

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,	)	No. CR19-5213BHS
)	
Plaintiff,	)	SUPPLEMENTAL FILING IN SUPPORT
	)	OF EMERGENCY APPEAL [DKT. 37] OF
v.	)	MAGISTRATE COURT ORDER [DKT.
	)	36] DENYING MOTION TO REOPEN
	)	DETENTION HEARING [DKT. 28]
)	
MICHAEL MCPHERSON,	)	Noted for April 10, 2020, but expedited
	)	review is requested so that the motion may
	)	be heard before that date.
Defendant.	)	Oral argument requested (telephonically)

I. Summary

Mr. McPherson filed his reply brief yesterday. Since that time, additional information has come to light relative the BOP’s underreporting of the pandemic’s impacts within BOP’s facilities. Additionally, a federal district court has explicitly noted the same obvious shortcomings in the BOP’s screening protocols that Mr. McPherson has long-argued. Finally, both his mother (T.M.) and parenting partner (C.E.) sent counsel emails supporting Mr. McPherson’s release. All of this material is provided in this supplemental filing, as it bears on the question of Mr. McPherson’s release.

II. Further information showing that BOP underrepresents that crisis it confronts in its facilities

As reported in yesterday’s Reply (dkt. 41), the rate of the virus’s transmission within the confines of a BOP facility is roughly seven times as great as that of the general

1 community. Dkt. 41 at 3; Exhibit V (dkt. 41-1). And as noted at n. 1 of Exhibit V, the
2 increased transmission rates are likely worse than even that, since media reports have
3 suggested the BOP underreports its infection rates. The BOP itself admitted that this was
4 true in a congressional briefing held April 7, 2020, where it reported that the BOP lists
5 only positive lab tests. But they also have additional “open” cases which they define as
6 “suspected, presumed positive, or clinically confirmed” and that they don’t publicly
7 report. As of the morning of Tuesday, April 7, 2020, the BOP reported at the
8 congressional briefing that:

- 9 · **456 people are in isolation** (which means symptomatic, but not necessarily
10 tested);
- 11 · **3,850 inmates in quarantine**; and
- 12 · **193 residents were quarantined at Residential Reentry Centers** (a figure
13 that may or may not include a recently confirmed infection at the Seattle RRC).

14 None of these numbers are publicly reported on the BOP website, however, which
15 would have a reader believing that only 253 inmates have been infected by the virus.¹

16 **III. At least one federal court found the same “obvious shortcomings” in the BOP
17 of which Mr. McPherson has long complained.**

18 For the last three weeks, Mr. McPherson has maintained that the BOP’s assurance
19 – that its screening mechanisms would prevent infection outbreaks – was scientifically
20 unsound. Throughout this time, the Government has dismissed as speculative any
21 concerns over an outbreak at the FDC because the BOP has not yet reported any
22 confirmed infections.² Mr. McPherson has countered that the lack of such a report lacks
23 any significant meaning since the FDC routinely tests neither employees nor inmates.
24 After Mr. McPherson filed his reply yesterday, a district court in Idaho ruled that it agreed

25 ¹ <https://www.bop.gov/coronavirus/> (accessed at April 8, 2020 1:40 p.m.).

26 ² The Government’s most recent response provides “The risk of such an outbreak is speculative
at the moment. Currently, to the best of the undersigned’s knowledge, there are no known cases
at FDC Seatac.” Dkt. 40 at 8.

1 with both of these points, noting that the BOP’s touted action plan had “obvious
2 shortcomings” and the absence of testing rendered the BOP’s statistics “largely
3 meaningless”:

4 Though the BOP has implemented a COVID-19 Action Plan, which in recent
5 days includes a 14-day in-cell quarantine,⁷ the plan has obvious shortcomings:
6 First, testing inside prisons has been scant except for people who self-report
7 symptoms— which means that statistics about the number of infections already
8 in BOP facilities are largely meaningless. And second, the plan provides no
9 additional protections for high-risk individuals The Court assumes that,
despite the best efforts of BOP officials, the likelihood of contracting the virus
is greater in prison than if a defendant were able to fully self-isolate[] at home.³

....

10 There is a substantial likelihood that, despite BOP’s best efforts, the virus will
11 continue to breach prison walls.⁴

12 **IV. Mr. McPherson has two possible release addresses: with his mother and the**
13 **mother of his daughter. Each has written to the Court in support of his release.**

14 Mr. McPherson can be safely released to either his mother’s (T.M.) residence or
15 that of the mother of his daughter (C.E). Both have written supporting emails, the
16 substance of which are copied in full here, starting with Mr. McPherson’s mother:

17 TO THE HON. BENJAMIN H SETTLE;

18 Thank you for your time to consider my son, Michael Gordon McPherson as
19 a trusted, nonviolent candidate for monitored house arrest. These are
20 unprecedented times affecting each of us. I am more than willing to provide

21 ³ Memorandum Decision, *United States v. Esparza*, 07-cr-00294-BLW, dkt. 124 at 6-7 (D.Idaho,
22 April 7, 2020) (footnotes omitted). Despite making this findings, the Court found that Mr.
23 Esparza was a leader of a substantial drug trafficking organization (with five felony drug
24 trafficking convictions) in which guns played a significant role. *Id.* at 9-10. He also may have
25 lacked a viable release plan, as the Government represented that he had no family support or
26 structure to aid him if released. *Id.* at 3. Mr. McPherson’s case presents facts diametrically
opposed to these, and the *Esparza* court was applying a wholly different legal standard; one that
relates to a convicted felon serving a sentence, as opposed to one who is presumed innocent and
subject to release under the BRA.

⁴ *Id.* at 9.

1 housing and everything required for him to be safe here. We share a very
2 close Mother/son relationship and I guarantee he is willing to follow all
3 necessary requirements. He has two beautiful, 2 year old daughters and a
4 large family unit full of loving support.

5 His daughters are very much in need of their dad right now.

6 As prisons in Louisiana are only beginning to show what devastation
7 COVID19 will undoubtedly cause to all prisons across our nation, I am
8 thankful to you for considering Michael as a trustworthy individual who will
9 be allowed to spend these uncertain times with his loving family. He is truly
10 worth your time.

11 Respectfully,

12 Mrs T [REDACTED] M [REDACTED]

13 Likewise, C.E. asks the Court to consider allowing Mr. McPherson to live with
14 her. In a short email, the USPO remarked that it was worried that C.E.'s home might not
15 be "stable," apparently because C.E. does not currently have full-time employment. Ms.
16 E. has reported to counsel, however, that she has lived in the same residence for roughly
17 four years now without missing a rent payment, further demonstrating that there is no
18 cause for concern here.⁵ Here is her e-mail:

19 My name is C [REDACTED] E [REDACTED], I'm writing this letter on behalf of a Michael
20 Mcpherson. Due to the Corona virus and the danger presented with many people in
21 close proximity. I am seeking his release. In response to this world wide Pandemic all
22 visits have been canceled for a unspecified amount of time. Mr. Mcpherson's has had
23 weekly visits from his 2 year old daughter A [REDACTED], I believe it is a key component to the
24 father daughter bond that they continue to have consistent interaction. Mr.
25 Mcpherson is currently being held for a nonviolent charge. I am willing to go above
26 and beyond to ensure that all Conditions are met for the release of Mr. Mcpherson.
Therefore he will be able to continue To play a vital role in his daughter's life. And
give back to the community In this time of need.

⁵ As noted earlier, vast portions of the world's population would currently be construed as being unstable if a lack of full-time employment compelled such a conclusion. And as noted, a recent inheritance has provided C.E. with financial wherewithal. *See* Emergency Motion at 7 n. 21, 12-13 (dkt. 37).

1 Thank you for your time and consideration in this matter.

2 C [REDACTED] E [REDACTED]
3 (253) [REDACTED]

4 **V. Conclusion.**

5 Mr. McPherson should be immediately released

6 DATED this 8th day of April 2020.

7 Respectfully submitted,

8 *s/ John R. Carpenter*

9 Assistant Federal Public Defender

10 Attorney for Michael McPherson

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

s/ John R. Carpenter
Assistant Federal Public Defender
Attorney for Michael McPherson