

**LITIGATING THE RACIAL DIMENSIONS  
OF THE FEDERAL PRETRIAL DETENTION CRISIS**

**CLE MATERIALS & HANDOUTS**

Alison Siegler

(Race in the Federal Criminal Court—New Orleans, 2/6/20; updated 3/19)

**Initial Appearance Materials**

- **Initial Appearance Checklist & Flowchart for Defense Attorneys**
  - For use in court: Provides arguments, responses to government, and supporting caselaw for the initial court appearance on a complaint or indictment. You can add good law from your own circuit/district.
- **Template Motion: Defendant’s Motion for Immediate Release With Conditions; Exhibit A**
  - File this template motion and Exhibit A immediately after the initial appearance only in the rare case where:
    - (1) the government requested detention on the grounds of risk of flight/serious risk of flight, but not dangerousness; and
    - (2) the charge is fraud, extortion, or another charge not listed in § 3142(f)(1).
- **Template Appellate Brief: Defendant’s Appeal of Magistrate Judge’s Detention Order and Request for Immediate Release With Conditions; Exhibit A**
  - File this template appeal and Exhibit A immediately after the initial appearance only in the rare case where:
    - (1) the government requested detention either on the basis of “danger to the community,” or on the dual grounds of “danger” & “risk of flight”; and
    - (2) the charge is fraud, extortion, or another charge not listed in § 3142(f)(1).
- (The Initial Appearance template motion and appeal should not be filed in the following types of cases because a § 3142(f)(1) factor authorizes detention at the Initial Appearance: bank robbery or other crime of violence listed in § 3142(f)(1)(A); drug case listed in (f)(1)(C); 924(c) gun case, 922(g) gun case, child pornography case, or terrorism case, all listed in (f)(1)(E).)

**Detention Hearing Materials**

- **Detention Hearing Checklist & Flowchart for Defense Attorneys**
  - For use in court: Provides arguments, responses to government, and supporting caselaw for the detention hearing. You can add good law from your own circuit/district.
- **Template Motion: Defendant’s Motion for Pretrial Release in Presumption Case**
  - File this template motion before the detention hearing in any case involving a presumption of detention under 18 U.S.C. § 3142(e)(2) or (e)(3). Common presumption cases: drugs, § 924(c) gun cases, minor victim, terrorism.
- **Supporting Materials for Presumption Cases**
  - **Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 FEDERAL PROBATION 52 (2017)**: Examines the presumptions of detention and concludes that they have led to a “massive increase” in the federal pretrial detention rate.
  - **Judicial Conference Recommendation Re: Presumptions of Detention (September 12, 2017)**: Recommends amending 18 U.S.C. § 3142(e) to limit the presumption of detention in drug cases to people with very serious criminal records.

- **Non-Citizen Cases: Sample Motion for Release in U.S. v. Melo-Ramirez, Case No. 4:19-CR-68, Dkt. 9 (E.D. Va.) (filed 6/26/19)**
  - This motion was written by AFPD Andrew Grindrod of the EDVA, an alum of the Federal Criminal Justice Clinic. Andrew won the motion and his client was released.

### **Client Interview Form**

- Comprehensive form for gathering essential personal information from client in preparing for initial appearance and detention hearing.

### **Good Bond Cases**

- *United States v. Gibson*, 384 F. Supp. 3d 955 (N.D. Ind. 2019) (This opinion was written by a federal magistrate judge who attended our pretrial release presentation at the Seventh Circuit Judicial Conference in May 2019.)
- *United States v. Mendoza-Balleza*, No. 4:19-CR-1 (E.D. Tenn. May 23, 2019) (McDonough, J.) (district court order reversing magistrate judge’s detention order and releasing non-citizen client)
- *United States v. Magana*, 19-CR-447 (N.D. Ill.) (Coleman, J.) (district court reversed magistrate judge’s detention order and released non-citizen client).
  - Docket 18: Defendant’s Motion for Immediate Release With Conditions
  - Docket 22: Response by AUSA to Defendant’s Motion for Immediate Release
  - Docket 23: Reply by Magana to Motion by AUSA for Detention
  - Docket 24: Release Order

### **Congressional Testimony re: Federal Pretrial Detention**

- Alison Siegler Truth-in-Testimony Form at 4–10, *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security on the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), <https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-TTF-SieglerA-20191114.pdf> (attached)
- *Written Statement of Alison Siegler, The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), <https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf> (attached)
- Video of hearing at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2256>

### **Statistics and Data (compiled by the FCJC)**

- Memo: Race and Federal Pretrial Detention Statistics
- Federal Pretrial Detention Statistics: Most of these tables are publicly available here if you want more updated data: <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts>. If you can’t find a table there, then check the J-Net.
  - Pretrial Services Violations Summary Report: Table H-15
    - Add to motions and in-court arguments information about how rare it is for clients on bond to reoffend/fail to appear, nationwide and in your district. These numbers show that, in the vast majority of cases, detention is not necessary to “reasonably assure” safety and appearance. See pp. 4-5 of PowerPoint for more.
  - Federal Release Rates by District, excluding immigration cases: Table H-14A



# **Initial Appearance Checklist & Flowchart for Defense Attorneys**

## INITIAL APPEARANCE CHECKLIST FOR DEFENSE ATTORNEYS

### **If AUSA asks for detention:**

- Do not waive Preliminary Hearing/Preliminary Examination.**
- Do not waive Detention Hearing.**
- Ask AUSA to provide the legal basis for their detention request under § 3142(f). These are:**
  - **3142(f)(1): Case specific bases**
    - **Crime of violence**, sex trafficking of children, terrorism [§ 3142(f)(1)(A)]
    - Offense with maximum term of “life imprisonment or death” [§ 3142(f)(1)(B)]
      - i. E.g., certain firearms offenses, murder, sex abuse, racketeering
    - **Drug offense** with maximum term of 10 years or more [§ 3142(f)(1)(C)]
      - i. This includes almost all offenses under 21 U.S.C. §§ 841, 846, 960
    - [Very rare] Current felony case & the client has two priors that are either: (1) crime of violence punishable by maximum life or death, or (2) a drug case with 10+ year maximum [§ 3142(f)(1)(D)]
    - Any felony that involves a **minor victim, possession of a firearm under §§ 921, 922, 924(c)**, or failure to register as a sex offender [§ 3142(f)(1)(E)]
  - **3142(f)(2): Subjective bases that require evidence**
    - “Serious risk . . . person will flee” or not appear at trial [§ 3142(f)(2)(A) (emphasis added)] [Judge or prosecutor can invoke]
      - Ask AUSA/judge for a proffer of evidence/justification that the client poses more than an ordinary risk of flight.
      - Present your own evidence to show the client does not pose a “serious” risk.
        - E.g., lack of bail forfeitures, record of appearance at court, evidence that client has lived in the community/U.S. for a long time, PTS will keep custody of passport
    - “Serious risk” person will obstruct justice or threaten witness or juror [§ 3142(f)(2)(B) (emphasis added)] [Judge or prosecutor can invoke]
      - Ask AUSA/judge for a proffer of evidence/justification that the client poses a “serious” risk of obstructing justice or threatening a witness/juror.
- **Main types of cases where § 3142(f) is met: drugs, 924(c) gun case, 922(g) gun case, bank robbery and other crimes of violence, minor victim, terrorism.**
- **If client is charged with fraud/financial crime, postal theft, bank theft, extortion, threats, illegal reentry, or alien smuggling, the *only* possible (f) factors the AUSA can invoke are:**
  - “Serious risk . . . person will flee” or not appear at trial [§ 3142(f)(2)(A)]
  - “Serious risk” of obstruction or of threat to witness or juror [§ 3142(f)(2)(B)]
  - The very rare recidivist scenario in § 3142(f)(1)(D)
- **If AUSA gives “risk of flight” as the reason for detention:**
  - Argue** that ordinary risk of flight is not an (f) factor, and it is illegal to detain your client if no (f) factor is met.
  - Support with caselaw:**
    - See cases cited on p. 3 of this checklist. See, e.g., *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 966 (E.D. Wis. 2008): “Unless the case falls within one of the above categories in § 3142(f), the court may not detain the defendant.”; *United States v.*

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*Morgan*, No. 14-CR-10043, 2014 WL 3375028, at \*4 (C.D. Ill. July 9, 2014): “If none of the factors in either § 3142(f)(1) or (f)(2) are met, then the defendant may not be detained.”; *see also* p. 3 of this checklist.

### ➤ **If AUSA then argues the client presents a serious risk of flight under (f)(2)(A):**

- Ask AUSA for a proffer of evidence that client poses more than ordinary risk of flight
- Present your own evidence to show the client does not pose a “serious” risk
  - E.g., lack of bail forfeitures, record of appearance at court, evidence that client has lived in the community/U.S. for a long time
- If client is not a citizen, see non-citizen section below.

### ➤ **If AUSA gives “danger to community” as the reason for detention:**

- Argue** that “danger to the community” is not an (f) factor, and it is illegal to detain your client if no (f) factor is met.
- Support with caselaw:**
  - *United States v. Ploof*, 851 F.2d 7, 11–12 (1st Cir. 1988): “[W]here detention is based on dangerousness grounds, it can be ordered only in cases involving one of the circumstances set forth in § 3142(f)(1). . . . Insofar as in the present case there is no longer any contention that any of the subsection (f)(1) conditions were met, pre-trial detention solely on the ground of dangerousness to another person or to the community is not authorized.”
  - *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988): “[T]he Bail Reform Act does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice or an indictment for the offenses enumerated [in the statute] . . . .”
  - *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986): “[T]he statute does not authorize the detention of the defendant based on danger to the community from the likelihood that he will if released commit another offense involving false identification. Any danger which he may present to the community may be considered only in setting conditions of release.”
  - *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992): “[W]e find ourselves in agreement with the First and Third Circuits: a defendant’s threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention.”
  - *United States v. Morgan*, 2014 WL 3375028, at \*8 (C.D. Ill. July 9, 2014): “[T]he statute does not authorize the detention of the defendant based on danger to the community.” (citing *Himler*, 797 F.2d at 160) (emphasis added); *see also id.* at \*5 (“[W]here none of the factors set forth in § 3142(f)(1) are present, these same courts have held that ‘dangerousness’ is only relevant for purposes of choosing which, if any, conditions accompanying an order of release are necessary to ensure the appearance of the defendant or the safety of the community.”) (citing *Ploof*, 851 F.2d at 9) (emphasis added).
  - *United States v. Thomas*, No. 11-CR-2011, 2011 WL 5386773 (S.D. Ind. 2011): “When a motion for pretrial detention is made, . . . first, the judicial officer determines whether one of the ten conditions exists for considering a defendant for pretrial detention . . . .”
- Make a Due Process constitutional argument:**
  - In *United States v. Salerno*, the Supreme Court affirmed the Bail Reform Act, 18 U.S.C. § 3142, over a Due Process challenge to presumption-based detention hearings by

## INITIAL APPEARANCE CHECKLIST FOR DEFENSE ATTORNEYS

explaining that hearings would be held only under the limited circumstances set out in § 3142(f). 481 U.S. 739, 747 (1987). Interpreting the Bail Reform Act to authorize detaining someone for being a “danger to the community,” although “danger to the community” is not listed in § 3142(f), would thus contradict Salerno and render the Act unconstitutional under the Due Process Clause.

➤ **If AUSA gives “waiting for Pretrial Services report” as the reason for detention:**

- Argue that waiting for the PTS report is not a legitimate basis for detention under the statute, and it is illegal to detain your client if no (f) factor is met.

**Argue that when no (f) factor applies, it is illegal to detain your client at all.**

- Argument:** The Bail Reform Act does not permit detention unless one of the § 3142(f) factors is met. All of the courts of appeals to decide the issue agree.

**Support with caselaw:**

- *United States v. Salerno*, 481 U.S. 739, 755 (1987): The Supreme Court upheld the Bail Reform Act, 18 U.S.C. § 3142, over a Fifth Amendment substantive Due Process challenge partially on the grounds that detention hearings could be held *only* under the limited circumstances set out in § 3142(f): “The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. *See* 18 U.S.C. § 3142(f) (*detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders*).” *Salerno*, 481 U.S. at 747 (emphasis added).
- *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988): “Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists.”
- *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988): “[T]he Bail Reform Act does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice or an indictment for the offenses enumerated [in § 3142(f)].”
- *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986): “[I]t is reasonable to interpret the statute as authorizing detention only upon proof of a likelihood of flight, a threatened obstruction of justice or a danger of recidivism in one or more of the crimes actually specified by the bail statute.”
- *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992): “Detention can be ordered, therefore, only in a case that involves one of the six circumstances listed in (f), and in which the judicial officer finds, after a hearing, that no condition or combination of conditions will reasonably assure . . . appearance . . . and . . . safety.”
- *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003): We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2).”
- *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999): “[A] judicial officer must find one of six circumstances triggering a detention hearing. *See* 18 U.S.C. § 3142(f). Absent one of these circumstances, detention is not an option.”
- *United States v. Morgan*, 2014 WL 3375028, at \*14 (C.D. Ill. July 9, 2014): “§ 3142(f) specifies certain conditions under which a detention hearing shall be held. . . . If none of the

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factors in either § 3142(f)(1) or (f)(2) are met, then the defendant may not be detained.” (holding in an access device fraud case that magistrate could not detain defendant as a matter of law because no 18 U.S.C. § 3142(f) factor was satisfied) (emphasis added) (internal citation omitted).

- *Morgan*, 2014 WL 3375028, at \*10–11: “The [First Circuit in *United States v. Ploof*] found that the structure of the statute and its legislative history make clear that Congress did not intend to authorize preventative detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists. To conclude otherwise would be to ignore the statement in the legislative history that the circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial . . . and to authorize detention in a broad range of circumstances that we do not believe Congress envisioned.” (emphasis added) (internal citations omitted).

**Ask for immediate release. See p. 6 for additional steps if AUSA asks for detention with NO basis under § 3142(f).**

**If there is a basis to detain client under § 3142(f), ask for a detention hearing *immediately/soon*.**

- The default in the Bail Reform Act is for the hearing to be held “immediately”: “The judicial officer shall hold a hearing. . . . The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance.” § 3142(f).

**If AUSA asks for three days, request an earlier date and explain why there’s no good cause for a three-day continuance.**

- While the government may request “up to” three days and a judge may grant a continuance for that entire period, the judge also has the discretion to grant a shorter continuance or not grant a continuance at all.
- According to § 3142(f), the hearing “shall be held immediately” unless the government or defense requests a continuance. AUSA may request “up to” three business days to prepare for Detention Hearing. § 3142(f).
- Good cause:
  - *United States v. Hurtado*, 779 F.2d 1467, 1476 (11th Cir. 1985): “We find nothing in the language or the legislative history [of § 3142(f)] to suggest that the mere convenience of the court or of the attorneys, on either side, constitutes good cause to expand upon the three or five day period provided.”
- If government requests a continuance to give Pretrial Services time to prepare its report, argue that does not constitute good cause.

**Ensure that that detention hearing is scheduled within three business days, or five business days if the defense seeks more time.**

- Defense may ask for “up to” two additional business days, but there is a maximum of five business days total for continuance. § 3142(f).
- Defense should only ask for additional time if there are truly extenuating circumstances.
- There is no legal basis for judges to set a detention hearing beyond five business days of the initial appearance.

## INITIAL APPEARANCE CHECKLIST FOR DEFENSE ATTORNEYS

### ☐ Specific Issues at the Initial Appearance in Non-Citizen Cases

- In an illegal reentry case, the only statutory basis for detention is “serious risk” of flight under § 3142(f)(2)(A). Dangerousness is not a legal basis for detention.
- The existence of an ICE detainer does not make the client a serious risk of flight, because any flight must be voluntary.
  - *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (“a risk of involuntary removal does not establish a serious risk that [the defendant] will flee”)
  - *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015) (“the risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition”)
  - *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1135–36 (N.D. Iowa 2018)
  - *United States v. Suastegui*, No. 3:18-MJ-00018, 2018 WL 3715765, at \*4 (W.D. Va. Aug. 3, 2018)
  - *United States v. Martinez-Patino*, 2011 U.S. Dist. LEXIS 26234 (N.D. Ill. Mar. 14, 2011)
- Therefore, a judge cannot deny bond to a removable alien based on his immigration status or the existence of an ICE detainer.
  - *United States v. Sanchez-Rivas*, 752 F. App’x 601, 604 (10th Cir. 2018) (defendant “cannot be detained solely because he is a removable alien”)
  - *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015)
  - *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (mere presence of an ICE detainer does not override § 3142(g))
  - *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 968 (E.D. Wis. 2008) (“[I]t would be improper to consider only defendant’s immigration status, to the exclusion of the § 3142(g) factors, as the government suggests.”)
- Additional argument: if there’s an ICE detainer and the government believes ICE plans to detain and deport the client, then he is per se not a risk of flight because his absence from court would be involuntary.
  - *See United States v. Mendoza-Balleza*, 4:19-CR-1 (E.D. Tenn. May 23, 2019) (McDonough, J.) (noting that, according to the government, “If [this] Court does not detain Defendant, ICE will immediately detain him and deport him within ninety days,” and holding, “As long as Defendant remains in the custody of the executive branch, albeit with ICE instead of the Attorney General, the risk of his flight is admittedly nonexistent.”).
- Some courts say that the INA prohibits ICE from detaining a defendant after he’s been released on bond in the criminal case.
  - *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (the Executive Branch has a choice to make when it concludes that a noncitizen violated federal law: proceed “with a prosecution in federal district court or with removal of the deportable alien.”).
  - *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1170 (D. OR. 2012) (if a judge releases a client on bond, “the Executive Branch may no longer keep that person in physical custody. To do so would be a violation of the BRA and the court’s order of pretrial release.”).
  - *United States v. Boutin*, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017), appeal withdrawn, No. 18-194, 2018 WL 1940385 (2d Cir. Feb. 22, 2018) (“When an Article III court has

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- ordered a defendant released, the retention of a defendant in ICE custody contravenes a determination made pursuant to the Bail Reform Act.”).
- But at least one COA says that a federal judge does not have the authority to order ICE not to detain or deport the person. *See United States v. Veloz-Alonso*, 910 F.3d 266, 268–69 (6th Cir. 2018) (holding a federal judge does not have the authority to order ICE not to detain or deport a person released on bond in a federal criminal case).

## INITIAL APPEARANCE CHECKLIST FOR DEFENSE ATTORNEYS

### **If AUSA asks for detention without an (f) factor OR does not ask for detention:**

- Do not waive Preliminary Hearing/Preliminary Examination.**
- Remind judge that the statute contains a presumption of release on personal recognizance without any conditions, and ask judge to release client on personal recognizance.**
  - The presumption of release is stated in § 3142(b): The judge “shall order the pretrial release of the [client] on personal recognizance . . . unless” there are absolutely NO conditions of release that would reasonably assure (1) that the client will return to court and (2) that the client will not pose a danger to the community. (emphasis added)
  - “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).
- Remind judge that the statute contains a “least restrictive conditions” requirement.**
  - Even if the judge decides that a PR bond “will not reasonably assure” a client’s appearance and safety, § 3142(b), the judge “shall order the pretrial release of the person,” § 3142(c)(1) “subject to the least restrictive further condition, or combination of conditions that . . . will reasonably assure the appearance of the person . . . and the safety of any other person and the community,” § 3142(c)(1)(B).
- Propose pretrial release conditions that would “reasonably assure” appearance and safety, and contest conditions that are overly restrictive or are not necessary to meet those goals.**
  - **Under § 3142(c)(1)(B), the available conditions include:**
    - Place client in custody of third party custodian “who agrees to assume supervision and to report any violation of a release condition to the court” [(i)]
    - Maintain or actively seek employment [(ii)]
    - Maintain or commence an educational program [(iii)]
    - Follow restrictions on “personal associations, place of abode, or travel” [(iv)]
      - Can include electronic monitoring, GPS monitoring, home detention (which allows defendant to leave for employment/schooling/etc.), home incarceration (re: 24-hour lockdown).
      - Can include residence at a halfway house or community corrections center.
    - Avoid “all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense” [(v)]
    - Report on a “regular basis” to PTS or some other agency [(vi)]
    - Comply with a curfew [(vii)]
    - Refrain from possessing “a firearm, destructive device, or other dangerous weapon” [(viii)]
    - Refrain from “excessive use of alcohol” [(ix)]
    - Refrain from “any use of a narcotic drug or other controlled substance . . . without a prescription” [(ix)]
    - Undergo “medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency” [(x)]
    - Post “property of a sufficient unencumbered value, including money” [(xi)]
    - Post a “bail bond with solvent sureties” [(xii)]
    - Require the client to “return to custody for specified hours following release for employment, schooling, or other limited purposes” [(xiii)]

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- Or “any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.” [(xiv) (emphasis added); this allows you to be creative about proposing other conditions].

➤ **If the judge proposes/imposes a condition that an indigent client post property or meet any other financial condition that effectively results in the pretrial detention of the client:**

- Object**, citing § 3142(c)(2): “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”

- Argue for/against any additional conditions of release (listed above).**

### **If Removal Case:**

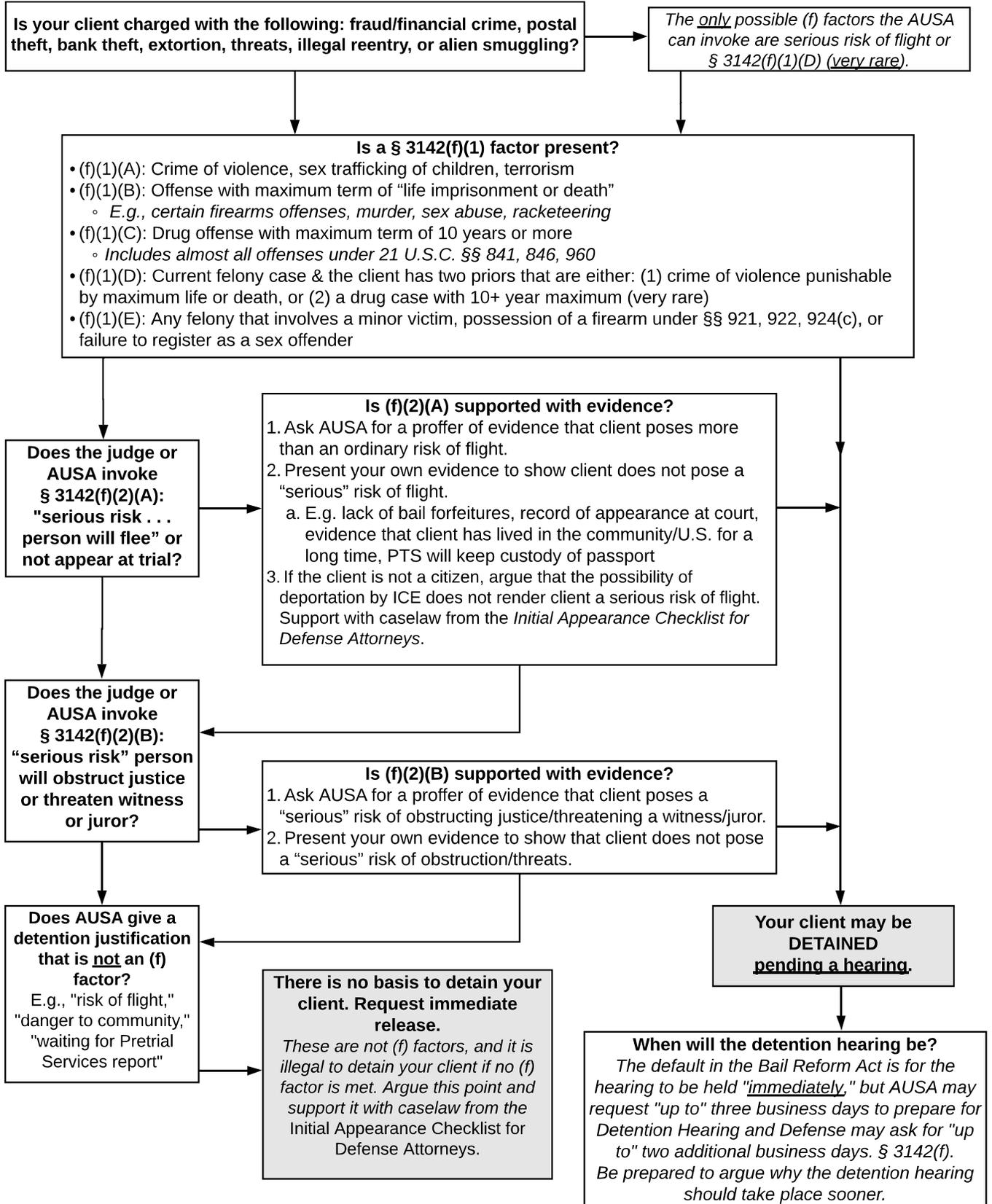
- Determine your client’s ties to the two jurisdictions.

➤ **If the client’s primary ties are to your jurisdiction and not the charging jurisdiction:**

- Argue against detention as you would at any initial appearance.
- Advocate for the detention hearing to be held in your jurisdiction.
- Negotiate with AUSA for agreed-upon conditions for client to travel to charging district.

## INITIAL APPEARANCE

Note: The most common cases where § 3142(f) is met:  
drugs, § 924(c) gun, 922(g) gun, bank robbery/COVs, minor victim, terrorism.



**Template Motion:**

**Defendant's Motion for Immediate  
Release With Conditions**

**Exhibit A**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA	)	
	)	
v.	)	Judge [NAME]
	)	No. XX-CR-XX
[CLIENT]	)	
	)	

**DEFENDANT’S MOTION FOR IMMEDIATE RELEASE WITH CONDITIONS**

- This motion should be filed immediately after the initial appearance only in the rare case where:
  - (1) the government requested detention on the grounds of risk of flight/serious risk of flight, but not dangerousness; and
  - (2) the charge is fraud, extortion, threats, or another charge not listed in § 3142(f)(1).
- This motion should not be filed in the following types of cases because a § 3142(f)(1) factor authorizes detention at the initial appearance: bank robbery, other crime of violence, or terrorism case listed in § 3142(f)(1)(A), drug case listed in (f)(1)(C), 924(c) gun case, 922(g) gun case, or minor victim case listed in (f)(1)(E).
- If you have questions about when this motion should be filed, please contact Alison Siegler ([alisonsiegler@uchicago.edu](mailto:alisonsiegler@uchicago.edu)) or Erica Zunkel ([ezunkel@uchicago.edu](mailto:ezunkel@uchicago.edu)).

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court order [his/her] release from custody pursuant to the Bail Reform Act (BRA) and the Fifth Amendment’s Due Process Clause. Supreme Court precedent makes it unconstitutional for a court to hold a detention hearing or detain a defendant at all when, as here, there is no basis for detention under 18 U.S.C. § 3142(f). As all six courts of appeals to have directly addressed the question have recognized, the only permissible bases for detaining a defendant are the enumerated factors set out in 18 U.S.C. § 3142(f). Under 3142(f), ordinary risk of flight is not a permissible basis for detention; rather, the statute only authorizes detention if there is a “*serious risk* that [the defendant] will flee.” § 3142(f)(2)(A) (emphasis added). In this case, the government has not presented sufficient evidence that [CLIENT] poses a serious risk of flight.

Accordingly, [CLIENT] must be released on bond immediately with appropriate conditions of release. *See* 18 U.S.C. §§ 3142(a)–(c). In support of this motion, [CLIENT] states as follows:

On [DATE], [CLIENT] was arrested on a criminal complaint charging [him/her] with [LIST CHARGES AND STATUTORY SECTIONS]. Magistrate Judge [JUDGENAME] held [his/her] [initial appearance/arraignment] on [DATE]. At that initial appearance, the government requested detention on the grounds that [CLIENT] posed [a risk of flight/a serious risk of flight]. Magistrate Judge [NAME] detained [CLIENT] as a risk of flight pending a detention hearing.

**I. The BRA Only Authorizes Detention at the Initial Appearance When One of the § 3142(f) Factors is Met.**

[CLIENT] is being detained in violation of the law. According to the plain language of § 3142(f), “the judicial officer shall hold a [detention] hearing” only “in a case that involves” one of the seven factors listed in § 3142(f)(1) & (f)(2). None of the § 3142(f) are present in this case.<sup>1</sup> Ordinary “risk of flight” is not among the § 3142(f) factors.

**A. Supreme Court Precedent and the Plain Language of the BRA Prohibit this Court from Detaining the Defendant Without a § 3142(f) Factor.**

The Supreme Court’s seminal opinion in *United States v. Salerno*, 481 U.S. 739, 755 (1987) confirms that a defendant may only be detained at the Initial Appearance if one of the seven § 3142(f) factors is present. *Salerno* held: “The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes,” specifically the

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<sup>1</sup> This case does not meet any of the five factors discussed in § 3142(f)(1), as it does not involve: (1) a crime of violence under (f)(1)(A); (2) an offense for which the maximum sentence is life imprisonment or death under (f)(1)(B); (3) a qualifying drug offense under (f)(1)(C); (4) a felony after conviction for two or more offenses under the very rare circumstances described in (f)(1)(D); or (5) a felony involving a minor victim or the possession/use of a firearm under (f)(1)(E).

The government has also not presented any evidence to establish that this case meets either of the two additional factors discussed in § 3142(f)(2): (1) a “serious risk that [the defendant] will flee” under (f)(2)(A); or (2) a “serious risk” that the defendant will engage in obstruction or juror/witness tampering under (f)(2)(B).

crimes enumerated in § 3142(f). *Id.* at 747. The Court continued by saying that “detention hearings [are] available if” and only if one of the § 3142(f) factors is present. *Id.* According to the Supreme Court, “[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).” *Id.* at 750 (emphasis added). *Salerno* thus stands for the proposition that the factors listed in § 3142(f) serve as a gatekeeper, and only certain categories of defendants are eligible for detention in the first place.

If no § 3142(f) factor is met, several conclusions follow: the government is prohibited from seeking detention, and there is no legal basis to detain the defendant at the Initial Appearance, jail the defendant, or hold a Detention Hearing.<sup>2</sup> Instead, the court is required to release the defendant on personal recognizance under § 3142(b) or on conditions under § 3142(c).

Notably, the constitutionality of the Bail Reform Act depends on this gatekeeping function of § 3142(f). The strict limitations § 3142(f) places on pretrial detention are part of what led the Supreme Court to uphold the BRA as constitutional. It was the § 3142(f) limitations, among others, that led the Court to conclude that the Act was “regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.” *Id.* at 748.<sup>3</sup>

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<sup>2</sup> In some districts, the U.S. Attorney’s Office explicitly acknowledges the gatekeeping function served by § 3142(f) by routinely filing a motion at the Initial Appearance that lists the government’s legal basis for detention under § 3142(f). *See* Ex. A, Motion for Detention (WDWA). That motion reads, “This case is eligible for a detention order because this case involves (check all that apply),” and provides a checkbox for each § 3142(f) factor.

<sup>3</sup> The *Salerno* Court further relied on the limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that “the government’s interest in preventing crime by arrestees is both legitimate and compelling.” To reach this conclusion, the Court contrasted the Bail Reform Act with a statute that “permitted pretrial detention of any juvenile arrested on any charge” by pointing to the gatekeeping function of § 3142(f): “The Bail Reform act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).” *Id.* at 750 (emphasis added). The Court emphasized that Congress “specifically found that these individuals” arrested for offenses enumerated in § 3142(f) “are far more likely to be responsible for dangerous acts in the community after arrest.” *Id.*

Throughout its substantive Due Process ruling, the *Salerno* Court emphasized that the only defendants for whom the government can seek detention are those who are “already indicted or held to answer for a *serious* crime,” meaning the “extremely serious offenses” listed in § 3142(f). *Id.* (emphasis added); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (“The legislative history of the Bail Reform Act of 1984 makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a narrowly-drafted statute with the pretrial detention provision addressed to the danger from ‘a small but identifiable group of particularly dangerous defendants.’” (quoting S. REP. NO. 98-225, at 6 (1983))). It follows that when a court detains a defendant without regard to the limitations in § 3142(f), the Act as applied becomes unconstitutional.

**B. The Courts of Appeals Agree that Detention Is Prohibited When No § 3142(f) Factor is Present.**

Following the Supreme Court’s guidance in *Salerno*, six courts of appeals agree that it is illegal to detain someone—let alone hold a Detention Hearing—unless the government invokes one of the factors listed in 18 U.S.C. § 3142(f). *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988); *United States v. Friedman*, 837 F.2d 48, 48–49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992); *United States v. Twine*, 344 F.3d 987 (9th Cir. 2003); *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999). For example, the First Circuit holds: “Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a Detention Hearing exists.” *Ploof*, 851 F.2d at 11. The Fifth Circuit agrees. *See Byrd*, 969 F.2d at 109 (“A hearing can be held only if one of the . . . circumstances listed in (f)(1) and (f)(2) is present,” and “detention can be ordered, therefore, only in a case that involves one of the . . . circumstances listed in (f).”).

Unfortunately, a practice has developed that contravenes the Bail Reform Act and *Salerno* and results in defendants being detained in violation of the statute and the Constitution. Specifically, it is common for the government to seek detention at the Initial Appearance on the ground that the defendant is either “a danger to the community,” “a risk of flight,” or both. Because neither “danger to the community” nor ordinary “risk of flight” is a factor listed in § 3142(f), it is flatly illegal to detain a defendant on either of these grounds at the initial appearance. The practice in this district must be brought back in line with the law. That will only happen if this Court demands that the government provide a legitimate § 3142(f) basis for every detention request.<sup>4</sup>

**II. It is Illegal to Detain [CLIENT] At All Because Ordinary “Risk of Flight” is Not a Statutory Basis for Detention at the Initial Appearance.**

It was improper to detain [CLIENT] on the government’s bare allegation that [he/she] poses a “risk of flight” for three reasons. First, the plain language of the statute only detention at the Initial Appearance when the defendant poses a “*serious* risk” of flight, § 3142(f)(2)(A), and in this case the government merely alleged *ordinary* risk of flight. Second, the government bears the burden of presenting some *evidence* to substantiate its allegation that a defendant is a serious risk of flight, and here the government has provided no such evidence. Third, to establish “serious risk” of flight the must demonstrate that the defendant presents an “extreme and

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<sup>4</sup> Perhaps the confusion arises because the BRA is not organized in the order in which detention issues arise in court. Although the question of detention at the Initial Appearance comes first in the court process, it is not addressed until § 3142(f). To make matters worse, § 3142(f) itself is confusing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before “the judicial officer shall hold a hearing”—meaning a Detention Hearing. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies at the next court appearance, *the Detention Hearing*. See § 3142(f) (explaining that the purpose of the Detention Hearing is “to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community.”). The long paragraph in § 3142(f) that follows § 3142(f)(2)(B) then describes the procedures that apply at the Detention Hearing in depth.

unusual” risk of willfully fleeing the jurisdiction if released, and the government has not met that burden here. Accordingly, it is improper to detain [CLIENT] until a Detention Hearing, let alone for the duration of the case.

**A. Supreme Court Precedent and the Plain Language of the BRA Prohibit this Court from Detaining a Defendant as an Ordinary “Risk of Flight.”**

Ordinary “risk of flight” is not a factor in § 3142(f). By its plain language, § 3142(f)(2)(A) permits detention and a hearing only when a defendant poses a “*serious risk*” of flight. There is some risk of flight in every criminal case; “serious risk” of flight means something more. According to a basic canon of statutory interpretation, the term “*serious risk*” means that the risk must be more significant or extreme than an ordinary risk. *See, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009) (“One of the most basic interpretative canons’ is ‘that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.’”).

**B. It was Improper to Detain [CLIENT] Because the Government Has Provided No Evidence to Support its Claim that [CLIENT] is a Serious Risk of Flight.**

Where the government’s only legitimate § 3142(f) ground for detention is “serious risk” of flight, the government bears the burden of presenting some *evidence* to support its allegation that a defendant poses a “serious risk” of flight rather than the ordinary risk attendant in any criminal case. After all, the statute only authorizes detention “*in a case that involves*” a “serious risk” that the person will flee. § 3142(f)(2)(A) (emphasis added). This contemplates a judicial finding about whether the case in fact involves such a risk.<sup>5</sup> The government must provide an

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<sup>5</sup> Had Congress intended to authorize detention hearings based on a mere certification by the government, Congress could have enacted such a regime, just as they have done in other contexts. *See, e.g.,* 18 U.S.C. § 5032 (creating exception to general rule regarding delinquency proceedings if “the Attorney General, after investigation, certifies to the appropriate district court of the United States” the existence of certain circumstances); 18 U.S.C. § 3731 (authorizing interlocutory appeals by the

evidentiary basis to enable the judge to make an informed decision, evidence that relates either to the defendant's history and characteristics or to the circumstances of the offense. The government has presented no such evidence here.

**C. Detaining a Defendant as a “Serious Risk of Flight” is Appropriate Only in “Extreme and Unusual Circumstances.”**

The BRA's legislative history makes clear that detention based on serious risk of flight is only appropriate under “extreme and unusual circumstances.”<sup>6</sup> For example, the case relied on in the legislative history was deemed extreme and unusual enough to justify detention on the grounds of serious risk of flight because the defendant was a fugitive and serial impersonator who had failed to appear in the past and had recently transferred over a million dollars to Bermuda. *See Abrahams*, 575 F.2d at 4. The government must demonstrate that the risk of flight in a particular case rises to the level of extreme or unusual, and no such showing has been made here.

In addition, a defendant should not be detained as a “serious risk” of flight when the risk of non-appearance can be mitigated by conditions of release. The only defendants who qualify for detention under § 3142(f)(2) are those “[t]rue flight risks”—defendants the government can

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government “if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding”).

<sup>6</sup> *See Bail Reform Act of 1983: Rep. of the Comm. on the Judiciary*, 98th Cong. 48 (1983) (“Under subsection f(2), a pretrial Detention Hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases. . . . [T]hose [types] involving . . . a serious risk that the defendant will flee . . . reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.”) (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a “rare case of extreme and unusual circumstances . . . justifies pretrial detention”—as representing the “current case law”); *see also Gavino v. McMahon*, 499 F.2d 1191, 1995 (2d Cir. 1974) (holding that in a noncapital case the defendant is guaranteed the right to pretrial release except in “extreme and unusual circumstances”); *United States v. Kirk*, 534 F.2d 1262, 1281 (8th Cir. 1976) (holding that bail can only be denied “in the exceptional case.”).

prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process. *See, e.g.*, Lauryl Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017).<sup>7</sup>

**III. In This Case, the Government Has Not Met Its Burden of Proving That [CLIENT] Presents a “Serious Risk” Of Fleeing the Jurisdiction Under § 3142(f)(2)(A).**

[CLIENT] must be released immediately on conditions because the government did not argue that [CLIENT] posed a “serious risk” of flight and did not present any evidence whatsoever to establish that “there is a serious risk that the [defendant] will flee” the jurisdiction under § 3142(f)(2)(A). Although the defense bears no burden of proof, it is clear from

[CLIENT’S] history and characteristics that [he/she] does not pose a serious risk of flight.

[DISCUSS FACTS HERE THAT SHOW NO SERIOUS RISK OF FLIGHT: TIES TO COMMUNITY, FAMILY, EMPLOYMENT, PAST COURT APPEARANCES, FTAs ARE STALE, OTHER EVIDENCE OF STABILITY.]

Because [CLIENT] does not present a “serious risk” of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

**IV. There Is No Other Basis to Detain [CLIENT] as a Serious Risk of Flight in this Case.**

The potential penalty in this case is not a legitimate basis for finding a serious risk of flight. There is no evidence Congress intended courts to de facto detain any client facing a long prison sentence. Indeed, many federal defendants face long sentences—being a defendant in a run-of-the-mill federal case cannot possibly be an “extreme and unusual circumstance.” Even at

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<sup>7</sup> This rule is sound policy, as the risk of a defendant becoming either a “local absconder” (who intentionally fails to appear but remains in the jurisdiction), or a “low-cost non-appearance” (who unintentionally fails to appear), can be addressed by imposing conditions of release like electronic monitoring, GPS monitoring, and support from pretrial services. *See* Gouldyn, 85 U. Chi. L. Rev. at 724.

the detention hearing, where the standard for finding risk of flight is lower, Congress did not authorize courts to evaluate potential penalty when considering risk of flight. *See* § 3142(g) (listing as relevant factors the nature and seriousness of the charge, (2) the weight of the evidence against the defendant, and (3) the history and characteristics of the defendant); *Friedman*, 837 F.2d at 50 (in “cases concerning risk of flight, we have required *more* than evidence of the commission of a serious crime and the fact of a potentially long sentence to support finding risk of flight”) (emphasis added).

**[USE IF CLIENT HAS A CRIMINAL RECORD BUT NO BOND FORFEITURES]**

Additionally, a criminal record also does not automatically render a client a serious risk of flight. To the contrary, evidence that a defendant has complied with court orders in the past supports a finding that he is *not* a serious risk of flight. *See, e.g., United States v. Williams*, 1988 WL 23780, at \*1 (N.D. Ill. Mar. 8, 1988) (defendant who made regular state court appearances in the past deemed not a serious flight risk).

**[USE THIS PARAGRAPH IN FRAUD CASE]** The mere fact that **[CLIENT]** is charged with an economic crime likewise does not render **[him/her]** a serious risk of flight. “In economic fraud cases, it is particularly important that the government proffer more than the fact of a serious economic crime that generated great sums of ill-gotten gains . . . [;] evidence of strong foreign family or business ties is necessary to detain a defendant.” *United States v. Giordano*, 370 F. Supp. 2d 1256, 1264 (S.D. Fla. 2005). The government has not presented any evidence that **[CLIENT]** intends to flee or has anywhere to flee to, meaning that “many of the key factors that would warrant detention in an economic fraud case are absent here.” *Id.* at 1270.

**V. Detaining [CLIENT] as a Serious Risk of Flight Is Not Only Legally Unsupported, But Is Also Harmful and Unnecessary.**

**A. A Few Days of Detention Can Have Disastrous Consequences on a Defendant's Life.**

Congress was correct to cabin pretrial detention to “extreme and unusual circumstances,” because even very short periods of detention have been shown to seriously harm defendants. For example, according to a recent study published by the Administrative Office of the U.S. Courts, 37.9% of federal defendants detained fewer than three days reported have a negative outcome at work (such as losing their job). Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) *Federal Probation* 39, 42 (2018), archived at <https://perma.cc/LQ2M-PL83>. Likewise, 29.9% of people detained fewer than three days reported that their housing became less stable. *Id.* In other words, a substantial minority of people held for only one or two days in federal cases still lose their jobs or their housing as a result of the brief detention.

The first few days of detention can also be dangerous. According to the Bureau of Justice Statistics, between 38% and 45% of all jailhouse rapes perpetrated on a male victim happen within three days of admission. Allen J. Beck, et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09*, Bureau of Justice Statistics (2010), 22–23, archived at <https://perma.cc/H33S-QFPK>. Over 40% of people who die in jail die within their first week. Margaret Noonan, et al., *Mortality in Local Jails and State Prisons, 2000–14—Statistical Tables*, Bureau of Justice Statistics 8 (2015), archived at <https://perma.cc/B9CN-ST3K>. Despite the trauma and danger inherent in the first few days of a jail stay, jails’ physical and mental health screening and treatment is often inadequate. See Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Justice Statistics 9, 10 (2014),

archived at <https://perma.cc/HGT9-7WLL> (comparing healthcare in prisons and jails); *see also* Faye S. Taxman, et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 *Journal of Substance Abuse Treatment* 239, 247–49 (2007), archived at <https://perma.cc/G55Z-4KQH>. In sum, detaining [CLIENT] for even one or two days in this case is not just illegal—it could also jeopardize [his/her] physical, financial, and mental wellbeing.

**B. Many Conditions of Release Have Been Proven to Effectively Manage Ordinary Risk of Flight or Nonappearance.**

Any concerns the Court may have about local nonappearance can be allayed by imposing any number of conditions of release that empirically have been shown to reduce the risk of local nonappearance. For example, a study conducted in New York state courts found that text message reminders were able to reduce failures to appear by up to 26 percent, translating to 3,700 fewer arrest warrants per year. *See* Brice Cooke et al, *Text Message Reminders Decreased Failure to Appear in Court in New York City*, Abdul Latif Poverty Action Lab (2017), archived at <https://perma.cc/JCW7-JVZW>. Holistic pre-trial services focused on providing social services and *support* to clients also reduce the risk of non-appearance across all risk levels in state systems. *See generally* Christopher Lowenkamp and Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*, John and Laura Arnold Foundation, Special Report (2013), archived at <https://perma.cc/R3F3-KZ76>. Beyond the traditional role of Pretrial Services, this could include providing funding for transportation to court, providing childcare on court dates, and assisting clients in finding stable housing, employment or education. *See generally* John Clark, *The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage*, Pretrial Justice Institute (2014), archived at <https://perma.cc/5C8C-7HJK>.

Moreover, scholars and courts agree that electronic monitoring is especially effective at reducing risk of flight. *See, e.g.*, Samuel R. Wiseman, *Pretrial Detention and the Right to the Monitored*, 123 Yale L. J. 1344, 1347–48 (2014) (“Increasingly sophisticated remote monitoring devices have the potential to sharply reduce the need for flight-based pretrial detention . . . . [T]he question of finding other ways of ensuring a non-dangerous defendant’s presence at trial is one not of ability, but of will. . . .”); *id.* at 1368–74 (citing studies in both European and American contexts to demonstrate that electronic monitoring is at least as effective as secured bonds at deterring flight, and that it comes at far reduced cost to both the defendant and the government); *United States v. O’Brien*, 895 F.2d 810, 814–16 (1st Cir. 1990) (describing reduction in flight rate from monitoring program and concluding that “evidence concerning the effectiveness of the bracelet alone [] arguably rebuts the presumption of flight”).

#### **VI. [CLIENT] Requests Immediate Release with Conditions**

Because there is no basis to detain [CLIENT], [he/she] should be released immediately under the following conditions: [INSERT CONDITIONS TAILORED TO CASE]. These conditions will “reasonably assure” [CLIENT’S] appearance and the safety of the community. § 3142(c). [ADD BRIEF EXPLANATION OF BASES FOR CONDITIONS].

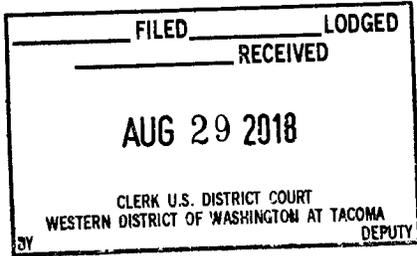
#### **VI. Conclusion**

For these reasons, [CLIENT] respectfully requests that [he/she] be released with conditions this Court deems appropriate, under §§ 3142(a)–(c). Because the government has provided no permissible basis for pretrial detention under § 3142(f), continuing to detain [CLIENT] violates the law.

University of Chicago Law School  
Federal Criminal Justice Clinic

**EXHIBIT A**

**Motion for Detention (WDWA)**



Magistrate Judge David W. Christel

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,  
Plaintiff,

v.

[REDACTED]

Defendant.

NO [REDACTED]

MOTION FOR DETENTION

The United States moves for pretrial detention of the Defendant, pursuant to 18 U.S.C. 3142(e) and (f)

1. **Eligibility of Case.** This case is eligible for a detention order because this case involves (check all that apply):

- Crime of violence (18 U.S.C. 3156).
- Crime of Terrorism (18 U.S.C. 2332b (g)(5)(B)) with a maximum sentence of ten years or more.
- Crime with a maximum sentence of life imprisonment or death.
- Drug offense with a maximum sentence of ten years or more.

[REDACTED]

- 1  Felony offense and defendant has two prior convictions in the four
- 2 categories above, or two State convictions that would otherwise fall within
- 3 these four categories if federal jurisdiction had existed.
- 4  Felony offense involving a minor victim other than a crime of violence.
- 5
- 6  Felony offense, other than a crime of violence, involving possession or use
- 7 of a firearm, destructive device (as those terms are defined in 18 U.S.C.
- 8 921), or any other dangerous weapon.
- 9  Felony offense other than a crime of violence that involves a failure to
- 10 register as a Sex Offender (18 U.S.C. 2250).
- 11  Serious risk the defendant will flee.
- 12  Serious risk of obstruction of justice, including intimidation of a
- 13 prospective witness or juror.

14 2. **Reason for Detention.** The Court should detain defendant because there  
15 are no conditions of release which will reasonably assure (check one or both):

- 16  Defendant's appearance as required.
- 17  Safety of any other person and the community.

18 3. **Rebuttable Presumption.** The United States will invoke the rebuttable  
19 presumption against defendant under 3142(e). The presumption applies because:

- 20  Probable cause to believe defendant committed offense within five years of
- 21 release following conviction for a qualifying offense committed while on
- 22 pretrial release.
- 23  Probable cause to believe defendant committed drug offense with a
- 24 maximum sentence of ten years or more.
- 25  Probable cause to believe defendant committed a violation of one of the
- 26 following offenses: 18 U.S.C. 924(c), 956 (conspiracy to murder or
- 27 kidnap), 2332b (act of terrorism), 2332b(g)(5)(B) (crime of terrorism).
- 28

1  Probable cause to believe defendant committed an offense involving a  
2 victim under the age of 18 under 18 U.S.C. 1591, 2241, 2242, 2244(a)(1),  
3 2245, 2251, 2251A, 2252(a)(1) through 2252(a)(3), 2252A(a)(1) through  
4 2252A(a)(4), 2260, 2421, 2422, 2423 or 2425.

5 4. **Time for Detention Hearing.** The United States requests the Court  
6 conduct the detention hearing:

- 7  At the initial appearance  
8  After a continuance of 3 days (not more than 3)

9  
10 DATED this 29th day of August, 2018.

11 Respectfully submitted,

12 ANNETTE L. HAYES  
13 United States Attorney

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17 REBECCA S. COHEN  
18 Assistant United States Attorney  
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**Template Appellate Brief:**

**Defendant's Appeal of Magistrate Judge's  
Detention Order and Request for  
Immediate Release With Conditions**

**Exhibit A**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )  
 )  
v. ) Judge [NAME]  
 ) No. XX-CR-XX  
[CLIENT] )  
 )  
 )

**DEFENDANT’S APPEAL OF MAGISTRATE JUDGE’S DETENTION ORDER AND  
REQUEST FOR IMMEDIATE RELEASE WITH CONDITIONS**

- **This appeal should be filed immediately after the initial appearance only in the rare case where:**
  - **(1) the government requested detention either on the basis of danger to the community or on the dual grounds of danger to the community & risk of flight; and**
  - **(2) the charge is fraud, extortion, threats, or another charge not listed in § 3142(f)(1).**
- **This appeal should not be filed in the following types of cases because a § 3142(f)(1) factor authorizes detention at the initial appearance: bank robbery, other crime of violence, or terrorism case listed in § 3142(f)(1)(A), drug case listed in (f)(1)(C), 924(c) gun case, 922(g) gun case, or minor victim case listed in (f)(1)(E).**
- **If you have questions about when this appeal should be filed, please contact Alison Siegler ([alisonsiegler@uchicago.edu](mailto:alisonsiegler@uchicago.edu)) or Erica Zunkel ([ezunkel@uchicago.edu](mailto:ezunkel@uchicago.edu)).**

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully moves this Honorable Court to vacate Magistrate Judge [JUDGENAME’s] detention order pursuant to 18 U.S.C. § 3145(b) and order [him/her] released from custody pursuant to the Bail Reform Act and the Fifth Amendment’s Due Process Clause. Supreme Court precedent makes it unconstitutional for a court to hold a detention hearing or detain a defendant at all when, as here, there is no basis for detention under 18 U.S.C. § 3142(f). As all six courts of appeals to have directly addressed the question have recognized, the only permissible bases for detaining a defendant are the enumerated factors set out in 18 U.S.C. § 3142(f). The concepts of “dangerousness” or “safety of the community” are simply not among the factors listed in § 3142(f) and are therefore not

legitimate bases for detention at the Initial Appearance. The federal courts of appeals that have addressed the issue all reach this same conclusion. In this case, the government has also not presented sufficient evidence that [CLIENT] poses a “serious risk” of flight to authorize detention under § 3142(f)(2)(A). Accordingly, [CLIENT] must be released on bond immediately with appropriate conditions of release. *See* 18 U.S.C. §§ 3142(a)–(c). This appeal arises under 18 U.S.C. § 3145(b), which provides for de novo review of a magistrate judge’s detention order. In support of this appeal, [CLIENT] states as follows:

On [DATE], [CLIENT] was arrested on a criminal complaint charging [him/her] with [LIST CHARGES AND STATUTORY SECTIONS]. Magistrate Judge [JUDGENAME] held [his/her] [initial appearance/arraignment] on [DATE]. At that initial appearance, the government requested detention on the grounds that [CLIENT] was a danger to the community and a risk of flight. Magistrate Judge [JUDGENAME] detained [CLIENT] as a danger to the community and a risk of flight pending a detention hearing. This appeal follows.

**I. The BRA Only Authorizes Detention at the Initial Appearance When One of the § 3142(f) Factors is Met.**

[CLIENT] is being detained in violation of the law. According to the plain language of § 3142(f), “the judicial officer shall hold a [detention] hearing” only “in a case that involves” one of the seven factors listed in § 3142(f)(1) & (f)(2). None of the § 3142(f) are present in this case.<sup>1</sup> Ordinary “risk of flight” is not among the § 3142(f) factors.

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<sup>1</sup> This case does not meet any of the five factors discussed in § 3142(f)(1), as it does not involve: (1) a crime of violence under (f)(1)(A); (2) an offense for which the maximum sentence is life imprisonment or death under (f)(1)(B); (3) a qualifying drug offense under (f)(1)(C); (4) a felony after conviction for two or more offenses under the very rare circumstances described in (f)(1)(D); or (5) a felony involving a minor victim or the possession/use of a firearm under (f)(1)(E).

The government has also not presented any evidence to establish that this case meets either of the two additional factors discussed in § 3142(f)(2): (1) a “serious risk that [the defendant] will flee” under (f)(2)(A); or (2) a “serious risk” that the defendant will engage in obstruction or juror/witness tampering under (f)(2)(B).

**A. Supreme Court Precedent and the Plain Language of the BRA Prohibit this Court from Detaining the Defendant Without a § 3142(f) Factor.**

The Supreme Court’s seminal opinion in *United States v. Salerno*, 481 U.S. 739, 755 (1987) confirms that a defendant may only be detained at the Initial Appearance if one of the seven § 3142(f) factors is present. *Salerno* held: “The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes,” specifically the crimes enumerated in § 3142(f). *Id.* at 747. The Court continued by saying that “detention hearings [are] available if” and only if one of the § 3142(f) factors is present. *Id.* According to the Supreme Court, “[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).” *Id.* at 750 (emphasis added). *Salerno* thus stands for the proposition that the factors listed in § 3142(f) serve as a gatekeeper, and only certain categories of defendants are eligible for detention in the first place.

If no § 3142(f) factor is met, several conclusions follow: the government is prohibited from seeking detention, and there is no legal basis to detain the defendant at the Initial Appearance, jail the defendant, or hold a Detention Hearing.<sup>2</sup> Instead, the court is required to release the defendant on personal recognizance under § 3142(b) or on conditions under § 3142(c).

Notably, the constitutionality of the Bail Reform Act depends on this gatekeeping function of § 3142(f). The strict limitations § 3142(f) places on pretrial detention are part of what led the Supreme Court to uphold the BRA as constitutional. It was the § 3142(f) limitations,

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<sup>2</sup> In some districts, the U.S. Attorney’s Office explicitly acknowledges the gatekeeping function served by § 3142(f) by routinely filing a motion at the Initial Appearance that lists the government’s legal basis for detention under § 3142(f). *See* Ex. A, Motion for Detention (WDWA). That motion reads, “This case is eligible for a detention order because this case involves (check all that apply),” and provides a checkbox for each § 3142(f) factor.

among others, that led the Court to conclude that the Act was “regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.” *Id.* at 748.<sup>3</sup>

Throughout its substantive Due Process ruling, the *Salerno* Court emphasized that the only defendants for whom the government can seek detention are those who are “already indicted or held to answer for a *serious* crime,” meaning the “extremely serious offenses” listed in § 3142(f). *Id.* (emphasis added); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (“The legislative history of the Bail Reform Act of 1984 makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a narrowly-drafted statute with the pretrial detention provision addressed to the danger from ‘a small but identifiable group of particularly dangerous defendants.’” (quoting S. REP. NO. 98-225, at 6 (1983))). It follows that when a court detains a defendant without regard to the limitations in § 3142(f), the Act as applied becomes unconstitutional.

**B. The Courts of Appeals Agree that Detention Is Prohibited When No § 3142(f) Factor is Present.**

Following the Supreme Court’s guidance in *Salerno*, six courts of appeals agree that it is illegal to detain someone—let alone hold a Detention Hearing—unless the government invokes one of the factors listed in 18 U.S.C. § 3142(f). *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988); *United States v. Friedman*, 837 F.2d 48, 48–49 (2d Cir. 1988); *United States v.*

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<sup>3</sup> The *Salerno* Court further relied on the limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that “the government’s interest in preventing crime by arrestees is both legitimate and compelling.” To reach this conclusion, the Court contrasted the Bail Reform Act with a statute that “permitted pretrial detention of any juvenile arrested on any charge” by pointing to the gatekeeping function of § 3142(f): “The Bail Reform act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates *only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).*” *Id.* at 750 (emphasis added). The Court emphasized that Congress “specifically found that these individuals” arrested for offenses enumerated in § 3142(f) “are far more likely to be responsible for dangerous acts in the community after arrest.” *Id.*

*Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992); *United States v. Twine*, 344 F.3d 987 (9th Cir. 2003); *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999). For example, the First Circuit holds: “Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a Detention Hearing exists.” *Ploof*, 851 F.2d at 11. The Fifth Circuit agrees. *See Byrd*, 969 F.2d at 109 (“A hearing can be held only if one of the . . . circumstances listed in (f)(1) and (f)(2) is present,” and “detention can be ordered, therefore, only in a case that involves one of the . . . circumstances listed in (f).”).

Unfortunately, a practice has developed that contravenes the Bail Reform Act and *Salerno* and results in defendants being detained in violation of the statute and the Constitution. Specifically, it is common for the government to seek detention at the Initial Appearance on the ground that the defendant is either “a danger to the community,” “a risk of flight,” or both. Because neither “danger to the community” nor ordinary “risk of flight” is a factor listed in § 3142(f), it is flatly illegal to detain a defendant on either of these grounds at the initial appearance. The practice in this district must be brought back in line with the law. That will only happen if this Court demands that the government provide a legitimate § 3142(f) basis for every detention request.<sup>4</sup>

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<sup>4</sup> Perhaps the confusion arises because the BRA is not organized in the order in which detention issues arise in court. Although the question of detention at the Initial Appearance comes first in the court process, it is not addressed until § 3142(f). To make matters worse, § 3142(f) itself is confusing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before “the judicial officer shall hold a hearing”—meaning a Detention Hearing. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies at the next court appearance, *the Detention Hearing*. *See* § 3142(f) (explaining that the purpose of the Detention Hearing is “to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community.”). The long paragraph in § 3142(f) that follows § 3142(f)(2)(B) then describes the procedures that apply at the Detention Hearing in depth.

## II. It Is Illegal to Detain [CLIENT] as a Danger to the Community

First, the plain text of § 3142(f) does not authorize detention on generalized dangerousness grounds. Second, interpreting the Bail Reform Act to authorize detaining someone for being a “danger to the community,” although “danger to the community” is not listed in § 3142(f), would contradict *Salerno* and render the Act unconstitutional under the Fifth Amendment. Third, the same six courts of appeals that hold that there must be a § 3142(f) factor present to justify detention also uniformly agree that “the statute does not authorize detention of the defendant based on danger to the community.” *Himler*, 797 F.2d at 160; *see also Byrd*, 969 F.2d at 110 (“[A] defendant’s threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention.”); *Friedman*, 837 F.2d at 49 (“[T]he Bail Reform Act does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice or an indictment for the offenses enumerated [in the statute].”); *Ploof*, 851 F.2d at 9–12; *Singleton*, 182 F.3d at 9 (citing *Ploof*, 851 F.2d at 11); *Twine*, 344 F.3d at 987 (agreeing with *Himler*, *Ploof*, and *Byrd*).

Courts within this circuit have reached the same conclusion. As in this case, the government in *Morgan* raised generalized dangerousness as a basis for detention. Based on its analysis of the statute, the *Morgan* court concluded that detention is only appropriate when one of the factors in § 3142(f) is met and that “danger to the community” is not a valid basis for detention. *United States v. Morgan*, 2014 WL 3375028, at \*14 (C.D. Ill. July 9, 2014) (“§ 3142(f) specifies certain conditions under which a detention hearing shall be held, and the grounds in [§ 3142(f)] limit a dangerousness finding to instances of the kind listed therein.”). The court agreed with the conclusion in *Himler* that “[t]he statute does not authorize the detention of the defendant based on danger to the community.” *Morgan*, 2014 WL 3375028 at

\*7, \*12–\*13 (quoting *Himler*, 797 F.2d at 160). The court explained that both the First and Third Circuits have “held that a person’s threat to the safety of any other person or the community, in the absence of one of the six specified circumstances, could not justify detention under the Act.” *Id.* at \*12 (quoting *Byrd*, 969 F.2d at 109). The court accordingly ordered Mr. Morgan’s immediate release. *Id.* at \*16.

Without a § 3142(f) factor present, the court may not detain [CLIENT] as a danger to the community, economic or otherwise. *See Friedman*, 837 F.2d at 49 (“The Bail Reform Act does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice, or an indictment for the offenses enumerated [in § 3142(f)(1)].”). The fraud charge in [CLIENT’s] case is not among the enumerated offenses in § 3142(f)(1), nor is potential economic harm a basis for detention under § 3142(f). *See supra* note 1. Even in cases where a § 3142(f) factor exists and a detention hearing is appropriate, courts “rarely conclude that the economic harm presented rises to the level of danger of the community for which someone should be detained.” *United States v. Madoff*, 586 F. Supp. 2d 240, 253–54 (S.D.N.Y. 2009) (releasing Madoff on conditions despite concerns that he posed an economic danger). Regardless, potential economic harm to the community cannot be weighed against a defendant when the case does not involve a § 3142(f) factor. Because no § 3142(f)(1) or § 3142(f)(2) factor is met in [CLIENT’s] case, any concerns that she poses an economic danger to the community cannot serve as a basis for holding a detention hearing or detaining her pending trial.

### **III. It is Illegal to Detain [CLIENT] At All Because Ordinary “Risk of Flight” is Not a Statutory Basis for Detention at the Initial Appearance.**

It was improper to detain [CLIENT] on the government’s bare allegation that [he/she] poses a “risk of flight” for three reasons. First, the plain language of the statute only detention at the Initial Appearance when the defendant poses a “*serious risk*” of flight, § 3142(f)(2)(A), and

in this case the government merely alleged *ordinary* risk of flight. Second, the government bears the burden of presenting some *evidence* to substantiate its allegation that a defendant is a serious risk of flight, and here the government has provided no such evidence. Third, to establish “serious risk” of flight the must demonstrate that the defendant presents an “extreme and unusual” risk of willfully fleeing the jurisdiction if released, and the government has not met that burden here. Accordingly, it is improper to detain [CLIENT] until a Detention Hearing, let alone for the duration of the case.

**A. Supreme Court Precedent and the Plain Language of the BRA Prohibit this Court from Detaining a Defendant as an Ordinary “Risk of Flight.”**

Ordinary “risk of flight” is not a factor in § 3142(f). By its plain language, § 3142(f)(2)(A) permits detention and a hearing only when a defendant poses a “*serious risk*” of flight. There is some risk of flight in every criminal case; “serious risk” of flight means something more. According to a basic canon of statutory interpretation, the term “*serious risk*” means that the risk must be more significant or extreme than an ordinary risk. *See, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009) (“One of the most basic interpretative canons’ is ‘that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.’”).

**B. It was Improper to Detain [CLIENT] Because the Government Has Provided No Evidence to Support its Claim that [CLIENT] is a Serious Risk of Flight.**

Where the government’s only legitimate § 3142(f) ground for detention is “serious risk” of flight, the government bears the burden of presenting some *evidence* to support its allegation that a defendant poses a “serious risk” of flight rather than the ordinary risk attendant in any criminal case. After all, the statute only authorizes detention “*in a case that involves*” a “serious risk” that the person will flee. § 3142(f)(2)(A) (emphasis added). This contemplates a judicial

finding about whether the case in fact involves such a risk.<sup>5</sup> The government must provide an evidentiary basis to enable the judge to make an informed decision, evidence that relates either to the defendant’s history and characteristics or to the circumstances of the offense. The government has presented no such evidence here.

**C. Detaining a Defendant as a “Serious Risk of Flight” is Appropriate Only in “Extreme and Unusual Circumstances.”**

The BRA’s legislative history makes clear that detention based on serious risk of flight is only appropriate under “extreme and unusual circumstances.”<sup>6</sup> For example, the case relied on in the legislative history was deemed extreme and unusual enough to justify detention on the grounds of serious risk of flight because the defendant was a fugitive and serial impersonator who had failed to appear in the past and had recently transferred over a million dollars to Bermuda. *See Abrahams*, 575 F.2d at 4. The government must demonstrate that the risk of flight in a particular case rises to the level of extreme or unusual, and no such showing has been made here.

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<sup>5</sup> Had Congress intended to authorize detention hearings based on a mere certification by the government, Congress could have enacted such a regime, just as they have done in other contexts. *See, e.g.*, 18 U.S.C. § 5032 (creating exception to general rule regarding delinquency proceedings if “the Attorney General, after investigation, certifies to the appropriate district court of the United States” the existence of certain circumstances); 18 U.S.C. § 3731 (authorizing interlocutory appeals by the government “if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding”).

<sup>6</sup> *See Bail Reform Act of 1983: Rep. of the Comm. on the Judiciary*, 98th Cong. 48 (1983) (“Under subsection f(2), a pretrial Detention Hearing may be held upon motion of the attorney for the government or upon the judicial officer’s own motion in three types of cases. . . . [T]hose [types] involving . . . a serious risk that the defendant will flee . . . reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.”) (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a “rare case of extreme and unusual circumstances . . . justifies pretrial detention”—as representing the “current case law”); *see also Gavino v. McMahon*, 499 F.2d 1191, 1995 (2d Cir. 1974) (holding that in a noncapital case the defendant is guaranteed the right to pretrial release except in “extreme and unusual circumstances”); *United States v. Kirk*, 534 F.2d 1262, 1281 (8th Cir. 1976) (holding that bail can only be denied “in the exceptional case.”).

In addition, a defendant should not be detained as a “serious risk” of flight when the risk of non-appearance can be mitigated by conditions of release. The only defendants who qualify for detention under § 3142(f)(2) are those “[t]rue flight risks”—defendants the government can prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process. *See, e.g.*, Lauryl Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017).<sup>7</sup>

**IV. In This Case, the Government Has Not Met Its Burden of Proving That [CLIENT] Presents a “Serious Risk” Of Fleeing the Jurisdiction Under § 3142(f)(2)(A).**

[CLIENT] must be released immediately on conditions because the government [did not argue that [CLIENT] posed a “serious risk” of flight and] did not present any evidence whatsoever to establish that “there is a serious risk that the [defendant] will flee” the jurisdiction under § 3142(f)(2)(A). Although the defense bears no burden of proof, it is clear from [CLIENT’S] history and characteristics that [he/she] does not pose a serious risk of flight. [DISCUSS FACTS HERE THAT SHOW NO SERIOUS RISK OF FLIGHT: TIES TO COMMUNITY, FAMILY, EMPLOYMENT, PAST COURT APPEARANCES, FTAs ARE STALE, OTHER EVIDENCE OF STABILITY.]

Because [CLIENT] does not present a “serious risk” of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

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<sup>7</sup> This rule is sound policy, as the risk of a defendant becoming either a “local absconder” (who intentionally fails to appear but remains in the jurisdiction), or a “low-cost non-appearance” (who unintentionally fails to appear), can be addressed by imposing conditions of release like electronic monitoring, GPS monitoring, and support from pretrial services. *See* Gouldyn, 85 U. Chi. L. Rev. at 724.

**V. There Is No Other Basis to Detain [CLIENT] as a Serious Risk of Flight in this Case.**

The potential penalty in this case is not a legitimate basis for finding a serious risk of flight. There is no evidence Congress intended courts to de facto detain any client facing a long prison sentence. Indeed, many federal defendants face long sentences—being a defendant in a run-of-the-mill federal case cannot possibly be an “extreme and unusual circumstance.” Even at the detention hearing, where the standard for finding risk of flight is lower, Congress did not authorize courts to evaluate potential penalty when considering risk of flight. *See* § 3142(g) (listing as relevant factors the nature and seriousness of the charge, (2) the weight of the evidence against the defendant, and (3) the history and characteristics of the defendant); *Friedman*, 837 F.2d at 50 (in “cases concerning risk of flight, we have required *more* than evidence of the commission of a serious crime and the fact of a potentially long sentence to support finding risk of flight”) (emphasis added).

**[USE IF CLIENT HAS A CRIMINAL RECORD BUT NO BOND FORFEITURES]**

Additionally, a criminal record also does not automatically render a client a serious risk of flight. To the contrary, evidence that a defendant has complied with court orders in the past supports a finding that he is *not* a serious risk of flight. *See, e.g., United States v. Williams*, 1988 WL 23780, at \*1 (N.D. Ill. Mar. 8, 1988) (defendant who made regular state court appearances in the past deemed not a serious flight risk).

**[USE THIS PARAGRAPH IN FRAUD CASE]** The mere fact that [CLIENT] is charged with an economic crime likewise does not render [him/her] a serious risk of flight. “In economic fraud cases, it is particularly important that the government proffer more than the fact of a serious economic crime that generated great sums of ill-gotten gains . . . [:] evidence of strong foreign family or business ties is necessary to detain a defendant.” *United States v. Giordano*,

370 F. Supp. 2d 1256, 1264 (S.D. Fla. 2005). The government has not presented any evidence that [CLIENT] intends to flee or has anywhere to flee to, meaning that “many of the key factors that would warrant detention in an economic fraud case are absent here.” *Id.* at 1270.

Because [CLIENT] does not present a “serious risk” of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

**VI. [CLIENT] Requests Immediate Release with Conditions**

Because there is no basis to detain [CLIENT], [he/she] should be released immediately under the following conditions: [INSERT CONDITIONS TAILORED TO CASE]. These conditions will “reasonably assure” [CLIENT’S] appearance and the safety of the community. § 3142(c). [ADD BRIEF EXPLANATION OF BASES FOR CONDITIONS].

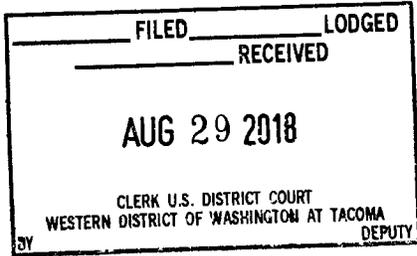
**VII. Conclusion**

For these reasons, [CLIENT] respectfully asks this Court to vacate the detention order and order [him/her] released on conditions this Court deems appropriate under §§ 3142(a)–(c). Because the government has provided no permissible basis for pretrial detention under § 3142(f), continuing to detain [CLIENT] violates the law.

University of Chicago Law School  
Federal Criminal Justice Clinic

**EXHIBIT A**

**Motion for Detention (WDWA)**



Magistrate Judge David W. Christel

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,  
Plaintiff,

v.

[REDACTED]

Defendant.

NO [REDACTED]

MOTION FOR DETENTION

The United States moves for pretrial detention of the Defendant, pursuant to 18 U.S.C. 3142(e) and (f)

1. **Eligibility of Case.** This case is eligible for a detention order because this case involves (check all that apply):

- Crime of violence (18 U.S.C. 3156).
- Crime of Terrorism (18 U.S.C. 2332b (g)(5)(B)) with a maximum sentence of ten years or more.
- Crime with a maximum sentence of life imprisonment or death.
- Drug offense with a maximum sentence of ten years or more.

[REDACTED]

- 1  Felony offense and defendant has two prior convictions in the four
- 2 categories above, or two State convictions that would otherwise fall within
- 3 these four categories if federal jurisdiction had existed.
- 4  Felony offense involving a minor victim other than a crime of violence.
- 5
- 6  Felony offense, other than a crime of violence, involving possession or use
- 7 of a firearm, destructive device (as those terms are defined in 18 U.S.C.
- 8 921), or any other dangerous weapon.
- 9  Felony offense other than a crime of violence that involves a failure to
- 10 register as a Sex Offender (18 U.S.C. 2250).
- 11  Serious risk the defendant will flee.
- 12  Serious risk of obstruction of justice, including intimidation of a
- 13 prospective witness or juror.

14 2. **Reason for Detention.** The Court should detain defendant because there  
15 are no conditions of release which will reasonably assure (check one or both):

- 16  Defendant's appearance as required.
- 17  Safety of any other person and the community.

18 3. **Rebuttable Presumption.** The United States will invoke the rebuttable  
19 presumption against defendant under 3142(e). The presumption applies because:

- 20  Probable cause to believe defendant committed offense within five years of
- 21 release following conviction for a qualifying offense committed while on
- 22 pretrial release.
- 23  Probable cause to believe defendant committed drug offense with a
- 24 maximum sentence of ten years or more.
- 25  Probable cause to believe defendant committed a violation of one of the
- 26 following offenses: 18 U.S.C. 924(c), 956 (conspiracy to murder or
- 27 kidnap), 2332b (act of terrorism), 2332b(g)(5)(B) (crime of terrorism).
- 28

1  Probable cause to believe defendant committed an offense involving a  
2 victim under the age of 18 under 18 U.S.C. 1591, 2241, 2242, 2244(a)(1),  
3 2245, 2251, 2251A, 2252(a)(1) through 2252(a)(3), 2252A(a)(1) through  
4 2252A(a)(4), 2260, 2421, 2422, 2423 or 2425.

5 4. **Time for Detention Hearing.** The United States requests the Court  
6 conduct the detention hearing:

- 7  At the initial appearance  
8  After a continuance of 3 days (not more than 3)

9  
10 DATED this 29th day of August, 2018.

11 Respectfully submitted,

12 ANNETTE L. HAYES  
13 United States Attorney

14  
15   
16 REBECCA S. COHEN  
17 Assistant United States Attorney

# **Detention Hearing Checklist & Flowchart for Defense Attorneys**

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

### IF NO STATUTORY PRESUMPTION OF DETENTION APPLIES

- No presumption of detention in the following types of cases:**
  - Crimes of violence (robbery, etc.), felon in possession under § 922(g), illegal reentry, fraud.
  - Non-citizen cases; removable alien cases. *See United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (“[A]lthough Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list.”).
  
- In non-presumption cases, remind judge that the statute contains a presumption of release on personal recognizance without *any* conditions.**
  - 18 U.S.C. § 3142(b): The judge “shall order the pretrial release of the [client] on personal recognizance . . . unless” there are absolutely NO conditions of release that would reasonably assure (1) that the client will return to court and (2) that the client will not pose a danger to the community (emphasis added).
  - “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).
  - Under the federal statutory scheme, “it is only a ‘limited group of offenders’ who should be [detained] pending trial.” *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987) (quoting S. Rep. N. 98-225 at 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189); *see also United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992) (“There can be no doubt that this Act clearly favors nondetention.”).
  
- Argue that the government has not met its burden of proof regarding the safety of community and assuring appearance in court.**
  - For the safety of community, government must prove by “clear and convincing evidence,” § 3142(f), that there are no conditions of release that will “reasonably assure” the safety of the community. *See United States v. Patriarca*, 948 F.2d 789, 792–93 (1st Cir. 1991).
  - For assuring appearance in court, government must prove by a preponderance of the evidence that there are no conditions of release that will reasonably assure your client’s appearance in court. *See Patriarca*, 948 F.2d at 792–93.
  
- Argue that there *are* conditions of release that will “reasonably assure” appearance and safety, and therefore that detention is illegal. § 3142(e)(1).**
  - Remind judge that the statute contains a “least restrictive conditions” requirement and that the conditions need only “reasonably assure” appearance and safety.
  - Request that the judge release client on the least restrictive conditions that will “reasonably assure” appearance and safety.
  - Cite to statute:
    - The judge “shall order the pretrial release of the person,” § 3142(c)(1) “subject to the least restrictive further condition, or combination of conditions that . . . will reasonably assure the appearance of the person . . . and the safety of any other person and the community,” § 3142(c)(1)(B).
    - The judge is only allowed to detain a client after a detention hearing if the judge finds that no condition or combination of conditions will reasonably assure the appearance of the person . . . and the safety of any other person and the community.” § 3142(e)(1).

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- Propose pretrial release conditions that will “reasonably assure” appearance and safety, and contest conditions that are overly “restrictive” or are not necessary to meet those goals.**
  - **Under § 3142(c)(1)(B), available conditions include:**
    - Place client in custody of third-party custodian “who agrees to assume supervision and to report any violation of a release condition to the court” [(i)]
    - Maintain or actively seek employment [(ii)]
    - Maintain or commence an educational program [(iii)]
    - Follow restrictions on “personal associations, place of abode, or travel” [(iv)]
      - Can include electronic monitoring, GPS monitoring, home detention (which allows defendant to leave for employment/schooling/etc.), home incarceration (24-hour lockdown)
      - Can include residence at a halfway house or community corrections center
    - Avoid “all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense” [(v)]
    - Report on a “regular basis” to PTS or some other agency [(vi)]
    - Comply with a curfew [(vii)]
    - Refrain from possessing “a firearm, destructive device, or other dangerous weapon” [(viii)]
    - Refrain from “excessive use of alcohol” [(ix)]
    - Refrain from “any use of a narcotic drug or other controlled substance . . . without a prescription” [(ix)]
    - Undergo “medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency” [(x)]
    - Post “property of a sufficient unencumbered value, including money” [(xi)]
    - Post a “bail bond with solvent sureties” [(xii)]
    - Require the client to “return to custody for specified hours following release for employment, schooling, or other limited purposes” [(xiii)]
    - Or “any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.” [(xiv) (emphasis added)]
  - **If the judge proposes/imposes a condition that an indigent client post property or meet any other financial condition that effectively results in the pretrial detention of the client:**
    - Object**, citing § 3142(c)(2): “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”
- Argue for/against any additional conditions of release (listed above).**
- If able, contest any proffered facts/testimony that the government offers in support of their request for detention.**
- Proffer facts/testimony favoring release. Under § 3142(g), the factors are expansive and include:**
  - Nature and circumstances of offense charged [(g)(1)]
  - The “weight of evidence against the person” [(g)(2)]

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- **Argue that placing too much emphasis on the weight of the evidence is akin to applying a presumption of guilt, which is forbidden under § 3142(j).**
- **NOTE:** According to case law, this is the least important factor. *See, e.g., United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (“The weight of the evidence against the defendant is a factor to be considered but it is ‘the least important’ of the various factors.”); *United States v. Gray*, 651 F. Supp. 432, 436 (W.D. Ark. 1987) (“[T]he court does not believe that . . . any court should presume that every person charged is likely to flee simply because the evidence against him appears to be weighty. . . . Such a presumption would appear to be tantamount to a presumption of guilt, a presumption that our system simply does not allow.”).
- History and characteristics of defendant, “including:” [(g)(3)]
  - Defendant’s character [(g)(3)(A)]
  - Physical and/or mental condition [(g)(3)(A)]
  - Family ties [(g)(3)(A)]
  - Employment [(g)(3)(A)]
  - Financial resources [(g)(3)(A)]
  - Length of residence in the community [(g)(3)(A)]
  - Community ties [(g)(3)(A)]
  - Past conduct [(g)(3)(A)]
  - History “relating to drug or alcohol abuse” [(g)(3)(A)]
  - Criminal history [(g)(3)(A)]
  - Record concerning appearance in court proceedings [(g)(3)(A)]
  - Whether “the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense” at the time of the alleged offense [(g)(3)(B)]
- Real property “for potential forfeiture or offered as collateral” unless “because of its source,” it “will not reasonably assure the appearance of the person” [(g)(4)]
- “[N]ature and seriousness of the danger to any person or the community that would be posed by the person’s release.” [(g)(4)]

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

### IF AUSA ARGUES THAT A STATUTORY PRESUMPTION OF DETENTION APPLIES

- Ask AUSA to specify which presumption of detention applies.**
  
- Analyze and dispute whether a presumption of detention even applies.**
  - For the § 3142(e)(3) presumption of detention, the following must be satisfied:
    1. Current charge is a:
      - Drug case charged under 21 U.S.C. §§ 801–41 or 951 et seq. with maximum penalty of 10 years or more [§ 3142(e)(3)(A)]
      - Gun case charged under 18 U.S.C. § 924(c) [§ 3142(e)(3)(B)]
      - Terrorism case charged under 18 U.S.C. § 2332b [§ 3142(e)(3)(B) & (C)]
      - Case involving a minor victim, mostly charged under 18 U.S.C. § 2241–425 [§ 3142(e)(3)(E)]
    2. There is probable cause to believe the client committed current offense.
      - **NOTE: The following offenses do not automatically trigger a presumption of detention: crimes of violence (robbery, etc.), felon in possession under § 922(g), illegal reentry.**
  
  - The § 3142(e)(2) presumption of detention is extremely rare. It only applies when the client is charged with one of a few serious crimes and the client has a prior conviction for a specified offense that was committed recently and while on pretrial release in another case. Specifically, the following conditions must be satisfied:
    1. Current charge is a:
      - Crime of violence
      - Sex trafficking of children
      - Terrorism
      - Crime with maximum punishment of life or death
      - Drug offense with maximum penalty of 10 years or more
      - Felony case where the client has two priors that are either (1) a crime of violence or drug offense with maximum penalty of 10 years or more; or (2) felony involving a minor victim or gun.
    2. Client has prior conviction of:
      - Crime of violence
      - Sex trafficking of children
      - Terrorism
      - Crime with maximum punishment of life or death
      - Drug offense with maximum penalty of 10 years or more
    3. The prior offense was committed while the client was on pretrial release.
    4. It has been five years or less since the date of conviction/release for that prior offense.
  
- Ask AUSA to specify what the presumption entails in your particular case and be prepared to explain it to the judge.**
  - For the § 3142(e)(3) presumption: the rebuttable presumption is that no conditions will reasonably assure appearance and safety of the community.
  - For the § 3142(e)(2) presumption (very rare): the rebuttable presumption is that no conditions will reasonably assure safety of any other person and the community.

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- Explain that, under the law, it takes very little evidence to rebut the presumption.**
- “[T]he burden of production” to rebut the presumption “is *not a heavy one* to meet.” *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (emphasis added); *see also United States v. Mises-Casiano*, 161 F. Supp. 3d 166, 168 (D.P.R. 2016) (the burden of production “the presumption imposes on the defendant . . . *is not heavy*”) (emphasis added).
    - Note that the government still bears the burden of *persuasion* at all times. *Mises-Casiano*, 161 F. Supp. 3d at 168.
  - The defense just needs to present “some evidence” to rebut the presumption. *United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985).
  - The presumption can be rebutted by “[a]ny evidence favorable to a defendant that comes within a category listed in § 3142(g) . . . , including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in 3142(g)(3).” *Dominguez*, 783 F.2d at 707 (emphasis added).
  - As long as a defendant “come[s] forward with *some evidence* that [the defendant] will not flee or endanger the community if released,” the presumptions of flight risk and dangerousness are definitively rebutted. *Id.* (emphasis added). Significantly, “[o]nce this burden of production is met, *the presumption is ‘rebutted.’*” *Id.* (quoting *United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985)) (emphasis added).
    - Any “evidence of economic and social stability” can rebut the presumption. *Id.*
    - That means evidence of any one of the following can rebut the presumption: ties to the community, children, a job, a clean or minimal criminal record, lack of drug history, lack of mental health history, etc.
      - *See, e.g., United States v. Torres-Rosario*, 600 F. Supp. 2d 327, 335 (D.P.R. 2009) (“[D]espite his criminal history, Mr. Torres has verified ties to the community and to a family willing to assist in his compliance with release conditions.”).
  - Beyond the First and Seventh Circuits, other circuits have similarly held that a defendant can successfully rebut the presumption of detention simply by producing any evidence that the defendant is not a flight risk or danger to the community, and that the defendant need not produce much evidence to rebut the presumption.
    - *See, e.g., United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (stating that a defendant has a burden of production and only needs “to offer some credible evidence contrary to the statutory presumption”); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (stating that the burden of persuasion rests with the government, not the defendant).
- Rebut the presumption by offering “evidence favorable to a defendant that comes within a category listed in § 3142(g)”**
- Nature and circumstances of offense charged [(g)(1)]
  - The “weight of evidence against the person” [(g)(2)]
    - **Argue that placing too much emphasis on the weight of the evidence is akin to applying a presumption of guilt, which is forbidden under § 3142(j).**
    - **NOTE:** According to case law, this is the least important factor. *See, e.g., United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (“The weight of the evidence against the defendant is a factor to be considered but it is ‘the least important’ of the various factors.”).

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- In the rare circumstance where the defense has information that undermines the weight of the evidence, that can rebut the presumption of detention. *See, e.g., Torres-Rosario*, 600 F. Supp. 2d at 332–34 (holding that the government’s eyewitness testimony was unreliable and rebutted the presumption of dangerousness in a carjacking case that carried a possible death sentence).
- History and characteristics of defendant, “including:” [(g)(3)]
  - Defendant’s character [(g)(3)(A)]
  - Physical and/or mental condition [(g)(3)(A)]
  - Family ties [(g)(3)(A)]
  - Employment [(g)(3)(A)]
  - Financial resources [(g)(3)(A)]
  - Length of residence in the community [(g)(3)(A)]
  - Community ties [(g)(3)(A)]
  - Past conduct [(g)(3)(A)]
  - History “relating to drug or alcohol abuse” [(g)(3)(A)]
  - Criminal history [(g)(3)(A)]
    - If client has criminal history, be sure to emphasize lack of prior bond violations. *See, e.g., Torres-Rosario*, 600 F. Supp. 2d at 334 (finding presumption rebutted in part because, although defendant was on probation, “[t]here is no indication from the pretrial report that Mr. Torres violated any terms of his release”).
  - Record concerning appearance in court proceedings [(g)(3)(A)]
    - *See Torres-Rosario*, 600 F. Supp. 2d at 334 (D.P.R. 2009) (finding presumption rebutted in part because, although defendant was on probation and had pending charges, “[t]here is no indication that Mr. Torres failed to appear at any court hearings in relation to any of these charges”); *United States v. Dodd*, 2010 U.S. Dist. LEXIS 30830, at \*9 (D. Me. Mar. 29, 2010) (releasing defendant despite prior flight and eluding authorities: “The Government presents a legitimate concern; Mr. Dodd has fled before and he might again. However, the Court is satisfied that the conditions imposed, including that Mr. Dodd reside at his mother’s home, wear a GPS monitoring device, and keep the Probation Office apprised of his weekly appointments, will reasonably assure Mr. Dodd’s appearance when required.”).
  - Whether “the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense” at the time of the alleged offense [(g)(3)(B)]
  - Highlight the absence of bad evidence: “There is no evidence . . . that Mr. Torres has access to large quantities of cash that would aid his release, that he has family or friends outside of Puerto Rico, that he has a history of violating release conditions, or that he is a drug user. Neither is there any evidence relating to a retributive tendency or violent reputation . . . or any other testimony from anyone who knows Mr. Torres that would provoke speculation about either his potential to flee or his potential to be a danger to his community.” *Torres-Rosario*, 600 F. Supp. 2d at 335 (citations omitted).
- Real property “for potential forfeiture or offered as collateral” unless “because of its source,” it “will not reasonably assure the appearance of the person” [(g)(4)]
  - **Object** if the judge asks an indigent client to post property, suggests that the judge would be more comfortable if the client had property to post, or otherwise proposes/imposes a financial

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

condition that results in the pretrial detention of the client. Such conditions violate § 3142(c)(2).

- “[N]ature and seriousness of the danger to any person or the community that would be posed by the person’s release.” [(g)(4)]

### Explain that, once the presumption is rebutted it’s just one factor in the analysis

- “[T]he presumption is just one factor among many.” *Jessup*, 757 F.2d at 384.
- After the presumption is rebutted, it “does not disappear,” but must be weighed against good evidence: “[T]he presumption does not disappear, but rather retains evidentiary weight . . . [and must] be considered along with all the other relevant factors.” *U.S. v. Palmer-Contreras*, 835 F.2d 15, 18 (1st Cir. 1987); *see also Dominguez* 783 F.2d at 707.
- After the presumption is rebutted, “the judge should then still keep in mind . . . that Congress has found that [such] offenders, as a general rule, pose *special* risks of flight.” *Jessup*, 757 F.2d at 384.
  - However, “[t]he judge may still conclude that what is true in general is not true in the particular case before him.” *Id.*

### Remind the judge that even in a presumption case, the defendant never bears the burden of proving that he is not a danger or a flight risk. The burden of proof continues to rest with the government.

- The presumption “does not impose a burden of persuasion upon the defendant.” *Jessup*, 757 F.2d at 384.
- If a judge improperly shifts the burden of proof to the defendant to show that he’s not a danger or a flight risk, the presumption may well become unconstitutional. The presumption is only constitutional if the burden of proof continues to rest with the government at all times. *See Jessup*, 757 F.2d at 386 (“Given [inter alia]. . . the fact that the presumption does not shift the burden of persuasion, . . . the presumption’s restrictions on the defendant’s liberty are constitutionally permissible.”).
  - Regarding flight risk, even in a presumption case: “The burden of establishing that no combination of conditions will reasonably assure a defendant’s appearance for trial rests on the government.” *United States v. Palmer-Contreras*, 835 F.2d 15, 17 (1st Cir. 1987); *see also United States v. Torres-Rosario*, 600 F. Supp. 2d 327, 330 (D.P.R. 2009) (in a presumption case, “[t]he government retains the burden throughout the inquiry to prove that no release conditions can reasonably assure the defendant’s appearance.”).
- Remind judge what client does not have to show to rebut the presumption.
  - Client does not have to “‘rebut’ the government’s showing of probable cause to believe that he is guilty of the crimes charged. That showing is not really at issue once the presumptions . . . have been properly triggered.” *Dominguez*, 783 F.2d at 706.
  - Client does not have to “demonstrate that [the type of crime charged] is not dangerous to the community.” *Id.*

### Regardless of whether judge finds that the presumption of detention has been rebutted, remind the judge that the court still cannot detain client without finding that “no release conditions will reasonably assure the safety of the community.” *Dominguez*, 783 F.2d at 706–07; *see also* § 3142(e).

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- This finding must be made by clear and convincing evidence. *United States v. Patriarca*, 948 F.2d 789, 792–93 (1st Cir. 1991) (citing § 3142(f)); *Dominguez*, 783 F.2d at 707.
  - See, e.g., *United States v. Dodd*, 2010 U.S. Dist. LEXIS 30830, at \*9 (D. Me. Mar. 29, 2010) (releasing defendant despite prior flight and eluding authorities on the ground that there were conditions of release that could nevertheless reasonably assure appearance in court).
- Remind judge that, even in a presumption case, the statute contains a “least restrictive conditions” requirement.**
- The judge “shall order the pretrial release of the person,” § 3142(c)(1), “subject to the least restrictive further condition, or combination of conditions that . . . will reasonably assure the appearance of the person . . . and the safety of any other person and the community,” § 3142(c)(1)(B).
- Propose pretrial release conditions that would “reasonably assure” appearance and safety and contest conditions that are overly “restrictive” or are not necessary to meet those goals. (See conditions listed on pp. 1-2.)**
- **If the judge proposes/imposes a condition that an indigent client post property or meet any other financial condition that effectively results in the pretrial detention of the client:**
- Object**, citing § 3142(c)(2): “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”
- “[T]he Government confirmed that it would not oppose release with significant conditions, if appropriate financial security were available to assure Mr. Dodd’s appearance. . . . [However,] the Court became concerned that if not released, the critical factor for his continued incarceration would be his and his family’s lack of wealth or property, a circumstance the Court considered to be potentially contrary to § 3142(c)(2) and basic concepts of equal justice.” *United States v. Dodd*, 2010 U.S. Dist. LEXIS 30830, at \*7 (D. Me. Mar. 29, 2010).
- Tell the judge the Judicial Conference of the United States, led by Chief Justice John Roberts, recently asked Congress to limit the presumption of detention in drug cases to people with very serious criminal records. See Report of the Proceedings of the Judicial Conference of the United States, September 12, 2017, at 10, [http://www.uscourts.gov/sites/default/files/17-sep\\_final\\_0.pdf](http://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf).**
- This reform was proposed after a government study concluded that the presumption was unnecessarily increasing the detention rates for low-risk defendants, in particular those charged with drug crimes. *Id.*
- Inform the judge that research favors limiting the presumption of detention.**
- A government study found that presumption cases had a lower re-arrest rate than non-presumption cases for almost every risk level. The study found that presumption cases in the lowest risk category were re-arrested at slightly higher rates than non-presumption cases. But for all other risk categories, presumption cases had lower rates of re-arrest than non-presumption cases. Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 Federal Probation 52, 58 (2017), <https://www.uscourts.gov/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates>.
  - Furthermore, “across all of the risk categories, there was no significant difference in rates of

## DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

failure to appear between presumption and non-presumption cases.” *Id.* at 60.

- The quantitative data demonstrates that the presumption of detention has evolved into a “de facto detention order for almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.” *Id.* at 61.
  - Social costs: loss of employment, increased financial pressures, loss of community ties, increased likelihood of custodial sentence, increased recidivism. *Id.* at 53.
  - Economic costs: As of 2016, the average pretrial detention period was 255 days. Detention costed an average of \$73 per day, while pretrial supervision cost averaged \$7 per day. Over the 255 days then, pretrial detention cost taxpayers an average of \$18,615 per detainee while pretrial supervision cost an average of \$1,785 per defendant. *Id.*

**\*\*\*Do not waive Preliminary Hearing/Preliminary Examination\*\*\***

# DETENTION HEARING

## Does the § 3142(e)(3) presumption of detention apply?

The following must be satisfied:

1. Current charge is a:
  - a. Drug case charged under 21 U.S.C. §§ 801–41 or 951 et seq. with maximum penalty of 10 years or more [§ 3142(e)(3)(A)]
  - b. Gun case charged under 18 U.S.C. § 924(c) [§ 3142(e)(3)(B)]
  - c. Terrorism case charged under 18 U.S.C. § 2332b [§ 3142(e)(3)(B) & (C)]
  - d. Case involving a minor victim, mostly charged under 18 U.S.C. § 2241–425 [§ 3142(e)(3)(E)]
2. There is probable cause to believe the client committed current offense.

*NOTE: The following offenses **do not** automatically trigger a presumption of detention: crimes of violence (robbery, etc.), felon in possession under § 922(g), illegal reentry.*

NO

## Does the § 3142(e)(2) presumption of detention apply? (**very rare**). The following must be satisfied:

1. Current charge is a:
  - a. Crime of violence
  - b. Sex trafficking of children
  - c. Terrorism
  - d. Crime with maximum punishment of life or death
  - e. Drug offense with maximum penalty of 10 years or more
  - f. Felony case where the client has two priors that are either (1) COV or drug case with maximum penalty of 10 years or more; or (2) felony involving a minor victim or gun.
2. Client has prior conviction of:
  - a. Crime of violence
  - b. Sex trafficking of children
  - c. Terrorism
  - d. Crime with maximum punishment of life or death
  - e. Drug offense with maximum penalty of 10 years or more
3. The prior offense was committed while the client was on pretrial release.
4. It has been five years or less since the date of conviction/release for that prior offense.

YES

NO

YES

## Can Defense rebut the presumption of detention?

1. Explain that it takes very little evidence to rebut the presumption. Support with caselaw from *Detention Hearing Checklist for Defense Attorneys*.
2. Offer evidence favorable to your client that comes within the § 3142(g) categories
3. Using information compiled in *Detention Hearing Checklist for Defense Attorneys*, inform judge that:
  - a. In September 2017, the Judicial Conference of the United States asked Congress to limit the presumption of detention in drug cases to people with very serious criminal records.
  - b. Research favors limiting the presumption of detention.

NO

YES

## What is the effect of the presumption of detention?

1. Ask AUSA to specify what the rebuttable presumption entails for your particular case.
  - a. For § 3142(e)(3): no conditions will reasonably assure appearance and safety of the community.
  - b. For § 3142(e)(2): no conditions will reasonably assure just the safety of the community.
2. Remind judge that, regardless of whether judge finds that the presumption of detention has been rebutted, the court still cannot detain client without a finding that "no release conditions will reasonably assure the safety of the community." *United States v. Dominguez*, 783 F.2d 702, 706–07 (7th Cir. 1986); § 3142(e).

*Once rebutted, the rebutted presumption becomes just one factor among the § 3142(g) factors for the court to consider.*

## Are there conditions of release that will "reasonably assure"

(1) the safety of the community and (2) your client's appearance in court?

1. Argue that AUSA failed to meet their burden that there are no such conditions that will "reasonably assure" (1) the safety of the community by clear and convincing evidence, and (2) your client's appearance in court by a preponderance of the evidence.
2. Contest any proffered facts/testimony offered by AUSA. Proffer additional facts/testimony allowed in § 3142(g) favoring release.
3. Argue that there are conditions of release under § 3142(c)(1)(B) that will reasonably assure appearance. Propose such conditions and argue for/against any additional conditions of release.

NO

YES

Your client may be **DETAINED**.

Your client must be **RELEASED** with the "**least restrictive**" conditions to "reasonably assure the appearance of the person . . . and the safety of any other person and the community." § 3142(c)(1)(B).  
*Note: Even in a presumption case, the "least restrictive conditions" requirement applies. § 3142(c)(1)(B).*

*The statute contains a **presumption of release** on personal recognizance without any conditions.*

**Template Motion:  
Defendant's Motion for Pretrial Release  
in Presumption Case**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )  
 )  
v. ) Judge [NAME]  
 ) No. XX-CR-XX  
[CLIENT] )  
 )  
 )

**DEFENDANT’S MOTION FOR PRETRIAL RELEASE IN PRESUMPTION CASE**

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court release [him/her] on bond pursuant to the Bail Reform Act, 18 U.S.C. § 3142; *United States v. Salerno*, 481 U.S. 739 (1987); and *United States v. Dominguez*, 783 F.2d 702 (7th Cir. 1986). [CLIENT] has rebutted the presumption of detention with evidence that [short summary of evidence under 3142(g) that rebuts the presumption]. In support, [CLIENT] states as follows:

**I. The Statutory Presumptions of Detention Should Be Viewed with Caution Because They Lead to High Rates of Detention for Low-Risk Defendants.**

Congress enacted the statutory presumptions of detention in the Bail Reform Act of 1984 (BRA) “to detain high-risk defendants who were likely to pose a significant risk of danger to the community if they were released pending trial.”<sup>1</sup> But the presumptions of detention have not worked as intended, and federal pretrial detention rates have increased dramatically since 1984.<sup>2</sup> Before the BRA, *less than two percent* of federal arrestees were jailed pending trial.<sup>3</sup> According to the Bureau of Justice Statistics, the detention rate across the country increased from 59% in

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<sup>1</sup> Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 FEDERAL PROBATION 52, 56–57 (2017), archived at <https://perma.cc/9HGU-MN2B>.

<sup>2</sup> *Id.* at 53.

<sup>3</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Pretrial Release and Detention: The Bail Reform Act of 1984* Table 1 (1988), archived at <https://perma.cc/CS86-NJA8> (showing 1.7% of federal arrestees were detained pretrial in 1983).

1995 to 76% in 2010.<sup>4</sup> A recent study by the Administrative Office of the Courts (AO) attributed this “massive”<sup>5</sup> increase in detention rates to the presumptions of detention, especially as they are applied to low-risk defendants.<sup>6</sup> For example, the statutory presumptions in drug and firearm cases applied to *nearly half* of all federal cases each year.<sup>7</sup> If not for the presumptions of detention, low-risk defendants “might be released at higher rates.”<sup>8</sup> Instead, the presumptions of detention have become “an almost de facto detention order in almost half of federal cases.”<sup>9</sup>

[ONLY INCLUDE THIS PARAGRAPH IN A DRUG PRESUMPTION CASE] Relying on the groundbreaking findings of the AO study, the Judicial Conference’s Committee on Criminal Law recently determined “that the § 3142(e) presumption was unnecessarily increasing detention rates for low-risk defendants, particularly in drug trafficking cases.”<sup>10</sup> To address this problem, the Judicial Conference proposed significant legislative reform that would amend the presumption of detention in drug cases “to limit its application to defendants described therein whose criminal history suggests that they are at a higher risk of failing to appear or posing a danger to the community.”<sup>11</sup> While the Judicial Conference’s proposed legislation has not been enacted yet, this Court can certainly take it into account when evaluating the presumption of detention in this case.

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<sup>4</sup> Austin, *supra* note 1, at 53 (citing U.S. Department of Justice Bureau of Justice Statistics, *Pretrial Detention and Misconduct in Federal District Courts, 1995–2010* 1 (2013), archived at <https://perma.cc/U2V5-GYYP>).

<sup>5</sup> *Id.* at 61.

<sup>6</sup> *Id.* at 57.

<sup>7</sup> *Id.* at 55 (the drug presumption “applied to between 42 and 45 percent of [all federal] cases every year”).

<sup>8</sup> *Id.* at 57.

<sup>9</sup> *Id.* at 61.

<sup>10</sup> *Report of the Proceedings of the Judicial Conference of the United States* 10 (September 12, 2017), archived at <https://perma.cc/B7RG-5J78>.

<sup>11</sup> *Id.*

The problems with the statutory presumptions of detention are important to [CLIENT's] motion because, as the AO study confirms, high federal pretrial detention rates come with significant and wide-ranging “social and economic costs.”<sup>12</sup> For example, that study explains that “[e]very day that a defendant remains in custody, he or she may lose employment which in turn may lead to a loss of housing. These financial pressures may create a loss of community ties, and ultimately push a defendant towards relapse and/or new criminal activity.”<sup>13</sup> Indeed, the economic harms stemming from being detained pretrial persist for years: even three to four years after their bail hearing, people released pretrial were still 24.9% more likely to be employed than those who were detained.<sup>14</sup> [IF CLIENT IS MALE: And these harms are not just limited to the detained person—once someone is incarcerated, the odds that his children become homeless increase by 95%, and the odds that his partner becomes homeless increase by 49%.<sup>15</sup>] The other emotional and psychological harms visited upon the children of incarcerated parents is well-documented.<sup>16</sup>

It is unsurprising, then, that another AO study found a relationship “between the pretrial detention of low-risk defendants and an increase in their recidivism rates, both during the pretrial

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<sup>12</sup> *Id.* at 61.

<sup>13</sup> *Id.*; see also Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) FEDERAL PROBATION 39, 42 (2018), archived at <https://perma.cc/LQ2M-PL83> (finding that for people detained pretrial for at least three days, 76% had a negative job-related consequence and 37% had an increase in residential instability).

<sup>14</sup> Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) AMER. ECON. REV. 201, 204 (2018), archived at <https://perma.cc/X77W-DAWV>.

<sup>15</sup> For children, Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 74, 88 (2013); for partners, see Amanda Geller & Allyson Walker Franklin, *Paternal Incarceration and the Housing Security of Urban Mothers*, 76 Journal of Family and Marriage 411, 420 (2014), archived at <https://perma.cc/G3NQ-NWH7>.

<sup>16</sup> See, e.g., Joseph Murray, et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138(2) PSYCHOLOGICAL BULLETIN 175, 186 (2012).

phase as well as in the years following case disposition.”<sup>17</sup> Other, more recent studies, have confirmed that pretrial detention is criminogenic,<sup>18</sup> and cautioned that “lower crime rates should not be tallied as a benefit of pretrial detention.”<sup>19</sup> One reason why pretrial detention is criminogenic is because jails’ physical and mental health screening and treatment is often inadequate.<sup>20</sup> In addition, federal “pretrial detention is itself associated with increased likelihood of a prison sentence and with increased sentence length,” even after controlling for criminal history, offense severity, and socio-economic variables.<sup>21</sup> These stark statistics must also be considered in light of the fact that 99% of federal defendants are not rearrested for a violent crime while on pretrial release.<sup>22</sup> In other words, pretrial detention imposes enormous costs on criminal defendants, their loved ones, and the community, in a counterproductive attempt to prevent crimes that are extremely unlikely to happen in the first place.

There are also significant fiscal costs associated with high federal pretrial detention rates. As of 2016, the average pretrial detention period was 255 days (although several districts

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<sup>17</sup> Austin, *supra* note 1, at 54 (citing Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pre-trial Detention on Sentencing Outcomes* (The Laura and John Arthur Foundation 2013), archived at <https://perma.cc/8RPX-YQ78>).

<sup>18</sup> Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017), archived at <https://perma.cc/5723-23AS> (“[D]etention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects.”); Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. OF LEGAL STUDIES 471, 496 (2016) (“[O]ur results suggest that the assessment of money bail yields substantial negative externalities in terms of additional crime.”).

<sup>19</sup> Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. OF LAW AND ECON. 529, 555 (2017).

<sup>20</sup> See Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Justice Statistics 9 (2014), archived at <https://perma.cc/HGT9-7WLL> (comparing healthcare in prisons and jails); see also Faye S. Taxman, et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 JOURNAL OF SUBSTANCE ABUSE TREATMENT 239, 247, 249 (2007), archived at <https://perma.cc/G55Z-4KQH>.

<sup>21</sup> James C. Oleson, et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 Crime and Delinquency 313, 325 (2017), archived at <https://perma.cc/QAW9-PYYV>.

<sup>22</sup> Thomas H. Cohen, et al., *Revalidating the Federal Pretrial Risk Assessment Instrument: A Research Summary*, 82(2) FEDERAL PROBATION 23, 27 (2018), archived at <https://perma.cc/8VM9-JH9T>.

averaged over 400 days in pretrial detention).<sup>23</sup> Pretrial detention costs an average of \$73 per day per detainee, while pretrial supervision costs an average of just \$7 per day.<sup>24</sup> Thus, 255 days of pretrial detention would cost taxpayers an average of \$18,615 per detainee, while pretrial supervision for the same time would cost an average of \$1,785.<sup>25</sup>

## II. [CLIENT] Should Be Released on Bond with Conditions.

This Court should [follow Pretrial Services' recommendation and] release [CLIENT] with conditions. In this case, the statute creates a rebuttable presumption “that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” § 3142(e)(3). However, release is warranted here because there are numerous facts under 18 U.S.C. § 3142(g) that rebut the presumption of detention and demonstrate that there are conditions of release that will reasonably assure both [CLIENT's] appearance in court and the safety of the community.

As the Supreme Court held in *United States v. Salerno*, 481 U.S. 739 (1987), “[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” *Id.* at 755. This presumption of release is encapsulated in the BRA, 18 U.S.C. § 3142. The statute states that the Court “shall order” pretrial release, § 3142(b), except in certain narrow circumstances. Even if the Court determines under § 3142(c) that an unsecured bond is not sufficient, the Court “shall order” release subject to “the least restrictive further conditions” that will “*reasonably assure*” the defendant’s appearance in court and the safety of the community. § 3142(c)(1) (emphasis added). Under this statutory scheme, “it is only a ‘limited group of offenders’ who should be detained pending trial.” *United States v. Shakur*, 817 F.2d 189, 195 (2d

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<sup>23</sup> Austin, *supra* note 1, at 53.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Cir. 1987) (quoting S. Rep. No. 98-225, at 7 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3189); *see also United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) (“There can be no doubt that this Act clearly favors nondetention.”).

### **III. The Presumption of Detention Can Be Easily Rebutted and, Once Rebutted, Must Be Considered Alongside All of the Evidence That Weighs in Favor of Release.**

The law is clear that (1) very little is required for a defendant to rebut the presumption and (2) courts must weigh the rebutted presumption against every factor that militates in favor of release before detaining a defendant. Moreover, under controlling Seventh Circuit precedent, this Court is not allowed to detain a defendant in a presumption case based solely on evidence of past dangerousness, the nature of the crime charged, or the weight of the evidence.

#### **A. Rebutting the Presumption**

Under Seventh Circuit law, very little is required for a defendant to rebut the presumption of detention. A defendant simply needs to produce “some evidence that he will not flee or endanger the community if released.” *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986). This “burden of production is not a heavy one.” *Id.* Indeed, the presumption of detention is rebutted by “[a]ny evidence favorable to a defendant that comes within a category listed in § 3142(g) . . . including evidence of their marital, family and employment status, ties to and role in the community . . . and other types of evidence encompassed in § 3142(g)(2).” *Id.* (emphasis added). Any “evidence of economic and social stability” can rebut the presumption. *Id.* As long as a defendant “come[s] forward with some evidence” pursuant to § 3142(g), the presumption of flight risk and dangerousness is definitively rebutted. *Id.* (“Once this burden of production is met, the presumption is ‘rebutted.’”) (quoting *United States v. Jessup*, 757 F.2d 378, 384 (1st

Cir. 1985)).<sup>26</sup> The government bears the burden of *persuasion* at all times. *Id.*; *Jessup*, 757 F.2d at 384.

Other circuits have similarly held that a defendant can successfully rebut the presumption of detention simply by producing any evidence that the defendant is not a flight risk or danger to the community, and that the defendant need not produce much evidence to rebut the presumption. *See, e.g., Jessup*, 757 F.2d at 384 (holding that a defendant only has a burden of production and only needs to produce “some evidence” to rebut the presumption); *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (stating that a defendant has a burden of production and only needs “to offer some credible evidence contrary to the statutory presumption”); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (stating that the burden of *persuasion* rests with the government, not the defendant).

In *Dominguez*, for example, the Seventh Circuit determined that the defendants had sufficiently rebutted the presumption of detention by introducing fairly minimal evidence about their employment and family ties. *Dominguez*, 783 F.2d at 706. Both defendants were Cuban immigrants who were not U.S. citizens but had been in the country lawfully for five years, and neither had a criminal record. *Id.* One of the defendants was married, had family members in the U.S., and was a welder who owned his own welding business. *Id.* The other was employed as a body shop mechanic. *Id.* These facts alone were sufficient for the Seventh Circuit to find that defendants had rebutted the presumption. *Id.* In fact, the court specifically noted that “[this] evidence of economic and social stability, coupled with the absence of any relevant criminal

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<sup>26</sup> To rebut the presumption of flight risk, for example, a defendant does not “have to prove that he would not flee—i.e., he would [not] have to *persuade* the judicial officer on the point. [Instead], he would only have to introduce a certain amount of evidence contrary to the presumed fact.” *Jessup*, 757 F.2d at 380–81; *accord Dominguez*, 783 F.2d at 707.

record” suggested that the defendants would not pose a danger to the community or a risk of flight. *Id.*

### **B. Weighing the Rebutted Presumption**

After the presumption is rebutted, the Court must weigh the presumption against all of the other evidence about the defendant’s history and characteristics that tilts the scale in favor of release. *See Dominguez*, 783 F.2d at 707 (“[T]he rebutted presumption is not erased. Instead it remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g).”). The Court should not give the presumption undue weight if evidence relating to other § 3142(g) factors supports release.

### **C. Forbidden Considerations in a Presumption Case**

The Seventh Circuit has held that a judge may not detain a defendant in a presumption case based solely on (1) evidence of past dangerousness, (2) the nature and seriousness of the crime charged, or (3) the weight of the evidence against him.

First, even if the presumption is not rebutted, a judge is prohibited from detaining a defendant “based on evidence that he has been a danger in the past, except to the extent that his past conduct suggests the likelihood of future misconduct.” *Dominguez*, 783 F.2d at 707. This means that, even when a defendant is charged with a serious crime or has a significant criminal history, there may be release conditions that will reasonably assure the safety of the community. *Id.*

Second, to rebut the presumption of dangerousness, a defendant need not “demonstrate that [the type of crime charged] is not dangerous to the community.” *Dominguez*, 783 F.2d at 706. In *Dominguez*, the Seventh Circuit reversed a district court for expecting the defendants to “provide[] evidence that their participation in a narcotics distribution scheme was not a danger to

the community.” *Id.* As the court explained: “Under the district court’s interpretation, few if any defendants in narcotics cases could ever rebut the presumption of dangerousness and thereby defeat pretrial detention..” *Id.* Despite this clear precedent, judges sometimes detain defendants based solely on the dangerousness inherent in the offense with which they are charged, whether the offense is drug distribution, gun possession, or terrorism. Detention on that ground is improper in this circuit. Instead, this Court must analyze the defendant’s individual characteristics under § 3142(g).

Third, the Court is forbidden from relying solely on the weight of the evidence to detain a defendant in a presumption case. A defendant is not required to “‘rebut’ the government’s showing of probable cause to believe that he is guilty of the crimes charged. That showing is not really at issue once the presumptions . . . have been properly triggered.” *Id.*

In sum, to rebut the presumption, a defendant simply needs to show is that there is “some evidence that he will not flee or endanger the community if released,” and any evidence of the defendant’s family ties, community ties, work history, or lack of criminal record can satisfy this requirement. *Id.* at 707.

#### **IV. The Presumption of Detention Is Rebutted in This Case.**

As detailed below, there is more than “some evidence that [CLIENT] will not flee or endanger the community if released.” *Dominguez*, 783 F.2d at 707. Accordingly, the presumption is rebutted in this case. [FILL IN THE BELOW CATEGORIES BASED ON THE SPECIFICS OF YOUR CASE; ADD ADDITIONAL 3142(g) CATEGORIES AS NEEDED.] [CLIENT] has presented evidence that...

**Family Ties**

**Ties to the Community**

**Employment History**

**No Criminal History/Limited Criminal History/Stale Criminal History**

**No History of Nonappearance**

**No History of Drug or Alcohol Abuse**

**V. Regardless of the Presumption, [CLIENT] Must Be Released Because the Government Has Not Proven That There Are No Conditions That Will Reasonably Assure Appearance and Safety.**

Even if this Court finds that the presumption of detention is not rebutted, [CLIENT] should still be released because there are conditions that will reasonably assure the safety of the community and [CLIENT's] appearance in court. A defendant cannot be detained “unless a finding is made that no release conditions will ‘reasonably assure . . . the safety of the community’” and the defendant’s appearance in court. *Dominguez*, 783 F.2d at 707 (quoting § 3142(e)). Here, the government has not carried its high burden of proving by clear and convincing evidence that there are *no* release conditions that will reasonably assure the safety of the community. *See id.* at 708 n.8. The government also has not proved by a preponderance of the evidence that there are no conditions that would reasonably assure [CLIENT's] appearance in court. Thus, [CLIENT] cannot be detained.

The following conditions of release under § 3142(c)(1)(B), and any other conditions the Court deems necessary, will reasonably assure [CLIENT's] appearance in court and the safety of the community. [CHOOSE AMONG THE BELOW BASED ON THE SPECIFICS OF YOUR CASE.]

- Place [CLIENT] in custody of third-party custodian “who agrees to assume supervision and to report any violation of a release condition to the court”

[§ 3142(c)(1)(B)(i)] [Be sure to name the third-party custodian and explain why that person is appropriate.]

- Maintain or actively seek employment [(ii)]
- Maintain or commence an educational program [(iii)]
- Follow restrictions on “personal associations, place of abode, or travel” [(iv)]
  - Can include electronic monitoring, GPS monitoring, home detention (which allows defendant to leave for employment/schooling/etc.), home incarceration (re: 24-hour lockdown).
  - Can include residence at a halfway house or community corrections center.
- Avoid “all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense” [(v)]
- Report on a “regular basis” to PTS or some other agency [(vi)]
- Comply with a curfew [(vii)]
- Refrain from possessing “a firearm, destructive device, or other dangerous weapon” [(viii)]
- Refrain from “excessive use of alcohol” [(ix)]
- Refrain from “any use of a narcotic drug or other controlled substance . . . without a prescription” [(ix)]
- Undergo “medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency” [(x)] [If possible, research and suggest a program.]
- Post “property of a sufficient unencumbered value, including money” [(xi)]
- Post a “bail bond with solvent sureties” [(xii)]
- Require [CLIENT] to “return to custody for specified hours following release for employment, schooling, or other limited purposes” [(xiii)]
- “[A]ny other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.” [(xiv) (emphasis added)] [Think creatively about other conditions that will reasonably assure your CLIENT’s presence in court and the safety of the community.]

## VI. Conclusion

For these reasons, [CLIENT] respectfully requests that this Court find that the presumption has been rebutted and release [him/her] with conditions.

Dated:

Respectfully submitted,

/s/

\_\_\_\_\_  
[Attorney Name]

Attorney for [CLIENT]

WRITTEN WITH:  
Alison Siegler & Erica Zunkel  
Katerina Kokkas & Sam Taxy, Class of 2019  
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Federal Criminal Justice Clinic

## CERTIFICATE OF SERVICE

The undersigned, [Attorney Name], hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

### **DEFENDANT'S MOTION FOR PRETRIAL RELEASE IN PRESUMPTION CASE**

was served pursuant to the district court's ECF system as to ECF filers, and was sent by first-class mail/hand delivery on [date], to counsel/parties that are non-ECF filers.

/s/  
\_\_\_\_\_  
[Attorney name & contact information]

**Amaryllis Austin,**  
*The Presumption for Detention Statute's  
Relationship to Release Rates*  
**81 FEDERAL PROBATION 52 (2017),**  
[https://www.uscourts.gov/sites/default/files/  
81\\_2\\_7\\_0.pdf](https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf).

# The Presumption for Detention Statute's Relationship to Release Rates

*Amaryllis Austin*

*Probation and Pretrial Services Office  
Administrative Office of the U.S. Courts*

**SINCE 1984, THE** pretrial detention rate for federal defendants has been steadily increasing. Recent work has aimed to address why the detention rate continues to rise and if there may be alternatives that could slow or reverse this trend. The presumption for detention statute, which assumes that defendants charged with certain offenses should be detained, has been identified as one potential factor contributing to the rising detention rate. Therefore, in this article I examine the relationship between the presence of the presumption and release rates. I will also examine the effect, if any, of the presumption on the release recommendations made by pretrial services officers. Finally, I will compare outcomes—defined as rates of failures to appear, rearrests, or technical violations resulting in revocation of bond—for presumption and non-presumption cases.

## Historical Background

For almost 200 years, the federal bail system was premised on a defendant's right to bail for all non-capital offenses if the defendant could post sufficient sureties (Schnacke, Jones, & Brooker, 2010). In other words, all defendants were entitled to release, but release was based on a defendant's financial resources, leaving indigent defendants with few alternatives. Eventually, this disparity led to the passage of the Bail Reform Act of 1966 [18 U.S.C. § 4141-51 (repealed)]. The purpose of the act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention

serves neither the ends of justice nor the public interest." [18 U.S.C. § 4141-51 (repealed)] To accomplish this goal, the act restricted the use of financial bonds in favor of pretrial release conditions (Lotze et al., 1999). Furthermore, the Bail Reform Act of 1966 limited a judicial officer's determination to the question of non-appearance for court hearings—and not other issues such as danger to the community—stating that "any person charged with an offense [...] be ordered released pending trial [...] unless the officer determines [...] that such a release will not reasonably assure the appearance of the person as required." [18 U.S.C. § 4141-51 (repealed)].

The movement for bail reform continued throughout the 1960s and 1970s, with special interest in how judicial officers could obtain the information they needed about defendants prior to making release recommendations (GAO, 1978). In response, Congress passed the Speedy Trial Act of 1974, which among other things allowed for the creation of 10 pretrial "demonstration" districts (Hughes & Henkel, 2015). The mission of these districts was twofold: They were to increase the number of defendants released on bail while also reducing crime in the community (Hughes & Henkel, 2015). To fulfill this mandate, pretrial agencies were charged with interviewing newly arrested defendants for background and biographical information, verifying this information by contacting family or friends, and preparing a report for the court with a recommendation regarding bail (Hughes & Henkel, 2015). Should the defendant be released during the pretrial period, a pretrial services

officer (PSO) would be responsible for supervising them in the community (Schnacke, Jones, & Brooker, 2010).

During this time, there was also growing concern about judicial officers' lack of discretion to consider a defendant's dangerousness when making a release decision. In response, the Attorney General's Office (OAG) established a Task Force on Violent Crime that produced a final report on August 17, 1981 (US DOJ, 1981). The report made a number of sweeping recommendations for many aspects of the criminal justice system, including the existing bail system. In their report, the task force recommended that the Bail Reform Act of 1966 be amended to include the following (not exhaustive) recommendations:

Permit courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community.

Deny bail to a person accused of a serious crime who had previously, while in a pretrial release status, committed a serious crime for which he or she was convicted.

Abandon, in the case of serious crimes, the current standard presumptively favoring release of convicted persons awaiting imposition or execution of sentence or appealing their convictions.

While these recommendations were being made, Congress was receiving testimony from judicial officers that the information received from federal public defenders and prosecutors was insufficient to make an informed bail decision, and that they valued the investigations and reports that had been prepared by

the 10 demonstration districts. Therefore, in 1982, Congress expanded the Pretrial Services Agency to each of the 94 districts in the United States (Schnacke, Jones, & Brooker, 2010).

Following the expansion of pretrial services and the recommendations by the AGO in 1981, a 1984 Senate report stated, “Considerable criticism has been leveled at the Bail Reform Act [of 1966] in the years since its enactment because of its failure to recognize the problem of crimes committed by those on Pretrial release. In just the past year, both the President and the Chief Justice have urged amendment of federal bail laws to address this deficiency.”<sup>1</sup> This same year, federal legislation was enacted under the Comprehensive Crime Control Act of 1984, which included the Bail Reform Act of 1984 (US DOJ, 1981).

The Bail Reform Act of 1984 stated that all defendants charged in federal court were to be released on their own recognizance unless the “judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community” (18 U.S.C. § 3142(b)). If the judicial officer determined that a defendant posed a risk of nonappearance or danger, he or she could still order release on a condition or combination of conditions that would mitigate the established risk (18 U.S.C. § 3142(c)(1)(A) & (B)). Finally, if the judicial officer found “that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” (18 U.S.C. § 3142(e)(1)). Therefore, the presumption was that all defendants would be ordered released, save for those determined to pose too great a risk of nonappearance or danger to the community.

Additionally, the Bail Reform Act of 1984 established two circumstances under which this presumption for release is reversed. Defendants falling into either of these two categories (commonly referred to as “presumption cases”) are presumed to be detained unless they can demonstrate by clear and convincing evidence that they do not pose a risk of nonappearance or danger to the community.

## Presumptions

The first such presumption is often referred to as the “Previous Violator Presumption”

(18 U.S.C. § 3142(e)(2)). This presumption applies to a defendant charged with *any* crime of violence or act of terrorism with a statutory maximum term of imprisonment of 10 years or more, *any* drug offense with a statutory maximum term of imprisonment of 10 years or more, *any* felony involving a minor victim, *any* felony involving the use or possession of a firearm or destructive device, a charge for Failure to Register as a Sex Offender, *any* felony with a statutory maximum sentence of life or death, or *any* felony if the defendant has at least two prior felony convictions for one of the above-noted offenses at the federal, state, or local level (18 U.S.C. § 3142(e)(2)).

Despite this seemingly broad qualification, the Previous Violator Presumption has three “qualifiers” that must be met before the presumption can apply. These qualifiers are:

Does the defendant have a prior conviction that would trigger this presumption? If yes,

Was that prior offense committed while the defendant was out on bail for an unrelated matter? If yes,

Has less than five years passed from the date of conviction or from the defendant’s release for that conviction (whichever is later)?

If the answer is yes to all of these questions, the defendant is subject to the Previous Violator Presumption (18 U.S.C. § 3142(e)(2)).

The other presumption established in the Bail Reform Act of 1984, often referred to as the “Drug and Firearm Offender Presumption,” is much more straightforward—a defendant qualifies based exclusively on the charge and statutory maximum term of imprisonment (18 U.S.C. § 3142(e)(3)). The charges included in this presumption are: *any* drug charge with a statutory maximum term of imprisonment of 10 years or more; *any* firearms case where the firearm was used or possessed in furtherance of a drug crime or crime of violence; a conspiracy to kill, kidnap, maim, or injure persons in a foreign country; an attempt or conspiracy to commit murder; an act of terrorism transcending national boundaries with a statutory maximum term of imprisonment of 10 years or more; a charge of peonage, slavery, or trafficking in persons with a statutory maximum term of imprisonment of 20 years or more, or *any* sex offense under the Adam Walsh Act where a minor victim is involved (18 U.S.C. § 3142(e)(3)).

Since the enactment of these presumptions in the Bail Reform Act of 1984, there has been no known research into the effect of the presumptions on pretrial detention rates. As

such, the focus of this study was to examine the relationship between the presumption and the pretrial release decision.

## Rising Detention Rates and Consequences

Since the passing of the Bail Reform Act of 1984, pretrial detention rates in the federal system have been steadily increasing. Including defendants charged with immigration charges, the federal pretrial detention rate increased from 59 percent in 1995 to 76 percent in 2010 (Bureau of Justice Statistics, 2013). During the same time period, the percentage of defendants charged with drug offenses who were detained pretrial increased from 76 percent to 84 percent, and defendants charged with weapons offenses who were detained pretrial increased from 66 percent to 86 percent (Bureau of Justice Statistics, 2013). Even after excluding immigration cases, from 2006 to 2016, the pretrial detention rate increased from 53 percent to 59 percent.

The rising pretrial detention rates have generated a number of social and fiscal concerns. Significantly, when the 1981 task force report recommended the addition of dangerousness as a consideration, it was with the understanding that defendants ordered detained as a risk of danger would only be detained for a brief period of time under the Speedy Trial Act. The task force specifically stated that this recommendation would not be favorable for systems where defendants may wait one to two years before their trials (US DOJ, 1981).

As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention (H-9A Table). At an average cost of \$73 per day, 255 days of pretrial detention costs taxpayers an average of \$18,615 per detainee (Supervision, 2013). In contrast, one day of pretrial supervision costs an average of \$7 per day, for an average cost of \$1,785 per defendant across the same 255 days (Supervision, 2013).

There are also significant social costs to the defendant as the result of pretrial detention. Every day that a defendant remains in custody, he or she may lose employment, which in turn may lead to a loss of housing. These financial pressures may create a loss of community ties, and ultimately push a defendant towards relapse and/or new criminal activity (if he was guilty of the charged criminal activity) (Stevenson & Mayson, 2017). Pretrial detention has also been found to correlate with

<sup>1</sup> Senate Report No. 98-225, at 3.

a greater likelihood of receiving a custodial sentence, and one of greater length, than for defendants released on pretrial (Lowenkamp, VanNostrand, & Holsinger, 2013a). This study found that defendants who were detained for the entire pretrial period were 4.44 times more likely to receive a jail sentence and 3.32 times more likely to receive a prison sentence (Lowenkamp, VanNostrand, & Holsinger, 2013a). In addition to making it more likely that a custodial term would be received, never being released pretrial was associated with significantly longer sentences. For those defendants not released pretrial who were later sentenced to jail, their sentences were 2.78 times longer than those of defendants who had been out on bond, and, for defendants sent to prison, sentences were 2.36 times longer (Lowenkamp, VanNostrand, & Holsinger, 2013a).

Another recent study found a relationship between the pretrial detention of low-risk defendants and an increase in their recidivism rates, both during the pretrial phase as well as in the years following case disposition (Lowenkamp, VanNostrand, & Holsinger, 2013b). In this study, low-risk defendants who were held pretrial for two to three days were almost 40 percent more likely to recidivate before trial compared to similarly situated low-risk defendants who were detained for 24 hours or less (Lowenkamp, VanNostrand, & Holsinger, 2013b). When held for 8 to 14 days, low-risk defendants became 51 percent more likely to recidivate within two years of their cases' resolution, and when held for 30 or more days, defendants were 1.74 times more likely to commit a new criminal offense than those detained for 24 hours or less.

The increasing rate of pretrial detention, along with the effects noted above, have prompted growing interest in what factors may be contributing to the detention of low-risk defendants, with a special focus on what has been deemed "unnecessary" detention. In federal bail statute, unnecessary detention occurs when a defendant with a high predicted probability of success is nonetheless detained as a potential risk of danger to the community or nonappearance.<sup>2</sup>

Among other factors, the statutory presumptions for detention were identified as a potential factor influencing the pretrial release decision. Therefore, the focus of this study was to examine the relationship between the presumption and the pretrial

release decision. Furthermore, the dataset was used to compile descriptive statistics on presumption cases, identify the average risk levels of presumption cases, and determine their release rates compared to release rates for non-presumption cases. Finally, the outcomes of presumption cases were compared to those of non-presumption cases for failures to appear, rearrests, violent rearrests, and technical violations leading to revocations.

## Methods

The first step in the three-pronged study was to distinguish presumption cases from non-presumption cases. This process was complicated by the fact that presumption cases are not identified in any existing source, because the U.S. Code does not provide a specific list of citations that would be subject to the presumptions (18 U.S.C. § 3142(e)(2) & (3)). Instead, pretrial services officers have identified presumption cases by experience and the general guidance provided in the statute (e.g., any drug offense with a statutory maximum term of imprisonment of ten years or more).

In order to identify as many presumption cases as possible, a dataset was created containing every pretrial case received from fiscal year 2005 through fiscal year 2015 (N=1,012,874). Next, cases where the defendant was categorized as being in the United States without legal status were excluded from the sample (N lost= 437,022). Defendants without legal status in the United States were removed from the sample, because they are detained in such high numbers based on their lack of legal immigration status that it would not have been clear whether the lack of immigration status or the presumption led to the detention. The resulting dataset consisted of 575,412 defendants. At this point, a manual inspection of the citations was conducted to ascertain exactly which citations were subject to which presumption.

As described above, the Previous Violator Presumption is subject to a number of criteria that must be met before the presumption can apply. In addition, there is significant overlap between the two presumptions, most notably among drug and sex offenses. After I excluded any citation that triggered both presumptions, only 6 percent of all the cases met the initial criteria for the Previous Violator Presumption. Unfortunately, the data needed to identify the exact number of cases under this presumption does not exist, as officers do not record the nature of previous convictions or the specific

dates of any prior convictions. Therefore, it was impossible to determine exactly how many cases may be subject to this presumption, but a conservative estimate is less than 3 percent of all cases. Given the limited number of cases subject to this presumption and the lack of needed data, I focused the rest of the study on the Drug and Firearm Offender Presumption, which is triggered solely by the charge and potential statutory maximums. The manual inspection of the data produced a comprehensive list of citations subject to each presumption, listed in Appendix A.

This process also led to the creation of a sub-category of cases, designated as "wobblers." The wobbler category was created to address an ambiguity in the statute that includes any crime of violence if a firearm was used in the commission of the crime or any sex offense where the victim was a minor (18 U.S.C. § 3142(e)(3)(B) & (E)). Unfortunately, the details of the weapon used or the age of the victim are rarely specified in the citation for the offense. For instance, the citation for assault (18 U.S.C. § 113) does not specify whether the assault was committed with a firearm, vehicle, or a knife. Therefore, the citation itself is not sufficient to know if an assault case is subject to this presumption. As a result, wobblers represent cases, mostly crimes of violence or sex offenses, that may or may not be subject to the presumption, depending on the specific details of the offense.

Once the list of citations that triggered the Drug and Firearm Offender presumption and wobblers had been identified, it was coded into statistical analysis software, creating "presumption" and "wobbler" variables and allowing for the direct comparison of presumption cases to non-presumption cases. After excluding illegal defendants, the final dataset consisted of 568,195 defendants.

## The PTRAs and Risk Categories

The Pretrial Risk Assessment Tool (PTRAs) was used to identify defendants' risk level. The PTRAs was developed in 2010 by Christopher Lowenkamp, Ph.D., a nationally recognized expert in risk assessment and community corrections research who was hired by the AO for his extensive experience with actuarial risk assessment. He has presented on the subject of risk assessment at many forums and training events and routinely consults with government agencies and programs.

The primary purpose of the PTRAs tool was to aid officers in making pretrial release recommendations by providing an

<sup>2</sup> *Guide to Judiciary Policy*, Vol. 8C, § 140.30.

actuarially-based risk category for defendants (Lowenkamp & Whetzel, 2009). Since its implementation in 2010, it has been found to effectively predict pretrial outcomes, specifically defined as failure to appear, suffering a new criminal arrest, and/or engaging in technical violations substantive enough to result in revocation of bond (Cadigan, Johnson, & Lowenkamp, 2012). Additionally, the PTRAs have been validated in all 94 federal districts and found to be valid and predictive in every one (Cadigan, Johnson, & Lowenkamp, 2012).

The PTRAs tool places defendants into one of five categories based on a total score obtained from responses to 11 questions. The total score can range from one to fifteen points. This score, known as the raw score, then corresponds to a risk category with a predicted risk of failure as follows: category 1 defendants are predicted to fail while on pretrial release 3 percent of the time, category 2 defendants have failure rates of 10 percent of the time, category 3 defendants have failure rates of 19 percent, category 4 defendants have failure rates of 29, and category 5 defendants have failure rates of 35 percent. For the purposes of this study, those falling into categories 1 and 2 are considered low-risk defendants, category 3 defendants are considered moderate risk, and categories 4 and 5 defendants are considered high-risk.

### Composition of Presumption Cases

As can be seen in Figure 1, between fiscal years 2005 and 2015, the Drug and Firearm presumption was found to have applied to between 42 and 45 percent of cases every year.

When analyzed by risk category, there was a higher proportion of presumption cases among categories 3 to 5 (Figure 2).

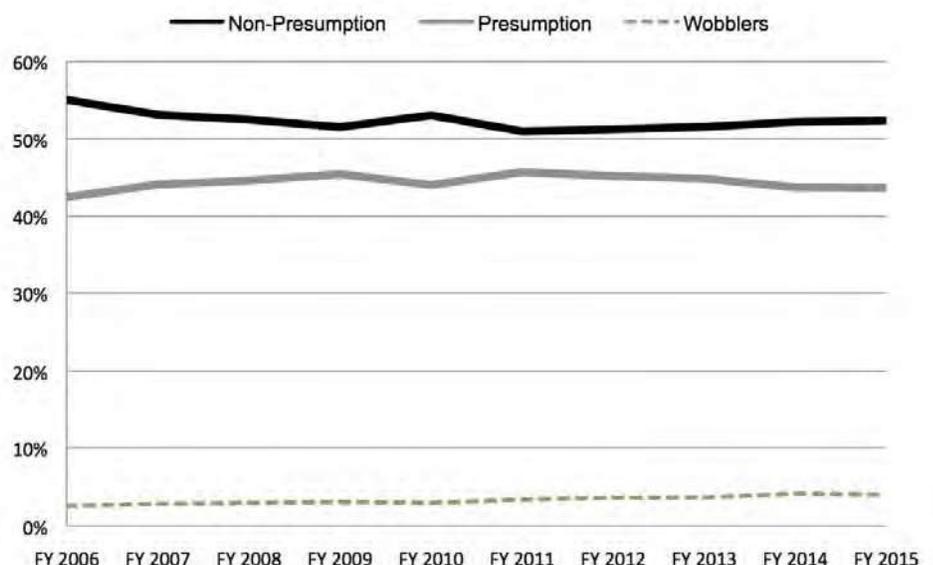
Presumption cases were also compared to non-presumption cases by offense type and PTRAs category (Table 1). Presumption cases accounted for 93 percent of drug offenses; 77 percent of sex offenses, 17 percent of all weapons offenses, and only 2 percent of all violence charges (however, an additional 44 percent of violent offenses were categorized as wobblers).

Interestingly, for weapons and sex offenses, as risk levels increase, fewer and fewer cases are subject to the presumption, indicating that for these charges, the presumption may be targeting lower-risk defendants rather than higher-risk defendants. One potential explanation may be that while all sex offenses

**TABLE 1.**  
Percent of defendants with presumption charge, by offense type and PTRAs category

PTRAs category	Number	Percent of defendants with		
		Non-Presumption	Presumption	Wobblers
<b>Drugs</b>				
One	4,761	14.56%	85.44%	0.00%
Two	15,425	5.90%	94.10%	0.00%
Three	25,449	3.19%	96.81%	0.00%
Four	19,201	2.32%	97.68%	0.00%
Five	8,215	1.83%	98.17%	0.00%
<b>Property</b>				
One	24,996	99.85%	0.09%	0.06%
Two	10,927	99.43%	0.14%	0.43%
Three	6,234	97.53%	0.32%	2.15%
Four	3,106	96.97%	0.32%	2.70%
Five	807	97.15%	0.25%	2.60%
<b>Weapons</b>				
One	978	80.27%	18.71%	1.02%
Two	2,611	76.02%	23.67%	0.31%
Three	6,036	77.62%	22.23%	0.15%
Four	8,140	83.14%	16.72%	0.14%
Five	5,932	87.42%	12.53%	0.05%
<b>Sex</b>				
One	4,394	6.78%	91.94%	1.27%
Two	3,680	16.63%	81.41%	1.96%
Three	2,035	37.15%	60.10%	2.75%
Four	995	53.47%	44.02%	2.51%
Five	203	55.67%	42.36%	1.97%

**FIGURE 1.**  
Percent of defendants charged with presumption or non-presumption case, 2006–2015



against minors (known as Adam Walsh cases) are presumption cases, many defendants charged with these offenses do not have significant prior criminal histories and are usually categorized as low-risk defendants (Cohen & Spidell, 2016). By contrast, a defendant charged with a violent sexual assault is more likely to have a substantial criminal history and a higher risk level, yet, because the victim is an adult, this violent sexual assault may not be categorized as a presumption case (Cohen & Spidell, 2016).

## Results

### Pretrial Services Recommendations

By statute, a judicial officer (judge) may only consider certain factors in making a release decision. These factors are 1) the nature and circumstances of the offense charged, including whether the offense is violent in nature, a federal crime of terrorism, involves a minor victim, controlled substance, firearm, explosive, or destructive device; 2) the weight of the evidence against the defendant; 3) the history and personal characteristics of the defendant, including his or her character, physical and mental condition, family ties, employment

history, financial condition, community ties, past criminal history, and behavior; and 4) the nature and seriousness of the danger to any person or the community posed by the defendant (18 U.S.C. § 3142(g)).

However, because pretrial services officers are not trained in the rules of evidence, local policy outlined in the *Guide to Judiciary Policy* mandates that they consider all of the above factors except the weight of the evidence and the presence of the presumption.<sup>3</sup> Despite pretrial services officers being trained not to consider these factors, anecdotal experience suggests that they are being considered. In order to determine if the presumption was having an effect on pretrial services officers' release recommendations, the recommendations for presumption and non-presumption cases were compared, controlling for risk. If the presumption was not being considered, then the release rates should not differ significantly between the two types of cases. The results, seen in Figure 4, demonstrate that this is not the case.

For category 1 defendants, pretrial services officers recommended release on 93 percent of non-presumption cases, compared to 68 percent of presumption cases. For category 2 defendants, release was recommended on 78 percent of non-presumption cases and 64 percent of presumption cases. By category 3, the differences are reduced, with pretrial services officers recommending release on 53 percent of cases, 30 percent of category 4 defendants and 14 percent of category 5 non-presumption cases, compared to 50 percent, 29 percent, and 13 percent of presumption cases, respectively.

Notably, the largest difference in release recommendations was for category 1 defendants, with a differential of 25 percent. As risk levels increase, the lines converge, until there is virtually no difference between moderate and high-risk defendants. Given pretrial services officers' mandate to recommend alternatives to detention and the fact that they, in theory, consider fewer factors than the judicial officers, it is unclear why their recommendations would be comparable to or lower than the actual release rates ordered by the courts for any of the case types.

### Release Rates

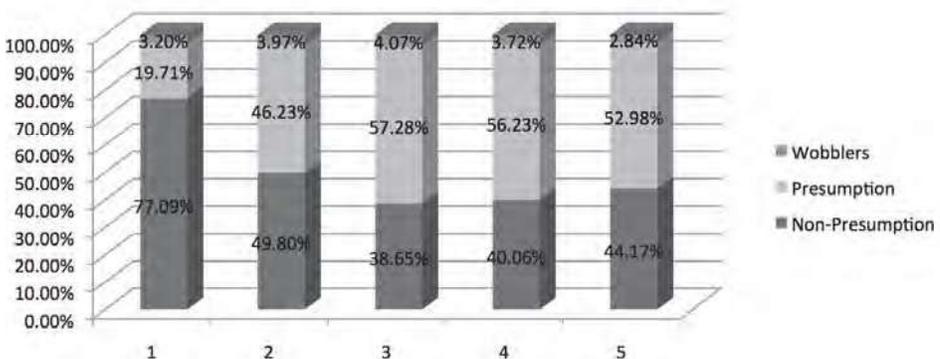
The intended purpose of the presumption was to detain high-risk defendants who were likely to pose a significant risk of danger to the

**TABLE 2.**  
Relationship between presumption case and pretrial violations for all released defendants, by PTR A category

Presumption and PTR A category	Number on release	Percent of released defendants with:			
		Any rearrest	Violent rearrest	FTA	Revocation
<b>One</b>					
Non-presumption	22,879	2.8%	0.4%	0.7%	1.7%
Presumption	4,251	3.7%**	0.5%	0.8%	4.3%***
<b>Two</b>					
Non-presumption	14,211	5.9%	0.9%	1.5%	5.2%
Presumption	8,952	5.3%*	0.7%	1.6%	6.5%***
<b>Three</b>					
Non-presumption	9,116	10.2%	1.8%	2.7%	12.6%
Presumption	11,098	8.7%***	1.2%***	2.5%	12.9%
<b>Four</b>					
Non-presumption	4,029	16.8%	2.7%	3.9%	20.0%
Presumption	5,535	12.2%***	2.0%*	3.1%*	18.1%*
<b>Five</b>					
Non-presumption	1,076	20.8%	4.8%	5.5%	24.1%
Presumption	1,355	16.4%**	3.0%*	4.5%	22.2%

Note: Includes subset of 82,502 defendants with PTR A assessments with cases closed prior to fiscal year 2015. \*p<.05; \*\*p<.01; \*\*\*p<.001

**FIGURE 2.**  
Composition of risk categories



<sup>3</sup> *Guide to Judiciary Policy*, Vol. 8A, § 170.

community if they were released pending trial.<sup>4</sup> If this purpose were fulfilled, release rates would be higher for low-risk presumption defendants than for high-risk presumption defendants. Additionally, because the presumption can be rebutted if sufficient evidence is presented that the defendant does not pose a risk of nonappearance or danger to the community, we wanted to investigate whether low-risk presumption cases were released at rates similar to low-risk non-presumption cases.

The results can be seen in Figure 3. At the lowest risk level (category 1), non-presumption cases are released 94 percent of the time, while the release rate for presumption cases was only 68 percent. For category 2 defendants, 80 percent of non-presumption cases are released, as opposed to 63 percent of presumption cases. For category 3 defendants, the release rates drop to 57 percent and 50 percent. At the high-risk categories 4 and 5, basically there was no difference in the release rates between presumption and non-presumption cases. For example, the percentage of non-presumption PTR A 4 cases released was 33 percent, while the percentage of PTR A 4 presumption cases released was 32 percent.

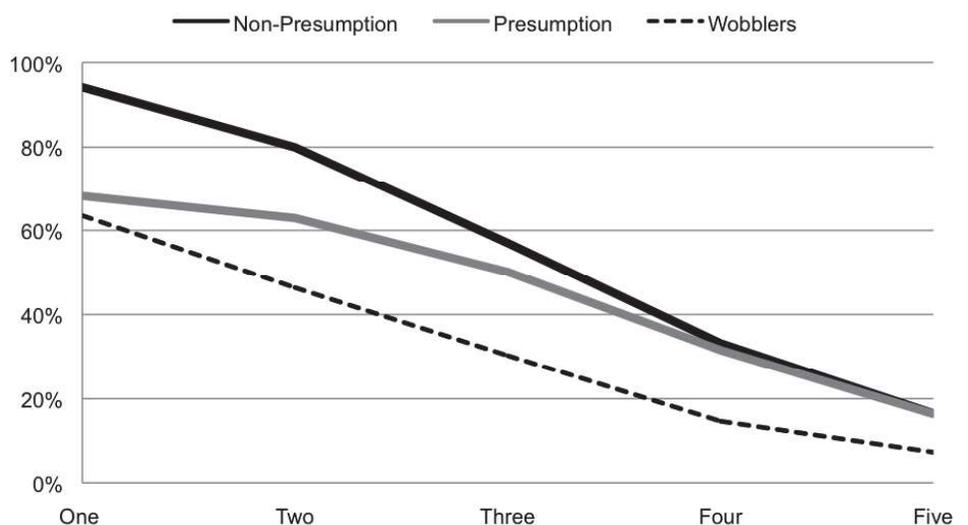
These results were illuminating for several reasons. The most surprising result was that the largest difference in release rates was among the lowest risk defendants, with the differential in release rates disappearing as the risk increases. Notwithstanding the presumption, a PTR A category 1 case represents a defendant with a minimal, if any, criminal history and a stable personal background in terms of employment, residence, education, and substance abuse history. Given the lack of substantive risk factors in these defendants, it seems possible that the presumption is accounting for this difference in release rates. Stated differently, were it not for the existence of the presumption, these defendants might be released at higher rates.

Interestingly, the difference in release rates gets smaller as the risk level increases, until it is virtually identical for high-risk defendants. A category 5 defendant, presumption or non-presumption, will most likely have multiple felony convictions, a history of failures to appear, unstable residence, little or no employment history, and a significant history of substance abuse. These are all legitimate risk factors, and their combined presence makes

**TABLE 3.**  
**Presence of pretrial special conditions for presumption and non-presumption cases, by PTR A category**

PTR A categories	Number	Percent with conditions	Average number special conditions
<b>All defendants</b>			
Non-presumption	42,601	89.2%	8.5
Presumption	24,412	98.3%***	11.1***
Wobbler	2,325	97.0%***	10.5***
<b>PTR A ones</b>			
Non-presumption	18,648	83.7%	7.5
Presumption	3,204	98.1%***	11.5***
Wobbler	713	96.1%***	9.3***
<b>PTR A twos</b>			
Non-presumption	11,918	90.4%	8.6
Presumption	6,882	98.2%***	10.9***
Wobbler	687	97.5%***	10.5***
<b>PTR A threes</b>			
Non-presumption	7,756	96.4%	9.7
Presumption	8,779	98.4%***	11.1***
Wobbler	651	97.9%	11.3***
<b>PTR A fours</b>			
Non-presumption	3,396	97.0%	10.4
Presumption	4,464	98.4%***	11.2***
Wobbler	219	96.8%	12.1***
<b>PTR A fives</b>			
Non-presumption	883	96.0%	10.4
Presumption	1,083	97.8%*	11.1***
Wobbler	55	94.6%	11.5*

**FIGURE 3.**  
**Percent of defendants charged with presumption cases recommended for release pretrial, by PTR A category**

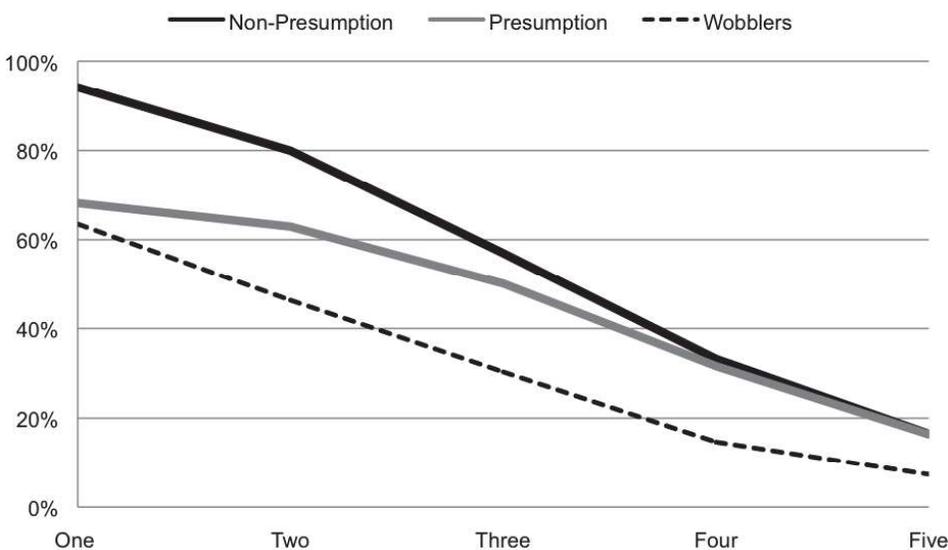


<sup>4</sup> S. REP. No. 225, *supra* note 2, at 3.

**TABLE 4.**  
Types of pretrial special conditions for presumption and non-presumption cases, by PTRA category

PTRA categories	Types of pretrial special conditions				
	Restriction condition	Monitoring condition	Treatment condition	Education/training or employment condition	Other party guarantees condition
<b>All defendants</b>					
Non-presumption	83.6%	64.6%	39.9%	32.3%	13.6%
Presumption	96.8%	90.5%	68.0%	43.7%	23.3%
Wobbler	95.1%	81.6%	61.9%	32.9%	26.5%
<b>PTRA ones</b>					
Non-presumption	77.4%	50.0%	25.3%	24.2%	9.2%
Presumption	96.6%	86.6%	55.7%	33.3%	18.7%
Wobbler	94.1%	65.1%	41.4%	26.7%	18.8%
<b>PTRA twos</b>					
Non-presumption	84.2%	67.4%	40.3%	34.1%	14.1%
Presumption	96.9%	87.6%	60.8%	43.3%	22.2%
Wobbler	95.9%	83.6%	62.6%	31.2%	25.2%
<b>PTRA threes</b>					
Non-presumption	92.2%	81.6%	57.2%	42.9%	19.2%
Presumption	97.0%	91.7%	71.2%	47.4%	25.0%
Wobbler	95.2%	92.0%	76.8%	38.4%	34.0%
<b>PTRA fours</b>					
Non-presumption	94.0%	89.8%	70.6%	44.0%	21.6%
Presumption	96.5%	94.4%	78.5%	44.8%	24.6%
Wobbler	96.4%	95.9%	80.4%	42.9%	30.6%
<b>PTRA fives</b>					
Non-presumption	92.8%	90.0%	73.5%	42.0%	21.4%
Presumption	95.8%	95.0%	81.4%	41.7%	25.1%
Wobbler	92.7%	89.1%	70.9%	29.1%	38.2%

**FIGURE 4.**  
Percent of defendants released pretrial, by presumption charge



release difficult, with or without the presumption. As such, it appears the presumption is influencing the release decision for the lowest-risk defendants, while having a negligible influence on higher risk defendants.

#### Outcomes on Pretrial Release

The wide variations in release rates may be justified if presumption cases have substantially worse outcomes than non-presumption cases with regard to failure to appear, rates of rearrest, rates of violent rearrest, and/or technical violations resulting in revocations. In order to accurately measure outcomes, the data for this part of the analysis was limited to cases opened after the implementation of PTRA in 2010 and whose cases had been closed prior to fiscal year 2015, for a total value of 82,502 defendants.

#### Rates of Rearrest

When analyzing rates of rearrest, I found that category 1 presumption cases were rearrested at slightly higher rates than non-presumption cases; however, presumption rearrest rates were lower than non-presumption rearrest rates for every other risk level<sup>5</sup> (Table 2). This finding would seem to confirm the belief that the presumption does a poor job of assessing risk, especially compared to the results produced by actuarial risk assessment instruments such as the PTRA.

The risk principle could explain the slightly higher rearrest rates found for lower risk presumption defendants. In essence, the risk principle states that supervision conditions and strategies should be commensurate to a defendant's actual risk. Studies based on the risk principle have found that when low-risk cases are placed on intensive supervision strategies, such as placement in a halfway house, residential drug treatment, or participation in location monitoring, they are more likely to fail (Andrews, Bonta, & Hoge, 1990; Lowenkamp & Latessa, 2004; Lowenkamp, Holsinger, & Latessa, 2006; Lowenkamp, Flores, Holsinger, Makarios, & Latessa, 2010). Existing literature on the risk principle has explained this increased failure rate as the result of intermixing low- and high-risk defendants in the same programs and exposing low-risk defendants to high-risk thought processes and influences (Cohen, Cook, & Lowenkamp, 2016).

In support of this theory, I compared the average number of special conditions for

<sup>5</sup> The results were all found to be statistically significant at the .05 level.

defendants charged with presumption cases to those not charged with presumption cases, controlling for risk (Table 3). Low-risk cases (Categories 1 & 2) charged with a presumption case received an average of 12 and 11 special conditions, respectively. In contrast, low-risk cases not charged with a presumption averaged 8 and 9 special conditions respectively.

Additionally, the special conditions imposed on presumption cases were substantively more restrictive than those imposed on non-presumption cases (Table 4). Specifically, while only 50 percent of category 1 non-presumption cases were placed on a monitoring condition (such as location monitoring), 87 percent of PTR A 1 presumption cases received a monitoring condition. Furthermore, for

Categories 1 and 2, presumption cases were much more likely to have a third-party guarantee condition (third-party custodian and/or co-signer) compared to low-risk non-presumption cases.

#### *Rates of Violent Rearrest*

Since presumption cases are assumed to pose a greater than average risk of danger to the community, their rates for violent rearrest while on supervision were also compared. For low-risk defendants, there was no statistical difference in rates of violent rearrest between presumption and non-presumption cases (see Table 2). However, for moderate and high-risk categories, presumption cases had fewer violent rearrests than non-presumption cases. Again, a possible explanation for this result

is that pretrial officers supervised according to the risk principle, with higher risk presumption cases being adequately placed on intensive supervision strategies.

#### *Technical Revocations*

The risk principle also provides an explanation for the rates of revocation for presumption and non-presumption cases. For this study, the revocation rate was defined as a technical violation or series of technical violations that ultimately led to the revocation of bond. For category 1 and 2 defendants, non-presumption cases were revoked at lower rates than presumption cases (1.7 percent compared to 4.3 percent for category 1, and 5.2 percent compared to 6.5 percent for category 2). However, there was no difference in revocation rates for

**TABLE 5.**  
Cost of Pretrial Detention versus Supervision for PTR A Categories 1 and 2 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTR A 1-2 Presumption Cases	Daily Cost of Incarceration	Daily Cost of Supervision	Average Days Incarcerated	Total Cost of Incarceration	Total Cost of Supervision	Net Savings
2005	1485	62.09	5.7	213	\$19,639,377	\$1,802,939	\$17,836,439
2006	1843	62.73	5.65	222	\$25,665,728	\$2,311,675	\$23,354,054
2007	1853	64.4	5.85	224	\$26,730,637	\$2,428,171	\$24,302,466
2008	1847	66.27	6.09	228	\$27,907,357	\$2,564,596	\$25,342,761
2009	1336	67.79	6.38	231	\$20,921,079	\$1,968,970	\$18,952,109
2010	1161	70.56	6.62	232	\$19,005,477	\$1,783,110	\$17,222,367
2011	1603	72.88	7.35	233	\$27,220,607	\$2,745,218	\$24,475,390
2012	1639	73.03	7.24	237	\$28,367,992	\$2,812,327	\$25,555,665
2013	1499	74.61	7.17	243	\$27,177,215	\$2,611,723	\$24,565,492
2014	1255	76.25	8.98	250	\$23,923,438	\$2,817,475	\$21,105,963
2015	1330	78.77	10.08	255	\$26,714,846	\$3,418,632	\$23,296,214
<b>Totals</b>					<b>\$273,273,753</b>	<b>\$27,264,836</b>	<b>\$246,008,917</b>

**TABLE 6.**  
Cost of Pretrial Detention versus Supervision, PTR A Categories 1-3 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTR A 1-3 Presumption Cases	Daily Cost of Incarceration	Daily Cost of Supervision	Average Days Incarcerated	Total Cost of Incarceration	Total Cost of Supervision	Net Savings
2005	5051	62.09	5.7	213	\$66,800,334	\$6,132,419	\$60,667,915
2006	6296	62.73	5.65	222	\$87,678,474	\$7,897,073	\$79,781,401
2007	6381	64.4	5.85	224	\$92,049,754	\$8,361,662	\$83,688,091
2008	6250	66.27	6.09	228	\$94,434,750	\$8,678,250	\$85,756,500
2009	6060	67.79	6.38	231	\$94,896,509	\$8,931,107	\$85,965,403
2010	5822	70.56	6.62	232	\$95,305,674	\$8,941,660	\$86,364,014
2011	6024	72.88	7.35	233	\$102,293,785	\$10,316,401	\$91,977,384
2012	5605	73.03	7.24	237	\$97,011,957	\$9,617,507	\$87,394,449
2013	5415	74.61	7.17	243	\$98,175,195	\$9,434,609	\$88,740,587
2014	4521	76.25	8.98	250	\$86,181,563	\$10,149,645	\$76,031,918
2015	4587	78.77	10.08	255	\$92,136,087	\$11,790,425	\$80,345,663
<b>Totals</b>					<b>\$1,006,964,082</b>	<b>\$100,250,759</b>	<b>\$906,713,323</b>

category 3 defendants; for categories 4 and 5, non-presumption cases were *more* likely to be revoked than presumption cases.

### *Failure to Appear*

Finally, rates of failure to appear were compared for presumption and non-presumption cases. Across all of the risk categories, there was no significant difference in rates of failure to appear between presumption and non-presumption cases. For instance, category 1 non-presumption cases failed to appear in 0.7 percent of instances compared to 0.08 percent for category 1 presumption cases. The same trend was found at the highest risk category, where non-presumption cases failed to appear in 5.5 percent of instances, compared to 4.5 percent for presumption cases.

In sum, high-risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, rearrested for a violent offense, failing to appear, or being revoked for technical violations. At the lower risk categories, presumption cases were more likely than non-presumption cases to be rearrested for any offense or be revoked for a technical violation, both of which are likely the result of the misapplication of the risk principle in supervision. Even for categories where presumption cases fared worse than non-presumption cases, the outcomes did not vary significantly enough to justify a presumption for detention.

## **Discussion**

The presumption was instituted by Congress to address the perceived risk of danger to the community posed by defendants charged with certain serious offenses and only after a judicial officer makes a finding of dangerousness by the “clear and convincing” standard (US DOJ, 1981). Additionally, it was clear that defendants detained as a potential danger should only be detained for the relatively short period of time—70 days—defined by the Speedy Trial Act (US DOJ, 1981).

Despite these caveats and precautions, there has been little research into whether these goals have been met. This study represents an initial attempt to do so by first defining the citations subject to the presumption as comprehensively as possible. This study found that, when clearly defined, the presumption focuses primarily on drug offenses and excludes the majority of violent, sex, or weapons-related offenses. The rise in federal drug prosecutions in the last decade

means that at least 42 percent of all federal cases in any given year are now subject to the presumption. This has led to a drastic rise in the number of defendants detained in federal court, reaching as high as 59 percent in the latest fiscal year, after excluding immigration cases (Table H-14A). Compounding the matter is the lengthening average term of pretrial detention, which currently ranges from 111 days to as high as 852 days, with a national average of 255 days. Even the lowest average, 111 days, is significantly above the threshold set by the Speedy Trial Act and is counter to the intended purpose of the 1981 Task Force.

Furthermore, the effect of the presumption on actual release rates and on the recommendations of pretrial services officers was most significant for low-risk defendants (meaning there may be some level of unnecessary detention), while having a negligible effect on the highest risk defendants. Additionally, the presumption has failed to correctly identify defendants who are most likely to be rearrested for any offense, rearrested for a violent offense, fail to appear, or be revoked for technical violations. In the limited instances where defendants charged with a presumption demonstrated worse outcomes than non-presumption cases, the differences were not significant and were most likely caused by the system’s failure to address these defendants appropriately under the risk principle.

These results lead to the conclusion that the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant’s charge was a good proxy for that defendant’s risk. In the years since the passage of the Bail Reform Act of 1984, there have been huge advances in the creation of scientifically-based risk assessment methods and tools, such as the PTRR. This study finds that these tools are much more nuanced and effective at identifying high-risk defendants.

### *Cost of the Presumption*

According to our estimates, after excluding defendants charged with a sex offense and those without legal status in the United States, the detention of low-risk defendants charged in a presumption case has cost taxpayers an estimated \$246 million dollars in the last 10 years alone (Table 5).

When moderate risk defendants are added to these calculations, the number rises to \$1 billion in costs across the last ten years (Table 6).

Aside from the fiscal cost of pretrial detention, one should not lose sight of the high social costs of pretrial detention on an entire community. Recent research has demonstrated that for low-risk defendants, as defined by actuarial risk assessment and not charge, every day in pretrial detention is correlated with an increased risk of recidivism (Lowenkamp, VanNostrand, & Holsinger, 2013). Low-risk defendants experiencing even a two- to three-day period of pretrial detention are 1.39 times more likely to recidivate than low-risk defendants released at their initial appearance ((Lowenkamp, VanNostrand, & Holsinger, 2013). When held for 31 days or longer, they are 1.74 times more likely to recidivate than similarly situated defendants who are not detained pretrial.

The first finding is especially concerning when considering that the federal bail statute allows the government to move for a formal detention hearing up to three days after the initial appearance in any case involving a serious risk that the defendant will flee, a crime of violence, a charge under the Adam Walsh Act, any charge where the statutory maximum term of imprisonment is life or death, any offense where the statutory maximum term of imprisonment is 10 years or more, any felony if the defendant has two prior felony convictions in the above-noted categories, any felony that involves a minor victim or the possession a weapon, or a charge for failing to register as a sex offender (18 U.S.C. § 3142(f)). Given the wide array of charges that qualify for a detention hearing, it is not unusual for a low-risk defendant to be detained for at least three days, which in and of itself is associated with a substantial increase in the odds of recidivating.

The second finding is equally serious when viewed from the context of low-risk presumption cases. As noted above, thousands of low-risk presumption cases are detained every year for an average of 255 days, making them almost twice as likely to recidivate as defendants who are released pretrial. Once a defendant recidivates, the cycle of incarceration begins all over again, with the defendant being even less likely to be released on bond.

### *Recommendations*

The presumption was written into federal statute to address the potential risk of danger and nonappearance posed by certain defendants, particularly defendants charged with drug offenses. Nonetheless, this study suggests the presumption is overly broad. Therefore,

my primary recommendation is to ask the Judicial Conference, through its Committee on Criminal Law, to consider whether to seek a legislative change tailoring the presumption to those defendants who truly should be presumed to be a danger or risk of nonappearance. This can be accomplished by adding qualifiers to the existing statute, limiting the application of the presumption to those defendants who have a demonstrated history of violence and who research suggests pose the greatest risk.

Additionally, the Administrative Office of the U.S. Courts (AO) could explore means of educating all pretrial services and probation officers to 1) identify the effect the presumption is having on their recommendations and 2) address ways to limit this effect.

One such way to limit the unintended effect of the presumption on pretrial services officers' recommendations could be to expand the AO's Detention Outreach Reduction Program (DROP). The DROP program, created in February 2015, is a two-day, in-district program in which a representative from the Administrative Office visits a district working to reduce unnecessary detention. It includes a full-day training session for pretrial services officers and their management team on the PTRAs and its role in guiding pretrial services officers' recommendations prior to the judicial decision. It also includes a briefer presentation to any interested stakeholders, such as magistrate and district judges, assistant United States attorneys, and federal public defenders.

In addition, more information regarding the effect of the presumption could be shared with pretrial services offices and judges through official notifications, communications, and trainings held for new unit executives and new judges.

Finally, districts that currently demonstrate the highest release rates for presumption cases could be encouraged to share with other districts the approaches to modifying their court culture that they have found successful.

In sum, the presumption was created with the best intentions: detaining the "worst of the worst" defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration. Clearly, the time has arrived for a significant

assessment of the federal pretrial system, followed by modifications to reduce the overdetention of low-risk defendants, the impact of pretrial incarceration on the community, and the significant burden of pretrial detention on taxpayers, while ensuring that released defendants appear in court as required and do not pose a danger to the community while released.

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## Appendix A

### *Drug and Firearm*

#### *Presumption Fact Sheet:*

ANY drug case charged as an A, B, or C

Felony, most often:

21:841

21:846

21:849

21:856

21:858

21:859

21:860

21:952

21:953

21:959

21:960

21:962

21:963

Any firearms case where the firearm was possessed or used in furtherance of a drug crime or a crime of violence:

18:924c

Conspiracy to Kill, Kidnap, Maim, or Injure Persons in a foreign country

Conspiracy must have taken place in the jurisdiction of the United States but the act is to be committed in any place outside the United States

18:956(a)

Attempt or Conspiracy to Commit Murder:

18:2332(b)

Acts of Terrorism Transcending National Boundaries charged as an A, B, or C Felony:

18:2332b(g)(5)(B)

18:1030(a)(1)

18:1030(a)(5)(A)

18:1114

18:1116

18:1203

18:1361

18:1362

18:1363

18:1366(a)

18:1751(a), (b), (c), (d)

18:175b

18:175c

18:1992

18:2155

18:2156

18:2280

18:2280a

18:2281

18:2281a

18:229

18:2332

18:2332(a), (b), (f), (g), (h), (i)

18:2339

**18:2339(a), (b), (c), (d)**

**18:2340A**

**18:32**

**18:351(a), (b), (c), (d)**

**18:37**

**18:81**

**18:831**

**18:832**

**18:842(m), (n)**

**18:844(f)(2), (f)(3)**

**18:844(i)**

**18:930(c),**

**18:956(a)(1)**

**21:1010A**

**42:2122**

**42:2284**

**49:46502**

**49:46504**

**49:46505(b)(3)**

**49:46505(c),**

**49:46506**

**49:60123(b)**

Peonage, Slavery, and Trafficking in Persons with a potential maximum of 20 years or more:

18:1581

18:1583

18:1584

18:1589

18:1590

18:1591

18:1594

Any of the following offenses only if a **minor** victim is involved:

18:1201

18:1591

18:2241

18:2242

18:2244(a)(1)

18:2245

18:2251

18: 2251A

18: 2252(a)(1)

18: 2252(a)(2)

18:2252(a)(3)

18:2252A(a)(1)

18: 2252A(a)(2)

18:2252A(a)(4)

18:2260

18:2421

18:2422b

18:2423

18:2425

### *Disclosures:*

List is **not** mutually exclusive, but includes the most frequently charged citations that trigger this presumption.

Most crimes of violence only trigger this presumption if a firearm was used in the commission of the crime. Otherwise, this presumption does NOT apply (see the Previous Violator Presumption).

### *Previous Violator Presumption Fact Sheet:*

This presumption is triggered only after numerous qualifiers have been met. See the attached flow chart to determine if a defendant qualifies under this presumption.

Many of the charges that fall under this presumption also fall under the Drug and Firearm Offender Presumption, which does not require any additional qualification. These charges have been **bolded**.

### *Citations for initial qualification:*

Any Crime of Violence charged as an A, B, or C Felony including :

8:1324 (if results in death or serious bodily injury)

18:111(b)

18:1111

18:112(a)

18:1112

18:113(a)(1), (a)(2), (a)(3), (a)(6), (a)(8)

18:1113

18:114

**18:1114**

18:115

**18:1116**

18:117

18:1117

18:1118

18:1153

**18:1201**

**18:1203**

18:1503

18:1512

18:1513

**18:1581**

18:1583

**18:1584**

**18:1589**

**18:1590**

**18:1591**

**18:1594(c)**

18:1791(d)(1)(C)

18:1791(d)(1)(A)

18:1792

18:1841

18:1951

18:1952	<b>18:2339</b>	Failure to Register as a Sex Offender
18:1958	<b>18:2339(a), (b), (c), (d)</b>	18:2250
18:1959	<b>18:2340A</b>	
18:2111	<b>18:32</b>	ANY felony with a potential sentence of life or death
18:2113	<b>18:351(a), (b), (c), (d)</b>	
18:2114(a)	<b>18:37</b>	
18:2118	<b>18:81</b>	ANY felony if the defendant has at least two prior felony convictions for one of the above-noted offenses, at the federal, state, or local level.
18:2119	<b>18:831</b>	
18:2241	<b>18:832</b>	
18:2242	<b>18:842(m), (n)</b>	
18:2243	<b>18:844(f)(2), (f)(3)</b>	
18:2244	<b>18:844(i)</b>	
18:2261	<b>18:930(c),</b>	
18:2262	<b>18:956(a)(1)</b>	
18:241	<b>21:1010A</b>	
18:242	<b>42:2111</b>	
18:2422	<b>42:2284</b>	
18:2426	<b>49:46502</b>	
18:245 (b)	<b>49:46504</b>	
18:247(a)(2)	<b>49:46505(b)(3)</b>	
18:249	<b>49:46505(c),</b>	
18:36	<b>49:46506</b>	
18:372	<b>49:60123(b)</b>	
18:373		
18:871		ANY drug case charged as an A, B, or C
18:872		Felony, most often:
18:875	<b>21:841</b>	
18:876	<b>21:846</b>	
18:892	<b>21:849</b>	
18:894	<b>21:856</b>	
21:675	<b>21:858</b>	
42:3631	<b>21:859</b>	
	<b>21:860</b>	
Acts of Terrorism Transcending National	<b>21:952</b>	
Boundaries charged as an A, B, or C Felony:	<b>21:953</b>	
<b>18:2332b(g)(5)(B)</b>	<b>21:959</b>	
<b>18:1030(a)(1)</b>	<b>21:960</b>	
<b>18:1030(a)(5)(A)</b>	<b>21:962</b>	
<b>18:1114</b>	<b>21:963</b>	
<b>18:1116</b>		
<b>18:1203</b>		Any felony involving a minor victim not previously mentioned:
<b>18:1361</b>		18:1461
<b>18:1362</b>		18:1462
<b>18:1363</b>		18:1465
<b>18:1366(a)</b>		18:1466
<b>18:1751(a), (b), (c), (d)</b>		18:1470
<b>18:175b</b>		
<b>18:175c</b>		
<b>18:1992</b>		Any felony involving the possession or use of a firearm or destructive device:
<b>18:2155</b>		18:844
<b>18:2156</b>		18:921
<b>18:2280</b>		18:922
<b>18:2280a</b>		18:924
<b>18:2281</b>		18:930
<b>18:2281a</b>		26:5845
<b>18:229</b>		26:5861
<b>18:2332</b>		
<b>18:2332(a), (b), (f), (g), (h), (i)</b>		

# **Judicial Conference Recommendation Re: Presumptions of Detention**

*Report of the Proceedings of the Judicial Conference of  
the United States 10 (September 12, 2017),  
[https://www.uscourts.gov/sites/default/files/17-  
sep\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf).*

**REPORT OF THE PROCEEDINGS  
OF THE JUDICIAL CONFERENCE  
OF THE UNITED STATES**

**September 12, 2017**

The Judicial Conference of the United States convened in Washington, D.C., on September 12, 2017, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Jeffrey R. Howard  
Judge Paul Barbadoro,  
District of New Hampshire

Second Circuit:

Chief Judge Robert A. Katzmann  
Chief Judge Colleen McMahon,  
Southern District of New York

Third Circuit:

Chief Judge D. Brooks Smith  
Chief Judge Leonard P. Stark,  
District of Delaware

Fourth Circuit:

Chief Judge Roger L. Gregory  
Judge Robert James Conrad, Jr.,  
Western District of North Carolina

Fifth Circuit:

Chief Judge Carl E. Stewart  
Chief Judge Lee H. Rosenthal,  
Southern District of Texas

Sixth Circuit:

Chief Judge Ransey Guy Cole, Jr.  
Judge Joseph M. Hood,  
Eastern District of Kentucky

Seventh Circuit:

Chief Judge Diane P. Wood  
Chief Judge Michael J. Reagan,  
Southern District of Illinois

Eighth Circuit:

Chief Judge Lavenski R. Smith  
Judge Linda R. Reade,  
Northern District of Iowa

Ninth Circuit:

Chief Judge Sidney R. Thomas  
Judge Claudia Wilken,  
Northern District of California

Tenth Circuit:

Chief Judge Timothy M. Tymkovich  
Judge Martha Vazquez,  
District of New Mexico

Eleventh Circuit:

Judge Federico A. Moreno,  
Southern District of Florida

District of Columbia Circuit:

Chief Judge Merrick B. Garland  
Chief Judge Beryl A. Howell,  
District of Columbia

Federal Circuit:

Chief Judge Sharon Prost

Court of International Trade:

Chief Judge Timothy C. Stanceu

The following Judicial Conference committee chairs also attended the Conference session: Circuit Judges Michael A. Chagares, Richard R. Clifton, Julia Smith Gibbons, Thomas M. Hardiman, Raymond J. Lohier, Jr., and Anthony J. Scirica; District Judges John D. Bates, Susan R. Bolton, David G. Campbell, Gary A. Fenner, David R. Herndon, Royce C. Lamberth, Ricardo S. Martinez, Donald W. Molloy, Karen E. Schreier, Richard Seeborg, Rodney W. Sippel, and Lawrence F. Stengel; and Bankruptcy Judge Helen E. Burris. Attending as the bankruptcy judge and magistrate judge observers, respectively, were Chief Bankruptcy Judge Marcia Phillips Parsons and Magistrate Judge Kevin N. Fox. James P. Gerstenlauer of the Eleventh Circuit represented the circuit executives.

James C. Duff, Director of the Administrative Office of the United States Courts, attended the session of the Conference, as did Lee Ann Bennett, Deputy Director; Sheryl L. Walter, General Counsel; Katherine H. Simon, Secretariat Officer, Helen G. Bornstein, Senior Attorney, and Ellen Cole Gerdes, Program Manager, Judicial Conference Secretariat; Cordia A. Strom, Legislative Affairs Officer; and David A. Sellers, Public Affairs Officer. District Judge Jeremy D. Fogel, Director, and John S. Cooke, Deputy Director, Federal Judicial Center, and Kenneth P. Cohen, Staff Director, and Brent E. Newton, Deputy Staff Director, United States Sentencing Commission, were in attendance at the session of the Conference, as were Jeffrey P. Minear, Counselor to the Chief Justice, and Ethan V. Torrey, Supreme Court Legal Counsel.

Attorney General Jeff Sessions addressed the Conference on matters of mutual interest to the judiciary and the Department of Justice. Senator Patrick J. Leahy and Representatives Bob Goodlatte and Darrell Issa spoke on matters pending in Congress of interest to the Conference.

## **REPORTS**

Mr. Duff reported to the Judicial Conference on the judicial business of the courts and on matters relating to the Administrative Office. Judge Jeremy D. Fogel

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## COMMITTEE ACTIVITIES

The Committee on Court Administration and Case Management reported that it endorsed an initial report from its cost-containment subcommittee on efforts to develop and evaluate organizational cost-containment proposals and decided on next steps for moving the initiative forward. The Committee approved a recommendation from its case management subcommittee to amend its method of identifying courts in need of case management assistance, i.e., those with protracted civil case dispositions. The Committee also received an update regarding the Committee's investigation into privacy concerns related to sensitive information found in Social Security and immigration opinions and agreed to communicate those concerns to the courts, along with a suggested approach for addressing the concerns, and to ask the Committee on Rules of Practice and Procedure whether any rules changes might be warranted. In addition, the Committee was briefed on the work of the Administrative Office's Task Force on Protecting Cooperators.

## COMMITTEE ON CRIMINAL LAW

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### PRESUMPTION OF DETENTION

Section 3142(e) of title 18, U.S. Code, provides a rebuttable presumption of pretrial detention if a defendant is charged with committing any one of several enumerated offenses, regardless of the defendant's criminal history or whether he or she is at a high risk of failing to appear or poses a threat to the community. To assess the impact of this presumption on the detention of low-risk defendants, the Administrative Office commissioned a study that analyzed how the presumption is applied to defendants charged with certain drug and firearms offenses. Based on the study, the Committee concluded that the § 3142(e) presumption was unnecessarily increasing detention rates of low-risk defendants, particularly in drug trafficking cases. On recommendation of the Committee, the Judicial Conference agreed to seek legislation amending the presumption of detention found in 18 U.S.C. § 3142(e)(3)(A) to limit its application to defendants described therein whose criminal history suggests that they are at a higher risk of failing to appear or posing a danger to the community or another person as follows (new language underlined)—

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 and such person has previously been convicted of two or more offenses described in subsection (f)(1) of this section, or two or more state or local offenses that would have been offenses described in subsection (f)(1) of this section if a circumstance giving rise to federal jurisdiction had existed, or a combination of such offenses;

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## **SPECIAL PROBATION TERMS**

Section 3607 of title 18, U.S. Code, offers a process of special probation and expungement for first-time drug offenders who are found guilty of simple possession under 21 U.S.C. § 844. Specifically, a court may, with the offender’s consent, place the offender on a one-year maximum term of probation without entering a judgment of conviction, and upon successful completion of the term of probation, the proceedings are dismissed. For offenders under the age of 21 that successfully complete their terms of probation, upon application by the offender, an order of expungement is entered. A bill was introduced in Congress, H.R. 2617 (115<sup>th</sup> Congress), the RENEW Act, that would expand the age of eligibility for expungement under section 3607 of title 18 from “under the age of 21” to “under the age of 25.” The Committee on Criminal Law noted that the RENEW Act’s aim of expanding the scope of section 3607 is consistent with practices already occurring in many courts looking to increase alternatives to incarceration and enhance judicial discretion and is consistent with Judicial Conference policy on sealing and expunging records in that it would not limit judicial discretion in the management of cases and adoption of rules and procedures. On recommendation of the Committee, the Conference agreed to support amendments to 18 U.S.C. § 3607 that provide judges with alternatives to incarceration and expand sentencing discretion, and that are consistent with the Conference’s prior views on sealing and expunging records (see JCUS-SEP 15, pp. 12-13).

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## **COMMITTEE ACTIVITIES**

The Committee on Criminal Law reported that, relying on its delegated authority to approve technical, non-controversial revisions to the forms for judgments in criminal cases (JCUS-MAR 04, p. 13), the Committee approved, consistent with the Justice for All Reauthorization Act of 2016, Public Law No. 114-324, a new mandatory condition of supervised release requiring defendants to make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a

**Non-Citizen Cases:  
Sample Motion for Release**

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division

UNITED STATES OF AMERICA )  
 )  
 v. ) Case No. 4:19CR68  
 )  
 LEONARDO MELO-RAMIREZ, )  
 )  
 Defendant. )

**DEFENDANT'S OBJECTION TO DETENTION HEARING AND  
REQUEST FOR RELEASE ON CONDITIONS**

The defendant, Leonardo Melo-Ramirez, by counsel, hereby objects to the Court holding a detention hearing in this case because no such hearing is authorized under § 3142(f). Even if a detention hearing is authorized, Mr. Melo-Ramirez's release on conditions is warranted. Accordingly, we respectfully request his release.

**PROCEDURAL BACKGROUND**

Leonardo Melo-Ramirez is charged in a single-count indictment with reentry by a previously removed alien, in violation of 8 U.S.C. § 1326(a). ECF No. 1. Mr. Melo-Ramirez made his initial appearance on June 21, 2019, at which time the government moved for a detention hearing. The Court scheduled a detention hearing for Wednesday, June 26, 2019, and detained Mr. Melo-Ramirez on a temporary detention order until that hearing.

**LAW & ARGUMENT**

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The Bail Reform Act (BRA) provides those limited exceptions. Because the government cannot meet its heavy burden of showing that no combination of release conditions would reasonably assure the safety of the community and Mr. Melo-Ramirez's appearance as directed, the Court should grant his release.

**I. The BRA does not permit pretrial detention or the holding of a detention hearing based solely on a defendant's immigration status or the existence of an ICE detainer.**

The BRA demands an individualized analysis of the § 3142(g) factors to determine whether a defendant should be released on bond prior to trial. *See United States v. Santos-Flores*, 794 F. 3d 1088, 1092 (9th Cir. 2015) (“The court may not [ ] substitute a categorical denial of bail for the individualized evaluation required by the Bail Reform Act”). Because § 3142(g) demands such an individualized analysis, this Court cannot categorically deny bond to removable aliens solely on the basis of their immigration status or the existence of an immigration detainer. *See United States v. Sanchez-Rivas*, 752 F. App'x 601, 604 (10th Cir. 2018) (holding that defendant “cannot be detained solely because he is a removable alien”); *Santos-Flores*, 794 F.3d 1088, 1092 (9th Cir. 2015) (“We conclude that the district court erred in relying on the existence of an ICE detainer and the probability of Santos–Flores’s immigration detention and removal from the United States to find that no condition or combination of conditions will reasonably assure Santos-Flores’s appearance pursuant to 18 U.S.C. § 3142(e.)”); *United States v. Barrera-Omana*, 638 F.Supp.2d 1108, 1111 (D. Minn. 2009) (concluding that the mere presence of an ICE detainer does not override Congress’ detention plan in § 3142(g)); *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 968

(E.D. Wis. 2008) (“[I]t would be improper to consider only defendant’s immigration status, to the exclusion of the § 3142(g) factors, as the government suggests.”).

In asking the Court to consider the presence of an ICE detainer, the government may suggest that the risk of Mr. Melo-Ramirez’s removal by ICE were he released on bond presents a cognizable risk of non-appearance under the BRA. But the risk that the government will remove Mr. Melo-Ramirez from the United States while this case is pending does not qualify as a risk of flight under the BRA. The BRA contemplates the risk that the defendant will flee—i.e., make a voluntary decision not to appear as directed.<sup>1</sup> Being forcibly removed from the country by ICE is not voluntary flight.

Moreover, the Executive Branch’s Department of Justice should not be able to threaten that, if this Court follows the law under the Bail Reform Act, another arm of the Executive Branch (ICE/DHS) will cause the defendant not to be available for trial. If this Court orders release under the BRA and the Executive Branch chooses to prioritize Mr. Melo-Ramirez’s removal over this prosecution, it is free to do so by dismissing this case and processing Mr. Melo-Ramirez for removal. But the Executive cannot hold the courts and Mr. Melo-Ramirez hostage over the prospect that it may

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<sup>1</sup> Most courts that have considered the issue, including the only two circuit courts to do so, have concluded that § 3142(f)(2)(A) only refers to *voluntary* flight risks, which does not include the risk that the person will be removed by ICE. *See, e.g., Ailon-Ailon*, 875 F.3d at 1337 (10th Cir. 2017) (holding that “a risk of involuntary removal does not establish a serious risk that [the defendant] will flee”); *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015) (holding that “the risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition”); *United States v. Suastegui*, No. 3:18mj18, 2018 WL 3715765, at \*2 (W.D. Va. Aug. 3, 2018) (same); *Barrera-Omana*, 638 F. Supp. 2d at 1111 (same); *United States v. Montoya-Vasquez*, No. 4:08cr3174, 2009 WL 103596, at \*5 (D. Neb. Jan. 13, 2009) (same).

make such a choice. *See United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1180 (D. Or. 2012) (“[I]f the Executive Branch chooses to forgo criminal prosecution of Mr. Alvarez-Trujillo on the pending charge of illegal reentry and deport him from the United States, as previously stated, there is nothing further for this Court to do.”).

It is beyond peradventure that the BRA’s standard provisions apply to cases involving aliens. Section 3142(d)(1)(B) provides for the temporary detention of removable aliens “for a period of not more than ten days” if the court finds that the individual may flee or poses a danger to any other person or the community. 18 U.S.C. § 3142(d). If the court fails to make such a finding, the court must treat the individual in accordance with the other provisions of the BRA. 18 U.S.C. § 3142(d)(2). Likewise, if DHS “fails or declines to take such person into custody during that [ten-day temporary detention] period, such person shall be treated in accordance with the other provisions of [the Bail Reform Act].” § 3142(d)(2). The other provisions of the BRA require release unless the government meets its heavy burden of showing the person presents an unmitigatable risk of flight. Accordingly, § 3142(d) explicitly makes removable aliens subject to the BRA’s general standard for pretrial release and therefore implicitly authorizes their release on bond.

**II. The Court should not give undue weight to an illegal reentry defendant’s alleged removability, citizenship status, or generic ties to a foreign country.**

Even if the Court agrees that immigration status or the presence of an ICE detainer does not categorically preclude a person’s release pending trial, the Court may be inclined to give considerable weight to those facts or to the foreign ties every alien

inherently has to his native country when considering release or detention under § 3142(g). But the Court should be cautious not to create a *de facto* presumption of detention that does not exist in the statute.

As the Tenth Circuit has observed, “although Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list.” *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017). Thus, Congress knew how to identify cases in which grounds for detention are intrinsic to the alleged offense. We also know that Congress explicitly contemplated the BRA applying to non-citizen, non-LPRs who may be subject to detention by ICE (formerly INS). *See* § 3142(d). So merely pointing to the defendant’s status as a non-citizen, to his alleged removability, or to his generic ties to a foreign country<sup>2</sup> cannot be enough for the government to meet its burden of proving that no condition will “reasonably assure the appearance of the person as required.” § 3142(e)(1). Indeed, if the only evidence of the defendant’s flight risk consists of his foreign citizenship, immigration status, and the offense charged—even if the defense presents no evidence mitigating the risk of non-appearance—the person should be released. Otherwise, the Court will have found that facts intrinsic to the offense are sufficient to justify detention in the

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<sup>2</sup> We acknowledge that *specific* ties to a foreign country—assets, family ties, etc.—should be treated as they are in any other case. But the government often merely relies on an illegal reentry defendant’s status as a citizen of another country as the sole means of establishing a tie to that country. This nonspecific tie to a foreign country is inherent in every illegal reentry case—an element of the offense is that the person is not a U.S. citizen. Therefore, giving significant weight to an illegal reentry defendant’s implicit ties to his native country undermines Congress’s clear intention not to have § 1326(d) offenses give rise to a presumption of detention under § 3142(f).

absence of some proof by the defense. That is the equivalent to a rebuttable presumption of detention for illegal reentry offenses, which Congress could have but affirmatively chose not to create.

The presence of an ICE detainer may not be strictly intrinsic to the offense, but it adds nothing to the picture. The detainer says on its face that this “detainer arises from DHS authorities and *should not impact decisions about the alien’s bail.*” DHS Form I-247A (emphasis added).<sup>3</sup> Implicit in the charged offense is the allegation that the defendant has been removed before and is subject to removal again. Because the detainer adds nothing to this backdrop and explicitly states that it should not impact decisions about bail, it is unclear why the government so often cites these ICE detainers at detention hearings under the BRA.

Concluding that the facts intrinsic to an illegal reentry charge effectively create a presumption of detention would have an enormous impact. In Fiscal Year 2018, the government brought over 18,000 illegal reentry cases, which made up 26% of all federal criminal prosecutions. U.S.S.C., *Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based*, at 58 (2018).<sup>4</sup> Congress chose not to create a presumption of pretrial detention for these thousands of people annually facing

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<sup>3</sup> Available at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> (last accessed June 24, 2019).

<sup>4</sup> Available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use\\_of\\_SOC\\_Guideline\\_Based.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use_of_SOC_Guideline_Based.pdf) (last accessed June 24, 2019).

one of the least serious felony charges<sup>5</sup> available in the federal system. That choice should have consequences.

**III. Detention pending trial is not warranted based on the facts of this case.**

The first § 3142(g) factor, the nature and circumstances of the offense, weighs strongly in favor of release. It is beyond dispute that this offense does not fall within any of the categories of serious offenses enumerated in § 3142(g)(1). Illegal reentry is a regulatory offense that involves no victim, weapon, or controlled substance. And there is no allegation that Mr. Melo-Ramirez committed this generally non-violent offense in any particularly aggravating way. *See United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1137 (N.D. Iowa 2018) (ordering defendant's release under BRA and observing that "[t]here is no allegation that his reentry, apart from being unlawful, harmed any particular person or place").

Although the offense charged is a felony, Mr. Melo-Ramirez faces a maximum of only two years on prison. 8 U.S.C. § 1326(a). If convicted, Mr. Melo-Ramirez's guidelines will likely call for 0 to 6 months in custody. *See* U.S.S.G. § 2L1.2(a) (providing base offense level of 8, which—absent specific offense enhancements not foreseen here—leads to a guidelines range of 0 to 6 months even after trial for defendants in Criminal History Category I). The likely sentence if convicted confirms that the nature and circumstances of the offense are among the least serious in the

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<sup>5</sup> The two-year statutory maximum penalty for this offense is among the lowest possible in a felony case and is substantially lower than that faced by white-collar defendants who are routinely granted bond. *Contrast* § 1326(d) (providing two-year statutory maximum for illegal reentry), *with* 18 U.S.C. § 1344 (30 years for bank fraud); 18 U.S.C. § 1343 (20 years for wire fraud).

federal system. *United States v. Vasquez-Benitez*, 919 F.3d 546, 551 (D.C. Cir. 2019) (affirming order releasing defendant under BRA and noting that “illegal reentry is a nonviolent crime” which, in that case, “appear[ed] to carry with it a relatively low penalty”). The seriousness of the penalty faced, if convicted, also does not create a serious risk that Mr. Melo-Ramirez will attempt to flee if released on bond.

The second (g) factor, concerning the weight of the evidence, is largely unknown at this point. Because the government does not produce discovery before detention hearings, the government’s summary of the expected evidence at the detention hearing—the only proffer the Court is likely to hear on this factor—will be the view of one adversary without the other side having the benefit of a meaningful opportunity to respond. Even if the government’s evidence seems strong at first blush, the underlying removal order may well be subject to collateral attack. *See* § 1326(d); *see also United States v. El Shami*, 434 F.3d 659, 663 (4th Cir. 2005) (“Because a deportation order is an element of the offense of illegal reentry, the Supreme Court has recognized that an alien can collaterally attack the propriety of the original deportation order in the later criminal proceeding.”). At any rate, this Court should not place too much emphasis on the weight of the evidence because doing so is akin to applying a presumption of guilt, which is expressly forbidden under § 3142(j). Even if the Court chooses to consider the weight of the evidence supporting guilt, this should be treated as the “least important” of the § 3142(g) factors. *See United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990); *United States v. Jones*, 566 F. Supp. 2d 288, 292 (S.D.N.Y. 2008) (“Courts generally consider the Weight Factor as the ‘least

important' of the Factors.”)

The third (g) factor is the history and characteristics of the person. This factor strongly favors release:

- Criminal history: Even though Mr. Melo-Ramirez is 49 years old, he has never been convicted of a crime.
- Incentive to flee: If Mr. Melo-Ramirez is removable, “he must not flee if he wishes to preserve his opportunity to obtain withholding of removal in his immigration case.” *Vasquez-Benitez*, 919 F.3d at 551. The D.C. Circuit found this to be a critical factor supporting the release of the illegal-reentry defendant in *Vasquez-Benitez*. *Id.* As noted above, the prospect of punishment in this case also does not create a strong incentive to flee. So Mr. Melo-Ramirez has an affirmative incentive to appear as directed to resolve his immigration case favorably and this prosecution does not create a strong incentive to flee.
- Employment: Mr. Melo-Ramirez has been steadily employed at the same job for years, working the kitchen of a local pizza parlor. According to a co-worker and his boss, Mr. Melo-Ramirez works basically all of the time. He is regarded as a dependable employee, who does what is asked of him. Mr. Melo-Ramirez’s ability to maintain employment and his reliability in meeting the demands of his employer show his capacity to comply with whatever release conditions this Court sets. Other courts have found employment to be an important factor at detention hearings in illegal reentry cases. *See, e.g., United States v. Jimenez-Lopez*, No. 18mj30320, 2018 WL 2979692, at \*1 (E.D. Mich. June 14, 2018) (releasing defendant and holding that his self-employment for two years as a handyman weighed in favor of release); *United States v. Lizardi-Maldonado*, 275 F. Supp. 3d 1284, 1293 (D. Utah 2017) (releasing defendant and observing that “Mr. Lizardi-Maldonado has worked in the past for two separate employers for a number of years. Both employers wrote letters in favor of Mr. Lizardi-Maldonado attesting to his hard work and good nature.”).
- Character: The defense interviewed Mr. Melo-Ramirez’s friend, Lucas Jimenez, who told the defense that Mr. Melo-Ramirez is a “good person” whom he trusts and respects. When the defense asked Mr. Jimenez whether he thought Mr. Melo-Ramirez would appear in court as directed, Mr. Jimenez said that he absolutely thought his friend would appear. As noted above, the defense also interviewed Mr. Melo-Ramirez’s boss, Hasan Cinar. Mr. Cinar said that Mr. Melo-Ramirez could live with Mr.

Cinar in his wife in their apartment on Jefferson Avenue in Newport News if he were released on bond. (Mr. Melo-Ramirez had been living with Mr. Cinar at the time of his arrest.) Mr. Cinar provided counsel with what appeared to be a valid Virginia driver's license listing the full address he had previously provided and a date of birth that pretrial services could use to run a criminal history check. Mr. Cinar described Mr. Melo-Ramirez as a "good, good man" and a reliable employee. Mr. Cinar's assessment of Mr. Melo-Ramirez's character is particularly credible because Mr. Melo-Ramirez both worked for and lived with Mr. Cinar. Finally, the defense interviewed another co-worker of Mr. Melo-Ramirez who attested to his good character, work ethic, and reliability.

With respect to the fourth (g) factor, the nature and seriousness of the danger posed by the person's release, the defense submits that this factor cannot be considered in an (f)(2) case such as this.<sup>6</sup> The Court need not resolve that question here, however, because there is no evidence that Mr. Melo-Ramirez poses a danger to the community or any other person.

Statistical evidence suggests that federal courts are detaining too many people pretrial, and specifically detaining too many so-called "illegal aliens." According to the Department of Justice, only 1% of pretrial supervisees fail to appear as directed. *See* Thomas H. Cohen, Ph.D., U.S. Dept. of Justice, Bur. of Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, at 15 (Nov. 2012).<sup>7</sup> The evidence shows that *illegal aliens have the exact same rate of non-appearance as do U.S.*

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<sup>6</sup> *See United States v. Himler*, 797 F.2d 156, 157 (3d Cir. 1986) (holding that, under the Bail Reform Act, an accused taken into custody may not be detained pending trial based on danger to the community where the detention hearing was justified only by an alleged serious risk of flight pursuant to 18 U.S.C. § 3142(f)(2)(A)).

<sup>7</sup> Available at <https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf> (last accessed June 26, 2019).

*citizens released on bond: 1%. Id.* Moreover, compared to U.S. citizens, illegal aliens were dramatically more likely to comply with other conditions of release<sup>8</sup> and significantly less likely to have their bond revoked.<sup>9</sup> *Id.* This suggests that a person’s status as an “illegal alien” may not actually create the risk of flight that it is so often assumed to create.

The universally low rates of non-appearance generally suggest that courts may be requiring more than *reasonable assurance* that defendants will appear. “Section 3142 does not seek ironclad guarantees, and the requirement that the conditions of release ‘reasonably assure’ a defendant’s appearance cannot be read to require guarantees against flight.” *United States v. Chen*, 820 F. Supp. 1205, 1208 (N.D. Cal. 1992). As in every case, there is *some* risk that Mr. Melo-Ramirez will flee and this Court cannot guarantee his appearance. But no good evidence suggests that his status as an “illegal alien” meaningfully increases his risk of flight. And, in the end, there is no statutory basis to deprive this innocent person of his liberty.

The government cannot demonstrate that this case involves a serious risk that Mr. Melo-Ramirez will flee under § 3142(f)(2)(A). At the very least, this Court can craft conditions that will reasonably assure Mr. Melo-Ramirez’s appearance as directed. We respectfully request his release.

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<sup>8</sup> Whereas 22% of U.S. citizens on bond had at least one bond violation, only 2% of illegal aliens had at least one bond violation. *Id.*

<sup>9</sup> U.S. citizens were twelve times more likely that illegal aliens to have their bond revoked. *Id.*

Respectfully submitted,

LEONARDO MELO-RAMIREZ

By: \_\_\_\_\_/s/\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of June, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Jeremy I. Franker  
United States Attorney Office (Newport News)  
721 Lakefront Commons, Suite 300  
Newport News, VA 23606  
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\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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# **Client Interview Form**



- LIVES WITH CHILDREN?
  - Where are they now?
- PROVIDES SUPPORT?
- NAME OF OTHER PARENT?
- ANYONE ELSE WHO CAN CARE FOR CHILDREN?
- OTHER DEPENDANTS
  
- **FAMILY RESPONSIBILITIES**
  - Details re involvement with children/emotional support:
  
  - Details re involvement with elderly or other family members who need assistance:
  
- **RELATIVES/FRIENDS**
  - **IN SAME CITY AS CLIENT**
    - NAME:
      - RELATIONSHIP:
      - PHONE/ADDRESS:
    - NAME:
      - RELATIONSHIP:
      - PHONE/ADDRESS:
  - PARENTS/ WHERE
  - SIBLINGS/ WHERE
  - OTHERS WHO CAN CONTACT CLIENT (get as many phone numbers as possible)
  
- **THIRD PARTY CUSTODIAN**
  - Is there anyone who would agree to serve as your third party custodian?
    - Explain what this means: Person agrees to
      - 1. Do their best to ensure that you come to court as ordered
      - 2. Report to the judge if they're aware you intend to skip a court date or if they become aware that you've left the jurisdiction

- Does that person have any convictions that you know of?
- Does that person live with you?
  - If not, would that person let you live with them?
- Would that person be willing to co-sign an unsecured bond? They wouldn't have to put down any money, but if you fled they would have to pay up to \$10,000

## **EMPLOYMENT**

- **PRESENT: Do you have a job?**
  - If yes:
    - Where do you work?
    - What do you do there?
    - How long have you been working there?
    - How much do you make?
    - Address/Phone number
    - Employer name; can I call employer?
- **IF UNEMPLOYED**
  - How long?
  - Searching for job?
  - Any interviews?
  - How are you supporting yourself?
- **PRIOR: When did you last have a job?**
  - Where did you work?
  - What did you do there?
  - How long did you work there?
  - How much did you make?
  - Why did you leave?
  - Address/Phone number
  - Employer name; can I call former employer?

- PRIOR: Previous Job
  - Where did you work?
  - What did you do there?
  - How long did you work there?
  - How much did you make?
  - Why did you leave?
  - Address/Phone number
  - Employer name; can I call former employer?
  
- PRIOR: Previous Job
  - Where did you work?
  - What did you do there?
  - How long did you work there?
  - How much did you make?
  - Why did you leave?
  - Address/Phone number
  - Employer name; can I call former employer?
  
- **OTHER COMMUNITY TIES**
  - Church?
  - Community activities?
  
- **PROPERTY**
  - Do you own property?
  - Does anyone in your family own property?
  - Would they be willing to post property as security for your bond?
  - Any mortgages, if you know?
  
- **EDUCATION**
  - Highest grade completed
  - Date of completion/graduation
  - If didn't graduate: Do you have a GED?

- School(s) attended

- **CRIMINAL HISTORY**

<u>Charges</u>	<u>Date</u>	<u>Disposition</u>	<u>Bond</u>	<u>On Probn/Parole?</u>	<u>Attorney</u>
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- **FAILURES TO APPEAR**

- Any failures to appear in court?
  - Date?
  - Disposition?

- **CITIZENSHIP STATUS**

- Country of origin/citizenship
- Ever been deported?
- Green card/visa/residency . . .
- How long in U.S./travel history

- **PHYSICAL HEALTH PROBLEMS**

- Diagnosis:
- Treating physician:
- Medications:

- **MENTAL HEALTH PROBLEMS**

- Diagnosis:
- Treating physician:
- Medications:

- **DRUGS/ALCOHOL**
  - Ever use?
  - What?
  - Substances you currently use:
  - Last use:
    - Are you going to test positive today?
  - Ever been in treatment?
  - Do you feel like you have a problem with drugs/alcohol?
  
- **MILITARY SERVICE**
  - Branch:
  - Length of service:
  
- **ANY MISTREATMENT DURING ARREST?**
  
- **ANYONE I SHOULD CONTACT?**
  
- **WARNINGS**
  - Don't discuss your case over the phones/email at jail
  - Don't discuss your case with other people at jail
  - Don't have any contact with witnesses/codefendants

**MISCELLANEOUS COMMENTS:**

# **Good Bond Cases**

## United States v. Gibson

United States District Court for the Northern District of Indiana, Hammond Division

May 28, 2019, Decided; May 28, 2019, Filed

CAUSE NO.: 2:19-CR-40-PPS-JPK

### Reporter

2019 U.S. Dist. LEXIS 90131 \*

UNITED STATES OF AMERICA, Plaintiff, v. DEVON GIBSON, Defendant.

### Core Terms

conditions, detention, Bail, appearance, flight, danger to the community, flee, serious risk, courts, detention hearing, Probation, arrest, cases, condition of release, Pretrial, detain, monitoring, circumstances, factors, terms, grounds, judicial officer, third party, nonappearance, criterion, custodian, failures, involves, weighing, fled

**Counsel:** [\*1] For Devon Gibson, Defendant: Alison L Benjamin, Paul G Stracci, LEAD ATTORNEYS, Stracci Criminal Defense PC, Merrillville, IN.

For United States of America, Plaintiff: Alexandra McTague, LEAD ATTORNEY, US Attorney's Office - Ham/IN, Hammond, IN.

**Judges:** JOSHUA P. KOLAR, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** JOSHUA P. KOLAR

### Opinion

#### OPINION AND ORDER

This matter is before the Court on the United States of America's oral motion to detain Defendant Devon Gibson. While the appropriate legal standards are unsettled and there are facts weighing in both directions, the Court concludes that the government has failed to meet its burden of proof on the current record. After a brief summary of the hearings in this case, the Court will turn to a discussion of the legal standards this Court finds applicable before moving to an analysis of the factors that apply to all detention hearings.

On April 17, 2019, Gibson was charged with three counts of

bank fraud in violation of [18 U.S.C. § 1344\(1\)](#) and one count of aggravated identity theft in violation of [18 U.S.C. § 1028A\(a\)\(1\)](#). Gibson was arrested on May 15, 2019, and his initial appearance was held the same day. The government moved for detention on the grounds Gibson is a serious flight risk under [18 U.S.C. § 3142\(f\)\(2\)](#) and noted that pending [\*2] review of Gibson's prior criminal history, it would consider also moving under [§ 3142\(f\)\(1\)\(D\)](#). As discussed below, resolving how the government may meet its burden of proof under subsection (f)(1) versus subsection (f)(2) is necessary to rule on the detention motion. At the government's request, the Court continued the detention hearing to May 17, 2019.

At the May 17, 2019 hearing, the government confirmed it was moving forward with its detention motion solely on the ground that Gibson is a serious flight risk under [§ 3142\(f\)\(2\)\(A\)](#). The government also highlighted the [§ 3142\(g\)\(4\)](#) factor of danger to the community. The United States Probation Officer recommended detention due to the fact that there were no conditions or combination of conditions that would reasonably assure the safety of the community or Gibson's appearance. The Court considered argument, heard proffered evidence and stated, "if this were the typical case where [it] was looking at both danger to the community and risk of flight, this would be very easy; you would be remanded to the custody of the marshal." (Hr'g Tr. vol. 1, 17:10-13, ECF No, 17).

Gibson requested a continuance of the detention hearing to allow for a home visit to determine eligibility for electronic monitoring. After the home [\*3] visit, the United States Probation Officer's ultimate recommendation for Gibson's detention remained.<sup>1</sup> The detention hearing was continued to May 23, 2019, at which time counsel were provided with the opportunity to address legal issues and make additional

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<sup>1</sup> The United States Probation Officer prepared a thorough report and promptly completed a home visit. The report, subsequent memorandum, and clarifying testimony were very helpful to the Court. As noted during the detention hearing, however, courts consider different statutory factors than United States Probation Officers do when making a decision regarding detention.

arguments. The Court indicated that it found the government had not met its burden regarding detention, Gibson was not released after the May 23, 2019 hearing, but the Court indicated how it intended to proceed, set forth conditions it found appropriate, and noted that the government would have a chance to suggest additional conditions.<sup>2</sup>

The hearing was continued to May 28, 2019, for the Court to hear from a potential third party custodian and, assuming issues were resolved regarding conditions of release, the issuance of an order setting conditions of release. The government asked that the Court hold its order of release in abeyance. The Court indicated that it would hear further argument on that issue at the May 28, 2019 hearing.

Prior to a final release order, a United States Probation Officer testified at the May 28, 2019 hearing and clarified that an earlier recommendation, which was silent as to Gibson's risk of nonappearance, [\*4] was not intended to suggest that such grounds no longer justified detention. The Court indicated that this change was relevant to its earlier determination. Both parties were given an opportunity to question the United States Probation Officer and offer any additional evidence or argument. The government initially declined to do so, but did examine the United States Probation Officer after Gibson's counsel.

After reviewing the matter further, and considering the additional testimony and argument presented on May 28, 2019, the Court issued an order setting conditions of release. The Court again found that the government failed to meet its burden of proof and imposed a number of very strict conditions of release. While Gibson earlier requested only location monitoring with a curfew, the Court ultimately determined that home detention, with location monitoring, was appropriate. Gibson's mother was questioned and will serve as a third party custodian, a task she has not undertaken in past instances where Gibson failed to appear in court. To alleviate concerns related to the potential for ongoing criminal activity, the only device capable of receiving any internet connection in Gibson's [\*5] home is limited to his mother's cell phone, which is to remain in her custody at all times. Finally, Gibson's mother was not merely named a third party

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<sup>2</sup>The government took this as an order of release and sought review under [18 U.S.C. § 3145](#). That filing is not part of the record for purposes of this decision. Because the request for review was attached as an exhibit to a motion to seal, the first few pages of the motion for review were seen by the undersigned magistrate judge. Though the Court considered requiring written submissions on issues not fully explored by the parties prior to releasing Gibson on conditions, to do so at this time would unduly encroach on time that could be used for review under [§ 3145](#).

custodian. She also agreed to serve as a surety along with Gibson. They stand to lose \$20,000, an amount that would impose significant economic hardship should Gibson violate the terms of his release or fail to appear. As discussed below, the government's case was not without some compelling evidence. However, it seemed to rest on the notion that the defendant was simply "ineligible" for conditions without carefully considering whether it met its burden of proof that no conditions were capable of reasonably assuring Gibson's appearance as required.

### I. Standards for Pretrial Detention

Bail pending trial has long been a part of this nation's criminal procedure. The *Eighth Amendment to the Constitution of the United States* prohibits excessive bail. The First Congress enacted the Judiciary Act of 1789, providing that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death," in which case bail was only permitted in certain circumstances. Judiciary Act, [§ 33, 1 Stat. 73, 91 \(1789\)](#). Somewhat more recently, a 1966 law dictated pre-trial release in non-capital cases "unless the [judicial] [\*6] officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required." Bail Reform Act, [Pub. L. No. 89-465, § 3146\(a\) 80 Stat. 214, 214 \(1966\)](#). Detailed review of this history is for another day. In short, while constitutional and statutory principles have limited bail determinations, courts always retained the power to assure the appearance of a criminal defendant and guarantee the administration of justice. The current statutory framework is the Bail Reform Act of 1984 ("Bail Reform Act").<sup>3</sup> Under the Bail Reform Act, judicial officers are often called upon to determine whether a defendant is a flight risk *or* a danger to the community. [18 U.S.C. § 3142, et seq.](#) In some ways, this "mark[ed] a radical departure from former federal bail policy. Prior to the 1984 Act, consideration of a defendant's dangerousness in a pretrial release decision was permitted only in capital cases." [United States v. Himler, 797 F.2d 156, 158 \(3d Cir. 1986\)](#).

In *United States v. Salerno*, the Supreme Court upheld the Bail Reform Act. Against this backdrop of a statutory scheme that prior to the Act allowed for pretrial detention based upon a defendant's risk of flight, the Supreme Court found the Act did not violate constitutional principles, noting:

The Bail Reform Act [\*7] carefully limits the circumstances under which detention may be sought to

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<sup>3</sup>The Bail Reform Act was later amended.

*the most serious of crimes. See 18 U.S.C. § 3142(f)* (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders).

*United States v. Salerno, 481 U.S. 739, 747 (1987)* (emphasis added).

The legislative history of the Bail Reform Act, *Salerno*, numerous other cases, and common sense dictate that the government cannot fulfill its duty to protect the public without the ability to detain those arrested for the most dangerous crimes when that is the only way to ensure the safety of the community pending trial. *Salerno, 481 U.S. at 749* ("The government's interest in preventing crime by arrestees is both legitimate and compelling."); Cf. *ODonnell v. Harris Cty., Tex., 251 F. Supp. 3d 1052, 1075 (S.D. Tex. 2017)* ("Congress wanted to address the alarming problem of crimes committed by persons on release and to give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." (internal quotation marks omitted)), Individuals have a "strong interest in liberty," but this interest "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater [\*8] needs of society." *Salerno, 481 U.S. at 750-51*. This balancing of liberty interests versus public safety led to a narrowly crafted set of conditions under which detention is permitted. Pretrial detention can impact a defendant's ability to prepare a defense, is costly, and while not intended as punishment nonetheless cabins a defendant's freedom, imposing a hardship on both the defendant and the defendant's family. See *Barker v. Wingo, 407 U.S. 514, 532-33 (1972)*; *Schultz v. State, 330 F. Supp. 3d 1344, 1374-75 (N.D. Ala., 2018)*, appeal docketed, No. 18-13898 (11th Cir. Sept. 13, 2018).

Under the Bail Reform Act, courts "shall hold" detention hearings in two instances. The first instance is when the case involves any one of the enumerated serious offenses outlined in *§ 3142(f)(1)*, so called "(f)(1)" cases involving allegations of particularly dangerous criminal activity. The second instance is when one of the "serious" concerns about risk of flight or obstruction of justice are present, the so called "(f)(2)" cases. *18 U.S.C. § 3142(f)(2)*. Once one of these conditions is met, a hearing is held "to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and the community." *Id. § 3142(f)*. That is, there can be no detention hearing—and therefore no detention—unless [\*9] an (f)(1) or (f)(2) criterion is met.

Even then, detention is only proper where, after a hearing,

"the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." *Id. § 3142(e)*. Here, while the government has moved to detain Gibson only because the (f)(2) predicate of serious risk of flight was met, the government also argues for Gibson's detention because he is a danger to the community. The law is unclear regarding whether a judge may detain a defendant in such a case solely because the defendant is such a danger to the community that no conditions can reasonably assure public safety. That is, after holding a detention hearing on the basis that the defendant is a serious risk of flight, if a judge is convinced that the government has not met its burden of showing that there is no condition or combination of conditions that can reasonably assure the defendant's appearance as required, is that the end of the analysis, or is the judge to move on to consider danger to the community as the sole reason to detain the defendant pending trial?<sup>4</sup> The Court's limited review of [\*10] cases suggests this is an unresolved issue. See *U.S. v. Parahams, 3:13-CR-005-JD, 2013 WL 683494, at \*3 (N.D. Ind. Feb. 25, 2013)* (noting the issue but not resolving it because detention was warranted on other grounds). Two interpretations of the Bail Reform Act, which the Court will call the *Holmes* and the *Himler* interpretations after *United States v. Holmes, 438 F. Supp. 2d 1340 (S.D. Fla. 2005)* and *United States v. Himler, 797 F.2d 156 (3d Cir. 1986)*, respectively, answer this question differently.

#### A. The *Holmes* Interpretation

The *Holmes* interpretation finds that subsection (f) provides criteria that serve only as prerequisites for holding a detention hearing. *438 F. Supp. 2d 1340*. In this view, once a prerequisite is met, a court holds a detention hearing and may consider danger regardless of the (f) criterion under which the hearing is held. For example, the government could move for detention based on a serious risk of flight. After a hearing, the court could subsequently find that there are conditions that can reasonably assure the defendant's appearance, but also find that detention is warranted because the defendant presents a danger to the community such that no condition or combination of conditions of release could reasonably assure the safety of the community.

This approach finds some support in the text of the Bail Reform Act. The language in subsection (f) directing [\*11] a court to determine "whether any condition or combination of conditions . . . will reasonably assure . . . the safety of . . . the

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<sup>4</sup> The judge may always consider danger to the community in setting the *conditions of release* under *§ 3142(c)*.

community" is found before the division into (f)(1) and (f)(2). *Id.* § 3142(f). Taking the approach in *Holmes*, one could argue that a plain reading of the statute directs courts to consider the safety of the community in cases where there is a serious risk that the defendant will flee—the criterion found in (f)(2)(A). Subsection (g) reinforces this reading by providing that courts should consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *Id.* § 3142(g)(4). Section (e) similarly provides,

If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

*Id.* § 3142(e)(1).

A court following the *Holmes* interpretation could point out that Congress indicated three times—in subsections (e), (f), and (g) of [section 3142](#)—that a court, when determining whether to detain an individual, should consider the [\*12] danger that the defendant poses to the community. *See* [438 F. Supp. 2d at 1351](#) ("[T]his Court concludes that dangerousness as a grounds for detention is not excluded in cases involving detention hearing(s) brought under (f)(2)."); *see also* *U.S. v. Ritter*, 2:08P000031-53, [2008 WL 345832, at \\*2 \(W.D. Va. Feb. 6, 2008\)](#) ("I am of the opinion that the plain language of the Bail Reform Act authorizes the court to detain a defendant when the clear and convincing evidence shows that the defendant presents a danger to the community and the court finds that there are no conditions or combination of conditions which the court may impose upon the defendant which will protect the community."). While the government did not significantly develop this argument as to Gibson, its rough outline can be seen since the government moved for detention on the sole basis that there is a serious risk that Gibson will flee (an (f)(2) criterion) and also referenced the subsection (g) factor of danger to the community.

## B. The *Himler* Interpretation

Another line of cases finds that courts may not consider dangerousness as a factor weighing in favor of detention when a motion for detention is made only under [18 U.S.C. § 3142\(f\)\(2\)](#). As with the *Holmes* interpretation, this reading is based on a reading of the text of the [\*13] Bail Reform Act. Moreover, as the Third Circuit Court of Appeals recognized

in *Himler*,<sup>5</sup> to do otherwise fails to recognize the Bail Reform Act is a narrowly-drafted statute aimed at danger from "a small but identifiable group of particularly dangerous defendants." [797 F.2d 156, 160 \(3d Cir. 1986\)](#) (citing S. Rep. No. 98-225, at 6-7 (1983)) (finding that danger to the community should not be considered as a ground for detention under [18 U.S.C. § 3142\(f\)\(2\)](#)).

Support for this reading is summarized in [United States v. Chavez-Rivas](#), [536 F. Supp. 2d 962 \(RD. Wisc. 2008\)](#). *Chavez-Rivas*<sup>6</sup> found squarely that since the government's motion was brought on (f)(2) grounds, the defendant could not be detained as a danger to the community. *Id.* at 968-69. The *Chavez-Rivas* analysis noted that the Bail Reform Act authorizes detention only in seven specific circumstances, enumerated in the statute. *Id.* at 965-66. While these circumstances include "a serious risk that the defendant will flee," they do not include a general showing of danger to any person or to the community. *Id.* at 966 (citing [18 U.S.C. § 3142\(f\)\(2\)\(A\)](#)). The *Chavez-Rivas* court found support for this conclusion in *United States v. Byrd*, which stated that "even after a hearing, detention can be ordered only in certain designated and limited circumstances, irrespective of whether the defendant's release may jeopardize [\*14] public safety." [United States v. Byrd](#), [969 F.2d 106, 109-10 \(5th Cir. 1992\)](#); [Chavez-Rivas](#), [536 F. Supp. 2d at 966](#). The *Byrd* court further held that, in agreement with [Himler and the First Circuit Court of Appeals in United States v. Ploof](#), [851 F.2d 7 \(1988\)](#), "a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention." [969 F.2d at 110](#).

This Court places less weight on *Byrd*, however, because it did not squarely involve the application of (1)(2)(A). Instead, *Byrd* is one of many cases holding that the government cannot simply move for detention based on a danger to the community without reference to any of the prerequisites set forth in (f)(1) or (f)(2). Here, in contrast, the government moved to detain Gibson under (f)(2)(A).

## C. The Court Follows *Himler*

While cognizant of conflicting cases on the issue, this Court finds that detention motions under (f)(2)(A) cannot result in a

<sup>5</sup> *Himler* reversed an order of detention in a case involving the production of false identification cards that proceeded to a detention hearing on only the (f)(2) ground the defendant was serious risk of flight.

<sup>6</sup> The facts of *Chavez-Rivas* involved immigration issues that are not present in this case.

detention order solely on ground of danger to the community. The *Himler* interpretation, like the *Holmes* interpretation, is well supported through a plain reading of the statute. Condensed as necessary for purposes of this analysis, the Bail Reform Act states:

**(f) Detention hearing.**--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure [\*15] the appearance of such person as required and the safety of any other person and the community--

**(1)** upon motion of the attorney for the Government, in a case that involves--[specifically enumerated crimes, all of which have elements that can be seen to cause a significant danger to the community, or closely related factors, such as the presence of a firearm]

**(2)** upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--

**(A)** a serious risk that such person will flee; or

**(B)** a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

...

**(g) Factors to be considered.**--The judicial officer shall, 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, take into account the available information concerning [enumerated factors].

[18 U.S.C. § 3142.](#)

Before dividing into subsections, (f) states that the court should determine whether "the appearance of [the defendant]" and "the safety of any other person [\*16] and the community" can be reasonably assured by any condition or combination of conditions of release. Subsection (1)(1) provides that, if the case involves a listed type of offense, the government may move for detention. It is easy to apply *both* the appearance and safety mandates of (f) to (f)(1) because the (f)(1) criteria do not place limits on either mandate. Subsection (f)(1) lists a number of situations where a defendant would normally pose both a danger to the community and risk of nonappearance. However, the same

does not hold true for subsection (f)(2), which lists both "(A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror."

The "safety to the community" mandate applies to subsection (f)(2)(B) in the sense that the serious risks contemplated by subsection (f)(2)(B) can pose a danger to another person or the community. Attempts to injure or intimidate a witness certainly threaten the safety of a person. On the other hand, there is no rationale supporting the application of the safety to the community mandate to (f)(2)(A)'s language. The specific clause "serious risk of flight" [\*17] controls over the general inquiry into both risk of flight and danger to the community, especially since the (f)(2)(A) criterion appears merely to restate the historic ground for detention that existed prior to the 1984 enactment of the Bail Reform Act, which did not allow for a consideration of danger to the community.

The Court is faced with competing readings of the Bail Reform Act. One may argue that the reading should simply apply the introductory language in to the entirety of (f)(1) and (f)(2). After all, the judge is to determine whether they can "reasonably assure" both safety of the community *and* the continued appearance of the defendant, and the presence of an (f) criterion only means that the court moves on to a hearing under (g). That is, the (f) criterion does not itself resolve the question of detention.

However, following this interpretation would prove too much. The *Holmes* interpretation runs into the very problem *Salerno* indicated was *not* present in the Bail Reform Act. That is, this broad reading of the Bail Reform Act has the potential to apply the Act to a nearly limitless range of cases, thereby raising constitutional concerns under the *Due Process Clause of the Fifth Amendment* and the *Eighth Amendment's* ban on excessive [\*18] bail.<sup>7</sup> [Salerno, 481 U.S. at 750](#) ("The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest."). Any reading of the Bail Reform Act that allows danger to the community as the sole ground for detaining a defendant where detention was moved for only under (f)(2)(A) runs the risk of undercutting one of the rationales that led the *Salerno* Court to uphold the statute as constitutional. Because of this potential constitutional issue and because the *Himler* interpretation is another plain

<sup>7</sup>This is not the sole reason for *Salerno's* holding, and the Bail Reform Act may well survive a constitutional challenge under the broader reading of the act set forth above.

language interpretation of the Bail Reform Act that involves no such constitutional issue, the Court will not follow the *Holmes* interpretation. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." [Clark v. Martinez, 543 U.S. 371, 380-81 \(2005\)](#).<sup>8</sup> Moreover, the Court does find that the *Himler* line of cases reads the statute in a more natural manner.

The Bail Reform Act could be [\*19] rewritten to make these issues clear, but on the record before the Court, the Court will not detain Gibson solely on grounds related to community safety. The Court is mindful that while this reading of the Bail Reform Act avoids constitutional concerns, it also has a very real possibility of increasing danger to the community compared to the *Holmes* interpretation. Perhaps that is bad public policy. Perhaps society should weigh the liberty interests of those awaiting trial in a different manner. Nevertheless, as currently drafted, the Bail Reform Act does not mandate a contrary outcome. Given the text of the Bail Reform Act and the analysis above, it is not for this Court to weigh those significant liberty interests against the important duty of the government to ensure public safety, and that is certainly not something for the Court to take up on the current record.

For these reasons, the Court will not consider the danger Gibson poses to the community because consideration of dangerousness is improper where, as is the case here, the sole ground for detention is [18 U.S.C. § 1342\(f\)\(2\)\(A\)](#). The controlling questions, therefore, become whether Gibson is a serious risk of flight and, if so, whether the government [\*20] has met its burden in establishing that there is no condition or combination of conditions that will reasonably assure his appearance as required.

## II. Serious Risk of Flight

The Court first determines whether Gibson presents a serious risk of flight. The record shows that the government did not move for detention due to "serious risk of flight" as any type of end run around subsection (f) of the Bail Reform Act.

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<sup>8</sup> At least one court has also endorsed this reading of the Bail Reform Act on the grounds that subsequent modifications of the act did not suggest a rule contrary to *Himler* and "reaffirm[ed] the validity of *Byrd's* reasoning." [United States v. Giordano, 370 F. Supp. 2d 1256, 1262 \(S.D. Fla. 2005\)](#). As discussed, this Court does not find *Byrd* controlling, but the analogous argument applies here that Congress's imputed knowledge of *Hinder* did not lead to any amendment of the Bail Reform Act that rejects the *Himler* interpretation.

There is an ample good faith basis to move for detention under this standard. Though the government and Gibson disagree on the number of "bad faith" failures to appear, they agree Gibson failed to appear in court as required on multiple occasions, and the Pretrial Services Report supports the finding of multiple failures to appear. Even more alarming, Gibson reportedly fled from law enforcement on multiple occasions.

Specifically, the Pretrial Services Report lists multiple failures to appear, though none of the failures were in federal proceedings. Gibson presented explanations for many of these failures, but he concedes that for five of the failures to appear he has no explanation to proffer. The Pretrial Services Report further indicates that Gibson has twice fled law enforcement after attempted [\*21] traffic stops, once traveling in excess of 100 miles per hour through three counties. During this encounter, Gibson reportedly attempted to strike an Indiana State Police trooper who was attempting to deploy stop sticks. Gibson was arrested and charged with a number of crimes, including resisting law enforcement and reckless driving. The second time Gibson fled police, he accelerated after an officer activated lights and sirens. Gibson's rate of speed was reportedly as high as 150 miles per hour. The government has shown by a preponderance of the evidence that Gibson presents a serious risk of flight.

## III. Assuring Gibson's Appearance

The next step for the Court is to determine whether the government has shown by a preponderance of the evidence that there is no condition or combination of conditions that will reasonably assure Gibson's appearance as required in this case. [United States v. Portes, 786 F.2d 758, 765 \(7th Cir. 1985\)](#). As discussed below, because the government has failed to meet its burden detention is not permitted under [18 U.S.C. § 3142\(e\)](#).

Courts frequently use the phrase "risk of flight" while weighing the factors set forth in subsection (g) of [§ 3142](#). It is useful shorthand that is employed for good reason.<sup>9</sup> However, "risk of flight" is not the proper standard to [\*22] apply when deciding to detain an individual. As discussed above, risk of flight or more precisely "serious risk of flight" is only what allows the government to move for detention in this case.

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<sup>9</sup> Courts do not always need to parse the terms of the criminal code so closely. While the undersigned has used "risk of flight" as shorthand for the determination required under subsection (g), that shorthand is not appropriate in circumstances such as this, where courts are compelled to conduct an analysis that turns on factors not captured in that term.

While Congress chose to use "serious risk of flight" in subsection (f)(2)(A) to describe this limited scenario under which a defendant will face a detention hearing, Congress settled on very different language when describing the analysis courts must undertake once a detention hearing goes forward. Here, Congress did not use the term "flight" at all. Instead, it mandated that courts look to whether the government has met its burden to show that there is no condition or combination of conditions that will "reasonably assure the appearance of the person as required." [18 U.S.C. § 3142\(g\)](#).

If there is a condition or combination of conditions that will reasonably ensure that Gibson will not *attempt* to flee, then the government has not met its burden, as that would assure his appearance. Given the text of the Bail Reform Act, however, the analysis cannot end there. Instead, courts must look at what conditions might reasonably assure the Court that, even if Gibson seeks to flee, he will ultimately fail. *See* H. Rep. No. 1030, 98th Cong., [\*23] 2d Sess. 15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3198 (acknowledging feasibility of conditions even "where there is a substantial risk of flight"). For that reason, courts routinely look to whether a defendant is capable of successfully fleeing the jurisdiction before discounting the availability of monitoring systems. *Parahams*, No. 3:13-CR-005 JD, 2013 WL 683494, at \*3 (recognizing, prior to rejecting electronic monitoring as a reasonable alternative, that the defendant "may have the means to disappear"); *United States v. Anderson*, 384 F. Supp. 2d 32, 41 (D.D.C. 2005) ("Weekly or even daily call-ins or visits to Pretrial Services would still allow the defendant a day's head-start on flight from the United States. Conventional electronic monitoring also would only apprise authorities of whether Mr. Anderson was in or out of his home, and would likewise give him ample lead time if he wished to flee.").

When courts find that a defendant cannot successfully flee, they fashion conditions on release unless no conditions of release are needed. Before revoking an order of detention issued by the trial court, the D.C. Circuit Court of Appeals stressed that "the government has taken away all [the defendant's] passports and travel documents, so it [\*24] is unlikely he could go far even if he wished to." [United States v. Xulam](#), 84 F.3d 441, 443 (D.C. Cir. 1996). Similarly, the First Circuit Court of Appeals affirmed the release of a fauna federal agent who had worked abroad for five years and may have had "inside information that could assist him to escape" after discussing the effectiveness of location monitoring in apprehending those who attempt to abscond. [United States v.](#)

[O'Brien](#), 895 F.2d 810, 816 (1st Cir. 1990).<sup>10</sup>

This is not to say that the government's burden is transformed into showing that should Gibson attempt to flee the U.S. Marshal would fail to capture him. That would create such a high bar that the government may never be capable of seeking detention on such grounds. It would also omit "as required" from the court's review of whether there is a condition or combination of conditions that will "reasonably assure the appearance of [the defendant] as required." Nevertheless, it is appropriate to consider what would occur if Gibson did violate conditions of release, such as home detention. And the Court must do so while keeping in mind that it is the government's burden to show that no condition or combination of conditions exists that will reasonably assure Gibson's presence. This inquiry stems from the text of the Bail Reform [\*25] Act and also separately bears on whether Gibson would even attempt to flee in instances requiring advance planning and where he has no realistic probability of success.

This means the Court must consider what would happen if Gibson violates the terms of his release. Does he abscond to some far-off locale, or even another state? Is he the type of criminal who can slyly gather significant funds and live on the lam? The government did not delve too deeply into this area, except for some comments concerning his ability to raise funds through continued criminal activity, which is discussed in greater detail below. The government may have decided that it did not need to focus on such an analysis due to its argument regarding Gibson's danger to the community. It could also have failed to properly embrace the dual nature of its burden, that is to show both that Gibson was a risk of nonappearance *and* that there were no conditions or combinations that would reasonably assure his appearance as required. *See United States v. Sabhnani*, 493 F.3d 63, 74-75 (2d Cir. 2007) (discussing the government's "dual burden of proof" to secure detention). This finds some support in the government's multiple comments framing the issue as whether Gibson is eligible for [\*26] conditions of release instead of attacking their burden to show that no conditions or combinations exist to reasonably assure appearance, which would necessarily involve some discussion, however brief, of the shortcomings in any proposed conditions.<sup>11</sup>

At the May 28, 2019 hearing, a United States Probation

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<sup>10</sup> *O'Brien* stressed that such evidence only arguably rebutted the presumption of flight, which was present in that case. However, here the government has no such presumption.

<sup>11</sup> The government also correctly stated its burden on many occasions.

Officer took the stand to amend the previous memorandum filed after the home visit and make clear that his office felt that risk of nonappearance also remained as a factor justifying detention. Prior to this, the Court informed the parties that it felt the change was quite relevant to its earlier findings. Both the government and defense counsel had an opportunity to question the United States Probation Officer. The government questioned the United States Probation Officer about the circumstances under which the home detention might fail, asking whether the United States Probation Officer encountered any prior instances in which those on home detention left their home "to commit a crime or cut off a monitor." Leaving home detention to commit a crime goes to danger to the community, not risk of nonappearance. Perhaps the government meant to infer that cutting off the monitor leads inexorably [\*27] to nonappearance, but that was not fleshed out through questioning, other evidence, or argument. Given the chance to more fully develop the record, the government did not discuss instances in which defendants placed on home monitoring have successfully fled and failed to appear as directed, or how Gibson would do so in this case. Such evidence may well exist and one could assume that defendants on home monitoring have fled from time to time, yet the Court's speculation should not fill in gaps in the government's burden of proof, especially when the government presented evidence (through its questioning) on one factor (the risk of danger to the community) and chose not to fully do so on another (the risk of nonappearance).

The government stated many times that it did not feel any conditions would assure appearance, but it never addressed specific conditions and explained how they were ineffective in reasonably assuring Gibson's appearance. Gibson will be released subject to several conditions, including a \$20,000 surety posted by both Gibson and his mother. At the hearing conducted on May 28, 2019, Gibson's mother testified that if Gibson fled and was she forced to pay such a surety, [\*28] that would cause her to lose her residence. Gibson was questioned and understood that any flight would have these dire consequences. Gibson's release conditions further include home detention with location monitoring, as well as other restrictions meant to ensure that he cannot continue any criminal activity and regenerate funds that could assist in any attempts to flee.

Therefore, should Gibson violate the terms of his pretrial release, a warrant will issue shortly after he leaves his home. After that, there are a few possible outcomes. This is where Gibson's criminal history is telling. The government and defense counsel were effective advocates and set forth a reading of that criminal history that supports their respective arguments. The Court's reading is not as nuanced: if left to his own devices, for the present purposes meaning that he ignores

the conditions of his release, Gibson will engage in illegal—and likely dangerous—conduct. He will get caught, as he has so often in the past, usually within or very near the Northern District of Indiana. Gibson faces a decision. He can abide by the terms of his release, or he can continue to go down a path that has seen him arrested twice [\*29] in 2015, six times in 2016, three times in 2017, once in 2018, and twice already in 2019, including the instant case. The choice is his. The result is the same: he is reasonably certain to stand before the Court again prior to trial.

Of course, there are other possible scenarios if Gibson ignores the conditions of his release. There are admittedly some factors discussed in more detail below that suggest an outcome that cuts more in the government's favor. However, with the record currently before the Court, the government has failed to meet its burden.

#### IV. Statutory Factors

Under [§ 3142\(g\)](#), the Court considers several factors when determining conditions of release:

- (1) the nature and circumstance of the offense charged, including whether the offense is a crime of violence, a violation of section 1951, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including-
  - (A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating [\*30] to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
  - (B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

In this case, Gibson was arrested for bank fraud and identity theft. These are not crimes of violence, but they are crimes which cause economic harm. More relevant to the Court's determination, Gibson can engage in this conduct anywhere he can connect to the internet. The fact that there is probable cause to believe Gibson committed these crimes and even lied

to law enforcement supports the government's position. It weighs strongly in favor of finding that Gibson may *attempt* to violate the terms of any conditions the Court places upon him. It does not show what will happen if Gibson does so and whether conditions can reasonably assure his appearance. All devices connected to the internet, with the exception of his third party custodian's phone, [\*31] which is to stay in the third party custodian's possession at all times, were removed from the home. No such devices can return to the home. The United States Probation Officer is permitted to make unannounced visits to Gibson's home. The government was unable to say whether Gibson had any funds from his criminal activity at his disposal, only that he may be able to "easily regenerate" funds. (Hr'g Tr. vol. 2, 23:25, ECF No. 18). The same is true of most anyone charged with financial crimes. Likewise, there is some mention of other participants in criminal activity, but nothing to show Gibson is still in touch with these individuals or that he will have the ability to contact them given his conditions of release. Gibson's ability to circumvent these conditions is not eliminated, but the question here is whether Gibson can commit crimes that provide him with enough money to flee. The government has failed to meet its burden to show that there is no condition or combination of conditions that will reasonably assure Gibson cannot accumulated the funds necessary to successfully flee without authorities learning about such efforts prior to their success. The conditions imposed are designed [\*32] to allow for such detection. They are not foolproof, but do provide reasonable assurance.

The government has proffered evidence of Gibson's guilt in the form of images from security cameras and data from his social media accounts, including his alleged efforts to recruit others to be a part of his scheme. The weight of the evidence is strong, which supports the government's motion for detention. Yet, that is more a question for dangerousness than risk of flight. To be sure, one can argue that stronger evidence creates a greater risk that Gibson will face incarceration, which in turn creates a greater likelihood that he will flee in order to avoid that incarceration. However, the Court's determination centers on the fact that the government has not met its burden in showing by a preponderance of the evidence that Gibson can avoid continued appearance in court, so this factor is somewhat discounted.

Gibson's history and characteristics trouble the Court, especially as they relate to failures to appear and attempts to evade or lie to law enforcement. This factor is admittedly a mixed bag. The hearing revealed that though Gibson attended some state court proceedings while he was out on bond, [\*33] at other times he did not voluntarily appear and courts were required to issue warrants to secure his presence. The exact number of warrants issued is not clear. Gibson proffered a

rationale for a number of his failed appearances, essentially indicating that he was unaware of the court date or that his appearance was required. The government showed that Gibson's counsel was present at those court dates and provided docket sheets to prove as much. However, this does not completely discount Gibson's explanation, as he claims his attorney simply did not tell him about the appearances. Where the truth lies is not entirely clear.

What is clear is that the procedural differences between federal and state court may avoid a repeat scenario. With the current federal charges, Gibson will have notice of the court appearances and is assigned a United States Probation Officer. The conditions of release in no way *guarantee* that Gibson will appear in Court, but the government has not met its burden of showing by a preponderance of the evidence that there is no condition or combination of conditions that will reasonably assure his appearance. His record of appearing in state court is mixed, but there [\*34] was no evidence or argument presented concerning the conditions of Gibson's previous pretrial release or how they compare to what he will now face. On the other hand, there was evidence that Gibson may have lacked notice of some earlier state court appearances, that his mother was never a third party custodian in those cases, and that there was no posting of a surety that would place Gibson's family in financial hardship should he flee. Therefore, this factor, while weighing somewhat in the government's favor is significantly discounted.

Gibson's efforts to flee from the police are yet more troubling still. They show that when he feels he may have an opportunity to avoid arrest he may unwisely take that perceived opportunity. They also show poor decision making. This bears on whether Gibson will appear as directed perhaps more than any other consideration. Yet, again, it must be discounted here where the conditions imposed present Gibson with a very different set of choices and with no evidence that he has the ability to successfully flee. It is nevertheless very concerning and raises significant public safety concerns. The notion that Gibson fled before so he will flee again is not [\*35] without some pull, but a closer review shows that vastly different circumstances were present during his past decisions than those he will face on release. Here, he is not presented with a spur of the moment decision. The second he does violate the terms of his pretrial release, he is placing his family in financial peril.

This leads to the question of Gibson's ties to the community and whether there are locations to which he will likely flee. The overwhelming majority of Gibson's arrests are within the geographical bounds of the Northern District of Indiana, with two others elsewhere in Indiana and only one out-of-state arrest. Gibson's long criminal history does not benefit his

overall cause. To the contrary, it is what makes this such a close call. Nevertheless, his arrests offer a large sample size and suggest he does not routinely travel outside of the district. And, the government has not suggested that Gibson has any ability to travel internationally. Gibson has family in the Northern District of Indiana, and, while the Pretrial Services Report indicated the one of Gibson's children and the child's mother reside out of state, no evidence was introduced to suggest that he has [\*36] travelled out of state to see them or that he remains in contact with them.

As detailed above, Gibson's arrest record is long. He had many pending charges at the time of his arrest and the commission of the crimes charged in the indictment. This shows both that he is a very real danger to the community *and* that he is not prone to abide by the terms of prior court orders. Again, however, the record is unclear as to how the terms of his earlier release compare with the instant conditions of release. The Court is unable to conclude that the government met its burden under these circumstances. While much of the government's evidence and argument was inarguably compelling concerning Gibson's danger to the community, the same is not true of showing that there is no condition or combination of conditions that can reasonably assure his appearance as required.

The Court is concerned with whether Gibson will take this opportunity and live by the very strict conditions he must in order to avoid violating the terms of his release. He is confined to his home with very few exceptions, is not to drive or ride in cars other than as his mother's passenger for court appearances and medical appointments, [\*37] which unless involving a medical emergency require notice to his U.S. Probation Officer. Gibson's mother is his third party custodian and surety. There are warning signs that Gibson may fail, yet these warning signs do not meet the government's burden.

It bears noting that Gibson, while presumed innocent of the pending charges against him, is likely a danger to the community. He may attempt to flee. This could result in tragic consequences. However, this Court finds that the record, the arguments presented, and the Court's independent review of the applicable legal standards in the Bail Reform Act require the Court to issue an order of release on conditions.

This decision is made without the benefit of briefing, or even the oral presentation of any case law other than that the Court brought forth. Further review is certainly not unwarranted. The government has moved to hold the Court's release order in abeyance pending review under [18 U.S.C. § 3145](#). This request is granted.

## CONCLUSION

Based on the foregoing, the Court hereby **DENIES** the government's oral motion to detain and **ORDERS** that Defendant Devon Gibson shall be **RELEASED** pending trial subject to the conditions set forth in the accompanying order [\*38] setting conditions of release. This decision is **STAYED** pending further review by United States District Judge Philip P. Simon, pursuant to Title [18 U.S.C. §3145](#).

So ORDERED this 28th day of May, 2019.

/s/ Joshua P. Kolar

MAGISTRATE JUDGE JOSHUA P. KOLAR

UNITED STATES DISTRICT COURT

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT WINCHESTER**

UNITED STATES OF AMERICA	)	
	)	Case No. 4:19-cr-1
v.	)	
	)	Judge Travis R. McDonough
JUAN MENDOZA-BALLEZA	)	
	)	Magistrate Judge Susan K. Lee
	)	

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**ORDER**

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Before the Court is Defendant Juan Mendoza-Balleza’s motion seeking district court review of Magistrate Judge Susan K. Lee’s order of detention. (Doc. 30.)

The Court is authorized to conduct a detention hearing (*i.e.*, to consider whether to detain Defendant) only if the Government first establishes that one of the circumstances listed in Title 18, United States Code, Section 3142(f) exists. *See United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992) (“In other words, § 3142(f) does not authorize a detention hearing whenever the government thinks detention would be desirable, but rather limits such hearings to the [six circumstances listed in (f)(1)(A), (f)(1)(B), (f)(1)(C), (f)(1)(D), (f)(2)(A) and (f)(2)(b)].”); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988) (“After a motion for detention has been filed, the district court must undertake a two-step inquiry. . . . It must first determine by a preponderance of the evidence . . . that the defendant has either been charged with one of the crimes enumerated in Section 3142(f)(1) or that the defendant presents a risk of flight or obstruction of justice.”); *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) (“[T]he structure of the statute and its legislative history make it clear that Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for

holding a detention hearing exists.”). In this case, the parties agree that the only basis for a detention hearing is the Government’s assertion that there is a serious risk Defendant will flee. *See* 18 U.S.C. § 3142(f)(2)(A); (Doc. 25, at 5; May 21, 2019 Hrg. Tr. at 13–16).

Defendant has been in either state or federal custody since December 27, 2018, when the Coffee County Sheriff arrested him for driving on a revoked or suspended license. (*See* Pretrial Servs. Report, at 6.) On January 8, 2019, a federal grand jury returned a one-count indictment charging Defendant with illegally reentering the United States in violation of Title 8, United States Code, Section 1326. (Doc. 1.) At his initial arraignment, Defendant waived his right to a detention hearing “with the understanding that a hearing will be granted at a later date on motion of defendant.” (Doc. 6.)

On April 2, 2019, Defendant moved the Court to release him pending trial. (Doc. 17.) Magistrate Judge Lee conducted a hearing on Defendant’s motion for bond on April 10, 2019. (Doc. 25.) At that time, the Government urged the Court to conduct a detention hearing and to determine under Title 18, United States Code, Section 3142(e)(1) that no conditions of release would reasonably assure Defendant’s appearance and the safety of the community. (*Id.* at 5.) The Government took the position that Title 18, United States Code, Section 3142(f)(2)(A) authorized such a detention hearing because it had presented evidence to meet its threshold burden to show Defendant posed a “serious risk of flight.” (*Id.* at 5–6, 71–72.) Magistrate Judge Lee agreed and proceeded to consider whether any condition or set of conditions of release would reasonably assure Defendant’s appearance and the safety of the community. (*See id.* at 70–84.) During the hearing, Magistrate Judge Lee and the parties noted that Immigration and Customs Enforcement (“ICE”) had filed a detainer on Defendant. (*Id.* at 78–82.) The Government did not, however, take the position that Defendant was sure to be detained and

deported by ICE in the event Magistrate Judge Lee ordered Defendant released pending trial. (*Id.*) Magistrate Judge Lee ultimately ruled that the Government satisfied its burden to show that there was no condition or set of conditions of release that would reasonably assure Defendant's appearance as required under Title 18, United States Code, Section 3142(e)(1). (*Id.* at 82–84; Doc. 23.) In making this determination, Magistrate Judge Lee found that the ICE detainer on Defendant was a “factor” she could consider but that it was not determinative with regard to whether detention pending trial was appropriate. (Doc. 25, at 78–82.)

On May 2, 2019, Defendant moved for the undersigned to review Magistrate Judge Lee's detention order pursuant to Title 18, United States Code, Section 3145(b). (Doc. 30.) On May 21, 2019, the Court held a hearing on Defendant's motion. Neither Defendant nor the Government introduced new evidence. Instead, both parties relied on the record established at the April 10, 2019 hearing. The Court did, however, hear additional argument from the parties regarding whether the Government satisfied its burden to show that: (1) it is entitled to a detention hearing under Title 18, United States Code, Section 3142(f)(2) based on its assertion that there is a “serious risk [Defendant] will flee”; and (2) no condition or set of conditions of release will reasonably assure Defendant's appearance and safety of others as required under Title 18, United States Code, Section 3142(e)(1).

During the hearing, the Government acknowledged for the first time that the serious risk of flight on which Magistrate Judge Lee relied does not exist. If the Court does not detain Defendant, ICE will immediately detain him and deport him within ninety days. (May 21, 2019 Hrg. Tr. at 12–16.)

THE COURT: But you're telling me today it's factually impossible for him to flee.

MR. WOODS: Well, I'm not going to say anything is impossible.

THE COURT: I mean, barring him breaking out of custody, you're saying if I don't detain him that – I mean, the question on the – the serious risk question, the threshold question, is, is there – with that – in the absence of detention, is there a serious risk of flight.

MR. WOODS: Uh-huh.

THE COURT: But there is no risk of flight.

MR. WOODS: Your Honor, that is correct. If I were – if everything were to proceed as I believe Congress directs it to proceed, because there's already a final order in place, the defendant will not go through immigration court. . . .

(*Id.*) Given these undisputed facts, the Government cannot satisfy its threshold burden under Title 18, United States Code, Section 3142(f)(2)(A) to show that there is a serious risk Defendant will flee. Therefore, the Court is not authorized to conduct a detention hearing.<sup>1</sup> *See Byrd*, 969 F.2d at 109. As long as Defendant remains in the custody of the executive branch, albeit with ICE instead of the Attorney General, the risk of his flight is admittedly nonexistent. *Cf. United States v. Veloz-Alonso*, 910 F.3d 266, 268–69 (6th Cir. 2018) (noting issues that arise when the executive branch attempts to pursue prosecution and removal or deportation simultaneously). Accordingly, Magistrate Judge Lee's detention order is hereby **VACATED**. Defendant is hereby **ORDERED** to be **RELEASED** from custody of the Attorney General or the Attorney General's representative pending trial. Defendant is **ORDERED** to appear before Magistrate Judge Lee on **May 24, 2019**, at **2:00 p.m.** to effectuate this order.

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<sup>1</sup> Because the Court finds the Government has not satisfied its burden to show it is entitled to a detention hearing, the Court makes no finding as to whether there is any condition or combination of conditions that will reasonably assure the appearance of a person as required and the safety of the community under Title 18, United States Code, Section 3142(g).

**SO ORDERED.**

*/s/Travis R. McDonough*

**TRAVIS R. MCDONOUGH  
UNITED STATES DISTRICT JUDGE**

**Siegler Congressional Testimony,  
*The Administration of Bail By State and  
Federal Courts: A Call for Reform*  
(11/14/19)**

Alison Siegler Truth-in-Testimony Form at 4–10,  
*The Administration of Bail by State and Federal Courts:  
A Call for Reform: Hearing Before the Subcomm. on  
Crime, Terrorism, and Homeland Security on the H.  
Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019),  
[https://docs.house.gov/meetings/JU/JU08/20191114/1101  
94/HHRG-116-JU08-TTF-SieglerA-20191114.pdf](https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-TTF-SieglerA-20191114.pdf)

**TESTIMONY OF ALISON SIEGLER**  
**Clinical Professor of Law and Director of the Federal Criminal Justice Clinic**  
**University of Chicago Law School**

**Before the Judiciary Committee of the House of Representatives, Subcommittee on Crime,  
Terrorism, and Homeland Security**

**November 14, 2019, Hearing on  
“The Administration of Bail by State and Federal Courts: A Call for Reform”**

Chairwoman Bass, ranking member Ratcliffe, committee members: thank you for the opportunity to speak today. My name is Alison Siegler and I am the Director of the Federal Criminal Justice Clinic at the University of Chicago and a former federal public defender. I am here today because the federal pretrial detention system is in crisis, and I believe Congress should intervene and fix the Bail Reform Act of 1984.<sup>1</sup>

Today, the federal system detains people at an astronomical rate. The percentage of defendants incarcerated pending trial has increased from 19% in 1985—just a year after the Act’s passage—to 61% in 2018.<sup>2</sup> But that was never what Congress intended. The Act was supposed to authorize detention for a narrow set of people: those who were highly dangerous or posed a high risk of absconding.<sup>3</sup> When the Supreme Court upheld the Bail Reform Act as constitutional in 1987, it emphasized that, “[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.”<sup>4</sup> But in practice, pretrial detention is now the norm, not the exception, even though our Constitution says that every detainee is presumed innocent.<sup>5</sup>

The skyrocketing federal pretrial detention rate is problematic for several reasons. Studies show that detention actually makes society less safe because it increases a detainee’s long-term risk of recidivism.<sup>6</sup> The longer someone is held in jail before their trial, the more prone they are to criminality and the less likely they are to stay on the straight and narrow.

This is particularly salient because most federal defendants are not violent. The data shows that violent offenders make up just 2% of those arrested in the federal system.<sup>7</sup> The data also shows that the vast majority of released defendants appear in court and do not reoffend while on bond. In 2018, 98% of released federal defendants nationwide did not commit new crimes while on bond, and 99% appeared for court as required.<sup>8</sup> What’s really remarkable is that this near-perfect compliance is seen equally in federal districts with very high release rates and those with very low release rates.<sup>9</sup> So when release rates increase, crime and flight do not.

The high federal detention rate also imposes huge human and fiscal costs. On average, a defendant spends 255 days in pretrial detention,<sup>10</sup> often in deplorable conditions. For example, in the depths of winter last January, pretrial detainees at the Metropolitan Detention Center in Brooklyn, New York went without heat and electricity for days.<sup>11</sup> Moreover, while defendants

sit in jail awaiting trial, they can lose their jobs,<sup>12</sup> their homes,<sup>13</sup> their health,<sup>14</sup> and even their children.<sup>15</sup> The evidence also shows that pretrial detention leads to an increased likelihood of conviction<sup>16</sup> and results in longer sentences.<sup>17</sup> And federal pretrial detention imposes a high burden on taxpayers: It costs approximately \$32,000 per year to incarcerate a defendant, but just \$4,000 to supervise them on pretrial release.<sup>18</sup>

These problems make clear that the federal pretrial detention system is in crisis and reform is needed.

Today, I will highlight two crucial fixes to the Bail Reform Act: eliminating financial conditions that require people to buy their freedom, and modifying the blanket presumptions of detention that limit judicial discretion and unnecessarily lock up low-risk defendants. My written testimony provides additional suggestions for reform.

A primary goal of the Act was to end practices that conditioned freedom on a person's ability to pay.<sup>19</sup> But every day in federal courtrooms across the country, judges impose conditions of release that privilege the wealthy. For example, some judges impose bail bonds, while others require family members to co-sign the bond and meticulously document their net worth.<sup>20</sup> At best, this unnecessarily delays release; at worst, it results in the pretrial detention of indigent defendants. In other districts, indigent defendants are required to pay the costs of court-ordered electronic monitoring, which can be very expensive, particularly given how long federal cases last. Congress should end these injustices by modifying the Bail Reform Act to eliminate financial conditions and put rich and poor on equal footing.

Turning to my next proposal for reform, the statute contains a rebuttable presumption that puts a thumb on the scale in favor of detention in many federal cases.<sup>21</sup> These presumptions must be changed because they've had far-reaching and devastating consequences that were unforeseen and unintended by Congress.

First, the presumptions sweep too broadly, detaining low risk offenders and failing to accurately predict who will reoffend or abscond.<sup>22</sup> In fact, a federal government study has found that the presumptions are driving the high federal detention rate.<sup>23</sup> This study had a real world impact: It led the Judicial Conference, chaired by Chief Justice John Roberts, to recommend that Congress significantly limit certain presumptions of detention.<sup>24</sup> Today's hearing gives Congress a real opportunity to act on this sound recommendation.

Second, like mandatory minimum sentences, the presumptions of detention severely constrain judicial discretion, preventing judges from making individualized detention decisions. Federal judges lament that the presumptions tie their hands. Congress can empower judges to fulfill their vitally important role by modifying the presumptions.

Although the presumptions were created with good intentions, they've failed us in practice. They have, in the words of a government study, "become an almost de facto detention

order for almost half of all federal cases,” and have “contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.”<sup>25</sup>

I urge you to take action to bring the federal pretrial detention system back in line with Congress’ intent.

Thank you, and I look forward to your questions.

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<sup>1</sup> 18 U.S.C. § 3142.

<sup>2</sup> *Pretrial Release and Detention: The Bail Reform Act of 1984*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, Table 1 (Feb. 1988) (18.8% of defendants detained pretrial in 1985); *Judicial Business: Federal Pretrial Services Tables*, ADMIN. OFF. U.S. COURTS, Table H-14A (Sept. 30, 2018), <https://www.uscourts.gov/statistics/table/h-14a/judicial-business/2018/09/30>.

<sup>3</sup> See *United States v. Salerno*, 481 U.S. 739 (1987) (upholding preventative detention because the Act (1) “carefully limits the circumstances under which detention may be sought to the most serious of crimes,” *id.* at 747, (2) “operates only on individuals who have been arrested for a specific category of extremely serious offenses” listed in § 3142(f), *id.* at 750, and (3) targets individuals that Congress specifically found “far more likely to be responsible for dangerous acts in the community after arrest,” *id.*); see also *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (“The legislative history of the Bail Reform Act of 1984 makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a narrowly-drafted statute with the pretrial detention provision addressed to the danger from ‘a small but identifiable group of particularly dangerous defendants.’”) (quoting S. REP. NO. 98-225, at 6 (1983)).

<sup>4</sup> *Salerno*, 481 U.S. at 755.

<sup>5</sup> See *Nelson v. Colorado*, 137 S. Ct. 1249, 1255–56 (2017) (“[A]xiomatic and elementary, the presumption of innocence lies at the foundation of our criminal law.”) (citations omitted); see also 18 U.S.C. § 3142(j) (“Nothing in this statute shall be construed as modifying or limiting the presumption of innocence.”).

<sup>6</sup> See, e.g., Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017), archived at <https://perma.cc/R99T-5F2J> (finding that, eighteen months post-hearing, pretrial detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges); Christopher T. Lowenkamp, *The Hidden Costs of Pretrial Detention*, THE LAURA AND JOHN ARNOLD FOUNDATION (2013), archived at <https://perma.cc/XK2P-3UZT> (regression analysis shows strong correlation between detention and future offending, even after taking into account risk level and offense type); *id.* at 22–23 (finding increased recidivism even two years after pretrial detention); Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. OF LEGAL STUDIES 471, 473 (2016), archived at <https://perma.cc/YY8Y-UBBE> (finding that the assessment of money bail “increases recidivism in our sample period by 6-9 percent yearly”).

<sup>7</sup> *Felony Defendants in Large Urban Counties, 2009*, BUREAU OF JUSTICE STATISTICS, at 2 (2013).

<sup>8</sup> *Judicial Business: Federal Pretrial Services Tables*, ADMIN. OFF. U.S. COURTS, Table H-15 (Sept. 30, 2018).

<sup>9</sup> Court data shows that the five federal districts with the lowest release rates (average 20.5%) have a failure to appear rate of 1.44%, while the five districts with the highest release rates (average 69.94%) have a failure to appear rate of 1.37%. See ADMIN. OFF. U.S. COURTS, Table H-15, *supra* note 8. The five districts with the lowest release rates have an average re-arrest rate of 0.59%, while the five districts with the highest release rates have an average re-arrest rate of 1.04%. *Id.* (The districts with the lowest release rates are the S.D. California, W.D. Arkansas, E.D. Tennessee, D. Puerto Rico, and S.D. Texas; the districts with the highest release

rates are D. Guam, W.D. Washington, M.D. Alabama, E.D. Wisconsin, and D. Hawaii. *Id.*) The below chart reflects this data:

## Federal Defendants on Bond Rarely Flee or Recidivate (AO Table H-15, 9/30/18)



<sup>10</sup> Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81(2) FED. PROBATION 52, 53 (2017), <https://www.uscourts.gov/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates> (“As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention.”) (citing *Judicial Business: Federal Pretrial Services Tables*, ADMIN. OFF. U.S. COURTS, Table H-9A).

<sup>11</sup> Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates are Sick and 'Frantic,'* N.Y. TIMES, Feb. 1, 2019, <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html>.

<sup>12</sup> See e.g., Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) AMER. ECON. REV. 201 (2018) (finding that, when compared with people on pretrial release, people detained pretrial are less likely to become employed or have income, and have lower incomes if employed); Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) FED. PROBATION 39 (2018) (finding that, for individuals detained for 3 days or more, 76.1% report job loss or other job-related negative consequences and 44.2% report that they are less financially stable); *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) (“Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle.”).

<sup>13</sup> Holsinger & Holsinger, *supra* note 12, at 42 (finding 32.7% of people detained pretrial for 3 days or more reported that their residential situation became less stable.); Amanda Geller & Mariah A. Curtis, *A Sort of Homecoming: Incarceration and Housing Security of Urban Men*, 40

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SOC. SCI. RESEARCH 1196, 1203 (2011) (finding that, among those already at risk for housing insecurity, pretrial incarceration leads to 69% higher odds of housing insecurity).

<sup>14</sup> Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, BUREAU OF JUSTICE STATISTICS (2014) (concluding that people in local jails are less likely to get diagnostic or medical services and are more likely to report worsened health as compared to those in state or federal prison); Faye S. Taxman, et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 J. SUBSTANCE ABUSE TREATMENT 239 (2007) (finding that, in state facilities, physical and mental health treatment is of poorer quality in jails than in prison).

<sup>15</sup> Heaton, et al., *supra* note 6, at 713.

<sup>16</sup> Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. OF L. ECON. & ORG. 511, 512 (2018) (finding that pretrial detention leads to a 13% increase in the likelihood of conviction using data from state-level cases in Philadelphia); Dobbie et al., *supra* note 12, at 225 (finding that a defendant who is initially released pretrial is 18.8 percentage points less likely to plead guilty in Philadelphia and Miami-Dade counties); Mary T. Phillips, *A Decade of Bail Research*, 116 (2012), archived at <https://perma.cc/A3UM-AHGW> (“[A]mong nonfelony cases with no pretrial detention [in New York City], half ended in conviction, compared to 92% among cases with a defendant who was detained throughout,” and in the felony context “[o]verall conviction rates rose from 59% for cases with a defendant who spent less than a day in detention to 85% when the detention period stretched to more than a week”).

<sup>17</sup> A recent empirical study of the federal system found “that federal pretrial detention significantly increases sentences, decreases the probability that a defendant will receive a below-Guidelines sentence, and decreases the probability that they will avoid a mandatory minimum if facing one.” Stephanie Didwania, *The Immediate Consequences of Pretrial Detention*, at 30 (2019), archived at <https://ssrn.com/abstract=2809818>.

<sup>18</sup> U.S. Courts, *Incarceration Costs Significantly More than Supervision*, JUDICIARY NEWS (2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

<sup>19</sup> *See Bail Reform Act Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives*, 98th Cong. 243 (1984) (testimony of Ira Glasser) (explaining that the purpose of § 3142(c)(2) was to ensure that “the judicial officer may not impose excessive bail as a means of detaining the individual”); *see also* § 3142(c)(2) (“The judicial officer shall not impose a financial condition that results in the pretrial detention of the person.”).

<sup>20</sup> The Bail Reform Act as currently written explicitly authorizes these practices. *See* § 3142(c)(1)(B)(xii) (condition of release that defendant “execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety’s property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond”).

<sup>21</sup> 18 U.S.C. § 3142(e)(2), (e)(3).

<sup>22</sup> Austin, *supra* note 10, at 57–58 (explaining data showing that low-risk defendants in presumption cases are detained pretrial at higher rates than low-risk defendants in non-presumption cases, and concluding that “it appears the presumption is influencing the release

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decision for the lowest risk defendants, while having a negligible influence on higher risk defendants”); *id.* at 60 (finding that the presumptions inaccurately predict which defendants are likely to violate conditions of release: “In sum, high-risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, rearrested for a violent offense, failing to appear, or being revoked for technical violations.”).

<sup>23</sup> *Id.* at 60–61.

<sup>24</sup> *Report of the Proceedings of the Judicial Conference of the United States* at 10–11 (Sept. 12, 2017), [https://www.uscourts.gov/sites/default/files/17-sep\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf).

<sup>25</sup> Austin, *supra* note 10, at 61.

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**WRITTEN STATEMENT OF ALISON SIEGLER**  
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**Before the Judiciary Committee of the House of Representatives, Subcommittee on Crime,  
Terrorism, and Homeland Security**

**Hearing on “The Administration of Bail by State and Federal Courts: A Call for Reform”**

**November 14, 2019**

**Alison Siegler**, Clinical Professor of Law & Director of the FCJC  
**Erica K. Zunkel**, Associate Clinical Professor of Law & Associate Director of the FCJC

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## **Introduction**

There is widespread agreement that the cash bail system is broken, and there is a robust reform movement afoot at the state level to eliminate money bail. The federal pretrial detention system is in crisis, too, but its problems have been largely overlooked, even by federal legislators. The Bail Reform Act of 1984 (BRA or “the Act”) results in the pretrial detention of far too many people because it is overbroad, confusing, and targets low-risk defendants for detention. Legislative reform is needed to address this crisis.

In fall 2018, the Federal Criminal Justice Clinic (FCJC) created a Federal Bail Reform Project that is having far-reaching local and national impact. FCJC Director Alison Siegler and Associate Director Erica Zunkel conceived of this project out of a concern that pretrial release and detention practices in federal court deviated from the legal requirements of the Bail Reform Act.

To delve deeper into the source of the problems, the FCJC designed what appears to be the first courtwatching project ever undertaken in federal court anywhere in the country. Volunteers observed 170 federal bail-related hearings in Chicago over the course of 10 weeks. The clinic watched both types of federal bail hearings: Initial Appearance hearings and Detention Hearings. The clinic gathered and logged detailed information about each hearing, including whether defendants were being illegally detained and whether the government was requesting detention for reasons not authorized anywhere in the statute. The clinic’s courtwatching revealed significant problems in the implementation of the Bail Reform Act in practice. In the wake of our courtwatching, we met with Federal Public Defenders around the country and learned that many of the problems we had observed in Chicago were happening elsewhere in the country. Although judges, prosecutors, and the defense bar are changing their approach to bail-related issues in response to our Federal Bail Reform Project, it is clear that changing the culture of federal bail is not enough; legislative reform is urgently needed.

### **I. Certain Provisions of § 3142(f) Should be Eliminated or Made Discretionary.**

Under the BRA, if the prosecutor charges any offense that is listed in § 3142(f)(1) and seeks detention at the Initial Appearance, detention is mandatory. In determining what types of offenses authorize detention at the Initial Appearance, § 3142(f) sweeps too broadly and unnecessarily cabins judicial discretion.

The simplest fix would be to entirely eliminate certain categories of offenses listed in § 3142(f), including drug offenses under § 3142(f)(1)(C) and cases involving flight risk concerns under § 3142(f)(2)(A). This fix alone would bring skyrocketing detention rates under control. According to United States Sentencing Commission data, approximately 68% of federal cases in 2018 appear to qualify for detention under § 3142(f)(1) (excluding immigration cases).<sup>1</sup> This fix

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<sup>1</sup> U.S. SENT. COMM., *2018 Annual Report and Sourcebook* 45 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf>. This number was calculated using the total number of federal cases in 2018 (69,245) and subtracting the number of immigration cases (23,883). That results in 45,542 federal cases. Using the Sentencing Commission’s “type of crime” breakdown, 30,900

would not have detrimental effects on public safety given the data showing lower federal detention rates are not accompanied by any increase in reoffending or failure to appear.<sup>2</sup> Moreover, the mandatory detention provisions in § 3142(f) were created when the crime rate was much higher and are no longer necessary in the current climate.<sup>3</sup>

Alternatively, for certain categories of offenses—including drug offenses and cases involving flight risk concerns—detention at the Initial Appearance should be discretionary rather than mandatory. This change would shift the locus of discretion from prosecutors to judges, giving judges the authority to decide whether detention at the Initial Appearance is warranted.

Regardless, mandatory detention that rests solely in the hands of the government must be reevaluated and limited. There are reasons to be concerned with a regime that makes the prosecutor’s charging decision the sole determinant of detention at the Initial Appearance and removes all discretion from judges at this stage. Recent empirical research shows that prosecutors’ charging decisions are the major driver of mass incarceration in the state system.<sup>4</sup> Further support for shifting the locus of discretion from prosecutors to judges at the Initial Appearance can be found in a growing body of research in the federal system showing that prosecutorial charging decisions create sentencing disparities—including racial disparities—and arguing for increased judicial discretion in the sentencing arena.<sup>5</sup>

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federal cases appear to qualify for detention under one of the § 3142(f)(1) case categories, which equals 67.8% of all non-immigration cases.

<sup>2</sup> Court data shows that the five federal districts with the lowest release rates (average 20.5%) have a failure to appear rate of 1.44%, while the five districts with the highest release rates (average 69.94%) have a failure to appear rate of 1.37%. *See* ADMIN. OFF. U.S. COURTS, *Judicial Business: Federal Pretrial Services Tables*, Table H-15 (Sept. 30, 2018). The five districts with the lowest release rates have an average re-arrest rate of 0.59%, while the five districts with the highest release rates have an average re-arrest rate of 1.04%. *Id.* (The districts with the lowest release rates are the S.D. California, W.D. Arkansas, E.D. Tennessee, D. Puerto Rico, and S.D. Texas; the districts with the highest release rates are D. Guam, W.D. Washington, M.D. Alabama, E.D. Wisconsin, and D. Hawaii. *Id.*)

<sup>3</sup> *See* John Pfaff, *Locked In* 72 (2017) (“The crime decline since 1991 has been dramatic. Between 1991 and 2008, violent crime fell by 36% and property crime by 31%. By the end of 2014, both violent and property crime declined another 14%.”).

<sup>4</sup> *See* Pfaff, *supra* note 3, at 72. (“I had expected to find that changes at every level—arrests, prosecutions, admissions, even time served had pushed up prison populations. Yet across a wide number and variety of states, . . . the only thing that really grew over time was the rate at which prosecutors filed felony charges against arrestees.”); *id.* at 72–73 (“Between 1994 and 2008, the number of felony cases in my sample rose by almost 40%, from 1.4 million to 1.9 million. . . . In short, between 1994 and 2008, the number of people admitted to prison rose by about 40%, from 360,000 to 505,000, and almost all of that increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees.”).

<sup>5</sup> *See* Sonja B. Starr and M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 48 (2013) (prosecutorial “charging decisions appear to be the major driver of sentencing disparity,” including racial disparities); *see also id.* at 31 (“Our research thus suggests that the post-arrest justice process—especially mandatory minimum charging—introduces sizeable racial disparities.”); *id.* at 78 (“[W]e are particularly concerned about proposals to respond to sentencing disparities by restoring tighter constraints on sentencing, especially those that entail expanding mandatory minimums” and thus moving the locus of discretion from judges to prosecutors); Crystal S. Yang, *Have Inter-judge Sentencing Disparities Increased in an Advisory*

Alternative limitations could be placed on the current § 3142(f)(1) categories to shift discretion from prosecutors to judges. For example, some of the § 3142(f)(1) categories could be limited to people with more serious criminal histories, or to people who have reoffended while on pretrial release in the past. This latter limitation echoes § 3142(e)(2), which creates a presumption of detention for people who have previously reoffended while on pretrial release. Such a recidivist limitation would also support Congress’s intent to target those who commit new offenses while on release. Alternatively, the § 3142(f) categories could be limited to those facing mandatory minimum penalties.

## **II. The Standard for Detention at the Initial Appearance Should Be Clarified and Amended.**

A key reason the Supreme Court upheld the Bail Reform Act as constitutional in *United States v. Salerno* was because the statute only authorizes detention at the Initial Appearance under certain limited circumstances.<sup>6</sup> Specifically, § 3142(f) limits the circumstances under which a person can be detained at the Initial Appearance to “extremely serious offenses.”<sup>7</sup>

Congress intended § 3142(f) to serve as a gatekeeper to detention, and the Supreme Court upheld the statute in reliance on the limitations in that section. The BRA only authorizes pretrial detention at the Initial Appearance hearing when one of 7 enumerated factors in § 3142(f) is met. It was these limitations, among others, that led the Court to conclude that the Act was “regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.”<sup>8</sup> The *Salerno* Court further relied on the narrow limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that “the government’s interest in preventing crime by arrestees is both legitimate and compelling.”<sup>9</sup>

Caselaw further supports § 3142(f)’s role as a gatekeeper. Since the Supreme Court decided *Salerno*, every court of appeals to address the issue agrees that it is illegal to detain someone—or even hold a Detention Hearing—unless the government affirmatively invokes one of the § 3142(f) factors.<sup>10</sup>

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*Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. Rev. 1268, 1278–79, 1323–26 (2014) (finding “that the application of a mandatory minimum is a large contributor to interjudge and interdistrict [sentencing] disparities,” explaining that eliminating mandatory minimums would “reduc[e] unwarranted disparities in sentencing,” and arguing that “any proposal that contemplates shifting power to prosecutors will likely exacerbate unwarranted disparities”).

<sup>6</sup> 481 U.S. 739, 747 (1987).

<sup>7</sup> *Id.* at 750; see also *id.* at 747 (“The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. See 18 U.S.C. § 3142(f) (*detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders.*”) (emphasis added).

<sup>8</sup> *Id.* at 748.

<sup>9</sup> *Id.* at 749.

<sup>10</sup> See, e.g., *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) (“Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a Detention Hearing exists.”); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir.

In practice, however, judges and the government misunderstand and disregard the limitations § 3142(f) places on detention. At times, this issue results in people being illegally detained at the Initial Appearance when, in fact, there is no statutory basis for detention. When this happens, the Act as applied becomes unconstitutional. The disregard for § 3142(f)'s gatekeeping role also illustrates a broader problem, which is that the practice at detention proceedings has become untethered from the statute.

Our courtwatching confirmed that the fundamental disregard for the Bail Reform Act's limitations on detention at the Initial Appearance is a serious and nationwide problem. Lack of adherence to the statute results in prosecutors requesting detention without a legal basis, and at times even leads to illegal detentions. For example, the government sought detention in 80% of the cases we observed during the first 7 weeks of our courtwatching. In approximately 95% of those cases, the government did not cite a § 3142(f) factor and instead based their detention request on reasons not authorized by the statute.<sup>11</sup>

Conversations with Chief Federal Public Defenders and other defense attorneys around the country reveal that disregard of the statute's gatekeeping provisions is a significant problem. In one federal district, prosecutors ignore the adversarial requirements of the criminal justice system and do not even appear in court at the Initial Appearance, let alone state the statutory basis for their detention requests. Instead, only the judge, defense attorney, and defendant are present at the Initial Appearance, and judges regularly detain defendants without any discussion of the statutory basis for detention. This violates the statute and the common law rule established by every court of appeals to address the issue.

Discussions with judges and practitioners further reveal that part of the problem is one of organization: The legal standard for the *first* court appearance is buried in the middle of the statute—in subsection (f)—and is lumped together with the procedures that apply at the *second* court appearance, the Detention Hearing. Clarifying § 3142(f)'s application and requirements would reduce or eliminate these problems, put the Act on stronger constitutional footing, and bring it back in line with the drafters' intent.

#### **A. The BRA Should Be Modified to Clarify That Detention at the Initial Appearance Hearing is Limited to Cases That Raise One of the 7 Factors in § 3142(f).**

The plain language of the statute demonstrates that the BRA only authorizes pretrial detention at the Initial Appearance hearing when one of the 7 factors in § 3142(f) is met. Section 3142(f) says: “The judicial officer shall hold a [detention] hearing” only “in a case that involves” one of the seven factors in § 3142(f)(1) and (f)(2). Section (f)(1) lists case-specific factors and authorizes pretrial detention in cases charging crimes of violence, drugs, guns, minor victim

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1992); *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003); *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999).

<sup>11</sup> The clinic's courtwatching spanned 10 weeks in late 2018 and early 2019. In January 2019, our clinic conducted a training for criminal defense attorneys about the BRA and best practices at bail-related hearings. After that training, bail practices improved. To provide the most accurate information about the problems we observed, we will reference data from the first 7 weeks of our courtwatching, before any intervention occurred.

offenses, and terrorism offenses, among others. Section (f)(2) authorizes detention on the grounds of “serious risk that such person will flee” or “serious risk” of obstruction of justice in the form of a threat to a witness or juror.

Despite § 3142(f)’s gatekeeping role, the government and judges often rely on impermissible factors not found in § 3142(f). There are two primary ways in which the statutory restrictions are evaded or disregarded.

First, across the country, the government often moves for detention on the ground that the person is a *danger to the community*, even though that is not a permissible statutory basis. The courts of appeals agree that generalized danger to the community is not a basis for detention at the Initial Appearance because it is not one of the enumerated § 3142(f) factors.<sup>12</sup> Judges nevertheless grant detention on dangerousness grounds.

Second, the government often moves for detention on the ground that the person is an ordinary “risk of flight,” which is also not a permissible statutory basis for detention. Rather, the statute only authorizes detention if there is a “*serious risk* that [the defendant] will flee.”<sup>13</sup> There is some risk of flight in every criminal case; according to a basic canon of statutory interpretation, the term “serious risk” means that the risk must be more significant.<sup>14</sup> Moreover, the government rarely, if ever, presents any evidence to support its allegation that the risk that a particular person will flee rises to the level of a “serious risk.” In fact, the Senate’s 1983 report makes clear that detention based on serious risk of flight should only occur only in *extreme and unusual cases*.<sup>15</sup> Congress surely intended judges to make findings on this issue. After all, § 3142(f)(2)(A) only authorizes detention at the Initial Appearance “in a case that involves” a “serious risk” that the person will flee. Yet judges regularly detain people under this provision in non-extreme, ordinary cases without expecting the government to substantiate its request or demonstrate that there is a “serious risk” the person will flee.<sup>16</sup>

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<sup>12</sup> See, e.g., *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) (“[W]e find ourselves in agreement with the First and Third Circuits: a defendant’s threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention.”).

<sup>13</sup> § 3142(f)(2)(A) (emphasis added).

<sup>14</sup> See *Corley v. United States*, 556 U.S. 303, 314 (2009) (“One of the most basic interpretative canons” is “that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”).

<sup>15</sup> See *Bail Reform Act of 1983: Report of the Committee on the Judiciary*, 98th Cong. 48 (1983) (“Under subsection f(2), a pretrial Detention Hearing may be held upon motion of the attorney for the government or upon the judicial officer’s own motion in three types of cases. . . . [T]hose [types] involving . . . a serious risk that the defendant will flee . . . reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.”) (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a “rare case of extreme and unusual circumstances . . . justifies pretrial detention”—as representing the “current case law”).

<sup>16</sup> For example, a federal magistrate judge in the District of Puerto Rico detained a defendant based on ordinary “risk of flight,” even though no § 3142(f)(1) factor was met and there was no determination that the defendant posed a “serious risk of flight” as required by the statute, and despite clear First Circuit authority to the contrary. *United States v. Martinez-Machuca*, 18-cr-568 (D.P.R. April 30, 2019) at 5–6 (acknowledging that First Circuit law only authorizes detention when “one of the

We saw both of these problems repeatedly in our courtwatching and have heard similar anecdotes from defense attorneys in many federal districts. On the dangerousness issue, during the first 7 weeks of our courtwatching, the government cited danger to the community as the basis for detention in approximately 56% of the cases. Regarding flight, during that same period of courtwatching, the government cited ordinary risk of flight as the basis for detention in approximately 60% of the cases, and only provided evidence to support the request in one case. All told, the government cited improper bases for detention in 95% of cases. In many cases, a legitimate statutory basis for detention existed under § 3142(f)(1), but simply was not cited. However, in some cases there was no statutory basis for detention whatsoever.

The chart below illustrates the problem:

### Initial Appearance: Factors Cited by Gov't to Support Detention Request



#### **B. The BRA Should Specify a Standard and Burden of Proof for Detention Based on Risk of Flight at the Initial Appearance.**

As discussed above, in practice, people are regularly detained at the Initial Appearance and held for a Detention Hearing on a mere allegation of “risk of flight,” without regard to the fact that § 3142(f)(2)(A) authorizes detention only if the person poses a “serious risk that such person will flee.” There is rarely any discussion by judges, the government, or the defense about the seriousness of a particular person’s risk of flight.

This failure can be traced to the fact that the statute does not specify a standard or burden of proof for proving “serious risk” of flight at the Initial Appearance hearing. Courts have

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§ 3142(f) conditions for holding a detention hearing exists”) (citing *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)).

expressed frustration at the statute’s lack of an evidentiary requirement for proof of serious risk of flight, explaining that at the Initial Appearance, “[n]either side [prosecution or defense] provides any guidance about the quantum of evidence needed to show a serious risk of flight sufficient to warrant the holding of a Detention Hearing.”<sup>17</sup> This guidance must be provided by Congress.

Without a clear standard and burden of proof, § 3142(f)(2)(A) is not performing the gatekeeping function that Congress intended. Instead, prosecutors can detain someone on mere assertion and speculation. Relatedly, there is a risk that the government will treat the flight risk provision in § 3142(f)(2)(A) as a catch-all and will “move for detention as . . . [an] end run around subsection (f),” ignoring the narrow tailoring that led the Supreme Court to uphold the Act as constitutional.<sup>18</sup>

Practitioners report that this risk is a reality in certain jurisdictions, and the caselaw bears this out. In *United States v. Robinson*, for example, the judge criticized the government for not presenting evidence of “serious risk” of flight at the Initial Appearance. Though the government purported to be proceeding by proffer, the judge noted, “[n]othing about those statements amounts to a ‘proffer’ of anything . . . because no information was offered to support either allegation.”<sup>19</sup>

Legislative reform is particularly important in this area, as some judges have construed the Bail Reform Act as not requiring the government to provide any evidence whatsoever of risk of flight at the Initial Appearance.<sup>20</sup> During our courtwatching, when the government asked for detention based on ordinary “risk of flight,” they virtually never cited evidence to support their request, and the judges did not require them to do so. This cannot be right, because § 3142(f)(2)(A) authorizes detention only “in a case that involves” a “serious risk” of flight, which contemplates at least some kind of judicial finding. Clear guidance from Congress is needed to require the government to provide a sufficient evidentiary basis to support detention.

### **III. The BRA Should Be Reorganized and Reformatted to Provide Much-Needed Clarity to Judges and Practitioners.**

Judges and practitioners alike lament that the Bail Reform Act is badly organized, difficult to follow, and does not proceed in a logical order. For example, judges and practitioners do not understand the limitations on detention at the Initial Appearance, perhaps in part because the relevant provision comes in the middle of the statute—in subsection (f)—rather than towards the beginning. The confusion may also arise because one part of § 3142(f) discusses the legal standard for the Initial Appearance hearing, while another part lists the standards and procedures for the Detention Hearing. The Act needs to be reorganized so that the text proceeds in the order in which the legal issues arise during the two bond-related court proceedings, the Initial

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<sup>17</sup> *United States v. Lizardi-Maldonado*, 275 F. Supp. 3d 1284, 1288–89 (D. Utah 2017).

<sup>18</sup> *United States v. Gibson*, 384 F. Supp. 3d 955, 964 (N.D. Ind. 2019).

<sup>19</sup> 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010).

<sup>20</sup> *See, e.g., United States v. Baltazar-Martinez*, No. 19-20439, 2019 WL 3068176, at \*2 (E.D. Mich. July 12, 2019) (noting “the Government is not required to make an evidentiary proffer before a Detention Hearing can even be set, and such a requirement is not supported by the statute”).

Appearance hearing and the Detention Hearing. Subsections and headings should also be added to further clarify the meaning of the Act.

#### **IV. Financial Conditions of Release Should Be Eliminated.**

The BRA should be modified to prohibit all financial conditions of release. Such a modification would bring the Act back in line with Congress’s original intent of preventing judges from imposing financial conditions that lead poor people to be detained while wealthy people can buy their freedom.

The purpose of the Bail Reform Act of 1966 was to “revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.”<sup>21</sup> At the bill signing, President Lyndon Johnson reiterated harsh criticism against the system of money bond, arguing that “[b]ecause of the bail system, the scales of justice [were] weighted not with fact nor law nor mercy. They [were] weighted with money.”<sup>22</sup> The Bail Reform Act of 1984 continued to work towards the elimination of detention based solely on inability to pay. To effectuate this intent, § 3142(c)(2) states, “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.” The purpose of § 3142(c)(2) was to ensure that “the judicial officer may not impose excessive bail as a means of detaining the individual” was an “unauthorized” practice.<sup>23</sup>

However, the Act also contains and endorses a panoply of financial restrictions and conditions that privilege the wealthy over the poor.<sup>24</sup> These provisions enable judges to impose conditions that are dependent on, or proxies for, a person’s financial means. The data make clear that, for some people, the scales of justice are still weighted with money. For example, nearly 10% of federal defendants detained pretrial are held because they cannot post a secured bond.<sup>25</sup>

In practice, some of the Act’s financial provisions result in de facto detention. For example, in some federal districts, judges will not authorize a defendant’s family member to serve as a third-party custodian and/or co-signer of a bond unless that person can demonstrate that they are a solvent surety. Federal judges elsewhere refuse to release defendants unless they pay cash bonds or post real property as security for their release, in spite of § 3142(c)’s mandate.

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<sup>21</sup> Pub. L. No. 89-465, 80 Stat. 214, 214 (1966).

<sup>22</sup> See Lyndon B. Johnson, President of the United States, *Remarks at the Signing of the Bail Reform Act of 1966*, (June 22, 1966), <https://www.presidency.ucsb.edu/ws/?pid=27666>.

<sup>23</sup> *Bail Reform Act Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives*, 98th Cong. 243 (1984) [hereinafter 1984 Hearings] (testimony of Ira Glasser).

<sup>24</sup> See 18 U.S.C. § 3142(c)(1)(B)(xi)–(xii) (listing “execut[ing] a bail bond with solvent sureties” and agreeing to forfeit “property of a sufficient unencumbered value, including money” as permissible conditions of release); § 3142(g)(4) (authorizing a judge to inquire into the source of property in considering the conditions of release in § 3142(c)(1)(B)(xi)–(xii)).

<sup>25</sup> Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* at 6–7, Special Report, U.S. Dep’t of Justice Bureau of Justice Statistics (2012), <https://perma.cc/4LT8-YPX8>.

In addition, indigent defendants released on bond are sometimes ordered to pay costs associated with mandatory conditions of release, such as the cost of electronic monitoring.

The Act should be amended to make clear that the imposition of financial conditions is flatly impermissible. Such a bright line rule will do a far better job of effectuating the drafters' intent. It will also avoid the injustice—not to mention the constitutional minefields—of a regime that conditions liberty on a person's financial means.<sup>26</sup>

## **V. The Standard for Flight Risk/Appearance Should be Modified.**

Currently, the BRA authorizes detention at the Initial Appearance under § 3142(f) if there is a “serious risk that such person will flee.” The BRA authorizes continued detention at the Detention Hearing under § 3142(e) if a judge finds that “no condition or combination of conditions will reasonably assure the appearance of the person as required.”

### **A. Detention Based on Flight Risk Should Only Be Authorized Where There Is a Real Likelihood That a Defendant May *Voluntarily Abscond*.**

The BRA should be modified to authorize detention for flight risk only where there is a serious likelihood that someone will voluntarily abscond. Legal scholars and criminologists have recently advocated for a clearer delineation between the small number of “defendants who are expected to flee a jurisdiction” and the “much larger group” of people who are simply attendance risks due to poverty, transportation barriers, and lack of resources.<sup>27</sup> Increasingly, scholarship recognizes that “some nonappearances are more problematic than others”<sup>28</sup> and

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<sup>26</sup> The legality of cash bail is being aggressively litigated around the country. On June 1, 2018, the Fifth Circuit struck down as unconstitutional the cash bail system in Harris County, Texas, because the “state of affairs [where a wealthy arrestee is able to post bond while an identical indigent arrestee cannot] violates the equal protection clause.” See *ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018). Similarly, on June 11, 2019, a federal judge granted a preliminary injunction, enjoining the City of St. Louis, Missouri from “enforcing any monetary condition of release that results in detention solely by virtue of an arrestee’s inability to pay” unless “detention is necessary because there are no less restrictive alternatives to ensure the arrestee’s appearance or the public’s safety.” See *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2019 WL 2437026, at \*16 (E.D. Mo. June 11, 2019). And on August 29, 2019, the Fifth Circuit ruled unanimously that the Louisiana bail system, where judges receive a cut of every monetary bond they set to fund their courts, was unconstitutional. See *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019). There are other lawsuits pending that challenge the cash bail systems in Cook County, Illinois (encompassing Chicago), Davidson County, Tennessee (encompassing Nashville), and Calhoun County, Georgia, among others.

<sup>27</sup> Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 683 (2018); see also Jason Tasha, *Text-message reminders are a cheap and effective way to reduce pretrial detention*, ABA JOURNAL (July 17, 2018) (“[T]he vast majority of criminal defendants are not flight risks—they’re attendance risks.”).

<sup>28</sup> *Id.* at 726.

“detention should be reserved for those who cannot be prevented or dissuaded from leaving the jurisdiction using less intrusive interventions.”<sup>29</sup>

State level data further shows that most concerns about non-appearance (i.e. cases where the person is *not* fleeing to avoid prosecution) can be prevented in ways that are less costly and less restrictive than detention. One study was able to reduce rates of non-appearance from 25% to 6% by reminding people directly of their upcoming court date.<sup>30</sup> Another recent study found that text message reminders “reduced failures to appear by 26% relative to receiving no messages.”<sup>31</sup> Partnering with community organizations, improving access to high-quality substance abuse treatment, and improving pretrial services support can also reduce rates of non-appearance.<sup>32</sup>

Where other factors may be responsible for appearance risks, such as inadequate transportation or drug addiction, a drug treatment program or vouchers for transportation may well meet the requirement that the judge impose the “least restrictive . . . conditions” that “will reasonably assure the appearance of the person as required” under § 3142(c)(1)(B).

### **B. Detention Based on Flight Risk Should Only Be Authorized When There is a High Risk of Imminent and Intentional Non-Appearance.**

The BRA’s provisions regarding flight risk and failures-to-appear must be revised, because they have become catchalls and contribute to the rising federal pretrial detention rate. The legislative history of the Bail Reform Act of 1966 indicates that Congress was primarily concerned about identifying and detaining people who might *flee to avoid prosecution*. One preliminary version of the bill, for example, specified that penalties for non-appearance applied only to a defendant who “fail[ed] to comply with the terms of his release with intent to avoid prosecution; the service of his sentence, or the giving of testimony.”<sup>33</sup> As Deputy Attorney General of the United States Ramsey Clark testified, “the test [as to whether a penalty would apply to a defendant] is whether he failed to appear *with intent* to avoid prosecution.”<sup>34</sup>

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<sup>29</sup> *Id.* at 686; *see also* John S. Goldkamp, *Fugitive Safe Surrender: An Important Beginning*, 11 *Criminology & Pub. Pol.* 229, 429–30 (drawing a distinction between “active flaunters” and “inadvertent absconders”).

<sup>30</sup> Gouldin, *supra* note 27, at 731 (citing data from Coconino County, Arizona); *see also* Rachel A. Harmon, 115 *Mich. L. Rev.* 337–38 (noting that “[j]urisdictions can increase appearance pursuant to citations by screening out the suspects least likely to appear if cited; by reducing obstacles to appearing as required; and by optimizing consequences for failures to appear”); Marie VanNostrand et al., *State of the Science of Pretrial Release Recommendations and Supervision*, Pretrial Justice Institute (June 2011) (“All . . . studies concluded that court date notifications in some form are effective at reducing failures to appear in court.”).

<sup>31</sup> Brice Cook et al., *Using Behavioral Science to Improve Criminal Justice Outcomes*, UChicago Crime Lab & Ideas 42 (January 2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf>.

<sup>32</sup> Gouldin, *supra* note 27, at 732.

<sup>33</sup> *Federal Bail Procedures Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate*, 89th Cong. 5 (1965) [hereinafter 1965 Hearings] (text of S. 1357).

<sup>34</sup> *Id.* at 33 (statement of Ramsey Clark) (emphasis added).

Legislative history accompanying the Bail Reform Act of 1984 reveals a continued focus on the need to prevent high-level, wealthy drug defendants from fleeing to avoid prosecution. In his 1984 testimony, Deputy Attorney General James Knapp emphasized that “detention to assure appearance at trial” was appropriate for “habitual and violent criminals and major drug traffickers.”<sup>35</sup> He then cited a case where “a bond of \$1 million was forfeited in the Southern District of Florida after a reputed head of a major marijuana smuggling operation failed to appear for trial” as an example of a case in which pretrial detention was appropriate.<sup>36</sup> In fact, however, the typical federal drug defendant does not have the funds to hire his own lawyer, let alone the means or wherewithal to flee the city, state, or country.

Legislative history supports modifying the Bail Reform Act to specify that risk of flight must be “imminent” and “intentional” for a Detention Hearing to be held. Regarding the imminence of flight, the government wanted to prioritize detention for people who would flee immediately upon release. Indeed, the 1964 Report of the Attorney General’s Committee on Poverty and the Administration of Criminal Justice expressed a concern about “imminent flight.”<sup>37</sup> Notably, this point of view was adopted by Senator Fong, then a member of the Committee on the Judiciary, who urged courts to place “reasonable restrictions on association or movement” in order to “prevent[] *imminent* flight.”<sup>38</sup> The legislative history also supports an emphasis on the intentionality of the flight. When Deputy Attorney General Ramsey Clark testified to the Senate, he made it clear that the executive branch placed great importance on a person’s intent and was in favor of a statute where “the Government would have the obligation or the burden of coming forward with some evidence of willfulness on the part of the defendant in connection with his failure to appear,” before imposing penalties.<sup>39</sup>

## **VI. The Presumptions of Detention Should be Clarified and Modified.**

The BRA includes a statutory presumption in favor of detention in many federal cases.<sup>40</sup> The language of the BRA has improperly led federal judges to feel that most presumption cases should result in detention, and many judges have a near-blanket policy of detaining defendants in presumption cases. Relatedly, there is a great deal of confusion among the bench and bar alike over how the presumptions operate.

### **A. Eliminate or Limit Certain Presumptions Of Detention.**

The presumptions of detention in the Bail Reform Act restrict judicial discretion, undermine the constitutional presumption of innocence, and are responsible for a massive increase in the pretrial detention rate. The presumptions of detention also run counter to the BRA’s presumption of release. Other provisions of the BRA already account for the seriousness of the offense, rendering the presumption superfluous. The BRA specifically requires judges to consider “the nature and circumstances of the offense charged” and “the weight of the evidence”

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<sup>35</sup> *1984 Hearings, supra* note 23, at 233 (Statement of James I.K. Knapp).

<sup>36</sup> *Id.*

<sup>37</sup> *See 1965 Hearings, supra* note 33, at 211 (text of S. 1357) (emphasis added).

<sup>38</sup> *Id.* at 16 (emphasis added).

<sup>39</sup> *Id.* at 33.

<sup>40</sup> 18 U.S.C. § 3142(e)(3).

at the Detention Hearing.<sup>41</sup> And, even without the presumptions, judges will retain the authority to detain defendants in serious cases.

The Administrative Office of the U.S. Courts released an important empirical study about the § 3142(e)(3) presumption and release rates, entitled *The Presumption for Detention Statute's Relationship to Release Rates*. The study made several key findings that support eliminating certain presumptions.<sup>42</sup>

First, pretrial services officers recommend release less frequently in § 3142(e)(3) presumption cases than non-presumption cases, especially for low-risk people. For low-risk people in category 1 (meaning little to no criminal history and a stable personal background<sup>43</sup>), pretrial services recommended release in 93% of non-presumption cases, compared to only 68% of presumption cases.<sup>44</sup> The numbers between presumption and non-presumption cases begin to converge as risk levels increase.<sup>45</sup>

Second, release rates are higher for low-risk non-presumption defendants than low-risk § 3142(e)(3) presumption defendants, meaning there may be some “unnecessary detention.” At the lowest risk level, people with non-presumption cases were released 94% of the time, while people with presumption cases were released only 68% of the time.<sup>46</sup> This suggests that the purported purpose of the presumption—to detain high-risk people who were likely to pose a danger to the community if released—was not being fulfilled.<sup>47</sup> “[W]ere it not for the existence of the presumption, these defendants might be released at higher rates.”<sup>48</sup>

Third, the § 3142(e)(3) presumption failed to correctly identify those who are most likely to recidivate, fail to appear, or be revoked for technical violations. For example, other than category 1 presumption cases, presumption rearrest rates were *lower* than non-presumption rearrest rates (for category 1, presumption rearrest rates were only slightly higher than non-presumption cases).<sup>49</sup> Similarly, for category 1 and 2 defendants, non-presumption cases were revoked for technical violations at a lower rate than presumption cases. However as risk levels increased there was no difference in revocation rates for technical violations for category 3 defendants. Notably, for risk categories 4 and 5, non-presumption cases were actually more likely to be revoked than presumption cases—again showing that the presumptions have little predictive value in the cases where they should matter most.<sup>50</sup> Finally, across all risk categories,

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<sup>41</sup> 18 U.S.C. § 3142(g).

<sup>42</sup> See Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Federal Probation Journal 52 (Sept. 2017), [https://www.uscourts.gov/sites/default/files/81\\_2\\_7\\_0.pdf](https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf).

<sup>43</sup> In the study, the Pretrial Risk Assessment Tool was used to identify defendants' risk level. *Id.* at 54. The tool puts defendants into a one of five categories based on their response to 11 questions. *Id.* at 55. These categories are different than a defendant's Criminal History Category under the U.S. Sentencing Guidelines.

<sup>44</sup> *Id.* at 56.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 57.

<sup>47</sup> *Id.* at 56–57.

<sup>48</sup> *Id.* at 57.

<sup>49</sup> *Id.* at 58.

<sup>50</sup> *Id.* at 59–60.

there was no significant difference in rates of failure to appear between presumption and non-presumption cases.<sup>51</sup>

The study concluded that “the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant’s charge was a good proxy for that defendant’s risk.”<sup>52</sup> The study goes on to state that the presumption has become “an almost de facto detention order in almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.”<sup>53</sup>

## **B. Clarify the Presumptions to Grant Judges More Discretion and Bring the Statute In Line With Case Law.**

Even if certain presumptions are not eliminated, the statutory language should be clarified to ensure that judges have the authority to make individualized, discretionary decisions in presumption cases. This will also promote judicial efficiency, ensuring that courts of appeals are not required to clarify the meaning of the statute for lower courts.

Moreover, the rules in § 3142(e)(2) and (3) should not be called “presumptions” at all, because that is not how they operate. A presumption typically shifts the burden of proof to one party; the presumption in § 3142(e) does not. Instead, the burden of proof/persuasion continues to rest with the government at all times. This presumption merely imposes on the defendant a burden of *production*, requiring the defendant to present some evidence that he/she will not flee and some evidence that he/she will not pose a danger to the community.<sup>54</sup>

Given the confusing language of the statute, courts have struggled with how to interpret and apply the presumption. Tellingly, a seminal case on the issue begins its extensive discussion of the presumption by saying, “We must first decide what the rebuttable presumption means,” and continues, “Congress did not precisely describe how a magistrate will weigh the presumption, along with (or against) other § 3142(g) factors.”<sup>55</sup>

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<sup>51</sup> *Id.* at 60.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 61.

<sup>54</sup> See, e.g., *United States v. Jessup*, 757 F.2d 378, 380–84 (1st Cir. 1985) (holding that the government bears the burden of *persuasion* at all times while a defendant just bears a burden of *production*, which entails producing “some evidence” under § 3142(g)); *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (engaging in lengthy analysis of the different burdens the presumption places on each party, explaining that the defendant rebuts the presumption by producing “some evidence” under § 3142(g), and concluding that after it is rebutted, “the presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)”; *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (holding that the defendant has a burden of production and only needs “to offer some credible evidence contrary to the statutory presumption”; *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (holding that the burden of *persuasion* rests with the government, not the defendant).

<sup>55</sup> *Jessup*, 757 F.2d at 380, 384.

Anecdotal information gathered during our courtwatching reveals that courts rarely understand how the presumption is supposed to operate, resulting in its misapplication in practice. For example, it is rare for judges to follow the two-step process of first analyzing whether the presumption has been rebutted and then weighing the presumption against the other evidence under § 3142(g). In practice, many judges feel that the presumption is a de facto directive by Congress that ties their hands and requires detention. For these reasons, the wording of the presumption should be changed to make it easier for judges to understand how it is supposed to work in practice.

### **C. Eliminate or Substantially Limit The Presumption Of Detention That Specifically Applies to People Charged in Federal Drug and Gun Cases.**

Section 3142(e)(3) contains a presumption of pretrial detention in drug and gun cases that applies in approximately 45% of all federal cases. The AO study found that the presumption applied in 93% of all federal drug cases.<sup>56</sup> The presumption has resulted in high detention rates. From 1995 to 2013, the percentage of people charged with drug crimes who were jailed while awaiting trial increased from 76% to 84%.<sup>57</sup>

It is important to address the drug presumption because drug crimes make up nearly 30% of the federal docket nationwide.<sup>58</sup> In contrast, when the BRA was enacted in 1984, drug crimes made up just 18% of the federal docket.<sup>59</sup> Moreover, in the ensuing years men of color have borne the brunt of our federal drug laws; data shows that they ultimately face longer prison terms than whites arrested for the same offenses with the same prior records.<sup>60</sup>

The drug and gun presumptions should be eliminated or substantially limited because they sweep too broadly. The BRA's drug presumption applies to any drug offense for which the maximum term of imprisonment is ten years or more—not just those that carry a mandatory minimum penalty.<sup>61</sup> This encompasses virtually all federal drug offenses, including all offenses involving any amount of a drug stronger than marijuana and 50 kilograms or more of marijuana.<sup>62</sup>

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<sup>56</sup> Austin, *supra* note 42, at 55.

<sup>57</sup> *Id.* at 53.

<sup>58</sup> U.S. SENT'G COMM'N, *Overview of Federal Cases—Fiscal Year 2018*, at 4, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf).

<sup>59</sup> John Scalia, *Federal Drug Offenders, 1999 with Trends 1984-99*, U.S. Dep't of Justice Bureau of Justice Statistics Special Report at 1 (Aug. 2001), <https://www.csdp.org/research/fdo99.pdf>.

<sup>60</sup> See Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1349 (2014); see also Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 *Judicature* 6 (July–Aug. 2010) (“Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system.”); U.S. SENT'G COMM'N, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 350 (Oct. 2011), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_12.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf) (finding that the cumulative sentencing impacts of criminal history and weapon involvement are “particularly acute for Black drug offenders”).

<sup>61</sup> See 18 U.S.C. § 3142(e)(3)(A).

<sup>62</sup> See 21 U.S.C. §§ 841(b), 960(b).

Because it covers so many drug offenses, the drug presumption applies to kingpins and couriers alike, regardless of culpability. This is not what the Congress that passed the BRA intended. In fact, the drug presumption was not part of the original bill, and was only added later in the drafting stages.<sup>63</sup> Senator Strom Thurmond, the Chair of the Senate Judiciary Committee, remarked that a presumption of detention for “grave drug offense[s]” was needed because “[i]t is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity” and “these persons have both the resources and foreign contacts to escape to other countries with relative ease[.]”<sup>64</sup> But, today, the drug presumption applies equally to a poor person with no criminal history who is alleged to possess only 1 gram of cocaine as it does to a true “kingpin” like Joaquin “El Chapo” Guzman. Likewise, we have heard from judges that the gun presumption is overbroad because it applies to cases in which a person may have possessed a weapon in a way that is only tangentially related to the underlying crime.

## **VII. The Definition of Dangerousness Should Be Modified.**

The statutory language that allows judges to detain anyone who “will endanger the safety of any other person or the community” is vague, overbroad, and results in more detention than is necessary to protect the community. The statute should be modified to comport with the original intent of Congress—that judges use this prong to detain only the “small but identifiable group of particularly dangerous defendants [for] whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.”<sup>65</sup>

### **A. Congress Intended Only a Small Minority of Defendants to Be Detained Based on Dangerousness, and Put Procedural Protections in Place to Ensure That Happened.**

From the Founding until the passage of the Bail Reform Act in 1984, judges were only permitted to detain people in order to mitigate their risk of flight, not on dangerousness grounds. Congress justified its departure from this historic norm in two ways. First, it pointed to the “growing problem of crimes committed by persons on release.”<sup>66</sup> Second, it found that judges were already detaining people they considered dangerous, even without statutory authorization, by setting high money bond that defendants could not pay. The hope was that formally authorizing the detention of dangerous defendants would allow Congress to deal with the problem of crimes committed by defendants released pretrial, and would ensure that detention decisions were happening in a transparent manner.

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<sup>63</sup> See *Senate Report of the Committee on the Judiciary on S. 1554, Subcommittee on the Constitution*, November 3, 1981 (“Senator DeConcini also offered an amendment which was approved 5-0, creating a rebuttable presumption that an individual charged with a grave drug-related offense, for which a maximum penalty of 10 years or more may be imposed, is not likely to appear for trial and is likely to pose a risk to community safety if not detained. The Subcommittee then approved S. 1554, as amended by a recorded vote of 4-0.”).

<sup>64</sup> S. Rep. No. 98-147, at 45–47

<sup>65</sup> S. Rep. No. 98-225, at 6.

<sup>66</sup> *Id.* at 6, 7, 10.

The legislative history of the BRA reveals that Congress expected only a small minority of defendants to be detained as dangerous. The Senate Judiciary Committee Report described the defendants eligible for detention under this prong as the “small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.”<sup>67</sup>

The design of the statute reflected this intention on the part of Congress to carefully limit the pool of people who could be detained as dangerous. For example, as noted above, to detain a person at the Initial Appearance, the government must prove that the defendant satisfies one of the factors laid out in § 3142(f). Generalized dangerousness is not one of the factors. Instead, the government must prove that the person is charged with a particular type of crime or that there is a serious risk that the person will obstruct justice.

Testimony from the Department of Justice in the lead-up to the passage of the BRA reveals a clear understanding that the government would have to carry a heavy burden to successfully detain someone based on dangerousness. Deputy Attorney General James Knapp testified that under this new regime the Department felt detention would “require clear and convincing evidence and . . . require something tangible in a particular case. It is going to have to be something very tangible demonstrated to the judge before he is going to make this finding [that a defendant is so dangerous that detention is required].”<sup>68</sup>

#### **B. Congress Should Modify the BRA’s Definition of Dangerousness.**

To better reflect Congressional intent and ensure that defendants who pose a true danger are being detained, the definition of dangerousness could be modified to require the government to identify an individual’s specific risk of physical harm to another reasonably identified person or persons in order to detain an individual as dangerous.<sup>69</sup>

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<sup>67</sup> *Id.* at 6. The House Judiciary Committee Report described them as “*the dangerous few* who will commit offenses while on bail.” H.R. Rep. No. 98–1121, at 60 (emphasis added).

<sup>68</sup> 1984 Hearings, *supra* note 23, at 223.

<sup>69</sup> See, e.g., *Blackson v. United States*, 897 A.2d 187, 194 (D.C. 2006) (interpreting similar “dangerousness” language in the D.C. bail statute to mean that “[t]he trial court . . . need[s] clear and convincing evidence that appellant pose[s] an identified and articulable threat to an individual or the community and that nothing short of detention [will] reasonably suffice to disable [him] from executing that threat.”).

**Statistics and Data (compiled by the FCIC)**

**MEMO: Race and Federal Pretrial Detention**  
**Statistics**

## Race & Federal Pretrial Detention Statistics

(Prepared by Elisabeth Mayer and Alex Schrader for the Federal Criminal Justice Clinic, 2/3/20)

**Studies consistently find racial disparities in federal pretrial detention.**

**Few empirical studies address the important issue of racial disparities in federal pretrial detention. Even so, all studies find that white defendants are less likely to be detained pretrial than black or Hispanic defendants.<sup>1</sup> Detention rates have increased for all groups, but sizable differences remain between white defendants and defendants of color.**

- *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform*, Stephanie Holmes Didwania (unpublished as of 2/4/20).
  - Detention Rates by Race, All Defendants (Figure 1, p. 22):
    - Black Defendants: 68%
    - Hispanic Defendants: 64%
    - White Defendants: 51%
  - Detention Rates by Race, Male Defendants (Figure 1, p. 22)
    - Black Male Defendants: 74%
    - Hispanic Male Defendants: 69%
    - White Male Defendants: 54%
  - Detention Rates by Race, Female Defendants (Figure 1, p. 22)
    - Black Female Defendants: 30%
    - Hispanic Female Defendants: 39%
    - White Female Defendants: 36%
  - “Particularly, the paper finds that black-white and Hispanic-white disparity in the full data are driven by disparity among *male* defendants (who constitute around 85 percent of all federal defendants).
- Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, Fed. Probation, September 2018, [https://www.uscourts.gov/sites/default/files/82\\_2\\_2\\_0.pdf](https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf).
  - Detention Rates by Race, 2008:
    - White: 33%
    - Black: 55%
    - Hispanic: 79%
  - Detention Rates by Race, 2018:
    - White: 45%
    - Black: 60%
    - Hispanic: 88%
- Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008–2010* (2012), <https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf>.
  - Detention Rates by Race:

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<sup>1</sup> When comparing these studies, please note that each study may have a different methodology or have controlled for different variables.

- White: 35%
    - Black: 57%
    - Hispanic/Latino: 80%
  - “Hispanic defendants had the lowest rates of pretrial release and were less likely to be released than white defendants for all major federal offense categories.” At 10.
    - Practice tip: Cite this study when seeking release of a Latinx client.
  - “Black defendants were also less likely than white defendants to be released pretrial for all major federal offense categories. The differences in pretrial release rates between black and white defendants were particularly large for drug offenses, as white defendants (60%) were more than one and a half times more likely to receive a pretrial release than black defendants (36%).” At 10.
    - Practice tip: Cite this study when seeking release of a black client, especially in drug cases.
- Cassia Spohn, *Race, Gender, and Pretrial Detention: Indirect Effects and Cumulative Disadvantage*, 57 Kan. L. Rev. 879 (2009).
  - Detention Rates by Race:
    - White: 53.3%
    - Black: 67.7%
  - “[Findings that black defendants and male defendants were more likely to be detained] may reflect judges’ interpretation and application of the criteria set forth in the Bail Reform Act. Although the statute does not, of course, allow judges to consider the offender’s race or sex, it does permit them to take the offender’s dangerousness into consideration when deciding between pretrial release and detention.” At 898.
  - “I found that black male offenders were more likely than all other offenders to be held in custody prior to trial and that white female offenders faced lower odds of pretrial detention than did white male offenders.” At 899.
    - Practice tip: Cite this study when seeking release of a black client.
- John Scalia, *Federal Pretrial Release and Detention, 1996* (1999).
  - Detention Rates by Race:
    - White: 19.3%
    - Black: 35.9%
    - Hispanic: 46.7%
- *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 117 (1997).
  - Detention Rates by Race:
    - White: 33.5%
    - Black: 61.5%
    - Hispanic: 74.5%
  - “The most significant factor in the racial and ethnic disparity in bail decisions was the recommendations of pretrial service officers and Assistant U.S. Attorneys.” At 318.
  - “[O]ne factor considered in the detention decision was home ownership--the assumption being that people who do not own homes are less likely to return to court. But such an assumption impacts differently on people of different races and

ethnic groups: in 1996, 33% of white arrestees owned a home, whereas only 7% of African-American arrestees and 9% of Hispanic/Latino arrestees were homeowners.” At 317–18.

- Practice tip: The results of this study are extremely concerning. The law is clear that “the judicial officer may not impose a financial condition that results in the detention of the person.” 18 U.S.C. § 3142(c)(2). Any reliance on property as a condition of release raises a serious concern that the judge is conditioning release on wealth in violation of this provision, and is imposing a financial condition that results in the detention of a person who does not have property to post. Cite this study when seeking release of any client who is a person of color and does not own property, especially if the judge or prosecutor suggests that property would facilitate release.
- *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias Special Committee on Race and Ethnicity*, 64 Geo. Wash. L. Rev. 189 (1996).
  - Detention Rates by Race:
    - White Men: 20%
    - White Women: 20.9%
    - Black Men: 43.6%
    - Black Women: 24%
- Brian A. Reaves, *Pretrial Release of Federal Felony Defendants*, 1990 (1994), <https://www.bjs.gov/content/pub/pdf/prffd.pdf>.
  - Detention Rates by Race:
    - White: 37%
    - Black: 43%
    - Other nonwhite: 31%

# **Federal Pretrial Detention Statistics**

**Table H-15.****U.S. District Courts ---- Pretrial Services Violations Summary Report  
For the 12-Month Period Ending September 30, 2019**

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TOTAL	193,632	53,476	27.6	8,761	16.4	406	505	65	618	8,086	13,544
1ST	6,927	2,333	33.7	221	9.5	11	13	0	10	202	317
ME	545	253	46.4	51	20.2	5	2	0	1	46	62
MA	1,650	659	39.9	73	11.1	3	1	0	4	70	105
NH	544	227	41.7	29	12.8	2	6	0	1	22	35
RI	386	158	40.9	33	20.9	1	4	0	1	32	68
PR	3,802	1,036	27.2	35	3.4	0	0	0	3	32	47
2ND	11,311	5,022	44.4	771	15.4	82	89	19	53	658	1,151
CT	1,295	605	46.7	101	16.7	7	5	2	9	93	153
NY,N	931	294	31.6	52	17.7	2	5	3	16	42	66
NY,E	3,148	1,393	44.3	206	14.8	12	18	4	6	191	345
NY,S	4,093	1,841	45.0	215	11.7	47	37	5	21	154	309
NY,W	1,421	709	49.9	136	19.2	11	19	5	1	119	188
VT	423	180	42.6	61	33.9	3	5	0	0	59	90
3RD	8,536	3,453	40.5	421	12.2	29	27	7	19	404	648
DE	325	73	22.5	2	2.7	0	0	0	0	2	3
NJ	3,027	1,427	47.1	88	6.2	8	5	1	11	80	114
PA,E	2,000	740	37.0	134	18.1	5	7	2	4	132	260
PA,M	1,400	415	29.6	48	11.6	1	3	2	2	42	58
PA,W	1,504	677	45.0	133	19.6	14	12	2	0	133	192
VI	280	121	43.2	16	13.2	1	0	0	2	15	21
4TH	12,096	4,192	34.7	727	17.3	19	54	7	33	657	1,055
MD	1,606	610	38.0	114	18.7	4	8	0	4	111	200
NC,E	1,950	505	25.9	104	20.6	5	15	3	6	83	150
NC,M	725	228	31.4	39	17.1	0	1	0	1	39	47
NC,W	1,248	274	22.0	35	12.8	1	5	1	0	30	38
SC	2,289	834	36.4	119	14.3	2	4	0	8	108	138
VA,E	2,271	975	42.9	110	11.3	2	14	3	9	90	147
VA,W	710	241	33.9	32	13.3	3	3	0	4	27	42
WV,N	663	340	51.3	140	41.2	2	4	0	1	137	244
WV,S	634	185	29.2	34	18.4	0	0	0	0	32	49
5TH	41,557	6,975	16.8	852	12.2	41	30	6	61	791	1,000
LA,E	852	278	32.6	23	8.3	1	2	0	1	20	32
LA,M	445	162	36.4	24	14.8	1	3	0	0	21	33
LA,W	830	205	24.7	6	2.9	1	0	0	0	5	6
MS,N	434	178	41.0	28	15.7	2	2	0	1	25	36
MS,S	1,071	268	25.0	11	4.1	2	2	0	0	7	12
TX,N	2,389	871	36.5	123	14.1	2	5	3	8	116	151
TX,E	1,828	331	18.1	34	10.3	4	3	0	2	35	40
TX,S	16,714	2,451	14.7	251	10.2	28	12	3	24	227	271
TX,W	16,994	2,231	13.1	352	15.8	0	1	0	25	335	419

**Table H-15.****U.S. District Courts ---- Pretrial Services Violations Summary Report  
For the 12-Month Period Ending September 30, 2019**

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
6TH	13,288	4,675	35.2	950	20.3	48	55	2	39	895	1,691
KY,E	1,104	277	25.1	24	8.7	0	0	0	1	23	28
KY,W	921	370	40.2	52	14.1	4	3	0	2	49	67
MI,E	2,444	1,105	45.2	270	24.4	8	8	0	5	265	572
MI,W	770	280	36.4	53	18.9	4	3	0	4	48	67
OH,N	1,957	655	33.5	66	10.1	2	6	1	12	61	109
OH,S	1,855	817	44.0	193	23.6	0	0	0	3	189	341
TN,E	1,826	357	19.6	46	12.9	1	2	0	1	41	54
TN,M	942	314	33.3	104	33.1	22	15	0	2	90	193
TN,W	1,469	500	34.0	142	28.4	7	18	1	9	129	260
7TH	7,659	2,787	36.4	498	17.9	21	36	4	7	466	829
IL,N	2,837	1,226	43.2	228	18.6	13	25	2	4	211	397
IL,C	679	190	28.0	26	13.7	0	1	0	0	25	30
IL,S	631	219	34.7	56	25.6	2	6	1	1	49	89
IN,N	970	306	31.5	19	6.2	3	1	0	1	16	21
IN,S	1,464	391	26.7	87	22.3	0	0	0	1	88	143
WI,E	749	365	48.7	68	18.6	3	3	1	0	63	126
WI,W	329	90	27.4	14	15.6	0	0	0	0	14	23
8TH	13,966	4,318	30.9	1,296	30.0	67	107	16	52	1,219	2,673
AR,E	1,852	723	39.0	243	33.6	22	19	2	26	223	420
AR,W	687	124	18.0	9	7.3	0	0	0	3	7	7
IA,N	830	194	23.4	76	39.2	3	12	1	2	70	116
IA,S	1,098	295	26.9	120	40.7	2	12	10	1	113	183
MN	941	360	38.3	71	19.7	4	9	1	3	63	96
MO,E	3,165	890	28.1	406	45.6	14	7	0	7	400	1,294
MO,W	2,285	589	25.8	133	22.6	5	9	1	2	123	213
NE	1,177	407	34.6	74	18.2	6	12	1	2	66	94
ND	792	307	38.8	44	14.3	2	4	0	6	40	57
SD	1,139	429	37.7	120	28.0	9	23	0	0	114	193
9TH	51,567	12,095	23.5	1,941	16.0	33	40	0	253	1,806	2,722
AK	441	134	30.4	23	17.2	1	2	0	1	21	29
AZ	21,165	2,164	10.2	455	21.0	2	15	0	75	433	571
CA,N	2,472	1,149	46.5	151	13.1	0	1	0	11	145	287
CA,E	2,014	714	35.5	61	8.5	2	0	0	9	58	65
CA,C	6,028	2,165	35.9	218	10.1	10	4	0	26	203	294
CA,S	11,880	2,521	21.2	474	18.8	7	7	0	104	409	604
HI	539	280	51.9	42	15.0	0	0	0	0	41	59
ID	763	219	28.7	47	21.5	1	1	0	4	46	59
MT	776	277	35.7	48	17.3	2	3	0	1	48	60
NV	1,589	559	35.2	83	14.8	0	1	0	7	81	101
OR	1,350	672	49.8	164	24.4	6	3	0	7	153	282
WA,E	914	339	37.1	74	21.8	1	1	0	3	71	126
WA,W	1,448	762	52.6	80	10.5	1	2	0	5	76	143
GUAM	150	120	80.0	17	14.2	0	0	0	0	17	37
NM,I	38	20	52.6	4	20.0	0	0	0	0	4	5

**Table H-15.****U.S. District Courts ---- Pretrial Services Violations Summary Report  
For the 12-Month Period Ending September 30, 2019**

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
10TH	12,696	3,081	24.3	465	15.1	10	11	0	60	436	625
CO	1,280	413	32.3	50	12.1	1	1	0	31	44	62
KS	1,182	412	34.9	84	20.4	2	1	0	3	83	118
NM	6,621	999	15.1	119	11.9	0	0	0	13	120	128
OK,N	563	207	36.8	68	32.9	0	0	0	3	66	135
OK,E	268	55	20.5	3	5.5	0	0	0	1	2	3
OK,W	1,223	502	41.0	66	13.1	1	2	0	2	59	89
UT	1,192	375	31.5	66	17.6	6	7	0	4	54	83
WY	367	118	32.2	9	7.6	0	0	0	3	8	7
11TH	14,029	4,545	32.4	619	13.6	45	43	4	31	552	833
AL,N	1,131	352	31.1	56	15.9	7	4	0	4	50	86
AL,M	392	172	43.9	20	11.6	0	0	0	5	16	27
AL,S	722	233	32.3	46	19.7	4	3	0	1	40	49
FL,N	757	305	40.3	30	9.8	6	3	3	1	24	41
FL,M	3,409	958	28.1	154	16.1	10	12	0	5	144	219
FL,S	3,879	1,321	34.1	156	11.8	0	0	0	3	149	198
GA,N	1,861	655	35.2	85	13.0	8	11	1	8	69	115
GA,M	970	351	36.2	51	14.5	8	8	0	4	40	71
GA,S	908	198	21.8	21	10.6	2	2	0	0	20	27

NOTE: This table excludes data for the District of Columbia and includes transfers received.

**Table H-14A.**  
**U.S. District Courts—Pretrial Services Release and Detention, Excluding Immigration Cases**  
**For the 12-Month Period Ending September 30, 2019**

Circuit and District	Cases <sup>1</sup>	Detained and Never Released <sup>2</sup>		Released <sup>3</sup>	
		Total	Pct.	Total	Pct.
<b>TOTAL</b>	<b>62,803</b>	<b>38,332</b>	<b>61.0</b>	<b>24,471</b>	<b>39.0</b>
<b>1ST</b>	<b>2,240</b>	<b>1,285</b>	<b>57.4</b>	<b>955</b>	<b>42.6</b>
ME	233	85	36.5	148	63.5
MA	619	319	51.5	300	48.5
NH	221	97	43.9	124	56.1
RI	116	54	46.6	62	53.4
PR	1,051	730	69.5	321	30.5
<b>2ND</b>	<b>3,300</b>	<b>1,518</b>	<b>46.0</b>	<b>1,782</b>	<b>54.0</b>
CT	444	162	36.5	282	63.5
NY,N	320	203	63.4	117	36.6
NY,E	660	289	43.8	371	56.2
NY,S	1,248	601	48.2	647	51.8
NY,W	438	176	40.2	262	59.8
VT	190	87	45.8	103	54.2
<b>3RD</b>	<b>2,901</b>	<b>1,454</b>	<b>50.1</b>	<b>1,447</b>	<b>49.9</b>
DE	81	51	63.0	30	37.0
NJ	1,145	488	42.6	657	57.4
PA,E	738	415	56.2	323	43.8
PA,M	285	169	59.3	116	40.7
PA,W	550	287	52.2	263	47.8
VI	102	44	43.1	58	56.9
<b>4TH</b>	<b>5,089</b>	<b>2,833</b>	<b>55.7</b>	<b>2,256</b>	<b>44.3</b>
MD	606	349	57.6	257	42.4
NC,E	937	614	65.5	323	34.5
NC,M	349	207	59.3	142	40.7
NC,W	467	340	72.8	127	27.2
SC	605	273	45.1	332	54.9
VA,E	1,196	527	44.1	669	55.9
VA,W	276	164	59.4	112	40.6
WV,N	308	126	40.9	182	59.1
WV,S	345	233	67.5	112	32.5

**Table H-14A. (September 30, 2019—Continued)**

Circuit and District	Cases <sup>1</sup>	Detained and Never Released <sup>2</sup>		Released <sup>3</sup>	
		Total	Pct.	Total	Pct.
<b>5TH</b>	<b>12,497</b>	<b>8,849</b>	<b>70.8</b>	<b>3,648</b>	<b>29.2</b>
LA,E	264	164	62.1	100	37.9
LA,M	127	68	53.5	59	46.5
LA,W	232	148	63.8	84	36.2
MS,N	184	79	42.9	105	57.1
MS,S	459	299	65.1	160	34.9
TX,N	985	579	58.8	406	41.2
TX,E	658	474	72.0	184	28.0
TX,S	5,017	3,752	74.8	1,265	25.2
TX,W	4,571	3,286	71.9	1,285	28.1
	<b>5,142</b>	<b>2,970</b>	<b>57.8</b>	<b>2,172</b>	<b>42.2</b>
<b>6TH</b>	<b>458</b>	<b>298</b>	<b>65.1</b>	<b>160</b>	<b>34.9</b>
KY,E	355	195	54.9	160	45.1
KY,W	747	310	41.5	437	58.5
MI,E	314	182	58.0	132	42.0
MI,W	787	473	60.1	314	39.9
OH,N	715	310	43.4	405	56.6
OH,S	872	667	76.5	205	23.5
TN,E	277	137	49.5	140	50.5
TN,M	617	398	64.5	219	35.5
TN,W	<b>2,573</b>	<b>1,486</b>	<b>57.8</b>	<b>1,087</b>	<b>42.2</b>
IL,N	834	398	47.7	436	52.3
IL,C	248	180	72.6	68	27.4
IL,S	282	161	57.1	121	42.9
IN,N	337	240	71.2	97	28.8
IN,S	559	370	66.2	189	33.8
WI,E	227	102	44.9	125	55.1
WI,W	86	35	40.7	51	59.3

**Table H-14A. (September 30, 2019—Continued)**

Circuit and District	Cases <sup>1</sup>	Detained and Never Released <sup>2</sup>		Released <sup>3</sup>	
		Total	Pct.	Total	Pct.
<b>8TH</b>	<b>5,523</b>	<b>3,512</b>	<b>63.6</b>	<b>2,011</b>	<b>36.4</b>
AR,E	473	202	42.7	271	57.3
AR,W	236	176	74.6	60	25.4
IA,N	328	207	63.1	121	36.9
IA,S	470	300	63.8	170	36.2
MIN	359	194	54.0	165	46.0
MO,E	1,588	1,150	72.4	438	27.6
MO,W	858	595	69.3	263	30.7
NE	426	249	58.5	177	41.5
ND	251	134	53.4	117	46.6
SD	534	305	57.1	229	42.9
<b>9TH</b>	<b>14,592</b>	<b>9,381</b>	<b>64.3</b>	<b>5,211</b>	<b>35.7</b>
AK	168	105	62.5	63	37.5
AZ	2,904	1,718	59.2	1,186	40.8
CA,N	730	309	42.3	421	57.7
CA,E	487	313	64.3	174	35.7
CA,C	1,417	647	45.7	770	54.3
CA,S	6,290	5,149	81.9	1,141	18.1
HI	195	74	37.9	121	62.1
ID	285	168	58.9	117	41.1
MT	324	162	50.0	162	50.0
NV	375	192	51.2	183	48.8
OR	423	188	44.4	235	55.6
WA,E	267	144	53.9	123	46.1
WA,W	659	198	30.0	461	70.0
GUAM	56	11	19.6	45	80.4
NM,I	12	3	25.0	9	75.0

**Table H-14A. (September 30, 2019—Continued)**

Circuit and District	Cases <sup>1</sup>	Detained and Never Released <sup>2</sup>		Released <sup>3</sup>	
		Total	Pct.	Total	Pct.
<b>10TH</b>	<b>3,795</b>	<b>2,199</b>	<b>57.9</b>	<b>1,596</b>	<b>42.1</b>
CO	463	254	54.9	209	45.1
KS	428	245	57.2	183	42.8
NM	1,300	763	58.7	537	41.3
OK,N	281	144	51.2	137	48.8
OK,E	119	87	73.1	32	26.9
OK,W	514	221	43.0	293	57.0
UT	535	390	72.9	145	27.1
WY	155	95	61.3	60	38.7
<b>11TH</b>	<b>5,151</b>	<b>2,845</b>	<b>55.2</b>	<b>2,306</b>	<b>44.8</b>
AL,N	361	170	47.1	191	52.9
AL,M	95	44	46.3	51	53.7
AL,S	239	104	43.5	135	56.5
FL,N	354	168	47.5	186	52.5
FL,M	1,193	705	59.1	488	40.9
FL,S	1,613	931	57.7	682	42.3
GA,N	531	244	46.0	287	54.0
GA,M	326	160	49.1	166	50.9
GA,S	439	319	72.7	120	27.3

NOTE: This table excludes data for the District of Columbia and includes transfers received.

NOTE: Includes data reported for previous periods on Table H-9.

<sup>1</sup> Data represents defendants whose cases were activated during the 12-month period. Excludes dismissals, cases in which release is not possible within 90 days,

<sup>2</sup> Includes data reported for previous periods as "never released."

<sup>3</sup> Includes data reported for previous periods as "later released," "released and later detained," and "never detained."

Table H-3A.

U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release Excluding Immigration Cases For the 12-Month Period Ending September 30, 2019

Circuit and District	Cases Activated	Type of PSO <sup>1</sup> Recommendation Made <sup>3</sup>						Type of AUSA <sup>2</sup> Recommendation Made <sup>3</sup>							
		PSO Recommended		Detention		Release		Release Without Supervision		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
<b>TOTAL</b>	<b>108,163</b>	<b>62,125</b>	<b>57.4</b>	<b>34,148</b>	<b>55.0</b>	<b>27,977</b>	<b>45.0</b>	<b>0</b>	<b>.0</b>	<b>62,170</b>	<b>57.5</b>	<b>40,285</b>	<b>64.8</b>	<b>21,885</b>	<b>35.2</b>
<b>1ST</b>	<b>2,730</b>	<b>2,088</b>	<b>76.5</b>	<b>1,212</b>	<b>58.0</b>	<b>876</b>	<b>42.0</b>	<b>0</b>	<b>.0</b>	<b>2,076</b>	<b>76.0</b>	<b>1,509</b>	<b>72.7</b>	<b>567</b>	<b>27.3</b>
ME	298	189	63.4	80	42.3	109	57.7			189	63.4	122	64.6	67	35.4
MA	760	526	69.2	237	45.1	289	54.9			525	69.1	295	56.2	230	43.8
NH	280	200	71.4	95	47.5	105	52.5			198	70.7	98	49.5	100	50.5
RI	143	122	85.3	66	54.1	56	45.9			123	86.0	78	63.4	45	36.6
PR	1,249	1,051	84.1	734	69.8	317	30.2			1,041	83.3	916	88.0	125	12.0
<b>2ND</b>	<b>3,942</b>	<b>3,437</b>	<b>87.2</b>	<b>1,561</b>	<b>45.4</b>	<b>1,876</b>	<b>54.6</b>	<b>0</b>	<b>.0</b>	<b>3,415</b>	<b>86.6</b>	<b>1,991</b>	<b>58.3</b>	<b>1,424</b>	<b>41.7</b>
CT	534	436	81.6	192	44.0	244	56.0			424	79.4	246	58.0	178	42.0
NY,N	442	334	75.6	232	69.5	102	30.5			329	74.4	233	70.8	96	29.2
NY,E	811	725	89.4	315	43.4	410	56.6			720	88.8	424	58.9	296	41.1
NY,S	1,403	1,326	94.5	552	41.6	774	58.4			1,325	94.4	691	52.2	634	47.8
NY,W	536	452	84.3	185	40.9	267	59.1			451	84.1	276	61.2	175	38.8
VT	216	164	75.9	85	51.8	79	48.2			166	76.9	121	72.9	45	27.1
<b>3RD</b>	<b>3,583</b>	<b>3,086</b>	<b>86.1</b>	<b>1,612</b>	<b>52.2</b>	<b>1,474</b>	<b>47.8</b>	<b>0</b>	<b>.0</b>	<b>3,078</b>	<b>85.9</b>	<b>1,775</b>	<b>57.7</b>	<b>1,303</b>	<b>42.3</b>
DE	133	89	66.9	58	65.2	31	34.8			89	66.9	59	66.3	30	33.7
NJ	1,399	1,274	91.1	611	48.0	663	52.0			1,274	91.1	649	50.9	625	49.1
PA,E	866	782	90.3	422	54.0	360	46.0			782	90.3	484	61.9	298	38.1
PA,M	445	297	66.7	191	64.3	106	35.7			291	65.4	190	65.3	101	34.7
PA,W	592	554	93.6	291	52.5	263	47.5			553	93.4	339	61.3	214	38.7
VI	148	90	60.8	39	43.3	51	56.7			89	60.1	54	60.7	35	39.3
<b>4TH</b>	<b>6,411</b>	<b>4,466</b>	<b>69.7</b>	<b>2,675</b>	<b>59.9</b>	<b>1,791</b>	<b>40.1</b>	<b>0</b>	<b>.0</b>	<b>4,551</b>	<b>71.0</b>	<b>3,144</b>	<b>69.1</b>	<b>1,407</b>	<b>30.9</b>
MD	668	629	94.2	421	66.9	208	33.1			627	93.9	430	68.6	197	31.4
NCE	1,088	746	68.6	516	69.2	230	30.8			746	68.6	626	83.9	120	16.1
NC,M	412	366	88.8	215	58.7	151	41.3			364	88.3	258	70.9	106	29.1
NC,W	607	499	82.2	360	72.1	139	27.9			495	81.5	396	80.0	99	20.0
SC	948	556	58.6	244	43.9	312	56.1			548	57.8	281	51.3	267	48.7
VA,E	1,512	830	54.9	366	44.1	464	55.9			907	60.0	538	59.3	369	40.7
VA,W	406	265	65.3	192	72.5	73	27.5			256	63.1	194	75.8	62	24.2
WV,N	372	297	79.8	155	52.2	142	47.8			296	79.6	157	53.0	139	47.0
WV,S	398	278	69.8	206	74.1	72	25.9			312	78.4	264	84.6	48	15.4

Table H-3A. (September 30, 2019—Continued)

Circuit and District	Cases Activated	Type of PSO <sup>1</sup> Recommendation Made <sup>3</sup>						Type of AUSA <sup>2</sup> Recommendation Made <sup>3</sup>							
		PSO Recommended		Detention		Release		Release Without Supervision		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
<b>5TH</b>	<b>26,777</b>	<b>11,539</b>	<b>43.1</b>	<b>7,167</b>	<b>62.1</b>	<b>4,372</b>	<b>37.9</b>	<b>0</b>	<b>.0</b>	<b>11,508</b>	<b>43.0</b>	<b>8,263</b>	<b>71.8</b>	<b>3,245</b>	<b>28.2</b>
LA,E	333	270	81.1	155	57.4	115	42.6		.0	269	80.8	184	68.4	85	31.6
LA,M	186	126	67.7	57	45.2	69	54.8		.0	126	67.7	74	58.7	52	41.3
LA,W	435	236	54.3	139	58.9	97	41.1		.0	227	52.2	145	63.9	82	36.1
MS,N	225	173	76.9	76	43.9	97	56.1		.0	173	76.9	82	47.4	91	52.6
MS,S	587	442	75.3	341	77.1	101	22.9		.0	443	75.5	334	75.4	109	24.6
TX,N	1,084	1,024	94.5	555	54.2	469	45.8		.0	1,010	93.2	714	70.7	296	29.3
TX,E	934	676	72.4	474	70.1	202	29.9		.0	674	72.2	559	82.9	115	17.1
TX,S	11,479	3,991	34.8	2,481	62.2	1,510	37.8		.0	3,989	34.8	2,836	71.1	1,153	28.9
TX,W	11,514	4,601	40.0	2,889	62.8	1,712	37.2		.0	4,597	39.9	3,335	72.5	1,262	27.5
<b>6TH</b>	<b>6,518</b>	<b>5,001</b>	<b>76.7</b>	<b>2,973</b>	<b>59.4</b>	<b>2,028</b>	<b>40.6</b>	<b>0</b>	<b>.0</b>	<b>5,098</b>	<b>78.2</b>	<b>3,429</b>	<b>67.3</b>	<b>1,669</b>	<b>32.7</b>
KY,E	642	441	68.7	307	69.6	134	30.4		.0	443	69.0	319	72.0	124	28.0
KY,W	446	325	72.9	208	64.0	117	36.0		.0	326	73.1	232	71.2	94	28.8
MI,E	1,045	815	78.0	365	44.8	450	55.2		.0	814	77.9	431	52.9	383	47.1
MI,W	414	324	78.3	174	53.7	150	46.3		.0	324	78.3	227	70.1	97	29.9
OH,N	1,020	803	78.7	498	62.0	305	38.0		.0	810	79.4	548	67.7	262	32.3
OH,S	883	706	80.0	260	36.8	446	63.2		.0	706	80.0	359	50.8	347	49.2
TN,E	996	877	88.1	698	79.6	179	20.4		.0	877	88.1	729	83.1	148	16.9
TN,M	367	172	46.9	141	82.0	31	18.0		.0	260	70.8	189	72.7	71	27.3
TN,W	705	538	76.3	322	59.9	216	40.1		.0	538	76.3	395	73.4	143	26.6
<b>7TH</b>	<b>3,221</b>	<b>2,610</b>	<b>81.0</b>	<b>1,478</b>	<b>56.6</b>	<b>1,132</b>	<b>43.4</b>	<b>0</b>	<b>.0</b>	<b>2,605</b>	<b>80.9</b>	<b>1,859</b>	<b>71.4</b>	<b>746</b>	<b>28.6</b>
IL,N	1,080	925	85.6	415	44.9	510	55.1		.0	927	85.8	594	64.1	333	35.9
IL,C	285	253	88.8	200	79.1	53	20.9		.0	252	88.4	212	84.1	40	15.9
IL,S	347	227	65.4	127	55.9	100	44.1		.0	227	65.4	158	69.6	69	30.4
IN,N	372	341	91.7	250	73.3	91	26.7		.0	342	91.9	275	80.4	67	19.6
IN,S	658	557	84.7	358	64.3	199	35.7		.0	550	83.6	458	83.3	92	16.7
WI,E	304	224	73.7	92	41.1	132	58.9		.0	224	73.7	125	55.8	99	44.2
WI,W	175	83	47.4	36	43.4	47	56.6		.0	83	47.4	37	44.6	46	55.4
<b>8TH</b>	<b>6,711</b>	<b>5,518</b>	<b>82.2</b>	<b>3,485</b>	<b>63.2</b>	<b>2,033</b>	<b>36.8</b>	<b>0</b>	<b>.0</b>	<b>5,491</b>	<b>81.8</b>	<b>4,249</b>	<b>77.4</b>	<b>1,242</b>	<b>22.6</b>
AR,E	686	462	67.3	217	47.0	245	53.0		.0	467	68.1	281	60.2	186	39.8
AR,W	340	249	73.2	204	81.9	45	18.1		.0	245	72.1	207	84.5	38	15.5
IA,N	446	338	75.8	225	66.6	113	33.4		.0	339	76.0	248	73.2	91	26.8
IA,S	550	470	85.5	281	59.8	189	40.2		.0	470	85.5	355	75.5	115	24.5
MN	457	389	85.1	203	52.2	186	47.8		.0	375	82.1	258	68.8	117	31.2
MO,E	1,691	1,581	93.5	1,167	73.8	414	26.2		.0	1,594	94.3	1,338	83.9	256	16.1
MO,W	998	870	87.2	534	61.4	336	38.6		.0	856	85.8	715	83.5	141	16.5
NE	595	433	72.8	274	63.3	159	36.7		.0	420	70.6	310	73.8	110	26.2
ND	345	196	56.8	90	45.9	106	54.1		.0	194	56.2	113	58.2	81	41.8
SD	603	530	87.9	290	54.7	240	45.3		.0	531	88.1	424	79.8	107	20.2

**Table H-3A. (September 30, 2019—Continued)**

Circuit and District	Cases Activated	Type of PSO <sup>1</sup> Recommendation Made <sup>3</sup>						Type of AUSA <sup>2</sup> Recommendation Made <sup>3</sup>							
		PSO Recommended		Detention		Release		Release Without Supervision		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
<b>9TH</b>	<b>32,846</b>	<b>15,248</b>	<b>46.4</b>	<b>6,870</b>	<b>45.1</b>	<b>8,378</b>	<b>54.9</b>	<b>0</b>	<b>0</b>	<b>15,177</b>	<b>46.2</b>	<b>8,296</b>	<b>54.7</b>	<b>6,881</b>	<b>45.3</b>
AK	188	168	89.4	118	70.2	50	29.8	.0	.0	164	87.2	133	81.1	31	18.9
AZ	16,929	2,899	17.1	1,754	60.7	1,135	39.3	.0	.0	2,880	17.0	2,144	74.4	736	25.6
CA,N	825	773	93.7	326	42.2	447	57.8	.0	.0	779	94.4	499	64.1	280	35.9
CA,E	629	581	92.4	397	68.3	184	31.7	.0	.0	580	92.2	486	83.8	94	16.2
C,A,C	2,036	1,806	88.7	1,008	55.8	798	44.2	.0	.0	1,800	88.4	1,182	65.7	618	34.3
C,A,S	8,671	6,325	72.9	1,962	31.0	4,363	69.0	.0	.0	6,261	72.2	2,204	35.2	4,057	64.8
HI	233	185	79.4	53	28.6	132	71.4	.0	.0	185	79.4	123	66.5	62	33.5
ID	428	259	60.5	139	53.7	120	46.3	.0	.0	272	63.6	206	75.7	66	24.3
MT	434	328	75.6	236	72.0	92	28.0	.0	.0	328	75.6	236	72.0	92	28.0
NV	584	462	79.1	244	52.8	218	47.2	.0	.0	461	78.9	308	66.8	153	33.2
OR	572	455	79.5	229	50.3	226	49.7	.0	.0	455	79.5	289	63.5	166	36.5
W,A,E	430	214	49.8	139	65.0	75	35.0	.0	.0	212	49.3	188	88.7	24	11.3
W,A,W	808	728	90.1	237	32.6	491	67.4	.0	.0	725	89.7	257	35.4	468	64.6
GUAM	63	61	96.8	21	34.4	40	65.6	.0	.0	61	96.8	32	52.5	29	47.5
NM,I	16	14	87.5	7	50.0	7	50.0	.0	.0	14	87.5	9	64.3	5	35.7
<b>10TH</b>	<b>7,927</b>	<b>3,726</b>	<b>47.0</b>	<b>2,233</b>	<b>59.9</b>	<b>1,493</b>	<b>40.1</b>	<b>0</b>	<b>0</b>	<b>3,724</b>	<b>47.0</b>	<b>2,576</b>	<b>69.2</b>	<b>1,148</b>	<b>30.8</b>
CO	658	426	64.7	203	47.7	223	52.3	.0	.0	418	63.5	288	68.9	130	31.1
KS	529	420	79.4	268	63.8	152	36.2	.0	.0	420	79.4	291	69.3	129	30.7
NM	4,760	1,296	27.2	795	61.3	501	38.7	.0	.0	1,294	27.2	888	68.6	406	31.4
OK,N	370	284	76.8	159	56.0	125	44.0	.0	.0	284	76.8	180	63.4	104	36.6
OK,E	136	123	90.4	80	65.0	43	35.0	.0	.0	123	90.4	97	78.9	26	21.1
OK,W	680	517	76.0	215	41.6	302	58.4	.0	.0	524	77.1	250	47.7	274	52.3
UT	585	532	90.9	421	79.1	111	20.9	.0	.0	532	90.9	464	87.2	68	12.8
WY	209	128	61.2	92	71.9	36	28.1	.0	.0	129	61.7	118	91.5	11	8.5
<b>11TH</b>	<b>7,497</b>	<b>5,406</b>	<b>72.1</b>	<b>2,882</b>	<b>53.3</b>	<b>2,524</b>	<b>46.7</b>	<b>0</b>	<b>0</b>	<b>5,447</b>	<b>72.7</b>	<b>3,194</b>	<b>58.6</b>	<b>2,253</b>	<b>41.4</b>
AL,N	656	359	54.7	196	54.6	163	45.4	.0	.0	359	54.7	209	58.2	150	41.8
AL,M	125	97	77.6	47	48.5	50	51.5	.0	.0	97	77.6	51	52.6	46	47.4
AL,S	427	222	52.0	121	54.5	101	45.5	.0	.0	220	51.5	135	61.4	85	38.6
FL,N	481	370	76.9	167	45.1	203	54.9	.0	.0	370	76.9	204	55.1	166	44.9
FL,M	1,780	1,263	71.0	598	47.3	665	52.7	.0	.0	1,263	71.0	833	66.0	430	34.0
FL,S	2,270	1,742	76.7	940	54.0	802	46.0	.0	.0	1,826	80.4	840	46.0	986	54.0
GA,N	735	589	80.1	303	51.4	286	48.6	.0	.0	576	78.4	380	66.0	196	34.0
GA,M	448	319	71.2	175	54.9	144	45.1	.0	.0	295	65.8	197	66.8	98	33.2
G,A,S	575	445	77.4	335	75.3	110	24.7	.0	.0	441	76.7	345	78.2	96	21.8

NOTE: This table excludes data for the District of Columbia and includes transfers received.

<sup>1</sup> PSO = Pretrial Services Officer.

<sup>2</sup> AUSA = Assistant U.S. Attorney.

<sup>3</sup> Excludes dismissals and cases in which release is not possible within 90 days.

**Table H-9A.****U.S. District Courts ---- Pretrial Services****Detention Summary: Days, Average and Median****For the 12-Month Period Ending September 30, 2019**

Circuit and District	Total Number of Defendants	Total Number of Days Detained	Average Number of Days Detained	Median Number of Days Detained
TOTAL	122,777	31,030,248	253	185
1ST	4,586	2,102,277	458	213
ME	356	83,367	234	166
MA	904	269,468	298	213
NH	335	83,046	247	202
RI	208	78,767	378	295
PR	2,783	1,587,629	570	406
2ND	6,028	3,188,528	529	259
CT	670	238,402	355	245
NY,N	639	224,152	350	205
NY,E	1,463	1,294,023	884	471
NY,S	2,136	994,681	465	344
NY,W	826	360,609	436	273
VT	294	76,661	260	190
3RD	4,363	1,758,426	403	261
DE	195	65,885	337	256
NJ	1,169	379,834	324	228
PA,E	1,123	455,344	405	266
PA,M	880	442,917	503	399
PA,W	821	367,766	447	309
VI	175	46,680	266	164
4TH	7,675	1,822,333	237	173
MD	935	287,090	307	241
NC,E	1,415	369,514	261	206
NC,M	456	74,025	162	147
NC,W	938	227,963	243	216
SC	1,404	423,037	301	232
VA,E	1,207	179,108	148	135
VA,W	468	102,452	218	173
WV,N	388	73,099	188	154
WV,S	464	86,045	185	169
5TH	31,117	5,596,858	180	185
LA,E	529	220,654	417	296
LA,M	276	78,940	286	191
LA,W	530	154,635	291	196
MS,N	222	42,963	193	179
MS,S	799	234,199	293	185
TX,N	1,383	319,588	231	179
TX,E	1,387	351,537	253	222
TX,S	11,818	1,973,183	166	129
TX,W	14,173	2,221,159	156	126

**Table H-9A.****U.S. District Courts ---- Pretrial Services****Detention Summary: Days, Average and Median****For the 12-Month Period Ending September 30, 2019**

Circuit and District	Total Number of Defendants	Total Number of Days Detained	Average Number of Days Detained	Median Number of Days Detained
6TH	8,554	2,356,721	276	189
KY,E	842	197,435	234	185
KY,W	568	145,592	256	179
MI,E	1,259	381,512	303	189
MI,W	505	84,527	167	143
OH,N	1,309	312,683	238	188
OH,S	1,019	296,057	290	235
TN,E	1,459	415,389	284	228
TN,M	619	253,025	408	287
TN,W	974	270,501	277	217
7TH	4,783	1,843,394	385	249
IL,N	1,552	774,815	499	298
IL,C	488	171,213	350	270
IL,S	430	101,202	235	181
IN,N	660	286,835	434	249
IN,S	1,079	361,502	335	261
WI,E	355	110,248	310	211
WI,W	219	37,579	171	161
8TH	9,893	2,791,367	282	182
AR,E	1,046	369,334	353	277
AR,W	463	94,453	204	182
IA,N	641	139,885	218	174
IA,S	920	317,589	345	218
MN	562	138,867	247	200
MO,E	2,230	502,111	225	182
MO,W	1,832	711,362	388	301
NE	827	199,034	240	158
ND	537	128,714	239	180
SD	835	190,018	227	164
9TH	28,434	6,098,299	214	174
AK	330	105,296	319	264
AZ	11,448	1,626,805	142	108
CA,N	1,261	1,167,389	925	339
CA,E	1,038	363,830	350	259
CA,C	2,047	827,050	404	229
CA,S	8,265	928,349	112	69
HI	245	62,507	255	167
ID	564	118,444	210	166
MT	555	106,519	191	174
NV	785	300,953	383	305
OR	742	216,483	291	212
WA,E	572	129,282	226	143
WA,W	521	112,794	216	176
GUAM	44	21,614	491	95
NM,I	17	10,984	646	7

**Table H-9A.**  
**U.S. District Courts ---- Pretrial Services**  
**Detention Summary: Days, Average and Median**  
**For the 12-Month Period Ending September 30, 2019**

Circuit and District	Total Number of Defendants	Total Number of Days Detained	Average Number of Days Detained	Median Number of Days Detained
10TH	9,576	1,738,704	182	180
CO	827	181,425	219	172
KS	745	263,981	354	209
NM	5,765	786,182	136	49
OK,N	349	54,694	156	131
OK,E	173	34,210	197	188
OK,W	606	131,433	216	187
UT	848	214,143	252	217
WY	263	72,636	276	125
11TH	7,768	1,733,341	223	172
AL,N	716	145,230	202	172
AL,M	180	56,885	316	217
AL,S	537	112,758	209	140
FL,N	388	58,801	151	113
FL,M	2,079	438,895	211	155
FL,S	1,827	261,834	143	113
GA,N	855	409,014	478	230
GA,M	517	117,062	226	180
GA,S	669	132,862	198	181

NOTE: This table excludes data for the District of Columbia, and includes transfers received

# **Memo: Personal and Social Harms of Pretrial Detention**

## **The Personal and Social Harms of Pretrial Detention**

(Prepared by Sam Taxy for the Federal Criminal Justice Clinic, 2/22/19)

### **I. Pretrial detention endangers the community because it causes crime.**

One of the two statutory rationales for pretrial detention is protection of the community. The evidence shows, however, that pretrial detention is more likely to increase crime than prevent it. First, pretrial detention makes people more likely to commit future crimes in the future than they otherwise would have been.

- Paul Heaton, et al., [\*The Downstream Consequences of Misdemeanor Pretrial Detention\*](#), 69 Stan. L. Rev. 711 (2017).
  - “Although detention reduces defendants' criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects.” At 718.
  - Findings reported on Table 8, page 768
- Arpit Gupta, et al., [\*The Heavy Costs of High Bail: Evidence from Judge Randomization\*](#), 45 J. of Legal Studies 471 (2016).
  - “We document that the assessment of money bail increases recidivism in our sample period by 6-9 percent yearly.” At 473.
  - Results reported on Table 10, and at 494 – 96.
  - “[O]ur results suggest that the assessment of money bail yields substantial negative externalities in terms of additional crime.” At 496
- Christopher T. Lowenkamp, *The Hidden Costs of Pretrial Detention* 18–28 (Laura and John Arnold Foundation, 2013) available at: [https://static.prisonpolicy.org/scans/ljaf/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://static.prisonpolicy.org/scans/ljaf/LJAF_Report_hidden-costs_FNL.pdf)
  - Regression shows strong correlation between detention and future offending
  - The longer someone is held pretrial, the worse this effect is. A 24-hour hold is much less criminogenic than a 30-day hold. After 30 days, the effect levels off. At 22–23.
  - [Note that this study has an admittedly weaker methodology than the others.]

On the flip side, federal defendants are [extremely unlikely](#) to commit a new violent crime while on bond. Ninety-nine percent of federal defendants released on bond are not arrested for a new violent crime. Even among people the PTRR identifies as being at the most serious risk of re-offense, over 97% are not rearrested for a new violent crime while on bond. Thomas H. Cohen, et al., [\*Revalidating the Federal Pretrial Risk Assessment Instrument: A Research Summary\*](#), 82(2) Federal Probation 23, 27 (2018). In other words, detaining people makes them more likely to become criminals, something that all the data shows they otherwise would not have done.

Even the research that is the least supportive of this argument confirms that pretrial detention is criminogenic and there is no public safety benefit to pretrial detention.

Will Dobbie, et al., [\*The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges\*](#), 108(2) Amer. Econ. Rev. 201 (2018).

- “[W]e find that pretrial detention reduces employment and increases future crime through a criminogenic effect.” at 204.
- The criminogenic effects are cancelled out by the incapacitative effects of detention itself. at 204–05.
- But ultimately concludes, “Releasing more defendants will likely increase social welfare.” At 204.

Emily Leslie & Nolan G. Pope, [\*The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments\*](#), 60 J. of Law and Econ. 529.

- Same results as Dobbie—pretrial detention is criminogenic, but also incapacitative. At 531.
- “[L]ower crime rates should not be tallied as a benefit of pretrial detention.” At 555.

While ambiguous, these studies underscore the futility and harmfulness of pretrial detention in the federal context. First, given the low rates of rearrest in the federal system, any single pretrial detention is unlikely to actually prevent *any* violent crime; in order to catch these needles in the haystack, courts would have to detain people en masse. Second, the best pro-detention argument is that it’s basically a wash. Given *Salerno* and the clear and convincing standard, that’s not enough. Third, the Dobbie, *et al.*, article ultimately concludes that “[r]eleasing more defendants will likely increase social welfare.” At 204. Finally, as discussed below, there are all kinds of other social costs associated with pretrial detention.

There is also an emerging body of research showing that a pretrial detainee who is convicted and sentenced to prison is more likely to engage in misconduct in prison than someone who had not been detained before trial. This likewise corroborates the research that shows that jails are criminogenic and traumatic (discussed below). Elisa L. Toman et al., [\*Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order\*](#), 45 Criminal Justice and Behavior 316, 327 (2018).

## **II. Pretrial detention hurts defendants and the community in a host of other ways.**

The deleterious effects of pretrial detention on defendants, their loved ones, and communities is well documented in the news and caselaw. *See, e.g.*, Nick Pinto, “[The Bail Trap](#),” *The New York Times Magazine*, (Aug. 13, 2015 pg. 38); Dobbie, *et al.*, at 202 n.1 quoting *id.*; Norimitsu Onishi, “[In California, County Jails Face Bigger Load](#),” *New York Times*, (Aug. 6, 2012, A8) (contrasting prison amenities with jails); *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) (“Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle.”); *see also* Benjamin Weiser & Ali Winston, “[Brooklyn Federal Jail Had Heat Failures Weeks Before Crisis, Employees Say](#),” *New York Times* (Feb. 5, 2019) (“They’re keeping [the federal jail] together with Scotch tape,” Judge [Nicholas G.] Garaufis added,

comparing the jail to an old, patched-up car. For years, he said, the jail’s physical state had been deteriorating...”).

The sociological research on pretrial release confirms that these horror stories are not aberrational: People who are detained pretrial are more likely to lose their jobs, homes, and health than those who are released. Pretrial detention also hurts families, with serious potentially long-term consequences for children. These harmful effects also feed on each other. For example, losing a job might then lead to residential instability, both of which harm families and are criminogenic.

**A. Pretrial detention causes people to lose their jobs and reduces their income, even years down the line.**

Will Dobbie, et al., [\*The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges\*](#), 108(2) *Amer. Econ. Rev.* 201 (2018).

- Found pretrial release led to much better employment outcomes in the formal employment market. People detained pretrial are less likely to become employed or have any income, and have lower incomes if they are employed. The order of magnitude is large; for example, the probability of employment increase by 20-25%. At 227.
- These results hold over time—the benefits of pretrial release can be seen in labor market outcomes years down the line.<sup>1</sup> At 204.
- The authors conduct a cost-benefit analysis, which shows that the net social benefits of pretrial release are between \$55,143 and \$99,124 *per defendant*. *Id.*

Alexander M. Holsinger & Kristi Holsinger, [\*Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes\*](#), 82(2) *Federal Probation* 39 (2018).

- Survey of some pretrial detainees in a county system in the Midwest. At 41.
- Of those detained for *less than three days*, 37.9% still report job loss, change, or other job-related negative consequences. 32% report that they’re less financially stable. At 42.
- Of those detained for 3 days or more, 76.1% report job loss, change, or other job-related negative consequences. 44.2% that they’re less financially stable. At 42.

**B. Pretrial detention causes people to experience housing instability and homelessness.**

Alexander M. Holsinger & Kristi Holsinger, [\*Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes\*](#), 82(2) *Federal Probation* 39 (2018).

- Of those detained *less than three days*, 29.9% reported that their residential situation became less stable. At 42.

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<sup>1</sup> The authors hypothesize that the causal pathway here is that detention leads to worse case outcomes (more likely to be found guilty, more likely to be incarcerated than those released pretrial). Criminal conviction is very stigmatizing, and this leads to the long-term detriments. Regardless of the causal pathway, the long-term harms are striking.

- Of those detained 3 days or more, 37.2% reported that their residential situation became less stable. At 42.

Amanda Geller & Mariah A. Curtis, *[A Sort of Homecoming: Incarceration and Housing Security of Urban Men](#)*, 40 Social Science Research 1196 (2011).

- Study examines people who are already at risk for housing insecurity, and finds that in this population, getting incarcerated (jail or prison) leads to 69% higher odds of housing insecurity. At 1203.

**C. Pretrial detentions harms families, particularly children. Children of incarcerated parents are more likely to become homeless, do poorly in school, or exhibit antisocial behavior than those without incarcerated parents. Thus, the harms of pretrial detention reverberate years down the line.**

Amanda Geller & Allyson Walker Franklin, *[Paternal Incarceration and the Housing Security of Urban Mothers](#)*, 76 Journal of Family and Marriage 411 (2014).

- “women whose partners were recently incarcerated faced odds of [housing] insecurity nearly 50% higher (OR=1.49) than women whose partners were not recently incarcerated.” At 420
  - The paper makes clear throughout that this is about mothers and fathers
  - The effects seem to only be statistically significant for partners that cohabitated.

Christopher Wildeman, *[Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment](#)*, 651 The ANNALS of the American Academy of Political and Social Science 74 (2013)

- “The results show that recent paternal incarceration is associated with a significant increase (at the .01 level) in the risk of child homelessness. According to the results from this model, recent paternal incarceration increases the odds of child homelessness by 95 percent [].” at 88
  - No significant increase in homeless for maternal incarceration

Joseph Murray, et al., *[Children’s Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis](#)*, 138(2) Psychological Bulletin 175 (2012)

- Collects all of the studies on the effects of parental incarceration
- Finds statistically significant effects of parental incarceration on anti-social behavior and poor education performance—kids with incarcerated parents behave antisocially and do worse in school. At 186.
  - “The association between parental incarceration and children’s antisocial behavior was significant and fairly large.” At 186.
  - “Parental incarceration was significantly associated with poor educational performance.” At 186.

**D. Jails offer inadequate healthcare and programming. People detained pretrial are unsafe, even in the first few days of detention.**

Laura M. Maruschak, et al., [\*Medical Problems of State and Federal Prisoners and Jail Inmates\*](#), Bureau of Justice Statistics (2014).

- People in jail are less likely to get diagnostic or medical services (than prisoners). At 9
- People in jail are more likely report that their health got worse while in jail (than prisoners). At 11.
- The findings about “jails” are about local jails, however. See at 12.

Faye S. Taxman, et al., [\*Drug Treatment Services for Adult Offenders: The State of the State\*](#), 32 *Journal of Substance Abuse Treatment* 239 (2007).

- Prisons are much more likely to offer substance abuse programming than jails and are of poorer quality. At 247
- This is true of pretty much every other kind of diagnostic or treatment tool that could be used for an incarcerated population, including health screening, mental health assessments, family therapy, social and life skills development, and cognitive behavioral treatment. At 249.
- But federal facilities were excluded from this study. At 244.

Elisa L. Toman et al., [\*Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order\*](#), 45 *Criminal Justice and Behavior* 316 (2018).

- Good literature review drawing together the theoretical and practical reasons why jails generally have worse programming and higher-risk populations than prisons. Also draws together the negative impacts of poor programming starkly. At 317–19.

Margaret Noonan, et al., [\*Mortality in Local Jails and State Prisons, 2000–14—Statistical Tables\*](#), Bureau of Justice Statistics (2015).

- 40% of people who die in local jails die in the first 7 days. At 8.

Allen J. Beck, et al., [\*Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09\*](#), Bureau of Justice Statistics (2010).

- 38% of inmate-on-inmate sexual assaults in jails with male victims first occur within the first 3 days. At 22.
- 45% of sexual misconduct involving a guard and a male victim in jail first occur within the first 3 days; and over 30% within the first 24 hours. At 23.
- For both inmate-on-inmate and guard perpetrated sexual violence with a female victim in jail, over 20% first occur within the first 3 days. At 22–23.
- The survey did not appear to reach people in federal jails. At 6.

# **Articles Regarding Pretrial Detention in the Federal System**

# Examining Federal Pretrial Release Trends over the Last Decade

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**WHEN A PERSON** (i.e., a defendant) is charged with committing a federal offense, judicial officials have the discretion to determine whether that defendant should be released pretrial, subject to the criteria required by the Eighth Amendment and under 18 U.S.C. §3142 of the federal statute. Under both guiding documents, the right to bail is clear and paramount, with detention reserved only for rare cases where “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” (see 18 U.S.C. §3142). When ordering release, judicial officials are required to determine why a personal recognizance bond will not suffice and what conditions, if any, should be set to allow for federal pretrial release (18 U.S.C. §3142).

The decision to release a defendant into the community or detain the defendant until his or her case is disposed is of crucial importance. Not only can a defendant’s liberty, and therefore, constitutional rights, be constrained by the detention decision, but research has shown that subsequent case outcomes

(including the likelihood of conviction, severity of sentence, and long-term recidivism) can be negatively affected when pretrial detention is mandated (Gupta, Hansman, & Frenchman, 2016; Heaton, Mayson, & Stevenson, 2017; Oleson, VanNostrand, Lowenkamp, Cadigan, & Wooldredge, 2014; Lowenkamp, VanNostrand, & Holsinger, 2013). Additionally, the pretrial release decision is often the defendant’s first interaction with the federal criminal justice system and can set a positive or a negative tone that may affect his or her cooperation with the system and attitude going into post-conviction supervision, if ultimately convicted. Hence, the process by which federal defendants are released or detained pretrial represents an important component of the federal criminal justice system.

Since the early 1980s, the federal criminal justice system has undergone numerous changes that have influenced pretrial release decisions and patterns. Specifically, it has moved from a system that primarily focused on fraud, regulatory, or other offenses within the original jurisdiction of the federal government to one directed at prosecuting defendants for crimes involving drug distribution, firearms and weapon possession, and immigration violations (VanNostrand & Keebler, 2009). As the offenses charged within the federal system changed, so too did the legal structure that undergirded pretrial release and detention decisions. The advent of the Pretrial Services Act of 1982 and more

importantly the Bail Reform Act of 1984 constructed a legal framework where judges were instructed to weigh several elements when considering a defendant’s flight risk; in addition, for the first time in federal law, judges were allowed to weigh potential danger to the community (AO, 2015). Moreover, the 1984 Act contained provisions involving the presumption of detention that shifted the burden of proof from the prosecution to the defendant in proving the appropriateness of pretrial release for certain offenses (Austin, 2017). How and to what extent these changes manifested themselves in federal pretrial release decisions and violation outcomes has been periodically examined, but there has been little recent research on this topic.

In this article we will update recent federal pretrial trends by examining key patterns within the federal pretrial system during a ten-year period spanning fiscal years 2008 through 2017. Initially, this paper will detail major legal/structural changes that occurred within the federal pretrial system since the 1980s that have influenced the pretrial release process. Next, a brief summary of prior studies examining federal pretrial trends will be provided for background purposes. Included in this overview will be a discussion of how rising pretrial detention rates led to the development of an actuarial tool—the federal Pretrial Risk Assessment (PTRA) instrument—meant to guide release recommendations and decisions. Afterwards, we will explicate research questions and the data used to examine federal

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pretrial trends. Major findings will then be presented and the report will conclude by discussing the study's implications for the federal pretrial system. It should be noted that, for the most part, illegal aliens will be omitted from the study, since most of these defendants are never released pretrial (see Table 1).

## Overview of Federal Pretrial Legislation

In 1982, following the perceived success of the 10 pretrial demonstration districts, Ronald Reagan signed the Pretrial Services Act of 1982 (Byrne & Stowel, 2007). This legislation established pretrial services agencies within each federal judicial district (with the exception of the District of Columbia) and authorized federal pretrial and probation officers to collect and report on information pertaining to release decisions, make release recommendations, supervise released defendants, and report instances of noncompliance (see 18 U.S.C. §3152). The Act's primary purpose was to increase pretrial release rates by diverting defendants who would ordinarily have been detained into pretrial supervision programs (Byrne & Stowel, 2007).

Shortly after the passage of the Pretrial Services Act of 1982, Congress passed the Bail Reform Act of 1984 (see 18 U.S.C. §3141-3150). This Act marked a significant turning point in the federal pretrial system and laid the groundwork for current detention rates. The Bail Reform Act of 1984 included two major modifications: 1) the inclusion of the danger prong, in addition to flight risk, as a consideration in making the release decision, and 2) two presumptions for detention where, instead of assuming a defendant would be granted pretrial release, the assumption was that he or she would be detained (Austin, 2017). Moreover, the 1984 Act identified several factors federal judges should consider when making pretrial release/detention decisions; many of these factors became integrated into the federal bail report.<sup>2</sup>

<sup>2</sup> The factors are: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the financial resources of the defendant; (4) the character and physical and mental condition of the defendant; (5) family ties; (6) employment status; (7) community ties and length of residency in the community; (8) record of appearances at court proceedings; (9) prior convictions; (10) whether, at the time of the current offense, the defendant was under criminal justice supervision; and (11) the nature and seriousness of the danger to the community or any person that the defendant's release would pose. (AO, 2015); see also 18 U.S.C. §3141 - 3150 for a detailed list of factors courts

Crucially, the Bail Reform Act of 1984 created two scenarios in which the assumed right to pretrial release was reversed, with the burden shifting to the defendant to prove he or she was not a risk of nonappearance or danger to the community. Creating the presumptions—before the advent of actuarial pretrial risk assessment—was Congress' effort to identify high-risk cases in which defendants would be required to overcome an assumption in favor of pretrial detention (Austin, 2017). It should be noted that the presumptions were also created in the midst of the "War on Drugs"; therefore, the cases targeted by these presumptions were largely drug offenses. At the time the presumptions were created, cases in the federal system were primarily fraud and regulatory and therefore, the presumptions did not affect a majority of cases (VanNostrand & Keebler, 2009). However, as drug prosecutions increased to the point where they became the largest case category in the federal system besides immigration, the presumption evolved into a more important component of the detention decision (Austin, 2017).

## Overview of Prior Studies Examining Federal Pretrial Trends

Since the passage of the Pretrial Services Act of 1982 and the Bail Reform Act of 1984, little research has been conducted into whether the objectives of these laws were met and what potential unanticipated consequences might have arisen. The limited research conducted to date has been primarily initiated by the Administrative Office of the U.S. Courts (AO) Pretrial and Probation system itself, the Bureau of Justice Statistics (BJS) under the Department of Justice, and a few outside academic sources.

In 2007, James Byrne and Jacob Stowell published a paper in *Federal Probation* analyzing the impact of the Federal Pretrial Services Act of 1982. In their paper, they observed that the Act led to significant increases in the number of people under federal pretrial supervision. The authors concluded that this result occurred because of defendants being placed on pretrial supervision who would previously have been released on their own recognizance. Second, they concluded that the Act failed to reduce the rate of pretrial detention. In fact, between 1982 and 2004, federal pretrial detention rates rose from 38 percent to 60 percent (including illegals). In explaining

should consider.

these changes, the authors hypothesized that the risk profile for federal defendants changed significantly in the intervening years, with large increases in drug and immigration cases. However, the detention rates went up across all sub-categories, including defendants with no prior criminal record and those who were employed. The authors concluded that the rising detention rate cannot be explained by the changing risk profile, but rather by changes in how the system regarded pretrial release and those entitled to it (Byrne & Stowel, 2007).

In 2013, BJS published a special report on pretrial detention and misconduct from 1995 to 2010. The findings were similar to those reported by Byrne and Stowell. Notably, from 1995 to 2010, the federal detention rate rose from 59 percent to 75 percent (including illegals). The study concluded that the rise in detention was driven primarily by a 664 percent increase in immigration cases, from 5,103 in 1995 to 39,001, in 2010 (Cohen, 2013). Despite this increase in immigration cases, the study also found that detention rates went up across case types, with detention rates for immigration cases increasing from 86 percent to 98 percent, from 76 percent to 84 percent for drug offenses, and from 66 percent to 86 percent for weapons offenses.

## Development of the Federal Pretrial Risk Assessment Instrument

As these and other similar studies emerged, various entities within the federal system became concerned with the rising federal detention rate. In response to this concern, the Office of the Federal Detention Trustee, in collaboration with the AO, embarked on a project to "identify statistically significant and policy relevant predictors of pretrial risk outcome [and] to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community ..." (VanNostrand & Keebler, 2009: 3).

One of the key recommendations of this study was that the federal system create an actuarial risk assessment tool to inform pretrial release decisions (Cadigan, Johnson, & Lowenkamp, 2012; VanNostrand & Keebler, 2009). The aim of the tool was to assist officers in making their recommendations by cutting through beliefs and implicit biases and presenting an objective assessment of an individual defendant's risk of nonappearance, danger to the community, and/or committing a technical violation that resulted in

revocation (VanNostrand & Keebler, 2009). The tool also had to be short enough to be completed as part of the pretrial investigation process, which was often limited to a few hours from start to finish.

The Pretrial Risk Assessment Tool (PTRA) was created in 2009 by analyzing about 200,000 federal defendants released pretrial between fiscal years 2001 and 2007 from 93 of the 94 federal districts (Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). Using a variety of multivariate models, the final tool included 11 questions measuring a defendant's criminal history, instant conviction offense, age, educational attainment, employment status, residential ownership, substance abuse problems, and citizenship status.<sup>3</sup> Responses to the questions generates a raw score ranging from 0-15 which then translates into five risk categories, with Category 1 being the lowest risk and Category 5 the highest. Once trained and certified, a federal pretrial services officer could complete the tool in under five minutes.

Although the PTRA was initially deployed to the field in fiscal year 2010 and both the initial and revalidation studies showed this tool to be an excellent predictor of pretrial violation outcomes (see Cadigan et al., 2012; Lowenkamp & Whetzel, 2009),<sup>4</sup> implementation by the districts was slow, as it was perceived to be replacing, not augmenting, officer discretion. For example, the percentage of defendants (excluding illegals) with PTRA assessments rose from 35 percent in fiscal year 2011 to 77 percent in fiscal year 2013 (data not shown in table). However, by 2014, implementation of the tool had grown sufficiently to be used for outcome measurement purposes. At present, nearly 90 percent of defendants with cases activated in federal district courts have PTRA assessments. While the PTRA is now used nearly universally in the federal pretrial system, it is unclear whether its deployment has been associated with changes in federal pretrial release patterns. We intend to explore whether previously documented trajectories of increasing detention rates have changed with the PTRA's implementation.

<sup>3</sup> For a list of specific items in the PTRA, see Cadigan et al. (2012) and Lowenkamp and Whetzel (2009).

<sup>4</sup> It should be noted that the PTRA was recently revalidated off a larger sample of officer-completed PTRA assessments ( $n = \text{approx. } 85,000$ ). Findings from this study are highlighted in the current *Federal Probation* issue (see Cohen, Lowenkamp & Hicks, 2018).

## Present Study

The present study will detail major trends occurring within the federal pretrial system over a 10-year period encompassing fiscal years 2008 through 2017. Specifically, we will explore the following research issues about the decision to release defendants charged with federal crimes:

- What percentage of federal defendants are being released pretrial and how have federal release patterns changed over the last 10 years? To what extent are federal pretrial release decisions influenced by citizenship status? How do pretrial officer and U.S. Attorney release recommendations align with actual release decisions?
- Are defendants more or less likely to be released depending upon their most serious offense charges (e.g., drugs, weapons/firearms, financial, sex, etc.), and have release rates changed over time within the specific offense categories? Relatedly, have the types of offenses associated with higher release rates increased or decreased during the study time frame?
- Have the criminal history profiles of federal defendants (e.g., prior arrest and/or conviction history) become more or less severe since 2008? To what extent does criminal history influence release decisions, and have release rates changed or remained the same over time for defendants with similar criminal history profiles?
- Has implementation of the PTRA been associated with an increasing, decreasing, or stabilizing pretrial release rate? If national federal pretrial release rates have remained stable or continued to decline, have districts incorporating this instrument in their bail reports witnessed increases in their release rates?
- Last, this study will investigate trends in the percentage of released defendants who committed pretrial violations. Defendants are considered to have garnered a pretrial violation if they were revoked while on pretrial release, had a new criminal rearrest, or failed to make a court appearance (i.e., FTA). The next section examines the data used in the current study.

### Data and Method

Data for this study were obtained from 93<sup>5</sup>

<sup>5</sup> It should be noted that although there are 94 federal judicial districts, the District of Columbia (D.C.) has its own separate pretrial system. Hence, the federal judicial district in D.C. is omitted from

U.S. federal judicial districts and comprised 531,809 defendants, excluding illegals, with cases activated within the federal pretrial system between fiscal years 2008 through 2017. These pretrial activations were drawn from a larger dataset containing 1.1 million pretrial defendants with cases opened between fiscal years 2008 and 2017. From this larger dataset, all pretrial defendants classified as illegal immigrants were excluded from the analysis ( $n \text{ lost} = 459,442$ ). The illegal aliens were removed because, as will be shown, very few illegal aliens were placed on pretrial release. Non-citizen defendants considered legal aliens, however, were included in the study. Legal aliens encompass non-citizen defendants with the status of humanitarian migrant (e.g., refugee), permanent resident (e.g., green card), or temporary resident (e.g., in U.S. for travel, educational, or employment purposes). In addition, we removed all courtesy transfer cases ( $n \text{ lost} = 72,183$ ) with the exception of rule 5 cases with a full bail report. Last, we omitted cases that fell into the following classification categories: collaterals, diversions, juveniles, material witnesses, and writs ( $n \text{ lost} = 41,975$ ). The transfers and these other cases were removed because they did not involve defendants being charged with new offenses within the federal system. Rather, they encompass case events in which the defendant was transferred from another district, was serving as a material witness, was placed into a diversion program, or was currently incarcerated on a prior conviction, nullifying the bail decision on the current federal matter. Hence, the report focuses on only those defendants prosecuted by U.S. Attorneys for new offenses in the federal court system and who had a reasonable expectation of bail.<sup>6</sup>

Data for this study were extracted from the Probation and Pretrial Services Automated Case Tracking System (PACTS), the case management system used by federal probation and pretrial officers. PACTS provides a rich dataset containing detailed information on the most serious offense charges, criminal history profiles, release/detention decisions, and violation outcomes for released defendants. The current study primarily uses descriptive statistics to explore pretrial release and violation trends in federal district courts.

this analysis.

<sup>6</sup> Because of the use of these filters, the pretrial release rates displayed in this report will most likely differ from those published by other federal statistical agencies.

## Results

### Overall Pretrial Trends

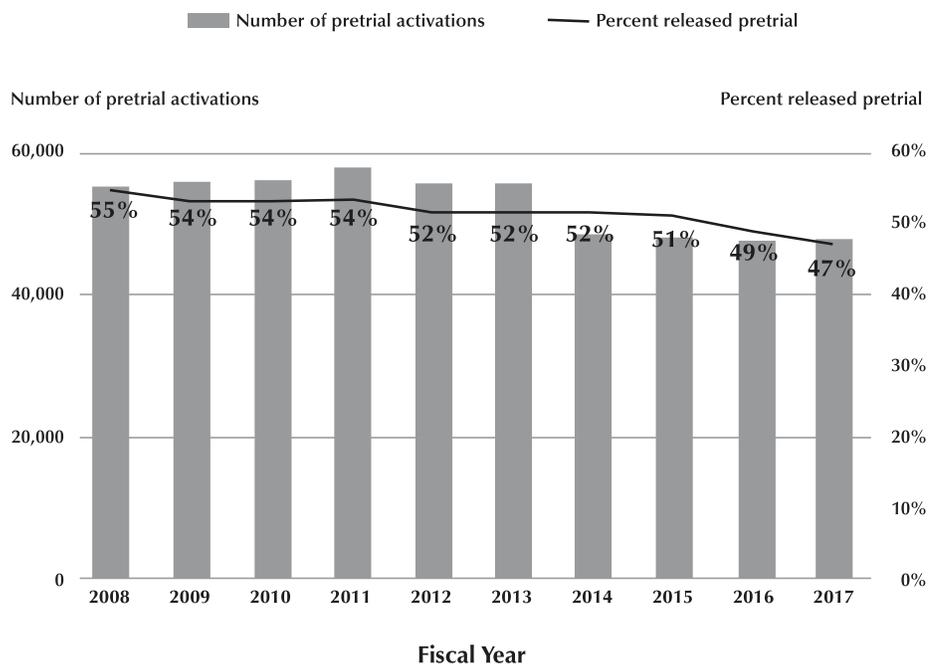
In general, the number of defendants with pretrial activations and the percentage released pretrial has declined during the 10-year period spanning fiscal years 2008 through 2017. Between fiscal years 2008

through 2017, the number of defendants with pretrial activations declined by 13 percent, from 55,578 cases in 2008 to 48,181 cases in 2017 (see Figure 1). Interestingly, most of this decline occurred between fiscal years 2013 and 2014, when budget sequestration cuts were enacted. In this report, defendants with

pretrial activations include U.S. or naturalized citizens or legal aliens charged with federal offenses. Illegal aliens are omitted from most of this analysis, with the exception of Table 1.

In addition to declining caseloads, the percentage of defendants released pretrial decreased by 8 percentage points from 55 percent in 2008 to 47 percent in 2017. As will be shown, many factors can influence pretrial release trends, including defendant criminal history profiles and most serious offense charges. If the criminal history profiles of federal defendants are becoming more serious, for example, that trend could exert downward pressures on federal pretrial release rates. Hence, we calculated an adjusted pretrial release rate that accounts for changes in the criminal history profiles and most serious offense charges filed in the federal courts. When adjusted by criminal history and offense severity charges, the federal pretrial release rates declined from 54 percent in 2008 to 50 percent in 2017, representing a 4-percentage point decrease (data not shown in table).

**FIGURE 1**  
Number of federal defendants (excluding illegals) with pretrial activations and percent released pretrial in U.S. district courts, FY 2008–2017



Note: Includes U.S./naturalized citizen defendants or legal aliens with cases opened between fiscal years 2008 - 2017.

**TABLE 1.**  
Percent of U.S. or naturalized citizens, legal aliens, or illegal aliens released pretrial in cases activated within U.S. district courts, FY 2008–2017

Fiscal year	U.S. or naturalized citizen		Legal aliens		Illegal aliens	
	Number of defendants	Percent released	Number of defendants	Percent released	Number of defendants	Percent released
2008	50,366	55.9%	4,300	44.9%	38,931	--
2009	51,348	55.2%	3,887	39.9%	46,599	4.5%
2010	51,040	55.8%	4,405	37.1%	52,206	2.6%
2011	53,111	55.6%	4,769	34.6%	52,274	2.3%
2012	50,917	53.2%	4,641	35.3%	50,086	1.6%
2013	51,075	53.3%	4,311	36.5%	49,777	1.5%
2014	44,911	52.6%	3,742	37.5%	48,184	1.4%
2015	44,353	52.0%	3,436	38.0%	43,714	1.6%
2016	43,319	50.2%	3,850	36.4%	40,602	1.8%
2017	43,768	48.1%	3,380	33.8%	37,069	1.7%

Note: The release rates for illegal aliens for fiscal year 2008 not shown because of a change in the way pretrial release was coded for these cases. Prior to 2009, some border districts were coding illegal aliens released to U.S. Immigration and Customs Enforcement (ICE) as released even if they remained detained until deportation. After 2008, the coding methodology was changed so that only illegal aliens released into the community were coded as released.

### Pretrial Release and Defendant Citizenship Status

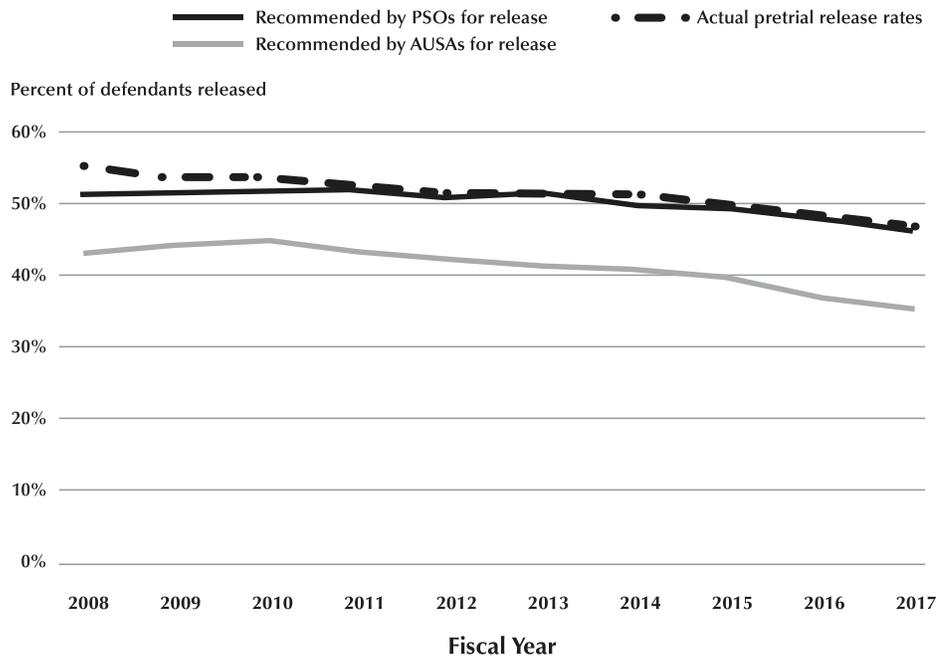
A defendant's citizenship status, including whether they are a U.S. or naturalized citizen, legal alien, or illegal alien, is strongly associated with the release decision. As shown in Table 1, very few illegal aliens are released pretrial; the release rates for illegal aliens has remained unchanged at about 2 percent since 2011. Given their low release rates, illegal aliens are excluded from the remainder of this report. If illegal aliens were included, the overall release rate would have declined from 38 percent in 2008 to 28 percent in 2017 (see table H-14 at the Administrative Office of the U.S. Courts statistics webpage: <http://www.uscourts.gov/data-table-numbers/h-14>).

In comparison to illegal aliens, the release rates for legal aliens or U.S. born and naturalized citizens are substantially higher, although these release rates have also declined over the past decade. For example, over half of U.S. born or naturalized citizens were released pretrial between fiscal years 2008 through 2015, while by 2017, the release rate for these defendants had dropped to 48 percent.

### Pretrial Release Recommendations

At the bail hearing, pretrial officers (PSOs) and U.S. Attorneys (AUSAs) make recommendations to release or detain defendants pretrial and these recommendations can influence release decisions. Over the past decade, PSOs

**FIGURE 2**  
**Percent of federal defendants (excluding illegals) recommended for release by PSOs and AUSAs and actually released pretrial in cases activated within U.S. district courts, 2008–2017**



Note: Includes U.S./naturalized citizen defendants or legal aliens with cases opened between fiscal years 2008 - 2017.

have consistently recommended defendants for release at higher rates than AUSAs (see Figure 2). In 2008, PSOs recommended 51 percent of defendants for release, while the release recommendation rate for AUSAs was 43 percent. By 2017, 48 percent of defendants were recommended for release by PSOs compared to 36 percent of defendants recommended for release by AUSAs. The actual release rates have generally tracked the PSO release recommendation rates between 2008 to 2017.

#### *Pretrial Release and Most Serious Offense Charge*

The decision to release a defendant pretrial varies substantially by the most serious offense charges. For instance, about four-fifths of defendants charged with financial crimes were released pretrial, and this release rate has remained relatively stable over the past decade (see Table 2). By comparison, approximately a third or less of defendants charged with weapons/firearms or violence offenses were released pretrial during the study coverage period. While financial offenses have higher release rates than most federal offenses, it is notable that fewer of these cases are being activated within the federal pretrial system. From 2008 through 2017, the number of

pretrial activations involving financial offenses declined by 34 percent. Conversely, there were increases in pretrial activations among several offense categories with relatively low or declining release rates, including weapons/firearms and sex offenses.

Some offense categories have witnessed appreciable decreases in their pretrial release rates. For example, from 2008 through 2017, defendants charged with sex offenses saw a 15-percentage-point decline in their pretrial release rates, from 55 percent to 40 percent. In addition, defendants charged with weapons/firearms offenses have witnessed an 8-percentage-point drop in their release rates, from 36 percent to 29 percent.

While drug cases continue to remain one of the largest offense categories within the federal system, the number of pretrial activations involving these offenses has declined by 15 percent between 2008 and 2017. Interestingly, the percentage of drug defendants released pretrial decreased by 4 percentage points, from 45 percent in 2008 to 41 percent in 2016 and 2017.

#### *Pretrial Release and Defendant Criminal History Profiles*

According to the 1984 Bail Reform Act,

judges and magistrates are required to consider a defendant's criminal history when making pretrial release decisions. Following the Act's guidance, defendants with more serious criminal histories should have a lower probability of pretrial release than those with less serious criminal histories. Hence, a worsening criminal history profile for federal defendants could influence the overall federal pretrial release rates.

There is mixed evidence that the criminal history profiles of federal defendants have become more serious during the last 10 years. This is displayed by figures 3 and 4, which show changes in the arrest and conviction history of federal defendants from 2008 through 2017. The percentage of defendants with 5 or more prior felony arrests increased from 21 percent in 2008 to 26 percent in 2017 (see Figure 3). Moreover, between 2008 and 2017, the percentage of defendants with 5 or more prior felony convictions increased from 8 percent to 10 percent (see Figure 4). Although the portion of defendants with extensive criminal histories has grown in the federal system, there have been few changes in the overall percentages of defendants with any prior felony arrest or conviction history. For example, since 2012, the percentage of defendants with no prior felony arrest history has remained stable at about 45 percent to 46 percent. Similar patterns are manifested when examining trends in the percentage of defendants without any prior felony convictions.

The relationship between criminal history and pretrial release is illustrated by the federal data, which show defendants with serious or lengthy criminal histories having lower pretrial release rates than those with less serious criminal backgrounds. In 2008, 77 percent of defendants with no felony arrest history were released pretrial, 40 percent of defendants with two to four prior felony arrests were released pretrial, and 23 percent of defendants with five or more prior felony arrests were released pretrial (see Table 3). By 2017, the percentage of defendants released pretrial was 64 percent for defendants with no prior felony arrests, 54 percent released for defendants with two to four prior felony arrests, and 21 percent released for defendants with 5 or more prior felony arrests.

An interesting pattern involves the steeper declines in pretrial release rates for defendants with less severe criminal history profiles between 2008 and 2017. There was a 13-percentage-point decline in the pretrial release rates for defendants with no prior felony arrest

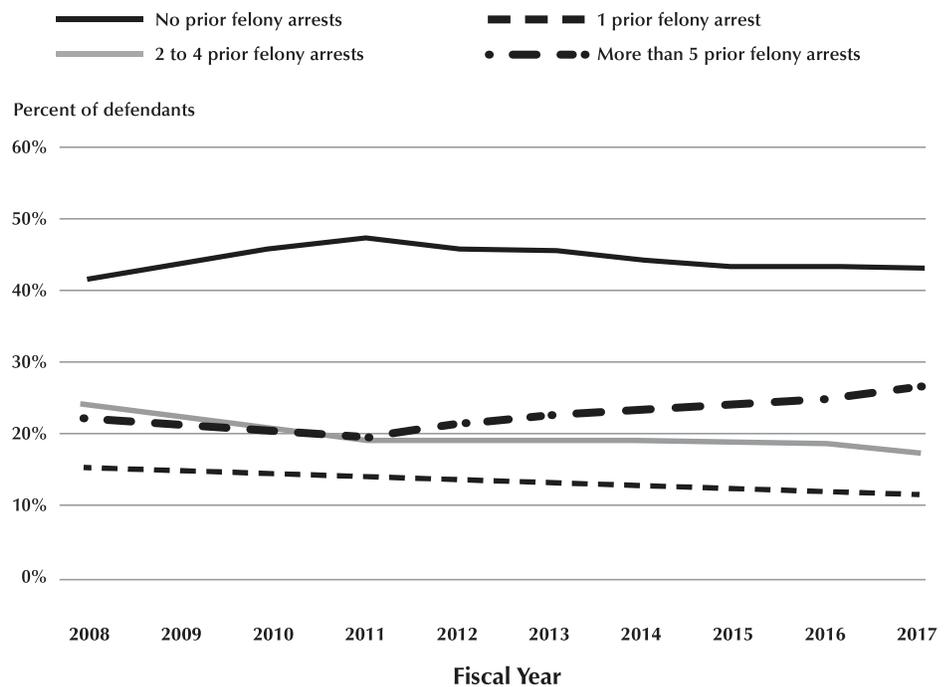
history, from 77 percent in 2008 to 64 percent in 2017. In comparison, the probability of being released pretrial for defendants with 5 or more prior felony arrests declined from 23 percent in 2008 to 21 percent in 2017, representing a 2-percentage-point decrease. The larger declines in pretrial release rates for defendants with less serious criminal histories also occurred among the other criminal history measures, including number of prior felony convictions, most serious conviction history, and court appearance record.

Table 4 examines pretrial release trends by the defendant's most serious offense charges and criminal history profile. In a pattern similar to that shown in the previous table, the release rates declined to a greater extent for defendants with less serious criminal histories than for their counterparts with more severe criminal histories. This finding was particularly apparent for defendants charged with weapons/firearms, sex, or drug offenses. The percentage of defendants charged with weapons/firearms offenses with no felony arrest history released pretrial decreased from 75 percent in 2008 to 49 percent in 2017. In contrast, the pretrial release rates for weapons/firearm defendants with five or more prior arrests declined from 19 percent in 2008 to 17 percent in 2017. A similar trend occurred for defendants charged with sex offenses. Sex offenders without any prior felony arrests saw their pretrial release rates decline from 70 percent in 2008 to 52 percent in 2017. In

comparison, the percentage of sex offenders with five or more prior felony arrests released pretrial decreased from 19 percent to 12 percent between 2008 and 2017. Last, the percentage of drug defendants without any record of prior felony arrests released pretrial

declined by 10 percentage points from 63 percent in 2008 to 53 percent in 2017, while their counterparts with 5 or more prior felony arrests were released at comparable rates (21 percent in 2008 vs. 20 percent in 2017) during the study coverage period.

**FIGURE 3**  
**Felony arrest history of federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008 - 2017**



Note: Includes U.S. or naturalized citizens or legal aliens.

**TABLE 2.**  
**Percent of federal defendants (excluding illegals) released pretrial for cases activated in U.S. district courts by most serious offense charge, FY 2008 - 2017**

Fiscal year	Drugs		Financial		Weapons/Firearms		Violence		Immigration/a		Sex Offenses	
	Number of activations	Percent released										
2008	22,557	44.6%	13,419	81.6%	6,676	36.3%	--	--	2,996	48.4%	2,544	54.6%
2009	23,145	43.8%	12,334	82.0%	6,591	36.3%	3,707	34.5%	2,791	47.3%	2,559	53.7%
2010	22,522	43.6%	13,304	84.4%	6,307	33.8%	3,477	35.0%	3,092	47.8%	2,409	51.9%
2011	24,564	43.3%	13,482	83.9%	6,473	35.4%	3,519	35.3%	2,800	50.9%	2,654	53.4%
2012	23,070	42.2%	12,438	82.6%	6,911	32.5%	3,540	31.4%	2,732	52.8%	2,518	47.9%
2013	22,736	42.4%	12,739	82.9%	6,599	31.7%	3,532	36.0%	2,919	50.5%	2,847	44.8%
2014	19,287	43.2%	11,225	82.7%	5,932	29.5%	3,359	32.1%	2,853	53.7%	2,692	41.5%
2015	18,850	42.9%	10,398	83.8%	6,136	29.6%	3,285	29.7%	2,978	52.3%	3,050	42.0%
2016	18,678	40.6%	9,397	83.1%	6,455	29.1%	3,646	32.9%	3,221	50.7%	2,806	41.5%
2017	19,244	40.8%	8,820	80.3%	7,228	28.6%	3,490	30.5%	3,228	49.4%	2,799	40.0%
<b>Percent change pretrial activations</b>												
2008-2017	-14.7%		-34.3%		8.3%		-5.9%		7.7%		10.0%	

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017. Obstruction, traffic/DWI, and public-order offenses not shown. Most serious offense charges sorted by most to least frequent among cases activated in FY 2017. Percent changes in violent activations covers period from 2009 to 2017.

-- Data not available.

a/ Includes only U.S. or naturalized citizens or legal aliens charged with immigration offenses. Illegal aliens not included in these rates.

*Pretrial Release in Districts that Have Placed the PTRA in the Bail Report*

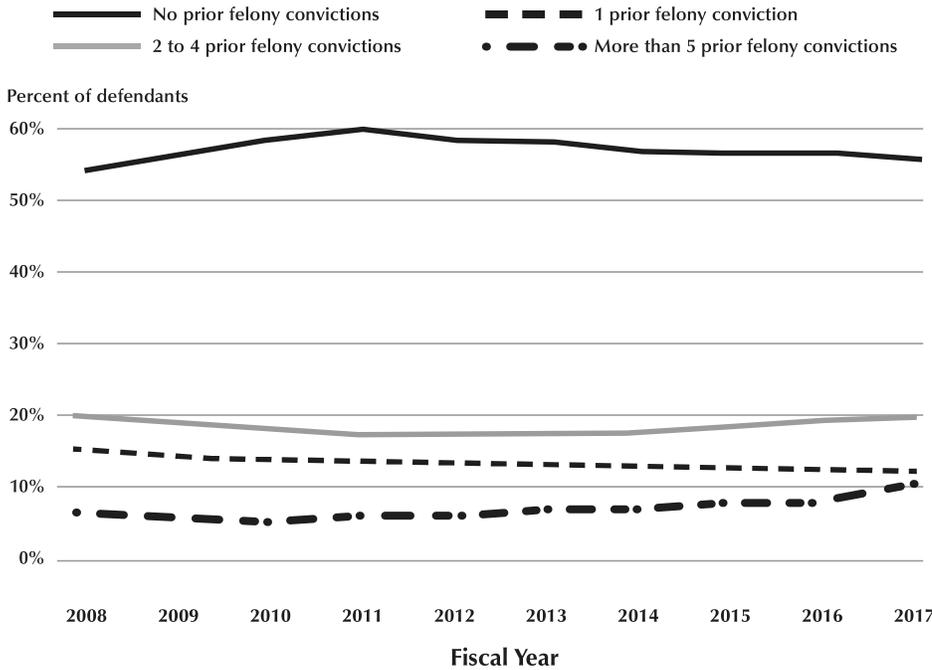
The above documented declines in federal pretrial release took place during a period in which federal officers began using a risk

assessment instrument (i.e., the PTRA) to inform pretrial release recommendations and decisions. Although the PTRA was developed to bring evidence-based practices into the federal pretrial system, federal judges or

magistrates are not required to consider this instrument when making release decisions (Cadigan & Lowenkamp, 2011). In five federal districts, however, the decision was made to include the PTRA assessment score in the bail report. Bail reports are prepared by pretrial officers and provide judges with information about the risk of flight and dangerousness to the community for persons charged with federal crimes.

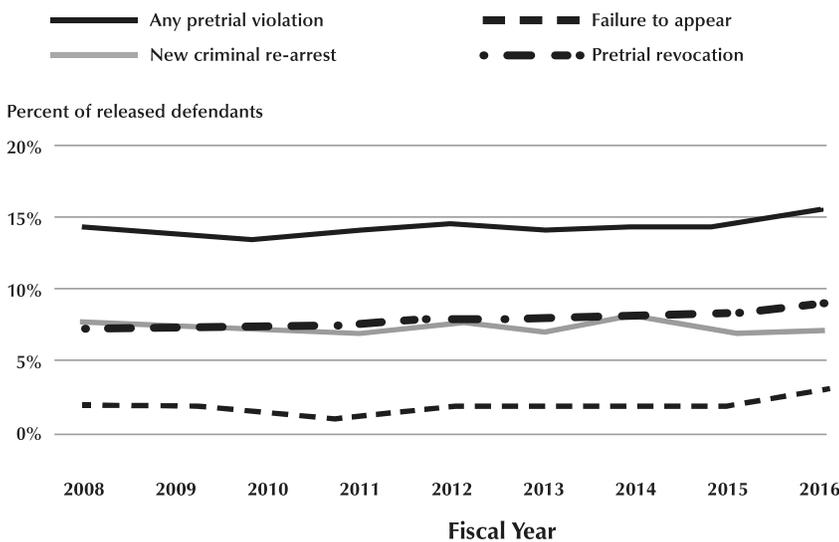
An examination of release rates for districts that included the PTRA in their bail reports shows a general trend of these districts initially experiencing some increases in their overall release rates, which are then followed by declines. In one district,<sup>7</sup> for example, the release rates increased by 12 percentage points, from 45 percent to 57 percent, during the first year this district included PTRA assessments in their bail reports; since then, the release rates in this district have trended downwards (data not shown in table). Similar trends have manifested in other districts using the PTRA in the bail reports.

**FIGURE 4**  
**Felony conviction history of federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008 - 2017**



Note: Includes U.S. or naturalized citizens or legal aliens.

**FIGURE 5**  
**Percent of federal defendants (excluding illegals) released pretrial who committed pretrial violations for cases closed FY 2008 - 2016**



Note. Includes U.S. or naturalized citizens or legal aliens released pretrial. Unlike previous tables/figures, this figure uses the closed rather than activation date as the case anchor.

\*Percentages won't sum to pretrial violation totals as defendants can commit multiple types of pretrial violations.

*Pretrial Violation Trends*

Last, we explored the percent of release defendants who violated their terms of pretrial release through a revocation, new criminal arrest, or FTA. Unlike the previous analyses, this part investigates violations for defendants released pretrial with cases closed between fiscal years 2008 through 2016. We used the closed rather than activation date because that allowed for an examination of pretrial violations during a case's life course. Since the closed date anchored this component of the study, we could only report on pretrial violation activity up until 2016. Violation data were unavailable for fiscal year 2017.

From 2008 to 2015, the percentage of released defendants with any pretrial violation remained fairly stable at about 14 percent (see Figure 5). In 2016, there was a slight rise in the overall violation rates, which increased to about 16 percent. The percentage of released defendants revoked from pretrial supervision rose incrementally from 7 percent in 2008 to 9 percent in 2016. Importantly, the percent of released defendants arrested for new criminal conduct ranged from 7 percent to 8 percent during the study coverage period. Relatively few released defendants (about 2-3 percent) FTA between 2008 and 2016.

<sup>7</sup> Given that these districts are still experimenting with methods that allow for the most beneficial and informative use of the PTRA in their bail decisions, we kept their names out of this report.

## Conclusions and Implications

Our examination of federal pretrial trends over the last decade revealed several key findings. Specifically, the federal pretrial release rates have declined during the period spanning 2008 through 2017, and this trend holds even adjusting for the changing composition of the federal defendant population. Generally, release rates have tracked the release recommendation decisions by PSOs; moreover, PSOs have consistently recommended defendants for release at higher rates compared to AUSAs. Another important finding involves changes in the most serious offenses filed in the U.S. court system. There are fewer cases associated with higher release rates (i.e., financial offenses) filed in federal courts at present than in the past. Conversely, several case types with low or declining pretrial release rates, including weapons/firearms and sex offenses, have increased during the ten-year timeframe.

We also examined the criminal history profiles of federal defendants and found some evidence that they have worsened over time. Interestingly, the percentage of defendants released pretrial has declined to a greater extent among defendants with less severe

criminal profiles than among defendants with more substantial criminal histories. The pattern of falling pretrial release rates for defendants with “light” criminal histories mostly centers on those charged with weapons/firearms, sex, and drug offenses. Another key component involved an examination of whether districts including the PTRAs in their bail reports witnessed any increases in their release rates. While these districts experienced some increases in their overall release rates, these changes were not sustaining, as release rates fell over time. Last, there has been stability in the proportion of released defendants committing pretrial violations involving revocations, new criminal arrests, and FTAs.

This article shows that the federal system has become more oriented towards pretrial detention than release over the last 10 years. Federal statutes, including the 1984 Bail Reform Act and the presumption of detention, most likely laid the groundwork for the reported increases in federal pretrial detention. While there is some evidence that the profiles of defendants have become more severe, these trends do not completely explain the downward trajectories of federal pretrial release rates.

For some offense types, particularly defendants charged with sex offenses, the decreases in pretrial release occurred concurrently with extensive media coverage of sex offenders committing violent crimes (see O’Brien, 2015). Nevertheless, even defendants charged with non-sex-related crimes have witnessed growing rates of pretrial detention, especially those with light criminal history profiles.

When the PTRAs were initially deployed, there was some hope that the instrument could influence federal pretrial release decisions (Cadigan & Lowenkamp, 2011). If officers could base their decisions and release recommendations on an actuarial instrument, that might lead to an increase in release rates for defendants classified as either low (e.g., PTRAs ones or twos) or moderate risk (PTRAs threes) by the PTRAs. While defendants placed into the lower risk categories are more likely to be released than their higher risk counterparts (Austin, 2017), the PTRAs implementation has not been associated with rising pretrial release rates. Rather, release rates have declined during the period coinciding with PTRAs implementation.

There are a variety of reasons why the

**TABLE 3.**  
Relationship between criminal history and pretrial release for federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008, 2011, 2014, & 2017

Defendant criminal history	2008		2011		2014		2017	
	Number of activations	Percent released						
<b>Number of prior felony arrests</b>								
None	23,087	77.1%	27,366	71.4%	22,401	69.9%	21,657	64.4%
1	8,521	58.3%	8,163	56.0%	6,263	57.5%	5,407	53.9%
2 to 4	12,133	40.3%	11,430	40.2%	9,524	39.0%	8,814	37.3%
5 or more	11,663	23.2%	11,403	23.3%	10,889	21.3%	12,303	20.7%
<b>Number of prior felony convictions</b>								
None	30,932	72.3%	34,959	68.3%	28,759	66.8%	27,727	62.0%
1	8,822	45.1%	8,396	44.0%	6,608	42.4%	6,083	38.4%
2 to 4	11,224	29.0%	10,626	28.5%	9,316	27.0%	9,355	25.4%
5 or more	4,426	17.0%	4,381	17.6%	4,394	17.0%	5,016	15.9%
<b>Most serious prior convictions</b>								
None	21,018	74.2%	24,773	69.3%	20,745	67.2%	20,795	62.0%
Misdemeanor-only conviction	9,914	68.3%	10,186	65.7%	8,014	65.8%	6,932	61.9%
Felony conviction	24,472	32.6%	23,403	32.0%	20,318	29.9%	20,454	26.9%
<b>Court appearance history</b>								
None	43,416	60.1%	46,674	58.1%	38,305	55.9%	37,212	52.0%
1	4,870	40.2%	4,626	40.8%	4,046	41.5%	3,944	35.7%
2 or more	7,118	32.3%	7,062	33.3%	6,726	32.5%	7,025	27.8%

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017.

PTRA has not been associated with rising pretrial release rates. Specifically, this instrument was developed without any judicial involvement, impeding its potential adoption (Cadigan & Lowenkamp, 2011). In addition, there is no requirement that federal judges

consider PTRA assessments when making release decisions (PJI, 2018). Rather, the Bail Reform Act of 1984 and federal statutes detail specific processes and elements judges must take into consideration when making pretrial release decisions, none of which involve the

PTRA. The inability to integrate the PTRA into the judicial decision-making process has resulted in this risk tool having a relatively minimal role in federal judicial release decisions (PJI, 2018). Moreover, release rates have not changed appreciably even among those

**TABLE 4.**

**Relationship between criminal history, most serious offense charges, and pretrial release for federal defendants with cases activated in U.S. district courts, FY 2008, 2011, 2014, & 2017**

Defendant criminal history and most serious offense charges	2008		2011		2014		2017	
	Number of activations	Percent released						
<b>Drugs</b>								
<b>Number of prior felony arrests</b>								
None	7,578	62.8%	9,928	56.1%	7,798	56.5%	8,067	52.7%
1	3,898	53.0%	3,830	49.4%	2,595	54.3%	2,223	51.1%
2 to 4	5,847	36.1%	5,700	36.5%	4,232	37.3%	3,771	37.0%
5 or more	5,187	21.1%	5,106	21.4%	4,662	20.2%	5,183	20.4%
<b>Financial</b>								
<b>Number of prior felony arrests</b>								
None	7,988	92.0%	8,759	91.8%	7,098	90.8%	5,476	88.6%
1	1,856	81.3%	1,675	82.5%	1,362	84.1%	1,020	82.3%
2 to 4	1,878	69.8%	1,650	73.4%	1,478	72.3%	1,157	70.5%
5 or more	1,654	45.7%	1,398	48.9%	1,287	49.0%	1,167	48.9%
<b>Weapons/Firearms</b>								
<b>Number of prior felony arrests</b>								
None	931	75.1%	1,295	65.1%	1,235	55.8%	1,588	49.0%
1	717	59.0%	649	55.5%	490	48.4%	526	47.3%
2 to 4	2,032	36.2%	1,709	34.0%	1,423	28.7%	1,604	28.8%
5 or more	2,961	18.5%	2,820	18.1%	2,784	14.9%	3,510	16.6%
<b>Violence</b>								
<b>Number of prior felony arrests</b>								
None	1,342	59.3%	1,344	57.6%	1,248	55.6%	1,311	50.1%
1	572	36.4%	531	35.4%	426	36.4%	416	37.5%
2 to 4	854	22.1%	773	24.1%	756	19.3%	758	22.0%
5 or more	935	9.1%	871	10.9%	929	8.8%	1,005	8.6%
<b>Immigration</b>								
<b>Number of prior felony arrests</b>								
None	1,506	66.8%	1,561	63.4%	1,440	70.7%	1,639	66.3%
1	526	43.0%	429	51.5%	445	53.3%	488	48.2%
2 to 4	612	28.9%	508	31.5%	594	33.3%	617	31.3%
5 or more	346	11.0%	302	18.2%	374	20.9%	484	16.9%
<b>Sex offenses</b>								
<b>Number of prior felony arrests</b>								
None	1,517	70.2%	1,690	65.1%	1,612	55.0%	1,655	52.2%
1	482	42.1%	488	44.1%	469	32.2%	424	35.1%
2 to 4	360	23.9%	305	22.6%	379	16.1%	397	17.1%
5 or more	181	18.8%	171	19.3%	232	8.2%	323	12.1%

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017. Defendants charged with traffic/DWI, public-order, and escape/obstruction not shown.

few districts that have included the PTRAs scores in their bail reports. In sum, this report shows that changing court culture is a difficult task and developing and implementing a risk assessment instrument is not sufficient when attempting to make systematic changes to complex systems such as pretrial decision processes (Stevenson, in press).

Despite the challenges inherent in reforming the federal pretrial system, more effort should be placed on attempting to reduce unnecessary pretrial detention because of the crucial role the release decision can have both for the individual defendant and for the system as a whole. Specifically, the bail decision is the opportunity for the court system to conserve financial resources, uphold the individual's constitutional right to bail and the presumption of innocence, set a positive, rehabilitative tone for the individual and his or her families, and, in low-risk cases where it is merited, divert individuals altogether from incarceration. Moreover, and perhaps even more importantly, a growing number of research studies have shown pretrial detention being associated with higher rates of failure at the post-conviction stage (Gupta et al., 2016; Heaton et al., 2017; Oleson et al., 2014). Given the resources being expended on supervising federal offenders at the post-conviction stage with the aim of reducing recidivism—including education programs, vocational training, halfway house and other transitional housing, specialized probation officers who use cognitive behavior training, and motivational interviewing—it is important to understand and accept the fact that any reentry effort meant to affect recidivism should take into consideration maximizing pretrial release rates.

Taken together, this study shows that systematic and permanent changes in the federal pretrial system can only occur if all key actors, including judges, U.S. Attorneys, federal defenders, and pretrial officers, are involved in an effort to actively and continuously integrate evidence-based practices into federal pretrial decision-making and view release as a favorable option whenever it can be established

that the risk of flight or danger to the community are not overtly present. Recently, the AO initiated the Detention Reduction Outreach Program (DROP), whose purpose is to safely reduce pretrial detention in federal districts. This effort involves outreach and collaboration with all stakeholders in the federal system, including the U.S. Attorney's Office, the Federal Defenders Office, the U.S. Marshals Service, the Probation and Pretrial Services Office, and other actors. Over the past few years, AO staff began visiting individual districts and initiating discussions with all pertinent stakeholders on the importance of integrating the PTRAs into the pretrial decision and encouraging districts to use alternatives to detention (such as special conditions) as a mechanism for increasing release rates. If DROP can help bridge the gap between these various court actors, we may be able to work together to find compromises in cases that previously would have been detained and encourage a move to higher release rates. Additionally, these consultations encourage officers to make better use of their data by closely monitoring release and release recommendation rates to try to forestall any downward trends in these rates after a DROP consultation. The hope is that over time the DROP program will begin altering current release and detention trends.

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## Federal Statutes

- Pretrial Services Act of 1982, 18 U.S.C. §§ 3152.  
Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150

# LITIGATING THE RACIAL DIMENSIONS OF THE FEDERAL BAIL CRISIS

Race in the Federal Criminal Court  
February 6, 2020

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# **FEDERAL PRETRIAL DETENTION CRISIS**

## **FCJC Federal Bail Reform Project**

- First federal courtwatching initiative
- Meeting with federal judges
- Testifying/advocating to Congress
- Training Fed Defenders & CJA
- Writing BRA of 2021

## Hearing: *The Administration of Bail by State and Federal Courts: A Call for Reform*

**House Representative Jerrold Nadler (D. NY.)** (11/14/19)

- “In the federal context, the reforms of the past have proven to be insufficient in balancing a defendant’s liberty interest and ensuring that communities remain safe.”
- “[R]elease rates have steeply declined” since the passage of the Bail Reform Act of 1984.
- “[S]urely community safety does not justify this trend.”

<https://judiciary.house.gov/legislation/hearings/administration-bail-state-and-federal-courts-call-reform>

## Federal Pretrial Detention Crisis: RACE

**Clients of color are detained  
pretrial at a much higher  
rate than White clients**

## Federal Release Rates **Lower** than State Felony Release Rates

### STATE release rates

- **62%** release rate for state felonies, large urban counties
- **55%** release rate for VIOLENT state felonies

U.S. Dept. of Justice Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009*, at 15 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>

### FEDERAL release rates (2018)

- **25%** release rate nationally
- **39%** release rate nationally (excl. immigration)

AO Table H-14 (Sept. 30, 2018), <https://www.uscourts.gov/statistics/table/h-14/judicial-business/2018/09/30>; AO Table H-14A, <https://www.uscourts.gov/statistics/table/h-14a/judicial-business/2018/09/30>

## Federal Pretrial Detention CRISIS

- 1984: BRA enacted
- 1985: 81% of defendants released pretrial
- 1996: 66% released
- 2006: 37% released
- **2018: 25% released (39% excl immig)**

### ➤ Data sources

- 1985: <https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf> (Table 1)
- 1996: <https://www.bjs.gov/content/pub/pdf/fprd96.pdf> (Table 1)
- 2006: <https://www.bjs.gov/content/pub/html/fjsst/2006/fjs06st.pdf> (Table 3.1)
- 2018: <https://www.uscourts.gov/statistics/table/h-14/judicial-business/2018/09/30> (Table H-14); see also Table H-14A

## Federal System **Less Violent** than State

### **FEDERAL**

- **2%** of arrestees are violent offenders

U.S. Dept. of Justice Bureau of Justice Statistics, *Federal Justice Statistics 2015–2016*, at 3, 11 (Jan. 2019), <https://www.bjs.gov/content/pub/pdf/fjs1516.pdf>.

### **STATE**

- **25%** of all felony cases involve violent crimes

U.S. Dept. of Justice Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009*, at 2 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>

## Almost Everyone on Bond Appears and Does Not Reoffend!

### **Federal defendants released on bond (2018)**

- **99%** appeared for court
- **98%** did not commit new crimes

(Source: AO Table H-15, 9/30/18)

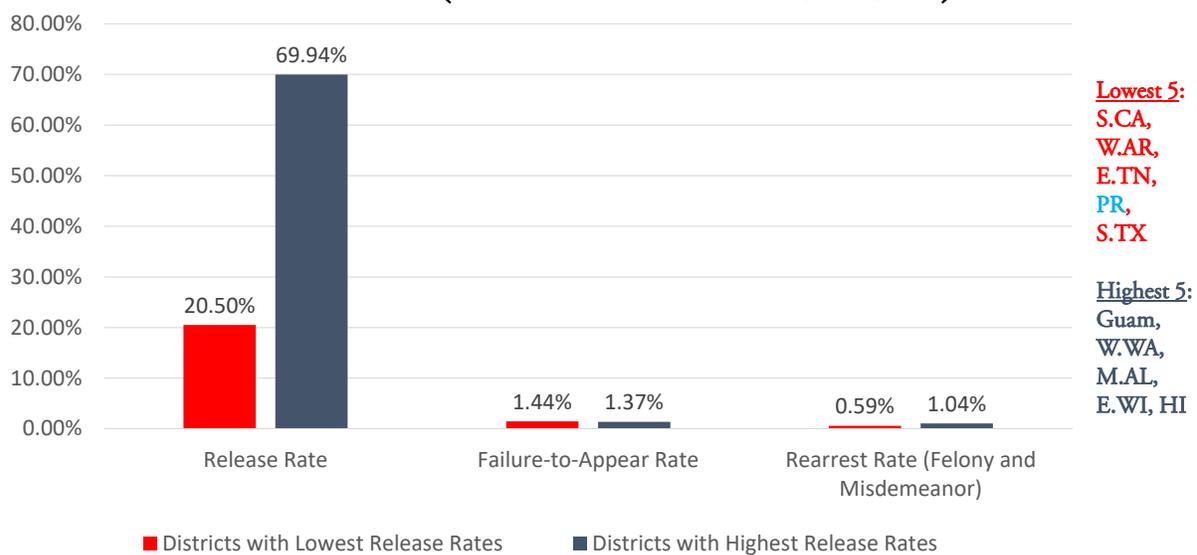
## Almost Everyone on Bond Appears and Does Not Reoffend!

### EDLA: Federal clients released on bond (2018)

- **100%** appeared for court
- **98%** did not commit new crimes

(Source: AO Table H-15, 9/30/18)

## Federal Defendants on Bond Rarely Flee or Recidivate (AO Table H-15, 9/30/18)



# **Racial Disparities in Federal Pretrial Detention**

**Federal Pretrial Detention Crisis:  
RACE**

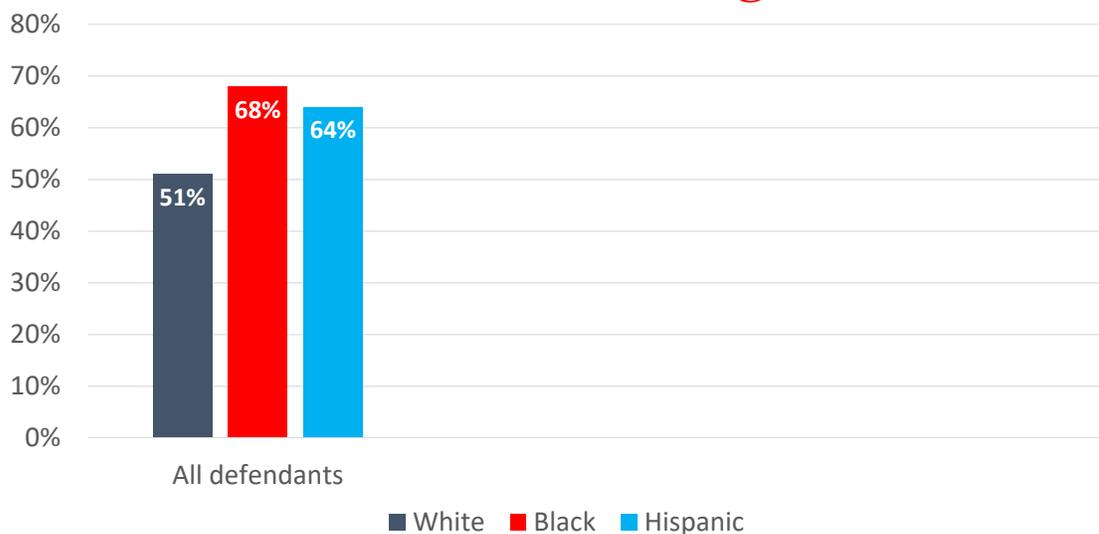
**Black and Latinx clients are more  
likely to be detained pretrial than  
White clients**

Stephanie Holmes Didwania  
*Race, Gender, and Detention in the Federal Courts:  
Lessons for the Future of Bail Reform (2020)*  
(FCJC alum)

Most comprehensive race study ever

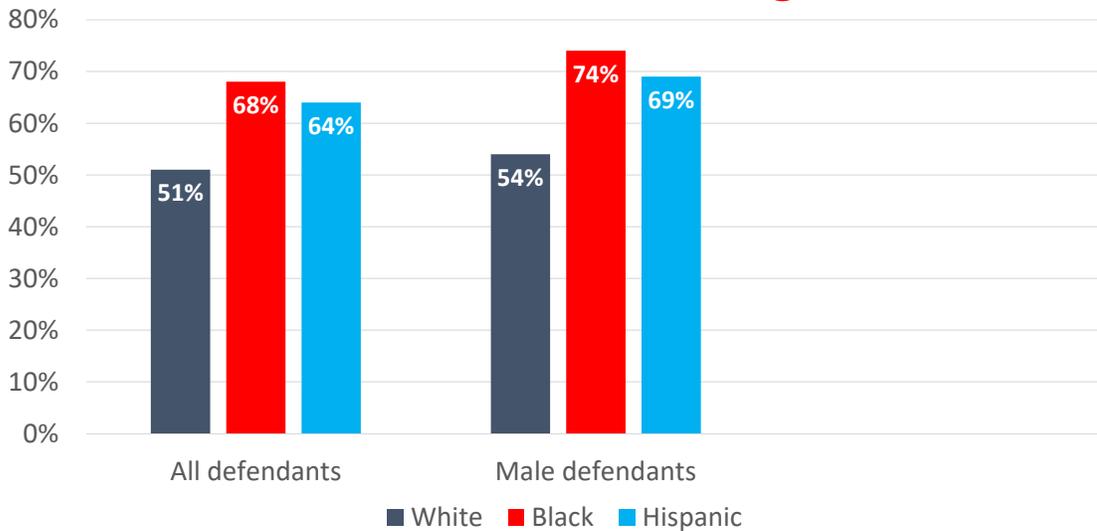
- 2002 to 2016
- Over 300,000 defendants
- 81 of the 94 federal district courts

**Federal Pretrial Detention Rates by Race:**  
**Clients of color detained at a higher rate**



Source: *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform* by Stephanie Holmes Didwania, p. 22

## Federal Pretrial Detention Rates by Race: Male clients of color detained at a higher rate



Source: *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform* by Stephanie Holmes Didwania, p. 22

## Racial Disparities in Federal Pretrial Detention

A black male client is **20 percentage points** and a Hispanic male client is **15 percentage points** more likely to be detained than a white client

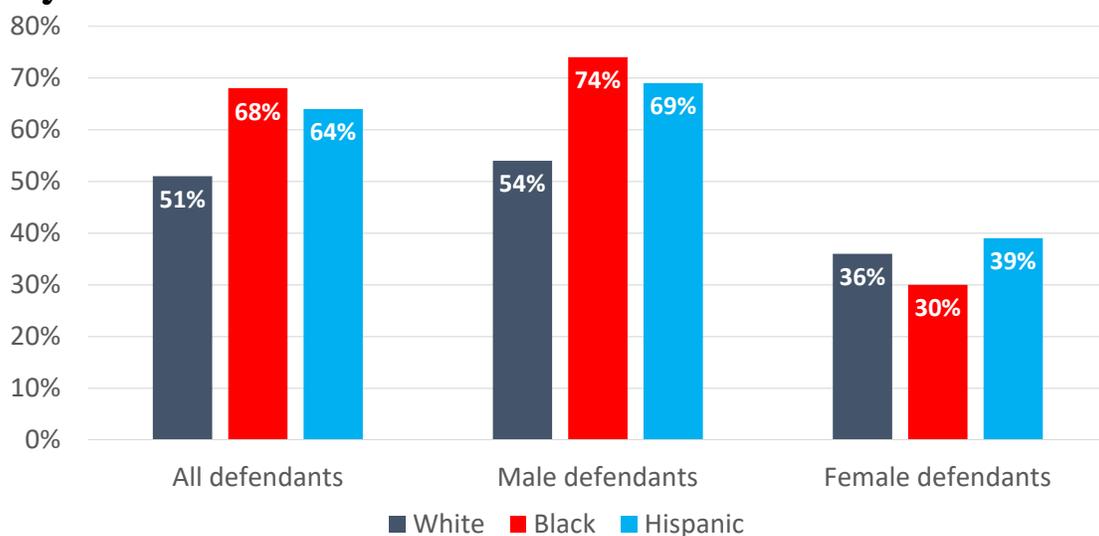
Source: *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform* by Stephanie Holmes Didwania, p. 22

## Racial Disparities in Federal Pretrial Detention

- Control variables: base offense level, indigence, criminal history, age, and education level, as well as geography and even courthouse specific trends.
- Even after controlling for everything
  - **Black clients 3% more likely** to be detained than whites
  - **Hispanic clients 5% more likely** to be detained than whites
  - This racial disparity is highly statistically significant.
  - Means **race alone** is driving those higher rates of detention.

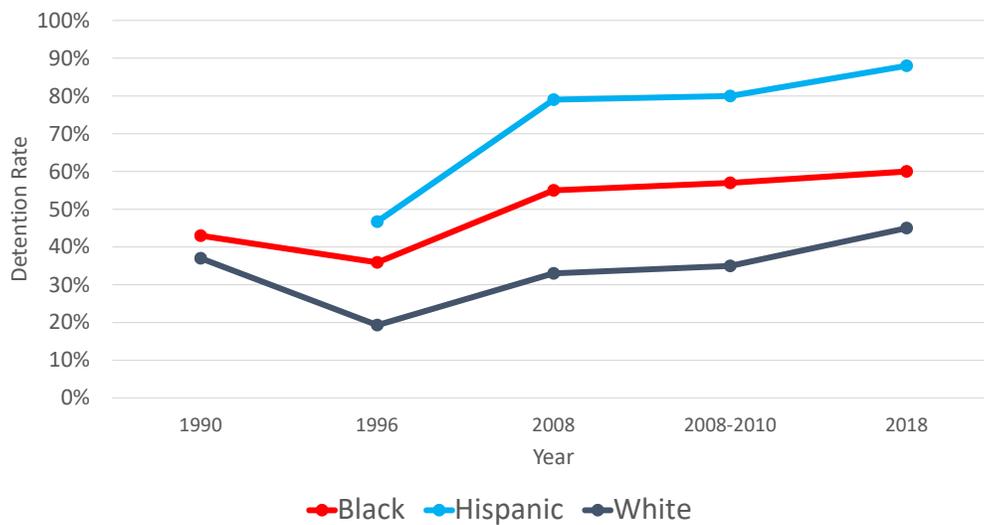
Source: *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform* by Stephanie Holmes Didwania, p. 18, 25

## Federal Pretrial Detention Rates by Race and Gender



Source: *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform* by Stephanie Holmes Didwania, p. 22

## Federal Pretrial Detention Rates by Race Over Time



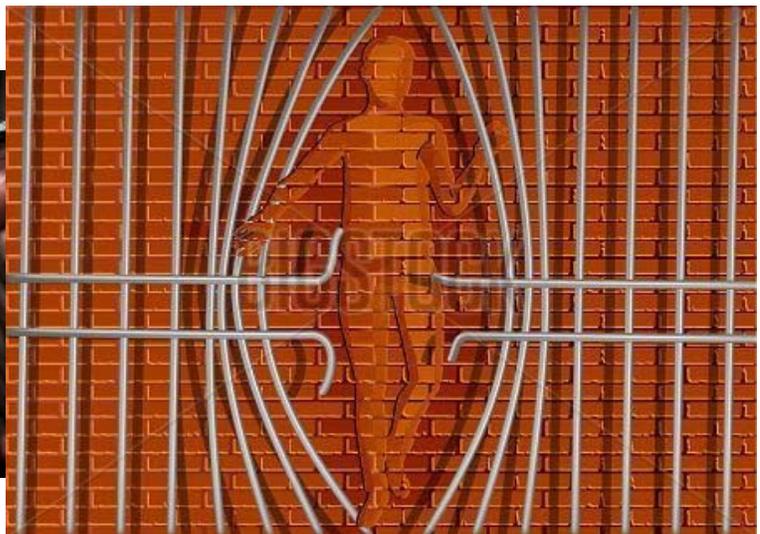
Remind judge § 3142(b) contains a  
presumption of release  
 on personal recognizance

“SHALL ORDER. . . RELEASE”

## Presumption of Release

“In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).

## FIGHT FOR OUR CLIENTS' RELEASE



## Pretrial Detention -> Higher Sentences

“[F]ederal pretrial detention significantly increases sentences, decreases the probability that a defendant will receive a below-Guidelines sentence, and decreases the probability that they will avoid a mandatory minimum if facing one.”

Stephanie Didwania, *The Immediate Consequences of Pretrial Detention*, at 30 Am. L. Econ. Rev. (forthcoming 2020), <https://ssrn.com/abstract=2809818>

## Detention -> Society Less Safe

### Pretrial Detention Increases Risk of Recidivism

- Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017), archived at <https://perma.cc/R99T-5F2J> (finding that, eighteen months post-hearing, pretrial detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges).
- Christopher T. Lowenkamp, *The Hidden Costs of Pretrial Detention*, THE LAURA AND JOHN ARNOLD FOUNDATION (2013), archived at <https://perma.cc/XK2P-3UZI> (regression analysis shows strong correlation between detention and future offending, even after taking into account risk level and offense type); *id.* at 22–23 (finding increased recidivism even two years after pretrial detention).

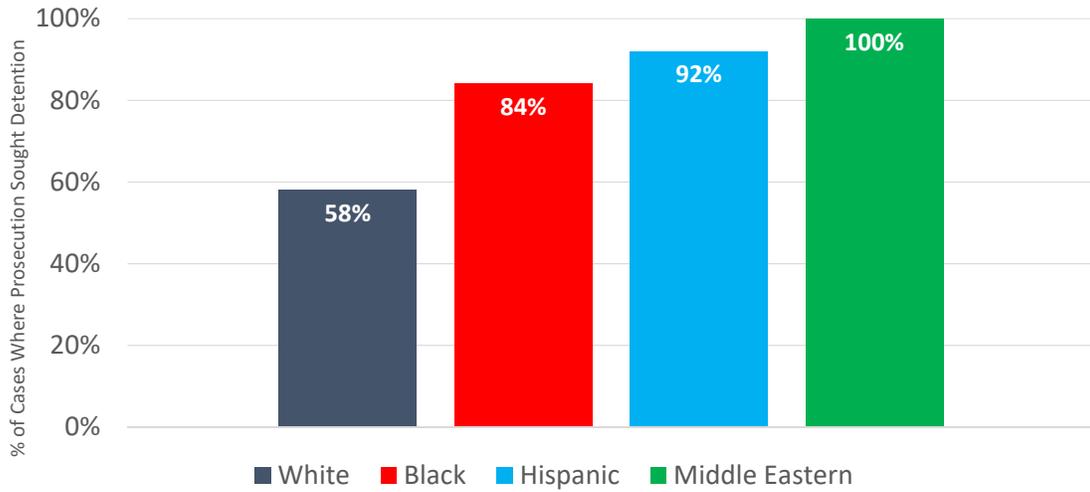
## **FCJC Federal Bail Reform Project: Courtwatching Initiative**

- 70 volunteers
- 10 weeks
- Gathered and logged data
- 172 hearings over 10 weeks
  - 106 initial appearance hearings/arraignments
  - 66 detention hearings
- 90% of clients were people of color

## **Racial Disparities in Federal Pretrial Detention**

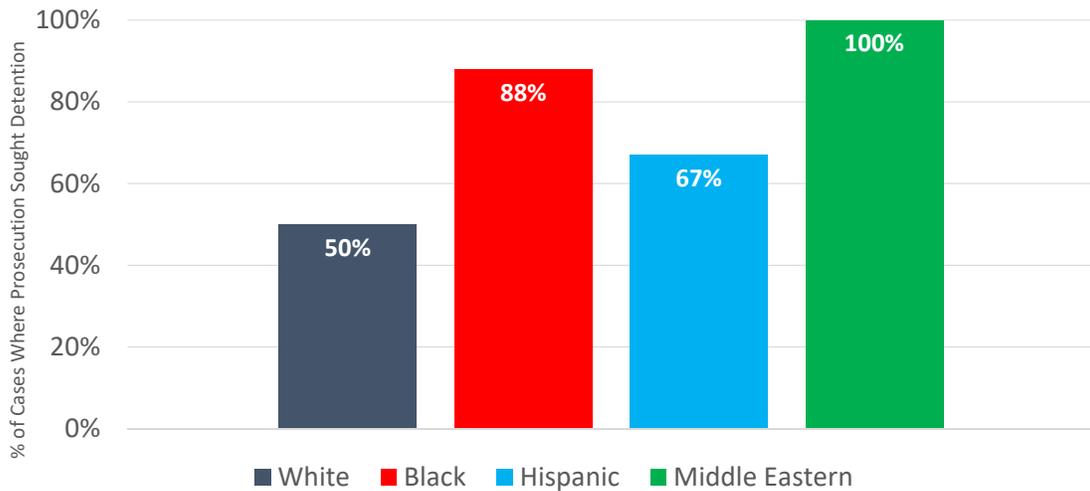
**FCJC Courtwatching Findings (N.D. Ill.)**

## Initial Appearance: Gov't Detention Requests by Race



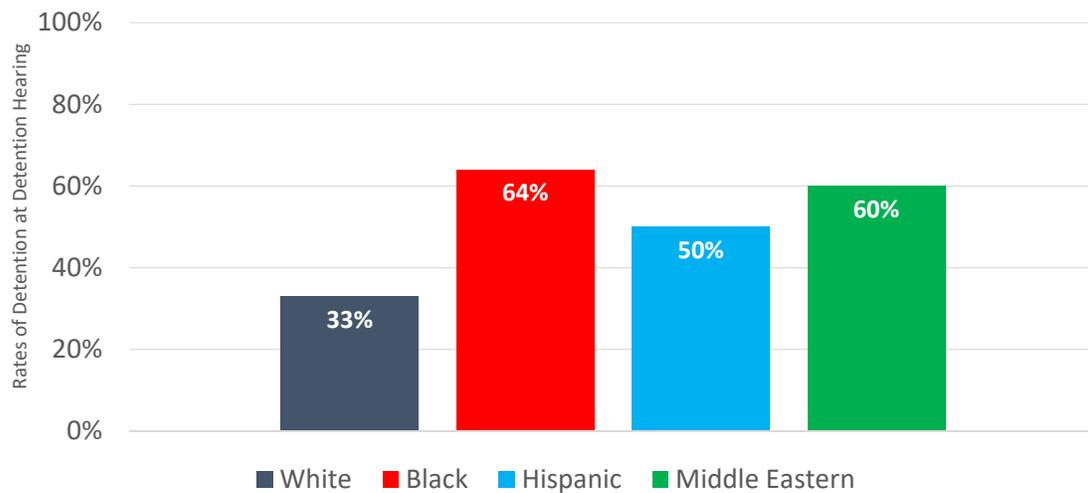
Source: *Federal Criminal Justice Clinic 2019 Courtwatching Project, Preliminary Findings*

## Detention Hearing: Gov't Detention Requests by Race



Source: *Federal Criminal Justice Clinic 2019 Courtwatching Project, Preliminary Findings*

## Courtwatching: Detention Rates by Race



Source: *Federal Criminal Justice Clinic 2019 Courtwatching Project, Preliminary Findings*

## Government & Judges Violate the Bail Reform Act (18 U.S.C. § 3142)

- We must remind everyone that B.R.A. is the law.
- We must ensure compliance with the law to ameliorate race disparities.
- We must remind everyone of what the B.R.A. says.
- We must file written bond motions & appeal
- **CHANGE THE CULTURE**

**ACTION STEPS**  
**for Busting Bond Myths and Using**  
**the Statute as a Sword**

- Initial Appearance
- Detention Hearing

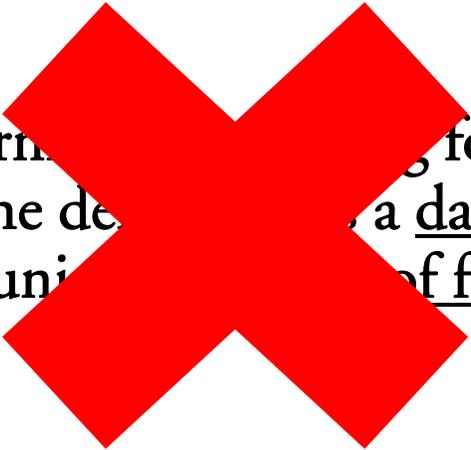
**Initial Appearance Hearing**

## Initial Appearance Hearing: Problem

- Government requests detention on grounds not authorized in the Bail Reform Act.
- Result: Clients detained **illegally**

## Initial Appearance Hearing: Problem

“The government requests detention because the defendant is a danger to the community and a flight...”



## Initial Appearance Hearing: Problem

### Danger to the community

**NOT** a legal basis for detention

### Ordinary risk of flight

**NOT** a legal basis for detention

## **Illegal to Detain As Danger/Ordinary ROF**

1. Plain language of Bail Reform Act, 18 U.S.C. § 3142(f)
2. *United States v. Salerno*, 481 U.S. 739, 747 (1987)
3. Courts of Appeals caselaw

## Illegal to Detain Client without “F” Factor

- Detention is only legally authorized if one of the 7 “(f) factors” is present.
- **STATUTE: § 3142(f):** “The judicial officer shall hold a [detention] hearing” only “in a case that involves” one of seven factors.

## Initial Appearance Law: 7 “F” Factors

- § 3142(f)(1): Case specific
  - **Crimes of violence** (e.g., bank robbery)
  - Offense with max of life or death
  - **Drugs**
  - **Guns (924(c), 922(g)), Minor victim, Terrorism**
  - Recent recidivists (v. rare)
- § 3142(f)(2): Subjective
  - “serious risk” of flight (SROF)
  - “serious risk” threat to witness/juror.
- **NOT DANGER TO THE COMMUNITY!**

## (F)(1) Factor: Types of Cases

### No (F)(1) Factor\*

- Fraud/Financial crime
- Postal theft/bank theft/ID theft
- Extortion
- Alien smuggling
- Illegal reentry

### Yes (F)(1) Factor

- Crimes of violence
- Drugs
- Guns: 924(c), 922(g)
- Minor victim
- Terrorism

\*NO DETN unless serious risk of flight (f)(2)(A)

## When no (F)(1) factor exists...

(f)(2)(A): “**Serious risk** that such person will flee”

- Only possible basis for detention
- But prosecutor must present EVIDENCE

## **Initial Appearance Hearing: Illegal to Detain Client Without “F” Factor**

### **6 Courts of Appeals Agree; None Disagree**

- **1<sup>st</sup> Circuit:** *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)
- **2<sup>nd</sup> Circuit:** *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988)
- **3<sup>rd</sup> Circuit:** *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986)
- **5<sup>th</sup> Circuit:** *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992)
- **9<sup>th</sup> Circuit:** *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003)
- **DC Circuit:** *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999)

## **Illegal to Detain Client w/o “F” Factor**

“Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists.”

*United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)

## Illegal to Detain Client as **Danger**

When none of the “subsection (f)(1) conditions [are] met, pretrial detention solely on the ground of dangerousness to another person or to the community is not authorized.”

*U.S. v. Ploof*, 851 F.2d 7, 12 (1st Cir. 1988); *see also U.S. v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003); *U.S. v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992)

## No “F” Factor = Constitutional Problem

**The Supreme Court upheld the B.R.A. as constitutional in *Salerno* because § 3142(f) serves as a gatekeeper**

- The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. *See* 18 U.S.C. § 3142(f) (detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders).” *United States v. Salerno*, 481 U.S. 739, 747 (1987).
- “The [B.R.A.] *narrowly focuses* on a particularly acute problem . . . . The Act operates *ONLY* on individuals who have been arrested for a specific category of *extremely serious offenses*. 18 U.S.C. § 3142(f)” *Id.* at 750.

## Great Opinion re Detention for Danger/Serious Risk of Flight

“Any reading of the [BRA] that allows danger to the community as the sole ground for detaining a defendant where detention was moved for only under (f)(2)(A) runs the risk of undercutting one of the rationales that led the *Salerno* Court to uphold the statute as constitutional.”

*United States v. Devon Gibson*, 2:19-CR-40-PPS-JPK  
(N.D. Ind. **May 28, 2019**)

## INITIAL APPEARANCE HEARING

**No “F” Factor**

**=>**

**No Detention Hearing**

**=>**

**IMMEDIATE RELEASE**

## **Initial Appearance:**

### **If no “F” factor Two Options for Release**

- **Release on personal recognizance or an unsecured appearance bond; OR**
- **Release on conditions** IF judge believes personal recognizance or an unsecured appearance bond “will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community”
- Either way, release is mandatory!

## **FCJC Chicago Courtwatching Data: Initial Appearance**

### **Results:**

**Bond statute is regularly disregarded  
and sometimes violated.**

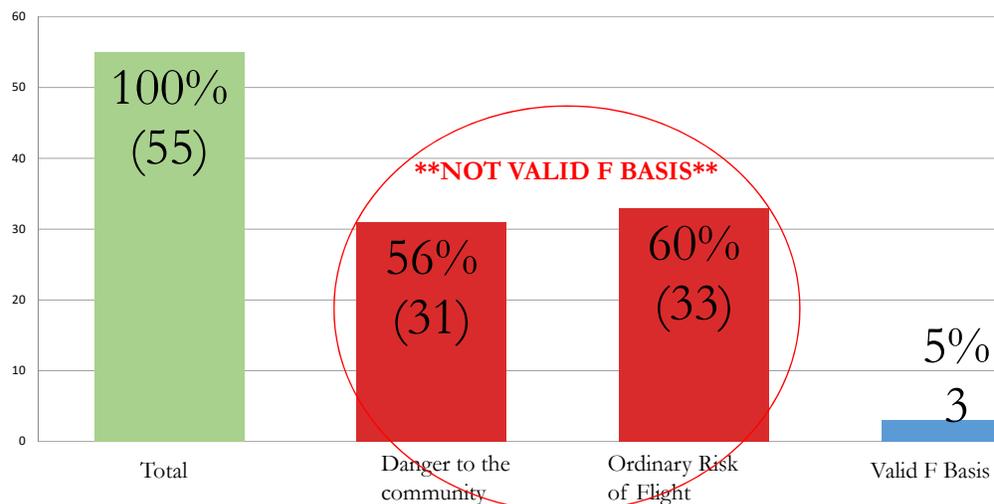
## FCJC Chicago Courtwatching Data: Initial Appearance

Out of the 69 initial appearances in first 7 weeks

- Gov't sought detention in 80% (55 of 69)
- All but 1 detained until a detention hrg (54 of 55)
- 95% of cases where govt seeking detn (52/55)

**GOV'T DID NOT CITE AN (F) FACTOR!!!!**

### Initial Appearance: Factors Cited by Gov't to Support Detention Request (7 wks)



## Courtwatching Data: Initial Appearance

**Clients were detained  
ILLEGALLY in 11% of cases**

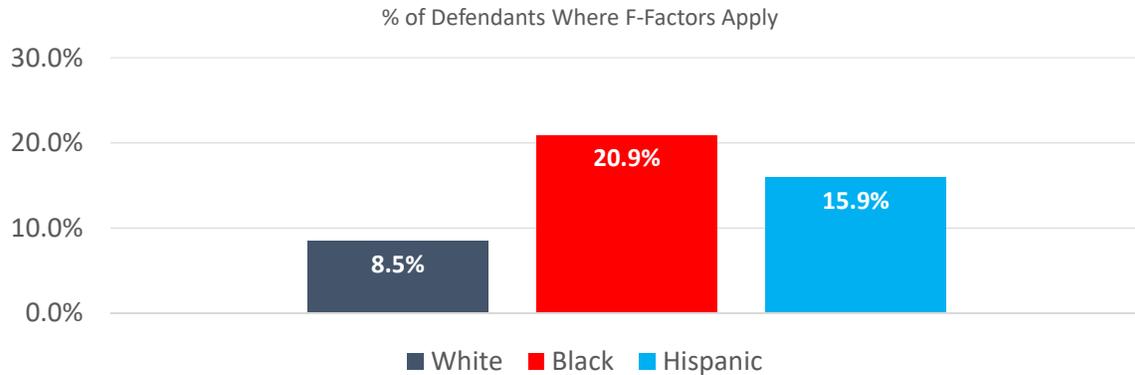
- No (f)(1) factor
- No evidence of (f)(2)(A) serious risk of flight

## Courtwatching Data: Initial Appearance

**Clients were detained without (f)(1)  
factor in 25% of cases**

- Adds illegal reentry cases to the previous slide
- No evidence of (f)(2)(A) serious risk of flight

## Initial Appearance: F-Factors Contribute to Race Disparities



Source: John Scalia, *Federal Pretrial Release and Detention*, 1996 10 (1999).

## **ACTION STEPS: Initial Appearance**

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor, **OBJECT** to Detention Hearing as illegal & request immediate release
  - A. Object if Govt Claims Ordinary Risk of Flight
  - B. Object if Govt Claims Danger to Community
  - C. Types of cases: fraud, illegal reentry, extortion, etc

**ACTION STEP #2A:****If Govt's Basis is Risk of Flight**

“The government is seeking for detention because the detainee poses a risk of flight.”

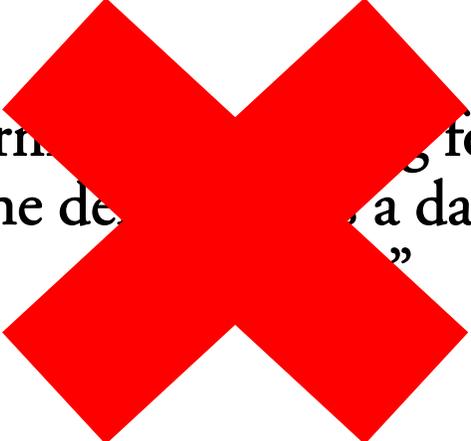
**ACTION STEP #2A:****If Govt's Basis is Risk of Flight (ROF)**

1. Object: Some risk of flight in every case; no evidence it's “serious” here.
2. Govt must present some evidence to demonstrate “serious” ROF.
3. Present our own evidence that client does not pose “serious” ROF.

**ACTION STEP #2B:**

If Govt's Basis is Danger to Community

“The government is seeking for detention because the detainee is a danger to the community.”


**ACTION STEP #2B:**

If Govt's Basis is Danger/Financial Danger

- **FRAUD CASE—judge cannot detain as “financial danger.”**
- Only legal basis: “**Serious risk** that such person will flee” under (f)(2)(A)
- Requires government to present EVIDENCE

## ACTION STEPS: Initial Appearance

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—fraud, illegal reentry, extortion, etc—OBJECT to detention hearing as illegal!
- 3) **File written motion if only basis is serious risk of flight (SROF): Template Defendant's Motion for Immediate Release With Conditions**
  - Client should only be detained as a SROF in a “rare case of extreme and unusual circumstances.” *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978) (relied on in BRA's legislative history).

## ACTION STEPS: Initial Appearance

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—fraud, illegal reentry, extortion, etc—OBJECT to detention hearing as illegal!
- 3) File written motion if SROF: Template Defendant's Motion for Immediate Release With Conditions
- 4) **Appeal to DCT if basis is danger: Template Defendant's Appeal of Magistrate Judge's Detention Order**

## **ACTION STEPS: Initial Appearance**

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—fraud, illegal reentry, extortion, etc—**OBJECT** to detention hearing as illegal!
- 3) File written motion if SROF: Template Defendant's Motion for Immediate Release With Conditions: "rare case of extreme and unusual circumstances"
- 4) Appeal to DCT if danger: Template Defendant's Appeal of Magistrate Judge's Detention Order
- 5) **Appeal to COA**

## **ACTION STEPS: Initial Appearance**

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—fraud, illegal reentry, extortion, etc—**OBJECT** to detention hearing as illegal!
- 3) File written motion if SROF: Template Defendant's Motion for Immediate Release With Conditions: "rare case of extreme and unusual circumstances"
- 4) Appeal to DCT if danger: Template Defendant's Appeal of Magistrate Judge's Detention Order
- 5) Appeal to COA
- 6) **Ask USAO to file motion listing (f) factor(s)**

## Initial Appearance: Gov't Best Practices File Motion re (F) Factors & (E) Presumptions

18 The United States moves for pretrial detention of the Defendant, pursuant to 18  
19 U.S.C. 3142(e) and (f)  
20 1. **Eligibility of Case.** This case is eligible for a detention order because this  
21 case involves (check all that apply):  
22  Crime of violence (18 U.S.C. 3156).  
23  Crime of Terrorism (18 U.S.C. 2332b (g)(5)(B)) with a maximum sentence  
24 of ten years or more.  
25  Crime with a maximum sentence of life imprisonment or death.  
26  Drug offense with a maximum sentence of ten years or more.  
27  
28

UNITED STATES ATTORNEY  
700 STEWART STREET, SUITE 5220  
SEATTLE, WASHINGTON 98101  
(206) 553-7970

## ACTION STEPS: Initial Appearance

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—fraud, illegal reentry, extortion, etc—**OBJECT** to detention hearing as illegal!
- 3) File written motion if SROF: Template Defendant's Motion for Immediate Release With Conditions: "rare case of extreme and unusual circumstances"
- 4) Appeal to DCT if danger: Template Defendant's Appeal of Magistrate Judge's Detention Order
- 5) Appeal to COA
- 6) Ask USAO to file motion listing (f) factor(s)
- 7) Ask for DH to be held < 3 days later**

**ACTION STEP #7:**

**Ask for DH to be held < 3 days later**

§ 3142(f): “The hearing shall be held **IMMEDIATELY** upon the person’s first appearance **unless** that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of [client] may not exceed five days . . . and a continuance on **motion of the attorney** for the Government **may not exceed three days.**”

**Timing of Pretrial Services Report**

- Pretrial does not prepare Pretrial Services Report for initial appearance.
- Judge will detain client to wait for Pretrial Report.

**Waiting for PTS Report is not an “F” factor and is not a legit basis for detention!**

## Pretrial Report Best Practices: Provide a Full Report at Initial Appearance

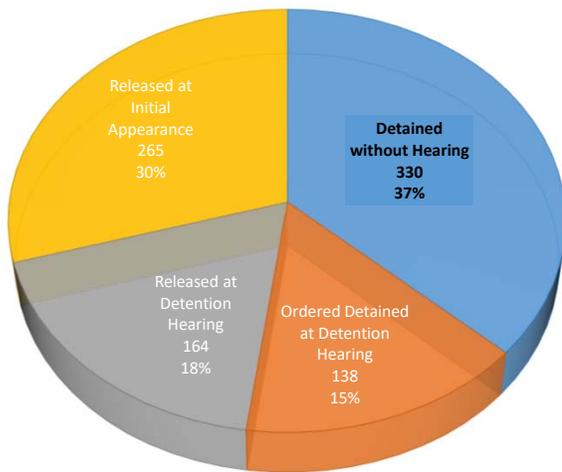
As happens in these and many more districts:

SDNY	CDCA	D. AZ.	EDTN
WDWI	ED. ARK.	D. NV.	D. UT.
EDMI	NDGA	D. OR.	WDVA
D. NJ.	D. MD.	MDPA	WDPA
NDFL	WDLA	D. SC.	SDMS
SDCA (-70 arraignments/day)			

**Take advantage of the  
opportunity to interview clients  
before the Initial Appearance!**

# Detention Hearing

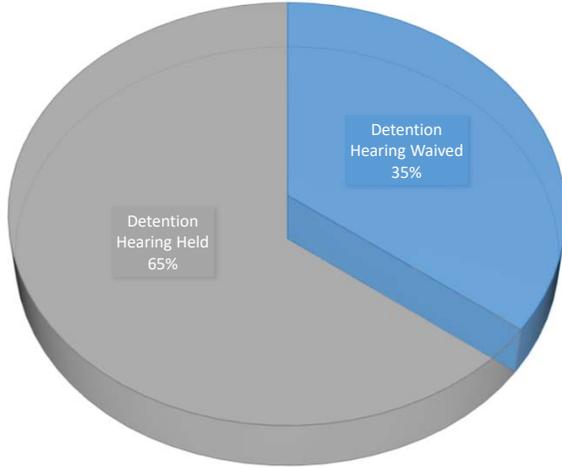
## Problem: Waiver of Detention Hearing



**37%** of defendants waived detention hearing in 2017 in Chicago

(Pretrial Services data)

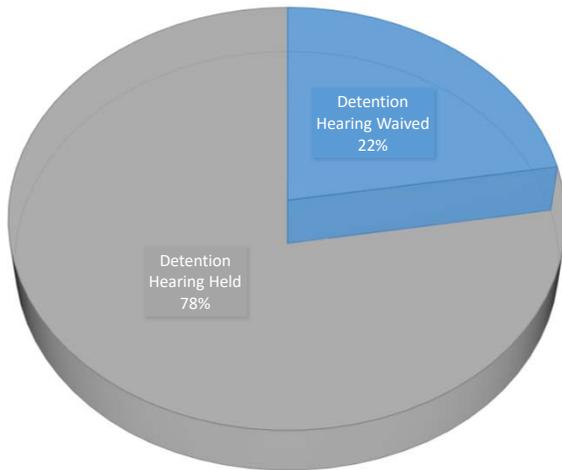
### Problem: Waiver of Detention Hearing



**35%** of defendants waived detention hearing in first 7 weeks

(2018-19 FCJC Courtwatching data)

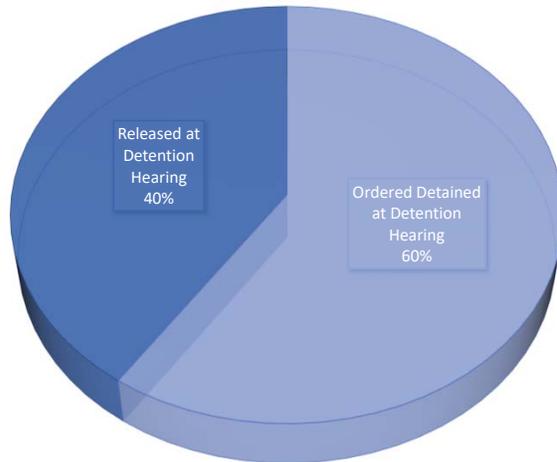
### Problem: Waiver of Detention Hearing



**22%** of defendants waived detention hearing in final 3 weeks

(2018-19 FCJC Courtwatching data)

## **Solution: Hold Detention Hearing**



**40%** of clients released when defense fights at detention hearing!

(2018-19 FCJC Courtwatching data)

**GENERAL RULE:  
DON'T WAIVE DETENTION  
HEARINGS!**

## Detention Hearing: § 3142(e)

When No Presumption of Detention Applies

### **ACTION STEP #1**

Remind judge § 3142(b) contains a  
presumption of release  
on personal recognizance

“SHALL ORDER. . . RELEASE”

**ACTION STEP #1**  
**Presumption of Release**

“In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).

**ACTION STEP #2**

- Remind judge must consider all possible conditions of release
- And must impose “least restrictive” conditions under § 3142(c)(1)(B)

**ACTION STEP #3:**  
**Remind judge govt bears burden of proof**

- Must prove risk of flight at least by preponderance
- Must prove dangerousness by clear & convincing evidence

**ACTION STEP #4**

Remind judge we don't have to *guarantee* appearance/safety.

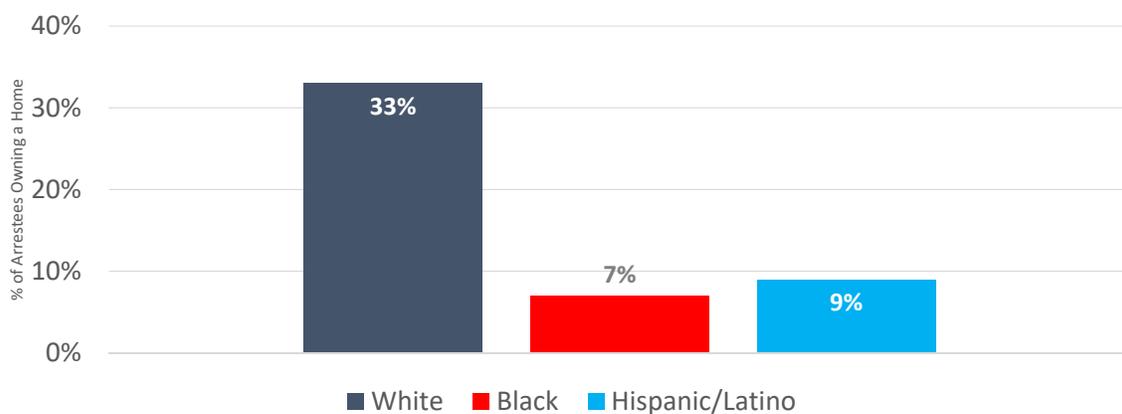
The statutory question is whether there are conditions of release that will “*reasonably assure*” appearance/safety.

## **ACTION STEP #5**

### **Ensure client isn't detained b/c poor**

- Clear rule: “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.” 3142(c)(2).
- Judges violate (c)(2) all the time.
- Detention b/c no solvent surety->violates (c)(2)
- Detention b/c TPC no \$\$->violates (c)(2)

## **Home-ownership Varies By Race: Property Requirements Violate 3142(c)(2)**



Source: *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 117, 317–18 (1997).

## Presumption of Detention: § 3142(e)(3)

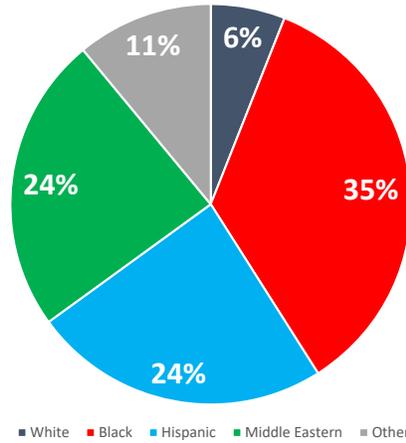
Drugs, 924(c), Minor Victim, Terrorism

### FCJC Chicago Courtwatching Data: Detention Hearing & Presumption

Of cases w/contested detention hrgs in 10 wks (42)

- Presumption of detention applied in **40%** (17)
- Judge found presumption rebutted in **64%** of presumption cases (11 of 17)
- But judges detained clients in **47%** of presumption cases (8 of 17)
- Judges detained in **67%** of presumption cases involving Black clients.

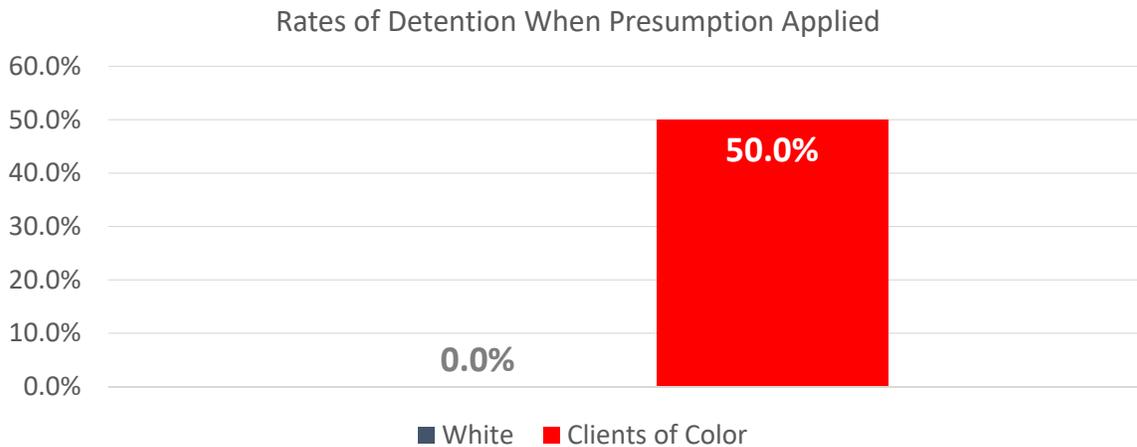
## Presumption of Detention Impact on clients of color (NDIL)



In 17 cases, a presumption of detention applied. Only 6% of the presumption clients were White.

Source: *Federal Criminal Justice Clinic 2019 Courtwatching Project*, Preliminary Findings

## Presumption of Detention Impact on clients of color (NDIL)



Source: *Federal Criminal Justice Clinic 2019 Courtwatching Project*, Preliminary Findings

## Federal Pretrial Detention Rates and Race

Nationally, “[a]mong female defendants, **black and Hispanic defendants are *more likely to be subject to a presumption*** of detention than similarly-situated white defendants...”

Source: *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform* by Stephanie Holmes Didwania, p. 29

**PRESUMPTION CASES:  
CHANGE THE CULTURE  
(DH Checklist & Flowchart)**

**ACTION STEP #1:  
Presumption of Detention**

**Know when the presumption applies**

- Most drug cases
- 924(c) gun cases
- Minor victim cases

**NO Presumption of Detention!!!**

- Crimes of Violence
- 922(g) gun cases
- Illegal reentry

**ACTION STEP #2:  
Presumption of Detention**

File Written Bond Motions before DH  
(see template Defendant's Motion for  
Pretrial Release in Presumption Case)

**ACTION STEP #3:  
Presumption of Detention**

Explain how easily the presumption is  
rebutted (orally & in motion)

### **ACTION STEP #3: Explain How Easily the Presumption is Rebutted**

- Just need “some evidence” to rebut the presumption.
  - *United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985)
- Including any evidence under § 3142(g). *Id.* at 384, 389.
- Any “evidence of **economic and social stability**.” *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986).
  - “evidence of [client’s] marital, family and employment status”:
    - married/partner; minor children
    - “ties to and role in the community”
    - “clean criminal record”; minimal criminal history
    - Lack of drug history
    - Lack of mental health history
    - ANYTHING ELSE in § 3142(g)

### **ACTION STEP #3: Explain How Easily the Presumption is Rebutted**

Evidence that rebutted the presumption in *Dominguez*:

- Ds were lawful U.S. residents, but not U.S. citizens
- Ds were employed as a mechanic and a welder
- Married
- No criminal record
- Family in Florida and Nevada; defendant in Chicago

### **ACTION STEP #3: Explain How Easily the Presumption is Rebutted**

- 1<sup>st</sup> Circuit: *United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985)
- 2<sup>nd</sup> Circuit: *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985)
- 7<sup>th</sup> Circuit: *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986)
- D.C. Circuit: *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985)

### **ACTION STEP #3**

#### **Once presumption is rebutted, it's just one factor**

- “[T]he presumption is just one factor among many.” *Jessup* at 384.
- It “does not disappear,” but must be weighed against good evidence.
  - “[T]he presumption does not disappear, but rather retains evidentiary weight . . . [and must] be considered along with all the other relevant factors.” *U.S. v. Palmer-Contreras*, 835 F.2d 15, 18 (1st Cir. 1987); see also *Dominguez* at 707.
  - “[T]he judge should then still keep in mind . . . that Congress has found that [such] offenders, as a general rule, pose *special* risks of flight.” *Jessup*, 757 F.2d at 384.
  - “The judge may still conclude that what is true in general is not true in the particular case before him.” *Id.*

## ACTION STEP #3

### Once presumption is rebutted, it's just one factor

- The presumption “does not impose a burden of persuasion upon the defendant.” *Jessup*, 757 F.2d at 384; *Dominguez*, 783 F.2d at 707 (“[T]he burden of persuasion remains with the government” at all times and never shifts to the defense).
- \*Means government bears the burden of convincing the judge that detention is warranted despite all of the evidence of social stability client presented.\*

## ACTION STEP #3

### If judges expect client to prove not a danger/flight risk, the presumption arguably violates Due Process.

- The constitutionality of the presumption depends in part on the fact that the defendant does not bear the burden of proving that he is NOT a danger or a flight risk.
  - *Jessup*, 757 F.2d at 386 (“Given [inter alia]. . . the fact that the presumption does not shift the burden of persuasion, . . . the presumptions restrictions on the defendant’s liberty are constitutionally permissible.”).

**ACTION STEP #4:**  
**Remind judge govt bears burden of proof**

- 3142(e): Gov't bears burden of proving “no condition or combination of conditions”
- That will “reasonably assure”
  - (1) Client's appearance
  - (2) Safety of the community

**ACTION STEP #5: Structure Argument around Conditions of Release: § 3142(c)(1)(B)**

- Third-party custodian
- Maintain/get employment
- Maintain/start education
- Restrictions on travel/living/EM/GPS
- Curfew
- Refrain from excessive alcohol/all drugs
- Undergo psych treatment
- Post property

**ACTION STEP #6: Structure Argument around Factors re ROF/Danger: § 3142(g)**

“Unfortunately neither party spoke directly to the statutory factors governing this Court’s decision [nor] frame[d] their evidence as specifically falling under the umbrella of any of those factors or as related to flight, safety or both.” *Torres-Rosario*, 600 F. Supp. 2d at 336.

**ACTION STEP #6: Structure Argument around Factors re ROF/Danger: § 3142(g)**

- Nature and circumstances of offense
- History & characteristics, including
  - Family ties
  - Employment ties
  - Length of time in the community
  - History of drug/alcohol abuse
  - Physical/mental condition
  - Criminal History
  - On parole, probation, supervision, bond
  - Record concerning appearance in court
- Weight of evidence: Least important factor

## **ACTION STEP #6: Structure Argument around Factors re ROF/Danger: § 3142(g)**

- Weight of the evidence is “the least important” factor.
  - *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990)
- Placing too much emphasis on the weight of the evidence creates an impermissible “presumption of guilt.”
  - *United States v. Gray*, 651 F. Supp. 432, 436 (W.D. Ark. 1987)

## **ACTION STEP #7: Explain problems w/the presumption**

**Drugs/Guns Presumption of Detention  
applied to 42-45% of all federal cases  
(2005-2015)**

Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, Federal Probation 52, 55 (Sept. 2017)

## ACTION STEP #7:

### Explain problems w/the presumption

- **“The presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.”** Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, Federal Probation 52, 61 (Sept. 2017).
- **The drug/gun presumption dramatically limits pretrial release for the lowest-risk offenders.** *Id.* at 57 (“[W]ere it not for the existence of the presumption, these defendants might be released at higher rates.”).
- **The presumption does a bad job of predicting whether clients on pretrial release will recidivate or FTA.** *Id.* at 58 (“[H]igh risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, being rearrested for a violent offense, failing to appear, or being revoked for technical violations.”).

## Presumption Criticized By Judiciary

In 2017, the Judicial Conference of the United States asked Congress to **limit the presumption of detention in drug cases to people with very serious criminal records.**

(This rec was based on the study in the previous slide.)

[http://www.uscourts.gov/sites/default/files/17-sep\\_final\\_0.pdf](http://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf)

**ACTION STEP #8:  
Presumption of Detention**

Appeal to DCT & Appeal to COA

**ACTION STEP #9:  
Keep Clients Released Pending Sent'g**

Avoid post-conviction detention under 3143(a)(2)  
by using 3145(c):

“A person subject to detention pursuant to 3143(a)(2) or (b)(2) ... may be ordered released ... if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.”

## **ACTION STEPS:**

### **Detention Hearing & Presumption of Detention**

- 1) Know the presumptions and when they apply
- 2) File motions in presumption cases
- 3) Explain how easily the presumption is rebutted (orally & in motion)
- 4) Remind judges gov't bears burden of proving there are no conditions that will "*reasonably assure*" appearance
- 5) Structure argument around conditions of release
- 6) Structure argument around § 3142(g) factors
- 7) Explain problems with the presumption and judicial conference recommendation
- 8) Appeal to District Court & Court of Appeals
- 9) Use § 3145 to avoid post-conviction detention in § 3143(a)(2)

## **Bond for Non-Citizen Clients**

## Bond for Non-Citizen Clients

### ICE cannot detain client after release on bond

- *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (the Executive Branch has a choice to make when it concludes that a noncitizen violated federal law: proceed “with a prosecution in federal district court or with removal of the deportable alien.”).
- *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1170 (D. OR. 2012) (if a judge releases a client on bond, “the Executive Branch may no longer keep that person in physical custody. To do so would be a violation of the BRA and the court’s order of pretrial release.”).
- *United States v. Boutin*, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017), appeal withdrawn, No. 18-194, 2018 WL 1940385 (2d Cir. Feb. 22, 2018) (“When an Article III court has ordered a defendant released, the retention of a defendant in ICE custody contravenes a determination made pursuant to the Bail Reform Act.”).
- *But see United States v. Veloz-Alonso*, 910 F.3d 266, 268–69 (6th Cir. 2018) (holding a federal judge does not have the authority to order ICE not to detain or deport a person released on bond in a federal criminal case).

## Bond for Non-Citizen Clients: DOJ Data

- **“Illegal aliens” have same low rate of non-appearance as citizens: FTA 1% of the time.**
  - U.S. Dept. of Justice Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts*, 2008–2010, at 15 (Nov. 2012), <https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf>
- **“Illegal aliens” MORE likely to comply with other conditions of release and LESS likely to have bond revoked than citizens. *Id.***
- **Proof that “illegal aliens” do not pose higher risk of flight or violation than citizens.**

## Bond for Non-Citizen Clients

### Initial Appearance Law

- **Only basis for detention is serious risk of flight under 3142(f)(2)(A); NOT DANGER**
- **ICE detainer is not evidence of SROF**
  - *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (“a risk of involuntary removal does not establish a serious risk that [the defendant] will flee”)
  - *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015) (“the risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition”)
  - *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1135–36 (N.D. Iowa 2018)
  - *United States v. Suastegui*, No. 3:18-MJ-00018, 2018 WL 3715765, at \*4 (W.D. Va. Aug. 3, 2018)
  - *United States v. Marinex-Patino*, 2011 U.S. Dist. LEXIS 26234 (N.D. Ill. Mar. 14, 2011)

## Bond for Non-Citizen Clients

### Initial Appearance Law, cont.

- **Federal judge cannot deny bond to a removable alien based on his immigration status or the existence of an ICE detainer.**
  - *United States v. Sanchez-Rivas*, 752 F. App'x 601, 604 (10th Cir. 2018) (defendant “cannot be detained solely because he is a removable alien”)
  - *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015)
  - *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (mere presence of an ICE detainer does not override § 3142(g))
  - *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 968 (E.D. Wis. 2008) (“[I]t would be improper to consider only defendant’s immigration status, to the exclusion of the § 3142(g) factors, as the government suggests.”)

**Bond for Non-Citizen Clients**  
**Initial Appearance Law, cont.**

- **If there's an ICE detainer and government believes ICE plans to detain and deport client, he is per se NOT a risk of flight b/c his absence is involuntary.**
  - **“As long as Defendant remains in the custody of the executive branch, albeit with ICE instead of the Attorney General, the risk of his flight is admittedly nonexistent.”**  
*U.S. v. Mendoza-Balleza*, 4:19-CR-1 (E.D. Tenn. May 23, 2019) (McDonough, J.) (noting that, according to the government, “If [this] Court does not detain Defendant, ICE will immediately detain him and deport him within ninety days.”).

**Non-Citizen Client Released!**  
**U.S. v. Magana, 19-CR-447 (N.D. Ill. Oct. 1, 2019)**

Case: 1:19-cr-00447 Document #: 24 Filed: 10/01/19 Page 1 of 1 PageID #:57

**IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

**ORDER**

Motion hearing held. The Court grants defendant's motion for release with conditions [18].

## **Bond for Non-Citizen Clients**

### **Detention Hearing Law**

- **The presumption of release applies**
- **No presumption of detention in non-citizen cases**
  - *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (“[A]lthough Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list.”).

## **Bond for Non-Citizen Clients**

### **Illegal Reentry/Alien Smuggling Cases**

#### **At Initial Appearance & Detention Hearing, counter SERIOUS risk of flight w/evidence**

- Ties to community
- Employment
- Stale criminal history
- Anything under 3142(g)

## CHANGING THE SYSTEM

**Andrew Grindrod**  
**AFPD in EDVA &**  
**Former Federal Criminal Justice Clinic student**



## Federal Pretrial Detention Rates and Race Sources

1. Stephanie Holmes Didwania, *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform*, publishing soon
2. Brian A. Reaves, *Pretrial Release of Federal Felony Defendants*, 1990 (1994)
3. John Scalia, *Federal Pretrial Release and Detention*, 1996 (1999)
4. Cassia Spohn, *Race, Gender, and Pretrial Detention: Indirect Effects and Cumulative Disadvantage*, 57 Kan. L. Rev. 879 (2009)
5. Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts*, 2008–2010 (2012)
6. Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, Fed. Probation, September 2018
7. *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias Special Committee on Race and Ethnicity*, 64 Geo. Wash. L. Rev. 189 (1996)
8. *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 117 (1997)
9. Federal Criminal Justice Clinic 2019 Courtwatching Project, preliminary results