

1 community would in fact be safer if he were released. The Court should therefore order
2 that release.

3 **II. The Government’s response ignores both critical data in dismissing Mr.**
4 **McPherson’s likelihood of contracting COVID-19 at the FDC. It also ignores**
5 **the danger that such a contraction would impose on other individuals who live**
6 **or work at the FDC – individuals who may be particularly vulnerable to being**
7 **killed by the virus – as well as the danger that increased rates of infection**
8 **would present to the community as a whole.**

9 Mr. McPherson moved to reopen his bond hearing on March 19, 2020 (dkt. 28).
10 When responding to that motion on March 25, 2020, the Government contended that
11 there was nothing to worry about because there were “only six known cases of COVID-
12 19 among inmates at any facility operated by the Bureau of Prisons[.]”¹ The Government
13 then declared that Mr. McPherson presented only speculative concerns.² But since Mr.
14 McPherson filed his initial motion, the rate of increase in positive tests within the BOP –
15 both for inmates and staff – has skyrocketed at a rate far greater than the nation at large.
16 The below chart shows a steady climb in BOP-related infections from March 20, 2020 to
17 April 6, 2020, with an astounding overall increase of 12,850 percent since Mr.
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¹ Government’s Response before Magistrate Court at 6 (dkt. 33).

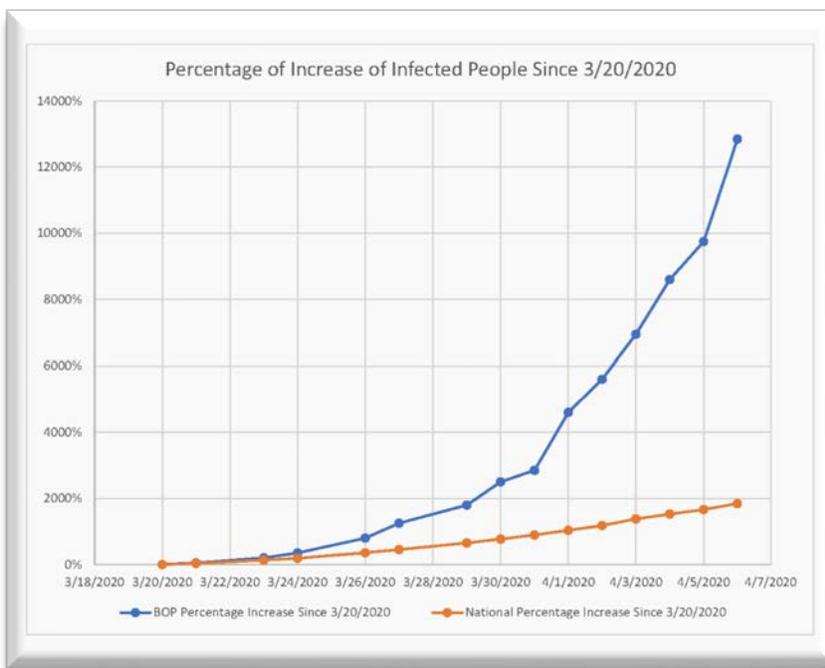
² *Id.* (“The risk of such an outbreak is speculative at the moment.”)

1 McPherson filed his motion. The BOP's rate of infectious increase is nearly seven times
 2 greater than the nation's as whole, which clocks in at about 11,000 percentage points less:

3 Percentage of Increase of Infected BOP People (Inmates and Staff)
 4 Since 3/20/2020

5 Date	6 Number of BOP Cases	7 BOP Percentage Increase Since 3/20/2020	8 National Percentage Increase Since 3/20/2020	9 Number of U.S. Cases
3/20/2020	2	0%	0%	18,747
3/21/2020	3	50%	31%	24,583
3/23/2020	6	200%	135%	44,183
3/24/2020	9	350%	190%	54,453
3/26/2020	18	800%	355%	85,356
3/27/2020	27	1250%	451%	103321
3/29/2020	38	1800%	651%	140904
3/30/2020	52	2500%	772%	163539
3/31/2020	59	2850%	892%	186101
4/1/2020	94	4600%	1036%	213144
4/2/2020	114	5600%	1176%	239279
4/3/2020	141	6950%	1379%	277205
4/4/2020	174	8600%	1526%	304826
4/5/2020	197	9750%	1665%	330891
4/6/2020	259	12850%	1845%	364723

15 The same figures are presented graphically below:



1 BOP's own data therefore supports Mr. McPherson's argument that he – and the
2 community as a whole – would be safer if he were released, in so far as he is far more
3 likely to become infected by the virus if he remains inside the walls of the FDC.³ The
4 Government does not acknowledge the disparate increase in infection rates shown above.
5 Instead, it dismisses the now eight (and counting)⁴ BOP inmate deaths as having no
6 bearing on Mr. McPherson's release question since none of them took place at the FDC.⁵

7 But this is faulty logic, since the FDC applies the same facially invalid screening
8 protocols that the BOP institutions responsible for eight inmate deaths – FCI Elkton (3
9 deaths) and FCI Oakdale (1 death when Mr. McPherson filed his Emergency Appeal less
10 than one week ago; now 5 deaths) are applying. The BOP's screening mechanisms are
11 insufficient for a number of reasons. Foremost among them is that the BOP does not test
12 employees for the virus, but only prohibit an employee's entry into the facility when that
13 employee is symptomatic. The major problem with this is that individuals can be
14 asymptomatic yet highly contagious. Dkt. 37 at 2 n.4; *id.* at 27 n. 41. As if this gaping
15 hole were not large enough, the protocols are so loosely written that they allowed a
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17 ³ The data underlying this chart and graph, are fully explained in the attached Exhibit V.
18 Continuing updates can be found here: <https://federaldefendersny.org/>; accord Prof. Douglas A.
19 Berman, “*Latest BOP data has another big spike in COVID cases, and ugly press reports and*
20 *lawsuits [are] not part of the story,*” Sentencing Law and Policy Blog (April 6, 2020)
(https://sentencing.typepad.com/sentencing_law_and_policy/2020/04/latest-bop-data-has-another-big-spike-in-covid-cases-and-ugly-press-reports-and-lawsuits-now-part-of.html).

21 ⁴ When Mr. McPherson filed his original motion to reopen his detention hearing almost three
22 weeks ago, there were no BOP inmate deaths. Dkt. 28 (filed March 19, 2020). When he filed his
23 Emergency Appeal six days ago, there was one such death. Dkt. 37 at 4. As noted, there are now
24 eight deaths in two different institutions.

25 ⁵ Despite these disparate rates of infections, the Government repeats verbatim its mere claim of
26 “speculation” that it is applicable when no deaths had occurred. *Compare* Opposition to
Emergency Appeal at 89 (“The risk of such an outbreak is speculative at the moment.”) (dkt. 40,
file April 6, 2020) *with* Government's Response before Magistrate Court at 6 (“The risk of such
an outbreak is speculative at the moment.”) (dkt. 33, filed March 26, 2020).

1 warden – contrary to CDC recommendations – to order an employee back to work after
2 that employee was known to have been exposed to the virus.⁶

3 Relying on a set of arguments identical to those that the Government advances
4 here, the Government incorrectly assured another court that it need not be concerned
5 about the virus spreading through FCC Butner because the BOP’s robust protocols would
6 prevent such an occurrence. At a time when that facility had then nine inmates infected,
7 the Government carefully detailed all the same steps the Government has listed here
8 regarding BOP’s “aggressive” steps to curb the disease. *See* Gov’t Opposition, *United*
9 *States v. Rumley*, 08-cr-00005-JLK-JCH, dkt. 185 at 4 and 4-8 (W.D.Va., April 3, 2020).⁷
10 Three days later, there were 59 confirmed cases; the virus is now surging through that
11 institution.⁸

12 By the Government’s reasoning, a fear of an outbreak is speculative until a number
13 of people are infected. Even then, the Government believes that such events would be
14 irrelevant as far as Mr. McPherson’s release question is concerned. The Government’s
15 position is that since Mr. McPherson is neither elderly nor has a known underlying
16 medical condition that would render him especially vulnerable, the impact of the virus
17 upon him is likely to be minimal.⁹ Additionally, noting that most people are not killed by

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19 ⁶ Joseph Neff and Keri Blakenger, “Federal Prisons Agency ‘Put Staff in Harm’s Way’ of
20 *Coronavirus*,” The Marshall Project (April 3, 2020) (attached as Exhibit W).
21 ([https://www.themarshallproject.org/2020/04/03/federal-prisons-agency-put-staff-in-harm-s-
22 way-of-coronavirus](https://www.themarshallproject.org/2020/04/03/federal-prisons-agency-put-staff-in-harm-s-way-of-coronavirus)).

23 ⁷ Attached as Exhibit X.

24 ⁸ Dan Kane and Ashad Hajela, “*Coronavirus cases Surge at Butner prison complex in NC, county*
25 *official reports*,” The News and Observer (April 6, 2020) (“Public Health Director Lisa Macon
26 Harrison said 59 people have tested positive at the complex, nearly five times what the federal
Bureau of Prisons reported over the weekend”)
(<https://www.newsobserver.com/news/coronavirus/article241801076.html>).

⁹ Opposition to Emergency Appeal. at 9 (“Defendant McPherson, by comparison, is well under
40 years old and apparently in good health.”) (dkt. 40).

1 the virus, the Government invites the Court to disregard all consideration of the
2 pandemic.¹⁰

3 This argument fails to account for the increased rate at which the virus will spread
4 to especially vulnerably individuals if the detainee population is not winnowed by
5 removing individuals, such as Mr. McPherson, who can be safely released under the
6 BRA. And if the rate of infection is allowed to explode within the FDC because we fail
7 to significantly reduce that detainee population, it is inevitable that those infected from
8 within the institution (be they inmates, staff, or contractors) will bring this increased rate
9 of infection back into the general community. The communities surrounding FCI
10 Oakdale, FCI Elkton, and FCC Butner are experiencing this outcome now.

11 Despite making this ripple-effect argument repeatedly over the course of the last
12 three weeks,¹¹ the Government continues to misstate Mr. McPherson’s position,
13 incorrectly claiming that he “focuses his motion solely on the health risks he and other
14 incarcerated individuals face form a potential COVID-19 outbreak.”¹² On the same day
15 that the Government filed its response, however, Attorney General Barr finally
16 recognized that it is in fact important to limit the size of the detainee population if we are
17 going to limit the damage that the virus visits upon both inmates and staff.¹³

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19 ¹⁰ *Id.* at 8-9 (dkt. 40).

20 ¹¹ Defendant’s Emergency Appeal at 18, 29-30 (dkt. 37). That the Government misstated Mr.
21 McPherson’s position in its response before the Magistrate Court was also fully explained in his
22 reply brief before that court. *See* dkt. 34 at 2, 13-14, 19.

23 ¹² Opposition at 7 (dkt. 40).

24 ¹³ Memo of Attorney General William Barr (“you should now consider the medical risks
25 associated with individuals being remanded into federal custody during the COVID-19
26 pandemic. Even with the extensive precautions we are currently taking, each time a new person
is added to a jail, it presents at least some risk to the personnel who operate that facility and to
the people incarcerated therein.”) (April 6, 2020) (attached as Exhibit Y).

1 The Government's disregard of any risk that the virus might visit upon Mr.
2 McPherson personally is contradicted by how the disease has impacted others. As
3 provided in earlier briefing, a brutal testimonial from a healthy 45 year-old man – who
4 once thought the way the Government does – illustrates this point well. Dkt. 37 at 23-24;
5 dkt. 37-6. Sadly, a high profile case can also be provided: the Prime Minister of England
6 – who just weeks ago took the same lax approach to the virus that the Government
7 advances in its response – is now in intensive care even though he “is thought not to have
8 any preexisting medical conditions” that would have rendered him particularly
9 vulnerable. According to news reports, Boris Johnson's condition is so serious that his
10 second-in-command hasn't even spoken to him for days.¹⁴

11 Finally, the Government's argument that the BOP is up to the task of providing
12 medical care to Mr. McPherson, should he become infected, is belied not only by BOP's
13 generally poor track record in providing decent medical care,¹⁵ but specifically by the
14 fact that the Governor of Ohio had to call in the National Guard to provide for the medical
15 care that BOP was unable to provide.¹⁶

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19 ¹⁴ Stephen Castle and Mark Landler, “*Boris Johnson Moved to Intensive Care; Foreign Minister*
20 *Deputized*,” The New York Times (April 7, 2017)
21 (<https://www.nytimes.com/2020/04/06/world/europe/boris-johnson-coronavirus-hospital-intensive-care.html>) (attached as Exhibit Z).

22 ¹⁵ According to the DOJ's own studies, the BOP fails to provide quality medical care even in the
23 best of times. Dkt. 37 at 28, nn. 44 and 45 and accompanying text.

24 ¹⁶ Shane Hoover, “*Coronavirus: DeWine sending National Guard to Elkton federal prison east*
25 *of Canton after 3 deaths*,” CantonRep.com (April 6, 2020)
26 (<https://www.cantonrep.com/news/20200406/coronavirus-dewine-sending-national-guard-to-elkton-federal-prison-east-of-canton-after-3-deaths>) (attached as Exhibit AA). This fact fairly
compellingly contradicts the Government's claim that “there is no evidence that the facility's
staff is unprepared to address such cases if they should arise.”

1 **III. The Government’s response fails to provide any argument that could support**
2 **its burden of proving an unmanageable danger to the community by clear and**
3 **convincing evidence.**

4 The Government agrees that it bears the burden to prove an unmanageable risk of
5 danger by clear and convincing evidence.¹⁷ This is a heavy burden, and the Government
6 doesn’t come close to meeting it.¹⁸ The Government fails to provide any evidence of
7 actual danger and ignores the case law which declares that the mere nature of current
8 charges cannot suffice, since guns and drugs frequently go “hand in hand.”¹⁹

9 To its credit, the Government does not argue that the pending charges alone *could*
10 *suffice*, but nevertheless maintains that because Mr. McPherson “would surround himself
11 and live with other felons/addicts who were also armed, also raises its own questions
12 about Mr. McPherson’s judgment and reliability regarding dangerousness and following
13 the law.”²⁰ There are many problems with this statement.

14 First, the Government again forgets that Mr. McPherson is not a convicted felon,
15 although it incorrectly argued that he was at the time of his initial hearing. This is one of
16 the bases for reopening the detention hearing that the Government has steadfastly ignored
17 when wrongly asserting that Mr. McPherson has not challenged the factual bases
18 underlying the original detention order.²¹ Second, whatever the precise contours of a

18 ¹⁷ Opposition at 4 (dkt. 40).

19 ¹⁸ See Emergency Appeal Br., Sections V.C and V.D (dkt. 37 at 14-33).

20 ¹⁹ See, e.g., *United States v. Ridinger*, 623 F. Supp. 1386, 1392-93 (W.D. Mo. 1985), quoted at
21 length at dkt. 14-15 but left unremarked upon by the Government, both before the Magistrate
22 Court and here. See Government’s responses 33 and 40 (*passim*). And it should be noted that
23 individuals who have been released in the district over the Government’s objection and with
24 similar charges and histories as Mr. McPherson have done well on pretrial supervision. See, e.g.,
25 *United States v. Esparza*, CR18-5077, dkts. 5, 9-10, 17.

24 ²⁰ Opposition at 5 dkt 40).

25 ²¹ Compare Emergency Appeal Br. at n. 16 (dkt. 37, noting that the Magistrate Court
26 misconstrued a juvenile adjudication as an adult criminal conviction to reach its incorrect finding
of danger, and further noting that the Government misinformed the Court – as memorialized in

1 “raising its own questions” evidentiary standard might be, it must lie in the far distance
2 from proof by clear and convincing evidence, which is a quantum of evidence so large
3 that it obligates the Court to have an “abiding conviction” that it is “highly probable” that
4 Mr. McPherson actually presents a danger. *See* Emergency Appeal Br. at 14 (citing *OTR*
5 *Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1020 (9th Cir. 2018)).
6 There is no evidence of actual danger in this case, as fully explained in Section V.C of
7 dkt. 37. And if there were no questions about a defendant’s “judgment and reliability”
8 concerning “following the law” there wouldn’t be federal case at all, meaning the
9 Government’s argument would apply to every federal defendant. The Government’s
10 argument thus proves too much.

11 Since it has no evidence to suggest that Mr. McPherson presents any threat of
12 violence in and of himself, the Government creatively argues that the pandemic itself
13 presents the requisite danger, contending it would be unfair to ask a probation officer to
14 risk exposure to the virus when hooking up location monitoring tools.²² Mr. McPherson’s
15 has already exposed the illogical nature of this argument. *See* dkt. 37 at 16-17.

16 Regardless of the points previously raised, any lingering concerns about the
17 validity of this argument can be dismissed because the USPO has contracted with a
18 phone-based monitoring service called SmartLink that does not require a probation
19 officer to be in close physical proximity with the supervisee to connect the service. The
20 service has already been approved for one of the Federal Public Defender’s clients.

21
22 the Complaint – that Mr. McPherson was a convicted felon); *see also id.* at 9 and nn. 4, 7-8, 15-
23 17, 19-20 (detailing multiple factual errors or changed circumstances that justify reopening the
24 detention hearing); dkt. 28 at 19-20 (noting changes in the weight of the evidence as well) *with*
25 Government’s Opposition at 2 (falsely claiming that “Defendant does not challenge the Court’s
26 factual findings underlying his original detention order) and *id.* at 13 (wrongly concluding that
Mr. McPherson has “not shown a material change that can be considered a real change of
circumstance...”).

²² Opposition at 6.

1 Attached as Exhibit BB are materials describing this service that show it is appropriate
2 for Mr. McPherson.

3 Other than what is outlined above, Mr. McPherson fully anticipated all of the
4 Government's arguments regarding alleged dangerousness in Sections V.C. and V.D. of
5 dkt. 37. No further reply is therefore necessary.

6 **IV. The Government failed to meet its burden in proving an unmanageable risk of**
7 **non-appearance under the BRA.**

8 The Government's response does not identify any risk factor suggesting non-
9 appearance other than its belief that a defendant's fear of being forced back into a
10 detention facility where social distancing is impossible might currently lead someone to
11 flee.²³ Mr. McPherson agrees with the Government that the impossibility of practicing
12 social distancing within the FDC's "could increase infection rates, leading to severe
13 illness and death."²⁴ The better argument though is that Mr. McPherson's rightful fear of
14 being returned to the FDC would motivate him to abide by any and all release conditions.
15 Additionally, since the Government failed to analyze the applicability of the SmartLink
16 monitoring system, its argument on risk of non-appearance is both incomplete and
17 unhelpful. That the Government did not prove its burden in showing an unmanageable
18 risk of nonappearance is argued in great detail in Section V.B (dkt. 37 at 13-14; *see also*

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21 ²³ Opposition at 6 (dkt. 20).

22 ²⁴ To be clear, the Government was not citing the BOP's well-documented inability to adhere to
23 mandated social distancing policies when declaring that the failure to adhere to such policies
24 "could increase infection rates, leading to severe illness and death." *See* Opposition at 7. Rather,
25 the Government was speculating as to what might happen if Mr. McPherson unreasonably failed
26 to adhere to such policies if given the chance. The Government's inconsistency here warrants
comment. If the defense cites concerns of "severe illness and death" as favoring release, the
Government labels such arguments as "hysterical ... screams from the rooftop...." *Id.* at 8. In
contrast, noting the potential for "severe illness and death" is apparently within the ken of
sophisticated and well-reasoned debate when deployed as a basis for detention.

1 *id.* at 7 n. 20 and accompanying text). The Government failed to respond to these detailed
2 arguments and in so doing failed to meet its burden.

3 **V. The Government incorrectly asserts that granting Mr. McPherson relief will**
4 **effect release decisions of others.**

5 The Government’s response wrongly suggests that granting Mr. McPherson relief
6 would dictate the release of “every detainee.”²⁵ This is incorrect. While the pandemic
7 certainly tips things heavily in his favor, Mr. McPherson’s release is mandated under the
8 BRA because the Government has utterly failed to meet its burden to prove the requisite
9 facts necessary to detain him pending trial. This is true even without considering the
10 pandemic. But the fact that the pandemic exists renders it urgent that Mr. McPherson be
11 released immediately, so as to best protect those individuals who will remain in custody
12 because they cannot be released under the BRA, along with the staff who are guarding
13 them. Granting Mr. McPherson relief does not speak to the release of other individuals,
14 all of whom are subject to release or detention based on their particular histories. This
15 point was explicitly explained in earlier briefing, when demonstrating a logical error
16 made by the Magistrate Court. Dkt. 37 at 9-10. The Government has made the identical
17 error.

18 **VI. The government failed to respond to the argument that Mr. McPherson is**
19 **entitled to immediate release under 18 U.S.C. § 3142(i)(4) because his**
20 **conditions of confinement prevent him being able to meaningfully prepare**
21 **his case. Release is there appropriate under this provision of the BRA.**

22 As of this writing, detainees are generally secured in their cells all of the time.
23 They are allowed out of them for about five minutes to shower on Monday, Wednesday
24 and Friday. On Tuesday and Thursday, detainees will be afforded 45 minutes to call or
25 email friends, family, and counsel, sharing eight phones and three computers among 24

26 ²⁵ Opposition at 13 (dkt. 40, citing Magistrate Court Order Denying Reopening of Detention
Hearing at 4, dkt. 36).

1 inmates to accomplish such communications.²⁶ The Government’s response outlines how
2 Mr. McPherson is in fact now forced to be in his cell almost all of the time, with counsel
3 being unable to visit him.²⁷ In Section VI of his earlier brief, Mr. McPherson argued that
4 these conditions of confinement improperly restrict his ability to prepare his case. Dkt.
5 37 at 34-35. Notably, the Government has not disputed this contention at all.
6 Accordingly, 18 U.S.C. § 3142(i)(4) provides an independent basis to order Mr.
7 McPherson’s immediate release. Dkt. 37 at 34-35.

8 **VII. Conclusion**

9 Mr. McPherson should be immediately released, as the Government has failed to
10 show an unmanageable risk of danger by clear and convincing evidence as well as an
11 unmanageable risk of non-appearance by a preponderance of the evidence. The on-going
12 pandemic strongly tips the scales in Mr. McPherson’s favor, and release should be
13 ordered to give effect to the Presiding Judge’s general order that rightly encouraged the
14 release of all detainees “who do not pose a current and substantial safety risk to the
15 community or flight risk.”²⁸

16 DATED this 7th day of April 2020.

17 Respectfully submitted,

18 *s/ John R. Carpenter*

19 Assistant Federal Public Defender

20 Attorney for Michael McPherson

21
22 ²⁶ Undersigned counsel represents that these facts accurately describe Mr. McPherson’s current
23 conditions of confinement, based on knowledge, information and belief. The above description
24 was relayed to undersigned counsel by a client who shares the same unit as Mr. McPherson.

25 ²⁷ Opposition at 11-12 (dkt. 40).

26 ²⁸ *In re: Remote Access to Remote Operations Under the Exigent Circumstances Created by
COVID-19 and Related Coronavirus*, General Order No. 03-210 at 5 (WDWA, March 25, 2020)
(dkt.34-2).

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 7, 2020 I electronically filed the foregoing document
3 with the Clerk of the Court using the CM/ECF system, which will send notification of
4 filing to all registered parties.

5 *s/ John R. Carpenter*
6 Assistant Federal Public Defender
7 Attorney for Michael McPherson
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