



RELEASE ME!

Fighting The Culture of Detention With Law and Facts

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A Plea (Not That Kind)

- ▶ I urge you to forget what you think you know about pretrial release and detention
- ▶ Come along with us through the statute and case law with an open, beginner's mind and a willingness to be uncomfortable for your clients
 - ▶ Practice in our District (and nationwide) is not tethered to the statute
 - ▶ Government is not focused on justifying its motion for detention with an (f) factor
 - ▶ COVID-19 has made pretrial detention more dangerous than ever
 - ▶ U Chicago's Courtwatching Project is coming to the EDNC
- ▶ If we're not rocking the boat, the boat is not rocking

Pretrial Detention Is Harmful, Disparately Applied, And Expensive

- ▶ Pretrial detention is correlated with wrongful convictions, overlong sentences, and higher recidivism rates
- ▶ A defendant on bond has the ability to demonstrate to the sentencing judge that he or she is not a danger to the community
- ▶ Attorneys spend less time with defendants who are detained than with those who are released (Allan et al., 2005)
- ▶ Men are detained twice as often as women, Black and Native-American defendants are detained more often than Asian, Pacific Islander, and white defendants
- ▶ Non-citizens are detained at much greater rates than citizens
- ▶ The cost of pretrial detention is approaching \$1.5 billion a year; every day of pretrial release saves the federal government \$64.82

It's Not Necessary

- ▶ 99% of federal defendants released on bond are not arrested for a new violent crime
- ▶ Even among people the USPO's Pretrial Risk Assessment tool identifies as "most serious risk of re-offense," more than 97% are not rearrested for a new violent crime while on bond.

Every Day Counts

- ▶ Pretrial detention can result in loss of employment, loss of housing, loss of community ties, and push a client toward relapse or recidivism
- ▶ Pretrial detention correlates with a greater likelihood of receiving a custodial sentence, and a longer sentence! (Lowenkamp, VanNostrand & Holsinger, 2013a)
 - ▶ Detained defendants were 3.32 times more likely to receive a prison sentence
 - ▶ Sentences were 2.36 times longer than for those on bond
 - ▶ After controlling for other variables, defendant with a 60-month sentence would serve only 36 months if he had been released pretrial (Oleson, VanNostrand, Lowenkamp, Cadigan, Wooldredge, Probation 2014)
 - ▶ Detained defendants are twice as likely as released defendants to fail on supervised release (Cadigan and Lowenkamp, 2011b)
- ▶ Low risk clients who were held pretrial for **2 to 3 days were almost 40% more likely to recidivate before trial than those detained 24 hours or less**
- ▶ If held for 8 to 14 days, 51% more likely to recidivate within 2 years
- ▶ SO...3 to 5 days is a big deal!

Fourth Circuit: Federal Release Rates By District

Table H-14A.

**U.S. District Courts ---- Pretrial Services Release and Detention, Excluding Immigration Cases
For the 12-Month Period Ending December 31, 2019**

Circuit and District	Cases ¹	Detained and Never Released ²		Released ³	
		Total	Pct.	Total	Pct.
TOTAL	63,941	38,506	60.2	25,435	39.8
4TH	4,946	2,715	54.9	2,231	45.1
MD	637	350	54.9	287	45.1
NC,E	941	612	65.0	329	35.0
NC,M	354	202	57.1	152	42.9
NC,W	480	343	71.5	137	28.5
SC	545	259	47.5	286	52.5
VA,E	1,148	504	43.9	644	56.1
VA,W	258	135	52.3	123	47.7
WV,N	274	113	41.2	161	58.8
WV,S	309	197	63.8	112	36.2

Latest Chapter In A Sad Story

- ▶ September 2018: 69% detained; 31% released
- ▶ September 2017: 64.7 % detained; 35.3% released
- ▶ September 2016: 60.2% detained; 39.8% released
- ▶ September 2015: 69.2% detained; 30.8% released
- ▶ September 2014: 66% detained; 34% released

It could be worse...

- ▶ Southern District of California: 80.7% detained
- ▶ Western District of Arkansas: 76.1% detained
- ▶ Eastern District of Tennessee: 75.2% detained
- ▶ Southern District of Texas: 74.6% detained
- ▶ Eastern District of Missouri: 74% detained



But it could be better...

- ▶ District of New Mexico: 85.7% released
- ▶ District of Guam: 71.9% released
- ▶ Western District of Washington: 71.5% released
- ▶ Western District of New York: 63.7% released
- ▶ District of Connecticut: 61.6% released



This is a new day!

- ▶ Movement against cash bail
- ▶ Renewed interest in pretrial detention
- ▶ <https://www.themarshallproject.org/records/1439-bail-reform>
- ▶ <https://www.aclu.org/issues/smart-justice/bail-reform>
- ▶ Alison Siegler at University of Chicago (AMAZING materials, including draft motions and checklists for initial and detention hearings)
- ▶ COVID-19: CDC recognizes the particular vulnerability of those in jails and prisons, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>

And this is one time where the law is actually pretty good!

- ▶ Bail Reform Act: 18 U.S.C. § 3142
 - ▶ Spend an afternoon with it; I'm willing to bet you'll be surprised at how helpful it is
 - ▶ Government must prove that **no combination of conditions would reasonably assure** appearance/safety
 - ▶ Court must **impose least restrictive conditions** to reasonably assure appearance/safety

Begin at the Beginning: Initial Appearances

- ▶ If you thought these were mere formalistic hearings, you were wrong!
- ▶ The Government may only seek detention in certain types of cases
- ▶ IT IS ILLEGAL TO DETAIN A CLIENT UNLESS (f)(1) OR (f)(2) IS MET
 - ▶ Language of 18 U.S.C. § 3142(f)
 - ▶ *United States v. Salerno*, 481 U.S. 739, 747 (1987)
 - ▶ Courts of Appeals caselaw
- ▶ 3142(f): “The judicial officer shall hold a [detention] hearing” *only* “in a case that involves” an (f) factor

When Can The Government Seek Detention?

- ▶ § 3142(f)(1): objective based on nature of case
 - ▶ Crimes of violence (yes, it's another one: consult Jenny's list)
 - ▶ Offense with max of life or death
 - ▶ Drugs
 - ▶ Guns (924(c), 922(g)), minor victim, terrorism
 - ▶ Recent recidivists (very rare)
- ▶ § 3142(f)(2): subjective
 - ▶ "serious risk" of flight
 - ▶ "serious risk" of obstruction of justice or threat to witness or juror
- ▶ NOT DANGER TO THE COMMUNITY

So if you don't have an (f)(1) case, PERK UP

- ▶ Only unusual case will have serious risk of obstruction of justice/threat to victims or witnesses
- ▶ SO STAND UP
- ▶ And argue that a detention hearing is allowed only if the Government can present EVIDENCE of a **serious risk** your client will flee
- ▶ And if it can't?
- ▶ IMMEDIATE RELEASE

Don't just take my word for it

- ▶ It's illegal to detain a client without an “f” factor
 - ▶ *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. Himmler*, 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, 987 (9th Cir. 2003)
 - ▶ *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999)

Bail Reform Act Is Constitutional Because It's *Limited*

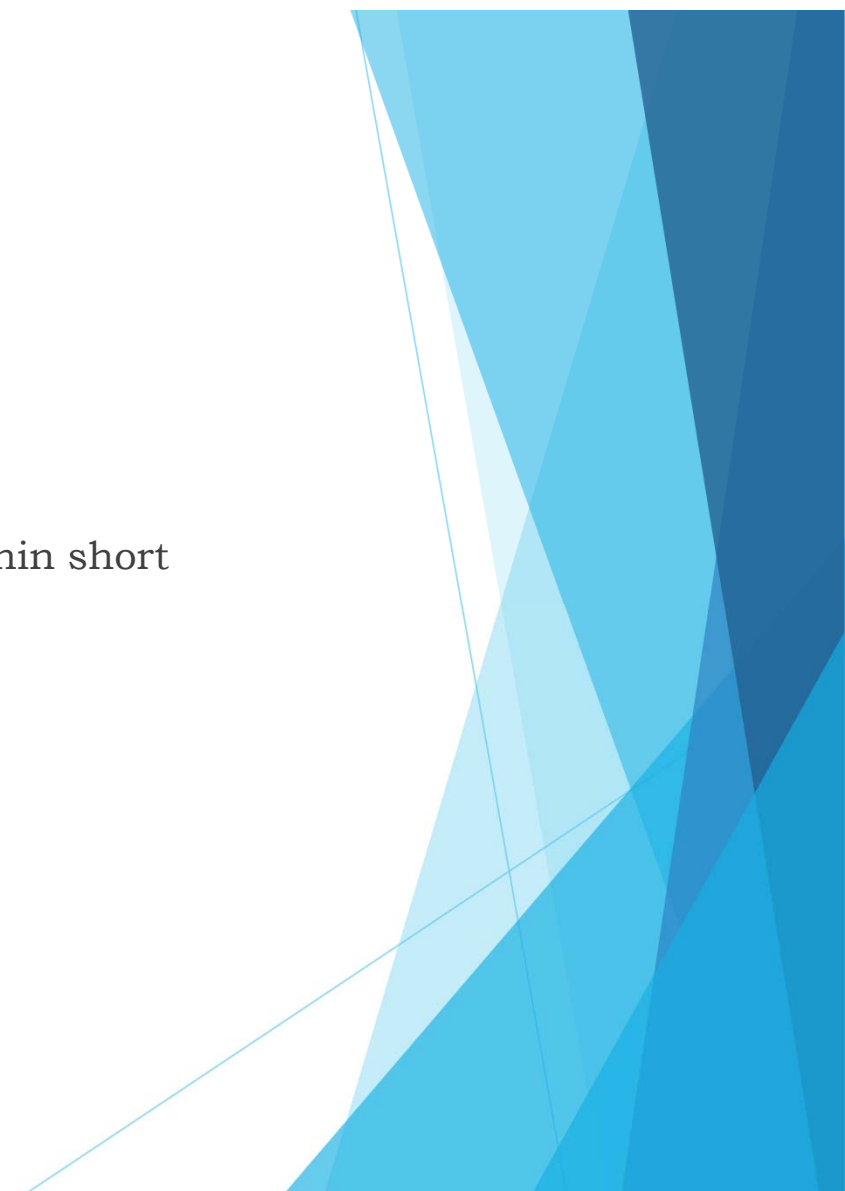
- ▶ “The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes. See 18 U.S.C. § 3142(f) (detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders).” *United States v. Salerno*, 481 U.S. 739, 747 (1987).
- ▶ “The [BRA] narrowly focuses on a particularly acute problem The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).” *Id.* at 750.

What do I do?

- ▶ Ask the Government to state on the record which (f) factor it is acting under
- ▶ If not (f)(1) (think fraud, illegal reentry, extortion, etc.), object to detention hearing
 - ▶ Object if risk of flight is not serious
 - ▶ Object if Gov argues danger to community (not relevant!)
- ▶ I'm talking about evidence and proffers of evidence AT THE INITIAL. For example:
 - ▶ Has client appeared for court on other charges?
 - ▶ Has he known government was investigating and stayed put?
 - ▶ Does he have family and/or children here?
- ▶ File a written motion

Don't let it go

- ▶ Appeal to District Court
- ▶ Appeal to Court of Appeals
- ▶ Ask for detention hearing to be held immediately or within short timeframe



Assuming you get to a detention hearing...DON'T WAIVE IT

- ▶ One exception: Client is in state or federal custody with a release date that is not imminent
 - ▶ Not: "I want to speed up my case"
 - ▶ Not: "It's a presumption case"
 - ▶ Not: "I don't have a third party custodian"
- ▶ Ask yourself: Is there any *harm* that could come to client by having a detention hearing or am I just uncomfortable with being uncomfortable?
- ▶ After all, a detention hearing can:
 - ▶ Give color to cold paper discovery
 - ▶ Divulge lines of investigation, possible defenses, or motions
 - ▶ Lock in the testimony of agents and other witnesses for impeachment purposes
- ▶ As my mother always says: "If you don't ask, you don't get."
- ▶ If the Government threatens an 851 or other sanction for declining to waive a detention hearing, PUT THAT ON THE RECORD. That is: "Did anyone threaten you or promise you anything to give up your right to this hearing?"

Non-Presumption Cases

§ 3142(e)

- ▶ 18 U.S.C. § 3142(b) **presumes release on personal recognizance**
- ▶ “shall order the pretrial release of the person . . . unless ... 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”
- ▶ “In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).

Standards

- ▶ Judge must consider ALL POSSIBLE conditions of release and impose “least restrictive” under § 3142(c)(1)(B)
- ▶ Gov must prove risk of flight *at least by a preponderance* (there is an argument standard should be clear and convincing evidence)
- ▶ Gov must prove dangerousness by clear and convincing evidence
- ▶ “reasonably assure,” not guarantee appearance/safety
- ▶ **Gov must prove no combination of conditions will reasonably assure appearance and safety**

Structure Argument Around Release Conditions

- ▶ Third-party custodian
- ▶ Maintain/get employment
- ▶ Maintain/start education
- ▶ Restrictions on travel/living/EM/GPS
- ▶ Curfew
- ▶ Refrain from excessive alcohol/all drugs
- ▶ Undergo psych treatment
- ▶ Post property

Structure Arguments Around Dangerousness/Flight Risk Factors

- ▶ Weight of the evidence is “the least important factor”
 - ▶ *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990)
- ▶ Overemphasizing the weight of the evidence creates impermissible “presumption of guilt”
 - ▶ *United States v. Gray*, 651 F. Supp. 432, 436 (W.D. Ark. 1987)

Presumption Cases

§ 3142(e)(3)

- ▶ Drugs, 924(c), minor victim, human trafficking, terrorism
- ▶ No presumption of detention for crimes of violence or 922(g)

What do I do?

- ▶ Consider filing a written motion
- ▶ Explain how easily presumption is rebutted: “any evidence favorable to a defendant that comes within a category listed in 3142(g)” can rebut the presumption. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986); see also *United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985); *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985).
- ▶ Married/partner, minor children
- ▶ Ties to and role in community
- ▶ Clean criminal record, minimal criminal history
- ▶ Lack of drug history
- ▶ Lack of mental health history
- ▶ Mine § 3142(g)

Problems With The Presumption

- ▶ **It applies too often:** “The presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.” Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, Federal Probation 52, 61 (Sept. 2017)
- ▶ **It’s bad at its job:** “[H]igh risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high risk non-presumption cases of being rearrested for any offense, being rearrested for a violent offense, failing to appear, or being revoked for technical violations”). *Id.* at 58.
- ▶ **SO:** In 2017, the Judicial Conference asked Congress to limit the presumption in drug cases to people with very serious criminal records

If at first, you don't succeed...

- ▶ APPEAL

- ▶ To the District Court
- ▶ To the Court of Appeals



Non-citizen Clients

- ▶ ICE cannot detain client after release on bond
 - ▶ *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017)
 - ▶ *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1170 (D. Or. 2012)
 - ▶ *United States v. Boutin*, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017)
- ▶ ICE detainer is not evidence of a serious risk of flight
 - ▶ *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017)
 - ▶ *United States v. Martinez-Patino*, 2011 U.S. Dist. LEXIS 26234 (N.D. Ill. Mar. 14, 2011)
 - ▶ *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1135-1136 (N.D. Iowa 2018)
 - ▶ *United States v. Suastegui*, No. 3:18-MJ-00018, 2018 WL 3715765, at *4 (W.D. Va. Aug. 3, 2018)

COVID-19: If you thought this was urgent before...

- ▶ The statute is the same, but the risks inherent in detention have shifted dramatically (see CDC guidance for jails and prisons)
- ▶ <https://www.pogo.org/analysis/2020/06/pretrial-detention-in-a-pandemic/> (As of June 8, 1,213 of 57,000 prisoners in Marshal's custody tested positive for COVID-19)
- ▶ https://www.americanbar.org/groups/crsj/events_cle/program-archive/covid-pretrial-release/
- ▶ Use this moment to bring judges back to the statute: This pandemic reinforces why courts must always consider less restrictive conditions than detention.
- ▶ Avoid continuances whenever possible. Now, more than ever, detention can be dangerous, and even deadly.
- ▶ <https://www.fd.org/coronavirus-disease-2019-covid-19/pretrial-release-and-conditions> (sample release orders, including on motions to reopen for changed conditions)

QUESTIONS?

