

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

United States of America,

Plaintiff,

vs.

Dondiago Jones,

Defendant.

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Case No. 3:20-cr-42-3

ORDER

Dondiago Jones moves for reconsideration of an order for detention pending trial, asserting his sickle cell disease renders him immunocompromised, puts him at increased risk of contracting COVID-19 while detained in a correctional facility, and puts him at increased risk for serious complications if he contracts COVID-19. Further, he asks that an order for discovery pursuant to stipulation be changed to instead allow for discovery pursuant to a “standard” order. (Doc. 255). Finally, Jones asks that a portion of a document the United States has been allowed to file under seal be made public. The United States opposes the motion, asserting Jones remains a risk of nonappearance at future proceedings and a danger to the community. The court held a hearing on Jones’ motion on April 15, 2020—the second review hearing the court has conducted since Jones was originally ordered detained.

Over the past several weeks, this court has considered various cases in which defendants requested release in light of the worldwide COVID-19 pandemic, and this court has read many decisions of other judges faced with similar questions. Each case requires a fact-intensive inquiry. This court has considered many hundreds of detention motions over a long period of time, and Jones’ motion presents one of the most difficult

detention decisions this court has faced. The court's task in this situation is to determine the "least worst" resolution.

Background

Jones is one of twenty individuals charged with drug conspiracy crimes. Jones, and other individuals from the Detroit, Michigan, area, is charged with conspiring to bring opiates to three Native American reservations in North Dakota and distributing the drugs on the reservations. Jones is charged in four counts—conspiracy to possess and distribute controlled substances, money laundering conspiracy, and two counts of maintaining drug premises. The charges against Jones give rise to a presumption of pretrial detention pursuant to 18 U.S.C. § 3142.

The court held a detention hearing on March 6, 2020. Jones sought release to reside with his girlfriend, Faith Liddell,¹ in Bottineau, North Dakota, whom he asserted was an appropriate third-party custodian. At the March 6, 2020 hearing, the United States proffered evidence of circumstances surrounding the charges against Jones and proffered evidence concerning Liddell. The pretrial services officer recommended detention. The court found Jones had not presented evidence sufficient to rebut the presumption of 18 U.S.C. § 3142(e). (Doc. 196). But, because Jones had not had opportunity to review discovery materials prior to the detention hearing, the court stated he could request another hearing after having that opportunity.

Asserting changed circumstances—worsening of the worldwide COVID-19 pandemic and his medical condition making him more susceptible to contracting the virus and suffering serious complications of the disease—Jones requested

¹ In some documents in the docket, Faith Liddell is incorrectly referred to as Faith Little.

reconsideration of the order for detention. The court held a review hearing on March 27, 2020.

During the March 27, 2020 hearing, Jones' mother testified about her knowledge of sickle beta thalassemia, a condition with which Jones was diagnosed shortly after birth. Jones' mother testified Jones' immune system is compromised by the disease. She stated Jones has received medication "his whole life" to treat the condition, and he had been hospitalized frequently because of the condition. Further, Jones' mother testified he could reside with her in her Detroit² apartment and she would accept responsibilities to act as his third-party custodian if Jones were released.

At the March 27, 2020 hearing, the court received in evidence a recording of a March 8, 2020 phone call between Jones and his mother. (Doc. 259-1). The call includes discussion between Jones and his mother about evidence against him and about his mother's conversation with a witness who testified before the grand jury. The conversation suggested Jones' mother made attempts to discern whether co-defendants or others had given statements implicating Jones. The court took the matter under advisement at the conclusion of the March 27, 2020 hearing.

Shortly after conclusion of the March 27, 2020 hearing, Jones filed a "Motion to Suspend Decision on Release Motion," asking that he be allowed to present phone testimony of a physician who had previously treated Jones' sickle cell disease. (Doc. 239). The United States opposed that request and, with its opposition, filed a recording of another call between Jones and his mother. (Doc. 242-1). During that call, Jones' mother talked about difficulty she expected in obtaining her landlord's approval for

² In this order, the court uses "Detroit" to refer to both the city and the surrounding metropolitan area.

Jones to live with her and the difficulty she would have if the pretrial services officer asked about her landlord's approval. During a March 31, 2020 status conference, the court advised the parties Jones' mother would not be considered an appropriate third-party custodian. (Doc. 246). Jones then advised the court there was no need to arrange for the physician's telephone testimony unless he was able to propose an alternate release plan. A March 31, 2020 order denied Jones' motion for reconsideration of the order for pretrial detention. (Doc. 248).

On April 8, 2020, Jones filed a second motion for reconsideration, this time proposing to live with an aunt in Detroit who had agreed to act as his third-party custodian. (Doc. 255). In that motion, Jones asked that Dr. Wanda Whitten-Shurney be allowed to testify by phone about Jones' sickle beta thalassemia. The court granted the request to receive Dr. Whitten-Shurney's testimony via phone and scheduled an April 15, 2020 hearing.

In anticipation of the April 15, 2020 hearing, the pretrial services officer prepared an updated detention/release report. (Doc. 258). The pretrial services officer spoke with Jones' aunt, who stated her willingness to act as Jones' third-party custodian and to have him live with her in the home she owns in Detroit. The aunt's husband is the father of a man who is a defendant in a case related to this case. Jones' aunt would not be able to drive Jones to North Dakota for court appearances but assured the pretrial services officer she could find someone who would do so. The aunt has a relatively minor criminal record. If Jones were to be released to live with his aunt in Detroit, pretrial supervision would be quite limited because of the severity of the COVID-19 outbreak in that area.

The pretrial services officer contacted Liddell again prior to the April 15, 2020 hearing. Liddell told the pretrial servicer she remains willing to act as third-party custodian and to have Jones reside in her home in Bottineau. Liddell is employed at a local hospital. She is currently on unsupervised probation for a conviction resulting from an altercation with a woman who is also charged in this case, but who has not yet appeared. If Jones were to be released to live with Liddell, pretrial supervision would be less limited than it would be in Detroit but would still be somewhat limited because of the COVID-19 pandemic.

The pretrial services officer recommended continued detention but is of the opinion that if Jones were to be released, release to reside with Liddell would be preferable to release to reside in Detroit with either his aunt or his mother.

Medical Evidence

At the April 15, 2020 hearing, Jones presented phone testimony of Dr. Whitten-Shurney, who provided medical care to Jones from infancy through approximately age nineteen. She is a pediatrician whose thirty-two-year career has focused on sickle cell disease. She is a member of a National Health Institute advisory committee on sickle cell diseases. She is president and medical director of the Michigan chapter of the Sickle Cell Disease Association of America. Dr. Whitten-Shurney testified she has cared for approximately 1200 children with sickle cell disease, typically caring for them from shortly after birth until they reach age nineteen.

Dr. Whitten-Shurney explained sickle cell disease as blocking blood vessels, which impedes oxygen flow to the body's organs. She described unpredictable pain as the hallmark of the disease. According to Dr. Whitten-Shurney, sickle beta thalassemia, the

disease with which Jones has been diagnosed, is treated in the same way as are other sickle cell diseases.

Because sickle cell disease affects function of the spleen, the disease causes immunocompromise. Dr. Whitten-Shurney testified that because of immune system compromise, individuals with sickle cell disease are more likely to get infections and, if they contract infections, to have more serious complications than those who do not have sickle cell disease. She testified individuals with sickle cell disease are particularly susceptible to pneumonia or acute chest syndrome. Dr. Whitten-Shurney testified infection is the leading cause of death of persons with sickle cell disease.

Dr. Whitten-Shurney testified about the impact of COVID-19 on persons who have sickle cell disease and testified they are at higher risk than the general population to contract the disease, though she was unable to quantify the increased risk. Acknowledging data is incomplete, she described a national registry of forty-eight persons with sickle cell disease who have been diagnosed with COVID-19 and testified eight of the forty-eight have died from COVID-19. She testified persons with sickle cell disease who have contracted COVID-19 more frequently need ventilator care because of their susceptibility to acute chest syndrome.

According to Dr. Whitten-Shurney, Jones is immunocompromised because of his sickle cell disease. Jones is now age thirty-two, and Dr. Whitten-Shurney has not treated him since he was age nineteen. Nor had she reviewed his medical records prior to her testimony. She was not familiar with medical treatment Jones has received for sickle cell disease or any other condition since he reached age nineteen. But she testified that she remembered him because he was hospitalized “a lot” and because she knew his mother from her work at the hospital where Dr. Whitten-Shurney practiced.

The only evidence about Jones' current medical treatment is his self-reported prescribed pain management, (Doc. 194, p. 2), and his statement at the initial appearance that he had recently required emergency room treatment. Dr. Whitten-Shurney testified that, if he has not received routine medical care recently, he might be at higher risk of COVID-19 contraction and its complications.

Though not familiar with precautions taken at the correctional facility where Jones is detained, Dr. Whitten-Shurney testified Jones is more likely to contract COVID-19 in a correctional facility because of difficulty maintaining safe distancing from others and because of the need for availability of frequent hand-washing. She was not aware that Jones and those who transported him to the courthouse for the April 15, 2020 hearing were wearing face masks. She was aware one person detained at the same correctional facility has been diagnosed with COVID-19 but was not familiar with the facility's COVID-19 mitigation plan.

Dr. Whitten-Shurney testified that, in her opinion, Jones would be safer from risk of COVID-19 disease at his aunt's home in Detroit than in a correctional facility. Further, she gave her opinion that he would be safer from the risk at a home in North Dakota than at his aunt's home in Detroit because of the lower incidence of the disease in North Dakota than in the Detroit area. She testified that, if he were released to either home, he should leave the home only for necessary hospital visits.

Applicable Law

Other courts around the country have addressed similar motions in light of the COVID-9 pandemic. The court has reviewed a number of those decisions and finds United States v. Clark, No. 19-40068-01-HLT, 2020 WL 1446895 (D. Kan. Mar. 25, 2020), particularly instructive. There, the court addressed a motion for temporary

release from pretrial detention under 18 U.S.C. § 3142(i). Section 3142(i) allows temporary release from pretrial detention if necessary for preparation of a person's defense or "for another compelling reason." One seeking release pursuant to § 3142(i) bears the burden to show a compelling reason for release. United States v. Lunnie, No. 4:19-cr-00180 KGB, 2020 WL 1644495, at *1 (E.D. Ark. Apr. 2, 2020); United States v. Buswell, No. 11-CR-198-01, 2013 WL 210899, at *5 (W.D. La. Jan. 18, 2013); United States v. Birbragher, No. 07-CR-1023-LRR, 2008 WL 2246913, at *1-2 (N.D. Iowa May 29, 2008).

Clark argued his pretrial detention posed a lethal threat to him because of his diabetes and because it did not afford him an opportunity for social distancing. In analyzing his motion, the magistrate judge considered four factors: (1) the original grounds for detention, (2) the specificity of the stated COVID-19 concerns, (3) the extent to which the proposed release plan was tailored to mitigate or exacerbate COVID-19 risks to the defendant, and (4) the likelihood the defendant's proposed release would increase COVID-19 risks to others. Clark, 2020 WL 1446895, at *5. The magistrate judge stated the four factors were not necessarily weighed equally and were considered as a whole in determining whether existence of a compelling reason made temporary release necessary.

Application of Clark Factors

The court then considers all of the evidence in light of the factors outlined in Clark.

1. Original Grounds for Detention

The original grounds for Jones' detention weigh against release. The nature of the charges against him give rise to a presumption of detention under 18 U.S.C. § 3142(e).

Though his criminal history is minimal, he has no employment ties to this district and reports he has received disability benefits since childhood because of his sickle cell disease. He reports having lived in North Dakota for one and a half years and his residence as in Bottineau with Liddell.

The United States has introduced and proffered significant evidence supporting the charges against him. At the various hearings, the United States presented evidence of (1) a Facebook photograph showing Jones holding a firearm, (2) cooperating witnesses stating Jones “always carries” and uses firearms to threaten others, (3) a Facebook photograph showing Jones holding a sizeable stack of what appears to be United States currency, and (4) statements linking Jones to 10,000 opiate pills. Although Jones did not initially acknowledge the Facebook photos were authentic, the United States later introduced a recorded call of March 31, 2020, during which he described the photos as coming from his Facebook page.

As to Liddell’s suitability as a third-party custodian, the United States proffers her statement to an Assistant United States Attorney that she did not intend to continue in a relationship with Jones and that she understood Jones traveled back and forth between North Dakota and Detroit because he was engaged in a business with his father in Detroit. The United States argued Jones was in North Dakota only to engage in criminal activity. Subsequent to the initial detention decision, defense counsel had an opportunity to review discovery materials and asserts Liddell has been thoroughly investigated but, since she has not been indicted, the United States must not have sufficient evidence to do so. Jones argues he has not been indicted on firearms charges, as have others charged in the case, but the United States counters that it plans to seek a superseding indictment.

Additionally, the United States argues Jones made misrepresentation to the pretrial services officer in advancing his mother as third-party custodian though he knew she would have difficulty getting her landlord's approval for him to live with her. And the United States asserts statements Jones has made on recorded phone calls demonstrate his lack of respect for authority.

2. Specificity of Risk

Though Dr. Whitten-Shurney has had no contact with Jones for about thirteen years, there is no question she is an expert in sickle cell disease or that it is a lifelong condition. There is no reason to discount her testimony because she has not treated Jones recently. There is no medical evidence contradicting Dr. Whitten-Shurney's testimony.

The United States contends the risk to Jones is speculative, especially in light of precautions in place at the correctional facility, and in light of the only positive case at the facility having been identified during the intake process. Additionally, the United States points to a recorded call during which Jones stated he had received good medical care locally and things were "going great."

Considering Dr. Whitten-Shurney's testimony, this factor weighs in favor of temporary release.

3. Mitigation and Exacerbation

Jones' proposed release plan would, of course, remove him from the close conditions of a correctional facility where one inmate has tested positive for COVID-19. The United States argues the correctional facility's mitigation plan has been effective since the only person who has tested positive for the virus was identified during the intake process and was not exposed to the general population of the facility. But

correctional officers are not isolated from the public when they are not working and thus are at some risk of exposure. If exposed to the virus outside the facility, there is some risk of correctional officers transmitting the virus within the correctional facility. As other courts have recognized, “[T]he 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. McClean, No. 1:19-cr-380, Doc. 21, p. 4 (D.D.C. Mar. 28, 2020).

Jones proposes home confinement as a condition of release, and the court could order location monitoring to insure he would abide by that condition. According to the North Dakota Department of Health, no persons residing in Bottineau County, which includes the city of Bottineau, have tested positive for COVID-19 as of this date. Liddell’s employment involves work at a health care facility, and health care workers are viewed as being at risk of exposure. But, because he would be exposed to many fewer people if residing with Liddell, it appears Jones’ plan would mitigate his risk of exposure to the virus causing COVID-19. And, as other courts have stated, someone at high risk if infected with the virus causing COVID-19 has compelling reason to stay at home, an incentive compounded by knowledge that violating conditions of release will result in return to a correctional facility. Id. at 5. The third Clark factor weighs in favor of temporary release.

As to the fourth Clark factor, if Jones were released, pretrial services officers would have periodic contact with him. And, if he were to contract and carry the virus, the officers would be put at an increased risk because of his release. But likelihood of Jones’ proposed release plan increasing risk of others being exposed to COVID-19 appears low.

Jones argues his situation is “almost identical” to that presented in McClellan and United States v. Chandler, No. 1:19-cr-867, 2020 WL 1528120 (S.D.N.Y. Mar. 31, 2020), where courts allowed release because of pandemic-related concerns. Procedurally, McClellan is more similar than Chandler because the defendant in McClellan was subject to the presumption of detention under 18 U.S.C. § 3142(e) and raised concerns about his medical conditions. The district judge had previously ordered McClellan detained because of “the seriousness of the charges against him, his history, and his failure to abide by the court-ordered terms of his release.” McClellan, No. 1:19-cr-380, Doc. 21, p. 5. But, because of McClellan’s diabetes, sleep apnea, and age (fifty-five), the court concluded the calculus had changed and ordered him released under the district’s high intensity supervision program. The court relied, at least in part, on medical evidence of the 9.2% mortality rate for persons with diabetes who contract the COVID-19 virus.³ Id. at 3 (citing Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), at 12 (Feb. 28, 2020), World Health Organization, [https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)), (follow “Download (2.8 MB)” hyperlink)).

Considering all of the evidence before it, this court concludes Jones has met the burden to show a compelling reason for his temporary release from pretrial detention. He will therefore be temporarily released, under conditions outlined below.

1. Jones must report to the designated Pretrial Services Officer at such times and in such a manner as designated by the Officer.

³ Though McClellan had not appeared for a video conference hearing on the motion for release as he had been rushed to the correctional facility’s medical unit because of an acute diabetic attack, the court later learned his condition had been stabilized without hospitalization.

2. Jones shall reside at 122 Ohmar Street, Bottineau, North Dakota, and shall not change his residence without prior approval from the Pretrial Services Officer.
3. Jones' plan for travel from the correctional facility to Bottineau must be approved in advance by the Pretrial Services Officer.
4. Within ten days of release, Jones must obtain a cellular telephone as directed by the Pretrial Services Officer, to allow visual communication with the Officer. Jones' cellular telephone will be subject to search by the Officer, to insure he has no communications with anyone with whom contact is prohibited.
5. Jones is placed in the third-party custody of Faith Liddell who agrees (1) to supervise Jones in accordance with all conditions of release, (2) to use every effort to assure Jones' appearance at all scheduled court proceedings, and (3) to notify the Pretrial Services Officer immediately in the event Jones violates any conditions of release or disappears.
6. Jones shall participate in a home confinement program using GPS monitoring and shall abide by requirements for use of that technology, including regular charging of the monitoring device. Jones shall pay all or part of the location monitoring program as directed by the Pretrial Services Officer.
7. GPS location monitoring shall be utilized to restrict Jones to the Liddell residence at all times except to seek emergency medical treatment for himself, unless specifically approved in advance by the Pretrial Services Officer (Home Confinement).

8. Jones may not travel outside Bottineau, North Dakota, without prior approval from the Pretrial Services Officer except to seek emergency medical treatment for himself.
9. Jones shall have no contact with any codefendants or witnesses, with the exception of Liddell, except that Jones' counsel, or counsel's agent or authorized representative, may have such contact with such person(s) as is necessary in the furtherance of Jones' legal defense.
10. Jones shall refrain from any use of alcohol; any use or possession of a narcotic drug and other controlled substances defined 21 U.S.C. § 802 or state statute, unless prescribed by a licensed medical practitioner; and any use of inhalants. Jones shall submit to drug/alcohol screening at the direction of the Pretrial Services Officer to verify compliance. Failure or refusal to submit to testing or tampering with the collection process or specimen may be considered the same as a positive test result.
11. Jones shall undergo a mental health and/or substance abuse evaluation if required by the Pretrial Services Officer and comply with resulting counseling or treatment recommendations.
12. Jones must sign authorizations to allow the Pretrial Services Officer to obtain copies of his medical records.
13. Jones must immediately report any symptoms associated with COVID-19 to the Pretrial Services Officer.
14. Jones shall not apply for or take any steps to obtain a passport.
15. Jones shall not possess a firearm, destructive device, or other dangerous weapon.

The court will review this order in 30 days. Any violation of the conditions described above will result in Jones' immediate arrest. For the reasons discussed above, Jones' motion for reconsideration is **GRANTED**.

Request for Unsealing Document

At the request of the United States, the court allowed sealing of the United States' response to Jones' first motion for reconsideration of the detention decision. (Doc. 234). Jones asks that portions of the document be unsealed, citing other attorneys' interest in the document. (Doc. 255, p. 6).

The public has a well-established right of access to court records. See, e.g., Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). Whether to seal a document is left to the sound discretion of the court. See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990). The court must consider less restrictive alternatives and must explain any decision to seal documents. See In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 574 (8th Cir. 1988); In re Sealed Documents, Standing Order (D.N.D. Sept. 18, 2019).

The Eighth Circuit has stated that "only the most compelling reasons can justify non-disclosure of judicial records." In re Neal, 461 F.3d 1048, 1053 (8th Cir. 2006) (internal quotation marks omitted). "[E]ven where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason." Shane Group, Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) (citing Press-Enter. Co. v. Super. Ct. of Cal., 464 U.S. 501, 509-11 (1984)). Therefore, the party seeking sealing must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." Baxter, 297 F.3d at 548.

The court has reviewed the document in question and is confident portions of it can be redacted to sufficiently allay the concerns underlying the motion to seal. The United States is therefore directed to file a redacted version of its response to Jones' motion within three business days. Exhibit 1 to the response shall remain under seal. Exhibits 2 and 3 are public documents and should not have been filed under seal. The United States is therefore directed to publicly file Exhibits 2 and 3 with its redacted version of its response to Jones' motion. Jones' request to unseal is **GRANTED**.

Discovery

Jones agreed to entry of a stipulated discovery order and protective order. (Doc. 193). Under terms of that order, Jones' counsel may not allow Jones to retain any discovery material. In his motion, Jones asked that the discovery order be "changed from stipulation to standard" so that he could review discovery materials from his aunt's home in Michigan. (Doc. 255, p. 8). Though Jones did not pursue that request in seeking release to reside with Liddell, the court could not make the changes Jones initially requested. Nineteen other individuals are charged in this case, and each of those who has appeared has agreed to the stipulated discovery process. Jones' request for a change in the discovery order is **DENIED**.

IT IS SO ORDERED.

Dated this 21st day of April, 2020.

/s/ Alice R. Senechal

Alice R. Senechal
United States Magistrate Judge