

Pretrial Release

And

Detention

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## I. Nature of Right To Be Released Pretrial

*See U.S. v. Salerno*, 481 U.S. 739 (1987); *U.S. v. Edwards*, 430 A.2d 1321 (D.C. 1981); *see Lopez-Valenzuela v. Arpaio*, 2014 WL 5151625 (9<sup>th</sup> Cir. 2014).

## II. Purpose of the Act

A. Primary purpose to de-emphasize use of money bonds and to provide flexible alternatives to judges setting high bail.

B. Act further intended to eliminate practice of detaining dangerous defendants by setting of high bail. 18 U.S.C. § 3142(c)(2).

*U.S. v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985) (*en banc*) (Act prohibits using high financial conditions to detain defendants); *see U.S. v. Badalamenti*, 810 F.2d 17 (2d Cir. 1987); *U.S. v. Holloway*, 781 F.2d 124 (8th Cir. 1986).

C. Thus, the Act (18 U.S.C. § 3142(b)) expressly provides that a defendant shall be released on OR or PR unless;

1. defendant represents a serious flight risk; or
2. defendant presents a danger to the community.

## *Notes*

- Act favors pretrial release; “the court must resolve all doubts regarding the propriety of release in the def.’s favor.” *U.S. v. Sanchez-Martinez*, 2013 WL 3662871 (D.Col. 2013); *U.S. v. Dany*, 2013 WL 4119425 (N.D.Cal. 2013) (pretrial release should be denied “only in rare circumstances”).
  
- Threat of flight must be **serious**. *U.S. v. Wasendorf*, 2012 WL 4052834 (N.D. Iowa 2012)(fact that def.’s assets have been frozen etc. eliminates serious flight risk; fact that def. attempted suicide does not create flight risk); *U.S. v. Jamal*, 285 F.Supp.2d 1221 (D. Ariz. 2003); *see U.S. v. Giordana*, 370 F.Supp.2d 1256 (S.D.Fla. 2005)(serious charges not enough by themselves to justify det. on basis of flight risk – court lists factors justifying finding of flight risk); *U.S. v. Sanchez*, 2011 WL 744666 (C.D. Cal. 2011)(def. knew of pending charges – never fled – not serious flight risk).
  
- Drug use does not mean def. poses flight risk. *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006).
  
- Court cannot detain merely if it determines that OR or PR will not prevent flight or danger to community; it must nonetheless consider other conditions. *Orta*, 760 F.2d at 890; 18 U.S.C. § 3142(a).
  
- Bad legislative history; Congress suggests if court believes monetary amount is necessary to ensure appearance and defendant cannot meet that amount, court may detain defendant. *See U.S. v. Gotay*, 609 F. Supp. 156, 158 (S.D.N.Y. 1985); *U.S. v. Mantecon-Zayas*, 949 F.2d 548 (1st Cir. 1991).

- Some courts have held that a court need not set bail in an amount defendant can easily make and may maintain financial conditions even if it results in detention. *U.S. v. Szott*, 768 F.2d 159 (7th Cir. 1985); *U.S. v. Westbrook*, 780 F.2d 1185 (5th Cir. 1986) (may maintain financial conditions and order detention *only* if no other conditions will assure defendant's presence); *U.S. v. McConnell*, 842 F.2d 105 (5th Cir. 1988). See *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985); *U.S. v. Wong-Alvarez*, 779 F.2d 583 (11th Cir. 1985); *U.S. v. Gotay*, 609 F.Supp. 156 (S.D.N.Y. 1985); *U.S. v. Lemos*, 876 F.Supp. 58 (D.N.J. 1995); *U.S. v. Penaranda*, 2001 WL 125621 (S.D.N.Y. 2001)(can impose fin. conditions, but court orders bond reduction when def. cannot meet original conditions).
- Unclear who must shoulder burden of proving financial conditions cannot be met. *Szott* suggests defendant has burden, although it does not define burden and merely holds that a bare affidavit claiming lack of ability to meet financial conditions insufficient. *U.S. v. Szott*, 768 F.2d 159 (7th Cir. 1985).
- If defendant cannot meet financial conditions and appeals to district court, district court can order detention. *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (*en banc*).
- If property is used to secure bond, government can't require property be unencumbered. *U.S. v. Frazier*, 772 F.2d 1451 (9th Cir. 1985).
- Some courts have expressed concerns about court policies re: property bonds if the policies prevent release. See *U.S. v. Price*, 773 F.2d 1526 (11th Cir. 1985).
- Government can obtain hearing on source of funds. § 3142(g)(4); *U.S. v. Sharma*, 2012 WL 1902919 (E.D. Mich. 2012) (hearing should be ex parte and under seal).
- Def. has limited right to refuse to answer financial questions posed by Pretrial Services. *U.S. v. Rechnitzer*, 2007 WL 676671 (N.D.N.Y. 2007).
- Rule 46 issue; no requirement that PR sureties have resources equivalent to amount of PR bond. *U.S. v. Beckett*, 2011 WL 1642507 (N.D. Cal. 2011); *U.S. v. Thomas*, 2009 WL 1385886 (N.D. Cal. 2009); *U.S. v. Powell*, 2010

WL 2557388 (N.D.Cal. 2010); *U.S. v. Muniz*, 2010 WL 2198198 (N.D.Cal. 2010).

### III. Procedural Aspects of the Act

#### A. Timing of Request for Detention

1. Government must request the defendant's detention at initial appearance. 18 U.S.C. § 3142(f).

*U.S. v. Payden*, 759 F.2d 202 (2d Cir. 1985); *U.S. v. O'Shaughnessy*, 764 F.2d 1035, *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985); *U.S. v. Holloway*, 781 F.2d 124 (8th Cir. 1986); *see U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985). **But see** *U.S. v. King*, 818 F.2d 112 (1st Cir. 1987)(first appearance requirement subject to harmless error standard and is not to be interpreted overly literally); *U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985) (delayed motion construed as motion to revoke release).

2. Court may reopen hearing if newly discovered evidence comes to Court's attention. 18 U.S.C. § 3142(f).

- New evidence, if proffered by Government, must not have been available at first hearing. *U.S. v. Flores*, 856 F.Supp. 1400 (E.D. Cal. 1994); *see U.S. v. Holloway*, 781 F.2d 124 (8th Cir. 1986) (new evidence must be exceptional to justify new detention hearing); *U.S. v. Hare*, 873 F.2d 796 (5th Cir. 1989) (court refuses to reopen hearing to allow family to testify - not new evidence). *Accord U.S. v. Dillion*, 938 F.2d 1412 (1st Cir. 1991).

- Def.'s winning suppression motion may allow court to reopen detention issue. *U.S. v. Hutton*, 2013 WL 3976628 (M.D. Tenn. 2013).

#### *Notes*

- Entire issue of time requirements brought into question by *U.S. v. Montalvo - Murillo*, 495 U.S. 711 (1990).

- If defendant not represented at initial appearance, court may order hearing within five days. *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985).

- District court may order detention hearing at initial appearance of defendant before it even if no request for detention made before magistrate. *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (*en banc*).
- District court may revoke release even without Government request. *U.S. v. Gebro*, 948 F.2d 1118 (9th Cir. 1991).
- If defendant is arrested out of district or initially appears before a magistrate and case is transferred to another magistrate, "initial appearance" is when defendant appears in charging district. *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986); *U.S. v. Valenzuela-Verdigo*, 815 F.2d 1011 (5th Cir. 1987); *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986); *U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985). *But see U.S. v. Cannon*, 2010 WL 1903749 (E.D. Va. 2010); *U.S. v. Patterson*, 2013 WL 5375438 (E.D. La. 2013).
- Defendant entitled to bail hearing in arresting district even if charging district issues no bail warrant. *U.S. v. Savader*, 944 F.Supp.2d 209 (E.D.N.Y. 2013)(crt. addresses uncertainty about issue in the 2d Cir); *U.S. v. Thomas*, 992 F.Supp. 782 (D. Virgin Is. 1998). *U.S. v. Havens*, 487 F.Supp.2d 335 (W.D.N.Y. 2007)(distinguishes *Melendez-Carrion* which says otherwise).

B. Grounds for request. 18 U.S.C. § 3142(f).

1. Government believes person poses a serious flight risk.
2. Government believes defendant will threaten witnesses, etc.
3. Person is *charged with*:
  - a) a crime of "violence," which is defined by 18 U.S.C. § 3156(a)(4) as:
    - (A) an offense that has as an element of the use, attempted use, or threatened use of *physical* force against the person or property of another;

- (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
  - (C) any felony charged under sexual abuse or abuse of children statutes.
- b) any terrorist offense listed in 18 U.S.C. § 2332b(g)(5)(B) with penalty over 10 years
  - c) an offense involving death penalty or life imprisonment;
  - d) a drug offense involving penalty of ten years or more;
  - e) any *felony* after defendant has committed two or more crimes of violence or drug offenses; or
  - f) Any crime which is not a crime of violence that involves a minor victim, possession of a firearm or destructive device, or failure to register as a sex offender.

### *Notes*

- Some issue whether "crime of violence" is to be determined by looking at nature of crime or by facts of commission. *See U.S. v. Hardon*, 6 F.Supp.2d 673 (W.D. Mich. 1998) (categorical); *U.S. v. Epps*, 987 F.Supp. 22 (D.C.C. 1997)(facts); *U.S. v. Carter*, 996 F.Supp. 260 (W.D.N.Y. 1998)(categorical). *U.S. v. Montoya*, 486 F.Supp.2d 996 (D.Ariz. 2007)(false statement not crime of violence, even if crime involved making false bomb threats).
- Conspiracy to commit a violent crime probably qualifies. *U.S. v. Mitchell*, 23 F.3d 1 (1st Cir. 1994).
- To obtain detention, government must charge defendant with crime of violence. *See U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *U.S. v.*

*Carswell*, 144 F.Supp.2d 123 (N.D.N.Y. 2001). **Contra** *U.S. v. Bess*, 678 F.Supp. 929 (D.D.C. 1988). See *U.S. v. Byrd*, 969 F.2d 106 (5th Cir. 1992) (case must involve violence).

- As of 2006, § 922(g)(1) is crime allowing for det. hearing. However, doesn't mean § 922(g)(1) is a crime of violence - can't presume def. who possesses a gun will use it for violent activity. *U.S. v. Bowers*, 432 F.3d 518 (3d Cir. 2005).

- Unless defendant charged with crime (or offense involves circumstance) identified in § 3142(f), detention not available. *U.S. v. Himler*, 797 F.2d 156 (3d Cir. 1986). *U.S. v. Ploof*, 851 F.2d 7 (1st Cir. 1988); *U.S. v. Byrd*, 969 F.2d 106 (5th Cir. 1992); *U.S. v. Friedman*, 837 F.2d 84 (2d Cir. 1988); *U.S. v. Wasendorf*, 2012 WL 4052834 (N.D. Iowa 2012); *U.S. v. LaLonde*, 246 F.Supp.2d 873 (S.D. Ohio 2003); *U.S. v. Simon*, 760 F. Supp. 495 (D.Vir.Is. 1990). *U.S. v. Giordana*, 370 F.Supp.2d 1256 (S.D. Fla. 2005). *U.S. v. Washburn*, 2011 WL 217388 (N.D. Iowa 2011); *U.S. v. Soria*, 2011 WL 3651272 (D. Nev. 2011). However, defendant can be ordered as part of release order to stop activities which pose economic danger. *U.S. v. Harris*, 920 F. Supp. 132 (D.Nev. 1996); *U.S. v. Zaccaria*, 2009 WL 3334601 (5th Cir. 2009). **Contra**, *U.S. v. Madoff*, 586 F.Supp.2d 240 (S.D.N.Y. 2009)(once Gov. obtains hearing on any ground, court can consider danger, including economic danger).

- Danger alleged by the government must relate to federal case - unrelated allegation of danger to others insufficient. *U.S. v. Ploof*, 851 F.2d 7 (1st Cir. 1988); *U.S. v. Byrd*, 969 F.2d 106 (5th Cir. 1992); *U.S. v. Say*, 233 F.Supp.2d 221 (D.Mass. 2002). See *U.S. v. Bell*, 2007 WL 2314928 (S.D. Tex. 2007)(threats to wife cannot be used to obtain detention on danger grounds in fraud case, even at reopened hearing).

- Prior arrests, not resulting in convictions, insufficient ground to base danger to community finding. *U.S. v. Leyba*, 104 F.Supp.2d 1182, 1184 n.2 (S.D. Iowa 2000).

- Refusal to accept jurisdiction of court and generally making threats against others sufficient ground for detention. *U.S. v. Ippolito*, 930 F.

Supp. 581 (M.D.Fla. 1996).

- Juvenile adjudications not “prior convictions.” *U.S. v. Silva*, 133 F.Supp.2d 104 (D.Mass. 2001).

- With regard to issue whether def. has two prior felonies which justify motion for detention, crimes must have been committed on different occasions. *U.S. v. Selby*, 333 F.Supp.2d 367 (D.Md. 2004).

C. If request for detention is made by government, court shall order defendant detained until hearing is held. 18 U.S.C. § 3142(f); however, once hearing begins, court *may* release defendant. *Id.*

D. Continuance for hearing.

1. Temporary detention (18 U.S.C. § 3142(d)). Ten-day continuance allowed if the defendant:

- a) at time of offense, was on bail for a felony charge;
- b) is awaiting sentencing on any charge;
- c) is on parole or probation; or
- d) is an illegal alien;

AND

- e) the person poses a flight risk or danger to community.

### *Notes*

- Unclear what burden is placed upon government to secure this continuance. *See U.S. v. Buck*, 609 F. Supp. 713 (S.D.N.Y. 1985).

- Ninth Circuit has held that ten-day continuance may not be used by the government as subterfuge to delay hearing. *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985).

- Burden on defendant to show citizenship. 18 U.S.C. § 3142(d).

2. Absent temporary detention, government may only have three days, defendant can obtain five-day continuance. 18 U.S.C. § 3142(f).

### *Notes*

- Unclear whether government may get three days in addition to ten days provided by temporary detention. *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985) (suggests three days improper after ten-day delay); *U.S. v. Lee*, 783 F.2d 92 (7th Cir. 1986) (ten-day request tolls time for a section 3142(f) hearing); *U.S. v. Vargas*, 804 F.2d 157 (1st Cir. 1986) (Gov. can request perm. detention anytime during ten-day temp. detention); *U.S. v. Becerra-Cobo*, 790 F.2d 427 (5th Cir. 1986) (same); *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985) (same); *U.S. v. Moncado-Pelaez*, 810 F.2d 1008 (11th Cir. 1987); *U.S. v. Daniels*, 622 F. Supp. 178 (N.D. Ill. 1985) (if ten-day temporary properly requested, government can later seek § 3142(f) detention).
- Unclear whether three-day continuance request by government requires some justification; statute seemingly makes granting of request automatic. 18 U.S.C. § 3142(f); *U.S. v. Lee*, 783 F.2d 92 (7th Cir. 1986).
- During continuance, defendant "shall be detained." Also def. can be examined to determine narcotics addiction. § 3142(f)(2)(B).
- Further continuance virtually impossible to grant; must be based upon "good cause." *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985) (defendant may not waive time; attorney conflicts are insufficient cause for continuance; court may not continue on its own motion); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985) (convenience of court, attorney not good cause). **But see** *U.S. v. Coonan*, 826 F.2d 1180 (2d Cir. 1987) (five-day rule not mandatory when defendant in state custody); *U.S. v. King*, 818 F.2d 112 (1st Cir. 1987) (defendant's counsel can waive time limits - rule of reason applicable); *U.S. v. Clark*, 865 F.2d 1433 (4th Cir. 1989) (*en banc*) (same); *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986) (continuance permitted to obtain witnesses).
- No remedy for violation of time limits - Government is still free to seek detention. *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990).

#### IV. The Detention Hearing. 18 U.S.C. § 3142(f).

##### A. Standard for detention.

1. Flight risk by preponderance of evidence.
2. Danger to community by clear and convincing evidence.

*U.S. v. Vortis*, 785 F.2d 327 (D.C. Cir. 1986); *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Hazime*, 762 F.2d 34 (6th Cir. 1985); *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1985); *U.S. v. Orta*, 760 F.2d 887 (8th Cir. 1985) (*en banc*); *U.S. v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985).

##### *Notes*

- Court need not find that defendant poses *both* flight risk and danger. *U.S. v. Askari*, 608 F. Supp. 1045 (E.D. Pa. 1985).
- Defendant need not show that release conditions will be equivalent of jail; only need conditions that will reasonably assure defendant's presence. *See Kin-Hong v. U.S.*, 926 F. Supp. 1180 (D.Mass. 1996).
- Clear and convincing evidence means proof that particular defendant actually poses a danger, not that defendant in theory poses a danger. *U.S. v. Patriarca*, 948 F.2d 789 (1st Cir. 1991).

##### B. Presumptions. 18 U.S.C. § 3142(e).

1. Rebuttable presumption that defendant shall be detained if:
  - a) defendant has been convicted of violent crime, capital offense, drug offense, or any felony after committing two violent crimes/drug offenses;

AND

- b) offense was committed while defendant was on bail;

AND

- c) less than five years from conviction date/release date for offense described in a. above;

OR

- d) court has probable cause to believe that defendant has committed a drug offense with penalty of ten years or more, 18 U.S.C § 924(c)(gun used in felony), § 956(a)(conspiracy to kill in foreign country), § 2332b(terrorism) or any crime involving a minor victim.

*Notes*

- Presumption does not apply unless defendant is charged with drug, gun, or sexual abuse offense. *U.S. v. Persico*, 2010 WL 1880723 (2d Cir. 2010); *U.S. v. Sabhnani*, 493 F.3d 63 (2d Cir. 2007); *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *U.S. v. Goba*, 220 F.Supp. 2d 182 (W.D.N.Y. 2002); *U.S. v. Shaker*, 665 F. Supp. 698 (N.D. Ind. 1987) (arson not presumption crime).

- Presumption in drug offense arguably intended to prevent flight. *See generally U.S. v. Jessup*, 757 F.2d 378, 395-98 (1st Cir. 1985) (remarks from hearings on Bail Reform Act).

- Single drug charge must exceed ten-year limit; cannot aggregate charges. *U.S. v. Hinote*, 789 F.2d 1490 (11th Cir. 1986).

2. Indictment alone represents probable cause.

*Kaley v. U.S.*, 134 S.Ct. 1090, 1098 n.6 (2014); *U.S. v. Vargas*, 804 F.2d 157 (1st Cir. 1986); *U.S. v. Contreras*, 776 F.2d 51 (2d Cir. 1985); *U.S. v. Suppa*, 799 F.2d 115 (3d Cir. 1986); *U.S. v. Trosper*, 809 F.2d 1107 (5th Cir. 1987); *U.S. v. Hazime*, 762 F.2d 34 (6th Cir. 1985); *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985).

### 3. Manner of establishing probable cause absent indictment.

- Hearsay permissible provided court finds information reliable.

*U.S. v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985) (same); *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1985); **but see** *U.S. v. Suppa*, 799 F.2d 115 (3d Cir. 1986) (court expresses doubt that probable cause can be established by proffer); *U.S. v. Delker*, 757 F.2d 1390 (3d Cir. 1985) (admission of hearsay discretionary); *U.S. v. Jeffries*, 679 F.Supp. 1114 (M.D.Ga. 1988) (court must establish reliability of hearsay evid.).

#### *Notes*

- In addition to showing probable cause that defendant committed an offense involving the presumption, the defendant must be charged with such an offense as well. *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985). **Contra** *U.S. v. Bess*, 678 F.Supp. 929 (D.D.C. 1988).

### C. Effect of presumption.

1. If presumption is invoked, defendant need only present some credible evidence showing defendant is not flight risk or danger to the community, *e.g.*, defendant has *burden of production* only.

*U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985); *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985); *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *U.S. v. Perry*, 788 F.2d 100 (3d Cir. 1986); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Hazime*, 762 F.2d 34 (6th Cir. 1985); *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1985); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985); *U.S. v. Freitas*, 602 F. Supp. 1283 (N.D. Cal. 1985); *U.S. v. Moore*, 607 F. Supp. 489 (N.D. Cal. 1985).

#### *Notes*

- Can use pretrial services report as "some credible evidence." *U.S. v. Robinson*, 733 F.Supp. 280 (N.D. Ill. 1990) (pretrial services report rebuts presumption); *see U.S. v. Nicholas*, 681 F.Supp. 527 (N.D. Ill. 1988) (uncorr. evid. re: background rebuts presumpt; but bad looks at pros.

represents a danger); *U.S. v. Hare*, 873 F.2d 796 (5th Cir. 1989) (court suggests that pretrial service report may rebut presumption).

- Use of electronic bracelet "arguably" rebuts presumption.

*U.S. v. O'Brien*, 895 F.2d 810 (1st Cir. 1990); *see Kin-Hong v. U.S.*, 926 F. Supp. 1180 (D.Mass. 1996); *U.S. v. Leyba*, 104 F.Supp. 2d 1182 (S. D. Iowa 2000).

- Can introduce evidence of polygraph to try to rebut presumption.

*U.S. v. Bellomo*, 944 F. Supp. 1160 (S.D. N.Y. 1996).

- Can argue cross-examination of Gov. witnesses may rebut presumption.

*U.S. v. Gourley*, 936 F. Supp. 412 (S.D. Tex. 1996).

- Evidence that def. was not "typical" drug dealer rebuts presumption.

*U.S. v. Giampo*, 755 F. Supp. 665 (W.D.Pa. 1990).

- *Jessup* and *Fortna* hold that some credible evidence does not eliminate presumption; it still may be considered by court. *See U.S. v. Jackson*, 823 F.2d 4 (2d Cir. 1987).

2. If presumption is un rebutted, unclear whether detention mandated.

*U.S. v. Volksen*, 766 F.2d 190 (5th Cir. 1985) (unrebutted presumption enough); *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985) (same); *U.S. v. Suppa*, 799 F.2d 115 (3d Cir. 1986) (same); *U.S. v. Kouyoumdjian*, 601 F. Supp. 1506 (C.D. Cal. 1985) (unrebutted presumption justified detention); *U.S. v. Maktabi*, 601 F. Supp. 607 (S.D.N.Y. 1985) (unrebutted presumption enough).

*But see U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986) (can't detain on presumption alone unless there is proof of future dangerousness); *see U.S. v. Jackson*, 845 F.2d 1262 (5th Cir. 1988) (excellent decision holding presumption and general allegations of danger insufficient); *U.S. v. Cox*, 635 F. Supp. 1047 (D. Kan. 1986) (unrebutted presumption not enough); *U.S. v. Jones*, 614 F. Supp. 96 (E.D. Pa. 1985) (defendant did not rebut presumption, but government failed to show clear and convincing evidence of danger); *U.S. v. Jeffries*, 679 F.Supp. 1114

(M.D.Ga 1988) (Government cannot rely on indictment alone; guns and drug charges not necessarily enough), *U.S. v. Bell*, 673 F.Supp. 1429 (E.D.Mich. 1987) (hearsay may not satisfy clear/convincing evidence); *U.S. v. Moore*, 607 F. Supp. 489 (N.D. Cal. 1985) (clear and convincing standard remains even when presumption exists).

### *Notes*

- Some courts have held hearsay may be enough to establish probable cause, but may not be sufficient to carry burden.

*U.S. v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985); *U.S. v. Hazzard*, 598 F. Supp. 1442 (N.D. Ill. 1984).

D. Factors to be considered at detention hearing. 18 U.S.C. § 3142(g).

– Court must consider all factors under § 3142(g). *See U.S. v. Nwokoro*, 651 F.3d 108 (D.C. Cir. 2011).

1. Nature of offense, including whether offense is violent or involves a *narcotic* drug. *See U.S. v. Yeaple*, 605 F. Supp. 85 (M.D. Pa. 1985) (visual depiction of minors engaged in sexual conduct form of violence). *U.S. v. Simon*, 760 F.Supp. 495 (D.Vir.Is. 1990) (jury tampering not dangerous crime).

2. Weight of evidence.

Ninth Circuit holds that this is the least important factor because court cannot make pretrial determination of guilt. *U.S. v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985).

3. History of defendant/characteristics.

4. Mental/financial/family ties/employment/criminal history/record of appearances/medical status.

- Be careful re: request to examine defendant for danger or suicide risk based on crime charged alone; cannot order defendant to undergo

psychiatric examination to determine dangerousness, although psychiatric treatment may be a condition of release. *U.S. v. Martin-Trigona*, 767 F.2d 35 (2d Cir. 1985); *see U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006). However, psychiatric report which shows def. is not a danger may justify release. *U.S. v. Blauvett*, 2008 WL 4755840 (D.Md. 2008).

Fact that def. may have been suicidal does not mean s/he is flight risk. *U.S. v. Wasendorf*, 2012 WL 4052834 (N.D. Iowa 2012). *Conta U.S. v. Metz*, 2012 WL 6632501 (W.D.N.Y. 2012).

*See U.S. v. Scarpa*, 815 F. Supp. 88 (E.D.N.Y. 1993) (def. with AIDS could be released to hospital if def. paid for care and for Marshal to guard him).

Request for psychiatric exam re: insanity defense not ground for revocation of release. *U.S. v. Gomez-Borges*, 91 F.Supp.2d 477 (D. Puerto Rico 2000).

*U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986) (can't rely on past indications of dangerousness alone).

Foreign nationality not necessarily enough to indicate flight risk. *U.S. v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985); *See U.S. v. Paterson*, 780 F.2d 883 (10th Cir. 1986); *U.S. v. Townsend*, 897 F.2d 989 (9th Cir. 1990); *see also Lopez-Valenzuela v. Arpaio*, 2014 WL 5151625 (9<sup>th</sup> Cir. 2014)(*en banc* court declares state law prohibiting bail to illegal aliens unconstitutional).

Pending INS detainer does not deprive court of ability to consider release. *U.S. v. Sanchez-Martinez*, 2013 WL 3662871 (D.Col. 2013); *U.S. v. Trujillo-Alvarez*, 900 F.Supp.2d 1167 (D.Or. 2012); *U.S. v. Blas*, 2013 WL 5317228 (S.D.Ala. 2013); *U.S. v. Clemente-Rojo*, 2014 WL 1400690 (D.Kan. 2014); *U.S. v. Jocol-Alfaro*, 840 F.Supp.2d 1116 (W.D. Iowa 2011); *U.S. v. Marinez-Patino*, 2011 WL 902466 (N.D. Ill. 2011); *U.S. v. Perez*, 2008 WL 4950992 (D. Kan. 2008)(ICE CFR mandates that def. not be deported); *U.S. v. Muniz*, 2010 WL 2198198 (N.D.Cal. 2010); *U.S. v. Villanueva-Martinez*, 707 F.Supp.2d 855 (N.D. Iowa 2010); *U.S. v.*

*Montoya-Vasquez*, 2009 WL 103596 (D.Neb. 2009); *U.S. v. Adomako*, 150 F.Supp.2d 1302 (M.D. Fla. 2001); *see also U.S. v. Chavez*, 536 F.Supp.2d 962 (E.D.Wis. 2008)(fact that def. is illegal alien does not prevent court from considering release); *U.S. v. Hernandez*, 2012 WL 1034942 (D. Kan. 2012)(fact that ICE says it will likely deport def. If released on bail not dispositive; not for court to reconcile ICE and prosecutor's interests).

Pendency of citizenship claim with possible merit justifies release in 1326 case. *U.S. v. Joseph*, 2012 WL 3264522 (D.Vt. 2012); **but see** *U.S. v. Castro-Inzunza*, 2012 WL 1952652 (D. Ore. 2012)(def. detained where there is ICE hold and reinstatement of prior removal order

"Ties to community" means both community of arrest and community where defendant normally resides. *U.S. v. Townsend*, 897 F.2d 989 (9th Cir. 1990); *U.S. v. Robinson*, 2010 WL 1857348 (D.N. Mariana Is. 2010); *U.S. v. Yuen*, 2011 WL 5025134 (S.D. Fla. 2011).

Crt. must hear testimony of family members if def. asks to present witnesses. *U.S. v. Torres*, 929 F.2d 291 (7th Cir. 1991).

Gang membership insufficient by itself to justify detention. *See U.S. v. Jackson*, 845 F.2d 1262 (5th Cir. 1988); *U.S. v. Hammond*, 204 F.Supp.2d 1157 (E.D. Wis. 2002).

Whether def. can obtain adequate medical care is a factor to be considered. *U.S. v. Bencomo-Chacon*, 2007 WL 2021850 (D.Colo. 2007); *U.S. v. Ramirez-Robles*, 2007 WL 2021852 (D.Colo. 2007).

5. Probation/parole/state prison status.

*See U.S. v. Hayes*, 2007 WL 708803 (W.D. Ok. 2007)(def. brought over from state prison entitled to hearing and can be released if he shows he is not a flight risk).

6. Nature of danger posed to community if defendant is released.

*See U.S. v. Yeaple*, 605 F. Supp. 85 (M.D. Pa. 1985)(possession of

material involving minors poses threat to community); *U.S. v. Cocco*, 604 F. Supp. 1060 (M.D. Pa. 1985) (same). **Contra** *U.S. v. Friedman*, 837 F.2d 48 (2d Cir. 1988); *U.S. v. Byrd*, 969 F.2d 106 (5th Cir. 1992).

*U.S. v. Moore*, 607 F. Supp. 489 (N.D.Cal.1985) ("compelling" evidence that defendant committed drug offense insufficient to show danger to community).

7. Amount of time before trial commences.

*See U.S. v. Gelfuso*, 838 F.2d 358 (9th Cir. 1988)(Due Process requires case-by-case analysis); *accord, U.S. v. Hare*, 873 F.2d 796 (5th Cir. 1989). *U.S. v. Colombo*, 777 F.2d 96 (2d Cir. 1985) (may be a factor); *accord U.S. v. Rios*, 846 F.2d 167 (2d Cir. 1988). *U.S. v. Jackson*, 823 F.2d 4 (2d Cir. 1987)(examine defendant's involvement in continuances); *see U.S. v. Theron*, 782 F.2d 1510 (10th Cir. 1986); *U.S. v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985); *U.S. v. Acceturro*, 783 F.2d 382 (3d Cir. 1986); *U.S. v. Gato*, 750 F.Supp. 664 (D.N.J. 1990) (Crt. orders release of defendants because of excessive delay). **But see** *U.S. v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987) (19 month detention OK); *U.S. v. Zannino*, 798 F.2d 544 (1st Cir. 1986) (extended detention does not require release). *U.S. v. Quartermaine*, 913 F.2d 910 (11th Cir. 1990) (10 month delay OK).

8. Whether defendant can adequately prepare his defense.

*U.S. v. Paulsen*, 2008 WL 161328 (S.D.Ohio 2008)(court orders def. to have adequate working privileges, including computer, at jail).

E. Hearing procedure. 18 U.S.C. § 3142(f).

1. Defendant may testify, present information, present witnesses, cross-examine witnesses *who appear*.

*See U.S. v. Davis*, 845 F.2d 412 (2d Cir. 1988) (defendant entitled to hearing and to testify; cannot order detention on government allegations alone).

2. Ability of defendant to receive discovery under Rule 16, *Brady* material, and to issue subpoenas subject to discretion of court. *U.S. v. Lewis*, 769 F. Supp. 1189 (D. Kan. 1991).
3. Either government or defendant can present information by proffer or through hearsay, as rules of evidence do not apply.

*U.S. v. Lafontaine*, 210 F.3d 125 (2d Cir. 2000); *U.S. v. Smith*, 79 F.3d 1208 (D. C. Cir. 1996); *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986) (government can use proffers); *U.S. v. Cardenas*, 784 F.2d 937 (9th Cir. 1986); *See generally U.S. v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985) (use of hearsay). **But see** *U.S. v. Hammond*, 44 F.Supp.2d 743 (D.Md. 1999) (Gov. proffer may be insufficient; court can order live testimony); *U.S. v. Cabrera-Ortigoza*, 196 F.R.D. 571 (S. D. Cal. 2000) (court can order witnesses to appear); *U.S. v. Muse*, 2014 WL 495121 (D.N.J. 2014)(same; however, Def. may need to make counter-proffer).

### *Notes*

- Crime Act of 1994 allows victim in sex cases to be heard re: danger.
- Good language re: fact that hearing should be meaningful. *U.S. v. Hernandez*, 747 Supp. 846 (D.P.R. 1990).
- Evidence of danger should involve quantifiable, objective evidence. *U.S. v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985).
- Hearsay may be insufficient for government to carry burden. (See above).
- Illegally seized evidence can be admitted at detention hearing. *U.S. v. Viers*, 637 F. Supp. 1343 (W.D. Ky. 1986); *See U.S. v. Angiulo*, 755 F.2d 969 (1st Cir. 1985) (court can use electronic surveillance evidence even if defendant challenges legality).
- Factual representations of counsel are inadmissible. *U.S. v. Yeaple*, 605 F. Supp. 85, 87 (M.D. Pa. 1985) (nature of ruling here unclear).

- Defendant can call Government agent to testify. *U.S. v. Stone*, 2010 WL 1687038 (E.D. Mich. 2010); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985)(maybe); *See U.S. v. Perry*, 788 F.2d 100 (3d Cir. 1986) (defendant afforded right to call adverse witnesses). **But** defendant may be required to make proffer as to testimony of "government witnesses" before calling them. *U.S. v. Cabrera-Ortigoza*, 2000 WL 1585081 (S. D. Cal. 2000); *U.S. v. Edwards*, 430 A.2d 1321, 1338 (D.C. 1981) (District of Columbia Detention Act); *U.S. v. Gaviria*, 828 F.2d 667 (11th Cir. 1987) (conditional right to call adverse witnesses). **See** *U.S. v. Delker*, 757 F.2d 1390, 1398 n.4 (3d Cir. 1985) (court not required to address issue when confrontation of witnesses appropriate but recognizes problem).

- If court orders Gov. to produce witnesses, Jencks applies. *U.S. v. Comas*, 2014 WL 129296 (S.D.Fla. 2014).

- Cases in other contexts suggest that due process requires that def. be allowed to confront and cross-examine agents. *See U.S. v. Bell*, 785 F.2d 640 (8th Cir. 1986); *U.S. v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994); *U.S. v. Comito*, 177 F.3d 1166 (9th Cir. 1999). *But see U.S. v. Hernandez*, 778 F.Supp.2d 1211 (D.N.M. 2011); *U.S. v. Bibbs*, 488 F.Supp.2d 925 (N.D.Cal. 2007)(poorly reasoned decision by a magistrate). *See U.S. v. Robinson*, 2010 WL 1857348 (D.N. Mariana Is. 2010)(court suggests that if counter proffer made, defendant can cross examine gov. witness).

- *U.S. v. Shakur*, 817 F.2d 189 (2d Cir. 1987) (court indicates that inability to cross-examine undermines integrity of fact finding process).

- Conclusory proffer by government may not be sufficient. *U.S. v. Robinson*, 2011 WL 1791319 (D. Mass. 2011); *See U.S. v. Cooper*, 2008 WL 2331051 (D.Md. 2008); **but see** *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986).

- Unclear whether *in camera* submissions appropriate. Some courts have held this to be improper absent extraordinary circumstances. *U.S. v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004)(excellent discussion about *ex parte* submissions). *U.S. v. Eischeid*, 315 F.Supp.2d 1033 (D.Arizona 2003); *U.S. v. Acceturro*, 783 F.2d 382 (3d Cir. 1986); *U.S. v. Leon*, 766

F.2d 77, 80 n.3 (2d Cir. 1985). *Contra U.S. v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985); *U.S. v. Terrones*, 712 F.Supp. 786 (S.D.Cal. 1989).

- No logical reason why proffer from defendant that government allegations are false won't satisfy burdens; however, it may be malpractice to actually put defendant on stand. *U.S. v. Frappier*, 615 F. Supp. 51 (D. Mass. 1985); *U.S. v. Ingham*, 832 F.2d 229 (1st Cir. 1987) (statements by defendant at det. hearing admissible at trial). **But see** *U.S. v. Perry*, 788 F.2d 100 (3d Cir. 1986) (court should give defendant use immunity to protect 5th Amendment right). See *U.S. v. Parker*, 848 F.2d 61 (5th Cir. 1988) (no Fifth Am. problem with Act).

- Unclear whether counsel's statement is admissible at trial - informal statements during bail negotiations not admissible. *U.S. v. Valencia*, 826 F.2d 169 (2d Cir. 1987).

- However, statements made by def. to pretrial can be used for impeachment. *U.S. v. Griffith*, 385 F.3d 124 (2d Cir. 2004); *U.S. v. De La Torre*, 599 F.3d 1198 (10th Cir. 2010).

- Def. is entitled to own statements before hearing if Gov. will rely on statements. *U.S. v. Muses*, 2014 WL 495121 (D.N.J. 2014).

- If prejudice to defendant is possible, bail hearing may be closed to public. *U.S. v. Gotti*, 753 F.Supp. 443 (E.D.N.Y. 1990); *U.S. v. Leonardo*, 129 F.Supp.2d 240 (W.D.N.Y. 2001).

- If defendant asks to call witnesses, crt. cannot force proffer instead. *U.S. v. Torres*, 929 F.2d 291 (7th Cir. 1991).

- Under 18 U.S.C. § 2518(9), defendant entitled to wiretap application and order if evidence of taps to be introduced at hearing. *U.S. v. Salerno*, 794 F.2d 64 (2d Cir. 1986), *rev'd on other grounds*, 107 S.Ct. 2095 (1987); see *In re Boston Globe*, 729 F.2d 47 (1st Cir. 1984).

F. Detention alternatives/release conditions. 18 U.S.C. § 3142(c).

1. Stay in custody of person.

2. Maintain employment.
3. Stay in school.
4. Not associate with others.
5. Not contact victim/witnesses.
6. Abide by curfew.
7. Not possess firearms.
8. Not use alcohol/drugs.
9. Participate in drug treatment program.
10. Post bond.
11. Go to jail after work.
12. Electronic Home Monitoring

### *Notes*

- These conditions must be considered before detention ordered. *U.S. v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985).

- Communications with PTS supposed to be confidential. *U.S. v. Mbirika*, 2013 WL 5295195 (S.D.N.Y. 2013)(Gov. can't call PTS officer to testify about def's mental state); *but see Baronski v. U.S.*, 2013 WL 718872 (E.D.Mo. 2013)(court may order PTS file of another def. released to def. if necessary to defense).

- In porn case, court may decline to order def. to agree to release psych. records to pretrial as condition of release. *U.S. v. Lee*, 2013 WL 5327465 (E.D.N.Y. 2013).

- Court may not impose warrantless search condition; search requires probable cause. *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006).

- 2006 Adam Walsh Act requires all defs. charged with certain sex crimes to be placed on electronic home monitoring; however, requirement is probably unconstitutional. *U.S. v. Arzberger*, 592 F.Supp.2d 590 (S.D.N.Y. 2008); *U.S. v. Polouizzi*, 697 F.Supp.2d 381 (E.D.N.Y. 2010); *U.S. v. Smedley*, 2009 WL 1086972 (E.D.Mo. 2009); *U.S. v. Rueb*, 2009 WL 764552 (D.Neb. 2009); *U.S. v. Torres*, 566 S.Supp.2d 591 (W.D. Texas 2008); *U.S. v. Crowell*, 2006 WL 3541736 (W.D.N.Y.). Does not apply where crime charged involves agent posing as a minor. *U.S. v.*

*Kahn*, 524 F.Supp.2d 1278 (W.D.Wash. 2007). **Contra:** *U.S. v. Rizzuti*, 2009 WL 1011518 (E.D.Mo. 2009); *U.S. v. Stephens*, 594 F.3d 1033 (8th Cir. 2010); *U.S. v. Frederick*, 2010 WL 2179102 (D.S.D. 2010); *U.S. v. Peebles*, 630 F.3d 1136 (9th Cir. 2010) (crazy opinion which says mandatory conditions subject to discretionary application).

- Court can order defendant to provide DNA as condition of release. See *Maryland v. King*, 133 S.Ct. 1958 (2013)(okay to take DNA from arrestee).

- Conditions for release need not *guarantee* safety or presence, but need only "reasonably assure" both. 18 U.S.C. § 3142(e). *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Orta*, 760 F.2d 887 (8th Cir. 1985) (*en banc*). See *U.S. v. Dreier*, 596 F.Supp.2d 831 (S.D.N.Y. 2009)(private armed guards sufficient to assure presence).

- *Ability* to flee not sufficient to justify detention. *U.S. v. Himler*, 797 F.2d 156 (3d Cir. 1986).

- Seriousness of charge doesn't necessarily justify detention. *U.S. v. Eischeid*, 315 F.Supp.2d 1033 (D. Ariz. 2003).

- Court can order defendant to refrain from engaging in some employment activities to protect community. *U.S. v. Harris*, 920 F. Supp. 132 (D.Nev. 1996).

G. If defendant is ordered detained, court must issue an order explaining detention. If defendant is released, court must set forth the conditions of release.

*U.S. v. Westbrook*, 780 F.2d 1185 (5th Cir. 1986) (order must make specific factual findings); see *U.S. v. Quinones*, 610 F. Supp. 74 (S.D.N.Y. 1985) (failure of magistrate to enter written order resulted in defendant's release); *U.S. v. Nwokoro*, 651 F.3d 108 (D.C. Cir. 2011)(transcript of hearing may be okay, citing *U.S. v. Peralta*, 849 F.2d 625 (D.C. Cir. 1988), but it must be complete enough to show that crt. considered all § 3142(g) factors). **But see** *U.S. v. English*, 629 F.3d 311 (2d Cir. 2011).

- H. If defendant detained conditions of confinement must not be punitive, danger defendant poses must be to community, not other inmates. *U.S. v. Gotti*, 755 F.Supp. 1159 (E.D.N.Y. 1991).
- I. Defendant can be temporarily released in marshal's custody to work on defense. § 3142(I)(4).
- J. Can't use medical marijuana. *U.S. v. Katz*, 2010 WL 183863 (9th Cir. 2010).

**V. Revocation of Release Order. 18 U.S.C. § 3148(b).**

A. Court may revoke prior release order if:

1. There is probable cause to believe that the defendant has committed a new offense or there is clear and convincing evidence that defendant has violated condition of release,

AND

2. After review of factors in section 3142(g), court determines that release is inappropriate.

B. If defendant is charged with a felony while on release, rebuttable presumption arises that defendant should not be released.

*Notes*

- *See U.S. v. Aron*, 904 F.2d 221 (5th Cir. 1990) for general discussion of § 3148. *See also U.S. v. Wilson*, 820 F. Supp. 1031 (N.D. Tex. 1993).

- It is clear that bail cannot be revoked automatically if defendant is charged with new offense, because section 3148(b) requires court to examine factors in section 3142(g) before deciding whether to detain defendant. If court attempts to detain defendant on basis of finding that there is probable cause to believe that defendant committed new offense, argue that this is denial of bail without a hearing and is unconstitutional.

*See Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom.*, *Murphy v. Hunt*, 455 U.S. 478 (1982).

- *See U.S. v. Santiago*, 826 F.2d 499 (7th Cir. 1987) (defendant need not be convicted of new crime to revoke - probable cause enough).

- Court may revoke release order if circs. change; denial of supp. motion sufficient. *U.S. v. Peralta*, 849 F.2d 625 (D.C. Cir. 1988).

## **VI. Review of Detention Order. 18 U.S.C. § 3145.**

A. Either side may seek review of order before district court, although magistrate may reconsider order. 18 U.S.C. § 3142(f) (hearing may be reopened if new information becomes available); *see U.S. v. Leon*, 766 F.2d 77, 80 (2d Cir. 1985).

### *Notes*

- Not an appeal, so 14 day rule does not apply. *But see U.S. v. Tooze*, 236 F.R.D. 442 (D. Ar. 2006) (where court has standing order referring det. hearings to Magistrate, appeal to dist. crt. governed by 10 day rule of Fed. R.Crim.P. 59(a)).

- Motion must be in writing in some jurisdictions. *U.S. v. Hudspeth*, 143 F.Supp.2d 32 (D.D.C. 2001).

- No logical reason why government can keep defendant detained while it seeks review of release order; *see U.S. v. Hudspeth*, 143 F.Supp.2d 32 (D.D.C. 2001) (crt. suggests that def. might have to be released while gov. files written motion to revoke release order); oftentimes governed by local rule. May also argue that stay provisions of Fed.R.App.P. 23 should apply. *Ferrara v. U.S.*, 370 F.Supp.2d 351 (D.Mass. 2005). **But see** *U.S. v. Brigham*, 2009 WL 1395839 (5th Cir. 2009).

- Review in out-of-district cases must be sought in charging district, not district of arrest. *U.S. v. Vega*, 438 F.3d 801 (7th Cir. 2006); *U.S. v. Evans*, 62 F.3d 1233 (9th Cir. 1995); *U.S. v. Torres*, 86 F.3d 1029 (11th Cir. 1996); *U.S. v. El-Edwy*, 272 F.3d 149 (2d Cir. 2001). *U.S. v. Godines-Lupian*, 2011 WL 4600800 (D.P.R. 2011); **But see** *U.S. v. Xulam*, 84 F.3d 441 (D.C. Cir. 1996) (D.C. Cir. reviews appeal even though defendant charged in California; no discussion of jurisdiction issue). *See also U.S. v. Thomas*, 992 F.Supp.782 (D.Virgin Is. 1998) (court hears appeal).

B. Review must be undertaken promptly. 18 U.S.C. § 3145(b).

### *Notes*

- 30 day delay not "promptly" - defendant ordered released on conditions. *U.S. v. Fernandez-Alfonzo*, 813 F.2d 1571 (9th Cir. 1987).

- 2 month delay may not be "promptly," but Fifth Circuit refuses to release defendant because no remedies are contained in statute. *U.S. v. Barker*, 876 F.2d 475 (5th Cir. 1989).

C. Standard of review in district court is generally held to be *de novo*.

*See U.S. v. Leon*, 766 F.2d 77 (2d Cir. 1985); *U.S. v. Delker*, 757 F.2d 1390 (3d Cir. 1985); *U.S. v. Williams*, 753 F.2d 329 (4th Cir. 1985); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (*en banc*); *U.S. v. Koenig*, 912 F.2d 1190 (9th Cir. 1990); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985); *U.S. v. Ramey*, 602 F. Supp. 821 (E.D.N.C. 1985).

D. Unclear whether defendant entitled to a new hearing. Courts have generally held parties are allowed to submit additional evidence.

*See U.S. v. Delker*, 757 F.2d 1390 (3d Cir. 1985) (district court may conduct new evidentiary hearing); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Allen*, 605 F. Supp. 864, 867 (W.D. Pa. 1985); *U.S. v. Askari*, 608 F. Supp. 1045 (E.D. Pa. 1985); *see U.S. v. Gaviria*, 828 F.2d 667 (11th Cir. 1987) (no right to complete de novo hearing

before district court).

### *Notes*

- *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985) requires district court to undertake independent fact finding; however, if no new evidence presented dist. court may adopt magistrate's findings. *U.S. v. King*, 849 F.2d 485 (11th Cir. 1988).
  - District court should consider facts independently, and no deference should be given to Magistrate's legal conclusions. *U.S. v. Koenig*, 912 F.2d 1190 (9th Cir. 1990).
- E. Appeal may be made to circuit court by either party. 18 U.S.C. § 3145(c).
1. Notice of appeal by defendant must be filed within ten days.
  2. Appeal must be heard on expedited basis. *U.S. v. Williams*, 753 F.2d 329 (4th Cir. 1985).
  3. Usually handled as a motion. *U.S. v. Perdomo*, 765 F.2d 942 (9th Cir. 1985).
  4. Standard of review unclear.
    - a) Clearly erroneous standard.

*U.S. v. Williams*, 753 F.2d 329 (4th Cir. 1985); *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985).
    - b) Supported by proceedings below.

*U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Barker*, 876 F.2d 475 (5th Cir. 1989) (abuse of discretion standard is same as "supported by proceedings below").
    - c) Mixed review.

*U.S. v. O'Brien*, 895 F.2d 810 (1st Cir. 1990); *U.S. v. Hazime*, 762 F.2d 34 (6th Cir. 1985); *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (*en banc*); *U.S. v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985).

d) *De novo*.

*U.S. v. Delker*, 757 F.2d 1390 (3d Cir. 1985).

## VII. Bail Pending Appeal Or After Conviction. 18 U.S.C. § 3143.

A. Change in presumption after conviction: defendant shall be detained unless guidelines indicate probation is possible or s/he demonstrates by clear and convincing evidence that s/he is not a flight risk/danger, *unless* crime is crime of violence or drug crime. Then release is possible *only* if (1) crt. plans to grant Rule 29 motion or new trial; or (2) Gov. recommends no time; *and* (3) crt. finds by clear/conv. evid. def. is not flight risk or danger.

### *Notes*

- Bail pending supervised release revocation governed by § 3143. *U.S. v. Loya*, 23 F.3d 1529 (9th Cir. 1994); *see U.S. v. Fernandez*, 144 F.Supp.2d 115 (N.D.N.Y. 2001)(def. facing sup. rel. violation entitled to hearing; burden on def. to show release is appropriate); *U.S. v. Mincey*, 482 F.Supp.2d 161 (D.Mass. 2007).

- Be careful; voluntary surrender may not be authorized. *See U.S. v. Mostrom*, 11 F.3d 93 (8th Cir. 1993).

B. Release pending sentencing or appeal: Defendant *must* be detained if convicted of violent/drug offense **unless except circs shown**. *See* below. Otherwise, def. can be released only if s/he shows by clear/convincing evidence that def. not flight risk/danger *and* that appeal will raise "substantial issue of law" resulting in reversal, new trial, sentence of probation, or reduced term less than amount def. has spent in custody.

Motion for bail pending appeal should be made first in the district court, even if notice of appeal has been filed. *See U.S. v. Provenzano*, 605 F.2d 85 (3d Cir. 1979); *U.S. v. Hochevar*, 214 F.3d 342 (2d Cir. 2000); *U.S.*

*v. Fraser*, 152 F.Supp.2d 800 (E.D.Penn. 2001).

C. General interpretation of section 3143(b) is that defendant need only show that issue raised is novel or not clearly controlled by precedent, and that if the defendant is successful on appeal, conviction will likely be reversed.

- *U.S. v. Perholtz*, 836 F.2d 554 (D.C. Cir. 1987); *U.S. v. Randell*, 761 F.2d 122 (2d Cir. 1985); *U.S. v. Miller*, 753 F.2d 19 (3d Cir. 1985); *U.S. v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985); *U.S. v. Bilanzich*, 771 F.2d 292 (7th Cir. 1985); *U.S. v. Powell*, 761 F.2d 1227 (8th Cir. 1985) (*en banc*); *U.S. v. Handy*, 761 F.2d 1279 (9th Cir. 1985); *U.S. v. Affleck*, 765 F.2d 944 (10th Cir. 1985); *U.S. v. Giancola*, 754 F.2d 898 (11th Cir. 1985).

### *Notes*

- § 3145(c) allows crt. to release any def. on appeal if def. shows exceptional circs. See *U.S. v. Vilaiphone*, 2009 WL 412958 (W.D.N.C. 2009)(except. Circs are “clearly out of the ordinary; uncommon or rare”); *U.S. v. Garcia*, 340 F.3d 1013 (9th Cir. 2003) (wonderful discussion of grounds constituting exceptional circs); *U.S. v. Kenney*, 2009 WL 5217031 (D. Me. 2009)(death of grandmother exceptional circ.); *U.S. v. Williams*, 903 F.Supp.2d 292 (M.D. Penn. 2012)(sick wife and family circs exceptional); *U.S. v. Rentas*, 2009 WL 3444943 (S.D.N.Y. 2009) (ill child in need of care except. circ.); *U.S. v. Szymanski*, 2009 WL 1212249 (N.D. Ohio 2009) (good except. circs case); *U.S. v. Boston*, 2008 WL 4661026 (W.D.N.C. 2008) (family hardship and other factors can be except. circs); *U.S. v. Herrera-Soto*, 961 F.2d 645 (7th Cir. 1992); *U.S. v. DiSomma*, 951 F.2d 494 (2d Cir. 1991); *U.S. v. Carr*, 947 F.2d 1239 (5th Cir. 1991); *U.S. v. Jones*, 979 F.2d 804 (10th Cir. 1992); *U.S. v. Mostrom*, 11 F.3d 93 (8th Cir. 1993); *U.S. v. Cantrell*, 888 F.Supp. 1055 (D.Nev. 1995) (good discussion of exceptional circs); *U.S. v. Burnett*, 76 F.Supp.2d 846 (E. D. Tenn. 1999); *U.S. v. Price*, 2008 WL 215811 (W.D.N.C. 2008); **but see** *U.S. v. Lugiglio*, 384 F.3d 925 (7th Cir. 2004).

- Dispute among courts whether § 3145(c) applies to dist. crts. or circuit crts. only. Most courts hold that district crt. determines exceptional circs. *U.S. v. Meister*, 744 F.3d 1236 (11<sup>th</sup> Cir. 2013); *U.S. v. Goforth*, 546 F.3d 712 (4th Cir. 2008)(see cases cited therein); See *U.S. v. Chen*, 257 F.Supp.2d 656 (S.D.N.Y. 2003); *U.S. v. Harrison*, 430 F.Supp.2d 1378 (M.D.Ga. 2006).

- This applies as well to defs. who are convicted but are awaiting sentencing. *U.S. v. Carr*, 947 F.2d 1239 (5th Cir. 1991); *U.S. v. Kinslow*, 105 F.3d 555 (10th Cir. 1997); *U.S. v. Jones*, 979 F.2d 804 (10th Cir. 1992); *U.S. v. Kaquatosh*, 252 F.Supp.2d 775 (E.D. Wis. 2003)(family circs may be exceptional); *U.S. v. Whitner*, 2005 WL 1334601 (N.D. Iowa 2005)(family circs may be except. circs).
- Unclear whether Bail Reform Act applies to bail pending appeal from probation violation or supervised release violation - exceptional circumstances rule applies. *U.S. v. Bell*, 820 F.2d 980 (9th Cir. 1987); *See U.S. v. Lacy*, 643 F.2d 284 (5th Cir. 1981); *U.S. v. Dansker*, 561 F.2d 485 (3d Cir. 1977); *U.S. v. Lodhi*, 21 F.3d 607 (5th Cir. 1994) (supervised release); *U.S. v. Matt*, 41 F.3d 1281 (9th Cir. 1994) (habeas/§ 2255 collateral attack); *Parretti v. U.S.*, 112 F.3d 383 (9th Cir. 1997) (extradition); *Borodin v. Ashcroft*, 136 F.Supp.2d 125 (E.D.N.Y. 2001)(same).
- Dist. Court maintains jurisd. even when case is on appeal. See *U.S. v. Krzyski*, 857 F.2d 1089 (6th Cir. 1988); *U.S. v. Queen*, 847 F.2d 346 (7th Cir. 1988).

## VIII. General Notes

- A. Failure to inform defendant of enhanced penalties under § 3147 for crimes committed while on release may preclude these penalties. *U.S. v. DiCaro*, 852 F.2d 259 (7th Cir. 1988); *U.S. v. Cooper*, 827 F.2d 991 (4th Cir. 1987); *U.S. v. Onick*, 889 F.2d 1425 (5th Cir. 1989). contra *U.S. v. Kentz*, 251 F.3d 835 (9th Cir. 2001); *U.S. v. Feldhacker*, 849 F.2d 293 (8th Cir. 1988); *U.S. v. Browning*, 61 F.3d 752 (10th Cir. 1995); *U.S. v. Lewis*, 991 F.2d 322 (6th Cir. 1993); *U.S. v. Di Pasquale*, 864 F.2d 271 (3d Cir. 1988); *U.S. v. Bozza*, 132 F.3d 659 (11th Cir. 1998). Notice need not be oral, but can be on written release form. *U.S. v. Night*, 29 F.3d 479 (9th Cir.1994).
- B. Be careful of issues regarding credit for time in detention; *See Reno v. Koray*, 515 U.S. 50 (1995); *Rodriguez v. Lamer*, 60 F.3d 745 (11th Cir. 1995); *U.S. v. Haynes*, 2011 WL 3444437 (S.D. Ga. 2011)(halfway house time not credited).

- C. Bail bond may be forfeited if defendant fails to appear or violates other conditions of bond. *U.S. v. Dunn*, 781 F.2d 447 (5th Cir. 1989); *U.S. v. Santiago*, 826 F.2d 499 (7th Cir. 1987); *U.S. v. Patriarca*, 948 F.2d 789 (1st Cir. 1991); *U.S. v. Vaccaro*, 51 F.3d 189 (9th Cir. 1995); *U.S. v. Dudley*, 62 F.3d 1275 (10th Cir. 1995); *U.S. v. Gigante*, 85 F.3d 83 (2d Cir. 1996).
- D. Post September 11, 2001 Issues. Special Administrative Measures may be imposed for certain detainees; forcing defense counsel to sign agreement to these measures is improper. *U.S. v. Reid*, 214 F.Supp.2d 84 (D.Mass 2002). However, enemy combatants have right to meaningfully contest their detention. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- E. Watch for severe conditions of confinement – def. may be able to challenge. *U.S. v. Basciana*, 369 F.Supp.2d 344 (E.D. N.Y. 2005).
- F. Watch out for information given during pretrial interviews – can be used to later support involuntary commitment under Adam Walsh Act and other sex crime related legislation.
- G. May be able to use CJA funds to house client during trial. *U.S. v. Mendoza*, 2010 WL 3377706 (E.D. N.Y. 2010); contra, *U.S. v. Ibarra*, 2014 WL 4352063 (S.D.Cal. 2014).
- H. Def. may be able to stay out pending petition for cert. *U.S. v. Inzunza*, 2011 WL 2680472 (S.D.Cal. 2011).
- I. Watch out for automatic release provision in § 3164 (speedy trial) – if def. is held for more than 90 days without speedy trial exclusion, even if case is dismissed and reinstated, s/he must be released. *U.S. v. Worthy*, 2012 WL 375432 (D.Me. 2012).