

# THE BAIL REFORM ACT: Getting and keeping them out!

By<sup>1</sup>

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If the Son therefore shall make you free,  
you shall be free indeed. John 8:36

Most often, our very first opportunity to impress our clients by strutting our legal acumen is at the preliminary and detention hearing. Often heard at the same time, the pair of hearings gives lawyers their first opportunity to have an adversarial hearing and begin to see the government’s case. Unfortunately, the preliminary and detention hearing is often the government’s first opportunity to nail your client, by requesting detention rather than allowing the setting of a reasonable bail bond.

Our response to the government’s motion to detain, however unwitting, sends various messages to all interested parties. To your client, how hard you fight to secure his release is an indication of how hard you will work in his case generally, however fair or unfair. How hard you fight to secure his release is an indication of your belief in one of the central tenets of our criminal justice system: the presumption of innocence. Your stewardship of this very fragile concept signals your willingness to fight your client’s cause. Therefore, this first showdown, this first battle, is extremely important. The battle lines must be drawn here.

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<sup>1</sup>The author wishes to acknowledge the incredible contributions in this area made by Geoffrey A. Hansen, Chief Assistant Federal Public Defender, Northern District of California, San Francisco Division. His article, entitled *Pretrial Release and Detention*, has been reviewed and relied upon by the burgeoning class of newly-minted assistant federal public defenders.

## I. THE HIERARCHY OF RELEASE OPTIONS

### A. Title 18 U.S.C. §3142(a)

- 1) released on personal recognizance or on unsecured appearance bond;
  - A. Judicial officer shall order the release of the defendant on personal recognizance, or upon execution of an unsecured appearance bond, subject to condition that person not commit a federal, state, or local crime AND subject to condition of cooperation with DNA collection;
- 2) released with condition(s) attached;
  - B. If judicial officer finds that the person is a flight risk or danger to the community, he shall order release subject to conditions that person not commit a federal, state, or local crime AND cooperate with DNA collection AND others;
    1. Except that in a case involving a minor victim (Title 18 U.S.C. §§1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, 2425), or Title 18 U.S.C. 2250, mandatory minimum conditions of release apply (electronic monitoring, travel restrictions, associations, residence restrictions, avoidance of victim and witnesses, regular reporting, curfew, no guns and destructive devices)
- 3) temporary detention;
- 4) detention.

Release upon personal recognizance or unsecured appearance bond is the starting point of the Bail Reform Act. In the event that the court determines that the person presents a flight risk or a danger to the community, conditions of release are set. What can stand in the way of your client's release? THE MOTION TO DETAIN WITHOUT BOND.

### B. GOVERNMENT'S MOTION TO DETAIN

- 1) The government can move to detain the defendant if the case involves:
  - a. A crime of violence [as defined in Title 18 U.S.C. §3156(a)(4)] or an offense listed in §2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
    1. A crime of violence
      - a. An offense that has an element 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 under chapter 109A[Sexual abuse—Title 18 U.S.C. §§2241-2248], chapter 110 [Sexual Exploitation and other abuse of children—Title 18 U.S.C. §§2251-2260], or 117 [Transportation for illegal sexual activity and related crimes—Title 18 U.S.C. §§2421-2427]
      - d. Note that there is some tension in the district courts about how to determine whether the offense is a crime of violence. What controls? The facts? Or the nature of the crime (categorical approach)? *United States v. Epps*, 987 F.Supp. 22 (D.C.C. 1997)(facts); *United States v. Carter*, 996 F.Supp. 260 (W.D.N.Y. 1998)(categorical).
    2. An offense listed in §2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed.
      - a. Added by Congress on December 17, 2004, presumably as a response to terrorism.
  - b. An offense for which the maximum sentence is life imprisonment or death;
  - c. A drug offense [21 U.S.C. §801 et seq, 21 U.S.C. §951 et seq, and 46 U.S.C. App §1901 et seq] for which the term of imprisonment

of ten years or more is prescribed;

- d. Any felony if the person has been convicted of two or more offenses described above or two or more state or local offenses that would have been offenses as described above had there existed federal jurisdiction;
- e. Any felony that is not otherwise a crime of violence that involves a minor victim or involves the possession/use of a firearm or destructive device (see Title 18 U.S.C. §921), or any other dangerous weapon, or involves a failure to register (registration of sex offenders under Title 18 U.S.C. §2250); OR
- e. A serious risk that such person will flee<sup>2</sup>; or
- f. A serious risk that such person will obstruct/attempt to obstruct justice, or threaten/intimidate a prospective witness or juror.

**C. COURT’S SUA SPONTE MOTION TO DETAIN**

- 1) The Court can move to detain the defendant if the case involves:
  - a. A serious risk that such person will flee; or
  - b. A serious risk that such person will obstruct/attempt to obstruct justice, or threaten/intimidate a prospective witness or juror.

**D. IF THE MOTION TO DETAIN IS MADE BY EITHER THE COURT OR**

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<sup>2</sup>There is a lot of stuff wrapped in this particular area—‘a serious risk that such person will flee...’ Keep in mind that the risk has to be serious, not just that there is a risk. Also, some would try to argue that past behavior (ie, failures to appear, evading arrest, etc. is a good indication of a flight risk). However, compare that behavior to the behavior exhibited by the defendant on this particular arrest. How can you argue that someone’s past behavior is a better indicator of future behavior vis a vis flight risk than more recent behavior vis a vis the current arrest.

Further, as it pertains to undocumented aliens, I have always thought it rather impressive that some would make the argument that undocumented aliens who are returning to the United States to be with family are flight risks. In a manner of speaking they are. They are fleeing their birth country for their adopted country. So where exactly is the flight risk? If you have supportive family in the United States, you can make the argument that the person should be released on bond because there is no serious risk that the person will flee.

## THE GOVERNMENT THEN...

1. The judicial officer shall hold a hearing to determine whether there is any condition or combination of conditions that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

## E. THE DETENTION HEARING

1. Shall be held immediately upon the person's *first* appearance before the court unless that person or the government seeks a continuance.
  - A. Government motion for continuance.
    1. Cannot exceed three days, except for good cause;
  - B. Defendant's motion for continuance.
    1. Cannot exceed five days, except for good cause.
  - C. Defendant remains incarcerated until the hearing;
  - D. During the continuance, court may order, on its own motion or on motion of the government, that defendant undergo medical examination to see if defendant is an addict. CAUTION: See U.S.S.G. §5H1.4 (Substance abuse is highly correlated to an increased propensity to commit crime.)
  - E. Defendant has these rights:
    1. right to counsel;
    2. right to testify;(What purpose will it serve for the defendant, at this early stage, to get on the stand and testify? It gives the government a free crack at your client and there isn't much you can do about it. Strongly counsel clients to avoid this option. Instead, since the rules of evidence don't apply, use an investigator or other person to relay hearsay information or even proceed by proffer. For a more detailed discussion on this subject see **A CAUTIONARY TALE ABOUT USING FAMILY MEMBERS AND/OR THE DEFENDANT AT A DETENTION HEARING** below).

3. right to cross-examine;
  - A. Proper cross-examination can contradict testimony relevant to the detention issue;
  - B. Use cross to explore the government's case (free discovery) and potentially lock-in a government agent's testimony. You are permitted to do this under §3142(g)(2)(the weight of the evidence against the person);
  - C. You are entitled to any reports of that witness under Fed.R.Crim.Pro. 26.2 if
    1. Witness has authored a report and has signed it or has otherwise adopted or approved it;
    2. Some recorded oral statement recorded contemporaneously with the oral statement and that is substantially verbatim;
    3. A statement made to a grand jury, however taken or recorded.
4. right to present witnesses (Again, see **A CAUTIONARY TALE ABOUT USING FAMILY MEMBERS AND/OR THE DEFENDANT AT A DETENTION HEARING** below);
5. and right to provide other information by proffer or otherwise. This might be the best option because it essentially short circuits the government's cross examination and avoids the problems inherent in your client or client's family testifying at the hearing on the matter.
- F. Rules of Evidence do not apply. What about Sixth Amendment right to confront? But, since the rules of evidence don't apply, remember that they also don't apply to you. You can use this to your advantage.
- G. Standard of Proof: Clear and Convincing Evidence if there is a

finding that there is no condition or combination of conditions that will reasonably assure the safety of any other person and the community. The standard for flight risk is preponderance of the evidence.

- H. The hearing may be re-opened if there is information that exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there is a condition or combination of conditions that will reasonably assure defendant's appearance and the safety of any other person and the community.

## F. DETENTION HEARING FACTORS

1. In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer **shall** take into account the available information concerning:
  - a. Nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
    1. Did defendant accept responsibility for his offense early on?;
    2. Has he cooperated with the government? Will his cooperation continue in the future? Is a legitimate governmental interest served by releasing defendant?;
      - A. But consider: What level of participant is he in the organization?
      - B. A truly informed participant might have more information than a simple mule. Is a medium level participant the kind of person the court will readily release? Be sure not to argue yourself into detention.
      - C. What about tying 5K1.1 recommendation to satisfying pretrial conditions?
    3. Defense counsel can make hay out of defendant's behavior

when confronted by law enforcement authorities (I wouldn't highlight his behavior, for example, in a case where he evaded arrest or detention);

4. What about his level of cooperation with pretrial services officers?
5. What were some of the aggravating/mitigating factors?
6. Does the case involve something that might have an affirmative defense or any defense? Be careful not to show too much of your hand here, however.

b. Weight of the evidence against the person;

1. Read: FREE DISCOVERY!!!
2. Also, take this as an opportunity to lock-in government witnesses. For example, a typical government witness at these preliminary/detention hearings will answer more often with "I don't know" than with anything else. Why does the agent not know? What did he fail to do that can be exploited at this hearing? How can his answer be used to damage the government's case?

A. Consider this exchange:

Defense: Did you notice that my client was acting in an unusual or nervous manner?

Agent: I don't know.

Defense: Is that because you once knew the answer to that question and have since forgotten, or you just never knew the answer?

Agent: I wasn't there. I never knew.

Defense: Well, now if he had been acting in a nervous manner, that would be important to your case?

Agent: Yes.

Defense: And being that it is important to the case, you'd expect the agents to tell you if my client was acting in a nervous manner, right?

Agent: Yes.

Defense: Now, when you testified here that you didn't know if my client was acting nervous, that's because none of the agents told you he was acting nervous, right?

Agent: That's correct.

3. Some defense counsel use the detention hearing to serve as the basis for exploring the totality of the government's case. A question you would never expect to hear in a trial might typically be asked at a detention hearing. For example, I sometimes ask, "Agent, what is the totality of the evidence against my client?" This might be helpful for several reasons. First, it allows your client to come to Jesus with the some of the evidence in the case. Second, it locks in the government witness. Third, it allows a testing of the weight of the government's evidence and how that interplays with the motion for detention.

c. History and characteristics of the person

1. Character

A. This is a virtual bottomless pit of goodwill that your client has developed throughout his life, if applicable;

B. Comments relevant to defendant's character can include whether he was dishonest with pretrial services officers/cops/etc. However unfair, these statements may be seen by the judge as a glimpse into future compliance by the person.

- C. Did defendant attempt to hide assets in the pretrial services interview?
2. Physical/mental condition
- A. Is there some kind of mental or physical ailment that defendant has that militates toward release? (I.e., Is your client so sick that it would be costly for the Marshals to treat him while detained? )
  - B. Does this analysis necessarily require defense counsel to show why detention might hurt defendant? I think so. Defense counsel might choose to show why pretrial release would lead to a more palatable alternative to detention re: medical or psychological condition.
3. Family ties
- A. This is perhaps one of the most important issues. Often, family are used to co-sign as well as to serve as third party custodians. Before you are involved in the case, pretrial services has usually already called family and gotten their shocked reactions to your client's recent arrest. And, a family's first reaction to a loved one's arrest is not usually good for your client. But, if contacted early enough, you can establish the support network that your client will need to get out and stay on bond during the pendency of the case.<sup>3</sup>
  - B. The ideal, instead, is for family members to rally around your client, without being enablers<sup>4</sup>.

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<sup>3</sup>As Sonny and Cher once sang, "Then put your little hand in mine, there ain't no hill or mountain we can't climb..." *I Got You Babe* © 1965, Gold Star Recording Studios.

<sup>4</sup>An enabler is the person in a codependent relationship who shields the bad actor from acceptance of responsibility for his own actions. The constant need to be needed dictates the shielding behaviors of the enabler. Enablers are classic helpers, but their help is excessive, and to a fault. Their help, rather than confronting the problem head-on, diverts responsibility and consequences for the problem. Source: *Are you an Enabler?*, Sara Chana Radcliffe.

C. This issue also becomes extraordinarily complicated with border districts that have border cases where the client's family resides in Mexico. On the one hand, lack of family ties in the United States is a (g) factor, but one that can usually be remedied by other issues. Does the client have other family in the United States where he can reside? A heavy restriction on travel is suggested. What about the fact that a US citizen can't find refuge legally in Mexico? Is that a point to raise?

4. Employment

A. It has always seemed odd to this author that if the person had steady employment he most likely would not have engaged in conduct that is the subject of his current detention. But, ours is not the job to wonder why. Look at the steadiness or stability of your client's employment history.

B. Wanderlust is not your client's best friend. Show connectivity or anchoring of some sort to his community, family, city, etc.

C. If your client is unemployed at the time of the detention hearing, try to see if a former or prospective employer will sign an affidavit that offers employment to your client if released on conditions.

5. Financial Resources

A. The court might take great interest in knowing that, as a condition of release, the family is willing to risk something of great import to them. Whether it is a parcel of land or something that is of great value to the entire family, it might serve as an incentive for the person to comply with conditions of release and not jeopardize that property.

B. It is also good practice for you, through whatever means, to present evidence of the amount of money that your client can post. This becomes important

later should you need to move to reduce the financial requirement on the bond since the setting of high bail has been abolished under §3142(c)(2)<sup>5</sup>.

6. Length of residence in community
  - A. Look at roots that the person has planted in the community where he will be released. Is it the same community where the court presides?
  - B. Some courts take issue with having the pretrial releasee supervised by some other pretrial services officer in some other part of the United States. Be mindful of this regional squabble.
  - C. To the extent possible, try to show that your client has strong ties to his community. Of course, if he committed the offense, his ties were apparently not strong enough to keep him from offending, but his guilt or innocence is not at issue right now. What is at issue is whether he is stable enough to stay put, not flee, and not be a danger to the community.
  
7. Community ties
  - A. Civic involvement
  - B. Church
  - C. Community service
  - D. As a practitioner, I would be careful not to over-emphasize some of these associations. For example, in a child porn case, the fact that your client is committed to his Boy Scout troop is not a good fact.
  - E. Other groups and memberships

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<sup>5</sup>Some judges, who I won't mention in this footnote, like to set a financial requirement so high that the ultimate effect is detention. This is specifically addressed in the Bail Reform Act as impermissible. Call 'em on it.

8. Past conduct
  - A. The sky's the limit. The Act already talks about criminal history, character, family and community ties, etc. So what does this past conduct refer to? Anything you want it to refer to. Talk about some of the good things your client has done. Try to find some recent good acts or works. Be mindful not to overly-stress good acts undertaken many moons ago lest you wish to hear the judge sing his version of Janet Jackson's *What Have You Done for Me Lately?*<sup>6</sup>
9. History of drug or alcohol abuse
  - A. It might shed some proper light if the abuse was as a response to some traumatic event. In other words, see what is causing the abuse and maybe a condition can be affixed to address the psychological nature of the abuse.
  - B. Does the alcohol/drug abuse correlate to criminal or other negative behaviors? Judge as intervention chair.<sup>7</sup>
10. Criminal history
  - A. The ideal is no criminal history. But, that's not always the hand you are dealt. If your client has *beaucoup* criminal history, what was the quality of those priors? Stealing a loaf of bread so that he can eat is qualitatively different than stealing a loaf of bread so that others won't eat.
11. Record of appearances at court proceedings

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<sup>6</sup>*What Have You Done for Me Lately?* Copyright 1986. Janet Jackson.

<sup>7</sup>Some judges become what I call the intervention chairs. They will try to craft a way to help your client finally kick his addiction. The entire defense (you and your client) knows that kicking an addiction will require more than just listening to the words of a magistrate judge who most likely has never known addiction or its subtle intractability. However, if you can get the judge to be your client's drug addiction intervention ally, a bond is more likely.

- A. Highlight how he has done on his promise to appear for court on other occasions.
  - B. Talk to his prior pretrial services officers. See what his rate of compliance was.
  - C. See if he self-surrendered for other sentences.
  - D. Was he summoned to his initial appearance or was a warrant served? If he was summoned, and he voluntarily surrendered to the summons, that shows a propensity to follow the court's rules. If a warrant issued for his arrest and he self-surrendered, this also goes a long way.
12. Whether person was on release status for a federal, state, or local offense (probation, parole, bail pending trial, sentencing, appeal, or completion of sentence)
- A. Unfortunately, if your client was on some sort of release status when the federal offense was committed, courts usually go crazy about his re-offending and label him, however unfortunate, as a continuing danger to the community. But, the practitioner must determine whether his new charged conduct constitutes a danger to the community. *United States v. Ploof*, 851 F.2d 7 (1<sup>st</sup> Cir. 1988); *United States v. Byrd*, 969 F.2d 106 (5<sup>th</sup> Cir. 1992).
- d. Nature and seriousness of the danger posed to any person or community by person's release.
  - e. In considering whether to release someone under a property bond or surety bond, court can, *sua sponte* or on motion of the government, conduct an inquiry into the source of the property to see if the source of the property will not reasonably assure appearance.
    - 1. If you find yourself representing a RICO or large-scale drug defendant (king pin), or any money case, the uneasiness you feel about the court or the government making inquiry into

the source of property or funds is justifiable. It would be much better to have someone post either property or money where there is no tie to the defendant. There's no real need to provide extra evidence against your client.

The above are commonly referred to as “g factors.” These G factors are reviewed and evaluated in every case where detention is sought and they become especially important where a presumption against release exists. When does the playing field between you and the government tilt to the government's favor? Rebuttable presumptions.

#### **F. THOSE PESKY LITTLE PRESUMPTIONS (TWO CLASSES)**

1. In various circumstances, the playing field in which you and the government play is tilted ever so slightly towards the government. Now, anyone who has ever practiced in federal court knows that this “tilt” is more akin to an avalanche, but nonetheless the tilt is supposed to be ever so slight. What are the circumstances under which the playing field begins tilted in favor of detention?
2. **IN A CASE DESCRIBED IN TITLE 18 U.S.C. §3142(f)(1), THERE EXISTS A REBUTTABLE PRESUMPTION THAT NO CONDITION OR COMBINATION OF CONDITIONS WILL REASONABLY ASSURE THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY IF THE JUDICIAL OFFICER FINDS THAT...**
  - A. The person has been convicted of an offense under (f)(1) (ie, a crime of violence, an offense listed in §2332b(g)(5)(B) for which a term of imprisonment of 10 years or more is prescribed, an offense with a life or death maximum, a drug offense where 10 years is a possible sentencing option, any state or local offense described in (f)(1) if there had been federal jurisdiction, and any felony that is not a crime of violence that involves a minor victim or involves the possession/use of a firearm or destructive device (see Title 18 U.S.C. §921), or any other dangerous weapon, or involves a failure to register (registration of sex offenders under Title 18 U.S.C. §2250)), AND
  - B. The offense described in (f)(1) was committed while the person was released pending trial for a f/s/l offense; and

- C. Not more than five years has elapsed since the date of conviction or release for the offense in (f)(1), whichever is later.
3. Subject to rebuttal by the person, presumption exists that no condition or combination of conditions will reasonably assure person's appearance and the safety of the community if the judicial officer finds that there is probable cause to believe that the person has committed:
    - A. A drug offense where the maximum term of imprisonment prescribed by statute is ten years or more; or
    - B. An offense under Title 18 U.S.C. §924(c)[possession of a firearm during a crime of violence or drug trafficking crime];
    - C. An offense under Title 18 U.S.C. §956(a)[conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country];
    - D. An offense under Title 18 U.S.C. §2332b[An act of terrorism transcending national boundaries]; or
    - E. An offense involving a minor victim Title 18 U.S.C. §§1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 [kidnapping, sex trafficking of children, sexual abuse, various child porn and sexual exploitation of children offenses]
  4. The preliminary and detention hearings are usually held at the same time. Some defense attorneys waive the preliminary hearing and elect, instead, to fight the detention portion. Keep in mind that your waiver of the preliminary hearing kicks in the presumption in an applicable case because you are admitting that there is probable cause. It has always seemed wiser to me to not waive either hearing so that you don't constrain your ability to cross examine, and so that you don't unwittingly kick in the presumption in an applicable case yourself.
  5. An indictment alone represents probable cause. *United States v. Vargas*, 804 F.2d 157 (1<sup>st</sup> Cir. 1986); *United States v. Contreras*, 776 F.2d 51 (2<sup>nd</sup> Cir. 1985); *United States v. Suppa*, 799 F.2d 115 (3<sup>rd</sup> Cir. 1986); *United States v. Trosper*, 809 F.2d 1107 (5<sup>th</sup> Cir. 1987).

**G. A WORD (or two) ABOUT REBUTTING THE PRESUMPTION**

1. Oftentimes, judges rely too heavily on the presumption to detain our clients. Although they know that the presumption may be rebutted, they often see this rebuttal as impossible to overcome. This is simply not the case. If the presumption is invoked, the defendant then has the burden of production showing that he is not a flight risk or danger to the community. *United States v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985); *United States v. Jessup*, 757 F.2d 378 (1<sup>st</sup> Cir. 1985); *United States v. Chimurenga*, 760 F.2d 400 (2<sup>nd</sup> Cir. 1985); *United States v. Perry*, 788 F.2d 100 (3<sup>rd</sup> Cir. 1986); *United States v. Fortna*, 769 F.2d 243 (5<sup>th</sup> Cir. 1985); *United States v. Hazime*, 762 F.2d 34 (6<sup>th</sup> Cir. 1985); *United States v. Portes*, 786 F.2d 758 (7<sup>th</sup> Cir. 1985); *United States v. Hurtado*, 779 F.2d 1467 (11<sup>th</sup> Cir. 1985). You will often hear a judge say, “This is a presumption case and I find that the defendant has not overcome the presumption.” Now, if you have not presented an iota of evidence, the judge is right. If, on the other hand, you have presented some evidence, then ask the judge to clarify his ruling. Is it that the judge feels that you have not overcome the burden of production? Or is the judge improperly shifting the burden of proof. This is a subtle difference. If you have presented evidence, you have met the burden of production, so it might appear that the judge has improperly made a bigger burden out of the rebuttable presumption and/or has shifted the entire burden of proof to you. OBJECT and state that for the record.

a. Ways to rebut presumption

1. Use of proffer evidence from pretrial services report;
2. Good cross-examination of government witness, but be careful not to make government’s point (ie, eluding, evading arrest and detention issues, any use of dangerous instrumentalities);
3. Defendant’s confession, if any;
4. Defendant’s activities prior to arrest (ie, no attempt to abscond, especially if indictment was forthcoming);
5. Self-surrender upon warrant of arrest;
6. The G Factors

**H. A CAUTIONARY TALE ABOUT USING FAMILY MEMBERS AND/OR THE DEFENDANT AT A DETENTION HEARING**

1. Before considering whether to put on a family member or your defendant on the stand to help you build your G-factors at a detention hearing, first thoroughly consider putting **every other person on Earth** on the stand to testify before letting your client’s family or your client testify. Consider this exchange:

**Defense Attorney: Is Ms. Defendant a good mother?**

**Client's Sister: My sister [ie, your client] is a good mom.**

**Defense Attorney: Do her kids need her at home?**

**Client's Sister: Not really, because they don't live with her. They live with me.**

**Defense Attorney: You mean they visit you?**

**Client's Sister: No, they live with me. She's hardly ever around because she's always working. But, when she does come by, she is a good mom.**

**[PRETRIAL SERVICES REPORT INDICATES  
DEFENDANT IS CURRENTLY UNEMPLOYED]**

**Defense Attorney: Pass the witness.**

This exchange raises more questions than provides options and alternatives to detention. What kind of a mother leaves her children with someone else full-time? Where is she allegedly working, if she told Pretrial Services she is unemployed? Is the sister covering for defendant, or is the defendant lying to the sister? Either of which, by the way, hurt your client. On the one hand, your client is lying to her sister about her whereabouts, which touches on character and the future promise to appear at court hearings. On the other hand, if the sister is covering for your client, although well-meaning, this could hurt her ability to become a co-signer or other surety for your client. All you wanted was for the sister to speak highly of your client's maternal instinct. What you have gotten, instead, is a road map to disaster, because now the sister is up for cross-examination. We return to the testimony...

**AUSA: Would you be surprised if Ms. Defendant told Pretrial Services that she is unemployed?**

**Sister: Yes.**

**AUSA: Why?**

**Sister: Because I have been taking care of her kids because she said she was working.**

**AUSA: Does it make you wonder what she is actually doing,**

**instead of working?**

**Sister: Yes. But I know she wouldn't do something like this. Would she?**

**AUSA: Have you ever known her to be in this kind of trouble in the past?**

**Sister: Yeah, but...**

**Defense Attorney: Objection. Relevance.**

**AUSA: Suitability of co-signer, reliability of prior testimony, characteristics of the person, and the other G factors.**

**Court: Overruled.**

**Sister: ...she said she wouldn't do it again.**

**[Defense Attorney rubs his forehead frustratingly and peers at the witness.]**

This exchange is just the tip of the “things that can go wrong during a detention hearing” iceberg. Defense counsel knew that the witness would say some positive things about your client’s maternal instincts. But there was no real way of knowing all of the family’s deep, dark secrets. Or is there? Is there another way to avoid this and many other scenarios?

## **I. HOW TO AVOID HARI-KARI<sup>8</sup> DURING A DETENTION HEARING**

1. Never, never, never put up a family member, friend, or your client to testify if you don't know exactly what they are going to say. And, even when you do know what they are going to say, putting these folks on the stand opens your entire case up for slaughter.
2. Even if you know exactly what they are going to say, you can never be prepared

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<sup>8</sup>Hari-Kari, also spelled hara-kiri is an ancient Japanese ritualistic form of honorable suicide where samurai, or other member of the warrior class, rip open their abdomen with a knife. [ < Japanese harakiri < *hara* belly + *kiri* cutting]

for the things they will make up or “remember” in the heat of battle.

3. Utilize investigators or other persons to take information from the prospective witness and testify as to those matters only. In this area, you are going to want to limit the negative things that this investigator knows. You can do this by letting him hear only the positive things. Remember, the rules of evidence are not in play. Hearsay is admissible. What’s good for the goose, is good for the gander.
4. Utilize the proffer option to relay positive information during a detention hearing. Proffering testimony is a permissible means of presenting evidence. It is also a way to get around the need for a live witness, investigator or otherwise.
5. What about proffering testimony by a pretrial services officer? Or, of course, calling one to testify? Just be careful that their intentions are worthy of your proffer or live testimony.
6. If your client wants to testify, dissuade them with visions of jail bars, perjury, contempt of court, upward departures<sup>9</sup>, the application of additional specific offense characteristics, etc.
7. If your client insists on testifying<sup>10</sup>, even against the advice of counsel, what do you do if he is testifying to matters you know are not truthful?

## J. APPEALING THE DETENTION/RELEASE ORDER

1. Title 18 U.S.C. §3145(b). The person may file, with the court having original jurisdiction over the offense, a motion for revocation of the order. See Appendix A for an example of this type of motion.
2. If, instead, a judge orders release, and for some reason, the person still can’t make the bond, a person can file a motion to amend the conditions of release pursuant to Title 18 U.S.C. §3145(a)(2). See Appendix B (Parts 1&2) for an example of this type of motion.

A. This most often arises in a situation where a bail bond amount is set but

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<sup>9</sup>To the extent that there is such an animal left after *Booker*. With blanket authority to do whatever one wants, a judge need not necessarily express an opinion as to why they are moving out of the advisory guideline range.

<sup>10</sup>This is one of the few rights that your client can exercise, regardless of your advice. In other matters during the course of the litigation, counsel makes strategic calculations. Here, as it is his and only his right to testify or not to testify, only he can make that call.

the person can't meet even that amount. For example, a person is ordered released upon satisfying a \$10,000 with 10% cash deposit bond. But, his family cannot gather the \$1000 necessary to meet the conditions. Do a motion to amend the conditions of release to address the issue of the bail bond being set too high. Remember, the court cannot impose a financial condition that results in the pretrial detention of the person. *See* Title 18 U.S.C. §3142(c)(2), (3). To compensate for the reduction in the bail bond requirement, you might want to consider adding an additional condition. See Appendix B (Parts 1&2).

3. The government can file a motion to revoke/amend release order with the court having original jurisdiction.
4. Original magistrate judge who ordered release/detention can reconsider the issue.
5. But, whether the magistrate reconsiders or the district court takes it up anew, the motion shall be determined promptly. The Circuits, predictably, have differed on their opinions regarding “prompt” and what remedy is available to a defendant. *See United States v. Fernandez-Alfonzo*, 813 F.2d 1571 (9<sup>th</sup> Cir. 1987)(court held that 30 day delay was not prompt; defendant ordered released on conditions). *Compare United States v. Barker*, 876 F.2d 475 (5<sup>th</sup> Cir. 1989)(court says 2 month delay may not be prompt, but does not release defendant).
6. The release/detention order is reviewed on a *de novo* basis. *United States v. Thibodeaux*, 663 F.2d 520 (5<sup>th</sup> Cir. 1981); *United States v. Fortna*, 769 F.2d 243 (5<sup>th</sup> Cir. 1985); *United States v. Delker*, 757 F.2d 1390 (3<sup>rd</sup> Cir. 1985); *United States v. Koenig*, 912 F.2d 1190 (9<sup>th</sup> Cir. 1990).
7. ONE INTERESTING NOTE: Title 18 U.S.C. §3142(i)(last paragraph) permits the judicial officer, by subsequent order, to temporarily release the person to the custody of the US Marshal or *another appropriate person*, to the extent that the court determines such release to be necessary for defense preparation or some other compelling reason. Does this section allow for permissible forum shopping? Maybe. Appealing the detention order will get the matter heard by another judge. Even if he agrees with the lower court's detention, the new judge may be less stringent with regard to the section dealing with release for defense preparation or other compelling reason. Something to think about.

**Let's say instead of detention the judicial officer decides that release on conditions is proper and adequate to reasonably assure the defendant's appearance at court proceedings and the safety of any other person and the**

**community. What conditions can he impose?**

**K. CONDITIONS OF RELEASE—Title 18 U.S.C. §3142(c)**

1. Where judicial officer finds that own recognizance or unsecured appearance bond will not reasonably assure appearance and safety of community, judicial officer *SHALL* order pretrial release, subject to...
  - A. condition that he not commit another federal/state/local crime during release;
  - B. subject to the least restrictive further conditions or combination of conditions, which includes (*but is not limited to*) the following,
    1. Third party custodianship;
      - A. When trying to find a suitable third party custodian, avoid persons with injurious habits (ie, co-defendants, enabling mothers/fathers);
      - B. Courts might be more inclined to do a third party custodian on a younger offender (ie, mother/father to take custody of son/daughter);
      - C. Court might look more favorably upon a third party custodian who has legal status and who has never been convicted of a crime;
      - D. Make sure that third party custodian actually has a tie to defendant and that defendant might reasonably respond to that custodian's guidance;
    2. Maintain/seek employment;
      - A. Legal employment is best;
      - B. Bring employer who might act as partial third party custodian during the daytime;
      - C. Multiple jobs might work best here under the idle-hands-

are-the-devil's-workshop theory<sup>11</sup>;

3. Maintain/commence educational program;
  - A. GED Program commencement and completion could also serve as mitigation for sentence, if applicable.
4. Restrictions on personal associations/abode/travel;
  - A. Cell phone limits re: associations;
  - B. Depending on ties to criminal city, consider move outside of the city or township—the “fresh start”;
  - C. Limit use of vehicles to work/school/church and nothing else;
  - D. Electronic monitoring could monitor place of abode (but be careful with costs);
  - E. Place of abode should not have call forwarding, monitoring, or caller ID.
5. Avoid contact with victim or potential witnesses;
6. Report regularly to a law enforcement agency, pretrial services, or other agency;
  - A. While it is an option, vigilance should be exercised to ensure that your client is not asked to regularly report to, say, the FBI, DEA, etc., especially if your case involves that agency;
  - B. Close communication and monitoring should always be kept over your client at all times. Let's say your client commits another crime while out on pretrial release. His normal conditions are to report arrests and other criminal activity. In reporting these circumstances and events to his supervising pretrial services officer, does he screw himself

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<sup>11</sup>See 1 Tim 5:13 (“...they get into the habit of being idle and going about from house to house. And not only do they become idlers, but also gossips and busybodies, saying things they ought not to.”)

with respect to admissions of additional criminal conduct? Moreover, what if your client is “less than truthful” about a recent arrest and/or conviction, does he not expose himself to an additional violation of Title 18 U.S.C. §1001(false statement) by not reporting or by falsely omitting it? Possibly.

7. Curfew;
  - A. Consider daytime and nighttime curfews tailored to work/school schedule.
8. No guns, destructive devices, or other dangerous weapons;
  - A. If he has it, move to relinquish membership to NRA;
  - B. Move to clear abode of any lawful weapons;
  - C. If your client is a reservist or other military trained individual who routinely trains with weapons, either seek advance permission of court or clear reservist obligation;
9. Refrain from excessive (or any) use of alcohol or drugs (that are not prescribed);
  - A. DWI and Public Intoxication might be viewed as excessive use of alcohol;
  - B. Remind client that even though he is “at a party where people are smoking dope” and even though he “doesn’t smoke the stuff,” his simple association might get him revoked;
  - C. Be extremely forthcoming to pretrial services about drugs, whether narcotic or otherwise, being taken by client under the direction of a physician;
  - D. If the offense involves dangerous drunken driving or similar concerns, inquire about the placement of an Interlock system or relinquish keys to any autos.
10. Undergo medical, psychological, or psychiatric treatment, including drug/alcohol treatment, and remain in a specified

institution if required for that purpose;

- A. Be extraordinarily careful about statements made to these professionals that might come back to bite you. A client who is undergoing a psychological evaluation might blurt out things you would rather not be reported to the Court. For example, a client undergoing a psychological evaluation to determine whether he could comply with his medication schedule and therefore reduce the risk on the community once blurted how he felt that 12 year old girls could easily consent to sexual performance with an adult male. Lovely.
- B. Use the medical treatment angle to show cost-effectiveness to government in avoiding their paying for care;
- C. No matter what part of the country you practice, there is always one pretrial or probation officer who fancies themselves a drug/alcohol rehabilitation expert. And, they love sharing their expertise with everybody. Make them your ally by building them up as the local expert. If possible, get this person on board to recommend treatment (start with outpatient and depending on re-offending, consider inpatient);
- D. Consider halfway house placement for person who cannot or will not keep a medication schedule (schizophrenics, etc.) where their lack of medication might make them a community danger.

11. Money or other property bond;

- A. Get a reasonable appraisal of real property, if any, and if applicable;
- B. Present evidence to the court relating to the maximum amount of money that the person or his family could post for him. This becomes prima facie evidence of a financial obligation acting as *de facto* detention should appeal of that condition be necessary;
- C. Liquidate assets, rather than providing appraisals, depending on connection to real property, for example.

- 12. Bail bond with other solvent surety;
  - A. Some courts don't accept these types of bonds, probably because of the lack of ties to the bondsman.
  
- 13. Intermittent release;
  - A. Release only for school, work, church and then back to the pokey.
    - 1. This alternative seems to be a bit unworkable at times because its involves getting the cooperation of the US Marshals. Enough said.
    - 2. But, couldn't you achieve the same thing as intermittent release if, after going to work, school, church, etc., the person would have to report to some individual or agency or go into the custody of his third party custodian? Sure.
  
- 14. Any other condition.
  - A. Community service;
  - B. No cell phones;
  - C. No driving, except to and from work/school;
  - D. No television;
  - E. No internet usage;
  - F. Multiple third party custodians;
  - G. Attendance at victim impact panels, if applicable;
  - H. Report pending indictment to potential employers, especially if person has a job that involves the public trust.

Now let's say that your client is awaiting sentencing or is awaiting a decision from the court of appeals regarding his appeal, what rules apply in these two instances?

**L. RELEASE OR DETENTION OF A DEFENDANT PENDING SENTENCING OR**

## APPEAL—TITLE 18 U.S.C. §3143

### A. PENDING SENTENCING.

1. The judge shall order that a person be detained if that person has been found guilty and is awaiting the imposition or execution of a sentence unless the guidelines<sup>12</sup> don't recommend a sentence of imprisonment. Court can still release person if it finds by clear and convincing evidence that person is not likely to flee or pose a danger to community.
2. Once judicial officer finds lack of flight risk and non-danger by clear and convincing evidence, the court **SHALL** order release pursuant to Title 18 U.S.C. §3142(b) or (c).
3. If the person has been found guilty and is awaiting imposition or execution of a sentence for a 1) crime of violence, 2) an offense where the maximum is life imprisonment or death, or 3) a drug offense where the maximum by statute is ten years or more, the court shall order detention unless,
  - A. The court finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
  - B. An attorney for the Government has recommended that no sentence of imprisonment be imposed;

***and***

  - C. The court finds by clear and convincing evidence that the person is not a flight risk and not a danger to the community.

### B. RELEASE/DETENTION PENDING APPEAL BY DEFENDANT

1. For a person found guilty, assessed a term of imprisonment, and who has filed an appeal or petition for writ of certiorari, court shall detain such person unless the court finds,
  - A. By clear and convincing evidence, person is not a flight risk or a danger to the community if released under own recognizance,

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<sup>12</sup>What Guidelines? The *Booker/Fanfan* decision holding that the United States Sentencing Guidelines are merely advisory and not mandatory might throw some of this analysis into some disarray. As it stands now, the applicable minimum term of imprisonment in all cases except statutory mandatory minimums is zero months.

unsecured bond, or condition or combination of conditions;

*and*

B. That the appeal is not for delay and raises a substantial question of law or fact likely to result in a reversal, an order for new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the duration of the appeal process.

1. Court, if it makes the above findings, must release person, except that detention can be ordered terminated at point at which reduced sentence served.

2. If the person has been found guilty and has been assessed a term of imprisonment for a 1) crime of violence, 2) an offense where the maximum is life imprisonment or death, or 3) a drug offense where the maximum by statute is ten years or more, the court shall order detention.

3. Title 18 U.S.C. §3145(c) still allows a court to release a convicted defendant who has been assessed a term of imprisonment and ordered detained under Title 18 U.S.C. §3143(b)(2) if the person can show exceptional circumstances such as...

A. Aberrant criminal conduct, uncharacteristic reaction to an unusually provocative situation, failing health, length of sentence, lost benefit while incarcerated awaiting appeal, to name a few. *See United States v. Garcia*, 340 F.3d 1013, 1019-22 (9<sup>th</sup> Cir. 2003); *United States v. Jones*, 979 F.2d 804 (10<sup>th</sup> Cir. 1992); *United States v. Herrera-Soto*, 961 F.2d 645 (7<sup>th</sup> Cir. 1992); *United States v. DiSomma*, 951 F.2d 494 (2d Cir. 1991).

C. RELEASE/DETENTION PENDING APPEAL BY THE GOVERNMENT

1. Detention/release order in place is still in effect. If neither in effect, then 3142 to be followed. But if person is sentenced to a term of imprisonment, he shall be detained. In any other circumstance, release or detention is proper as dictated by 3142.

**Now, let's say that you succeeded in either getting a bond set for your client, or you convinced the judge not to detain your client, or you convinced the district court to revoke the detention order below, or you convinced the appeals court**

**to reverse everybody else. And, after your incredibly hard work, your client gets released on his conditions of release. Except that, while out on bond, he manages to find a way to not comply with the release order. What can go wrong?**

**M. PENALTIES FOR LESS THAN COMPLIANT BEHAVIOR WHILE ON PRETRIAL RELEASE: A CASE OF KATY, BAR THE DOOR!!!<sup>13</sup>**

1. Failure to Appear before a court or failure to surrender for service of sentence. Title 18 U.S.C. §3146 establishes a punishment schema for failing to appear. This punishment schedule, if imposed, runs consecutively to any other sentence. The maximums for failing to appear:
  - A. For an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, person is subject to fine, not more than ten years imprisonment, or both;
  - B. For an offense punishable by imprisonment for a term of five years or more, person is subject to fine, imprisonment not to exceed five years, or both;
  - C. Any other felony, person is subject to a fine, not more than two years of imprisonment, or both;
  - D. A misdemeanor, person is subject to a fine, not more than one year of imprisonment, or both;
2. If the person commits a separate federal crime while on pretrial release, Title 18 U.S.C. §3147 can become a problem.

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<sup>13</sup>The precise etymology of the expression “Katy, bar the door!” is unclear. It first made its appearance in the United States in 1894. The expression might have been drawn from “The King’s Tragedy,” a poem by Gabriel Dante Rossetti written in 1881. Rossetti’s poem was narrated by Catherine Douglas. In 1437, King James I of Scotland was attacked by his enemies while staying in a room with no bar for the door. His Queen’s lady-in-waiting, Catherine Douglas, is said to have valiantly tried to bar the door with her own arm. Her arm was, unfortunately, broken in the attempt, and the King slain. It is entirely possible that the Queen’s cry of “Katherine, keep the door!” in Rossetti’s poem became the popular expression “Katy, bar the door,” but it remains to be explained how the phrase happened to first appear 13 years later in America.

Source: <http://www.word-detective.com/111703.html>

- A. A person convicted of a felony faces not more than ten years consecutive to other sentence;
  - B. A person convicted of a misdemeanor not more than one year consecutive to any other sentence.
3. Other Sanctions—Title 18 U.S.C. §3148
- A. Revocation of release—Title 18 U.S.C. §3148(b);
  - B. Order of detention;
  - C. Prosecution for contempt of court.
  - D. Practice Note: The author has had occasion to have several, if not most, of his clients be re-arrested for failure to comply with conditions of release for various reasons: commission of new federal and state offenses, drug ingestion, alcohol ingestion, failing to report, failing to appear for court, failing to abide by residence conditions, etc. While there are a number of options that the court has available as sanctions, counsel must carefully consider what course of action to take to avoid drawing the court's ire. The following are some considerations when considering how to handle a petition to revoke your client's bond:
    - 1. Does your client have a legitimate reason for non-compliance? Counsel remembers the quite ingenious argument of a client who was ordered to wear an electronic monitor. Somehow, and quite mysteriously, the monitor simply broke off of his ankle, despite his best attempts to keep it in place. This was the client's explanation for why the monitor alerted Pretrial Services that it had been tampered with. Do you buy it? Better yet, will the Court buy it? If your client does not have a fantastic reason for non-compliance, putting the government to the burden of proof in the revocation hearing might have dire consequences: the court might seek rent on the courtroom and order forfeiture of any bond money that was previously placed, may seek contempt, may attempt to strip acceptance of responsibility or apply obstruction of justice enhancements, or seek a separate cause of action for contempt of court. Is there a better way? Consider self-surrender on the day of the hearing to revoke bond. This course of action moots the government's petition and could get the court off your client's back without incurring financial obligations. Ask the court to rescind the conditions of release, not revoke.

2. If your client has a legitimate reason for non-compliance, seek an audience with the court, to explain the scenario and get a heads-up preview of what the judge might do. If the judge is amenable to re-release, ask that the petition be denied and other conditions placed on the release order, if necessary. If the judge is not looking interested in your argument, consider taking the self-surrender route, rather than incurring all the other problems.
3. **TRICKY SUBJECT:** Usually when your client is not complying with conditions of release, you will get a courtesy phone call from his pretrial services officer. The officer sometimes warns you that he will be filing a warrant for arrest of your client. Ideally, it is best to have your client self-surrender on this warrant, if he intends to want to be re-released. But, does advising him of the pending warrant obstruct justice? Tricky subject.

**N. SOMETIMES IT'S FUN TO BE WANTED....SOMETIMES IT'S NOT: CLIENTS IN FEDERAL CUSTODY BUT WHO ARE ALSO WANTED BY THE STATE OR WANTED FOR DEPORTATION**

**1. BEING WANTED BY A STATE FOR SOME ACTION.**

You will, from time to time, have clients who are in federal custody awaiting a federal bond determination but who are wanted by the State for some other offense (extraneous offense, probation violation, parole violation, etc.). If you have a concern that your client, if granted a federal bond, may not make a state bond, he could be buying himself a whole lot of pain. Generally speaking, I prefer my clients to stay in primary federal custody rather than be lost in the state system somewhere. If your client stays in federal custody, he will get the chance to have the state run their sentence, if any, with the federal sentence. What, on the other hand, are the chances that a federal court will run their sentence concurrently with the state? I think you have a better chance that your client will get a formal letter of apology from the US Attorney for his discomfort while incarcerated.

So, long story short, sometimes it's better to stay in federal custody rather than take the chance that the state will deal with your client favorably on a bond determination there.

The other part of the advice I give my clients is that, if convicted, he will be assigned a case manager in the BOP (Bureau of Prisons) who might be able to help him resolve any detainers he might have with other sovereigns. This would be his opportunity to get action on those detainers (plead guilty, true, or whatever) and have the state run them concurrently with the feds. But, make your client

aware of that possibility. Also, you should make your client aware of the possibility that the state may not want to run anything concurrently with the feds.

## **2. BEING WANTED BY THE FEDS FOR DEPORTATION.**

Oftentimes, you will have the opportunity to represent either a legal permanent resident or a completely undocumented person who seeks to be released on bond. Note that there is nothing in the Bail Reform Act that suggests that permanent resident aliens or undocumented aliens CANNOT be released on bond. In fact, with regard to pending deportation, courts often feel like their hands are tied and waive a white flag of surrender during the process. The white flag waiving sounds something like this:

HE DOESN'T HAVE ANY PAPERS.  
HE IS BEING PROCESSED FOR DEPORTATION.  
HE IS A DEPORTABLE ALIEN.  
HE IS GOING TO LOSE HIS PAPERS.  
HE IS A RESIDENT ALIEN.  
THERE IS A DETAINER FROM ICE FOR HIS DEPORTATION.

So the idea is that a lawyer shouldn't even try to seek a bond in these cases. Too hard. Too complicated. Not so fast.

## **3. USING TITLE 18 U.S.C. §3142(d) OFFENSIVELY TO BLUNT THE 'POTENTIAL DETAINER' ARGUMENT AGAINST BOND.**

The Bail Reform Act has an unusual provision for temporary detention. It is rarely, if ever, invoked. And, if invoked, it is invoked improperly, in this author's opinion. But the gist behind 'temporary detention' is to hold a defendant for a particular state or agency to determine if that state or agency is going to act on its detainer *instanter*.

The law provides that the Court shall order the detention of the person for not more than ten days, and direct the Government to notify the wanting agency or state of the presence of the defendant in the belly of the federal criminal system. If the wanting state or agency fails to take the person into custody within that time period, the person is treated under the other provisions of the Bail Reform Act.

This temporary detention scheme applies where the judicial officer determines that the defendant:

- a. is, and was at the time the offense was committed, on
  1. Release pending trial for a felony under federal, state, or local law;
  2. Release pending imposition or execution of sentence, appeal of

sentence or conviction, or completion of any sentence for any offense under federal, state, or local law; or

3. Probation or parole for any offense under federal, state, or local law; or
4. Is not a citizen of the United States or lawfully admitted as a permanent resident; and

b. such person may flee or pose a danger to the community.

Aside from the State warrants, discussed above, the next obvious place where this section can be used is with our legal permanent resident clients. When they are arrested, ICE loves to jump on the deportation bandwagon early. They will seize documents. They will initiate removal proceedings. They might file a notice to appear. And, oftentimes, a deportation is dependent upon the defendant's conviction. Since we are at the early stages of the process, it is obvious we haven't been convicted. So a cunning criminal defense attorney could use 3142(d) offensively to insist that ICE act on its detainer. It's what I call the put up or shut up provision of the Bail Reform Act. My mom used a phrase in my childhood that I'll share later that also aptly describes this provision.

The provision essentially vitiates the argument that pending deportation or state warrants are a per se reason to detain a defendant permanently. Use the section to take that argument away from the government. Because when the wanting state or agency does not (or in the case of permanent resident aliens cannot) act, the person becomes subject to the normal provisions of the Bail Reform Act.

### **PUT UP OR SHUT UP PROVISION:**

“If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.”

# APPENDIX A

## Motion to Revoke Detention Order

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DEL RIO DIVISION

UNITED STATES OF AMERICA

V.

JOHN DOE

§  
§  
§  
§  
§

CAUSE NO. DR--CR-

**DEFENDANT’S MOTION TO REVOKE DETENTION ORDER AND  
SET BOND**

TO THE HONORABLE ALIA MOSES LUDLUM, UNITED STATES DISTRICT JUDGE FOR  
THE WESTERN DISTRICT OF TEXAS:

COMES NOW, the Defendant, by and through his attorney of record, Assistant Federal  
Public Defender Frank Morales, pursuant to Title 18 U.S.C. §3145 (b) and files this motion to  
revoke detention order and set bond and in support thereof would show the following:

**I.**

Doe was originally charged with violating Title 21 U.S.C. §844 (a). The maximum term  
of imprisonment allowed by statute is one year of confinement. On June 25, 2003, he was  
sentenced by this Court to twelve months imprisonment followed by a one year term of  
supervised release. A petition to revoke his term of supervised release was filed in July, 2004.  
Doe has been continuously incarcerated on this petition since July 19, 2004.  
Doe has been under a detention order ordered by this court since that time.

**II.**

Doe moves this court to revoke its detention order and set a reasonable bond in the amount of \$15,000 unsecured with two co-signers.

### III.

Doe has filed a motion with the Court that objects to the imposition of any term of imprisonment upon revocation of his supervised release. This matter implicates various recent Supreme Court holdings, in addition to invoking a potential holding relating to the issues raised by *Blakely v. Washington*, 124 S.Ct. 2531 (2004), of which oral argument was heard on October 4, 2004.

### IV.

Although it is expected that the Supreme Court will move as quickly as practicable on this matter, counsel is of the belief that, should his motion be granted, Doe will have spent numerous months awaiting a decision, incarceration that was wholly unnecessary and potentially illegal.

### V.

In addition, counsel believes that his motion presents an issue of first impression since the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As such, any decision made by this court would most likely result in a direct appeal to the Fifth Circuit and/or the United States Supreme Court.

### VI.

As such, since the defense motion presents a novel question of law that might only be resolved through appeal, counsel is of the belief that his client should not languish in jail while this important question makes its way through the court system, a process that could take some

considerable amount of time, but whose answer is of utmost importance to all cases before the federal courts.

#### **VII.**

Defendant has very strong ties to Del Rio, Texas. He resides with his mother, Mary Doe, who is willing to take whatever steps are necessary to assure defendant's compliance with conditions of release. In addition, defendant has an extensive support base and system in place in Del Rio, Texas, a support system made up of family and friends who have continuously offered their support during this time.

#### **VIII.**

While incarcerated awaiting final resolution of this petition, defendant has fully complied with all jail rules and regulations and has, upon information and belief of counsel, been a model prisoner at the Val Verde Correctional Facility. Furthermore, defendant has been counseled on the importance of maintaining a life free from the abuse of drugs and other intoxicants.

#### **IX.**

Additionally, defendant has significant support from his last employer, Avanti's Restaurant, whose owner, Bob Michelini, has offered him a position in his restaurant. Moreover, defendant has received a letter of recommendation from Chuck Cox, General Manager of Denim & Diamonds, a local tavern. Finally, defendant was making strides in his education to become a professional chef. These matters are evidenced in defendant's exhibits 1, 2, and 3.

#### **X.**

There, no doubt, exists a very important question of law that requires resolution. The impact of this question is far-reaching and does not simply affect this case. In deciding this

question, counsel is of the belief that his client should not be made to pre-pay a penalty that may ultimately be decided to be illegal in its imposition against him.

**XI.**

Counsel respectfully requests that this court revoke its detention order and set a reasonable bond in the amount of \$15,000 (unsecured) with two co-signers.

**PRAYER**

WHEREFORE, premises considered, Defendant prays this Honorable Court will grant this motion.

Respectfully submitted.

LUCIEN B. CAMPBELL  
Federal Public Defender

FRANK MORALES  
Assistant Federal Public Defender  
Western District of Texas  
2400 Veterans Blvd, 21B  
Del Rio, Texas 78840  
Tel: (830) 703-2040  
Fax: (830) 703-2047  
Texas State Bar No.:24007701  
*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served a true and correct copy of the foregoing instrument on Assistant United States Attorney John Peralta by hand-delivering it to his office, which is located at Federal Building - U.S. Courts, 111 East Broadway, Suite A-306, on this the 6<sup>th</sup> day of September, 2004.

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
DEL RIO DIVISION**

**UNITED STATES OF AMERICA**

**V.**

**JOHN DOE**

⋄  
⋄  
⋄  
⋄  
⋄

**CAUSE NO. DR--CR-**

**ORDER**

On this day was considered defendant's motion to revoke detention order and set reasonable bond. The Court, after considering that motion, is of the opinion that said motion is meritorious.

It is ordered that the detention order previously entered in this matter is set aside.

It is further ordered that the defendant be granted a bond in the amount of

\_\_\_\_\_ \$15,000 (unsecured)

with two approved co-signers.

Signed this \_\_\_\_\_ day of October, 2004.

\_\_\_\_\_  
HON. ALIA MOSES LUDLUM  
United States District Judge

# APPENDIX B

## (Parts 1 & 2)

Motion to Amend Conditions of Release

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DEL RIO DIVISION

UNITED STATES OF AMERICA           §  
  §  
VS.   §       CAUSE NO. DR-  
  §  
JOHN DOE                                   §

**MOTION TO AMEND CONDITIONS OF RELEASE**

TO THE HONORABLE DENNIS GREEN, UNITED STATES MAGISTRATE JUDGE FOR  
THE WESTERN DISTRICT OF TEXAS:

COMES NOW the Defendant, in the above-styled and numbered cause and by and  
through his attorney of record Assistant Federal Public Defender Frank Morales, pursuant to Title  
18 U.S.C. §3145(a)(2) and hereby files this MOTION TO AMEND CONDITIONS OF  
RELEASE and in support thereof would show the following:

**I.**

Defendant stands charged by complaint with certain violations of the drug laws.

**II.**

Defendant's conditions of release relating to bond currently require a \$20,000 bond with a  
10% cash deposit. Defendant is unable to meet the 10% cash deposit requirement on his bond  
(\$2,000.00).

**III.**

Upon information and belief of defense counsel, Rubio's family has been very diligent in their search for funds to place as the cash deposit. Searching all means available to them, Rubio's family has been able to secure an amount close to \$1,000.

**IV.**

Defendant is requesting that the Court amend his conditions of release and allow him to post a 5% cash deposit with the registry of the Court rather than the current 10% cash deposit.

**V.**

Doe and his family are not wealthy individuals. In fact, the family is selling the few assets they have to be able to meet even the meager and requested \$1,000 cash deposit. They have been very supportive of his release, securing funds and making themselves available as co-signers. They have stayed in close communication with Pretrial Services and with the undersigned counsel. Their efforts are frustrated only by their lack of immediate funds to place with the registry of the Court.

**PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** Defendant prays that this MOTION TO AMEND CONDITIONS OF RELEASE be, in all respects, granted.

Respectfully submitted,

LUCIEN B. CAMPBELL  
Federal Public Defender

FRANK MORALES  
Assistant Federal Public Defender  
Western District of Texas  
2400 Avenue F., Suite 21-B  
Del Rio, Texas 78840  
(830) 703-2040 FAX (830) 703-2047  
Texas Bar No.:24007701  
*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

By my foregoing signature, I hereby certify that on the 10<sup>TH</sup> day of December, 2003 a true and correct copy of this instrument was served upon:

Edna Hernandez  
Assistant United States Attorney  
Federal Building—U.S. Courts  
111 E. Broadway  
Del Rio, Texas 78840

Rey Luna  
United States Pretrial Officer  
417 Cantu Road  
Del Rio, Texas 78840

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DEL RIO DIVISION

UNITED STATES OF AMERICA           §  
  §  
VS.                                       §     CAUSE NO. DR-  
  §  
JOHN DOE                               §

**ORDER**

On this day came on to be heard the Defendant's MOTION TO AMEND CONDITIONS RELEASE. After considering Defendant's motion, the Court is of the opinion that said motion is proper and shall be, and is hereby,

**GRANTED.**

**IT IS ORDERED** that Defendant's bond shall be modified to \$20,000.00 with a 5% cash deposit. All other conditions of release remain unchanged.

**SO ORDERED** on this the \_\_\_\_\_ day of December, 2003.

\_\_\_\_\_  
DENNIS G. GREEN  
United States Magistrate Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CAUSE NO. C-10-
	§	
JOHN DOE	§	

**MOTION TO AMEND CONDITIONS OF RELEASE**

TO THE HONORABLE BRIAN L. OWSLEY, UNITED STATES MAGISTRATE JUDGE  
FOR THE SOUTHERN DISTRICT OF TEXAS:

COMES NOW the Defendant, in the above-styled and numbered cause and by and through his attorney of record Assistant Federal Public Defender Frank Morales and hereby files this MOTION TO AMEND CONDITIONS OF RELEASE and in support thereof would show the following:

**I.**

Defendant's bond is currently set at \$100,000 with a 10% cash deposit, and a solvent co-surety approved by Pretrial Services.

**II.**

On December 2, 2010, counsel urged the Court to consider a loosening of some of the conditions of release, citing his client's poverty and very limited resources. The government urged the Court to keep the conditions as they were, allowing the family to try their best to attempt to meet the conditions of release. Counsel for defendant agreed, citing as reasonable the request from the government to allow the family time to try to meet the conditions of release.

### III.

Defendant's family has turned over every stone in its attempt to secure both the \$10,000 cash deposit and the solvent co-surety. XXXXXXXX XXXXXXXX, defendant's wife, has, on three separate occasions, secured promises by landowners in her family—XXXXXXX XXXXXXXX, XXXXXXXX XXXXXXXX, XXXXXXXX XXXXXXXX—XXXXXXX XXXXXXXX—to place their properties as co-surety on this bond. However, their properties are all homesteads and have not been approved by Pretrial Services for that reason. That said, it should not be overlooked that defendant's family is willing to place significant quantities in support of their family member. See Attachment #1 (Warranty Deeds from willing family members)<sup>14</sup>.

### IV.

Defendant's wife has made significant strides to gather together cash money to meet the requirement of the cash deposit. To date, she has gathered approximately \$8,500, after pawning some of her own jewelry, as well as jewelry that other family members have pawned to help with the cash deposit. Also, defendant's wife rented space at a local flea market attempting to sell

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<sup>14</sup>Note that all addresses and other forms of identification (except for names) have been redacted to comply with the Court's redaction rules.

more of her and family's possessions in support of her husband. See Attachment #2 (Pawn shop receipts and flea market receipt).

#### V.

In addition, two individuals have come forward to propose the posting of their individual 401k savings plans to help satisfy the solvent co-surety requirement. First, XXXXX XXXXXX, who is a close family friend of the defendant, and who lives across the street from defendant and his wife, has pledged her total 401k savings plan—\$49,743.68—to satisfy the solvent co-surety requirement. Second, XXXXX XXXXXX, mother-in-law to the defendant, has pledged her 401k savings—\$5,103.61—in support of her son-in-law. See Attachment #3(401k savings account statements).

#### VI.

In addition, to the pledging of homestead properties (which the Court will not allow), cash in hand, and 401k savings plans, defendant's uncle has pledged both his business, which consists of several tractor trailers, and has offered to employ defendant upon release. See Attachment #4 (Statement of XXXXXX XXXXXXXX).

#### VII.

Given the tremendous amount of family support and cohesiveness in his family, it becomes apparent that Doe is well-supported in these times by his family. The family has offered everything they have, pawned much of their property, and have pledged their help in supervising the defendant on bond.

#### VIII.

As such, counsel for Doe requests that this Court amend the conditions of release in this significant way: Reduce the total bond to \$60,000 with a \$8,500 cash deposit, leaving all other terms and conditions of the previously announced bond intact.

**IX.**

**CONSULTATION WITH OPPOSING COUNSEL**

The undersigned counsel has consulted on this motion with Assistant United States Attorney Mike Hess and he opposes the motion.

**PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** Defendant prays that this MOTION TO AMEND CONDITIONS OF RELEASE be granted.

Respectfully submitted,

MARJORIE MEYERS  
Federal Public Defender

/s/

FRANK MORALES  
Assistant Federal Public Defender  
Southern District of Texas  
Corpus Christi Division  
606 N. Carancahua, Suite 401  
Corpus Christi, Texas 78401  
(361) 888-3532 FAX (361) 888-3534  
Texas Bar No.:24007701  
Southern District No.:1017156

## CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of December, 2010, a true and correct copy of this instrument was served upon Assistant United States Attorney Mike Hess and upon the Pretrial Services Office via CM/ECF electronic filing.

\_\_\_\_\_  
/s/  
Frank Morales

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA           §  
  §  
VS.   §     CAUSE NO. C-10-  
  §  
JOHN DOE                                   §

**ORDER**

On this day came on to be heard the Defendant's MOTION TO AMEND CONDITIONS RELEASE. After considering Defendant's motion, the Court is of the opinion that said motion is proper and shall be, and is hereby,

**GRANTED.**

**IT IS ORDERED** that Defendant's previously ordered conditions of release are modified as follows:

\$60,000 bond with a \$8,500 cash deposit.

All other conditions of release remain unchanged.

**SO ORDERED** on this the \_\_\_\_\_ day of December, 2010.

\_\_\_\_\_  
HON. BRIAN L. OWSLEY  
United States Magistrate Judge