

EXPANDING ADVOCACY FOR PRETRIAL RELEASE
CLE MATERIALS & HANDOUTS

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Initial Appearance Materials

- **Initial Appearance Checklist & Flowchart for Defense Attorneys**
 - Provides arguments, responses to government, and supporting caselaw for use during the initial court appearance on a complaint or indictment.
- **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**
 - Provides arguments, responses to government, and supporting caselaw for use during the detention hearing.
- **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 Rec. 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 AFD Andrew Grindrod of the EDVA, an alum of the Federal Criminal Justice Clinic. Andrew won the motion and his client was released.

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.)

Statistics and Data (compiled by the FCJC)

- Release Data: Consider adding to motions and in-court arguments information about the rate at which judges release clients in your district, as well as the release recommendations by the AUSAs and Pretrial Services in your district. You might also contrast your district with bigger/more urban districts with far higher release rates to support the argument that judges in your district are locking up too many people.
 - Federal Release Rates by District, excluding immigration cases: Table H-14A (9/30/18)
 - AUSA & Pretrial Services Release Recommendations by District, excluding immigration cases: Table H-3A (9/30/18)
- Chart: Districts With High Rates of Pretrial Release
- Memo: Personal and Social Harms of Pretrial Detention
- Articles Regarding Pretrial Detention in the Federal System: These data-driven articles were written by Probation and Pretrial Services Officers and are therefore very credible. Consider adding to motions and in-court arguments.
 - Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Fed. Probation 2 (Sept. 2018)
 - Oleson, VanNostrand, et al., *Pretrial Detention Choices and Federal Sentencing*, 78 Fed. Probation 1 (June 2014)

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**
 - o **Crime of violence**, sex trafficking of children, terrorism [§ 3142(f)(1)(A)]
 - o Offense with maximum term of “life imprisonment or death” [§ 3142(f)(1)(B)]
 - i. E.g., certain firearms offenses, murder, sex abuse, racketeering
 - o **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
 - o [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)]
 - o 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**
 - o “**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
 - o “**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:**
 - o “Serious risk . . . person will flee” or not appear at trial [§ 3142(f)(2)(A)]
 - o 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. Morgan*, No. 14-CR-10043, 2014 WL 3375028, at *4 (C.D. Ill. July 9, 2014): “If none of

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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, argue that the possibility of deportation by ICE does not render client a serious risk of flight and support with caselaw.
 - *United States v. Marinez-Patino*, 2011 U.S. Dist. LEXIS 26234 (N.D. Ill. Mar. 14, 2011): Rejecting government’s detention request for client with ICE detainer: “The specter of a defendant’s removal from the United States by ICE is not enough to establish that there is a serious risk that a defendant will flee.” *Id.* at *3. “To show that there is a serious risk that a defendant will flee, the government must show that the defendant would seek to leave through some type of voluntary act.” *Id.* at *12.”

➤ **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).

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- *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 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:**

- o *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).
- o *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.”
- o *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)].”
- o *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.”
- o *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.”
- o *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

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dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2).”

- o *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.”
 - o *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 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).
 - o *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:
 - o *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.

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- ☐ **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

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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- o 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:

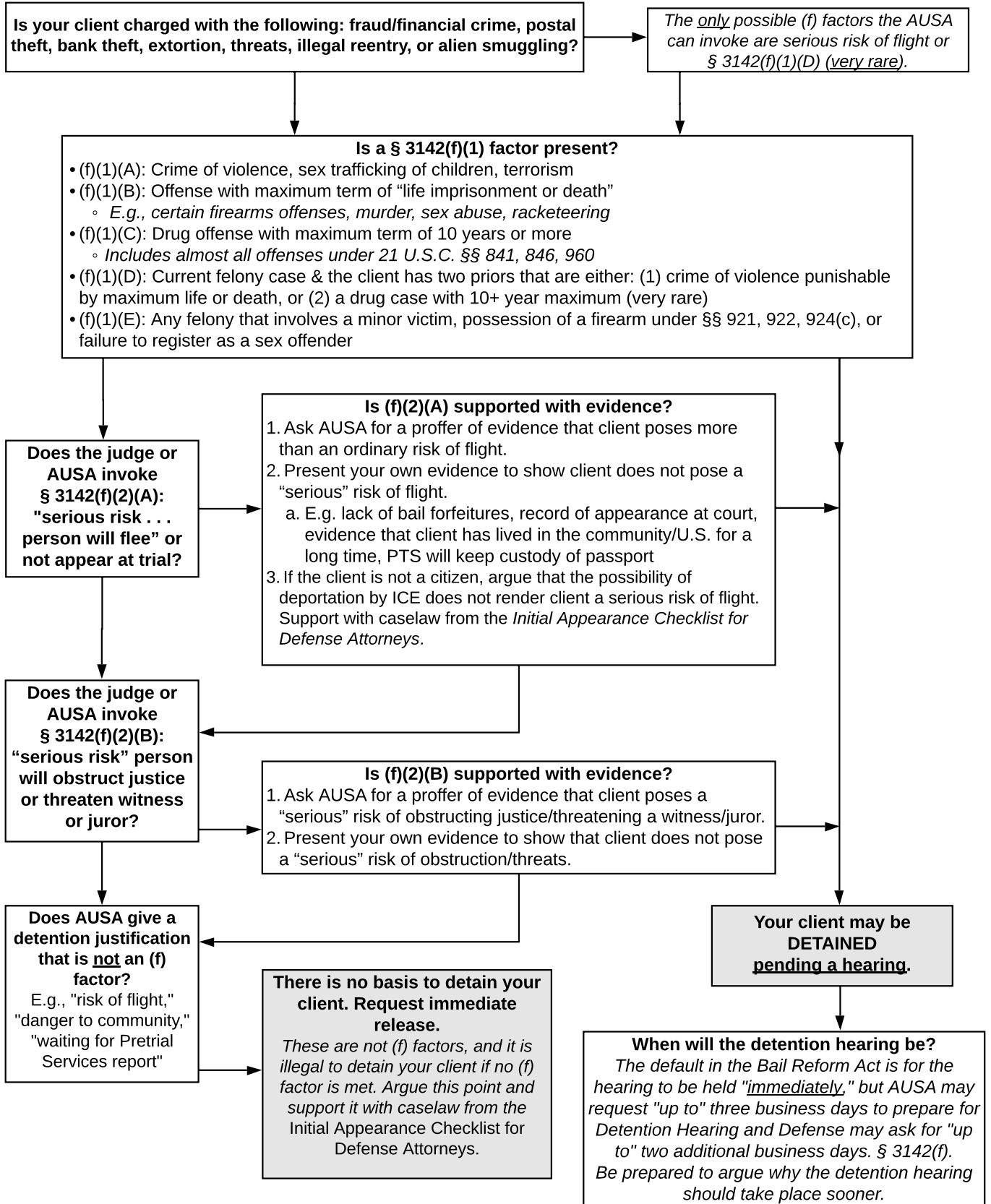
- ☐ Determine your client’s ties to the two jurisdictions.

- **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

[COUNSEL: 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).]

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court order [his/her] release 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). 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 Bond Statute Only Authorizes Pretrial Detention and a Detention Hearing When One of the Seven Factors Listed in § 3142(f) Is Met.

[CLIENT] is being detained in violation of the law because none of the seven § 3142(f) factors are met.¹ Supreme Court precedent and the plain language of the statute prohibit the court from holding a detention hearing and detaining a defendant for even one day when no § 3142(f) factor is present. Six courts of appeals as well as district courts in this circuit concur.

A. Supreme Court Law

In *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 in part on the grounds that detention hearings could be held *only* under the limited circumstances set out in § 3142(f). As the *Salerno* Court held: “[t]he 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*).”

¹ 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).

Salerno, 481 U.S. at 747 (emphasis added). The Supreme Court thus held that the factors listed in § 3142(f) serve as a gatekeeper. Only certain categories of defendants are eligible for detention at all, and the government is definitively prohibited from seeking detention if no (f) factor is met. Likewise, *Salerno* makes clear that when no § 3142(f) factor is present, a court is prohibited from holding a detention hearing and is required to release the defendant on conditions.

The constitutionality of the Bail Reform Act depends on this gatekeeping function of § 3142(f). If courts detain defendants without regard to the limitations in § 3142(f), the Act as applied becomes unconstitutional. In holding that the Act did not violate substantive Due Process, the *Salerno* Court focused on the fact that § 3142(f) “carefully limits the circumstances under which detention may be sought.” *Id.* at 747. It was these limitations in 3142(f), and several other aspects of the Act, 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. 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.* In fact, throughout its substantive Due Process ruling, the Court continued to emphasize 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).

B. The Plain Language of § 3142(f)

The gatekeeping role § 3142(f) plays is also clear from the plain language of the statute. Subsection 3142(f) says, “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). Moreover, the plain language of § 3142(e) authorizes a judge to “order the detention of the person” only “after a [detention] hearing pursuant to the provisions of subsection (f) of this section.”

The Bail Reform Act is difficult to parse because the statute is not organized in the order in which detention issues arise in court. Instead, the first pretrial release issue to arise at the Initial Appearance hearing—whether there is a legal basis for detention—is not addressed until § 3142(f), which comes halfway through the statute. To make matters worse, § 3142(f) itself is confusing, in that it is entitled “Detention hearing” but in fact speaks to *both* the legal standard that applies at the Initial Appearance hearing and to the legal standard that applies at the Detention Hearing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before a court can detain a defendant, introducing the limited circumstances under which “the judicial officer shall hold a hearing”—meaning a detention hearing. If none of the 7 circumstances enumerated in § 3142(f) are present *at the Initial Appearance*, the judge is not authorized to hold a detention hearing or detain the defendant at all. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies *at the Detention Hearing*, 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) describes the procedures that apply at the Detention Hearing in depth.²

C. Circuit and District Court Caselaw

Following the Supreme Court’s guidance in *Salerno*, six courts of appeals agree that it is illegal to detain a defendant—or even to hold a detention hearing—unless the government establishes 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, 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).

When the government requests detention at an initial appearance hearing, the judge must first determine whether there is a permissible statutory basis for detention under § 3142(f). *See Friedman*, 837 F.2d at 48 (“A motion seeking such detention is permitted only when the charge is for certain enumerated crimes . . . or when there is a serious risk that the defendant will flee, or obstruct or attempt to obstruct justice.”) (citing 18 U.S.C. § 3142(f)(1)–(2)); *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.”). Unless the statutory threshold set out in § 3142(f) is met, “detention is not an option.” *Singleton*, 182 F.3d at 9; *Byrd*, 969 F.2d at 109 (“Detention can be ordered, therefore, only in a

² 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.

case that involves one of the . . . circumstances listed in (f).”).

Although the Seventh Circuit has yet to address the question, courts within this circuit agree that a defendant cannot be detained at all—not even for a day—unless one of the circumstances enumerated in § 3142(f) is met. In *United States v. Morgan*, Magistrate Judge Hawley in the Central District of Illinois surveyed the appellate cases and concluded: “If none of the factors in either § 3142(f)(1) or (f)(2) are met, then the defendant may not be detained.” *United States v. Morgan*, No. 14-CR-10043, 2014 WL 3375028, at *14 (C.D. Ill. July 9, 2014) (holding that detention on dangerousness grounds in a fraud case was improper). In *United States v. Mays*, Magistrate Judge Gilbert recently concluded that “there is authority for the proposition that the government is entitled to a detention hearing (and up to 3 days to prepare for that hearing absent good cause) only if it shows that the charged crime is one of the offenses enumerated in 18 U.S.C. 3142(f)(1).” *United States v. Mays*, 18-CR-737, Dkt. No. 7 (N.D. Ill. Nov. 8, 2018). Other courts within this circuit agree. *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. Sweet*, 87-CR-544, 1987 WL 15384 (N.D. Ill. 1987) (finding that “[t]he statute does not provide for a hearing under § 3142(f) except in the cases enumerated in § 3142(f)(1) and (f)(2)” and ordering defendant released because “this case does not come within either § 3142(f)(1) or (f)(2)”).

Unfortunately, in Chicago and elsewhere, a cultural norm has developed that contravenes the Bail Reform Act and *Salerno* and results in defendants being illegally detained in violation of the statute and their constitutional rights. Specifically, at virtually every initial appearance hearing where the government is requesting detention, the Assistant United States Attorney asserts that the defendant is either “a danger to the community,” “a risk of flight,” or both.

However, neither “danger to the community” nor ordinary “risk of flight” is a factor listed in § 3142(f). Accordingly, it is flatly illegal to detain a defendant on either of these grounds at the initial appearance. And yet, every day, defendants are detained on these bases. The practice in this district must be brought back in line with the law. That will only happen if this Court and other judges in this district demand that the government provide a legitimate § 3142(f) basis for every detention request.

II. It is Illegal to Detain [CLIENT] At All Because the Government Has Not Presented Evidence that [He/She] Poses a “Serious Risk” of Flight.

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 authorizes a judge to detain a defendant pending a detention hearing 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 government bears the burden of demonstrating 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. Because the government has not met its burden in this case, it is improper to detain [CLIENT] until a detention hearing or for the duration of the case.

A. It Was Improper to Detain [CLIENT] Because the Plain Language of the Statute Prohibits Detention Based on Ordinary “Risk of Flight.”

Ordinary “risk of flight” is not a factor enumerated 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. The Supreme Court and the Seventh Circuit require courts to follow a very basic canon of statutory interpretation: “We must read a statute to give effect to each word so as to avoid rendering any words meaningless, redundant, or superfluous.” *Witzke v. Femal*, 376 F.3d 744, 753 (7th Cir. 2004); *see also Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 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.’” (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009))).

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. “When . . . the safety of the community is not at issue, a court must first determine whether the government has shown, by a preponderance of the evidence, the existence of a *serious risk* that the defendant will flee.” *United States v. Marinez-Patino*, 2011 WL 902466, at *3 (N.D. Ill. Mar. 14, 2011) (emphasis added).

The government is not entitled to a detention hearing by merely certifying in good faith that the case involves a risk—or even a serious risk—that the defendant will flee. Instead, the government must also make some *evidentiary showing* to substantiate its allegation that the defendant poses a “serious risk” of flight. This interpretation is derived from the plain text of the statute. Section 3142(f)(2)(A) authorizes a detention hearing “*in a case that involves*” a “serious risk” that the person will flee (emphasis added). This statutory language contemplates a judicial finding about whether the case in fact involves such a risk. 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”). But the language of the Bail Reform Act says nothing about the government certifying that a serious risk of flight exists. Instead, authorization for detention turns on whether the judge makes a finding that the case actually “involves” a “serious risk.” In our adversarial system, such disputed questions must be determined by a judicial officer unless the statute allows otherwise, and the government must provide an evidentiary basis to enable the judicial officer to make an informed decision.

C. The Legislative History of the Bail Reform Act Makes Clear That Detaining a Defendant as a “Serious Risk of Flight” is Appropriate Only in “Extreme and Unusual Circumstances.”

While § 3142(f)(2) does not spell out the standard of proof for “serious risk” of flight, the legislative history of the Bail Reform Act unequivocally demonstrates that Congress intended “serious risk of flight” to be a very demanding standard, and expected courts to detain on that ground only in “extreme and unusual circumstances.” The Senate and the House Judiciary Committee reports concur that:

Under subsection [3142]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. The first two types of cases, those involving either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.*

Bail Reform Act of 1983: Report of the Committee on the Judiciary, S Rep No 98-147, 98th Cong, 1st Sess. 48 (1983) (emphasis added). The footnote accompanying this text points to *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978), as representing the “scope of the current case law.” In *Abrahams*, the First Circuit held that only a “rare case of extreme and unusual circumstances . . . justifies pretrial detention” on the ground of risk of flight. *Id.* at 8 (emphasis added); 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.”).

Applying this rule to the defendant in *Abrahams*, the court emphasized just how demanding a standard “extreme and unusual circumstances” is. The defendant in *Abrahams* posed an almost preposterously high risk of fleeing the jurisdiction. He was an escaped state prisoner from New Jersey, and a fugitive from state court in California where he had jumped bail after giving a false last name. 575 F.2d at 4. He was a serial impersonator with multiple known aliases, and three previous convictions in state and federal court. *Id.* At his original bail hearing in this case he had given a false name and lied about his criminal history, had originally failed to appear, and to top it all off, had recently transferred 1.5 million dollars to Bermuda. *Id.* Under these extreme facts the court *deliberated* before finally holding that “[t]his is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail.”

By incorporating the *Abrahams* standard into “serious risk of flight,” Congress painted a clear picture of the kind of extreme factual circumstances required to even merit a detention hearing on the ground of serious risk of flight under § 3142(f)(2). To interpret “serious risk of

flight” as an ambiguous, undemanding catchall term, or to conflate it with “risk of non-appearance” is to deliberately ignore Congress’ intended limitations.

Moreover, some amorphous risk of local nonappearance does not rise to the level of a *serious* risk of flight. “[T]o conflate risk of flight and assuring appearance would have the effect of reading out of the BRA the threshold showing that there is a serious risk that the defendant will flee.” *Marinez-Patino*, 2011 WL 902466, at *5 (holding that defendant facing deportation was not a serious flight risk under § 3142(f)(2)(A)). In order “to show that there is a serious risk that a defendant will flee, the government must show that the defendant would seek to leave [the jurisdiction] through some type of voluntary act.” *Marinez-Patino*, 2011 WL 902466, at *12 (citations omitted). 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.,* Lauryng Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017).³

III. In This Case, the Government Has Not Presented “Extreme and Unusual Circumstances” and 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

³ 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.

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 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 F2d 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.

Dated: [May 16, 2019]

Respectfully submitted,

By: /s/ _____
[ATTORNEY]
Attorney for [CLIENT]

WRITTEN WITH:

Alison Siegler & Erica Zunkel
Keri Coble, Katerina Kokkas, Caroline Sabatier, and Samuel Taxy, Class of 2019
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University of Chicago Law School
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CERTIFICATE OF SERVICE

The undersigned attorney 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 IMMEDIATE RELEASE WITH CONDITIONS

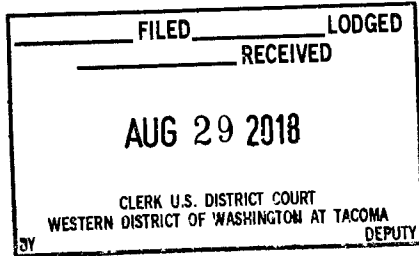
was served pursuant to the district court's ECF system as to ECF filers, and was sent by first-class mail/hand delivery on [May 16, 2019], to counsel/parties that are non-ECF filers.

/s/ _____

[Attorney name & contact information]

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.

NO [REDACTED]
MOTION FOR DETENTION

[REDACTED]
Defendant.

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.

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(206) 553-7970

- 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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15 Rebecca S. Cohen
16 REBECCA S. COHEN
17 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.

[CLIENT]

)
)
)
)
)
)

Judge [NAME]

No. XX-CR-XX

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

[COUNSEL: This motion 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 motion should be filed, please contact Alison Siegler (alisonsiegler@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, “danger to the community” is not a permissible basis for detaining [CLIENT] because it is not one of the enumerated factors set out in 18 U.S.C. § 3142(f). In addition, 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). 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 Bond Statute Only Authorizes Pretrial Detention and a Detention Hearing When One of the Seven Factors Listed in § 3142(f) Is Met.

[CLIENT] is being detained in violation of the law because none of the seven § 3142(f) factors are met.¹ Supreme Court precedent and the plain language of the statute prohibit the court from holding a detention hearing and detaining a defendant for even one day when no § 3142(f) factor is present. Six courts of appeals as well as district courts in this circuit concur.

A. Supreme Court Law

In *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 in

¹ 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).

part on the grounds that detention hearings could be held *only* under the limited circumstances set out in § 3142(f). As the *Salerno* Court held: “[t]he 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). The Supreme Court thus held that the factors listed in § 3142(f) serve as a gatekeeper. Only certain categories of defendants are eligible for detention at all, and the government is definitively prohibited from seeking detention if no (f) factor is met. Likewise, *Salerno* makes clear that when no § 3142(f) factor is present, a court is prohibited from holding a detention hearing and is required to release the defendant on conditions.

The constitutionality of the Bail Reform Act depends on this gatekeeping function of § 3142(f). If courts detain defendants without regard to the limitations in § 3142(f), the Act as applied becomes unconstitutional. In holding that the Act did not violate substantive Due Process, the *Salerno* Court focused on the fact that § 3142(f) “carefully limits the circumstances under which detention may be sought.” *Id.* at 747. It was these limitations in § 3142(f), and several other aspects of the Act, 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. 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.* In fact, throughout its substantive Due Process ruling, the Court continued to emphasize 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).

B. The Plain Language of § 3142(f)

The gatekeeping role § 3142(f) plays is also clear from the plain language of the statute. Subsection 3142(f) says, “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). Moreover, the plain language of § 3142(e) authorizes a judge to “order the detention of the person” only “after a [detention] hearing pursuant to the provisions of subsection (f) of this section.”

The Bail Reform Act is difficult to parse because the statute is not organized in the order in which detention issues arise in court. Instead, the first pretrial release issue to arise at the Initial Appearance hearing—whether there is a legal basis for detention—is not addressed until § 3142(f), which comes halfway through the statute. To make matters worse, § 3142(f) itself is confusing, in that it is entitled “Detention hearing” but in fact speaks to *both* the legal standard that applies at the Initial Appearance hearing and to the legal standard that applies at the Detention Hearing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before a court can detain a defendant, introducing the limited

circumstances under which “the judicial officer shall hold a hearing”—meaning a detention hearing. If none of the 7 circumstances enumerated in § 3142(f) are present *at the Initial Appearance*, the judge is not authorized to hold a detention hearing or detain the defendant at all. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies *at the Detention Hearing*, 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) describes the procedures that apply at the Detention Hearing in depth.²

C. Circuit and District Court Caselaw

Following the Supreme Court’s guidance in *Salerno*, six courts of appeals agree that it is illegal to detain a defendant—or even to hold a detention hearing—unless the government establishes 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, 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).

When the government requests detention at an initial appearance hearing, the judge must first determine whether there is a permissible statutory basis for detention under § 3142(f). *See Friedman*, 837 F.2d at 48 (“A motion seeking such detention is permitted only when the charge

² 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.

is for certain enumerated crimes . . . or when there is a serious risk that the defendant will flee, or obstruct or attempt to obstruct justice.”) (citing 18 U.S.C. § 3142(f)(1)–(2)); *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.”). Unless the statutory threshold set out in § 3142(f) is met, “detention is not an option.” *Singleton*, 182 F.3d at 9; *Byrd*, 969 F.2d at 109 (“Detention can be ordered, therefore, only in a case that involves one of the . . . circumstances listed in (f).”).

Although the Seventh Circuit has yet to address the question, courts within this circuit agree that a defendant cannot be detained at all—not even for a day—unless one of the circumstances enumerated in § 3142(f) is met. In *United States v. Morgan*, Magistrate Judge Hawley in the Central District of Illinois surveyed the appellate cases and concluded: “If none of the factors in either § 3142(f)(1) or (f)(2) are met, then the defendant may not be detained.” *United States v. Morgan*, No. 14-CR-10043, 2014 WL 3375028, at *14 (C.D. Ill. July 9, 2014) (holding that detention on dangerousness grounds in a fraud case was improper). In *United States v. Mays*, Magistrate Judge Gilbert recently concluded that “there is authority for the proposition that the government is entitled to a detention hearing (and up to 3 days to prepare for that hearing absent good cause) only if it shows that the charged crime is one of the offenses enumerated in 18 U.S.C. 3142(f)(1).” *United States v. Mays*, 18-CR-737, Dkt. No. 7 (N.D. Ill. Nov. 8, 2018). Other courts within this circuit agree. *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. Sweet*, 87-CR-544, 1987 WL 15384 (N.D. Ill. 1987) (finding that “[t]he statute does not provide for a hearing under § 3142(f) except in the cases enumerated in § 3142(f)(1) and (f)(2)” and ordering defendant released because “this case does not come within either § 3142(f)(1) or (f)(2)”).

Unfortunately, in Chicago and elsewhere, a cultural norm has developed that contravenes the Bail Reform Act and *Salerno* and results in defendants being illegally detained in violation of the statute and their constitutional rights. Specifically, at virtually every initial appearance hearing where the government is requesting detention, the Assistant United States Attorney asserts that the defendant is either “a danger to the community,” “a risk of flight,” or both. However, neither “danger to the community” nor ordinary “risk of flight” is a factor listed in § 3142(f). Accordingly, it is flatly illegal to detain a defendant on either of these grounds at the initial appearance. And yet, every day, defendants are detained on these bases. The practice in this district must be brought back in line with the law. That will only happen if this Court and other judges in this district demand that the government provide a legitimate § 3142(f) basis for every detention request.

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 the Government Has Not Presented Evidence that [He/She] Poses a “Serious Risk” of Flight.

It was improper to detain [CLIENT] on the government’s bare allegation that [he/she] poses a “risk of flight” because that is not a factor enumerated 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. “[S]erious risk” of flight in § 3142(f)(2)(A) means something more than ordinary risk of flight. The Supreme Court and the Seventh Circuit require courts to follow a very basic canon of statutory interpretation: “We must read a statute to give effect to each word so as to avoid rendering any words meaningless, redundant, or superfluous.” *Witzke v. Femal*, 376 F.3d 744, 753 (7th Cir. 2004); *see also Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 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.’” (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009))).

Moreover, where the government’s only legitimate § 3142(f) ground for detention is “serious risk” of flight, the government bears the burden of presenting *evidence* to support its allegation that a defendant poses a “serious risk” of flight rather than the ordinary risk attendant in any criminal case. “When . . . the safety of the community is not at issue, a court must first

determine whether the government has shown, by a preponderance of the evidence, the existence of a *serious risk* that the defendant will flee.” *United States v. Marinez-Patino*, 2011 WL 902466, at *3 (N.D. Ill. Mar. 14, 2011) (emphasis added).

In order to detain a defendant as a “serious risk” of flight under 3142(f)(2)(A), the government must present evidence that the defendant presents an “extreme and unusual” risk of willfully fleeing the jurisdiction if released. Because the government has not met its burden in this case, [CLIENT] may not be detained under 3142(f)(2)(A).

A. The Legislative History of the Bail Reform Act Makes Clear That Detaining a Defendant as a “Serious Risk of Flight” is Appropriate Only in “Extreme and Unusual Circumstances.”

While § 3142(f)(2) does not spell out the standard of proof for “serious risk” of flight, the legislative history of the Bail Reform Act unequivocally demonstrates that Congress intended “serious risk of flight” to be a very demanding standard, and expected courts to detain on that ground only in “extreme and unusual circumstances.” The Senate and the House Judiciary Committee reports concur that:

Under subsection [3142]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. The first two types of cases, those involving either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.*

Bail Reform Act of 1983: Report of the Committee on the Judiciary, S Rep No 98-147, 98th Cong, 1st Sess. 48 (1983) (emphasis added). The footnote accompanying this text points to *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978), as representing the “scope of the current case law.” In *Abrahams*, the First Circuit held that, before detaining a defendant as a risk of flight, the government must show that a “rare case of extreme and unusual circumstances” at 8 (emphasis added); *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.”).

Applying this rule to the defendant in *Abrahams*, the court emphasized just how demanding a standard “extreme and unusual circumstances” is. The defendant in *Abrahams* posed an almost preposterously high risk of fleeing the jurisdiction. He was an escaped state prisoner from New Jersey, and a fugitive from state court in California where he had jumped bail after giving a false last name. 575 F.2d at 4. He was a serial impersonator with multiple known aliases, and three previous convictions in state and federal court. At his original bail hearing in this case he had given a false name and lied about his criminal history, had originally failed to appear, and to top it all off, had recently transferred 1.5 million dollars to Bermuda. *Id.* Under these extreme facts the court *deliberated* before finally holding that “[t]his is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail.”

By incorporating the *Abrahams* standard into “serious risk of flight,” Congress painted a clear picture of the kind of extreme factual circumstances required to even merit a detention hearing on the ground of serious risk of flight under § 3142(f)(2). To interpret “serious risk of flight” as an ambiguous, undemanding catchall term, or to conflate it with “risk of non-appearance” is to deliberately ignore Congress’ intended limitations.

B. The Government Has Not Met Its Burden to Show That [CLIENT] Poses an “Extreme and Unusual” Risk of Fleeing the Jurisdiction.

In order “to show that there is a serious risk that a defendant will flee, the government must show that the defendant would seek to leave [the jurisdiction] through some type of voluntary act.” *Marinez-Patino*, 2011 WL 902466, at *12 (citations omitted). 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.,* Lauryn Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017).

An amorphous risk of local nonappearance does not rise to the level of a *serious* risk of flight. “[T]o conflate risk of flight and assuring appearance would have the effect of reading out of the BRA the threshold showing that there is a serious risk that the defendant will flee.” *Marinez-Patino*, 2011 WL 902466, at *5 (holding that defendant facing deportation was not a serious flight risk under § 3142(f)(2)(A)). The government must present evidence that the defendant will fail to appear because they have intentionally fled the jurisdiction.³

In this case the government has not offered [any/sufficient] evidence that [CLIENT] presents a serious risk of willfully fleeing the jurisdiction.

C. The Government Has Not Presented “Extreme and Unusual Circumstances” and Has Not Met Its Burden To Prove 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.]

³ 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.

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.

D. 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.

IV. [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].

V. 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.

Dated: [February 22, 2019]

Respectfully submitted,

By: /s/
[ATTORNEY]
Attorney for [CLIENT]

WRITTEN WITH:

Alison Siegler & Erica Zunkel

Keri Coble, Katerina Kokkas, Caroline Sabatier, and Samuel Taxy, Class of 2019

Claire Rogerson, Class of 2020

University of Chicago Law School

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CERTIFICATE OF SERVICE

The undersigned attorney 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:

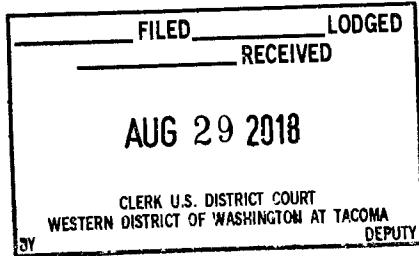
**DEFENDANT'S APPEAL OF MAGISTRATE JUDGE'S DETENTION ORDER AND
REQUEST FOR IMMEDIATE RELEASE WITH CONDITIONS**

was served pursuant to the district court's ECF system as to ECF filers, and was sent by first-class mail/hand delivery on [February 22, 2019], to counsel/parties that are non-ECF filers.

/s/ _____
[Attorney name & contact information]

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.

NO [REDACTED]

MOTION FOR DETENTION

[REDACTED]
Defendant.

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.

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- 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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15 Rebecca S. Cohen
16 REBECCA S. COHEN
17 Assistant United States Attorney
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Detention Hearing Checklist & Flowchart for Defense Attorneys

DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

IF NO STATUTORY PRESUMPTION OF DETENTION APPLIES

- ☐ **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, 110 (5th Cir. 1992) (“There can be no doubt that this Act clearly favors nondetention.”).
- ☐ **Argue that the government has not carried its burden of proof regarding safety of community/appearance.**
 - For 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.
 - 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.
- ☐ **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 judge release client on 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).
- ☐ **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)]

DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- o Maintain or commence an educational program [(iii)]
- o 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
- o Avoid “all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense” [(v)]
- o Report on a “regular basis” to PTS or some other agency [(vi)]
- o Comply with a curfew [(vii)]
- o Refrain from possessing “a firearm, destructive device, or other dangerous weapon” [(viii)]
- o Refrain from “excessive use of alcohol” [(ix)]
- o Refrain from “any use of a narcotic drug or other controlled substance . . . without a prescription” [(ix)]
- o Undergo “medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency” [(x)]
- o Post “property of a sufficient unencumbered value, including money” [(xi)]
- o Post a “bail bond with solvent sureties” [(xii)]
- o Require the client to “return to custody for specified hours following release for employment, schooling, or other limited purposes” [(xiii)]
- o 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)]
 - o **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).**
 - o **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

DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

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 offence [(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) 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:
 - 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).
 - Note that the government still bears the burden of *persuasion* at all times. *Id.*
 - 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)(2).” *Id.* (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 presumption of flight risk and dangerousness is 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.
 - Beyond the Seventh Circuit, 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).
 - Remind judge that in *Dominguez*, the Seventh Circuit held that the following evidence rebutted the presumption:
 - Defendants were lawful U.S. residents, but not U.S. citizens
 - Defendants were employed as a mechanic and a welder
 - Defendants had no criminal record
 - One defendant was married
 - One defendant had family in Florida and Nevada.
 - 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.*
- ❑ **Rebut 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)]

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.”).
 - 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)]
 - **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 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)]
- ☐ **Remind court that, once rebutted, the presumption becomes just one factor among many for the judge to consider in determining whether to detain the defendant.**
- Once rebutted, “the presumption is not erased,” but rather “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),” and “the burden of persuasion remains with the government” at all times. *Dominguez*, 783 F.2d at 707.
- ☐ **Regardless of whether judge finds that the presumption of detention has been rebutted, remind judge that the court still cannot detain client without a finding that “no release conditions will reasonably assure the safety of the community.” *Dominguez*, 783 F.2d at 706–07; *see also* § 3142(e).**
- This finding must be made by clear and convincing evidence. *Dominguez*, 783 F.2d at 707 (quoting § 3142(f)).
- ☐ **Remind judge that, even in a presumption case, the statute contains a “least restrictive conditions” requirement.**

DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

- 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.”
- ☐ **Tell judges that 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.**
 - 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 judges that research favors limiting the presumption of detention.**
 - One 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 different in rates of 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

YES

NO

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.

[CLIENT]

)
)
)
)
)
)

Judge [NAME]

No. XX-CR-XX

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.”¹ But the presumptions of detention have not worked as intended, and federal pretrial detention rates have increased dramatically since 1984.² Before the BRA, *less than two percent* of federal arrestees were jailed pending trial.³ According to the Bureau of Justice Statistics, the detention rate across the country increased from 59% in

¹ 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>.

² *Id.* at 53.

³ 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 2010.⁴ A recent study by the Administrative Office of the Courts (AO) attributed this “massive”⁵ increase in detention rates to the presumptions of detention, especially as they are applied to low-risk defendants.⁶ For example, the statutory presumptions in drug and firearm cases applied to *nearly half* of all federal cases each year.⁷ If not for the presumptions of detention, low-risk defendants “might be released at higher rates.”⁸ Instead, the presumptions of detention have become “an almost de facto detention order in almost half of federal cases.”⁹

[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.”¹⁰ 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.”¹¹ 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.

⁴ 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>).

⁵ *Id.* at 61.

⁶ *Id.* at 57.

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

⁸ *Id.* at 57.

⁹ *Id.* at 61.

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

¹¹ *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.”¹² 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.”¹³ 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.¹⁴ [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%.¹⁵] The other emotional and psychological harms visited upon the children of incarcerated parents is well-documented.¹⁶

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

¹² *Id.* at 61.

¹³ *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).

¹⁴ 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>.

¹⁵ 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>.

¹⁶ 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.”¹⁷ Other, more recent studies, have confirmed that pretrial detention is criminogenic,¹⁸ and cautioned that “lower crime rates should not be tallied as a benefit of pretrial detention.”¹⁹ One reason why pretrial detention is criminogenic is because jails’ physical and mental health screening and treatment is often inadequate.²⁰ 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.²¹ 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.²² 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

¹⁷ 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>).

¹⁸ 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.”).

¹⁹ 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).

²⁰ 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>.

²¹ 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>.

²² 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).²³ Pretrial detention costs an average of \$73 per day per detainee, while pretrial supervision costs an average of just \$7 per day.²⁴ 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 \$1,785.²⁵

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

²³ Austin, *supra* note 1, at 53.

²⁴ *Id.*

²⁵ *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)).²⁶ 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

²⁶ 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:

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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/](https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf)
[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.”¹ 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

¹ 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.²

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

² *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 PTRa has been validated in all 94 federal districts and found to be valid and predictive in every one (Cadigan, Johnson, & Lowenkamp, 2012).

The PTRa 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).

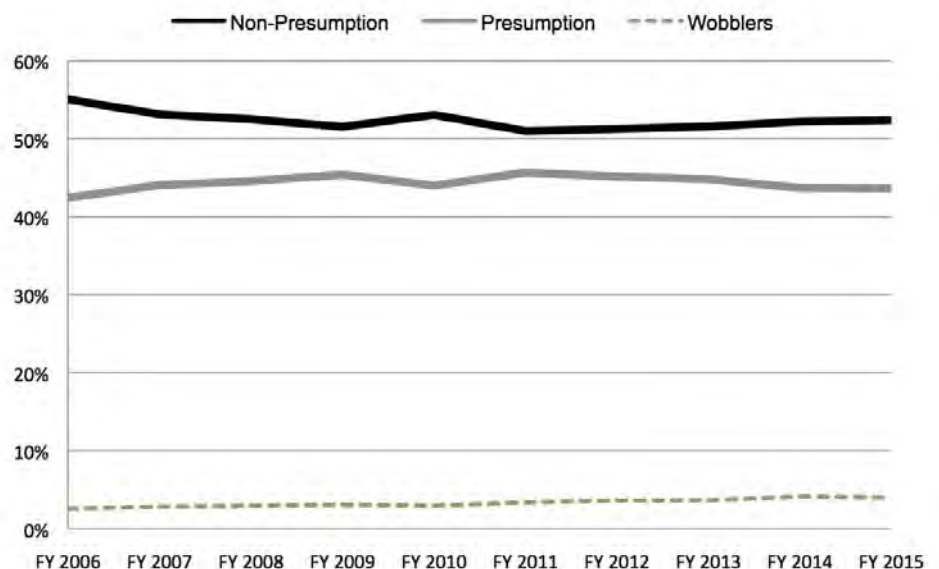
Presumption cases were also compared to non-presumption cases by offense type and PTRa category (Table 1). Presumption cases accounted for 93 percent of drug offenses; 77 percent of sex offenses, 17 percent of all weapons offenses, and only 2 percent of all violence charges (however, an additional 44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

PTRA category	Number	Percent of defendants with		
		Non-Presumption	Presumption	Wobblers
Drugs				
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%
Property				
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%
Weapons				
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%
Sex				
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.³ 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

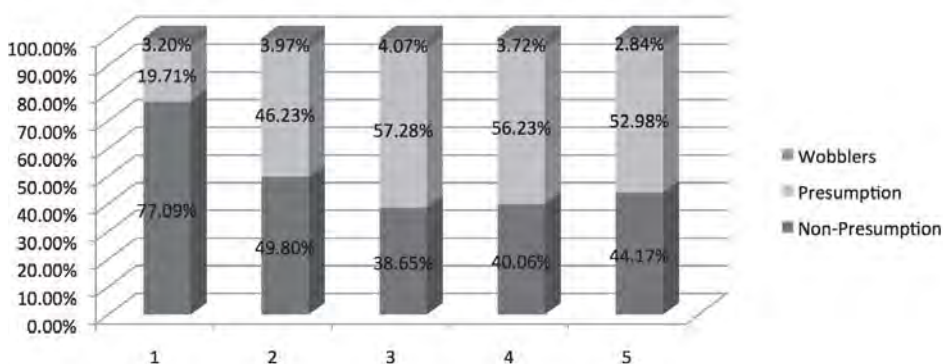
The intended purpose of the presumption was to detain high-risk defendants who were likely to pose a significant risk of danger to the

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

Presumption and PTR category	Number on release	Percent of released defendants with:			
		Any rearrest	Violent rearrest	FTA	Revocation
One					
Non-presumption	22,879	2.8%	0.4%	0.7%	1.7%
Presumption	4,251	3.7%**	0.5%	0.8%	4.3%***
Two					
Non-presumption	14,211	5.9%	0.9%	1.5%	5.2%
Presumption	8,952	5.3%*	0.7%	1.6%	6.5%***
Three					
Non-presumption	9,116	10.2%	1.8%	2.7%	12.6%
Presumption	11,098	8.7%***	1.2%***	2.5%	12.9%
Four					
Non-presumption	4,029	16.8%	2.7%	3.9%	20.0%
Presumption	5,535	12.2%***	2.0%*	3.1%*	18.1%*
Five					
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 assessments with cases closed prior to fiscal year 2015. * $p < .05$; ** $p < .01$; *** $p < .001$

FIGURE 2.
Composition of risk categories



³ *Guide to Judiciary Policy*, Vol. 8A, § 170.

community if they were released pending trial.⁴ 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 PTRAs 4 cases released was 33 percent, while the percentage of PTRAs 4 presumption cases released was 32 percent.

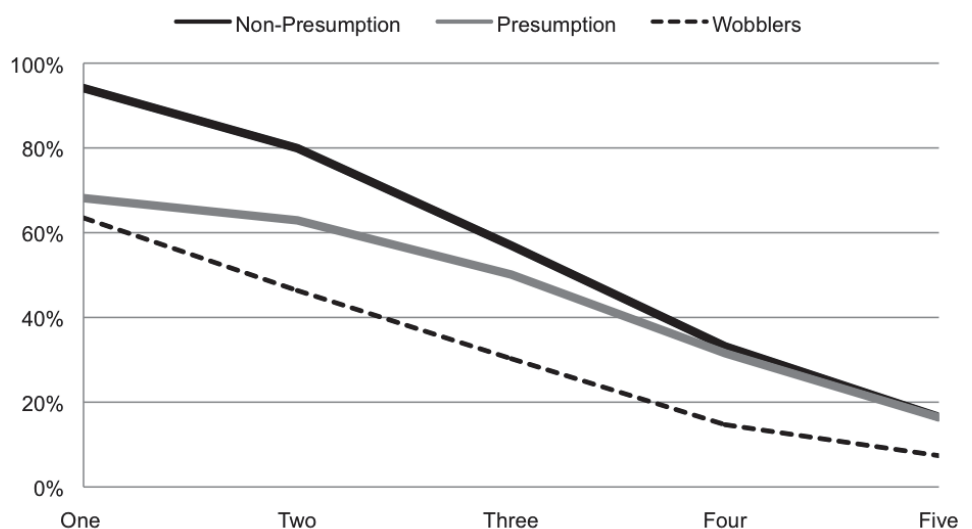
These results were illuminating for several reasons. The most surprising result was that the largest difference in release rates was among the lowest risk defendants, with the differential in release rates disappearing as the risk increases. Notwithstanding the presumption, a PTRAs category 1 case represents 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 PTRAs category

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

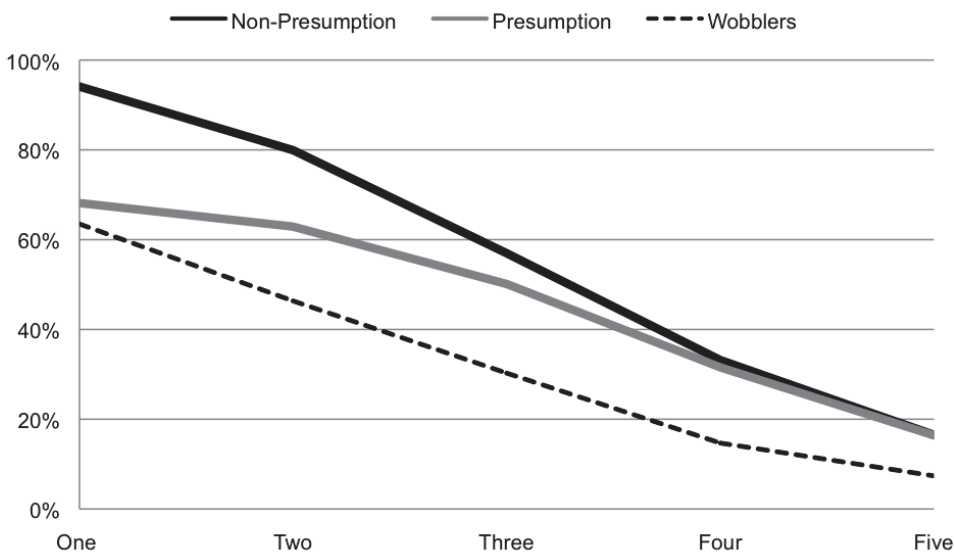


⁴ S. REP. No. 225, *supra* note 2, at 3.

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
All defendants					
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%
PTRA ones					
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%
PTRA twos					
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%
PTRA threes					
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%
PTRA fours					
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%
PTRA fives					
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 level⁵ (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

⁵ 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
Totals					\$273,273,753	\$27,264,836	\$246,008,917

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
Totals					\$1,006,964,082	\$100,250,759	\$906,713,323

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

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.

**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

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

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;

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 (115th 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).

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.¹ 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

¹ 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 country² 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

² 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).³ 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).⁴ Congress chose not to create a presumption of pretrial detention for these thousands of people annually facing

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

⁴ 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 (last accessed June 24, 2019).

one of the least serious felony charges⁵ 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

⁵ 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.⁶ 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).⁷ The evidence shows that *illegal aliens have the exact same rate of non-appearance as do U.S.*

⁶ *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)).

⁷ 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 release⁸ and significantly less likely to have their bond revoked.⁹ *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.

⁸ 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.*

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th 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:

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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

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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.¹ 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

¹ 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.²

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

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").³ 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

² 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](#).

³ 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. [O'Donnell 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?⁴ 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

⁴ 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*,⁵ 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*⁶ 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

⁵ *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.

⁶ 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.⁷ *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

⁷This 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 \(2005\)](#).⁸ 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.

⁸ 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.⁹ 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.

⁹ 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).¹⁰

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.¹¹

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

¹⁰ *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.

¹¹ 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
	)	

ORDER

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.¹ *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.

¹ 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**

Release Data

Table H-14A.
U.S. District Courts—Pretrial Services Release and Detention, Excluding Immigration Cases
For the 12-Month Period Ending September 30, 2018

Circuit and District	Cases ¹	Detained and Never Released ²		Released ³	
		Total	Pct.	Total	Pct.
TOTAL	58,552	35,762	61.1	22,790	38.9
1ST	2,059	1,363	66.2	696	33.8
ME	175	85	48.6	90	51.4
MA	438	237	54.1	201	45.9
NH	150	86	57.3	64	42.7
RI	149	78	52.3	71	47.7
PR	1,147	877	76.5	270	23.5
2ND	3,347	1,640	49.0	1,707	51.0
CT	349	161	46.1	188	53.9
NY,N	286	150	52.4	136	47.6
NY,E	716	331	46.2	385	53.8
NY,S	1,450	734	50.6	716	49.4
NY,W	414	191	46.1	223	53.9
VT	132	73	55.3	59	44.7
3RD	2,185	1,088	49.8	1,097	50.2
DE	93	64	68.8	29	31.2
NJ	756	293	38.8	463	61.2
PA,E	512	295	57.6	217	42.4
PA,M	311	156	50.2	155	49.8
PA,W	450	239	53.1	211	46.9
VI	63	41	65.1	22	34.9
4TH	4,760	2,623	55.1	2,137	44.9
MD	656	384	58.5	272	41.5
NC,E	772	533	69.0	239	31.0
NC,M	285	167	58.6	118	41.4
NC,W	522	373	71.5	149	28.5
SC	749	413	55.1	336	44.9
VA,E	1,068	402	37.6	666	62.4
VA,W	196	93	47.4	103	52.6
WV,N	270	106	39.3	164	60.7
WV,S	242	152	62.8	90	37.2

Table H-14A. (September 30, 2018—Continued)

Circuit and District	Cases ¹	Detained and Never Released ²		Released ³	
		Total	Pct.	Total	Pct.
5TH	10,615	7,356	69.3	3,259	30.7
LA,E	269	147	54.6	122	45.4
LA,M	153	67	43.8	86	56.2
LA,W	197	109	55.3	88	44.7
MS,N	155	77	49.7	78	50.3
MS,S	334	242	72.5	92	27.5
TX,N	859	528	61.5	331	38.5
TX,E	583	409	70.2	174	29.8
TX,S	3,863	2,863	74.1	1,000	25.9
TX,W	4,202	2,914	69.3	1,288	30.7
6TH	4,814	2,722	56.5	2,092	43.5
KY,E	356	229	64.3	127	35.7
KY,W	272	140	51.5	132	48.5
MI,E	795	354	44.5	441	55.5
MI,W	368	189	51.4	179	48.6
OH,N	733	433	59.1	300	40.9
OH,S	726	337	46.4	389	53.6
TN,E	688	559	81.3	129	18.8
TN,M	280	156	55.7	124	44.3
TN,W	596	325	54.5	271	45.5
7TH	2,571	1,469	57.1	1,102	42.9
IL,N	701	343	48.9	358	51.1
IL,C	280	197	70.4	83	29.6
IL,S	250	140	56.0	110	44.0
IN,N	432	271	62.7	161	37.3
IN,S	549	380	69.2	169	30.8
WI,E	278	99	35.6	179	64.4
WI,W	81	39	48.1	42	51.9
8TH	4,979	3,153	63.3	1,826	36.7
AR,E	448	170	37.9	278	62.1
AR,W	179	148	82.7	31	17.3
IA,N	319	221	69.3	98	30.7
IA,S	418	264	63.2	154	36.8
MN	287	157	54.7	130	45.3
MO,E	1,466	1,062	72.4	404	27.6
MO,W	701	475	67.8	226	32.2
NE	418	242	57.9	176	42.1
ND	266	135	50.8	131	49.2
SD	477	279	58.5	198	41.5

Table H-14A. (September 30, 2018—Continued)

Circuit and District	Cases ¹	Detained and Never Released ²		Released ³	
		Total	Pct.	Total	Pct.
9TH	14,473	9,569	66.1	4,904	33.9
AK	219	147	67.1	72	32.9
AZ	3,105	1,996	64.3	1,109	35.7
CA,N	572	254	44.4	318	55.6
CA,E	520	319	61.3	201	38.7
CA,C	1,257	594	47.3	663	52.7
CA,S	6,026	5,002	83.0	1,024	17.0
HI	210	78	37.1	132	62.9
ID	286	163	57.0	123	43.0
MT	332	173	52.1	159	47.9
NV	415	243	58.6	172	41.4
OR	438	198	45.2	240	54.8
WA,E	322	184	57.1	138	42.9
WA,W	719	208	28.9	511	71.1
GUAM	42	6	14.3	36	85.7
NM,I	10	4	40.0	6	60.0
10TH	3,505	1,976	56.4	1,529	43.6
CO	414	250	60.4	164	39.6
KS	437	234	53.5	203	46.5
NM	1,074	621	57.8	453	42.2
OK,N	176	73	41.5	103	58.5
OK,E	134	98	73.1	36	26.9
OK,W	502	196	39.0	306	61.0
UT	594	398	67.0	196	33.0
WY	174	106	60.9	68	39.1
11TH	5,244	2,803	53.5	2,441	46.5
AL,N	287	118	41.1	169	58.9
AL,M	206	71	34.5	135	65.5
AL,S	189	75	39.7	114	60.3
FL,N	268	111	41.4	157	58.6
FL,M	1,260	786	62.4	474	37.6
FL,S	1,952	1,080	55.3	872	44.7
GA,N	479	212	44.3	267	55.7
GA,M	332	155	46.7	177	53.3
GA,S	271	195	72.0	76	28.0

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.

¹ Data represents defendants whose cases were activated during the 12-month period. Excludes dismissals, cases in which release is not possible within 90 days, transfers out, and cases that were later converted to diversion cases during the period.

² Includes data reported for previous periods as "never released."

³ 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, 2018

Circuit and District	Cases Activated	Type of PSO ¹ Recommendation Made ³						Type of AUSA ² Recommendation Made ³					
		PSO Recommended		Detention		Release		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
TOTAL	99,494	58,203	58.5	32,333	55.6	25,870	44.4	58,193	58.5	36,833	63.3	21,360	36.7
1ST	2,483	1,966	79.2	1,317	67.0	649	33.0	1,961	79.0	1,549	79.0	412	21.0
ME	203	150	73.9	74	49.3	76	50.7	150	73.9	87	58.0	63	42.0
MA	581	374	64.4	206	55.1	168	44.9	375	64.5	232	61.9	143	38.1
NH	229	136	59.4	83	61.0	53	39.0	136	59.4	89	65.4	47	34.6
RI	168	150	89.3	75	50.0	75	50.0	150	89.3	98	65.3	52	34.7
PR	1,302	1,156	88.8	879	76.0	277	24.0	1,150	88.3	1,043	90.7	107	9.3
2ND	4,036	3,507	86.9	1,632	46.5	1,875	53.5	3,494	86.6	2,060	59.0	1,434	41.0
CT	415	312	75.2	156	50.0	156	50.0	303	73.0	185	61.1	118	38.9
NY,N	410	304	74.1	187	61.5	117	38.5	306	74.6	190	62.1	116	37.9
NY,E	895	798	89.2	307	38.5	491	61.5	792	88.5	478	60.4	314	39.6
NY,S	1,631	1,542	94.5	704	45.7	838	54.3	1,542	94.5	851	55.2	691	44.8
NY,W	509	432	84.9	203	47.0	229	53.0	432	84.9	263	60.9	169	39.1
VT	176	119	67.6	75	63.0	44	37.0	119	67.6	93	78.2	26	21.8
3RD	2,853	2,321	81.4	1,225	52.8	1,096	47.2	2,330	81.7	1,324	56.8	1,006	43.2
DE	116	88	75.9	66	75.0	22	25.0	88	75.9	70	79.5	18	20.5
NJ	962	860	89.4	381	44.3	479	55.7	860	89.4	401	46.6	459	53.4
PA,E	631	544	86.2	308	56.6	236	43.4	544	86.2	338	62.1	206	37.9
PA,M	558	334	59.9	198	59.3	136	40.7	333	59.7	199	59.8	134	40.2
PA,W	509	451	88.6	239	53.0	212	47.0	457	89.8	279	61.1	178	38.9
VI	77	44	57.1	33	75.0	11	25.0	48	62.3	37	77.1	11	22.9
4TH	5,943	4,151	69.8	2,460	59.3	1,691	40.7	4,130	69.5	2,749	66.6	1,381	33.4
MD	704	672	95.5	457	68.0	215	32.0	668	94.9	470	70.4	198	29.6
NC,E	923	631	68.4	476	75.4	155	24.6	629	68.1	538	85.5	91	14.5
NC,M	332	284	85.5	167	58.8	117	41.2	283	85.2	203	71.7	80	28.3
NC,W	642	553	86.1	400	72.3	153	27.7	553	86.1	426	77.0	127	23.0
SC	1,036	616	59.5	281	45.6	335	54.4	592	57.1	335	56.6	257	43.4
VA,E	1,379	777	56.3	316	40.7	461	59.3	784	56.9	408	52.0	376	48.0
VA,W	286	176	61.5	101	57.4	75	42.6	155	54.2	92	59.4	63	40.6
WV,N	334	225	67.4	104	46.2	121	53.8	246	73.7	113	45.9	133	54.1
WV,S	307	217	70.7	158	72.8	59	27.2	220	71.7	164	74.5	56	25.5

Table H-3A. (September 30, 2018—Continued)

Circuit and District	Cases Activated	Type of PSO ¹ Recommendation Made ³						Type of AUSA ² Recommendation Made ³					
		PSO Recommended		Detention		Release		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
5TH	21,878	10,082	46.1	6,361	63.1	3,721	36.9	10,059	46.0	7,246	72.0	2,813	28.0
LA,E	333	276	82.9	145	52.5	131	47.5	276	82.9	169	61.2	107	38.8
LA,M	223	150	67.3	57	38.0	93	62.0	150	67.3	99	66.0	51	34.0
LA,W	328	198	60.4	115	58.1	83	41.9	197	60.1	123	62.4	74	37.6
MS,N	195	145	74.4	78	53.8	67	46.2	145	74.4	83	57.2	62	42.8
MS,S	512	331	64.6	253	76.4	78	23.6	330	64.5	252	76.4	78	23.6
TX,N	999	925	92.6	533	57.6	392	42.4	919	92.0	686	74.6	233	25.4
TX,E	838	586	69.9	408	69.6	178	30.4	586	69.9	457	78.0	129	22.0
TX,S	8,092	3,274	40.5	2,093	63.9	1,181	36.1	3,272	40.4	2,354	71.9	918	28.1
TX,W	10,358	4,197	40.5	2,679	63.8	1,518	36.2	4,184	40.4	3,023	72.3	1,161	27.7
6TH	6,098	4,700	77.1	2,796	59.5	1,904	40.5	4,713	77.3	3,095	65.7	1,618	34.3
KY,E	463	334	72.1	230	68.9	104	31.1	334	72.1	231	69.2	103	30.8
KY,W	332	259	78.0	152	58.7	107	41.3	258	77.7	167	64.7	91	35.3
MI,E	1,125	841	74.8	390	46.4	451	53.6	840	74.7	445	53.0	395	47.0
MI,W	460	378	82.2	199	52.6	179	47.4	378	82.2	250	66.1	128	33.9
OH,N	912	736	80.7	482	65.5	254	34.5	738	80.9	501	67.9	237	32.1
OH,S	888	705	79.4	290	41.1	415	58.9	704	79.3	364	51.7	340	48.3
TN,E	842	707	84.0	575	81.3	132	18.7	708	84.1	609	86.0	99	14.0
TN,M	362	217	59.9	148	68.2	69	31.8	263	72.7	195	74.1	68	25.9
TN,W	714	523	73.2	330	63.1	193	36.9	490	68.6	333	68.0	157	32.0
7TH	3,126	2,619	83.8	1,513	57.8	1,106	42.2	2,601	83.2	1,829	70.3	772	29.7
IL,N	908	808	89.0	372	46.0	436	54.0	806	88.8	551	68.4	255	31.6
IL,C	301	284	94.4	215	75.7	69	24.3	282	93.7	221	78.4	61	21.6
IL,S	305	212	69.5	116	54.7	96	45.3	212	69.5	138	65.1	74	34.9
IN,N	468	434	92.7	286	65.9	148	34.1	435	92.9	311	71.5	124	28.5
IN,S	623	528	84.8	376	71.2	152	28.8	513	82.3	423	82.5	90	17.5
WI,E	351	276	78.6	108	39.1	168	60.9	276	78.6	144	52.2	132	47.8
WI,W	170	77	45.3	40	51.9	37	48.1	77	45.3	41	53.2	36	46.8
8TH	6,107	4,975	81.5	3,198	64.3	1,777	35.7	4,951	81.1	3,756	75.9	1,195	24.1
AR,E	659	445	67.5	200	44.9	245	55.1	445	67.5	233	52.4	212	47.6
AR,W	245	190	77.6	169	88.9	21	11.1	190	77.6	169	88.9	21	11.1
IA,N	410	322	78.5	233	72.4	89	27.6	320	78.0	256	80.0	64	20.0
IA,S	524	416	79.4	248	59.6	168	40.4	416	79.4	297	71.4	119	28.6
MN	372	313	84.1	178	56.9	135	43.1	295	79.3	212	71.9	83	28.1
MO,E	1,560	1,465	93.9	1,097	74.9	368	25.1	1,473	94.4	1,197	81.3	276	18.7
MO,W	835	719	86.1	470	65.4	249	34.6	716	85.7	608	84.9	108	15.1
NE	596	424	71.1	259	61.1	165	38.9	415	69.6	298	71.8	117	28.2
ND	356	208	58.4	106	51.0	102	49.0	209	58.7	124	59.3	85	40.7
SD	550	473	86.0	238	50.3	235	49.7	472	85.8	362	76.7	110	23.3

Table H-3A. (September 30, 2018—Continued)

Circuit and District	Cases Activated	Type of PSO ¹ Recommendation Made ³						Type of AUSA ² Recommendation Made ³					
		PSO Recommended		Detention		Release		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
9TH	32,004	15,034	47.0	6,989	46.5	8,045	53.5	14,977	46.8	7,870	52.5	7,107	47.5
AK	233	217	93.1	169	77.9	48	22.1	216	92.7	179	82.9	37	17.1
AZ	16,010	3,081	19.2	2,071	67.2	1,010	32.8	3,072	19.2	2,418	78.7	654	21.3
CA,N	670	626	93.4	254	40.6	372	59.4	626	93.4	369	58.9	257	41.1
CA,E	686	615	89.7	413	67.2	202	32.8	615	89.7	516	83.9	99	16.1
CA,C	1,846	1,566	84.8	902	57.6	664	42.4	1,565	84.8	1,059	67.7	506	32.3
CA,S	8,851	6,050	68.4	1,758	29.1	4,292	70.9	6,012	67.9	1,575	26.2	4,437	73.8
HI	233	203	87.1	66	32.5	137	67.5	203	87.1	139	68.5	64	31.5
ID	425	272	64.0	157	57.7	115	42.3	264	62.1	196	74.2	68	25.8
MT	436	345	79.1	219	63.5	126	36.5	345	79.1	220	63.8	125	36.2
NV	648	498	76.9	304	61.0	194	39.0	497	76.7	357	71.8	140	28.2
OR	568	451	79.4	216	47.9	235	52.1	451	79.4	273	60.5	178	39.5
WA,E	431	264	61.3	179	67.8	85	32.2	268	62.2	249	92.9	19	7.1
WA,W	907	794	87.5	264	33.2	530	66.8	791	87.2	300	37.9	491	62.1
GUAM	45	42	93.3	12	28.6	30	71.4	42	93.3	14	33.3	28	66.7
NM,I	15	10	66.7	5	50.0	5	50.0	10	66.7	6	60.0	4	40.0
10TH	7,533	3,465	46.0	2,039	58.8	1,426	41.2	3,465	46.0	2,303	66.5	1,162	33.5
CO	629	409	65.0	245	59.9	164	40.1	409	65.0	284	69.4	125	30.6
KS	532	446	83.8	270	60.5	176	39.5	446	83.8	287	64.3	159	35.7
NM	4,483	1,070	23.9	626	58.5	444	41.5	1,070	23.9	719	67.2	351	32.8
OK,N	253	175	69.2	70	40.0	105	60.0	175	69.2	84	48.0	91	52.0
OK,E	149	138	92.6	105	76.1	33	23.9	139	93.3	114	82.0	25	18.0
OK,W	612	518	84.6	199	38.4	319	61.6	518	84.6	225	43.4	293	56.6
UT	635	565	89.0	422	74.7	143	25.3	565	89.0	466	82.5	99	17.5
WY	240	144	60.0	102	70.8	42	29.2	143	59.6	124	86.7	19	13.3
11TH	7,433	5,383	72.4	2,803	52.1	2,580	47.9	5,512	74.2	3,052	55.4	2,460	44.6
AL,N	536	296	55.2	144	48.6	152	51.4	296	55.2	148	50.0	148	50.0
AL,M	240	197	82.1	95	48.2	102	51.8	196	81.7	101	51.5	95	48.5
AL,S	354	173	48.9	74	42.8	99	57.2	170	48.0	98	57.6	72	42.4
FL,N	364	272	74.7	119	43.8	153	56.3	267	73.4	146	54.7	121	45.3
FL,M	1,805	1,322	73.2	693	52.4	629	47.6	1,321	73.2	919	69.6	402	30.4
FL,S	2,551	1,960	76.8	1,019	52.0	941	48.0	2,125	83.3	901	42.4	1,224	57.6
GA,N	721	564	78.2	300	53.2	264	46.8	551	76.4	332	60.3	219	39.7
GA,M	482	328	68.0	151	46.0	177	54.0	320	66.4	199	62.2	121	37.8
GA,S	380	271	71.3	208	76.8	63	23.2	266	70.0	208	78.2	58	21.8

NOTE: This table excludes data for the District of Columbia and includes transfers received.

¹ PSO = Pretrial Services Officer.² AUSA = Assistant U.S. Attorney.³ Excludes dismissals and cases in which release is not possible within 90 days.

Chart: Districts With High Rates of Pretrial Release

Districts with High Rates of Pretrial Release

District	Total cases activated (excluding immigration)	Percent of Ds released pretrial (excluding immigration)	% of cases PTS recommends release (excl. immigration)	% of cases USAO recommends release (excl. immigration)
Western District of Washington*	907	71.1%	66.8%	62.1%
Middle District of Alabama	240	65.5%	51.8%	48.5%
Eastern District of Wisconsin*	351	64.4%	60.9%	47.8%
Eastern District of Virginia	1,379	62.4%	59.3%	48.0%
District of New Jersey*	962	61.2%	55.7%	53.4%
Northern District of West Virginia	334	60.7%	53.8%	54.1%
Northern District of Georgia*	721	55.7%	46.8%	39.7%
Eastern District of Michigan*	1,125	55.5%	53.6%	47.0%

Chart prepared by Alison Siegler, Erica Zunkel, and Samuel Taxy based on the following AO data charts: Pretrial and USAO Recommendations by District Excluding Immigration Cases (<https://www.uscourts.gov/statistics/table/h-3a/judicial-business/2018/09/30>); Pretrial Release Data by District Excluding Immigration Cases (<https://www.uscourts.gov/statistics/table/h-14a/judicial-business/2018/09/30>)

* District where we have confirmed that the Pretrial Services Report is provided at the Initial Appearance.

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
 - 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.¹ 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.

¹ 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

The Rising Federal Pretrial Detention Rate, in Context

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THE FEDERAL PRETRIAL detention rate has been steadily increasing. Twenty years ago, less than half of defendants were held pending trial; now the figure is nearly 75 percent (Figure 1).³ The cost of this detention, in monetary terms, is approaching \$1.5 billion a year (Department of Justice), and there are human costs as well. Researchers have connected pretrial detention to wrongful convictions, potentially longer-than-necessary prison sentences and higher recidivism rates (Gupta, Hansman & Frenchman) (Oleson, VanNostrand & Lowenkamp).⁴

¹ The author would like to thank the following people for their assistance in developing this article: Brian Christ, Chief U.S. Pretrial Services Officer for the District of Oregon; Roberto Cordeiro, Chief U.S. Pretrial Services Officer for the Eastern District of New York; John Fitzgerald, Deputy Chief of the AO's Probation and Pretrial Services Office; Charles Robinson, Division Chief, AO's Probation and Pretrial Services Office; Stephen Vance, Chief, AO's Criminal Law Policy Staff; William E. Hicks, Jr., Administrator, AO's Probation and Pretrial Services Office; Thomas H. Cohen, Analyst, AO's Probation and Pretrial Services Office; and Christopher T. Lowenkamp, Analyst, AO's Probation and Pretrial Services Office.

² The views expressed in this article are the author's alone and do not necessarily reflect those of the AO, the Judicial Conference of the United States, its committees, or the federal probation and pretrial services system.

³ All AO data cited in this article, unless otherwise noted, refers to cases processed in the 12-month period ending March 31, 2018 or of the year indicated. All race demographic data excludes Hispanics as Hispanics, and non-Hispanics are reported separately.

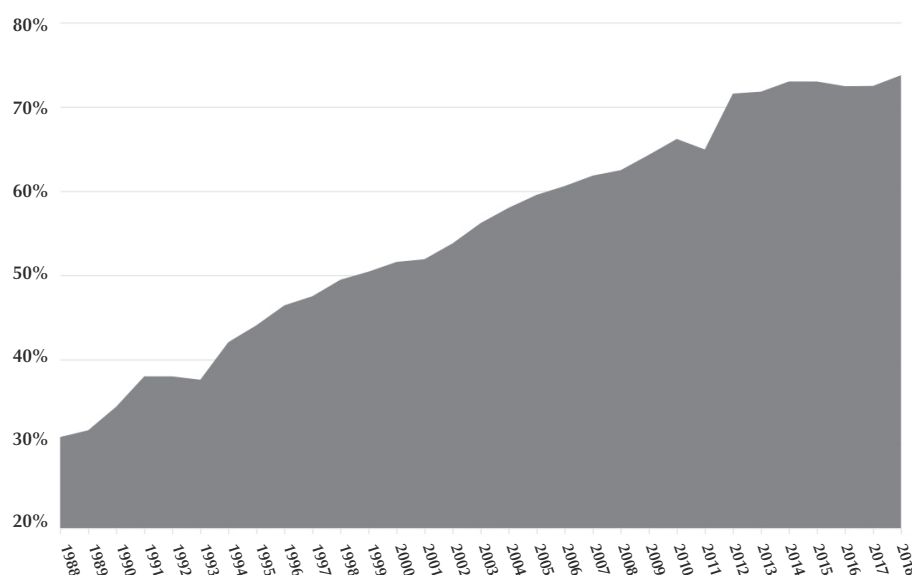
⁴ It is often difficult in research to distinguish

between correlation and causation, and that is true in terms of the relationship between pretrial detention and subsequent outcomes in criminal cases. Clearly, one interpretation is that pretrial detention has a corrosive effect on defendants—separating them from their legal team, family, and other potentially prosocial connections in the community. Detention also forces defendants, ironically, to associate with others involved in the criminal justice system, potentially creating negative peer networks. Another argument, however, is that judges are identifying those at higher risk at the pretrial stage, observing risk not fully captured by actuarial assessment devices. Consequently, the noted detention, sentence, and recidivism issues

The demographic disparity among those detained is yet another concern. Men are detained twice as often as women. Blacks and Native Americans are detained more often than Asians, Pacific Islanders, and whites. Hispanics are detained at substantially greater rates than non-Hispanics. Similarly, non-citizens are detained at much greater rates than U.S. citizens (Figure 2). Those differences may raise concerns regarding judges' objectivity,

may flow from defendants' preexisting level of risk rather than from the detention itself.

FIGURE 1
Federal Pretrial Detention Rate



Source: Judicial Business of the United States Courts and AOUSC Decision Support System

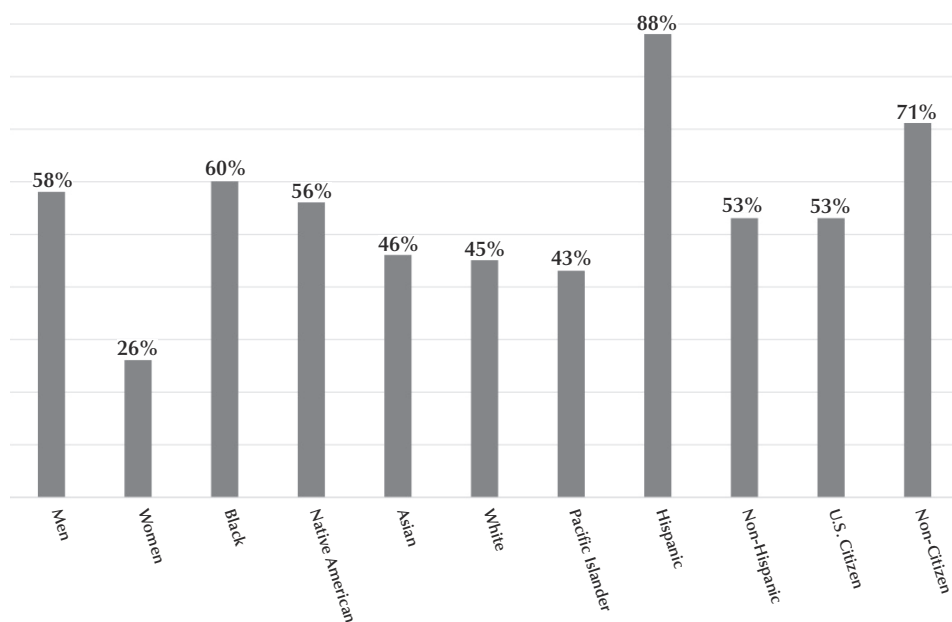
but like the overall pretrial detention rate, it is important to examine judges' decisions in context.

Judges are required by statute to consider specific factors when making release and detention decisions. Those factors, on their face, objectively relate to defendants' risk of flight and danger to the community.⁵ They include the nature and circumstances of the crime charged; the strength of the evidence against the defendant and likelihood of conviction; the defendant's criminal history, including prior failures to appear for court proceedings; personal history; physical and mental condition; ties to the community; financial condition and employment record. In taking these factors into account, judges are required to be impartial and are precluded from discriminating against defendants based on gender, race, or other protected classification (Judicial Conference of the United States).

The demographic disparity may, therefore, be a byproduct of the courts' objective application of statutory required factors rather than invidious discrimination. At the heart of the statutory factors is the offense charged.⁶ Although there is a presumption of innocence for people accused of crimes, the Supreme Court has upheld consideration of the charges lodged for detention purposes. The Court concluded that within the federal statutory framework, pretrial detention is reasonably designed to further the legitimate goal of public safety, not to punish defendants (*United States vs. Salerno*).

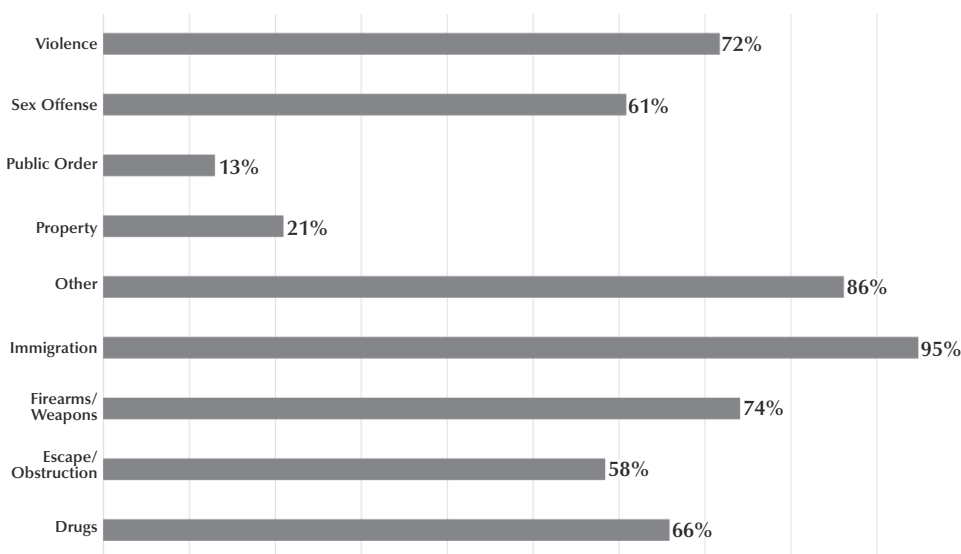
Some offenses inherently produce greater concerns about risk of flight and danger to the community than do others. For example, often those charged with illegal entry into the United States have acknowledged or obvious ties to other countries. Such ties increase the defendant's flight risk. Similarly, when defendants are charged with violence, weapons, and sex offending, concerns for community safety increase, another factor relevant to pretrial

FIGURE 2
Federal Pretrial Detention Rate



Source: AOUSC Decision Support System; race categories do not include Hispanics

FIGURE 3
Federal Detention Rate by Offense



Source: AOUSC Decision Support System

⁵ See, 18 U.S.C. § 3142. Note, not everyone considers the statutory factors to be unbiased. Some civil rights organizations argue that factors such as prior failures to appear and rearrest are more reflective of police and prosecutors' decisions than the conduct of defendants (Pretrial Justice).

⁶ It should be noted that prosecutors, not judges, decide which charges are to be brought against a defendant. Prosecutors, like judges, are ethically prohibited from discriminating against defendants based on demographic characteristics (American Bar Association), and their prosecutorial decisions are subject to published guidelines (Department of Justice).

detention. Therefore, it is not surprising that defendants charged with different offenses have different release rates (Figure 3).

What may be surprising is that there are distinct demographic patterns in terms of who is charged with different types of crimes. While drug charges are the most common across the majority of demographic groups, there is substantial variation. For example, property offenses are the second

most common for women, Asian, Pacific Islander, and white defendants. In contrast, the second most common group of offenses for males and blacks relate to firearms and weapons. Native Americans are charged most frequently with violent offenses, while Hispanics and non-citizens are most frequently charged with immigration crimes (Figure 4). The unique federal jurisdiction provided by the Constitution and consistent

FIGURE 4
Prevalence of Federal Offenses Charged within Each Demographic Category

	Female	Male	Asian	Black	Pacific Islander	Native American	White	Hispanic	Non-Hispanic	U.S. Citizen	Non-Citizen
Drugs	39%	34%	21%	38%	36%	19%	33%	21%	34%	40%	13%
Escape/Obstruction	3%	3%	2%	2%	4%	6%	3%	1%	3%	2%	0%
Firearms/Weapons	5%	22%	4%	28%	16%	9%	13%	3%	19%	18%	1%
Immigration	4%	3%	7%	2%	1%	4%	4%	62%	3%	6%	75%
Other	3%	2%	21%	1%	1%	2%	1%	7%	2%	1%	9%
Property	36%	17%	33%	16%	21%	7%	24%	3%	17%	16%	2%
Public Order	3%	3%	2%	2%	6%	3%	4%	0%	3%	3%	0%
Sex Offenses	2%	8%	5%	2%	5%	13%	12%	1%	8%	6%	0%
Violence	6%	9%	4%	9%	9%	37%	6%	1%	9%	8%	0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: AOUSC, Decision Support System

policy determinations across Presidential administrations have led to more prosecutions for illegal entry into the country, violence—particularly in “Indian Country,” and weapons offenses. In turn those prosecutions have contributed to the demographic differences in release rates.

Another statutory consideration for pretrial detention release is prior criminal history. It is generally thought that minorities, blacks in particular, have more documented criminal histories than do whites (Gase, Glenn et al.). In the federal system, we do not have a uniform measure of criminal history at the pretrial stage. We can, however, derive such a measure by borrowing the criminal history scoring system used at sentencing. Developed by the United States Sentencing Commission, the scoring system relies primarily on the number of convictions and the length of custody terms imposed on defendants (United States Sentencing Commission). Looking at the current post-conviction supervision population for which we have criminal history scores, there are indeed significant demographic differences in terms of criminal histories.

Only 12 percent of women score within the most severe criminal history categories, compared to 33 percent of men.⁷ There is also large variation among defendants of different races (Figure 5), with 11 percent of Asians in the most severe categories, 39 percent of Black defendants, 17 percent of the Native Americans, 15 percent of the Pacific Islanders,

and 19 percent of the whites. Hispanic and non-citizens have roughly half the criminal histories of non-Hispanics and United States citizens. Notably, however, the Commission’s system does not take foreign convictions into account, so the criminal histories of defendants with ties to other countries may be understated.

Consequently, it appears that the demographic differences in the charges against, and criminal history of, defendants may explain at least some of the difference in release rates.⁸ To further explore that possibility, the Administrative Office of the United States Courts (AO) examined records related to 210,000 defendants charged in the federal system between 2012 and 2016. Focusing on United States citizens, cases were matched based on most serious offense, criminal history, and other empirical risk factors for which there was available data.⁹ The results were analyzed by gender, the two largest race categories (black and non-Hispanic whites), and Hispanic origin and reported in an internal PPSO memo. With the stated controls in place, release rate differences between men and woman declined by 70 percent, going from 28 to 9 percentage points. The matching process eliminated the statistically significant differences between blacks and whites altogether,

⁸ For more information about the correlation of offense charge, criminal history, and release rates in the federal system, see Cohen and Austin.

⁹ There is not discrete data currently available for each of the factors specified by statute relative to pretrial release. Consequently, all research in this area is inherently limited. The additional factors are those included in the Pretrial Risk Assessment device or PTRR. See, Cadigan, Johnson & Lowenkamp, “The Re-validation of the Federal Pretrial Services Risk Assessment (PTRR).”

FIGURE 5
Pretrial Detention Rate

	2008	2018	Pct. Point Change
Men	48%	58%	10%
Women	19%	26%	7%
Black	55%	60%	5%
Native American	45%	56%	11%
Asian	35%	46%	11%
White	33%	45%	12%
Pacific Islander	39%	43%	4%
Hispanic	79%	88%	9%
Non-Hispanic	43%	53%	10%
U.S. Citizen	42%	53%	11%
Non-Citizen	61%	71%	10%

Source: AOUSC, Decision Support System

going from 17 percentage points to 1 percentage point. Nearly 60 percent of the difference between Hispanics and non-Hispanics could be explained by the controls, going from 11 to 7 percentage points. Of course, different models and datasets can be used to further explore the question of equity in release decisions, but the analysis already undertaken makes clear that many factors influence release rates and looking at one factor alone, such as demographics, would be incomplete.

So available data indicate that demographic disparity in detention may not stem from the release decision itself but rather from the characteristics of those being charged in federal court. That observation does not negate the fact that pretrial detention rates are at record high levels and on an upward trend for all demographic groups (Figure 5).

⁷ The United States Sentencing Commission criminal history scoring system provides six categories, I-VI. The highest referred to in this article relates to those defendants in categories III-VI. The least severe category is I and includes defendants with no criminal history.

Countervailing Costs and Concerns

Just as there are costs and concerns related to detaining people pending trial, there are costs and concerns related to supervising defendants during court proceedings. In most cases, to reduce risk of flight and danger to the community, the court imposes a term of community supervision monitored by a pretrial services or probation officer. That supervision, and the treatment programming it often entails, costs \$177 million a year (AO). Another cost to pretrial release is that defendants have a greater opportunity to abscond, intimidate witnesses, and commit other crimes compared to those defendants who are detained (Alexander). The federal government spends \$450 million a year on fugitive apprehension, and a portion of that is dedicated to searching for federal pretrial defendants who abscond before trial (Department of Justice). And while there is not an exact figure for the cost of crimes committed by persons released pending trial (General Accountability Office), conservative estimates put it in the hundreds of millions of dollars.¹⁰

What Should Be Done?

In light of the escalating federal pretrial detention rate and related concerns, some observers have suggested the federal system should model itself after state and local systems with lower detention rates and better release outcomes. For example, a keynote speaker at a National Association of Pretrial Services Agencies (NAPSA) conference¹¹ suggested that the federal system adopt the practices of the District of Columbia Superior Court.¹²

¹⁰ Using one published method on just 10 percent of the new charges filed against released defendants in fiscal year 2017 related to violence produced a loss figure of \$147 million alone (McCollister, French, & Fang, 2010).

¹¹ Hon. Truman Morrison, National Association of Pretrial Services Agencies 44th Annual Conference and Training Institute, Salt Lake, Utah. September 11-14, 2016.

¹² The Superior Court of the District of Columbia was created by Congress in 1970 "to assume responsibility for local jurisdiction, similar to that exercised by state courts." (Federal Judicial Center). The Pretrial Services Agency for the District of Columbia that supports the Superior Court, as well as the U.S. District Court for the District of Columbia, is a federal entity as well, but operates separate and apart from the "federal system" supporting all the U.S. district courts outside the nation's capital. In the business vernacular and for purposes of this article, the "federal system" and "federal pretrial system" refers to the operations

That court has repeatedly posted an impressive 90 percent release rate, with an equal percentage of released defendants making court appearances and remaining free from rearrest. The pretrial agency supporting the court has been praised in the media (Marimow), even being favorably satirized on the popular television show *Last Week Tonight with John Oliver* (Avery, Carvell & Gondelman).

Unfortunately, the differences in size and operations between the two jurisdictions makes large-scale transfer of practices difficult.¹³ For example, the Superior Court deals, relatively, with a homogenous defendant population concentrated in a small geographic area. Most of the charges filed in Superior Court are misdemeanors and infractions. In contrast, the federal system deals with a highly diverse defendant population and covers the entire country plus the federal protectorates of Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. Moreover, federal prosecutions overwhelmingly involve felonies and can be based on any one of 3,000 different statutory provisions (Cali). The alleged criminal conduct is often sophisticated (Wright), and associated with multi-year prison term upon conviction (United States Sentencing Commission) (Federal Bureau of Prisons).

The Purpose of This Article

The federal system is so unique that this article seeks to better contextualize its release rate and influencing factors. Hopefully, with that context, those of us within the system and outside observers can better identify opportunities for improvement. The discussion is organized as follows: (1) the structure of the

in the 93 United States District Courts outside the District of Columbia.

¹³ Geographically, the jurisdiction of the Superior Court is a fraction of one percent of the federal system (Deloitte and Data Wheel). While the defendant population in Superior Court has historically been predominately African Americans charged with non-violent, public order-type offenses (Washington Lawyers' Committee for Civil Rights and Urban Affairs), African Americans make up less than 30 percent of the defendants charged in the federal system, and drug possession and public order offenses are extremely rare in the federal system (AO). In terms of caseload volume, the Superior Court deals with about one-fifth of the new pretrial cases handled by the federal system, and more of its cases are misdemeanors or deal with traffic offenses (76 percent) than is the case in the federal system (7 percent). Felonies constitute most of the federal system docket (DC Courts) (Probation and Pretrial Services Decision Support System).

federal pretrial system and the roles of those who are part of it; (2) the changing profile of defendants charged in federal court; (3) institutional incentives leading some defendants to acquiesce to, rather than contest, pretrial detention; and (4) the potential impact of legislative reform and judicial discretion in terms of the future of federal pretrial detention.

1. The Structure of the Federal Pretrial System

In fiscal year 2017, there were 77,000 criminal filings (AO, Judicial Business of the United States Courts). That caseload is handled by a "system" that is really more of a collaboration between the judiciary, the defense bar, prosecutors, and the United States Marshals Service. Although not often thought of as part of the system, defendants, their families, and friends greatly influence how processes work and the outcomes that are achieved. Each of the participants is independent, but their actions work interactively with the others.

Judges are responsible for pretrial release determinations under 18 U.S.C. § 3142. The judges hear from the parties and consider information and recommendations from judicial employees, specifically pretrial services officers, who are responsible for gathering, verifying, and communicating information relevant to the release decision and potential alternatives to detention under 18 U.S.C. § 3154.¹⁴

Defense attorneys "serve as the accused's counselor and advocate" and file "motions seeking pretrial release of the accused" (American Bar Association). Prosecutors are responsible for timely and just charging decisions, and for seeking detention when needed to protect individuals and the community and ensure the return of defendants for future proceedings (American Bar Association) (Department of Justice). The U.S. Marshals Service houses defendants ordered detained and executes arrest warrants for those released who violate the conditions of their release (The United States Marshals Service).

Defendants and those who know them

¹⁴ Courts have the option to create a separate pretrial services office or to empower its probation office to provide pretrial services. See, 18 U.S.C. § 3152. Presently, 19 judicial districts maintain a separate pretrial office. Courts are required to periodically consider consolidation of pretrial and probation offices for economic and operational efficiency (Judicial Conference of the United States). Either way, officers are subject to the same statutes, policies, and procedures. For purposes of this article, the term "pretrial services officers" is used to refer to any officer carrying out the pretrial function.

provide information relevant to the release decision; for example, they offer details about potential third-party custodians and verify residential and employment information. Without that type of information, the courts are often left with just charge and prior record information to make release determinations.

The federal system does not operate as a monolithic whole but rather through 94 judicial districts that have autonomy and discretion to deal with local issues. Once more, the different entities involved in the system have their own priorities and objectives. Needed consistency on material issues comes from adherence to the United States Constitution, federal statutes, the Federal Rules of Criminal Procedure, applicable case-law, and the principle of comity. Another melding factor is the existence of professional standards for pretrial work and organizations.

Standards in relation to making the pretrial decision making and operations have been developed by the National Institute of Corrections, Pretrial Justice Institute, National Association of Pretrial Services Agencies, and American Bar Association (Pilnik) (Pretrial Justice Institute) (National Association of Pretrial Services Agencies) (American Bar Association). The standards basically call for (1) a legal framework that supports pretrial release based on the least restrictive conditions possible; (2) release decisions that are grounded in objective assessments of defendants' risk of flight and danger to the community; and (3) the availability of meaningful alternatives to detention, especially options that are researched and "evidence-based."

The legal framework in the federal system affords defendants procedural safeguards through the Fifth Amendment of the United States Constitution¹⁵ and protection from excessive bail under the Eighth Amendment (Department of Justice). In addition, there are statutes favoring defendants' release. For example, 18 U.S.C. §§ 3142 requires the defendant's automatic release when he or she is not charged with a particularly serious offense and

the government does not contest or meet its burden of proof showing why the defendant should be detained. Where the government does seek detention, it has the burden of proof in many cases and must demonstrate the defendant is a risk of flight by a preponderance of the evidence and show danger to the community by an even greater standard, clear and convincing (Boss).

There is an exception, however, that is growing larger than the rule in favor of release. The exception is found in 18 U.S.C. §3142(e) and flips the burden of proof for release onto the defendant when the defendant is charged with offenses said to involve violence, drugs, and sex offending. A presumption of detention also extends to some predicate felons. 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." (Austin 61). Unfortunately, research indicates that the enumerated offenses may not be the best predictors of risk of flight or danger to the community (Austin 60). Consequently, the Judiciary has suggested that Congress reexamine the presumption provisions (Judicial Conference of the United States).

As to the standard for effective pretrial work that calls for informed and objective assessments of defendants' risk of flight and danger to the community, pretrial release decisions are made by United States magistrate judges and United States district judges. Magistrate judges are appointed to eight-year terms by the district court and, in turn, district judges are appointed by the U.S. President for a period of "good behavior," sometimes called life tenure, with consent of the United States Senate, and often after vetting by the American Bar Association (Quality Judges Initiative). By design, federal judges are not subject to the pressures of election and campaigning. In fact, they are ethically required to refrain from political activity, just as they are required to execute their duties fairly, impartially, and diligently (Judicial Conference of the United States).

The federal system has also added an empirical component to the release decision process. Specifically, pretrial services officers calculate and consider an actuarial score when fashioning a recommendation to the court. The tool, called the Pretrial Risk Assessment or "PTRA," is based on study of more than half

a million federal cases from districts across the system. The PTRA has been statistically validated and revalidated (Cadigan, Johnson & Lowenkamp); it also continues to track release rates and release outcomes very well (Graphics 6 and 7). The officers responsible for the recommendations are particularly well qualified and trained.¹⁶

In regard to the third test for an effective pretrial services system, the federal system is progressively adopting innovative and evidence-based interventions as alternatives to detention. The most common alternative to detention is release conditioned on supervision in the community by pretrial services officers. It is common for the supervision term to also require substance abuse testing and treatment, as well as mental health evaluation and treatment, depending on the facts of the case. Home detention, usually enforced through electronic and GPS monitoring devices, is common in higher risk cases as well. While some services are rendered directly to defendants by pretrial services officers, over the past five years the federal judiciary spent \$134 million on contract services to assist defendants with basic life necessities, needed medical and addiction treatment, and employment services. Notably, those goods and services were in addition to anything defendants could have afforded on their own or that would have been available to them as ordinary members of the public.

The approach taken by pretrial services officers is inspired by the "evidence-based" Risk, Needs and Responsivity Model (Serin & Lloyd). That model, and Judicial Conference policy, calls for officers to assess defendants' strengths and weaknesses relative to their compliance with the court-ordered conditions of release. The PTRA, mentioned earlier, is one of the factors considered by officers in the assessment stage. Once the assessment is made, officers tailor programming to maximize responsivity in the defendant, which will promote a successful outcome in the case. In undertaking these efforts, officers can only operate within the conditions of release imposed by the court, must seek to minimize the burden of the intervention, and always uphold the defendant's presumption of innocence (AO, Supervision of Federal Defendants).

¹⁵ U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹⁶ Pretrial services officers average more than a decade of professional experience and at least 400 hours of related training. More than half exceed the requirement of a bachelor's degree with a master's degree or doctorate (AO).

Officers use a variety of “evidence-based techniques” in their interactions with defendants. Most relate to helping defendants acquire and use prosocial life skills with a focus on cognitive and choice awareness, recognition of the motive and influence of others, problem solving and deductive reasoning (Miyashiro) (Cadigan, 2009). The federal pretrial system continues to leverage technology and training of its staff (train-the-trainer) to maximize positive outcomes (AO Expanding Supervision Capabilities in Probation and Pretrial Services). In addition, the system is constantly studying data and monitoring outcomes in the effort to improve.

One area where, on the surface, the federal pretrial system is not following “best practices” is in use of summons rather than arrest to secure initial appearance (Pretrial Justice Institute). Although associated with a pretrial release rate of more than 90 percent in the federal system, summons were not commonly used. Instead, they were reserved for minor property, traffic, and drug possession, which are a small part of the federal docket, and typically involve defendants presenting little or no risk of flight or danger to the community.

2. The Risk Profile of Federal Defendants

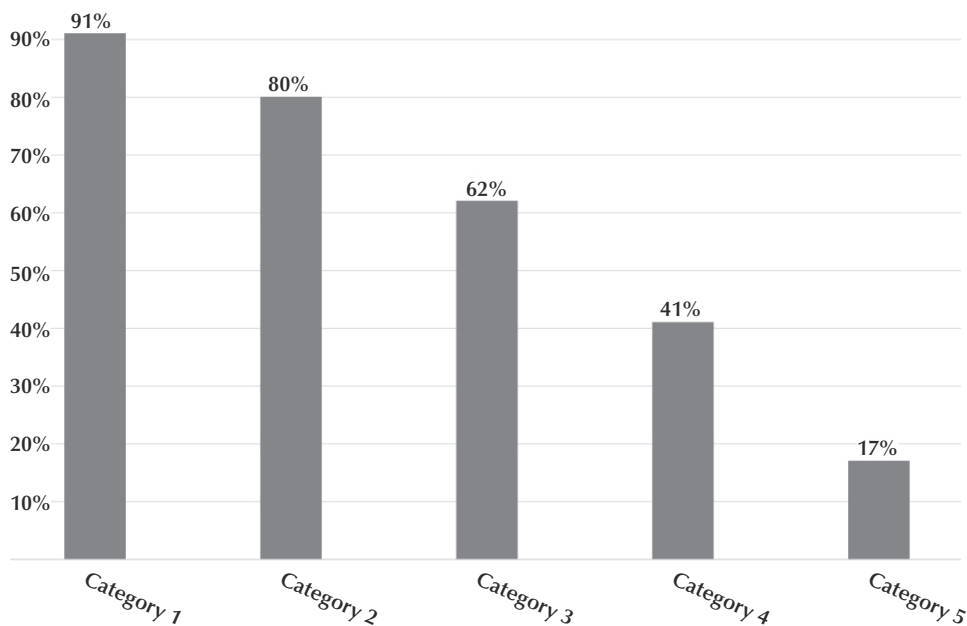
The risk of flight and criminogenic profile of defendants in the federal system has steadily worsened over the years, in part because of the focus of federal prosecutions. As acknowledged by the Department of Justice, “federal law enforcement resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources to achieve an effective nationwide law enforcement program, from time to time the Attorney General may establish national investigative and prosecutorial priorities” (Department of Justice). The priorities have generally focused on repeat offenders and offenses involving drug and human trafficking, violence, weapons, sex crimes, and illegal entry into the United States (Rowland). Between 1997 and 2017, the percentage of defendants charged with the crimes most associated with pretrial detention increased from 60 percent to 79 percent.¹⁷

There is a correlation between the nature of the charges and the use of pretrial detention. Over the past four years, the detention rates for

those charged with immigration offenses has been about 95 percent and for those charged with drug and weapons offenses 75 percent. In contrast, the detention rate for property and financial offenses has been less than 30 percent, and for offenses such as DWI even less—13 percent. The offenses with the higher detention rates make up a greater proportion of the overall federal docket; hence they contribute to the higher overall detention rate.

The high detention rate for immigration cases is in large part because the defendants have ties outside the United States and usually no verifiable connections to the district of prosecution. Therefore, the risk of flight is escalated. Moreover, even if those defendants were released pending trial, most would simply be taken into custody by U.S. Immigration and Customs Enforcement (ICE) for deportation proceedings. The percentage

FIGURE 6
Pretrial Release Rates by PTRR Risk Category



Source: AOUSC Decision Support System for Cases in the 12-Month Period Ending March 31, 2018

FIGURE 7
Pretrial Release Outcomes, Violation Rates by Type and PTRR Risk Category



Source: AOUSC Decision Support System for Cases in the 12-Month Period Ending March 31, 2018

¹⁷ The offenses most associated with pretrial detention are: immigration, weapons, violence, sex offenses and drug trafficking (AO).

of defendants who are not United States citizens has increased, mirroring the overall increase in detention rate.

It is not only the type of charge brought in federal court that relates to release rates, however, but the nature of the underlying conduct. The media has expressed concern that many defendants are being incarcerated for simple possession and drug use: “[d]uring the period from 1993 to 2011, there were three million admissions into federal and state prisons for drug offenses. Over the same period, there were 30 million arrests for drug crimes, 24 million of which were for possession” (Rothwell). In the federal system, however, 91 percent of the defendants prosecuted for drug crimes in 2016 were charged with distribution-related offenses, not simple possession. Moreover, 99.5 percent of those drug offenders in federal prison were guilty of drug trafficking (Taxy, Samuels & Adams). This is not to say that federal defendants don’t use or abuse drugs themselves, but it is not typically the reason they are charged federally.

In addition, the amount of drugs involved in federal offenses is usually large. Since the drug amount is a primary factor in determining the custody term under federal law, it is natural to consider it when assessing risk of flight pending trial. For every person arrested by the U.S. Drug Enforcement Administration, the agency seizes approximately 7.5 pounds of illicit drugs (Drug Enforcement Administration).

Similarly, the average loss amount in federal fraud cases is substantial. In cases where defendants are sentenced to imprisonment, the median loss is close to \$800,000 (USSC, Quick Facts on Offenders in the Bureau of Prisons). Moreover, most defendants’ relationship to the other contraband they are charged with, whether it be guns, child pornography, or counterfeit items, is generally substantive. Only 8 percent are considered minor or minimal participants in the offense as defined by the United States Sentencing Guidelines (USSC, Annual Sourcebook).

As noted above, immigration charges are also commonly prosecuted in federal courts. As with drug prosecutions, there are concerns that the wrong people are being targeted for immigration prosecution and treated too harshly in the process (Planas). Nonetheless, prosecutions continue, with a particular emphasis on illegal “reentry” cases, meaning people charged with repeatedly illegally entering the country (Light, Lopez &

Gonzalez-Barrera).¹⁸ About half of the people charged with and sentenced for immigration violations have one or more prior convictions in this country countable under the sentencing guidelines (USSC, Interactive Source Book of Federal Sentencing Statistics). Of those charged with illegal reentry, prior records tend to be even more serious. Nearly three quarters of the reentry defendants received a sentencing enhancement because of the gravity of their prior criminal record. A third of those defendants had one or more prior convictions related to violence, weapons, drug trafficking, or other type of aggravated felony (USSC, Illegal Reentry Offense).

The criminal history of defendants entering the federal system globally has been worsening, in terms of prior arrests, prior convictions, and previous prison terms. This is not only because of who is increasingly targeted for criminal prosecutions but because of the nature of federal offenses themselves. Many federal crimes have as an essential element of the crime that the defendant have a prior criminal record. For example, 18 U.S.C. § 922 makes it a federal crime for convicted felons to possess a firearm, so a prior felony is a precursor to the federal crime. Similarly, the federal offense of engaging in interstate commerce after failing to register as a sex offender, a violation of 18 U.S.C. §2250, requires an existing prior sex offense conviction.

Having prior arrests is associated with higher recidivism and having prior convictions foreshadows it even more. (USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*). It logically follows that it is appropriate for courts to consider the existence and nature of defendants’ prior criminal record when making determinations of danger to the community at the pretrial stage. One study has found that the majority of federal defendants, 68 percent, have not just prior arrests but convictions (USSC, Quick Facts on Offenders in the Bureau of Prisons). The severity of the sentences imposed on prior criminal convictions, measured by the federal sentencing guidelines, has increased steadily over the years, going from an average of 2.82 points

per defendant in 1992 to 4.11 points in 2016. In the past 20 years, the number of defendants designated under the guidelines as “career offenders,” including armed career offenders, has increased 54 percent, going from 1,368 defendants in 1997 to 2,108 defendants in 2017. The Sentencing Commission has more recently established a classification “repeat and dangerous sex offender”; in the past five years the number of defendants assigned that classification has increased 64 percent, going from 182 defendants to 298 (United States Sentencing Commission).

3. Changing Incentives for Federal Defendants in Relation to Pretrial Release

The last time sweeping criminal justice reform was enacted in the federal system was in the mid-1980s. At the time, crime rates were at record highs, concerns about the corrosive effects of cocaine epidemics were intense, and the effectiveness of rehabilitative programming was seriously in question (Harty). As a result, Congress, like many state legislatures, adopted “a tough on crime” approach. That approach included adding potential danger to the community to risk of flight as grounds for pretrial detention, presumptive pretrial detention for certain defendants perceived as particularly dangerous, increased prison time for those convicted of crimes, and limits on judicial discretion at sentencing while abolishing parole (Deaton).

The statutory provisions allowing for detention on grounds of danger to the community and the presumption of detention in certain cases had a direct impact on pretrial release rates. So too did the changes providing for increased use of imprisonment and decreased judicial discretion at sentencing. Of the defendants who reached disposition in 1980, before the “tough on crime” reform went into effect, the federal conviction rate was 78 percent, and less than half (46 percent) of those convicted were sentenced to imprisonment. The average prison term was 52 months, but with parole and more generous good behavior rules many served one-third of their custody term or 17 months on average (AO) (Sabol & McGready).

By 2000, when the tough on crime approach was in full swing, the conviction rate had climbed 11 percentage points, imprisonment was part of the sentence for 9 out of 10 those convicted, and the average prison term imposed increased by 5 months (AO); defendants had to serve at least 85 percent of

¹⁸ Jose Ines Garcia Zarate is one of the more well publicized cases of a repeat immigration violator. A Mexican native, he had seven drug and immigration prior felony convictions in the United States. He was deported to Mexico five times and was facing a sixth when a jury found that he possessed a stolen firearm and had accidentally shot and killed a tourist in San Francisco (Jose Ines Garcia Zarate Wiki: The Death of Kate Steinle).

their time regardless of their behavior while an inmate, and regardless of the risk they presented for recidivism.

The increased likelihood that they will be convicted and sentenced to prison and for a longer period creates a practical dilemma for federal defendants. The time spent by a defendant in pretrial detention is credited, under 18 U.S.C. § 3585(b), against any imprisonment term to be imposed in the case. Consequently, defendants can get a proverbial head start on a likely prison term and avoid the emotional trauma of having to leave their family not once but twice—staying in custody following original arrest. Another consideration for defendants is that Bureau of Prisons institutions, where most federal custody terms are served, are dispersed across the United States. This may mean that defendants will be separated from family and friends, as well as legal counsel, by hundreds of miles—if not more (Vigne) (Arons, Culver & Kaufman). Pretrial detention facilities, in contrast, tend to be closer to the district of prosecution and presumably to defendants' homes, making it easier for defendants to retain ties.

Defendants' involvement with the pretrial report process is voluntary, and they can decline to be interviewed by pretrial services officers (Criminal Justice Standards Committee). In fact, the percentage of defendants not interviewed by pretrial services has increased steadily over the years, nearly doubling to 44 percent of defendants between 1997 and 2016. In addition, it has become common for defendants who are interviewed to decline to answer specific questions that they fear may incriminate them or otherwise be detrimental to their interests.

4. Emerging Trends in the Federal Pretrial System

The federal pretrial system prides itself on upholding the presumption of innocence, despite the reality that the vast majority of defendants will ultimately plead guilty and be sentenced to imprisonment. One adjustment made in many judicial districts is the creation of voluntary pretrial programs offering defendants and their loved ones information on how the federal criminal justice system works and strategies on how to best manage the stress of prosecution (U.S. Probation Office for the District of Wyoming). Some jurisdictions, again recognizing the high conviction and imprisonment rate, have expanded to "preentry programs."

A more recent phenomenon, as judges have

been afforded more discretion at sentencing (with the guidelines now being advisory rather than binding), is for courts to support sentencing mitigation programs. In all, 24 districts now have formal judge-involved intervention and treatment programs, with even more informal programs of various sizes. For example, the pretrial services office in the Eastern of New York maintains various programs for different types of defendants in different situations and with varying needs (Pretrial Services Office, Eastern District of New York).

Conclusion

Structurally, the federal system has the hallmarks of a quality pretrial program. The system is led by qualified and independent judges who consider recommendations from talented defense attorneys and prosecutors. The court also has the support of an agency that has specific authority on pretrial matters and provides a range of detention alternatives. Why then has the federal pretrial detention rate increased? The answer seems to rest on a combination of factors, including "tough on crime" federal statutes, severity of the crimes prosecuted in federal court, the increased risk of flight and danger to the community, and strategic choices by defendants and their attorneys not to engage in the pretrial process.

Courts are innovating in light of broader sentencing discretion afforded judges, and sentencing mitigation, preentry, and preparation programs are developing in a pretrial context. Also, Congress has been considering criminal justice reform that may directly impact pretrial release rates. So is it possible that federal pretrial release trends will change, and more people will be released without compromising community safety or impeding justice? Time will tell.

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Pretrial Detention Choices and Federal Sentencing

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HOW JUDGES DECIDE cases has long been an issue of both academic and practical interest (e.g., Fitzmaurice & Pease, 1986; Hogarth, 1971; Myers & Talarico, 1987; Posner, 2008; Spohn, 2009a; Tonry, 1996; Ulmer, 1997). It is also a matter that has become increasingly important during the last 35 years, as many jurisdictions have dramatically increased their imprisonment rates (Austin & Irwin, 2012; Lynch, 2007), incurring burdensome economic and social costs (e.g., Clear, 2007; Frost & Clear, 2012; Western, 2006). The United States has the highest reported per capita rate of incarceration in the world (Walmsley, 2011), incarcerating its citizens at a rate 5 to 10 times that of other Western industrialized nations (Berman, 2009). Indeed, in 2009, the Pew Center on the States reported that 1 in 31 adult U.S. citizens was either incarcerated or under community supervision. Understanding how judges decide their cases may allow us to understand the drivers of mass incarceration and to thereby reduce the U.S. reliance upon prisons as a mechanism for social control.

A very substantial body of the research on how judges decide suggests that legal factors (e.g., severity of the offense and the offender's criminal history) are chiefly determinative in deciding whether an offender will be incarcerated and for how long (Gottfredson & Gottfredson, 1988; Klein et al., 1990; Kramer & Steffensmeier, 1993; Neubauer, 2002; Reitler et al., 2013; Spohn & Halleran, 2000). Nevertheless, other, so-called extralegal, factors also appear to influence sentencing

outcomes, including race (e.g., Mitchell, 2005; Steffensmeier & Demuth, 2000; Western, 2006), gender (e.g., Daly & Bordt, 1995; Doerner, 2012; Freiburger, 2011), and age (e.g., Doerner & Demuth, 2010; Steffensmeier & Motivans, 2000). These extralegal factors become even more influential when they act in combination than when they operate in isolation (Doerner & Demuth, 2010; Leiber & Fox, 2005; Steffensmeier et al., 1998; Wooldredge, 2012), such as harsher sentences for young, black males.

However, one factor that has received relatively little scholarly attention is the possible influence of pretrial detention on sentencing. Many researchers include pretrial detention in their analyses of sentencing, but it is usually included as a control variable and used in analyses of other legal or extralegal factors (Williams, 2003). Research focusing specifically upon the effects of release and detention on sentencing decisions is rare: Only a handful of such studies exist (see, e.g., Free, 2004; Philips, 2007, 2008, 2012; Reitler et al., 2013; Sacks & Ackerman, 2012; Tartaro & Sedelmaier, 2009; Williams, 2003).

More study is needed of the role of pretrial detention for shaping sentences in the U.S. federal courts and of related issues (e.g., Hagan et al., 1980; Reitler et al., 2013; Spohn, 2009b; Stith & Cabranes, 1998). The federal courts process an immense criminal docket. In 2011, a total of 91,938 defendants of the approximately 110,000 criminal defendants who moved through federal district courts were convicted and sentenced (Hogan, 2011, tbls.

D-1, D-5). Approximately 14 percent of those sentenced received non-custodial sentences (~2.5 percent were fined and ~11.3 percent were placed on probation), but approximately 86 percent were sentenced to federal prison, with an average sentence of 52.9 months (Hogan, 2011, tbl. D-5).

This article describes the effects of pretrial release and detention on sentencing decisions in the U.S. federal courts. It begins with a description of extant research on the sentencing consequences of pretrial detention, drawn mostly from city and state courts. The article then briefly outlines the establishment of the federal pretrial services system, describes the statute that governs detention decisions, and notes current trends in federal detention data. It also describes some current research on the sentencing consequences of pretrial detention and the revocation of pretrial services supervision. Finally, it discusses the implications of these findings for decision makers within the federal criminal justice system, noting that the choice to detain or release a defendant before trial can have reverberating consequences downstream.

Research on the Effects of Pretrial Detention

While there is not a great deal of research focusing particularly on the effects of pretrial release and detention on sentencing decisions, research on this topic is not altogether new. Fifty years ago, researchers with the Vera Foundation examined 3,000 cases of adult New York felony defendants and found

that defendants who were detained before trial were more likely to be convicted and incarcerated (Ares et al., 1963). Following up, they noted that other factors (e.g., prior record, bail amount, type of counsel, family integration, and employment stability) did not explain away the relationships between detention and conviction and incarceration, and concluded that “a causal relationship exists between detention and unfavorable disposition” (Rankin, 1964: 655). More recently, the New York City Criminal Justice Agency examined more than 50,000 cases from the New York metropolitan region and confirmed that pretrial detention is significantly and positively related to conviction, incarceration, and sentence length (Philips, 2012). The positive correlations between pretrial detention and increased conviction rates, increased likelihood of incarceration, and increased length of sentence exist for both felony cases (Philips, 2008) and non-felony cases (Philips, 2007). The New York City Criminal Justice Agency research seems to confirm the wry assessment of the subject by Sacks and Ackerman: “[P]retrial decisions determine mostly everything” (2012: 14).

Of course, the relationship between pretrial detention and unfavorable sentencing dispositions extends beyond New York. After analyzing 412 cases from Leon County, Florida, Williams concluded that “pretrial detention was a strong, significant predictor of both incarceration and length of sentence” (2003:313). Indeed, pretrial detention was the strongest predictor of incarceration in the model, even after controlling for legal (e.g., offense seriousness and criminal history) and extralegal variables (e.g., race, gender, and age). Similarly, Leiber and Fox (2005) reported a significant association between pretrial detention and sentencing dispositions. After controlling for a dozen other variables in a study of 1,800 Canadian cases, Kellough and Wortly (2002) reported that pretrial detention was the strongest predictor of guilty pleas. Other researchers have identified significant links between detention and increased rates of conviction (Cohen & Reaves, 2007; Hart & Reaves, 1999), detention and the increased probability of a prison sentence (Harrington & Spohn, 2007), and detention and increased sentence length (Tartaro & Sedelmaier, 2009; Willison, 1984), as well. While Goldkamp (1980) found little relationship between pretrial detention and conviction in his study of 8,000 cases from Philadelphia, he *did* find a strong relationship between detention and the likelihood of incarceration. Sacks and

Ackerman (2012), on the other hand, did not find evidence that pretrial detention affected the decision to incarcerate in their study of 975 New Jersey cases, but they *did* report an association between detention and increased sentence length.

There is a consensus within this body of research that pretrial detention is associated with negative effects on sentencing, but the precise causal mechanisms of these relationships remain unknown. Williams suggests that the explanation might be found in the released defendant's ability to demonstrate good behavior, writing, “[A] defendant who is out on bail has the ability to demonstrate to the sentencing judge that he or she is not a danger to the community” (2003: 314). Although the relationships between detention and unfavorable sentencing outcomes persist even when controlling for the nature of the offense, criminal history, and risk, Williams (2003) also notes that defendants are often detained before trial based on the same facts that drive sentencing decisions: serious and harmful crimes, lengthy criminal histories, and perceived risk of further offending. Defendants who are detained before trial are often indigent, and can neither afford privately-retained counsel nor post bail (Holmes et al., 1987). Many have prior convictions, lack employment and education, and suffer from deficits such as illiteracy, mental illness, physical disability, and drug and/or alcohol addiction (Petersilia, 2003; VanNostrand & Keebler 2009). Poor, marginalized, and vulnerable (Wacquant, 2009), such “rabble” (Irwin, 1985) may prove ill-equipped to contribute meaningfully to their own defense (Foote, 1954; Reitler et al., 2013), a problem exacerbated by the fact that attorneys spend less time with defendants who are detained before trial than with defendants who are released (Allan et al., 2005). The studies mentioned above, however, have not been conducted within the federal courts, with federal defendants and with federal judges. The federal criminal justice system is complex (Oleson, 2011). Sentencing decisions are made under obligations imposed by statute (i.e., 18 U.S.C. § 3551 et seq. and 28 U.S.C. §§ 991 to 998), now-advisory sentencing guidelines (e.g., *United States v. Booker*, 2005), and by controlling federal case law (e.g., *Gall v. United States*, 2007; *Kimbrough v. United States*, 2007; *Rita v. United States*, 2007). Given that kind of complexity, we wanted to examine the effects of pretrial detention on sentencing decisions in the U.S. federal courts.

Pretrial Services in the United States Federal Courts

The pretrial services system of the U.S. federal courts can be traced to the pioneering initiative of John Augustus (Panzarella, 2002) and the early Anglo-American reliance upon personal sureties, community custodians who assumed responsibility for ensuring the defendant's appearance at trial (Wanger, 1987). During the mid-nineteenth century, the system evolved from one that relied upon sureties to one dominated by commercial bail bondsmen (Freed & Wald, 1964). Under this system, in order to safeguard communities, “many judicial officers set financial conditions of release that exceeded the defendant's ability to pay, effectively ordering *sub rosa* pretrial detention” (Wanger, 1987, p. 324). To ameliorate such burdens, Congress passed the 1966 Bail Reform Act, establishing a presumption of release upon personal recognizance or execution of an unsecured security bond. Later, the Speedy Trial Act of 1974 created 10 demonstration pretrial services offices (Partridge, 1980), but the watershed moment for pretrial services supervision is customarily associated with passage of the Pretrial Services Act of 1982 (Byrne & Stowell, 2007; Cadigan, 2007). The 1982 Act established four principal goals: ensuring pretrial services investigations and reports for all defendants, reducing unnecessary detention, reducing crime and absconding while on bail, and reducing reliance on surety bonds (Cadigan, 2007). Today, the federal pretrial services system has offices in 93 of the 94 judicial districts (i.e., under 18 U.S.C. §3152 (a), the District of Columbia operates under a different system), but the federal criminal justice system of 2013 bears little resemblance to that of 1982, and the pretrial services system of today is very different from that of 30 years ago. Today, there are more federal crimes (Baker, 2008), more federal defendants (Hogan, 2011), more federal prisoners (La Vigne & Samuels, 2012), and more non-citizens (Lopez & Light, 2009; Scalia, 1996). In recent years, the federal pretrial services system has developed and implemented a program of risk assessment (Cadigan & Lowenkamp, 2011a; Lowenkamp & Whetzel, 2009) and it is increasingly evidence-based (Cadigan, 2009).

In the federal criminal justice system, decisions about pretrial detention and release are governed by the Constitution (the Eighth Amendment specifies that “excessive bail shall not be required”), by legal precedent (e.g., in *United States v. Salerno* [1987], the Supreme

Court held that detention under the Bail Reform Act does not constitute unconstitutional punishment), and by federal statute. Specifically, United States Code 18 U.S.C. § 3142(b) directs the presiding judicial officer to release the defendant upon personal recognizance or upon execution of an unsecured surety bond “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.” If a personal recognizance or surety bond is insufficient to ensure appearance and safety, § 3142(c) (1)(B) directs the judicial officer to order the least restrictive further condition (or conditions) that will reasonably assure appearance and community safety, such as maintaining ongoing employment or education, avoiding all contact with the victim, or abiding by a curfew. Only if no condition or conditions will reasonably assure appearance and safety, is pretrial detention authorized under § 3142(e). Detention, however, is not as difficult to impose as it might initially seem. A number of offenses (e.g., some drug crimes, possession of a firearm in connection with crimes of drugs and violence, terrorism offenses, human trafficking, and many offenses involving child pornography or minor victims) carry a statutory presumption of detention (18 U.S.C. § 3142(e)(3)); the attorney for the government may seek detention for a variety of other offenses under § 3142(f); and either the government attorney or the judicial officer can move for detention when flight risk or obstruction of justice are serious concerns. In making determinations about pretrial release, § 3142(g) directs judicial officers to consider specific factors, including: (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the history and characteristics of the person (e.g., “the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings”), and (4) the nature and seriousness of danger to any person or the community posed by the defendant’s release. Although 18 U.S.C. § 3142 indicates that federal defendants should not normally be detained before trial, rates of pretrial detention have actually increased over time (Byrne & Stowell, 2007; Cadigan, 2007; VanNostrand & Keebler, 2007) and now stand at 66.2 percent (Hogan 2011, tbl. H-14). After

excluding non-citizen immigration cases, the rate is still 53.4 percent (Hogan 2011, tbl. H-14A). This means that today, pretrial detention for federal defendants—U.S. citizens who enjoy the presumption of innocence under the law (Pennington, 2003)—is not the exception but the rule.

The § 3142(g) factors appear straightforward, but these seemingly straightforward decisions can have profound downstream consequences for federal defendants. Indeed, just as “a causal relationship exist[ed] between detention and unfavorable disposition” (Rankin, 1964: 655) in the New York courts, federal detention appears to exercise analogous negative effects on sentencing decisions. Using 2007 data obtained from the United States Sentencing Commission, Reitler and her colleagues (2013) examined the drivers of federal presentence detention and found that detention after conviction (but before sentencing) was most related to legal factors (e.g., length of criminal history, commission of a violent or otherwise serious offense, or commission of a crime while under criminal justice supervision) but that extralegal factors (e.g., race, ethnicity, and age) also influenced the decision to detain. More recently, looking specifically at the effects of pretrial detention and revocation of pretrial services supervision on sentencing, we conducted two different analyses. In the first, we analyzed 1,798 cases drawn from two federal districts (New Jersey and Pennsylvania Eastern) and, after controlling for a number of variables (including \$5K1.1 substantial assistance departures), found that being detained before trial—and, to a lesser degree, being revoked from pretrial services supervision—were associated with increased sentence length, while defendants who were released before trial and successfully completed their terms of pretrial services supervision appeared to receive shorter sentences (Oleson et al., 2013a). The effects of detention and revocation appeared to be dramatic: After controlling for other variables, a detained defendant who served 60 months in prison would serve only 36 months if released before trial; a defendant who completed pretrial services supervision and served 60 months in prison would serve 82 months in prison if supervision was revoked. In our second analysis (Oleson et al., 2013b), we followed all U.S. federal court defendants sentenced in fiscal year 2011 with a case-closure code of “execution of sentence” ($n = 94,229$) from indictment through to sentencing and found that being released before trial had a negative

(i.e., decreasing) effect on the likelihood of a prison sentence and on sentence length, while having pretrial services supervision revoked had a positive (increasing) effect on the likelihood of a prison sentence and on the length of sentence. In fact, the likelihood of going to prison was roughly double if a defendant had supervision revoked. Our finding that federal defendants who are detained before trial are more likely to go to federal prison and to serve longer sentences there, and our finding that revocation of pretrial services supervision has a similar, but less powerful, effect on sentencing break new ground in understanding the sentencing effects of pretrial detention in federal court. Our findings also have implications for the federal pretrial services system and for other decision makers throughout the federal criminal justice system.

Discussion

For a variety of reasons, a great deal of criminological research fails to lead to policy changes (Austin, 2003; Schmitt, 2013). Nevertheless, we believe that our findings should be of interest to actors throughout the federal criminal justice system: criminal defendants, prosecutors, federal defenders and panel attorneys, and judges, as well as probation and pretrial services officers, Bureau of Prisons staff, and other policy makers throughout government. This is nothing new. Twenty years ago, Judge Vincent Broderick warned:

Pretrial detention can create—and in many circumstances has created—crises of mammoth proportions, creating problems for every element of the criminal justice system: those charged with crime; defense counsel; pretrial services and probation officers; judges; prosecutors; marshals; and the Bureau of Prisons (1993, p. 5).

Matters of federal pretrial detention and release should interest all of these people because the effects of detention are like ripples that radiate outward from a central point where a stone has been thrown into a pool; in time, they will affect the whole of the federal criminal justice system, even those who are not immediately involved in detention decisions. Of course, most immediately, pretrial detention affects the detained defendant. Detention before trial is an obvious impediment to autonomy and freedom, but it also may impede the ability to contribute toward one’s defense (Williams, 2003). Furthermore, some research (e.g., Ares et al., 1963; Philips, 2012) indicates that pretrial

detention exerts an independent effect on the likelihood of conviction and—as found in our current research (Oleson et al., 2013a, 2013b)—the likelihood of imprisonment and increased sentence length. There may be consequences to pretrial detention that take effect even further downstream: Federal defendants who are detained before trial are twice as likely as released defendants to fail on post-conviction supervised release (Cadigan & Lowenkamp, 2011b).

The findings should be of pragmatic interest to federal prosecutors, defense counsel, and judges. Pretrial detention has created a number of logistical challenges for the federal judiciary, the U.S. Marshals Service, and the Federal Detention Trustee. Transferring pretrial defendants from detention facilities to their courthouse appearances requires a sophisticated system of management. This system is expensive. According to Fiscal Year 2012 data provided by the Administrative Office of the United States Courts, the U.S. Marshals Service, and the Office of Federal Detention Trustee, the daily cost of detaining a pretrial defendant in a federal facility ranged from a low of \$35.41 (in the Middle District of Alabama) to a high of \$163.35 (in the Eastern District of New York), with an adjusted average daily cost of detention while awaiting trial of \$72.67. In contrast, using current work measurement formulas, salary amounts for probation and pretrial services officers, law enforcement account obligations, and miscellaneous operating expenses, the daily cost of releasing the defendant under the supervision of a federal probation officer (as in the 71 districts where pretrial services functions are provided by the “combined” federal probation office) was \$9.17, and releasing the defendant under the supervision of a federal pretrial services officer (as in the 22 districts where pretrial services functions are provided by a separate pretrial services office) was \$7.24, for an average of \$8.21. Prosecutors, defense counsel, and judges should be interested in these findings, because every day of pretrial release saves the federal government \$64.82.

High rates of pretrial detention produce additional costs. High rates of detention mean that many defendants are held far from the courts in which they appear. In 1993, some 10% of the pretrial and presentence defendants appearing in the Southern and Eastern Districts of New York were detained outside the district, including several who were housed as far away as Tennessee and Texas (Broderick, 1993). Today, 15% of federal

detainees are housed more than 90 miles from the courts in which they appear (Office of Federal Detention Trustee, 2013), creating second-order costs for U.S. marshals who must manage strained resources and defense counsel who must meet with far-flung clients, and scheduling hardships for judges who must juggle busy courtroom calendars (Broderick, 1993). In 2013, the U.S. Marshals forecast a cost of \$1.6 billion for pretrial detention, much of which is paid to local jails on a per-day-per-inmate basis (U.S. Department of Justice, 2013). Reducing pretrial detention and revocation rates would help to alleviate some of this strain on the detention program of the U.S. Marshals Service.

Of course, judges and counselors should be interested in the findings for more philosophical reasons, as well. The promise of “equal justice under law” is emblazoned upon the west pediment of the United States Supreme Court building (Hennings, 1957), and it is an elegant ideal. But case processing statistics tell another story. After controlling for a range of legal (e.g., criminal history, nature of offense) and extralegal (e.g., race, ethnicity, and age) variables, it appears that federal defendants who are detained or who have their pretrial services supervision revoked are more likely to go to prison and to serve a longer sentence there. *Detention itself*, not a measured legal factor, increases this likelihood. Detention begets detention. Judges and counselors also may be familiar with the fundamental sentencing principle of restraint—the understanding that imprisonment is a severe deprivation and should be invoked with a grave sense of restraint (Ashworth, 2005; Roberts & Von Hirsch, 1999). Yet for defendants who are detained before trial, restraint is compromised: by virtue of detention, they are more likely to go to prison and to serve a longer sentence there; they also are twice as likely to fail on post-conviction supervised release and to be returned to prison (Cadigan & Lowenkamp, 2011b). While this is not the racial disparity that fuels so much of the fire in sentencing policy (e.g., Albonetti, 2011; Engen, 2011; Scott, 2011; Spohn, 2011; Ulmer et al., 2011; U.S. Sentencing Commission, 2010), systematic sentencing disparity of this kind should be of great interest to sentencing judges, the United States Sentencing Commission, the Judicial Conference of the United States, and other policymakers.

Given the sentencing effects of revocation of pretrial services supervision, our findings should interest pretrial services officers.

Although the effects of revocation of pretrial services supervision on incarceration and increased sentence length were only half as dramatic as the effects of pretrial detention, revocation also appears to exercise a significant relationship on sentencing decisions. Yet while the pretrial services officer's decision to revoke supervision may dramatically influence the ultimate sentencing outcome, there is great variation in revocation rates across districts that does not necessarily reflect differences in average risk levels as measured by the pretrial risk assessment (PTRA) tool used by officers in making pretrial release or detention recommendations (Oleson, 2013). There are also wider implications for the nature of pretrial services supervision. If pretrial services officers are to enhance supervision to reduce revocations, they may need to make use of evidence-based practices (Cadigan, 2009), ensuring that defendants who have greater criminogenic risks and needs receive high treatment dosages while those with relatively low risks and needs are not over-programmed (Lowenkamp et al., 2006). This can be achieved, given that the highest-risk pretrial defendants can successfully complete pretrial release (i.e., appearing for court, not violating conditions, and incurring no new charges) (Lowenkamp & Whetzel, 2009). Defendants who score in the PTRAs category five have an 80 percent chance of successfully completing pretrial release (Lowenkamp & Whetzel, 2009).

The findings should interest Bureau of Prisons personnel, as well. To the extent that detention drives increased imprisonment rates and increased sentence length, the high pretrial detention rates of recent years may forecast increasing BOP populations. Federal defendants detained before trial are twice as likely as released defendants to fail on post-conviction supervised release (Cadigan & Lowenkamp, 2011b) and this group represents a substantial population. Between 8 percent and 15 percent of prisoners entering BOP custody each year are offenders who have had their supervised release revoked (Rowland, 2013). Increased numbers of defendants going to federal prisons, for longer periods of time, will exacerbate crowding in federal prisons (Government Accountability Office, 2012; Mallik-Kane et al., 2012; Rowland, 2013). The population of the federal Bureau of Prisons has increased tenfold since 1980—from 21,000 to 218,000 (La Vigne & Samuels, 2012), and this population is expected to grow by another 11,000 during the next two

years (Government Accountability Office, 2012). Of course, reciprocally, decreases in detention and revocation rates would signal future decreases in BOP populations (all other things being equal). Probation officers should be concerned about the findings for the same reasons. As prisoners emerge from BOP custody, they will serve terms of supervised release under 18 U.S.C. § 3583. These supervisees will present serious challenges for probation officers: As noted above, federal defendants who are detained before trial are more likely to fail on supervised release (Cadigan & Lowenkamp, 2011b).

Other policy makers should be concerned, as well. The principle of equal justice under law has both ideological (Griswold, 1976; Hennings, 1957) and—if the theory of procedural justice has merit—practical value (Sunshine & Tyler, 2003; Tyler, 2003), but the fiscal bottom line also matters. It currently costs between \$21,006 (minimum security) and \$33,930 (high security) per year to incarcerate a federal prisoner (La Vigne & Samuels, 2012), yielding an annual budget for the Bureau of Prisons of \$6.6 billion (Department of Justice, 2013). In contrast, it costs only \$3,433 per year to supervise a probationer in the community (La Vigne & Samuels, 2012). The financial burdens of mass incarceration are paralleled by very real social costs, affecting individuals, families, and communities (Clear, 2007; Frost & Clear, 2012; Western, 2006). Federal policy makers may seek to alleviate these fiscal and human costs by establishing programs that reduce rates of federal detention and revocation, thereby mitigating the downstream consequences on prisons and the federal criminal justice system.

Conclusion

Fifty years of research suggests that “a causal relationship exists between detention and unfavorable [sentencing] disposition” (Rankin, 1964: 655). This relationship appears to hold true in the federal pretrial services system as well (Oleson et al., 2013a, 2013b), and while the effects of revocation are not as pernicious as those of detention, the revocation of pretrial services supervision also appears to lead to an increased likelihood of prison and a longer sentence (Oleson et al., 2013b). In making detention decisions under 18 U.S.C. § 3142, federal judges and pretrial services officers should be aware of the linkages between pretrial detention, release, conviction, incarceration, sentence length, and success or failure on supervised

release. Fortunately, researchers already know something about the factors that appear to lead to failure on federal pretrial services supervision (Bechtel et al., 2011). We hope that the establishment and dissemination of a federal pretrial risk assessment instrument (Cadigan & Lowenkamp, 2011a; Lowenkamp & Whetzel, 2009) will permit pretrial services officers and judges to make more informed release decisions.

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