially identified a *different* individual as holding the bag that contained the firearm. *See* Dkt. No. 2789-1 at 2. Though the Government proffers additional evidence that it will introduce at the hearing,¹ this new information nonetheless indicates that the Government’s case is weaker than it believed it to be at the March 6 hearing and bears upon the Court’s prior conclusion that the Defendant failed to establish by clear and convincing evidence that he did not pose a danger to the community.

Second, since the March 6 hearing, the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent. Although there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop. *See, e.g.,* Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), <https://doi.org/10.1086/521910> (noting that in jails “[t]he probability of transmission of potentially pathogenic organisms 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* Claudia Lauer & Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, Associated Press (Mar. 7, 2020). The magnitude of this risk has grown exponentially since the March 6 hearing before this Court; at the end of the day on March 6, New York State had 44 confirmed cases of COVID-19, *see* Andrew Cuomo (@NYGovCuomo),

¹ The Government proffers that at the hearing it will offer, among other evidence, video surveillance footage, testimony of an NYPD officer who was present when the firearm was recovered and will testify that he recognizes the Defendant in the surveillance video as the individual carrying the bag containing the firearm, and testimony from the Defendant’s Probation Officer, who will testify that she also identified the Defendant in the video as the individual carrying the bag containing the firearm.

Twitter (Mar. 6, 2020, 4:51 PM), <https://twitter.com/NYGovCuomo/status/1236046668220567553>, but by the end of the day on March 18, that number had climbed to 2,382, *see* Mitch Smith, *et al.*, *Tracking Every Coronavirus Case in the U.S.: Full Map*, N.Y. Times, Mar. 18, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>. Though the BOP has admirably put transmission mitigation measures in place, *see* Federal Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp, in the event of an outbreak at the Metropolitan Correctional Center (“MCC”) (where the Defendant is currently being detained), substantial medical and security challenges would almost certainly arise. A comprehensive view of the danger the Defendant poses to the community requires considering all factors—including this one—on a case-by-case basis. *See, e.g., United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020) (deciding to continue a criminal defendant on pretrial release rather than order him remanded to the Metropolitan Detention Center due, in part, to the Magistrate Judge’s recognition of the fact that “[t]he more people we crowd into that facility, the more we’re increasing the risk to the community”).

Taken together, these changed circumstances necessitate a reconsideration of the Defendant’s bail conditions. The question of whether the Defendant had met his burden to establish by clear and convincing evidence that he did not pose a danger to the community was a close one at the March 6 hearing. Indeed, Defense counsel presented ample evidence at that hearing that aside from the arrest from which the alleged violation of supervised release arises, the Defendant does not have a violent background: no prior convictions involved violent conduct or gun charges. *See* March 6 Hr’g Tr. at 16:18–17:14. In light of the changed circumstances discussed above, the weight of the evidence now clearly and convincingly tips in the Defendant’s favor. Accordingly, based on the evidence and arguments presented at the March 6 hearing coupled with the reasons stated above, the Court concludes that the Defendant has now established by clear and convincing evidence that he does not pose a danger to the community.

Even if the Court were to conclude that changed circumstances did not compel reconsideration of the Defendant's bond conditions, a separate statutory ground advanced by the Defendant would require his release here. 18 U.S.C. § 3142(i) 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." The Government does not challenge the application of this provision—indeed, it does not address it at all in opposing the Defendant's motion, *see generally* Dkt. No. 2791—and the Court thus concludes that it applies here.

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) (explaining that a defendant who is denied bail "retains the ability to request[,] . . . in extraordinary circumstances, . . . temporary release under § 3142(i)" should future developments with respect to his medical conditions so warrant); *see also United States v. Birbragher*, No. 07-cr-1023-(LRR), 2008 WL 1883504, at *2 (N.D. Iowa Apr. 25, 2008) (describing *United States v. Scarpa*, 815 F. Supp. 88 (E.D.N.Y. 1993), and *United States v. Cordero Caraballo*, 185 F. Supp. 2d 143 (D.P.R. 2002), as cases in which courts found "compelling reason" to temporarily release defendants due to the defendants' serious medical issues).² Furthermore, case law suggests that

² In a similar context, the Second Circuit has described "exceptional" reasons permitting the release of a defendant subject to mandatory detention—arguably a higher standard than "compelling" reasons—as those that "present a unique combination of circumstances giving rise to situations that are out of the ordinary." *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991); *see also* 18 U.S.C. § 3145 ("A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."). The Second Circuit has explained that determining whether a given circumstance presents exceptional reasons under Section 3145 requires a case-by-case evaluation by the district judge and that the district judge's discretion is "constrained only by the language of the statute: 'exceptional reasons.'" *DiSomma*, 951 F.2d at 497.

family members may constitute “appropriate persons” where the defendant is released to relatives and placed under house arrest. *See Cordero Caraballo*, 185 F. Supp. 2d at 145 (releasing the defendant, who the court would have detained on dangerousness grounds, to the custody of his mother and grandmother on 24-hour house arrest due to his severe injuries). “A defendant has the burden of showing that temporary release is ‘necessary . . .’ under Section 3142(i).” *See United States v. Dupree*, 833 F. Supp. 2d 241, 246 (E.D.N.Y. 2011).

The Court concludes that the Defendant has met his burden by demonstrating at least one compelling reason that also necessitates his release under this provision. Namely, the obstacles the current public health crisis poses to the preparation of the Defendant’s defense constitute a compelling reason under 18 U.S.C. § 3142(i). *See id.* (providing that the Court “may . . . permit the temporary release of [a] person, in the custody of a United States marshal or another appropriate person, to the extent [it] determines such release to be necessary for preparation of the person’s defense”). The spread of COVID-19 throughout New York State—and the country—has compelled the BOP to suspend all visits—including legal visits, except as allowed on a case-by-case basis—until further notice. *See Federal Bureau of Prisons, Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp (explaining that “legal visits will be suspended for 30 days” nationwide and that “case-by-case accommodation will be accomplished at the local level”). This suspension impacts the Defendant’s ability to prepare his defenses to the alleged violation of supervised release in advance of the merits hearing scheduled for March 25, 2020. Defense counsel represents that after contacting the MCC Legal Department to arrange legal calls with the Defendant, “the MCC did not permit a legal call to Mr. Stephens.” Dkt. No. 2789-1 at 10. He further proffers that other defense counsel have faced similar obstacles in attempting to communicate with their clients. *Id.* The Government neither responds to nor contests these factual representations, and so the Court relies upon them here. *See generally* Dkt. No. 2791. Thus, the Court concludes that these circumstances necessitate the Defendant’s temporary release. *See United States v. Persico*, No. 84-cr-809 (JFK), 1986 WL 3793, at *1 (S.D.N.Y. Mar. 27, 1986) (describing cases in which

“temporary releases of defendants therein were granted prior to trial in order to facilitate the defendants’ expeditious preparation for trial and thus to promote the prompt disposition of the charges against each defendant” where “[t]he concern in each case was that, given the admittedly limited access to telephones and attorney conference rooms at the detention facilities, the effective preparation of a defense might have been impossible in the short time available before the commencement of trial”).³

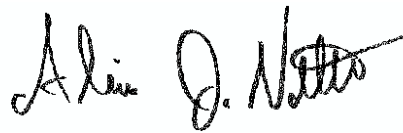
The Court further concludes that the Defendant’s mother constitutes an “appropriate person” within the meaning of this provision so long as the Defendant is subject to home incarceration with GPS monitoring at the residence he shares with her. *See Cordero Caraballo*, 185 F. Supp. 2d at 146 (finding that the defendant’s mother and grandmother “qualif[ied] as third-party custodians” for purposes of the release of the defendant).

In sum, circumstances that have changed since the March 6 hearing warrant reconsideration of the Defendant’s bail conditions, and the Court concludes that, in light of these changed circumstances, the Defendant has established by clear and convincing evidence that he does not pose a danger to the community. Furthermore, even were the Court to conclude that reconsideration was not warranted, compelling reasons would necessitate the Defendant’s temporary release under 18 U.S.C. § 3142(i). Accordingly, the Court orders the Defendant released from the custody of the Bureau of Prisons to the custody of his mother, with whom he lives, subject to the additional conditions of supervised release of 24-hour home incarceration at his current residence in the Bronx and electronic location monitoring as directed by the Probation Department.

SO ORDERED.

³ The Defendant also argues that the current public health crisis itself provides an additional compelling reason necessitating his release for all the reasons already articulated above. *Cf. Rebollo-Andino*, 312 F. App’x at 348 (explaining that “extraordinary circumstances” related to medical conditions may necessitate temporary release under § 3142(i)). The Court need not decide this additional factor here because its determination that release is necessary for the preparation of the Defendant’s defense is sufficient under § 3142(i).

Dated: March 18, 2020
New York, New York

A handwritten signature in black ink, appearing to read "Alison J. Nathan". The signature is written in a cursive style with a long horizontal stroke extending to the right.

ALISON J. NATHAN
United States District Judge