CLE MATERIALS
Breaking Out of the Cage: Bail Reform Act Fundamentals
Alison Siegler, alisonsiegler@uchicago.edu (Feb. 25, 2021)

Helpful Articles for Defense Attorneys Litigating Federal Pretrial Release Issues

- **Action Steps for Litigating Federal Bond Issues**: Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, THE CHAMPION (July 2020), https://perma.cc/GA48-BY6Z (attached)
- **Litigating Federal Bond During COVID-19**: Alison Siegler & Erica Zunkel, *Commentary: Don't Let Chicago's Federal Jail Become the Next Coronavirus Hot Spot*, CHI. TRIBUNE, Apr. 24, 2020, at 19 (attached).
- **Litigating Bond in Federal Drug Cases**: *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*,18 OHIO ST. J. CRIM. L. 1 (2021), https://ssrn.com/abstract=3589862 (not attached)
- **Federal Pretrial Detention Leads to Worse Sentencing Outcomes**: Stephanie Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 Am. L. & Econ. Rev. 24 (2020) ("This paper presents evidence that federal pretrial detention significantly increases sentences, decreases the probability that a defendant will receive a below-Guidelines sentence, and decreases the probability that they will avoid a mandatory minimum if facing one." *Id*. at 30) (not attached).

Client Interview Form

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

Initial Appearance Hearing Materials

- **Initial Appearance Checklist & Flowchart for Defense Attorneys**
  - For use in court: Provides arguments, responses to government, and supporting caselaw for the initial court appearance on a complaint or indictment. You can add good law from your own circuit/district.
- **Template Motion For Immediate Release in a Case that Doesn't Qualify for Detention Under § 3142(f)(1) & Appendices:**
  - File this template motion and Appendices immediately after the initial appearance only in the rare case where:
    - (1) the charge is fraud, extortion, or another charge not listed in § 3142(f)(1), and
    - (2) the client was detained as a "risk of flight" without sufficient evidence.
- **Template Appeal of Magistrate Judge's Detention Order and Request for Immediate Release With Conditions & Appendices:**
  - File this template appeal and Appendices immediately after the initial appearance only in the rare case where:
    - (1) the charge is fraud, extortion, or another charge not listed in § 3142(f)(1), and
    - (2) the client was detained as a "danger to the community" or as a "risk of flight." (File even if Initial Appearance and Detention Hearing are held on the same day.)
- NOTE: The Initial Appearance template motion and appeal should not be filed in the following types of cases because a § 3142(f)(1) factor authorizes detention at the Initial Appearance: bank robbery or other crime of violence listed in § 3142(f)(1)(A); drug case listed in (f)(1)(C); 924(c) gun case, 922(g) gun case, child pornography case, or terrorism case, all listed in (f)(1)(E).

Detention Hearing Materials

- **Detention Hearing Checklist & Flowchart for Defense Attorneys**
  - For use in court: Provides arguments, responses to government, and supporting caselaw for the detention hearing. You can add good law from your own circuit/district.
- **Template Motion: Defendant's Motion for Pretrial Release in Presumption Case**
  - File this template motion before the detention hearing in any case involving a presumption of detention under 18 U.S.C. § 3142(e)(2) or (e)(3). Common presumption cases: drugs, § 924(c) gun cases, minor victim, terrorism. Or file as a motion to reconsider after a detention hearing.
- **Supporting Materials for Presumption Cases**
  - The Smarter Pretrial Detention for Drug Charges Act of 2020 (would entirely eliminate the presumptions of detention)
  - **Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FEDERAL PROBATION 52 (2017):** Examines the presumptions of detention and concludes that they have led to a "massive increase" in the federal pretrial detention rate.
  - **Judicial Conference Recommendation Re: Presumptions of Detention (September 12, 2017):** Recommends amending 18 U.S.C. § 3142(e) to limit the presumption of detention in drug cases to people with very serious criminal records.
  - **Judicial Conference Recommendation Re: Presumptions of Detention During COVID (4/28/20)**
- **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)**
  - File before the Detention Hearing in any case involving a non-citizen client, or file as a motion to reconsider after Detention Hearing.
  - This motion was written by AFPD Andrew Grindrod of the EDVA, an alum of the Federal Criminal Justice Clinic. Andrew won the motion and his client was released.

Pending Senate and House Bills to Amend the BRA

- The Smarter Pretrial Detention for Drug Charges Act of 2020: Bi-partisan Senate bill that would entirely eliminate the presumption of detention in drug cases (bill attached; 1-pager attached; press release here).
- The Federal Bail Reform Act of 2020: House bill introduced by Rep. Jerry Nadler (D. NY.), Chair of the House Judiciary Committee that comprehensively rewrites the BRA (not attached; bill text linked; details here).

Federal Pretrial Detention and Release Statistics

- Federal Release Rates by District, excluding immigration cases: Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42; version of Table H-14A dated Sept. 30, 2019 also available at https://www.uscourts.gov/statistics/table/h-14a/judicial-business/2019/09/30
- AUSA & Pretrial Services Release Recommendations by District, excluding immigration cases: Table H-3A, https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf
- Pretrial Services Violations Summary Report: Table H-15 (Dec. 31, 2019), https://perma.cc/LYG4-AX4H; Table H-15 (Sept. 30, 2020), https://perma.cc/97CP-VG5C
- Some of these tables and more are publicly available here: https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts

Memo: Right to Counsel at Initial Appearance (FCJC)

- This memo establishes that people charged in federal criminal cases have the right to be represented by an attorney during the Initial Appearance under at least four statutes and constitutional provisions: Fed. R. Crim. P. 44, 18 U.S.C. § 3006A, the Sixth Amendment, and the Due Process Clause.
- NLADA Report, *Access to Counsel at First Appearance,* http://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf (not attached)

Good Federal 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.)
- **Non-Citizen Clients**
    - *United States v. Mendoza-Balleza*, No. 4:19-CR-1 (E.D. Tenn. May 23, 2019) (McDonough, J.) (district court order reversing magistrate judge's detention order and releasing non-citizen client)
    - *United States v. Magana*, 19-CR-447 (N.D. Ill.) (Coleman, J.) (district court reversed magistrate judge's detention order and released non-citizen client) (not attached)
        - Docket 18: Defendant's Motion for Immediate Release With Conditions
        - Docket 22: Response by AUSA to Defendant's Motion for Immediate Release
        - Docket 23: Reply by Magana to Motion by AUSA for Detention
        - Docket 24: Release Order

Congressional Testimony re: Federal Pretrial Detention

- Alison Siegler & Erica Zunkel, *Presumption of Release and Reimagining the Federal Bail Reform Act*, in Justice Roundtable, *Transformative Justice: Recommendations for the New Administration and the 117th Congress* at 22 (Nov. 19, 2020), https://www.sentencingproject.org/wp-content/uploads/2020/11/Transformative-Justice.pdf (not attached)
- Alison Siegler Truth-in-Testimony Form at 4–10, *The Administration of Bail by State and Federal Courts: A Call for Reform*, *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-TTF-SieglerA-20191114.pdf (attached)
- *Written Statement of Alison Siegler*, *The Administration of Bail by State and Federal Courts: A Call for Reform*, *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf (attached)
- Video of hearing at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2256

Additional Statistics and Data (compiled by the FCJC)

- Memo: Race and Federal Pretrial Detention Statistics
- Memo: Personal and Social Harms of Pretrial Detention

Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, The Champion (July 2020 2020), https://ssrn.com/abstract=3601230 or http://dx.doi.org/10.2139/ssrn.3601230

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Rethinking Federal Bail Advocacy to Change the Culture of Detention

I. Introduction

The federal bail system is in crisis, with three out of every four people locked in a cage despite the presumption of innocence. The federal pretrial detention rate has skyrocketed since the Bail Reform Act ("BRA") was enacted in 1984, rising from 19 percent in 1985 to 75 percent in 2019.[1] The federal system jails people before trial at a far higher rate than state systems. This is especially mystifying given the cash bail crisis plaguing the states[2] and the much lower rate of violent offenses in the federal system.[3] Disheartening as these numbers are, defense attorneys have the power to free their clients through zealous advocacy at bail hearings.

The federal bail crisis can be traced to two sources. First, in federal courts across the country, the law as it operates in practice has become untethered from the law as written in the statute. Second, the BRA itself needs revision — most importantly, the presumption of detention[4] that is driving high federal detention rates[5] must be eliminated. We have testified before Congress about the second problem,[6] but this article will focus on the first problem, since it can be addressed by defense advocacy.

Imagine if, over time, people playing Monopoly forgot the written rules and assumed that people could be sent to jail whenever they passed Go. That is akin to what is happening in the federal bail arena, although the consequences are far more serious. As in Monopoly, the BRA only authorizes pretrial jailing under very limited circumstances. But many of the players have forgotten the statutory rules, and in some cases, judges and prosecutors are jailing people for reasons not authorized by those rules. Because defense attorneys have also forgotten the rules, they are not always aware that clients' legal rights are being violated. Over time, the practice has deviated further and further from the law, and people charged with federal crimes are paying the price.

Bond advocacy is even more urgent now. As the COVID-19 pandemic ravages federal jails, pretrial release has become a matter of life or death.[7] To change the culture of detention, defense attorneys need to radically rethink their advocacy and ensure that all of the players follow the BRA's defense-friendly rules. This article provides statistics to illustrate the contours and costs of the federal bail crisis as well as action steps for bringing federal pretrial detention practices back in line with the law.[8]

II. The Federal Bail Crisis

The BRA was supposed to authorize detention for a narrow set of people: those who are highly dangerous or pose a high risk of absconding.[9] When the Supreme Court upheld the BRA as constitutional in 1987, it emphasized, "[i]n our society liberty is the norm, and detention prior to trial … is the carefully limited exception."[10] But in practice, pretrial detention is now the norm, not the exception.

BY ALISON SIEGLER AND ERICA ZUNKEL

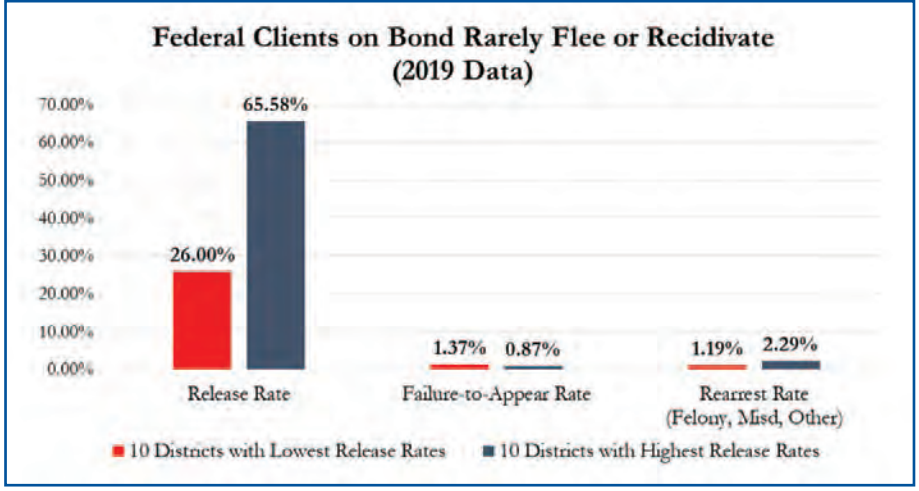
Chair of the House Judiciary Committee Jerrold Nadler said of the BRA during a recent bail reform hearing: "[T]he reforms of the past have proven to be insufficient in balancing a defendant's liberty interest and ensuring that the communities remain safe." He lamented that federal "release rates have steeply declined" since the passage of the BRA, and said, "surely community safety does not justify this trend."[11]

Federal pretrial detention rates are far higher than in state felony cases. To get a sense of how much higher, compare the federal detention rate of 75 percent with the 38 percent rate for state felonies in large urban counties nationwide, and the 45 percent detention rate for violent felonies in those same counties.[12] Only one offense — murder — has a higher detention rate than the federal system.[13] The astronomical federal detention rate is being driven by the rate at which prosecutors request detention. Their detention request rate has risen dramatically over time, from 56 percent in 1997 to 77 percent in 2019, with prosecutors in the Fifth Circuit requesting detention for a whopping 87 percent of clients last year.[14]

These high federal detention rates do not make sense. They are not necessary to ensure the primary goals of pretrial detention — community safety and appearance in court — because violent offenders make up just 2 percent of those arrested in the federal system.[15] Moreover, nearly everyone released before trial appears in court and does not reoffend. In 2019, 99 percent of released federal defendants nationwide appeared for court as required, and over 98 percent did not commit new crimes on bond.[16] What is really remarkable is that this near-perfect compliance rate is seen equally in federal districts with very high release rates and those with very low release rates.[17] So when release increases, crime and flight do not. This proves that the federal system is jailing far more people than necessary. Figure 1 reflects this data.

Caging so many people also exacts high human and fiscal costs. On average, a person charged with a federal crime spends over eight months in jail,[18] often in deplorable conditions,[19] and in some districts, the *average* time spent in a cage before trial is two and a half years![20] While people sit in jail, they can lose their jobs,[21] their homes,[22] their health,[23] and even their children.[24] Pretrial detention also increases the likelihood of conviction[25] and results in longer federal sentences.[26] And pretrial detention imposes a high burden on taxpayers: It costs approximately $36,299 per year to incarcerate someone in federal prison,[27] far more than the average college tuition.[28] Meanwhile, it costs just $4,000 to supervise someone on pretrial release.[29]

Figure 1



While there is disturbingly little published data about the race effects of federal pretrial detention, the few studies that exist show consistent racial disparities over time, with people of color being detained at higher rates than White people.[30] Figure 2 shows the disparities.

III. Defense Attorneys Must Bring Federal Bail Practices Back in Line with the Law

In 2018, the Federal Criminal Justice Clinic ("FCJC") at the University of Chicago Law School created a Federal Bail Reform Project to address the federal bail crisis, designing the first courtwatching project ever undertaken in federal court. During Phase 1 of courtwatching, volunteers gathered and logged data from 173 federal bail-related hearings in Chicago over the course of 10 weeks, both Initial Appearance Hearings and Detention Hearings.[31] FCJC learned that prosecutors often request detention for reasons not authorized by the statute and that, in some cases, clients are illegally detained. After Phase 1, FCJC conveyed its findings to a supervisor at the U.S. Attorney's Office and federal magistrate judges in Chicago. In mid-2019, FCJC ran Phase 2 of the courtwatching project and was heartened to see that prosecutors, defense attorneys, and judges had begun adhering more closely to the statute in the wake of FCJC's interventions.[32]

This section clarifies the law that applies at Initial Appearance Hearings and Detention Hearings and offers action steps for litigation. Defense attorneys can protect their clients' liberty and prevent unwarranted detention by ensuring that the practice at federal bail hearings aligns with the BRA's legal requirements. Counsel must also remind judges that Congress intended to create a culture of release, not a culture of detention, and that the Supreme Court upheld the BRA as constitutional in that spirit.[33] At the Initial Appearance, defense attorneys can empha-

Figure 2

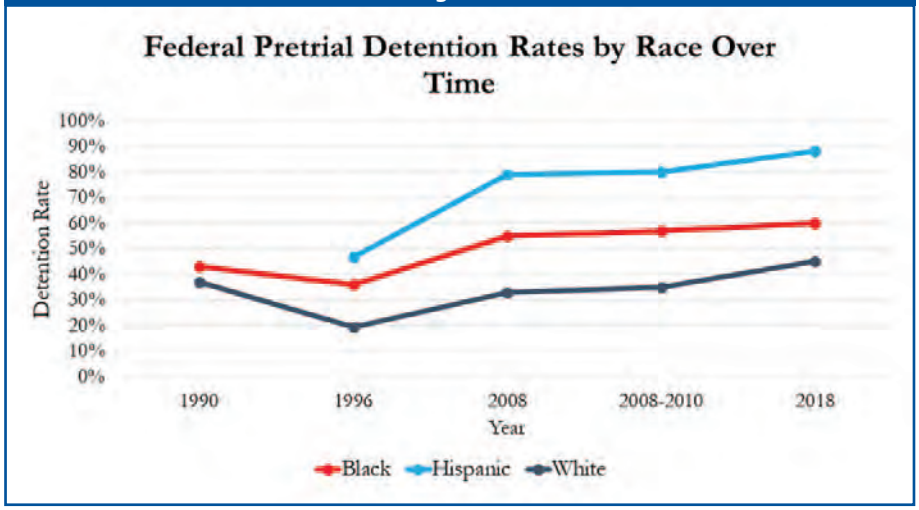
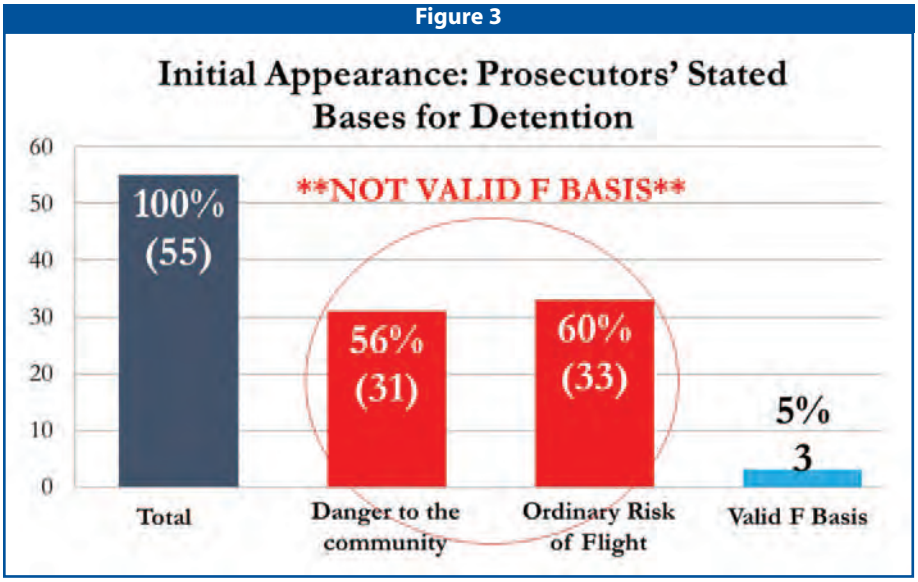


Figure 3



size the *limitations* on judicial discretion — the BRA carefully circumscribes the kinds of cases in which detention is authorized. At the Detention Hearing, attorneys can emphasize the *expansiveness* of judicial discretion — the BRA gives judges great leeway to grant release, even when a presumption of detention applies.

At both stages, defense counsel should file more written motions and appeal more often. Just as filing written sentencing motions in the wake of *United States v. Booker*[34] has won below-Guidelines sentences for clients, filing written bond motions will win clients' release.[35] It is crucial to include in defense motions the statistics proving that people on bond virtually never flee or reoffend, even in districts that release most people on bond.[36]

A. The Initial Appearance Hearing

The defense bar must emphasize that the BRA limits the types of federal criminal cases that are eligible for pretrial detention. Most important, the statute and case law make clear that neither "danger to the community" nor ordinary "risk of flight" is a legitimate basis for detention at the Initial Appearance Hearing. This may come as a surprise to many federal criminal defense attorneys, judges, and prosecutors, but it is clear from the plain language of the statute. In many instances, the government moves for detention on these impermissible grounds, the defense does not object, and the judge simply orders the client detained until a Detention Hearing. It is very rare that the Detention Hearing is held immediately; often it is set several days after the Initial Appearance.[37] In the interim, the person is taken from the courtroom in handcuffs and caged at the federal jail. While they wait for the Detention Hearing, clients can lose their jobs and their financial stability.[38]

During Phase 1 of FCJC's courtwatching project, prosecutors routinely requested detention at the Initial Appearance on the impermissible basis of "danger to the community" or "risk of flight," and judges regularly granted those requests. In the first 7 weeks of Phase 1, the prosecutor sought detention in 80 percent of the cases observed by the courtwatching project team, and in all but one case the person was detained and held in custody until a Detention Hearing.[39] In approximately 95 percent of those detained cases, the prosecutor based the detention request on reasons not authorized by the statute, citing "danger to the community" as the basis for detention in approximately 56 percent of the cases and ordinary "risk of flight" in approximately 60 percent of the cases.[40] Prosecutors only provided a valid basis for detention in 5 percent of cases and only provided evidence to support the request in one case.[41] Figure 3 illustrates these alarming results.

In most Phase 1 cases, a legitimate statutory basis for detention existed under § 3142(f), though the prosecutor did not invoke it.[42] However, in nearly 10 percent of the Phase 1 cases, there was no statutory basis for detention whatsoever, rendering the resulting detention illegal.[43] Information gathered from attorneys around the country reveals that this kind of disregard for the statute at the Initial Appearance is a nationwide problem.[44]

Fortunately, it appears that the very process of courtwatching — along with the FCJC's other interventions — led to significant improvements in how prosecutors and judges alike approached Initial Appearances in Chicago. For example, during Phase 2, prosecutors either explicitly cited the statute or used the words "serious risk of flight" in 82 percent of the Initial Appearances in which clients were detained without conceding detention.[45] In contrast to Phase 1, the FCJC courtwatching team did not observe a single case in Phase 2 where a judge detained a client without a legitimate statutory basis under § 3142(f).[46]

FCJC's courtwatching also revealed troubling racial disparities in federal detention practices in Chicago. Prosecutors sought detention at higher rates for people of color at the Initial Appearance: 58 percent of the time for White clients as compared with 82 percent of the time for Black clients and 92 percent of the time for Latinx clients.[47]

To combat these problems, we offer the following action steps for advocacy.

a. Action Step #1: Ensure that there is a statutory basis for the prosecutor's detention request.

Whenever a prosecutor seeks to detain a client, defense counsel must explain that it is illegal to do so on the mere allegation that the client is a "danger to the community" or an ordinary "risk of flight," and counsel must demand that the prosecutor cite a § 3142(f) factor to justify detention. If one of the factors in § 3142(f) is met, the judge is authorized to hold a Detention Hearing.[48] Without a § 3142(f) factor, however, the prosecutor cannot move for detention at the Initial Appearance, the judge cannot subsequently hold a Detention Hearing, and there is no legal basis to detain the client before trial. In that situation, the BRA requires immediate release, either on personal recognizance or an unsecured bond under § 3142(b), or on conditions under § 3142(c).

The BRA only authorizes the judge to hold a Detention Hearing when a § 3142(f) factor is met: "The judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors in § 3142(f)(1) and (f)(2). Section (f)(1) lists five case-specific factors that authorize pretrial detention:

1. most drug offenses;[49]
2. gun offenses and minor victim offenses;[50]
3. crimes of violence and terrorism offenses;[51]
4. offenses with a maximum term of life imprisonment or death;[52] and
5. certain rare recidivist offenses.[53]

Section (f)(2) authorizes detention on two additional bases:

6. when there is "a serious risk that such person will flee";[54] and

7. when there is "a serious risk" of obstruction of justice, or of a threat to a witness or juror.[55]

Congress intended § 3142(f) to serve as a gatekeeper to detention.[56] *Salerno* confirms that a person may only be detained at the Initial Appearance if one of these seven § 3142(f) factors is present: "The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious of crimes," specifically the crimes enumerated in § 3142(f).[57] When no § 3142(f) factor is met, the judge is flatly prohibited from holding a Detention Hearing; the client must be released.[58]

Case law further supports § 3142(f)'s role as a gatekeeper. Since *Salerno*, all six federal courts of appeals to address the issue have agreed that it is illegal to detain someone — or even to hold a Detention Hearing — unless the prosecutor affirmatively invokes one of the § 3142(f) factors.[59] For example, the First Circuit holds: "Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists."[60] The D.C. Circuit has articulated the procedure judges must follow at the Initial Appearance: "First, a [judge] must find one of six circumstances triggering a detention hearing … [under] § 3142(f). Absent one of these circumstances, detention is not an option."[61] The Second Circuit has agreed and has even set an evidentiary standard for the Initial Appearance, holding that the judge "must first determine by a preponderance of the evidence" that § 3142(f)(1) or (f)(2) is met.[62]

Notably, when a judge detains someone without a statutory basis in § 3142(f), the BRA as applied becomes unconstitutional.[63]

b. Action Step #2: Be vigilant in cases charging fraud or other offenses not listed in § 3142(f)(1).

The defense attorney must be especially attentive when the prosecutor seeks detention at the Initial Appearance for an offense not listed in § 3142(f)(1) — such as fraud or illegal entry. In such cases, the prosecutor typically justifies the detention request on the ground that the client poses a "danger/financial danger" or an ordinary "risk of flight." If the prosecutor makes such an argument, alarm bells should go off and defense counsel should object because the only legitimate basis for detention is "serious risk" of flight under § 3142(f)(2)(A).[64]

If the prosecutor invokes "danger to the community" or "financial danger" as a basis for detention at the Initial Appearance, counsel must argue that detention violates the statute, case law, and the Constitution.[65] Dangerousness is simply not a § 3142(f) factor. Every court to have addressed the issue agrees that it is illegal for a judge to detain someone at the Initial Appearance as a "danger" or a "financial danger."[66] As the Fifth Circuit has said: "[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 pretrial detention."[67]

Alternatively, if no § 3142(f)(1) factor is met and the prosecutor invokes *ordinary* "risk of flight," defense counsel must object and explain that the statute only authorizes detention at the Initial Appearance "in a case that involves" a "*serious risk* that such person will flee."[68] According to a basic canon of statutory interpretation, a "*serious* risk" is necessarily more signif-

icant or extreme than an ordinary risk.[69] In addition, the BRA's legislative history makes clear that detention for serious risk of flight should occur only in *extreme and unusual cases*.[70]

When the only possible basis for detention at the Initial Appearance is serious risk of flight, the defense should use the plain language of § 3142(f)(2)(A) to contend that the prosecutor must proffer some *evidence* to demonstrate the case indeed involves a risk that is "serious" — evidence that relates to the client's history and characteristics (e.g., past failures to appear in court) or to the circumstances of the offense (e.g., the client led the police in a high-speed chase). Case law supports the defense position that the government must provide evidence, explaining that when the only basis for detention is § 3142(f)(2)(A), a client "may be detained *only if the record supports a finding* that he presents a serious risk of flight."[71]

The defense lawyer should also proffer evidence to show that the client does not pose a "serious risk" of flight, such as evidence that the client has lived in the same community for a long time or has no record of failing to appear in court. The defense can rely on the Second Circuit's reasoning in *Friedman*, reversing a detention order for "serious risk of flight" where the client was a lifelong resident of the district, was married with children, had no prior record, had been steadily employed before his arrest, and had been on bond for related state charges without incident.[72]

FCJC's courtwatching suggests that defense attorneys rarely object to detention or request release at the Initial Appearance. During Phase 1, defense attorneys objected in just 9 percent of cases.[73] However, these numbers improved significantly during Phase 2. After FCJC's training and other interventions, defense attorneys raised some objection to detention at the Initial Appearance in 29 percent of cases, a very heartening development.[74]

c. Action Step #3: Appeal.

If defense counsel loses at Step #2, she should strongly consider filing a written motion to reconsider or appealing to the district court, and ultimately to the court of appeals.[75] A written motion or appeal can be especially powerful in reminding the judge of the legal requirements for detention in jurisdictions where the practice has drifted far from the statutory tether. For example, if the prosecutor presents little to no evidence of serious flight risk or the defense has countervailing evidence that there are conditions of release that would "reasonably assure" the client's appearance, much can be gained by presenting those arguments in a written motion.

d. Action Step #4: Request an *immediate* detention hearing.

When the prosecutor is seeking detention and a legitimate factor applies under § 3142(f)(1) (as in a drug, gun, crime of violence, or minor victim case), defense counsel should ask that the Detention Hearing be held immediately. The BRA's default is for the hearing to be "held immediately upon the person's first appearance" *unless* the prosecutor or defense counsel seeks a continuance.[76] Since the prosecutor's continuance "may not exceed three days,"[77] the defense should push back and request a Detention Hearing sooner.[78]

B. The Detention Hearing and the Presumption of Detention

There is also widespread misunderstanding about the law that applies at Detention Hearings. The defense bar must bring the practice back in line with the law by litigating more Detention Hearings, filing more motions, reminding judges of the favorable law and data, and linking clients' mitigating facts to those sources.[79]

At the Detention Hearing, there is a statutory presumption of release for most offenses, including crimes of violence, § 922(g) felon in possession of a gun, illegal entry, and fraud cases.[80] In contrast, a *presumption of detention* applies in a narrow set of cases: most drug cases, plus § 924(c) gun cases, terrorism cases, and minor victim cases.[81] Congress enacted the presumption of detention in such cases "to detain high-risk defendants who were likely to pose a significant risk of danger to the community if they were released pending trial."[82] But rather than applying narrowly to high-risk defendants, the presumption applies to nearly half of all federal criminal cases and to 93 percent of all drug cases.[83]

The courtwatching data confirms the vast reach of the presumption, particularly in drug cases. During Phase 1, the presumption applied in approximately 40 percent of the contested Detention Hearings the courtwatching team observed.[84] Nearly 90 percent of those presumption cases were drug cases, 94 percent involved people of color, and *all* of the clients detained in presumption cases were people of color.[85] The courtwatching also revealed that courts sometimes misapply the presumption or give it too much weight, effectively treating it as a mandate for detention. Judges found that the presumption was rebutted 64 percent of the time, yet still detained defendants in 47 percent of presumption cases.[86]

In addition, courtwatching revealed racial disparities at the Detention Hearing stage, with prosecutors again seeking detention at higher rates for people of color: 43 percent of the time for White clients as compared with 88 percent of the time for Black clients and 68 percent of the time for Latinx clients.[87] Judges likewise detained clients of different races at different rates: 50 percent of White clients were detained at the contested Detention Hearings watched, as compared with 67 percent of Black clients and 50 percent of Latinx clients.[88]

To align the practice with the law at the Detention Hearing, we provide the following action steps for advocacy.

a. Action Step #1: In presumption cases, highlight data demonstrating the problems with the presumption of detention.

A recent government data study shows that the presumption of detention is driving the high federal detention rate, applies in too many cases, and detains the wrong people. After examining every federal pretrial case from 2005 to 2015, the study concluded: "[T]he 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."[89]

The study further found that the presumption increases the detention rate without advancing community safety. Rather than jailing the worst of the worst, the presumption over-incarcerates the lowest-risk offenders in the system, people who are stable, employed, educated, and have minimal to no criminal history.[90] When a low-risk individual is not facing a presumption, he or she is released 94 percent of the time.[91] Yet an identically low-risk individual in a presumption case is released just 68 percent of the time.[92] The study similarly finds that in weapons and sex offense cases specifically, "the presumption may be targeting lower-risk defendants rather than higher-risk" ones.[93]

Moreover, the presumption results in the jailing of people who do not pose a high risk of violating bond.

Although the entire point of the BRA is to ensure that people do not flee or endanger others, "the presumption does a poor job of assessing risk" on both of those fronts.[94] Specifically, "[t]he presumption has failed to correctly identify defendants who are most likely to be rearrested for any offense, rearrested for a violent offense, [or] fail to appear."[95] In this way, too, the presumption does not further the goals of the BRA.

Defense counsel should file motions highlighting this government data study.[96] Such motions should also encourage judges to exercise their discretion to find that the defense has rebutted the presumption and to grant release despite the presumption. In any federal *drug* case where the presumption applies, it is important to tell the judge that the government study led the Judicial Conference of the United States to ask Congress to dramatically narrow the presumption in drug cases, limiting it to people with very serious criminal records.[97] Given the Judicial Conference's striking reiteration of this recommendation in 2020, judges should exercise their discretion to release many more clients in presumption cases.

b. Action Step #2: Litigate more detention hearings and highlight how rarely clients on bond flee or reoffend.

Clients who are charged in detention-eligible cases have a right to a Detention Hearing. Attorneys should not waive the Detention Hearing, even in presumption cases, without a very compelling reason. FCJC's courtwatching revealed that the defense waived Detention Hearings 35 percent of the time.[98] But after FCJC held its training, the defense waived the hearing just 22 percent of the time.[99]

Prosecutors benefit when defense attorneys do not fight at the Detention Hearing stage. If defense attorneys force prosecutors to defend more Detention Hearings, prosecutors may seek detention less often. In addition, when clients see defense counsel fighting early on, it builds trust and shows that defense lawyers are willing to fight for clients' best interests, regardless of the result. And, of course, the more defense attorneys fight, the more they will win. This was borne out by FCJC's courtwatching: clients were released in 40 percent of the contested Detention Hearings.[100]

It is also vital to cite the data showing how exceedingly rare it is for clients on bond to flee or reoffend.[101]

c. Action Step #3: Emphasize the defense-friendly aspects of the BRA.

The BRA is a defense-friendly statute, particularly in non-presumption cases, so it is critical that defense attorneys remind judges of what the law actually says.

First, the BRA's presumption of release means that the judge must release the client unless the prosecutor proves (1) by at least a preponderance of the evidence that there are absolutely no conditions of release that would reasonably assure the client's appearance,[102] or (2) by "clear and convincing evidence" that there are no conditions of release that will reasonably assure community safety.[103]

Second, the defense does not have to guarantee that the client will appear or is not a danger; the question is simply whether there are conditions of release that will "reasonably assure" appearance and safety, and the judge must impose "the least restrictive" conditions that meet that goal.[104]

d. Action Step #4: Structure release arguments around the § 3142(g) factors.

Counsel must link the client's facts to the § 3142(g) factors. In determining the least restrictive conditions of release that

will reasonably assure appearance and safety, the judge "shall … take into account the available information concerning" the client's personal history, the circumstances of the offense, and the weight of the evidence under § 3142(g).[105] Defense counsel should focus on the "history and characteristics of the person," which include "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."[106] Because the § 3142(g) factors are so wide ranging, they provide ample room to argue that there are conditions that can mitigate any flight or safety concerns. If release is warranted under § 3142(g), the conditions should be narrowly tailored. Consequently, defense lawyers should not suggest or agree to excessive conditions just because a case is detention-eligible.

e. Action Step #5: In presumption cases, emphasize that the prosecution bears the burden of proof and the presumption is easily rebutted.

The presumption of detention applies to a narrow subset of offenses; all other offenses enjoy a statutory presumption of release. It is important to know when the presumption applies and when it does not. It is just as important to fight back if the prosecutor or judge erroneously claims it applies to a crime-of-violence, § 922(g) gun, illegal reentry, or fraud case.[107]

Defense counsel should also emphasize the limits of the presumption orally and in written motions.[108] While a presumption ordinarily shifts the burden of proof to one party, the § 3142(e) presumption does not. Instead, the burden of *proof* continues to rest with the prosecution; the presumption merely imposes on the defense a burden of *production*. That burden "is not a heavy one to meet,"[109] simply requiring "some evidence" that the client will not flee or pose a danger to the community.[110]

To ensure that judges and prosecutors adhere to this legal framework, it is critical to emphasize how easy it is to rebut the presumption. The presumption can be rebutted by "[a]ny evidence favorable to a defendant that comes within a category listed in § 3142(g) …, including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3)."[111] "Once this burden of production is met, the presumption is 'rebutted.'"[112] While the rebutted presumption does not disappear, a judge must weigh it against all of the mitigating evidence that the defense presents,[113] and assign it no more weight than any other § 3142 factor.[114] Even in a presumption case, the burden of persuasion remains with the prosecution at all times and never shifts to the defense. Therefore, the prosecutor always bears the burden of convincing the judge that detention is warranted despite all the mitigating evidence that the defense presents.

f. Action Step #6: File written motions and appeal.

For both presumption and non-presumption cases, defense counsel should file written motions before the Detention Hearing linking the facts to the § 3142(g) factors.[115] In presumption cases, these motions must emphasize that the presumption is rebuttable and apply the defense-friendly appellate law. Whenever possible, these motions should be filed between the Initial Appearance and the Detention Hearing; otherwise, they should be filed as motions for reconsideration. And the defense should consider appealing when judges misinterpret or misapply the presumption.

C. Seeking Bond for Non-Citizen Clients

Federal criminal defense lawyers also need to redouble their advocacy on behalf of non-citizen clients. They must file bond motions and make the same efforts to secure the release of non-citizen clients as they do for other clients.[116] This bears emphasizing since some defense attorneys do not seek bond for non-citizen clients, either out of a sense of futility or out of a fear that their client will be detained by U.S. Immigration and Customs Enforcement ("ICE") and will not get credit for time served in ICE custody.[117] But defense attorneys can win release for non-citizen clients in federal court, and anecdotal evidence suggests that ICE will not necessarily take them into immigration custody afterwards.

Defense lawyers must first disabuse judges of the misconception that non-citizens pose a high risk of flight. The government's own data reveals that so-called "illegal aliens" released on federal bond have the same low rate of non-appearance as U.S. citizens, appearing 99 person of the time.[118] When compared with U.S. citizens, undocumented clients are actually *more* likely to comply with other conditions of release and significantly *less* likely to have their bond revoked.[119]

In representing non-citizen clients at the Initial Appearance, defense counsel must again bring the practice in line with the law. For clients charged with immigration offenses, the only possible basis for detention is serious risk of flight, not dangerousness. And the existence of an ICE detainer does not itself render the client a serious risk of flight because any flight must be voluntary.[120] Accordingly, it is improper for a judge to deny bond based solely on a client's immigration status or a detainer.[121] In addition, the Executive Branch has the discretion to "defer removal and deportation in favor of first proceeding with federal criminal prosecution."[122]

In representing non-citizen clients at Detention Hearings, defense lawyers must remind judges that the presumption of release extends to immigration offenses.[123] If the prosecutor alleges that the client poses a serious risk of flight, it is crucial to present all the facts that weigh against flight risk, such as the client's strong family and community ties, employment history, and the staleness of any past convictions.

IV. Conclusion

In view of the federal bail crisis and its race effects, all lawyers who represent clients in federal court have a responsibility to fight harder to win their clients' release. Otherwise, defense lawyers are complicit in a system that devalues the lives and liberty of people of color. Counsel can change the culture of detention by using the above action steps, tethering arguments to the statute and the data, and filing more bond motions.

Since the Federal Criminal Justice Clinic at the University of Chicago Law School created the Federal Bail Reform Project in 2018, federal criminal defense attorneys across the country have increased their bond advocacy. At the same time, federal prosecutors' detention request rates climbed from 2018 to 2019, as reflected in Figure 4. The judiciary's response has been heartening: rather than climbing in tandem with the government's requests, judicial detention rates leveled off in 2019. This is not an accident, but is rather a direct response to the defense bar's advocacy. If defense lawyers redouble their efforts to preserve their clients' fundamental right to liberty, perhaps detention will someday become the exception, not the rule.

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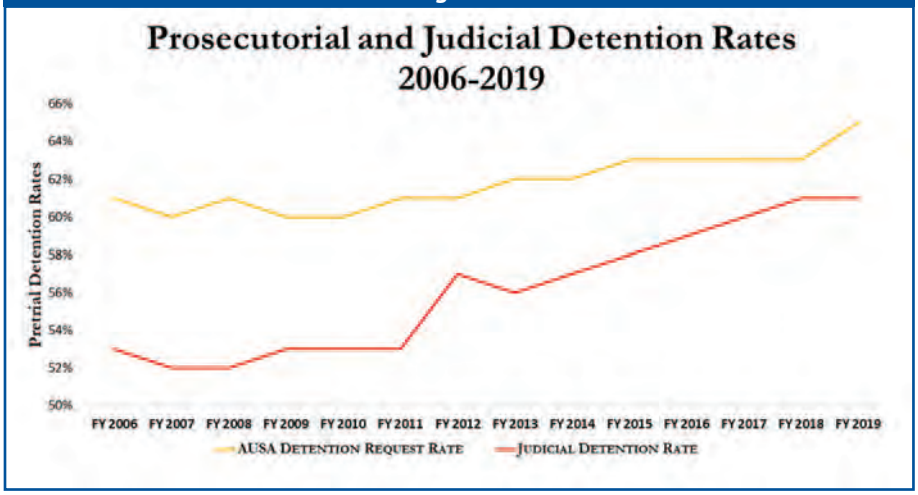
Figure 4



data analysis; Keri Coble, Katerina Kokkas, Erica Maricich, and Claire Rogerson for their leadership of the court-watching project; Alex Aparicio and David Silberthau for their legislative reform contributions; and the many other Federal Criminal Justice Clinic students involved in the Federal Bail Reform Project.

Notes

1. *Pretrial Release and Detention: The Bail Reform Act of 1984*, Bureau of Just. Stat. Special Rep., at 2 (Feb. 1988), https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf (Table 1) (18.8 percent of defendants detained pretrial in 1985); Admin. Office of the U.S. Courts, *Judicial Business: Federal Pretrial Services Tables* ("AO Table"), Table H-14 (Sept. 30, 2019) https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2019.pdf (74.8 percent of defendants detained pretrial in 2019); *see also* AO Table H-14A (Sept. 30, 2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_h14a_0930.2019.pdf (61 percent detention rate *excluding immigration cases*).

2. "From New Jersey to California, and Rand Paul to Bernie Sanders, there is widespread agreement that the cash bail system is broken." David Feige & Robin Steinberg, *Opinion: Replacing One Bad Bail System with Another*, N.Y. Times, Sept. 12, 2018, at 25, https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html. Financial conditions are also a problem in the federal system, especially in certain districts. However, judges rarely impose cash bail given the BRA's admonition that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

3. According to the Department of Justice, just 2 percent of federal arrests are classified as violent. Mark Motivans, *Federal Justice Statistics 2015–2016*, Bureau of Just. Stat., at 3 (Jan. 2019), https://www.bjs.gov/content/pub/pdf/fjs1516.pdf (Table 2) (just 2.3 percent of the 151,460 federal arrests in FY 2016 involved a violent offense as the most serious offense). In contrast, fully 25 percent of all state felony arrests are classified as violent offenses. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009*, Bureau of Just. Stat., at 2 (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (25 percent of the 56,000 felony cases filed in the largest urban counties during the study involved a violent offense).

4. 18 U.S.C. § 3142(e)(3).

5. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81(2) Fed. Probation 52, 61 (2017), https://www.uscourts.gov/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates.

6. *The Administration of Bail by State and Federal Courts: A Call for Reform*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. 4–10 (Nov. 14, 2019) (testimony of Alison Siegler), https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-TTF-SieglerA-20191114.pdf; *see also id.* (written statement of Alison Siegler), https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf.

7. *See* Alison Siegler & Erica Zunkel, *Commentary: Don't Let Chicago's Federal Jail Become the Next Coronavirus Hot Spot*, Chi. Trib., Apr. 24, 2020, at 19, https://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-jail-cook-county-mcc-20200424-zagv2nvjyzcrvknxbfasusx63a-story.html; Premal Dharia, *The Coronavirus Could Spark a Humanitarian Disaster in Jails and Prisons,* Slate (Mar. 11, 2020, 3:50 pm), https://slate.com/news-and-politics/2020/03/coronavirus-civil-rights-jails-and-prisons.html; Radley Balko, *Stopping Covid-19 Behind Bars Was an Achievable Moral Imperative. We Failed.*, Wash. Post (May 1, 2020), https://www.washingtonpost.com/opinions/2020/05/01/stopping-covid-19-behind-bars-was-an-achievable-moral-imperative-we-failed/.

8. The Federal Criminal Justice Clinic at the University of Chicago Law School has prepared in-court checklists for defense counsel to use during Initial Appearance Hearings and Detention Hearings, as well as Template Motions to file before and after those hearings. *See* Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

9. *See United States v. Salerno*, 481 U.S. 739, 747, 750 (1987).

10. *Id.* at 755.

11. *The Administration of Bail by State and Federal Courts: A Call for Reform*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. at 50:55 (Nov. 14, 2019) (statement of Rep. Nadler, Chair, H. Comm. on the Judiciary), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2256.

12. *See* Reaves, *supra* note 3, at 17 (Table 12).

13. *See id.* (showing an 88 percent detention rate for murder).

14. AO Table H-3 (Sept. 30, 2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf; AO Table H-3 (Sept. 30, 1997), https://www.uscourts.gov/sites/default/files/statistics_import_dir/h03sep97.pdf.

15. *See* Motivans, *supra* note 3, at 3 (Table 2).

16. AO Table H-15 (Dec. 31, 2019), *available at* Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2 percent and a rearrest rate of 1.9 percent).

17. The data showing near-perfect compliance on bond is illustrated in Figure 1, "Federal Clients on Bond Rarely Flee or Recidivate." The districts with the highest and lowest release rates were identified using the version of AO Table H-14A for the 12-month period ending December 31, 2019. *See* AO Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42 (release rates excluding immigration cases). The failure-to-appear and rearrest rates for these districts were calculated using AO Table H-15, *supra* note 16. With regard to flight, the 10 federal districts with the lowest release rates (average 26.00 percent) have an average failure-to-appear rate of 1.37 percent, while

the 10 districts with the highest release rates (average 65.58 percent) have an *even lower* failure-to-appear rate of 0.87 percent. *See* AO Table H-15, *supra* note 16; AO Table H-14A, *supra*. With regard to recidivism, the 10 districts with the lowest release rates have an average rearrest rate of 1.19 percent, while the 10 districts with the highest release rates have an average rearrest rate of 2.29 percent. *See* AO Table H-15, *supra* note 16; AO Table H-14A, *supra*. The districts with the lowest release rates are, from lowest to highest, S.D. California, W.D. Arkansas, E.D. Tennessee, S.D. Texas, E.D. Missouri, N.D. Indiana, E.D. Oklahoma, W.D. Texas, W.D. North Carolina, and C.D. Illinois; the districts with the highest release rates are, from lowest to highest, E.D. Michigan, E.D. Arkansas, D. New Jersey, E.D. New York, D. Maine, D. Connecticut, W.D. New York, W.D. Washington, D. Guam, and D. Northern Mariana Islands. *See* AO Table H-14A, *supra*.

18. Austin, *supra* note 5, at 53 ("As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention.") (citing AO Table H-9A); *see also* AO Table H-9A (Sept. 30, 2019), https://perma.cc/646M-WY2Y (showing that as of 2019, the average pretrial detention period nationwide was 253 days).

19. Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and 'Frantic'*, N.Y. Times, Feb. 2, 2019, at 19, https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html.

20. Austin, *supra* note 5, at 53.

21. *See, e.g.*, Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) Amer. Econ. Rev. 201 (2018) (finding that, when compared with people on pretrial release, people detained pretrial are less likely to get a job once their case concludes, and have lower incomes if employed); Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82 Fed. Probation 39, 41–42 (2018), archived at https://perma.cc/LQ2M-PL83 (finding that, for individuals detained for 3 days or more, 76.1 percent report job loss or other job-related negative consequences, and 44.2 percent report that they are less financially stable); *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) ("Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle.").

22. Holsinger & Holsinger, *supra* note 21, at 42 (finding 37.2 percent of people detained pretrial for 3 days or more reported that their residential situation became less stable); Amanda Geller & Mariah A. Curtis, *A Sort of Homecoming: Incarceration and Housing Security of Urban Men*, 40 Soc. Sci. Research 1196, 1203 (2011) (finding that, among those already at risk for housing insecurity, pretrial incarceration leads to 69 percent higher odds of housing insecurity).

23. *See generally* Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Just. Stat. (2014), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf (concluding that people in local jails are less likely to get diagnostic or medical services and are more likely to report worsened health as compared to those in state or federal prison); Faye S. Taxman et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 J. Substance Abuse Treatment 239 (2007) (finding that, in state facilities, physical and mental health treatment is of poorer quality in jails than in prison).

24. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017).

25. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. Econ. & Org. 511, 512 (2018) (finding that pretrial detention leads to a 13 percent increase in the likelihood of conviction using data from state-level cases in Philadelphia); Dobbie et al., *supra* note 21, at 225 (finding that a person who is initially released pretrial is 18.8 percent less likely to plead guilty in Philadelphia and Miami-Dade counties); Mary T. Phillips, *A Decade of Bail Research in New York City*, N.Y.C. Crim. Just. Agency, at 116 (Aug. 2012), archived at https://perma.cc/A3UM-AHGW ("Among nonfelony cases with no pretrial detention [in New York City], half ended in conviction, compared to 92 percent among cases with a defendant who was detained throughout," and in the felony context "[o]verall conviction rates rose from 59 percent for cases with a defendant who spent less than a day in detention to 85 percent when the detention period stretched to more than a week.").

26. A recent empirical study of the federal system found that "federal pretrial detention appears to significantly increase sentences, decrease the probability that a defendant will receive a below-Guidelines sentence, and decrease the probability that they will avoid a mandatory minimum sentence if facing one." Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 Am. L. & Econ. Rev. 24 (forthcoming 2020), https://ssrn.com/abstract=2809818.

27. *See Annual Determination of Average*

Cost of Incarceration, 83 Fed. Reg. 18,863 (Apr. 30, 2018), https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration (reporting cost for FY 2017).

28. Farran Powell & Emma Kerr, *What You Need to Know About College Tuition Costs*, U.S. News & World Rep. (Sept. 18, 2019), https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs.

29. U.S. Courts, *Incarceration Costs Significantly More Than Supervision*, Judiciary News (Aug. 17, 2017), https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision.

30. Figure 2, "Federal Pretrial Detention Rates by Race Over Time," combines 4 studies to show general trends in federal pretrial detention rates by race over time. Of course, each study involved different data sets, methodologies, and controls; those differences are not reflected in the graphic. *See* Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Fed. Probation 13, 15 (Figure 5) (Sept. 2018), https://www.uscourts.gov/federal-probation-journal/2018/09/rising-federal-pretrial-detention-rate-context (2008, 2018 data); Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008–2010*, Bureau of Just. Stat., at 10 (Table 9) (2012), https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf (2008–2010 data); John Scalia, *Federal Pretrial Release and Detention, 1996*, Bureau of Just. Stat., at 9 (Table 6) (1999), https://www.bjs.gov/content/pub/pdf/fprd96.pdf (1996 data); Brian A. Reaves, *Pretrial Release of Federal Felony Defendants, 1990*, Bureau of Just. Stat., at 6 (Table 5) (1994), https://www.bjs.gov/content/pub/pdf/prffd.pdf (Table 5) (1990 data).

31. Data on file with the Federal Criminal Justice Clinic ("FCJC") at the University of Chicago Law School. Phase 1 of FCJC's courtwatching project spanned 10 weeks, from November 1, 2018, to February 12, 2019, with a break for the holidays. During Phase 1, the courtwatching project team observed 173 hearings total: 107 Initial Appearance Hearings and 66 Detention Hearings. The first 7 weeks of Phase 1 courtwatching spanned November 1, 2018, to December 7, 2018, and January 7, 2019, to January 16, 2019. After those 7 weeks, on January 16, 2019, FCJC conducted a bail advocacy training for approximately 100 Federal Defenders and CJA attorneys in Chicago. The courtwatching project team then resumed Phase 1 courtwatching for another 3 weeks (January 17, 2019, to February 12, 2019). This article focuses on the first 7 weeks of courtwatching because this period provides the clearest look at how the system was functioning before any intervention.

32. Phase 2 of the courtwatching project spanned 4 weeks, from July 8, 2019, to August 2, 2019. During Phase 2, the courtwatching project team observed 60 hearings total: 38 Initial Appearance Hearings and 22 Detention Hearings.

33. *Salerno*, 481 U.S. at 747.

34. 543 U.S. 220 (2005).

35. *See* Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

36. *See, e.g.*, AO Table H-15, *supra* note 16; Figure 1, "Federal Clients on Bond Rarely Flee or Recidivate," and explanation of chart, *supra* note 17.

37. 18 U.S.C. §§ 3142(f), (d).

38. Holsinger & Holsinger, *supra* note 21, at 42 (finding in a study of inmates in county jail, of those detained for *less than 3 days*, 37.9 percent report job loss, change, or other job-related negative consequences, and 32 percent report being less financially stable).

39. During the first 7 weeks of Phase 1, the prosecutor sought detention in 55 of the 69 Initial Appearance Hearings FCJC observed (80 percent); 54 of those 55 people were detained until a Detention Hearing.

40. In 52 of the 55 cases in which the prosecutor sought detention at the Initial Appearance (95 percent), the prosecutor based the detention request on reasons not authorized by § 3142(f): in 31 of the 55 cases prosecutors cited danger to the community (56 percent); in 33 of the 55 cases they cited ordinary risk of flight (60 percent). In a number of cases, they cited both.

41. In 3 of the 55 cases in which prosecutors sought detention at the Initial Appearance, they based their detention request on a valid § 3142(f) factor (5 percent). In 1 of these 3 cases they cited to § 3142(f)(1). In the remaining 2 cases, they used the phrase "serious risk of flight," although they did not cite § 3142(f)(2)(A); and in 1 of these 2 cases they provided evidence to support the allegation of serious risk of flight.

42. During the first seven weeks of Phase 1, in 49 out of the 54 cases in which clients were detained at the Initial Appearance (91 percent), a legitimate basis for detention existed under § 3142(f).

43. During the first seven weeks of Phase 1, in 5 of the 54 cases in which clients were detained at the Initial Appearance (9 percent), judges detained clients without a basis under § 3142(f)(1) and without making a finding that the client presented a "serious risk of flight" under § 3142(f)(2)(A). Likewise, in those five cases, the government did not allege that the client posed a "serious risk of flight" under § 3142(f)(2)(A) or present any evidence to support such a finding.

44. For example, despite clear First Circuit authority to the contrary, a federal magistrate judge in the District of Puerto Rico detained an individual based on ordinary "risk of flight," even though no § 3142(f)(1) factor was met and there was no determination that the person posed a "serious risk of flight" as required by the statute. *United States v. Martinez-Machuca*, No. 18-cr-568, at 4–6 (D.P.R. Apr. 30, 2019), ECF No. 49 (acknowledging that First Circuit law only authorizes detention when "one of the § 3142(f) conditions for holding a detention hearing exists") (quoting *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)).

45. The courtwatching project team observed a total of 38 Initial Appearances Hearings during Phase 2. In 13 of the 38 cases, the client was released without objection from the government (34 percent). In 25 of the 38 cases, the government moved for detention (66 percent); in all those cases, the client was detained. In 8 of the 25 cases in which the government moved for detention at the Initial Appearance, the defense waived the issue of detention (32 percent). That left 17 cases in which the government moved for detention and the defense did not waive. In 14 of those 17 cases (82 percent), the government cited a proper statutory basis for detention at the Initial Appearance under § 3142(f).

46. During Phase 2, in all the 17 Initial Appearance Hearings where the government moved for detention and the defense did not waive, the judge detained the client until a Detention Hearing. Notably, in 14 of those 17 detained cases, the nature of the offense triggered detention under § 3142(f)(1). In the remaining 3 detained cases, the prosecutor moved for detention under § 3142(f)(2) and the judge concluded that there was sufficient evidence in the record to establish a serious risk of flight under § 3142(f)(2)(A) or, in one case, a serious risk to a witness under § 3142(f)(2)(B).

47. All the race data in this article comes from Phase 1 of courtwatching (10 weeks). In analyzing the race effects of detention in the courtwatching data, we have *not* controlled for any variables. We observed 107 Initial Appearances; prosecutors sought detention for 7 of the 12 White clients (58 percent), 41 of the 50 Black clients (82 percent), and 35 of the 38 Latinx clients (92 percent).

48. 18 U.S.C. § 3142(f) ("The judicial officer shall hold a [detention] hearing … (1) upon motion of the attorney for the government, in a case that involves …" any of the offenses listed in § 3142(f)(1)).

49. 18 U.S.C. § 3142(f)(1)(C).

50. 18 U.S.C. § 3142(f)(1)(E).

51. 18 U.S.C. § 3142(f)(1)(A).

52. 18 U.S.C. § 3142(f)(1)(B).

53. 18 U.S.C. § 3142(f)(1)(D).

54. 18 U.S.C. § 3142(f)(2)(A) (on motion of the government or on the judge's own motion).

55. 18 U.S.C. § 3142(f)(2)(B) (on motion of the government or on the judge's own motion).

56. *Salerno*, 481 U.S. at 750 (stating that the BRA targets individuals whom Congress considered "far more likely to be responsible for dangerous acts in the community after arrest") (citing § 3142(f)).

57. *Id.* at 747 (emphasis added). The Court continued by saying, "*detention hearings [are] available if* case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders" — that is, detention hearings are available only if one of the § 3142(f) factors is present. *Id*. (emphasis added); *see also id*. at 750 (the BRA "operates only on individuals who have been arrested for a specific category of extremely serious offenses" listed in § 3142(f)); *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999) ("[d]etention until trial is relatively difficult to impose" given the limitations in § 3142(f)); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992) (stressing the limitations § 3142(f) places on detention and stating, "[t]here can be no doubt that this Act clearly favors nondetention").

58. *See, e.g.*, *Ploof*, 851 F.2d at 9 ("Section 3142(f) … specifies certain conditions under which a detention hearing shall be held."); *id.* at 10 (reiterating that "§ 3142(f) does not authorize a detention hearing whenever the government thinks detention would be desirable, but rather limits such hearings to" the circumstances listed in §§ 3142(f)(1) and (f)(2))); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) ("'[T]he requisite circumstances for invoking a detention hearing [enumerated in § 3142(f)] in effect serve to limit the types of cases in which detention may be ordered prior to trial.'" (quoting S. Rep. No. 225, at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189)).

59. *See, e.g.*, *Ploof*, 851 F.2d at 9–11; *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988) ("The [BRA] limits the circumstances under which a district court may order pretrial detention. … A motion seeking such detention is permitted only when the charge is for certain enumerated crimes, 18 U.S.C. § 3142(f)(1) …, or when there is a serious risk that the defendant will flee or obstruct … justice… [,] § 3142(f)(2)."") (reversing detention order because the government had not established a § 3142(f) factor); *Himler*, 797 F.2d at 160 (reversing detention order and directing release in a fraud case because "Mr. Himler's case does not involve any of the offenses specified in subsection (f)(1), nor has there been any claim that he would attempt to obstruct justice. …"); *Byrd*, 969 F.2d at 109–10 ("A [detention] hearing can be held only if one of the six circumstances listed in (f)(1) and (2) is present. …") (reversing detention order); *United States v. Twine,* 344 F.3d 987, 987 (9th Cir. 2003) (reversing detention order); *Singleton*, 182 F.3d at 9 (affirming release order).

60. *Ploof*, 851 F.2d at 11.

61. *Singleton*, 182 F.3d at 9.

62. *Friedman*, 837 F.2d at 49.

63. *Salerno*'s holding that the BRA does not violate substantive due process depends in part on the fact that the statute only authorizes detention at the Initial Appearance under certain narrow and limited circumstances. 481 U.S. at 747. It was the § 3142(f) limitations, among others, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Id*. at 748. "Any reading of the [BRA] that allows danger to the community as the sole ground for detaining a defendant where detention was moved for only under (f)(2)(A) runs the risk of undercutting one of the rationales that led the *Salerno* Court to uphold the statute as constitutional." *United States v. Gibson*, 384 F. Supp. 3d 955, 963 (N.D. Ind. 2019).

64. Barring the rare circumstance where the prosecutor has evidence that the client poses a serious risk of obstructing justice or threatening a witness/juror under § 3142(f)(2)(B).

65. This argument should be made during the Initial Appearance Hearing. *See Initial Appearance In-Court Checklist and Flowchart* in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

66. *Ploof*, 851 F.2d at 11 (where none "of the subsection (f)(1) conditions were met, pretrial detention solely on the ground of dangerousness … is not authorized"); *Friedman*, 837 F.2d at 49 ("[T]he [BRA] 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 [in § 3142(f)(1)]."); *Himler*, 797 F.2d at 160 ("[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."); *Byrd*, 969 F.2d at 110 ("[A] defendant who clearly may pose a danger to society cannot be detained on that basis alone."); *Twine*, 344 F.3d at 987 ("We are not persuaded that the [BRA] authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2).") (collecting cases); *see also United States v. Morgan*, 2014 U.S. Dist. LEXIS 93306, at *14–15 (C.D. Ill. July 9, 2014) (concluding that financial dangerousness was not a legitimate ground for detention at the Initial Appearance and denying the prosecution's detention request in an access device fraud case); *United States v. Gloster*, 969 F. Supp. 92, 94 (D.D.C. 1997) (if none of the factors in § 3142(f) is met, "then no matter how dangerous or antisocial a defendant may be, Congress has concluded that such a defendant must be released, either on personal recognizance or on the least restrictive condition[s]" of release that will reasonably assure appearance and safety).

67. *Byrd*, 969 F.2d at 109–10 (citing *Ploof*, 851 F.2d at 11; *Himler*, 797 F.2d at 160).

68. § 3142(f)(2)(A) (emphasis added). This argument should be made during the Initial Appearance Hearing. *See Initial Appearance In-Court Checklist and Flowchart* in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

69. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne 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 *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

70. *See Bail Reform Act of 1983: Rep. of the Senate Comm. on the Judiciary on S. 215*, 98th Cong.. S. Rep. No. 98-147, at 48 (1983) ("Under subsection (f)(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases. … [Those types] involving [ ] a serious risk that the defendant will flee … *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases*.") (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978) — which held that only a "*rare case of extreme and unusual circumstances* [ ] justifies pretrial detention" — as representing the "current case law") (emphasis added).

71. *Himler*, 797 F.2d at 160 (emphasis added).

72. *Friedman*, 837 F.2d at 49–50. At the time *Friedman* was decided, minor victim cases were not covered by § 3142(f)(1); the statute has since been amended to include such cases in § 3142(f)(1)(E). However, *Friedman* is still instructive on the proper approach to cases not listed in § 3142(f)(1), where the government's only possible basis for detention is § 3142(f)(2).

73. During Phase 1, the defense objected to detention in 8 of the 89 Initial Appearances where the government was seeking detention (9 percent).

74. During Phase 2, the defense raised an objection to detention in 5 of the 17 Initial Appearances where the government sought detention and the defense did not waive (29 percent).

75. *See Template Motion for Immediate Release* and *Template Appeal of Magistrate Judge's Detention Order* in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

76. 18 U.S.C. § 3142(f).

77. *Id.*

78. While the BRA does not speak to this issue, defense attorneys should argue that it is not legitimate for prosecutors to request a continuance to either investigate the client's criminal record or wait for the Pretrial Services Report.

79. *See Detention Hearing In-Court Checklist and Flowchart* and *Template Motion for Release in a Presumption Case* in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

80. *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial … is the carefully limited exception.").

81. 18 U.S.C. § 3142(e)(3). Note that there is a separate presumption of detention if the person is charged with a detention eligible crime under § 3142(f), has been convicted of a similar offense, was on release when the prior offense was committed, and not more than five years have elapsed since conviction or release for that prior offense. *See* § 3142(e)(2). This § 3142(e)(2) presumption is extraordinarily rare.

82. Austin, *supra* note 5, at 56–57; *see also* Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 Ohio State J. Crim. L. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589862, PDF at 7–9 (analyzing the legislative history of the presumptions in detail).

83. Austin, *supra* note 5, at 55 (finding that from 2005 to 2015, the presumption "applied to between 42 and 45 percent of [all federal] cases.").

84. All the courtwatching data in the Detention Hearing section of this article comes from Phase 1 of the courtwatching project (the first 10 weeks). The § 3142(e) presumption applied in 17 of the 42 cases where detention was contested (40 percent).

85. Of the 17 cases with contested Detention Hearings where the presumption of detention applied, 15 were drug cases (88 percent) and 16 involved people of color (94 percent). Of the 8 clients detained in presumption cases, all 8 were people of color (100 percent).

86. Of the 17 cases with contested Detention Hearings where the presumption of detention applied, the judge found the presumption rebutted in 11 (64 percent) and detained the client in 8 (47 percent).

87. Of the 66 total Detention Hearings observed in Phase 1, the prosecutor sought detention for 3 of the 7 White clients (43 percent), 30 of the 34 Black clients (88 percent), 13 of the 19 Latinx clients (68 percent), and 5 of the 5 Middle Eastern clients (100 percent).

88. Of the 42 contested Detention Hearings observed in Phase 1, one of the 2 White clients was detained (50 percent), 16 of the 24 Black clients were detained (67 percent), 4 of the 8 Latinx clients were detained (50 percent), and 3 of the 5 Middle Eastern clients were detained (60 percent).

89. Austin, *supra* note 5, at 61.

90. *Id.* at 57.

91. *Id.*

92. *Id.*

93. *Id.* at 55.

94. *Id.* at 58.

95. *Id.* at 60.

96. *See Template Motion for Release in a Presumption Case* in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

97. The Judicial Conference is a powerful body presided over by Chief Justice Roberts that includes the chief judge of every federal circuit. *See* Report of the Proceedings of the Judicial Conference of the United States (Sept. 12, 2017), https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf. The Conference's proposed revision reads 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 10 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." *Id.* at 10–11. The Judicial Conference reiterated this same recommendation during the COVID-19 pandemic. *See* Letter from the Judicial Conference of the United States to the House and Senate Appropriations Committees (April 28, 2020), https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf.

98. During the first 7 weeks of Phase 1, the defense waived the Detention Hearing in 29 of the 83 cases where the prosecutor had sought detention at the Initial Appearance and was still seeking detention at the Detention Hearing (35 percent).

99. As noted above, FCJC held a CLE training after the first 7 weeks of Phase 1 of courtwatching. *See supra* note 31. During the final 3 weeks of Phase 1, the defense waived the Detention Hearing in 13 of the 58 cases where the prosecutor had sought detention at the Initial Appearance and was still seeking detention at the Detention Hearing (22 percent).

100. During Phase 1, the courtwatching project team observed 42 contested Detention Hearings; 17 clients were released (40 percent).

101. *See Template Motion for Release in a Presumption Case* in Federal Criminal

Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs. Defense counsel can cite this article for that data, as well as AO Table H-15, *supra* note 16, and Figure 1.

102. There is a constitutional argument that the standard for flight risk should be clear and convincing evidence. Currently, courts interpret the burden to establish risk of flight as the lower preponderance of the evidence standard. *See United States v. Motamedi*, 767 F.2d 1408, 1404 (9th Cir.1985) (stating that the prosecutor must "establish by a preponderance of the evidence that [the defendant] poses a flight risk"); *United States v. Cisneros*, 328 F.3d 610, 612 (10th Cir. 2003) (same); *Himler*, 797 F.2d at 161; *United States v. Portes,* 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Vortis,* 785 F.2d 327, 329 (D.C. Cir. 1986); *United States v. Medina,* 775 F.2d 1398, 1402 (11th Cir. 1985); *United States v. Fortna,* 769 F.2d 243, 250 (5th Cir. 1985); *United States v. Chimurenga,* 760 F.2d 400, 405–06 (2d Cir. 1985); *United States v. Orta,* 760 F.2d 887, 891 n.20 (8th Cir. 1985). While the text of the BRA is silent on the standard of proof for a finding of flight risk, the Constitution requires a higher standard of proof than preponderance of the evidence for deprivations of liberty. It is unconstitutional to use the preponderance of the evidence standard — employed in ordinary civil cases involving "mere loss of money" — where a person stands to lose his physical liberty in the face of pretrial detention. *Addington v. Texas*, 441 U.S. 418, 424 (1979). Where deprivation of physical liberty is at stake, the Supreme Court consistently applies the clear and convincing evidence standard. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992) (holding that clear and convincing evidence is the appropriate standard of proof for a state to confine a mentally ill defendant); *Cruzan ex rel. Cruzan,* 497 U.S. 261, 282–83 (1990) (upholding Missouri's statute requiring clear and convincing evidence for withdrawal of life support); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (holding that the Fourteenth Amendment at minimum requires the clear and convincing evidence standard before a state can terminate parental rights); *Addington*, 441 U.S. at 427 (concluding that preponderance of the evidence is insufficient for civil commitment of mentally ill individuals, and that due process requires the heightened standard of clear and convincing evidence). In each of these cases, the Supreme Court reasoned that clear and convincing evidence strikes the "appropriate balance between scrupulous protection of individual liberty interests and the government interest in public safety." *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018). The same logic applies in the context of pretrial detention. People have a fundamental liberty interest in not being confined pending trial, and the Fifth Amendment requires that any deprivation of liberty be attended by robust procedural protections. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

103. 18 U.S.C. § 3142(f); *Salerno*, 481 U.S. at 750 (confirming that "[i]n a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person").

104. 18 U.S.C. § 3142(e)(1), (c)(1)(B). The BRA's "reasonably assure" language recognizes that the possibility of flight exists for "every defendant released on conditions; [but] it is also not the standard authorized by law for determining whether pretrial detention is appropriate." *United States v. Xulam*, 84 F.3d 441, 444 (D.C. Cir. 1996).

105. 18 U.S.C. § 3142(g)(1)–(4). Courts have held that the weight of the evidence is the least important factor for the judge to consider. *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.") (quoting *Motamedi*, 767 F.2d at 1408)); *United States v. Gray*, 651 F. Supp. 432, 436 (W.D. Ark. 1987) ("[T]he court does not believe that … any court should presume that every person charged is likely to flee simply because the evidence against him appears to be weighty. … Such a presumption would appear to be tantamount to a presumption of guilt, a presumption that our system simply does not allow.").

106. 18 U.S.C. § 3142(g)(3)(A).

107. *See* 18 U.S.C. § 3142(e)(3) (listing types of cases that qualify for a presumption of detention).

108. *See Detention Hearing In-Court Checklist and Flowchart* and *Template Motion for Release in a Presumption Case* in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

109. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986).

110. *See, e.g.*, *United States v. Jessup*, 757 F.2d 378, 380–84 (1st Cir. 1985), *abrogated on other grounds by United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990) (holding that the prosecutor bears the burden of *persuasion* at all times while a defendant just bears a burden of *production*, which entails producing "some evidence" under § 3142(g)); *Dominguez*, 783 F.2d at 707 (analyzing the different burdens the presumption places on each party, explaining that the defendant rebuts the presumption by producing "some evidence" under § 3142(g), and concluding that after it is rebutted, "[the presumption] remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)"); *United States v. Gamble*, No. 20-3009, 2020 U.S. App. LEXIS 11558 at *1–2 (D.C. Cir. Apr. 10, 2020) (holding that "[t]he district court erred in concluding that appellant failed to meet his burden of production to rebut the statutory presumption" regarding dangerousness because "appellant did 'offer some credible evidence contrary to the statutory presumption,'" including information that he had a job offer) (unpublished) (quoting *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985)); *Chimurenga*, 760 F.2d at 405; *United States v. Stone*, 608 F.2d 939, 945 (6th Cir. 2010); *United States v. Hurtado*, 779 F.2d 1467, 1479-80 (11th Cir. 1985).

111. *Dominguez*, 783 F.2d at 707. As long as a defendant "come[s] forward with some evidence that [the defendant] will not flee or endanger the community if released," the presumptions of flight risk and dangerousness are definitively rebutted. *Id.*

112. *Id.* (quoting *Jessup*, 757 F.2d at 384).

113. *Jessup*, 757 F.2d at 384 (finding

(Continued on page 63)

(Continued from page 59)

that after the defendant produces "some evidence" to rebut the presumption, the "judge should then still keep in mind the fact that Congress has found that offenders, as a general rule, pose *special* risks of flight. The … judge should incorporate that fact and finding among the other special factors that Congress has told him to weigh when making his bail decision. *See* § 3142(g) … Congress did not precisely describe how a magistrate will weigh the presumption, along with (or against) other § 3142(g) factors."); *see also Dominguez*, 783 F.2d at 707.

114. *See Jessup*, 757 F.2d at 384 ("[T]he presumption is but one factor among many.").

115. *See Template Motion for Release in a Presumption Case*, in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

116. *See Sample Motion for Release in a Non-Citizen Case*, in Federal Criminal Justice Clinic's In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

117. However, Ninth Circuit law grants non-citizen clients credit toward their federal sentence for time served in ICE custody. *Zavala v. Ives*, 785 F.3d 367, 380 (9th Cir. 2015) ("We hold that when immigration officials detain an alien pending potential prosecution, the alien is entitled under § 3585(b) to credit toward his criminal sentence.We also hold that an alien is entitled to credit for all time spent in ICE detention subsequent to his indictment or the filing of formal criminal charges against him.").

118. Cohen, *supra* note 30, at 15.

119. *Id.*

120. *United States v. Ailon-Ailon*, 875 F.3d 1334, 1337 (10th Cir. 2017) ("[A] risk of involuntary removal does not establish a 'serious risk that [the defendant] will flee'.…") (quoting § 3142(f)(2)(A)); *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015) ("[T]he risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition."); *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1135–36 (N.D. Iowa 2018); *United States v. Suastegui*, No. 3:18-MJ-00018, 2018 WL 3715765, at *4 (W.D. Va. Aug. 3, 2018); *United States v. Marinez-Patino*, 2011 U.S. Dist. LEXIS 26234, at *12 (N.D. Ill. Mar. 14, 2011).

121. *United States v. Sanchez-Rivas*, 752 F. App'x 601, 604 (10th Cir. 2018) (finding that a defendant "cannot be detained solely because he is a removable alien"); *Santos-Flores*, 794 F.3d at 1091; *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (finding that mere presence of an ICE detainer does not override § 3142(g)); *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 968 (E.D. Wis. 2008) ("[I]t would be improper to consider *only* defendant's immigration status, to the exclusion of the § 3142(g) factors, as the government suggests.").

122. *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1170 (D. Or. 2012).

123. *Ailon-Ailon*, 875 F.3d at 1338 ("[A]lthough Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list."). ■

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COMMENTARY OPINION

Commentary: Don’t let Chicago’s federal jail become the next coronavirus hot spot

By ALISON SIEGLER AND ERICA ZUNKEL
CHICAGO TRIBUNE | APR 24, 2020

The first COVID-19 death, April 19, of a **Cook County Jail correctional officer** should be a call to action for federal judges in Chicago. As the novel coronavirus continues its dangerous and **lethal spread through Cook County Jail**, judges must release more people from the *federal* jail, known as the Metropolitan Correctional Center, or MCC. Otherwise, the MCC also will become downright disastrous.

The number of COVID-19 cases at the Chicago MCC has skyrocketed since April 13 when it was zero to more than 40 as of Friday, with at least **20 staff and 21 inmates** having now tested positive, according to the Federal Bureau of Prisons. Those numbers rise daily and show no sign of leveling off. As U.S. District Judge Matthew Kennelly said in a recent opinion: "The Court ... assumes that the measures undertaken by the MCC to prevent or stop the spread of coronavirus disease are, and have proven to be, inadequate to prevent spread of the disease within the institution."

Editorial: Coronavirus in Cook County Jail: Protect detainees, the public and criminal justice system »

Unfortunately, Attorney General William Barr is taking a draconian and misguided approach to pretrial jails like the MCC. Jails are different from prisons — the people caged in jail are awaiting trial and haven't been found guilty of anything. Yet for some inexplicable reason, Barr, the nation's chief federal prosecutor, is treating people in jails more harshly. Barr has recommended releasing people from federal *prisons*, recognizing that **"time is of the essence."** But he has **directed his federal prosecutors** — including those in Chicago — to largely oppose releasing people from federal *jails*. He claims that keeping presumptively innocent people in jail is the only way to advance "the safety of the community," a contention that flies in the face of the government's own data.

Rather than relying on the attorney general's bluster, federal judges in Chicago must be guided by the hard evidence, which shows that releasing people in jail poses far less risk to the community than COVID-19 itself. The vast majority of people released in federal cases pose little threat to the community. In fact, the **federal government's own data** shows that over 98% of people released in federal cases do not commit new crimes on release, and 99% appear for court. These numbers hold true even in the **federal districts that release the majority of people pending trial**. Meanwhile, the **Department of Justice** categorizes just 2% of federal arrestees as violent.

Judges concerned for the safety of the community must heed this evidence, which proves that we could release many more people from the Chicago MCC without increasing crime or endangering anyone.

In addition, federal judges must recognize that COVID-19 completely changes the safety-of-the-community calculus. The wide and deadly swath the pandemic has torn through Cook County Jail makes clear that officers and medical staff will die along with the people jailed there. Meanwhile, **a chorus of public health experts** says that releasing the incarcerated will protect the broader community from COVID-19. Failing to release people from the MCC poses its own **dangers to the community** — we are all at risk when people in jail need scarce hospital beds and ventilators. Just look downstate, where the hospital near Stateville prison has been **"overwhelmed"** by infected inmates needing

Judges should also disregard the attorney general's paternalistic **argument** that the very people his own prosecutors have potentially exposed to COVID-19 may spread the virus to their families if released. Not only is social distancing eminently more feasible at home than in jail, but you can be sure those families would rather risk infection than have their loved ones die alone behind bars. Just ask the families of **those in federal prisons** who have perished from COVID-19.

Even before COVID-19, **we testified before Congress** about the urgent need to release more people from federal jails. In the midst of the much-maligned war on drugs, Congress passed the federal Bail Reform Act of 1984 to respond to **"the alarming problem of crimes committed by persons on release."** But the government's own evidence cited above definitively proves that releasing more people does not lead to more crime.

The machinery of injustice nevertheless chugs along, with federal judges nationwide jailing **75% of people charged with federal crimes** under the outdated and unsound bail law. Just to provide some perspective, that's nearly double the jailing rate for *violent* felonies in state cases nationwide. The astronomical federal detention rates aren't making our communities any safer and come with high fiscal and social costs. Taxpayers spend **$36,299 per year** on every person jailed federally pending trial — far more than the **average cost of college tuition** today. Meanwhile, people who are presumed innocent can **lose their jobs, their homes and even their children** as they languish in cages.

Now more than ever, federal judges in Chicago must recognize that, contrary to the attorney general's message, the only way to give **"controlling weight ... to public safety"** during this extraordinary time is to release more people from the MCC. Otherwise, many people may die within the MCC's walls and beyond.

Professor Alison Siegler is the founder and director of the Federal Criminal Justice Clinic at the University of Chicago Law School; Professor Erica Zunkel is the clinic’s associate director. Both are former assistant federal public defenders.

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Client Interview Form

CLIENT INTERVIEW FORM

CASE NAME:
CASE #:
DATE:
JUDGE:
AUSA:
PRETRIAL OFFICER:

<table>
<tr><td colspan="4">BASIC CLIENT INFORMATION</td></tr>
<tr><td>FIRST NAME</td><td colspan="2">LAST NAME</td><td>MIDDLE NAME</td></tr>
<tr><td>AGE</td><td colspan="2">DATE OF BIRTH</td><td>PLACE OF BIRTH</td></tr>
<tr><td>HOME #</td><td colspan="2">WORK #</td><td>CELL #</td></tr>
<tr><td colspan="2">PREFERRED NAME</td><td colspan="2">PREFERRED PRONOUNS</td></tr>
<tr><td colspan="4">RESIDENCE INFORMATION</td></tr>
<tr><td colspan="2">HOME ADDRESS</td><td>LENGTH OF RESIDENCE</td><td>OWN/RENT:</td><td>RESPONSIBLE FOR RENT/BILLS?</td></tr>
<tr><td colspan="3"># OF CO-INHABITANTS</td><td colspan="2" rowspan="3">NAMES/RELATIONSHIPS OF CO-INHABITANTS</td></tr>
<tr><td colspan="3">PRIOR RESIDENCE(S) AND DATES</td></tr>
<tr><td colspan="3">STATES LIVED IN AND DATES</td></tr>
</table>

MARITAL/PARTNERSHIP INFORMATION				
MARITIAL STATUS	**NAME OF PARTNER/SPOUSE**	**HOME ADDRESS OF PARTNER/SPOUSE**		
LENGTH OF TIME TOGETHER	**EMPLOYED?**	**IF EMPLOYED, WHAT JOB?**		
		WHAT'S THEIR WORK SCHEDULE?		
HOME #	**WORK #**	**CELL #**		
DO YOU SUPPORT PARTNER FINANCIALLY?		**# OF CHILDREN TOGETHER**		
DEPENDANT INFORMATION				
CHILDREN: FULL NAME/AGE/CURRENT RESIDENCE		**CO-PARENT NAME**	**LIVE WITH YOU?**	**FINANCIAL SUPPORT?**
1ST CHILD				
2ND CHILD				
3RD CHILD				
4TH CHILD				
5TH CHILD				
6TH CHILD				
OTHER DEPENDANTS (PARENT, GRANDPARENT, SIBLING, ETC.)				
DEPENDANT 1:				
DEPENDANT 2:				
DEPENDANT 3:				
DEPENDANT 4:				
DEPENDANT 5:				

RELATIVES/FRIENDS INFORMATION			
RELATIONSHIP/ NAME	**OCCUPATION**	**PHONE #**	**ADDRESS/CITY**
MOTHER			
FATHER			
SISTER/BROTHER			
SISTER/BROTHER			
SISTER/BROTHER			
SISTER/BROTHER			
FRIENDS AND FAMILY IN SAME CITY AS CLIENT			
RELATIONSHIP	**NAME**	**PHONE #**	**ADDRESS/CITY**
OTHER CONTACTS			
RELATIONSHIP	**NAME**	**PHONE #**	**ADDRESS/CITY**

<table>
<tr><td colspan="4">EMPLOYMENT INFORMATION</td></tr>
<tr><td colspan="2" rowspan="7">CURRENTLY EMPLOYED? (Y/N)</td><td>IF Y, WHERE DO YOU WORK?</td><td>HOW LONG HAVE YOU WORKED THERE?</td></tr>
<tr><td>INCOME (MONTHLY)</td><td>EMPLOYER PHONE#</td></tr>
<tr><td colspan="2">EMPLOYER NAME AND ADDRESS</td></tr>
<tr><td colspan="2">MAY I CALL EMPLOYER?</td></tr>
<tr><td colspan="2">IF N, HOW LONG UNEMPLOYED?</td></tr>
<tr><td colspan="2">CURRENTLY SEARCHING FOR A JOB?</td></tr>
<tr><td>ANY UPCOMING INTERVIEWS?</td><td>IF Y, WHERE?</td></tr>
<tr><td colspan="4">PRIOR EMPLOYMENT (MOST RECENT TO EARLIEST)</td></tr>
<tr><td>JOB 1</td><td>NAME</td><td colspan="2">KIND OF WORK/WHAT DID YOU DO?</td></tr>
<tr><td colspan="2">INCOME FROM JOB</td><td colspan="2">REASON FOR LEAVING</td></tr>
<tr><td colspan="2">PHONE #</td><td colspan="2">ADDRESS</td></tr>
<tr><td colspan="2">SUPERVISOR NAME</td><td colspan="2">MAY WE CALL?</td></tr>
<tr><td>JOB 2</td><td>NAME</td><td colspan="2">KIND OF WORK/WHAT DID YOU DO?</td></tr>
<tr><td colspan="2">INCOME FROM JOB</td><td colspan="2">REASON FOR LEAVING</td></tr>
<tr><td colspan="2">PHONE #</td><td colspan="2">ADDRESS</td></tr>
<tr><td colspan="2">SUPERVISOR NAME</td><td colspan="2">MAY WE CALL?</td></tr>
<tr><td>JOB 3</td><td>NAME</td><td colspan="2">KIND OF WORK/WHAT DID YOU DO?</td></tr>
<tr><td colspan="2">INCOME FROM JOB</td><td colspan="2">REASON FOR LEAVING</td></tr>
<tr><td colspan="2">PHONE #</td><td colspan="2">ADDRESS</td></tr>
</table>

Criminal History and Failures to Appear						
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**
Charge	**Date**	**Disposition**	**Bond Amount**	**Probation/SR?**	**Attorney**	**FTA?**

MILITARY HISTORY				
BRANCH	**DATES OF SERVICE**	**TYPE OF DISCHARGE**	**HIGHEST RANK**	**AWARDS/DEOCRATIONS**

ADDITIONAL INTERVIEW QUESTIONS

WARNINGS

- Do not discuss your case over the phones/email at the jail.
- Do not discuss your case with other people at the jail.
- Do not have any contact with witness(s) and/or codefendants in your case.

FAMILY TIES AND RESPONSIBILITIES

1. If you have a spouse/partner, are they employed? If so, what is their job and what are their work hours?

2. Does your spouse/partner have any physical or mental health issues or other medical needs? Does your spouse/partner require care from you or anyone else? If so, please describe; also discuss your involvement in their care/treatment:

3. What is your involvement with your children? Do you support them financially? How do you support them emotionally? [Ask specific questions aimed at eliciting as many details as possible.]
    - Do you get children ready for school, help with homework, feed meals, change diapers, put to bed, etc.

    - What do you do with your children in the evenings/weekends?

- Have any of your children received certificates from school: good attendance, good conduct, etc.? Who would I talk to for copies of those documents so that I can provide them to the judge?

4. If you support your child/children, is that a part of an official arrangement?
    - If so, please describe the arrangement:

5. Do any of your children have an IEP?
    - If so, provide details about your understanding of your child's diagnosis and any involvement you have in assisting with their treatment/schooling.

6. Do any of your children have any mental health issues?
    - If so, please describe; also discuss your involvement in their care/treatment:

7. Do any of your children have physical health problems or special medical needs?

- If so, please describe; also discuss your involvement in their care/treatment:

8. Do any of your children have any other special needs of which you are aware?
    - If so, please describe; also discuss your involvement in their care/treatment:

9. Do you provide needed assistance to elderly and/or other family members?
    - If so, please describe the assistance you provide:

10. If you were previously taking care of someone, such as a child or another family member, who can take care of that person if you are sent to jail?
    - If you do have such dependents, do they have immediate or urgent needs?

THIRD-PARTY CUSTODIAN

Explain what a third-party custodian is to the client, including the responsibilities agreed to by a third-party custodian. Be sure to mention (a) they are obligated to do their best to ensure the client makes court appearances, and (b) they are obligated to report to the judge if they either learn that the client intends to skip a court appearance or if they learn that the client has left the jurisdiction.

1. Is there anyone who would agree to serve as your third-party custodian? Please provide name, relationship, and contact information:

2. Does the person/people you have listed as a potential third-party custodian(s) have any criminal convictions that you know of?

3. Does the person/people you have listed as a potential third-party custodian(s) currently live with you? If they do not, would that person let you live with them?

4. Would the person/people you have listed as a potential third-party custodian(s) be willing to co-sign an unsecured bond? [Explain that custodians would not have to put down money, but would have to pay up to the amount of the unsecured bond if the client fled]

CRIMINAL HISTORY FOLLOW-UP

1. Have you ever been arrested outside of your city or state? If so, please describe:

2. For any failures to appear or bond forfeitures, please provide details:

3. Please provide details about any prior successes or failures on bond, probation, supervised release, or parole:

CITIZENSHIP/IMMIGRATION STATUS INFORMATION

1. What is your country of origin?

2. What is your current citizenship status in the U.S.?

3. Have you ever been removed from the country (i.e., deported)?
    - If so, please list the date(s) & disposition(s) of removal(s):

4. Are you present in the U.S. on a "green card", visa, or are you a permanent U.S. resident?

5. About how long have you resided in the United States?

6. Please list any significant travel history:

HOUSING FOLLOW-UP

1. Before your arrest, did you reside in a house, an apartment, or somewhere else?

2. If released, can you go back to the same housing that you were living in before arrest?
    - If released, are you able to stay there for upwards of a year or more?

    - Are you aware of how rent/mortgage is paid?
        - If so, please briefly describe:

    - If you were to face eviction from your apartment, do you have anywhere else you could stay?

3. If you yourself have an apartment, has rent been paid since you've been locked up?
    - Do you have a way to continue paying your rent upon release?

4. Wherever you plan to stay, how would you get to court for appearances if released?

EMPLOYMENT INFORMATION FOLLOW-UP

1. If you are currently employed, do you think you would be able to return to that job after release?

2. Have you or someone in your family talked to your work supervisor about your arrest?

3. Can I call your supervisor to verify your job? Will they be supportive despite this arrest?

4. If electronic monitoring is a condition of your bond, would you still be able to work (e.g., work from home)? [Please describe]

5. If you do not have a job waiting for you upon release, how do you plan to make ends meet until you can secure employment? Is there someone who will be covering expenses until you can regain financial stability?

6. If you are ordered to pay for your conditions of release, such as electronic monitoring, where would you get the money?

PROPERTY/ASSETS INFORMATION

1. Do you own property, such as a condo, house, or business establishment?

2. To the best of your knowledge, does anyone in your family own property? Does anyone in your family have any mortgages that you know of?

3. If someone in your family owns property, would they be willing to post that property as security for your bond? [Explain what this means.]

EDUCATIONAL BACKGROUND

1. What is the highest grade-level you completed?

2. If you graduated from high school, what year did you graduate? If you graduated from college, what year did you graduate?

3. If you did not graduate from high school, do you have a GED?

4. Please list the schools you have attended (from most recent to earliest):
    - School One:
    - School Two:
    - School Three:
    - School Four:

5. At the time of your arrest, were you going to school or did you have plans to go to school? If so, would you be able to go back to school if you were released?

HEALTH INFORMATION

1. Do you currently suffer from any physical health problems?
    - List the (a) diagnosis and date, (b) your treating physician, and (c) the medication(s) taken:
        - o
        - o
        - o
        - o
        - o
    - Please discuss how these medical conditions have affected your quality of life:
    - Please discuss if you have ever self-medicated these conditions with alcohol or drugs:
    - Have you been able to get the care you need while in custody? If not, describe what has happened in terms of your need for medication or other treatment while in custody.
2. Do you currently suffer from any mental health problems?
    - List the (a) diagnosis, (b) your treating physician, and (c) the medication(s) taken:
        - o
        - o
        - o
        - o

- Please discuss how these mental health conditions have affected your quality of life:

- Please discuss if you have ever self-medicated these mental health conditions with alcohol or drugs:

- Have you been able to get the care you need while in custody? If not, describe what has happened in terms of your need for medication or other treatment while in custody:

- If you suffer from ongoing mental health issues, would you be able to continue getting the treatment you need for those issues if you were released?

- Is there anyone else in your family who suffers from mental health issues? If so, please describe:

DRUG/ALCHOL HISTORY

1. Tell me about your history of using alcohol and drugs:

2. Do you currently use alcohol or drugs?

3. If you currently use drugs, about when was your last use?

4. Have you ever been in treatment for alcohol or drugs? If so, please describe and list dates of treatment:

5. Do you feel like you have a problem with alcohol or drugs? If so, are you open to getting treatment for your addiction to obtain release on bond?

MISCELLANEOUS INFORMATION AND WARNINGS

1. Did you experience mistreatment during your arrest? If so, please describe:

2. Is there anyone that I should contact at this time? Who?

3. Please describe your experience in the military and how it has impacted your life.

4. Is there anything else about you or your family that I haven't asked about that it might be important for me to know, or that might help me convince the judge to release you?

INITIAL APPEARANCE MATERIALS

Initial Appearance In-Court Checklist & Flowchart

INITIAL APPEARANCE CHECKLIST FOR DEFENSE ATTORNEYS

If AUSA asks for detention:

- ☐ **Do not waive Preliminary Hearing/Preliminary Examination.**
- ☐ **Do not waive Detention Hearing.**
- ☐ **Ask AUSA to provide the legal basis for their detention request under § 3142(f). These are:**
  - **3142(f)(1): Case specific bases**
    - **Crime of violence**, sex trafficking of children, terrorism [§ 3142(f)(1)(A)]
    - Offense with maximum term of "life imprisonment or death" [§ 3142(f)(1)(B)]
      i. E.g., certain firearms offenses, murder, sex abuse, racketeering
    - **Drug offense** with maximum term of 10 years or more [§ 3142(f)(1)(C)]
      i. This includes almost all offenses under 21 U.S.C. §§ 841, 846, 960
    - [Very rare] Current felony case & the client has two priors that are either: (1) crime of violence punishable by maximum life or death, or (2) a drug case with 10+ year maximum [§ 3142(f)(1)(D)]
    - Any felony that involves a **minor victim**, **possession of a firearm under §§ 921, 922, 924(c)**, or failure to register as a sex offender [§ 3142(f)(1)(E)]
  - **3142(f)(2): Subjective bases that require evidence**
    - "Serious risk . . . person will flee" or not appear at trial [§ 3142(f)(2)(A) (emphasis added)] [Judge or prosecutor can invoke]
      - ☐ Ask AUSA/judge for a proffer of evidence/justification that the client poses more than an ordinary risk of flight.
      - ☐ Present your own evidence to show the client does not pose a "serious" risk.
        - E.g., lack of bail forfeitures, record of appearance at court, evidence that client has lived in the community/U.S. for a long time, PTS will keep custody of passport
    - "Serious risk" person will obstruct justice or threaten witness or juror [§ 3142(f)(2)(B) (emphasis added)] [Judge or prosecutor can invoke]
      - ☐ Ask AUSA/judge for a proffer of evidence/justification that the client poses a "serious" risk of obstructing justice or threatening a witness/juror.
- ➢ **Main types of cases where § 3142(f) is met: drugs, 924(c) gun case, 922(g) gun case, bank robbery and other crimes of violence, minor victim, terrorism.**

- ➢ **If client is charged with fraud/financial crime, postal theft, bank theft, extortion, threats, illegal reentry, or alien smuggling, the *only* possible (f) factors the AUSA can invoke are:**
  - "Serious risk . . . person will flee" or not appear at trial [§ 3142(f)(2)(A)]
  - "Serious risk" of obstruction or of threat to witness or juror [§ 3142(f)(2)(B)]
  - The very rare recidivist scenario in § 3142(f)(1)(D)

- ➢ **If AUSA gives "risk of flight" as the reason for detention:**
  - ☐ **Argue** that ordinary risk of flight is not an (f) factor, and it is illegal to detain your client if no (f) factor is met.
  - ☐ **Support with caselaw:**
    - *See* cases cited on p. 3 of this checklist. *See, e.g.*, *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 966 (E.D. Wis. 2008): "Unless the case falls within one of the above categories in § 3142(f), the court may not detain the defendant."; *United States v.*

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

- **If AUSA then argues the client presents a *serious* risk of flight under (f)(2)(A):**
  - ☐ Ask AUSA for a proffer of evidence that client poses more than ordinary risk of flight
  - ☐ Present your own evidence to show the client does not pose a "serious" risk
    - E.g., lack of bail forfeitures, record of appearance at court, evidence that client has lived in the community/U.S. for a long time
  - ☐ If client is not a citizen, see non-citizen section below.

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

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

- **If AUSA gives "waiting for Pretrial Services report" as the reason for detention:**
  - ☐ Argue that waiting for the PTS report is not a legitimate basis for detention under the statute, and it is illegal to detain your client if no (f) factor is met.

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

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

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

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

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

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

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

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

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

➢ If government requests a continuance to give Pretrial Services time to prepare its report, argue that does not constitute good cause.

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

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

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

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

ordered a defendant released, the retention of a defendant in ICE custody contravenes a determination made pursuant to the Bail Reform Act.").

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

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)]

- 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.

Federal Criminal Justice Clinic
2019

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.

Is your client charged with the following: fraud/financial crime, postal theft, bank theft, extortion, threats, illegal reentry, or alien smuggling?

→ *The only possible (f) factors the AUSA can invoke are serious risk of flight or § 3142(f)(1)(D) (very rare).*

Is a § 3142(f)(1) factor present?

- (f)(1)(A): Crime of violence, sex trafficking of children, terrorism
- (f)(1)(B): Offense with maximum term of "life imprisonment or death"
  - *E.g., certain firearms offenses, murder, sex abuse, racketeering*
- (f)(1)(C): Drug offense with maximum term of 10 years or more
  - *Includes almost all offenses under 21 U.S.C. §§ 841, 846, 960*
- (f)(1)(D): 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 (very rare)
- (f)(1)(E): Any felony that involves a minor victim, possession of a firearm under §§ 921, 922, 924(c), or failure to register as a sex offender

Does the judge or AUSA invoke § 3142(f)(2)(A): "serious risk . . . person will flee" or not appear at trial?

→ **Is (f)(2)(A) supported with evidence?**

1. Ask AUSA for a proffer of evidence that client poses more than an ordinary risk of flight.
2. Present your own evidence to show client does not pose a "serious" risk of flight.
   a. 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
3. If the client is not a citizen, argue that the possibility of deportation by ICE does not render client a serious risk of flight. Support with caselaw from the *Initial Appearance Checklist for Defense Attorneys*.

Does the judge or AUSA invoke § 3142(f)(2)(B): "serious risk" person will obstruct justice or threaten witness or juror?

→ **Is (f)(2)(B) supported with evidence?**

1. Ask AUSA for a proffer of evidence that client poses a "serious" risk of obstructing justice/threatening a witness/juror.
2. Present your own evidence to show that client does not pose a "serious" risk of obstruction/threats.

Does AUSA give a detention justification that is not an (f) factor?
E.g., "risk of flight," "danger to community," "waiting for Pretrial Services report"

→ **There is no basis to detain your client. Request immediate release.**
These are not (f) factors, and it is illegal to detain your client if no (f) factor is met. Argue this point and support it with caselaw from the Initial Appearance Checklist for Defense Attorneys.

Your client may be DETAINED pending a hearing.

When will the detention hearing be?
The default in the Bail Reform Act is for the hearing to be held "immediately," but AUSA may request "up to" three business days to prepare for Detention Hearing and Defense may ask for "up to" two additional business days. § 3142(f). Be prepared to argue why the detention hearing should take place sooner.

Template Motion For Immediate Release in a Case that Doesn't Qualify for Detention Under § 3142(f)(1)

IN THE
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

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

DEFENDANT'S MOTION FOR IMMEDIATE RELEASE WITH CONDITIONS

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

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court order [his/her] release from custody pursuant to the Bail Reform Act (BRA) and the Fifth Amendment's Due Process Clause. Supreme Court precedent makes it unconstitutional for a court to hold a detention hearing or detain a defendant at all when, as here, there is no basis for detention under 18 U.S.C. § 3142(f). As all six courts of appeals to directly address 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). Further, data from the Administrative Office of the U.S. Courts show that there is an exaggerated concern over risk of flight in our

system, and that the vast majority of released defendants do not flee. 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 [JUDGE NAME] held [CLIENT's] [initial appearance/arraignment] on [DATE]. At that initial appearance, the government requested detention on the grounds that [CLIENT] posed [a risk of flight/a serious risk of flight]. Magistrate Judge [NAME] detained [CLIENT] as a risk of flight pending a detention hearing.

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

[CLIENT] is being detained in violation of the law. According to the plain language of § 3142(f), "the judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors listed in § 3142(f)(1) & (f)(2). None of the § 3142(f) factors are present in this case.[1] Ordinary "risk of flight" is not among the § 3142(f) factors. The statute and the caselaw prohibit this Court from holding a Detention Hearing and do not authorize the Court to detain [CLIENT] pending trial.

[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 presented no evidence to establish that this case meets either of the two additional factors discussed in § 3142(f)(2): (1) a "serious risk that [the defendant] will flee" under (f)(2)(A); or (2) a "serious risk" that the defendant will engage in obstruction or juror/witness tampering under (f)(2)(B).

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

The Supreme Court's seminal opinion in *United States v. Salerno*, 481 U.S. 739 (1987), confirms that a Detention Hearing may only be held if one of the seven § 3142(f) factors is present. *See id.* at 747 ("Detention hearings [are] available if" and only if one of the seven § 3142(f) factors is present.). According to the Supreme Court, "[t]he Act operates *only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f)*." *Id.* at 750 (emphasis added); *see also id.* at 747 ("The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious of crimes," specifically the crimes enumerated in § 3142(f)) (emphasis added). *Salerno* thus stands for the proposition that the factors listed in § 3142(f) serve as a gatekeeper, and only certain categories of defendants are eligible for detention in the first place. As the D.C. Circuit has held, "First, a [judge] must find one of six circumstances triggering a detention hearing…. [under] § 3142(f). Absent one of these circumstances, detention is not an option." *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999).

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

Detaining [CLIENT] in this case without regard to the limitations in § 3142(f) raises serious constitutional concerns. The strict limitations § 3142(f) places on pretrial detention are part of what led the Supreme Court to uphold the BRA as constitutional. It was the § 3142(f)

limitations, among others, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Salerno*, 481 U.S. at 748.[2] Throughout its substantive Due Process ruling, the *Salerno* Court emphasized that the only defendants for whom the government can seek detention are those who are "already indicted or held to answer for a *serious* crime," meaning the "extremely serious offenses" listed in § 3142(f)(1). *Id.* (emphasis added); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (discussing the BRA's legislative history).

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

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

[2] 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." *Id.* at 749. 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.*

hearing can be held only if one of the . . . circumstances listed in (f)(1) and (2) is present," and "[d]etention can be ordered, therefore, only 'in a case that involves' one of the . . . circumstances listed in (f)." (quoting § 3142(f)).

Unfortunately, a practice has developed that results in defendants being detained in violation of the BRA, *Salerno*, and the Constitution. Specifically, it is common for the government to seek detention at the Initial Appearance on the ground that the defendant is either "a danger to the community," "a risk of flight," or both.[3] Because neither "danger to the community" nor ordinary "risk of flight" is a factor listed in § 3142(f), it is flatly illegal to hold a Detention Hearing on either of these grounds at the initial appearance.[4] The practice in this district must be brought back in line with the law. That will only happen if this Court demands that the government provide a legitimate § 3142(f) basis for every detention request.[5]

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

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[3] *See, e.g.*, *The Administration of Bail by State and Federal Courts: A Call for Reform*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), *Written Statement of Alison Siegler* at 8, https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf (presenting Congress with courtwatching data demonstrating that federal prosecutors regularly violate the BRA by requesting detention at the Initial Appearance on the impermissible ground of ordinary—not serious—risk of flight and by failing to provide any evidence to support the request).

[4] *See id.* at 7 ("Yet judges regularly detain people under [§ 3142(f)(2)(A)] in non-extreme, ordinary cases without expecting the government to substantiate its request or demonstrate that there is a 'serious risk' the person will flee.").

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

It was improper to detain [CLIENT] and set a Detention Hearing 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 permits detention at the Initial Appearance when the defendant poses a "*serious* risk" of flight, § 3142(f)(2)(A), but in this case the government merely alleged an *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, but here the government has provided no such evidence. Third, to establish "serious risk" of flight the government must demonstrate that the defendant presents an "extreme and unusual" risk of willfully fleeing the jurisdiction if released, but the government has not met that burden here. Accordingly, it is improper to hold a Detention Hearing at all, let alone detain [CLIENT] for the duration of the case.

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

Ordinary "risk of flight" is not a factor in § 3142(f). By its plain language, § 3142(f)(2)(A) permits detention and a hearing only when a defendant poses a "*serious* risk" of flight. There is some risk of flight in every criminal case; "serious risk" of flight means something more. According to a basic canon of statutory interpretation, the term "*serious* risk" means that the risk must be more significant or extreme than an ordinary risk. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne 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.") (citation omitted).

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. A defendant "may be detained *only if the record supports a finding* that he presents a serious risk of flight." *Himler*, 797 F.2d at 160 (emphasis added); *see also United States v. Robinson*, 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010) (criticizing the government for failing to present evidence of "serious risk" of flight at the Initial Appearance and saying "no information was offered to support [the] allegation"). After all, the statute only authorizes detention "*in a case that involves*" a "serious risk" that the person will flee. § 3142(f)(2)(A) (emphasis added). This contemplates a judicial finding about whether the case in fact involves a *serious* risk of flight.[6] The government must provide an evidentiary basis to enable the judge to make an informed decision, typically evidence that relates either to the defendant's history and characteristics or to the circumstances of the offense. The government has presented no such evidence here.

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

The BRA's legislative history makes clear that detention based on serious risk of flight is only appropriate under "extreme and unusual circumstances."[7] For example, the case relied on in

[6] 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").

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

the legislative history as extreme and unusual enough to justify detention on the grounds of serious risk of flight involved a defendant who was a fugitive and serial impersonator, had failed to appear in the past, and had recently transferred over a million dollars to Bermuda. *See Abrahams*, 575 F.2d at 4. The government must demonstrate that the risk of flight in a particular case rises to the level of extreme or unusual, and no such showing has been made here.

In addition, a defendant should not be detained as a "serious risk" of flight when the risk of non-appearance can be mitigated by conditions of release. The only defendants who qualify for detention under § 3142(f)(2) are those who are "[t]rue flight risks"—defendants the government can prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process.[8]

III. In This Case, the Government Has Not Met Its Burden of Proving That [CLIENT] Poses a "*Serious*" Risk Of Flight 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 THAT SHOW NO SERIOUS RISK OF FLIGHT: TIES TO COMMUNITY, FAMILY, EMPLOYMENT, PAST COURT APPEARANCES, FTAs ARE STALE, OTHER EVIDENCE OF STABILITY.]

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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").

[8] *See, e.g.,* Lauryn Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017). 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.

As in *United States v. Morgan*, 2014 U.S. Dist. LEXIS 93306 (C.D. Ill. July 9, 2014), "the facts fail to establish any risk of flight," let alone a risk serious enough to authorize a detention hearing. *Id.* at *17 ("[T]he defendant has lived at his current address for over seven years and has lived in the same community for his entire life. His mother and siblings also all live relatively close to his residence, as do his children and their mothers. . . . Additionally, nothing in his criminal history suggests that he ever failed to appear for a court hearing . . . ."); *see also Friedman*, 837 F.2d at 49–50 (reversing a detention order for "serious risk of flight" where defendant was a lifelong resident of the district, was married with children, had no prior record, had been steadily employed before his arrest, and had been on bond for related state charges without incident).

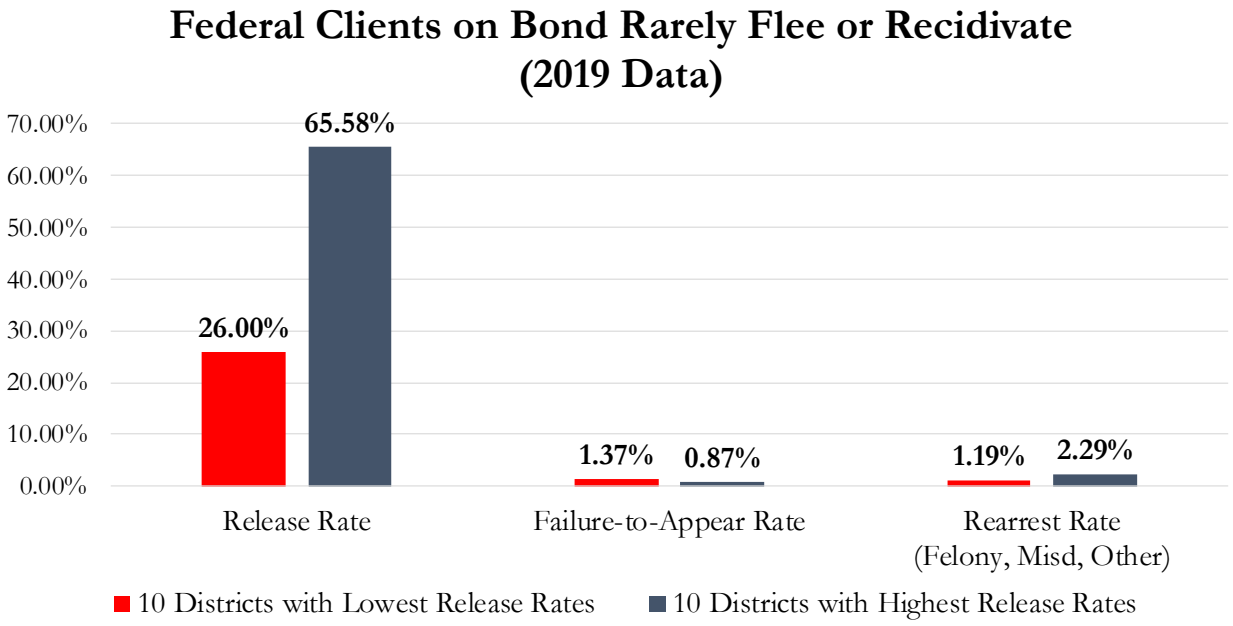
Because [CLIENT] does not present a "serious risk" of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

IV. Statistics Showing that It Is Extraordinarily Rare for Defendants on Bond to Flee Further Demonstrate that [CLIENT] Does Not Pose a Serious Risk of Flight.

The government's own data show that when release increases, crime and flight do not. In this case, this Court should be guided by AO statistics showing that nearly everyone released pending trial appears in court and doesn't reoffend. In fact, in 2019, 99% of released federal defendants nationwide appeared for court as required and 98% did not commit new crimes on bond.[9] Significantly, this near-perfect compliance rate is seen equally in federal districts with

[9] App. 1, AO Table H-15 (Dec. 31, 2019), *available at* Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

very high release rates and those with very low release rates.[10] Even in districts that release two-thirds of all federal defendants on bond, fewer than 1% fail to appear in court.[11] The below chart reflects this data:



The bond statistics for this district likewise strongly suggest that [CLIENT] should be released. In this district, released federal defendants appeared for court [calculate percentage of

[10] The data showing near-perfect compliance on bond is illustrated in the chart, "Federal Clients on Bond Rarely Flee or Recidivate." The districts with the highest and lowest release rates were identified using the version of AO Table H-14A for the 12-month period ending December 31, 2019. *See* App. 2, AO Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42. The failure-to-appear and rearrest rates for these districts were calculated using App 1, AO Table H-15. With regard to flight, the ten federal districts with the lowest release rates (average 26.00%) have an average failure-to-appear rate of 1.37%, while the ten districts with the highest release rates (average 65.58%) have an *even lower* failure-to-appear rate of 0.87%. *See* App. 1; App. 2. With regard to recidivism, the ten districts with the lowest release rates have an average rearrest rate on bond of 1.19%, while the ten districts with the highest release rates have an average rearrest rate of 2.29%. *See* App. 1; App. 2. The districts with the lowest release rates are, from lowest to highest, S.D. California, W.D. Arkansas, E.D. Tennessee, S.D. Texas, E.D. Missouri, N.D. Indiana, E.D. Oklahoma, W.D. Texas, W.D. North Carolina, C.D. Illinois; the districts with the highest release rates are, from lowest to highest, E.D. Michigan, E.D. Arkansas, D. New Jersey, E.D. New York, D. Maine, D. Connecticut, W.D. New York, W.D. Washington, D. Guam, D. Northern Mariana Islands. *See* App. 2.

[11] *See* App. 1; App. 2.

defendants who failed to appear while released using Appendix 1, Table H-15]% of the time in 2019, and only [calculate percentage of defendants who were rearrested while released using Appendix 1, Table H-15]% of defendants were rearrested on release. *See* App. 1, AO Table H-15. Yet despite the statistically low risk of flight that defendants like [CLIENT] pose, the government recommends detention in 77% of cases nationwide and in [find percentage associated with your district in using Appendix 3, Table H-3]% of cases in this district. *See* App. 3, AO Table H-3. Clearly the government's detention requests are not tailored to the low risk of flight and recidivism that defendants in this district and elsewhere pose.

[CLIENT] must be released because the government has not presented evidence that shows that [he/she] would be among the approximately 1% of defendants who fail to appear in court. Detaining [CLIENT] without evidence that they pose a "serious risk" of flight violates their constitutionally protected liberty interest.

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

The potential penalty in this case is not a legitimate basis for finding a serious risk of flight. There is no evidence Congress intended courts to de facto detain any client facing a long prison sentence. Indeed, many federal defendants face long sentences—being a defendant in a run-of-the-mill federal case cannot possibly be an "extreme and unusual circumstance." Even at the detention hearing, where the standard for finding risk of flight is lower, Congress did not authorize courts to evaluate potential penalty when considering risk of flight. *See* § 3142(g) (listing as relevant factors (1) 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.

VI. 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 Someone'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 having a negative outcome

at work (such as losing their job).[12] Likewise, 29.9% of people detained fewer than three days reported that their housing became less stable.[13] 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.[14] Over 40% of people who die in jail die within their first week.[15] Despite the trauma and danger inherent in the first few days of a jail stay, jails' physical and mental health screenings and treatment offerings are often inadequate.[16] 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 have been shown empirically 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%, translating to 3,700

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[12] 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.

[13] *Id.*

[14] 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.

[15] Margaret Noonan, et al., *Mortality in Local Jails and State Prisons, 2000–14—Statistical Tables*, Bureau of Justice Statistics 8 (2016), archived at https://perma.cc/B9CN-ST3K.

[16] *See* Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Justice Statistics 9, 10 (2015), 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.

fewer arrest warrants per year.[17] 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.[18] 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.[19] Moreover, scholars and courts agree that electronic monitoring is especially effective at reducing risk of flight.[20]

VII. [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].

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.

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[17] *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.

[18] *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.

[19] *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 (2007), archived at https://perma.cc/5C8C-7HJK.

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

Note to Counsel re Section IV Data and the Appendices

- If you don't want to do the district-specific FTA/re-arrest calculations, you can cut that entire paragraph from Section IV and leave the rest of that section as is.
- **To calculate the percentage of defendants in your district who failed to appear in court while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of failures to appear violations by going to the highlighted column, "FTA Violations."
    - Divide the total FTA Violations for your district by the total Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there was 1 FTA Violation and 262 Cases In Release Status. Divide 1 by 262, getting 0.0038. Multiply that value by 100 to get 0.38%.
- **To calculate the percentage of defendants in your district who were rearrested while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of people who violated bond by getting rearrested by going to the highlighted column, "Rearrest Violations."
        - Add up the 3 types of Rearrest Violations for your district by adding together the numbers in the columns titled Felony + Misdemeanor + Other. That sum represents the total Rearrest Violations for your district.
    - Divide the total Rearrest Violations for your district by the Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there were 9 Felony Rearrests, 2 Misdemeanor Rearrests, and 0 Other. The sum of these three values is 11. That is the total number of Rearrest Violations. There are 262 Cases In Release Status. Divide 11 by 262, getting 0.0419. Multiply that value by 100 to get 4.19%.

APPENDIX 1

AO TABLE H-15 (Dec. 31, 2019)

available at Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending December 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TOTAL	197,772	55,142	27.9	9,045	16.4	442	519	61	650	8,283	14,161
1ST	7,084	2,424	34.2	238	9.8	17	10	0	8	213	338
ME	572	262	45.8	63	24.0	9	2	0	1	55	84
MA	1,740	685	39.4	80	11.7	5	2	0	2	74	114
NH	559	245	43.8	29	11.8	2	4	0	1	24	31
RI	403	163	40.4	35	21.5	1	2	0	1	33	65
PR	3,810	1,069	28.1	31	2.9	0	0	0	3	27	44
2ND	11,394	5,178	45.4	773	14.9	78	95	16	58	644	1,157
CT	1,306	624	47.8	103	16.5	10	4	1	11	92	164
NY,N	926	304	32.8	50	16.4	2	8	0	15	39	64
NY,E	3,173	1,439	45.4	209	14.5	13	23	5	2	190	329
NY,S	4,209	1,914	45.5	212	11.1	39	36	4	29	149	303
NY,W	1,363	701	51.4	140	20.0	10	20	6	1	118	202
VT	417	196	47.0	59	30.1	4	4	0	0	56	95
3RD	8,792	3,633	41.3	451	12.4	39	26	6	23	422	711
DE	334	74	22.2	2	2.7	1	0	0	0	2	3
NJ	3,224	1,584	49.1	105	6.6	12	7	1	11	96	137
PA,E	2,026	742	36.6	138	18.6	5	6	2	4	134	287
PA,M	1,368	405	29.6	49	12.1	1	3	2	6	40	62
PA,W	1,563	693	44.3	140	20.2	19	10	1	1	134	203
VI	277	135	48.7	17	12.6	1	0	0	1	16	19
4TH	12,026	4,172	34.7	737	17.7	20	59	9	30	661	1,081
MD	1,596	611	38.3	112	18.3	4	8	0	1	110	201
NC,E	1,991	535	26.9	113	21.1	5	23	6	2	87	171
NC,M	743	242	32.6	46	19.0	0	1	0	1	43	61
NC,W	1,264	281	22.2	37	13.2	2	3	1	0	33	41
SC	2,228	814	36.5	111	13.6	2	3	0	10	101	141
VA,E	2,198	931	42.4	109	11.7	2	13	2	8	89	157
VA,W	724	248	34.3	40	16.1	3	3	0	7	36	55
WV,N	638	323	50.6	125	38.7	2	5	0	1	120	195
WV,S	644	187	29.0	44	23.5	0	0	0	0	42	59
5TH	43,756	7,287	16.7	867	11.9	43	33	5	66	789	1,013
LA,E	847	281	33.2	17	6.0	1	2	0	2	12	20
LA,M	442	163	36.9	24	14.7	2	3	0	0	20	30
LA,W	829	193	23.3	3	1.6	0	0	0	0	3	3
MS,N	418	176	42.1	30	17.0	3	3	0	1	25	38
MS,S	1,068	307	28.7	16	5.2	2	1	0	1	12	16
TX,N	2,442	895	36.7	118	13.2	3	2	5	7	111	145
TX,E	1,890	349	18.5	38	10.9	4	5	0	1	38	45
TX,S	18,370	2,629	14.3	276	10.5	27	16	0	28	234	295
TX,W	17,450	2,294	13.1	345	15.0	1	1	0	26	334	421
6TH	13,428	4,801	35.8	985	20.5	45	49	2	45	930	1,789
KY,E	1,122	305	27.2	33	10.8	0	0	0	1	32	39
KY,W	941	363	38.6	50	13.8	3	4	0	2	47	71
MI,E	2,382	1,109	46.6	287	25.9	11	6	0	7	284	611
MI,W	762	269	35.3	49	18.2	4	5	0	5	40	56
OH,N	1,970	660	33.5	72	10.9	1	3	1	19	67	116
OH,S	1,930	866	44.9	193	22.3	0	0	0	3	189	361

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						Felony	Misde-meanor	Other			
TN,E	1,935	398	20.6	49	12.3	2	3	0	0	44	58
TN,M	938	333	35.5	110	33.0	20	15	0	2	98	215
TN,W	1,448	498	34.4	142	28.5	4	13	1	6	129	262
7TH	7,785	2,813	36.1	505	18.0	28	39	6	13	466	873
IL,N	2,876	1,260	43.8	245	19.4	20	27	0	7	224	462
IL,C	694	192	27.7	34	17.7	1	2	0	1	32	39
IL,S	662	219	33.1	47	21.5	1	6	1	1	43	81
IN,N	981	291	29.7	23	7.9	4	1	0	2	17	23
IN,S	1,470	395	26.9	74	18.7	0	0	0	1	73	117
WI,E	758	366	48.3	71	19.4	2	3	5	0	66	136
WI,W	344	90	26.2	11	12.2	0	0	0	1	11	15
8TH	14,263	4,457	31.2	1,341	30.1	77	106	14	64	1,256	2,793
AR,E	1,971	794	40.3	257	32.4	25	16	2	35	236	431
AR,W	675	127	18.8	8	6.3	0	0	0	4	7	6
IA,N	851	212	24.9	80	37.7	1	12	2	3	72	121
IA,S	1,163	326	28.0	109	33.4	2	11	8	0	104	185
MN	934	346	37.0	75	21.7	5	10	1	3	64	110
MO,E	3,246	920	28.3	418	45.4	18	9	0	9	407	1,344
MO,W	2,334	599	25.7	139	23.2	7	10	0	0	129	227
NE	1,186	413	34.8	73	17.7	8	12	1	3	65	97
ND	774	298	38.5	47	15.8	2	3	0	6	44	59
SD	1,129	422	37.4	135	32.0	9	23	0	1	128	213
9TH	51,712	12,431	24.0	1,998	16.1	36	38	0	255	1,849	2,844
AK	448	131	29.2	17	13.0	1	0	0	1	17	27
AZ	20,907	2,264	10.8	475	21.0	4	11	0	65	453	587
CA,N	2,577	1,208	46.9	161	13.3	0	0	0	11	156	307
CA,E	2,051	722	35.2	54	7.5	1	0	0	8	53	65
CA,C	6,070	2,205	36.3	219	9.9	13	7	0	25	195	304
CA,S	12,034	2,612	21.7	523	20.0	7	9	0	114	443	669
HI	545	284	52.1	39	13.7	0	0	0	0	40	50
ID	790	238	30.1	45	18.9	2	1	0	4	42	66
MT	760	271	35.7	55	20.3	2	3	0	0	53	69
NV	1,583	578	36.5	73	12.6	1	1	0	7	70	92
OR	1,413	696	49.3	178	25.6	4	4	0	10	172	299
WA,E	920	347	37.7	69	19.9	1	1	0	6	65	131
WA,W	1,439	745	51.8	70	9.4	0	1	0	4	70	136
GUAM	140	107	76.4	17	15.9	0	0	0	0	17	38
NM,I	35	23	65.7	3	13.0	0	0	0	0	3	4
10TH	13,088	3,225	24.6	523	16.2	16	17	0	65	481	721
CO	1,288	408	31.7	52	12.7	3	1	0	29	46	67
KS	1,173	406	34.6	92	22.7	2	3	0	3	92	151
NM	6,919	1,101	15.9	143	13.0	0	0	0	16	140	154
OK,N	580	215	37.1	75	34.9	1	0	0	3	70	153
OK,E	266	57	21.4	4	7.0	0	0	0	1	3	4
OK,W	1,258	502	39.9	64	12.7	2	3	0	4	57	85
UT	1,222	417	34.1	82	19.7	8	10	0	5	64	98
WY	382	119	31.2	11	9.2	0	0	0	4	9	9
11TH	14,444	4,721	32.7	627	13.3	43	47	3	23	572	841
AL,N	1,188	372	31.3	60	16.1	6	6	0	4	55	93
AL,M	355	159	44.8	13	8.2	0	0	0	1	12	21
AL,S	706	233	33.0	47	20.2	2	4	0	0	44	52
FL,N	831	360	43.3	33	9.2	5	3	2	1	26	44

Table H-15.
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						Felony	Misde-meanor	Other			
FL,M	3,557	997	28.0	162	16.2	12	16	0	5	147	216
FL,S	3,967	1,319	33.2	161	12.2	1	0	0	2	159	200
GA,N	1,928	683	35.4	80	11.7	7	10	1	5	68	112
GA,M	977	373	38.2	52	13.9	8	6	0	2	45	77
GA,S	935	225	24.1	19	8.4	2	2	0	3	16	26

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

APPENDIX 2

AO TABLE H-14A (Dec. 31, 2019)

https://perma.cc/32XF-2S42

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
1ST	2,255	1,311	58.1	944	41.9
ME	224	89	39.7	135	60.3
MA	637	346	54.3	291	45.7
NH	221	90	40.7	131	59.3
RI	133	62	46.6	71	53.4
PR	1,040	724	69.6	316	30.4
2ND	3,330	1,463	43.9	1,867	56.1
CT	409	157	38.4	252	61.6
NY,N	308	181	58.8	127	41.2
NY,E	665	264	39.7	401	60.3
NY,S	1,357	636	46.9	721	53.1
NY,W	399	145	36.3	254	63.7
VT	192	80	41.7	112	58.3
3RD	2,923	1,454	49.7	1,469	50.3
DE	79	48	60.8	31	39.2
NJ	1,148	456	39.7	692	60.3
PA,E	724	396	54.7	328	45.3
PA,M	271	160	59.0	111	41.0
PA,W	600	344	57.3	256	42.7
VI	101	50	49.5	51	50.5
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
5TH	13,055	9,189	70.4	3,866	29.6
LA,E	282	175	62.1	107	37.9
LA,M	133	64	48.1	69	51.9
LA,W	228	146	64.0	82	36.0
MS,N	169	72	42.6	97	57.4
MS,S	435	260	59.8	175	40.2
TX,N	986	576	58.4	410	41.6
TX,E	691	476	68.9	215	31.1
TX,S	5,313	3,965	74.6	1,348	25.4
TX,W	4,818	3,455	71.7	1,363	28.3

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.
6TH	5,162	2,890	56.0	2,272	44.0
KY,E	452	273	60.4	179	39.6
KY,W	337	188	55.8	149	44.2
MI,E	743	296	39.8	447	60.2
MI,W	326	191	58.6	135	41.4
OH,N	814	477	58.6	337	41.4
OH,S	745	323	43.4	422	56.6
TN,E	872	656	75.2	216	24.8
TN,M	290	137	47.2	153	52.8
TN,W	583	349	59.9	234	40.1
7TH	2,556	1,464	57.3	1,092	42.7
IL,N	780	340	43.6	440	56.4
IL,C	258	184	71.3	74	28.7
IL,S	301	172	57.1	129	42.9
IN,N	360	261	72.5	99	27.5
IN,S	558	374	67.0	184	33.0
WI,E	230	101	43.9	129	56.1
WI,W	69	32	46.4	37	53.6
8TH	5,597	3,558	63.6	2,039	36.4
AR,E	499	198	39.7	301	60.3
AR,W	243	185	76.1	58	23.9
IA,N	352	217	61.6	135	38.4
IA,S	496	317	63.9	179	36.1
MN	349	197	56.4	152	43.6
MO,E	1,573	1,164	74.0	409	26.0
MO,W	875	604	69.0	271	31.0
NE	440	260	59.1	180	40.9
ND	253	138	54.5	115	45.5
SD	517	278	53.8	239	46.2
9TH	14,865	9,453	63.6	5,412	36.4
AK	152	95	62.5	57	37.5
AZ	3,004	1,767	58.8	1,237	41.2
CA,N	752	317	42.2	435	57.8
CA,E	489	320	65.4	169	34.6
CA,C	1,472	676	45.9	796	54.1
CA,S	6,393	5,156	80.7	1,237	19.3
HI	199	82	41.2	117	58.8
ID	297	174	58.6	123	41.4
MT	305	143	46.9	162	53.1
NV	376	175	46.5	201	53.5
OR	455	208	45.7	247	54.3
WA,E	273	143	52.4	130	47.6
WA,W	627	179	28.5	448	71.5
GUAM	57	16	28.1	41	71.9
NM,I	14	2	14.3	12	85.7

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.
10TH	3,943	2,188	55.5	1,755	44.5
CO	431	248	57.5	183	42.5
KS	433	231	53.3	202	46.7
NM	1,429	807	56.5	622	43.5
OK,N	290	146	50.3	144	49.7
OK,E	127	92	72.4	35	27.6
OK,W	522	215	41.2	307	58.8
UT	546	351	64.3	195	35.7
WY	165	98	59.4	67	40.6
11TH	5,309	2,821	53.1	2,488	46.9
AL,N	384	188	49.0	196	51.0
AL,M	105	47	44.8	58	55.2
AL,S	205	87	42.4	118	57.6
FL,N	400	172	43.0	228	57.0
FL,M	1,207	714	59.2	493	40.8
FL,S	1,683	954	56.7	729	43.3
GA,N	555	228	41.1	327	58.9
GA,M	389	182	46.8	207	53.2
GA,S	381	249	65.4	132	34.6

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."

APPENDIX 3

AO TABLE H-3 (Sept. 30, 3019)

https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf

Table H-3.
U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release
For the 12-Month Period Ending September 30, 2019

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	**108,163**	**97,784**	**90.4**	**69,571**	**71.1**	**28,213**	**28.9**	**98,071**	**90.7**	**75,365**	**76.8**	**22,706**	**23.2**
1ST	**2,730**	**2,342**	**85.8**	**1,450**	**61.9**	**892**	**38.1**	**2,330**	**85.3**	**1,754**	**75.3**	**576**	**24.7**
ME	298	202	67.8	93	46.0	109	54.0	202	67.8	135	66.8	67	33.2
MA	760	558	73.4	265	47.5	293	52.5	557	73.3	324	58.2	233	41.8
NH	280	216	77.1	108	50.0	108	50.0	214	76.4	111	51.9	103	48.1
RI	143	132	92.3	76	57.6	56	42.4	133	93.0	88	66.2	45	33.8
PR	1,249	1,234	98.8	908	73.6	326	26.4	1,224	98.0	1,096	89.5	128	10.5
2ND	**3,942**	**3,690**	**93.6**	**1,808**	**49.0**	**1,882**	**51.0**	**3,669**	**93.1**	**2,239**	**61.0**	**1,430**	**39.0**
CT	534	446	83.5	200	44.8	246	55.2	434	81.3	255	58.8	179	41.2
NY,N	442	416	94.1	313	75.2	103	24.8	411	93.0	315	76.6	96	23.4
NY,E	811	786	96.9	375	47.7	411	52.3	781	96.3	483	61.8	298	38.2
NY,S	1,403	1,376	98.1	601	43.7	775	56.3	1,375	98.0	738	53.7	637	46.3
NY,W	536	496	92.5	228	46.0	268	54.0	495	92.4	320	64.6	175	35.4
VT	216	170	78.7	91	53.5	79	46.5	173	80.1	128	74.0	45	26.0
3RD	**3,583**	**3,390**	**94.6**	**1,911**	**56.4**	**1,479**	**43.6**	**3,382**	**94.4**	**2,074**	**61.3**	**1,308**	**38.7**
DE	133	131	98.5	100	76.3	31	23.7	131	98.5	101	77.1	30	22.9
NJ	1,399	1,342	95.9	678	50.5	664	49.5	1,342	95.9	716	53.4	626	46.6
PA,E	866	853	98.5	492	57.7	361	42.3	853	98.5	554	64.9	299	35.1
PA,M	445	376	84.5	268	71.3	108	28.7	370	83.1	267	72.2	103	27.8
PA,W	592	567	95.8	304	53.6	263	46.4	566	95.6	352	62.2	214	37.8
VI	148	121	81.8	69	57.0	52	43.0	120	81.1	84	70.0	36	30.0

Table H-3. (September 30, 2019—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.
4TH	**6,411**	**4,872**	**76.0**	**3,069**	**63.0**	**1,803**	**37.0**	**5,093**	**79.4**	**3,678**	**72.2**	**1,415**	**27.8**
MD	668	631	94.5	423	67.0	208	33.0	629	94.2	432	68.7	197	31.3
NC,E	1,088	823	75.6	592	71.9	231	28.1	823	75.6	702	85.3	121	14.7
NC,M	412	388	94.2	236	60.8	152	39.2	386	93.7	279	72.3	107	27.7
NC,W	607	553	91.1	414	74.9	139	25.1	549	90.4	450	82.0	99	18.0
SC	948	685	72.3	369	53.9	316	46.1	680	71.7	411	60.4	269	39.6
VA,E	1,512	873	57.7	406	46.5	467	53.5	1,084	71.7	715	66.0	369	34.0
VA,W	406	319	78.6	243	76.2	76	23.8	309	76.1	243	78.6	66	21.4
WV,N	372	304	81.7	162	53.3	142	46.7	303	81.5	164	54.1	139	45.9
WV,S	398	296	74.4	224	75.7	72	24.3	330	82.9	282	85.5	48	14.5
5TH	**26,777**	**24,455**	**91.3**	**20,039**	**81.9**	**4,416**	**18.1**	**24,413**	**91.2**	**21,127**	**86.5**	**3,286**	**13.5**
LA,E	333	312	93.7	196	62.8	116	37.2	311	93.4	226	72.7	85	27.3
LA,M	186	136	73.1	67	49.3	69	50.7	136	73.1	84	61.8	52	38.2
LA,W	435	279	64.1	182	65.2	97	34.8	261	60.0	179	68.6	82	31.4
MS,N	225	174	77.3	77	44.3	97	55.7	174	77.3	82	47.1	92	52.9
MS,S	587	533	90.8	432	81.1	101	18.9	531	90.5	422	79.5	109	20.5
TX,N	1,084	1,031	95.1	561	54.4	470	45.6	1,017	93.8	720	70.8	297	29.2
TX,E	934	757	81.0	555	73.3	202	26.7	755	80.8	640	84.8	115	15.2
TX,S	11,479	9,884	86.1	8,350	84.5	1,534	15.5	9,875	86.0	8,703	88.1	1,172	11.9
TX,W	11,514	11,349	98.6	9,619	84.8	1,730	15.2	11,353	98.6	10,071	88.7	1,282	11.3
6TH	**6,518**	**5,548**	**85.1**	**3,511**	**63.3**	**2,037**	**36.7**	**5,651**	**86.7**	**3,978**	**70.4**	**1,673**	**29.6**
KY,E	642	512	79.8	378	73.8	134	26.2	514	80.1	390	75.9	124	24.1
KY,W	446	346	77.6	229	66.2	117	33.8	346	77.6	252	72.8	94	27.2
MI,E	1,045	967	92.5	512	52.9	455	47.1	966	92.4	583	60.4	383	39.6
MI,W	414	399	96.4	249	62.4	150	37.6	399	96.4	302	75.7	97	24.3
OH,N	1,020	868	85.1	562	64.7	306	35.3	879	86.2	616	70.1	263	29.9
OH,S	883	745	84.4	299	40.1	446	59.9	745	84.4	398	53.4	347	46.6
TN,E	996	954	95.8	774	81.1	180	18.9	954	95.8	805	84.4	149	15.6
TN,M	367	193	52.6	162	83.9	31	16.1	284	77.4	213	75.0	71	25.0
TN,W	705	564	80.0	346	61.3	218	38.7	564	80.0	419	74.3	145	25.7

Table H-3. (September 30, 2019—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.
7TH	**3,221**	**2,789**	**86.6**	**1,654**	**59.3**	**1,135**	**40.7**	**2,785**	**86.5**	**2,039**	**73.2**	**746**	**26.8**
IL,N	1,080	1,014	93.9	501	49.4	513	50.6	1,017	94.2	684	67.3	333	32.7
IL,C	285	273	95.8	220	80.6	53	19.4	272	95.4	232	85.3	40	14.7
IL,S	347	255	73.5	155	60.8	100	39.2	255	73.5	186	72.9	69	27.1
IN,N	372	352	94.6	261	74.1	91	25.9	353	94.9	286	81.0	67	19.0
IN,S	658	580	88.1	381	65.7	199	34.3	573	87.1	481	83.9	92	16.1
WI,E	304	232	76.3	100	43.1	132	56.9	232	76.3	133	57.3	99	42.7
WI,W	175	83	47.4	36	43.4	47	56.6	83	47.4	37	44.6	46	55.4
8TH	**6,711**	**5,967**	**88.9**	**3,931**	**65.9**	**2,036**	**34.1**	**5,940**	**88.5**	**4,698**	**79.1**	**1,242**	**20.9**
AR,E	686	516	75.2	271	52.5	245	47.5	521	75.9	335	64.3	186	35.7
AR,W	340	290	85.3	245	84.5	45	15.5	286	84.1	248	86.7	38	13.3
IA,N	446	387	86.8	274	70.8	113	29.2	388	87.0	297	76.5	91	23.5
IA,S	550	505	91.8	316	62.6	189	37.4	505	91.8	390	77.2	115	22.8
MN	457	401	87.7	214	53.4	187	46.6	387	84.7	270	69.8	117	30.2
MO,E	1,691	1,625	96.1	1,211	74.5	414	25.5	1,638	96.9	1,382	84.4	256	15.6
MO,W	998	904	90.6	566	62.6	338	37.4	890	89.2	749	84.2	141	15.8
NE	595	545	91.6	386	70.8	159	29.2	532	89.4	422	79.3	110	20.7
ND	345	232	67.2	126	54.3	106	45.7	230	66.7	149	64.8	81	35.2
SD	603	562	93.2	322	57.3	240	42.7	563	93.4	456	81.0	107	19.0
9TH	**32,846**	**30,960**	**94.3**	**22,474**	**72.6**	**8,486**	**27.4**	**30,897**	**94.1**	**23,397**	**75.7**	**7,500**	**24.3**
AK	188	169	89.9	119	70.4	50	29.6	165	87.8	134	81.2	31	18.8
AZ	16,929	16,260	96.0	15,104	92.9	1,156	7.1	16,266	96.1	15,514	95.4	752	4.6
CA,N	825	807	97.8	352	43.6	455	56.4	813	98.5	530	65.2	283	34.8
CA,E	629	619	98.4	434	70.1	185	29.9	618	98.3	524	84.8	94	15.2
CA,C	2,036	1,930	94.8	1,129	58.5	801	41.5	1,924	94.5	1,305	67.8	619	32.2
CA,S	8,671	8,077	93.1	3,666	45.4	4,411	54.6	8,007	92.3	3,353	41.9	4,654	58.1
HI	233	193	82.8	61	31.6	132	68.4	193	82.8	131	67.9	62	32.1
ID	428	297	69.4	176	59.3	121	40.7	311	72.7	245	78.8	66	21.2
MT	434	347	80.0	255	73.5	92	26.5	347	80.0	255	73.5	92	26.5
NV	584	546	93.5	328	60.1	218	39.9	545	93.3	392	71.9	153	28.1
OR	572	546	95.5	305	55.9	241	44.1	546	95.5	380	69.6	166	30.4
WA,E	430	320	74.4	234	73.1	86	26.9	316	73.5	290	91.8	26	8.2
WA,W	808	772	95.5	281	36.4	491	63.6	769	95.2	301	39.1	468	60.9
GUAM	63	61	96.8	21	34.4	40	65.6	61	96.8	32	52.5	29	47.5
NM,I	16	16	100.0	9	56.3	7	43.8	16	100.0	11	68.8	5	31.3

Table H-3. (September 30, 2019—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.
10TH	**7,927**	**7,353**	**92.8**	**5,846**	**79.5**	**1,507**	**20.5**	**7,349**	**92.7**	**6,196**	**84.3**	**1,153**	**15.7**
CO	658	516	78.4	290	56.2	226	43.8	509	77.4	378	74.3	131	25.7
KS	529	454	85.8	302	66.5	152	33.5	454	85.8	324	71.4	130	28.6
NM	4,760	4,634	97.4	4,128	89.1	506	10.9	4,629	97.2	4,221	91.2	408	8.8
OK,N	370	318	85.9	193	60.7	125	39.3	318	85.9	214	67.3	104	32.7
OK,E	136	124	91.2	81	65.3	43	34.7	124	91.2	98	79.0	26	21.0
OK,W	680	595	87.5	292	49.1	303	50.9	602	88.5	327	54.3	275	45.7
UT	585	549	93.8	438	79.8	111	20.2	549	93.8	481	87.6	68	12.4
WY	209	163	78.0	122	74.8	41	25.2	164	78.5	153	93.3	11	6.7
11TH	**7,497**	**6,418**	**85.6**	**3,878**	**60.4**	**2,540**	**39.6**	**6,562**	**87.5**	**4,185**	**63.8**	**2,377**	**36.2**
AL,N	656	400	61.0	237	59.3	163	40.8	400	61.0	250	62.5	150	37.5
AL,M	125	109	87.2	59	54.1	50	45.9	109	87.2	63	57.8	46	42.2
AL,S	427	263	61.6	162	61.6	101	38.4	261	61.1	176	67.4	85	32.6
FL,N	481	452	94.0	249	55.1	203	44.9	452	94.0	286	63.3	166	36.7
FL,M	1,780	1,642	92.2	969	59.0	673	41.0	1,641	92.2	1,208	73.6	433	26.4
FL,S	2,270	2,043	90.0	1,233	60.4	810	39.6	2,230	98.2	1,123	50.4	1,107	49.6
GA,N	735	653	88.8	367	56.2	286	43.8	641	87.2	445	69.4	196	30.6
GA,M	448	354	79.0	210	59.3	144	40.7	330	73.7	232	70.3	98	29.7
GA,S	575	502	87.3	392	78.1	110	21.9	498	86.6	402	80.7	96	19.3

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.

Template Appeal of Magistrate Judge's Detention Order and Request for Immediate Release

IN THE
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

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

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

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

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

bases for detention at the Initial Appearance. The federal courts of appeals all reach this same conclusion. Further, data from the Administrative Office of the U.S. Courts show that there is an exaggerated concern over risk of flight in our system, and that the vast majority of released defendants do not flee.

In this case, the government has also not presented sufficient evidence that [CLIENT] poses a "serious risk" of flight to authorize detention under § 3142(f)(2)(A). Accordingly, [he/she] 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 [JUDGE NAME] held [CLIENT's] [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. Judge [JUDGE NAME] detained [CLIENT] as a danger to the community and a risk of flight pending a detention hearing. [Add any additional procedural history here.] This appeal follows.

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

[CLIENT] is being detained in violation of the law. According to the plain language of § 3142(f), "the judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors listed in § 3142(f)(1) & (f)(2). None of the § 3142(f) factors are present in

this case.[1] Ordinary "risk of flight" is not among the § 3142(f) factors. The statute and the caselaw therefore prohibit any Court from holding a Detention Hearing and from detaining [CLIENT] pending trial.

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

The Supreme Court's seminal opinion in *United States v. Salerno*, 481 U.S. 739 (1987), confirms that a Detention Hearing may only be held if one of the seven § 3142(f) factors is present. *See id.* at 747 ("Detention hearings [are] available if" and only if one of the seven § 3142(f) factors is present.). According to the Supreme Court, "[t]he Act operates *only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f)*." *Id.* at 750 (emphasis added); *see also id.* at 747 ("The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious of crimes," specifically the crimes enumerated in § 3142(f)) (emphasis added). *Salerno* thus stands for the proposition that the factors listed in § 3142(f) serve as a gatekeeper, and only certain categories of defendants are eligible for detention in the first place. As the D.C. Circuit has held, "First, a [judge] must find one of six circumstances triggering a detention hearing…. [under] § 3142(f). Absent one of these circumstances, detention is not an option." *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999).

[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 presented no 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).

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

Detaining [CLIENT] in this case without regard to the limitations in § 3142(f) raises serious constitutional concerns. The strict limitations § 3142(f) places on pretrial detention are part of what led the Supreme Court to uphold the BRA as constitutional. It was the § 3142(f) limitations, among others, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Salerno*, 481 U.S. at 748.[2] Throughout its substantive Due Process ruling, the *Salerno* Court emphasized that the only defendants for whom the government can seek detention are those who are "already indicted or held to answer for a *serious* crime," meaning the "extremely serious offenses" listed in § 3142(f)(1). *Id.* (emphasis added); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (discussing the BRA's legislative history). An interpretation "of the [BRA] that allows danger to the community as the sole ground for detaining a defendant where detention was moved for only under (f)(2)(A) runs the risk of undercutting one of the rationales that led the

[2] 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." *Id.* at 749. 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.*

Salerno Court to uphold the statute as constitutional." *United States v. Gibson*, 384 F. Supp. 3d 955, 963 (N.D. Ind. 2019).

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

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

Unfortunately, a practice has developed that results in defendants being detained in violation of the BRA, *Salerno*, and the Constitution. Specifically, it is common for the government to seek detention at the Initial Appearance on the ground that the defendant is either "a danger to the community," "a risk of flight," or both.[3] Because neither "danger to the

[3] *See, e.g.*, *The Administration of Bail by State and Federal Courts: A Call for Reform*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), *Written Statement of Alison Siegler* at 8, https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf (presenting Congress with courtwatching data demonstrating that federal prosecutors regularly violate the BRA by requesting detention at the Initial Appearance on the impermissible ground

community" nor ordinary "risk of flight" is a factor listed in § 3142(f), it is flatly illegal to hold a Detention Hearing on either of these grounds at the initial appearance.[4] The practice in this district must be brought back in line with the law. That will only happen if this Court demands that the government provide a legitimate § 3142(f) basis for every detention request.[5]

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

Generalized "danger to the community" is not a factor in § 3142(f). Every court to have addressed this issue agrees that it is illegal for a judge to detain someone at the Initial Appearance as a "danger" or a "financial danger." *Ploof*, 851 F.2d at 11 (where none "of the subsection (f)(1) conditions were met, pre-trial detention solely on the ground of dangerousness … is not authorized"); *Friedman*, 837 F.2d at 49; *Himler*, 797 F.2d at 160; *Byrd*, 969 F.2d at 110; *Twine*, 344 F.3d at 987. The Fifth Circuit in *Byrd* emphasized that even "a defendant who *clearly* may pose a danger to society cannot be detained on that basis alone." 969 F.2d at 110 (emphasis added). Without a § 3142(f) factor present, the court has no authority to detain [CLIENT] as a danger to the community. *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)].").

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of ordinary—not serious—risk of flight and by failing to provide any evidence to support the request).

[4] *See id.* at 7 ("Yet judges regularly detain people under [§ 3142(f)(2)(A)] in non-extreme, ordinary cases without expecting the government to substantiate its request or demonstrate that there is a 'serious risk' the person will flee.").

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

[FOR FRAUD CASES] 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). Even in cases where a § 3142(f) factor exists and a detention hearing is appropriate, at the detention hearing stage 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. Any concerns that [CLIENT] poses an economic danger to the community cannot serve as a basis for holding a detention hearing or detaining [him/her] pending trial.

Because no § 3142(f)(1) or § 3142(f)(2) factor is met in [CLIENT's] case, detaining [him/her] is illegal.

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

It was improper to detain [CLIENT] and set a Detention Hearing 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 permits detention at the Initial Appearance when the defendant poses a "*serious* risk" of flight, § 3142(f)(2)(A), but in this case the government merely alleged an *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, but here the government has provided no such evidence. Third, to establish "serious risk" of flight the government must demonstrate that the defendant presents an "extreme and unusual" risk of willfully fleeing the jurisdiction if released, but the government has not met that burden here. Accordingly, it is improper to hold a Detention Hearing at all, let alone detain [CLIENT] for the duration of the case.

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

Ordinary "risk of flight" is not a factor in § 3142(f). By its plain language, § 3142(f)(2)(A) permits detention and a hearing only when a defendant poses a "*serious* risk" of flight. There is some risk of flight in every criminal case; "serious risk" of flight means something more. According to a basic canon of statutory interpretation, the term "*serious* risk" means that the risk must be more significant or extreme than an ordinary risk. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne 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.") (citation omitted).

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. A defendant "may be detained *only if the record supports a finding* that he presents a serious risk of flight." *Himler*, 797 F.2d at 160 (emphasis added); *see also United States v. Robinson*, 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010) (criticizing the government for failing to present evidence of "serious risk" of flight at the Initial Appearance and saying "no information was offered to support [the] allegation"). After all, the statute only authorizes detention "*in a case that involves*" a "serious risk" that the person will flee. § 3142(f)(2)(A) (emphasis added). This contemplates a judicial finding about whether the case in fact involves a *serious* risk of flight.[6] The government must provide an evidentiary basis to enable the judge to

[6] Had Congress intended to authorize detention hearings based on a mere certification by the

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

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

The BRA's legislative history makes clear that detention based on serious risk of flight is only appropriate under "extreme and unusual circumstances."[7] For example, the case relied on in the legislative history as extreme and unusual enough to justify detention on the grounds of serious risk of flight involved a defendant who was a fugitive and serial impersonator, had failed to appear in the past, and had recently transferred over a million dollars to Bermuda. *See Abrahams*, 575 F.2d at 4. The government must demonstrate that the risk of flight in a particular case rises to the level of extreme or unusual, and no such showing has been made here.

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

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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").

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

can prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process.[8]

IV. In This Case, the Government Has Not Met Its Burden of Proving That [CLIENT] Poses a "*Serious*" Risk Of Flight 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.]

As in *United States v. Morgan*, 2014 U.S. Dist. LEXIS 93306 (C.D. Ill. July 9, 2014), "the facts fail to establish any risk of flight," let alone a risk serious enough to authorize a detention hearing. *Id.* at *17 ("[T]he defendant has lived at his current address for over seven years and has lived in the same community for his entire life. His mother and siblings also all live relatively close to his residence, as do his children and their mothers. . . . Additionally, nothing in his criminal history suggests that he ever failed to appear for a court hearing . . . ."); *see also Friedman*, 837 F.2d at 49–50 (reversing a detention order for "serious risk of flight" where defendant was a lifelong resident of the district, was married with children, had no prior

[8] *See, e.g.,* Lauryn Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017). 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.

record, had been steadily employed before his arrest, and had been on bond for related state charges without incident).

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.

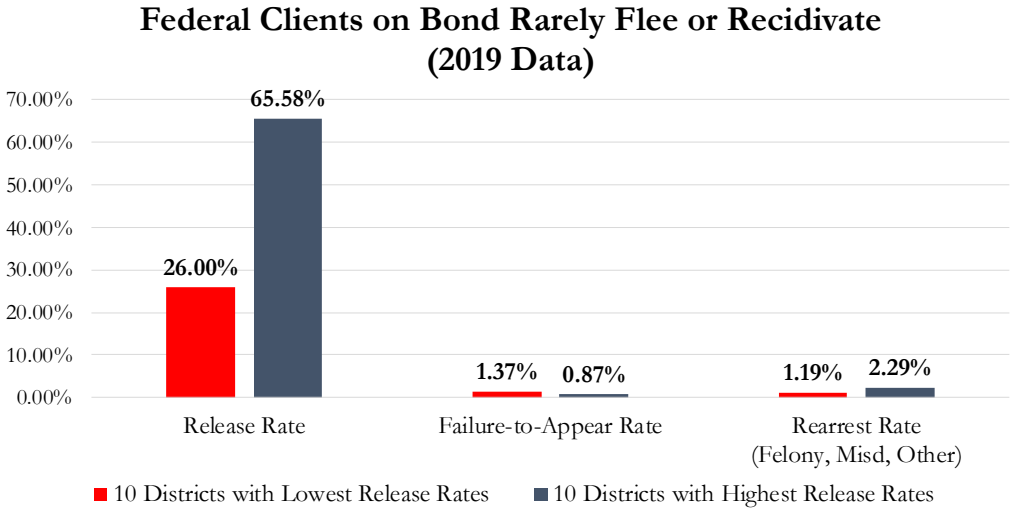
V. Statistics Showing that It Is Extraordinarily Rare for Defendants on Bond to Flee or Recidivate Further Demonstrate that [CLIENT] Does Not Pose a Serious Risk of Flight.

The government's own data show that when release increases, crime and flight do not. In this case, this Court should be guided by AO statistics showing that nearly everyone released pending trial appears in court and doesn't reoffend. In fact, in 2019, 99% of released federal defendants nationwide appeared for court as required and 98% did not commit new crimes on bond.[9] Significantly, this near-perfect compliance rate is seen equally in federal districts with very high release rates and those with very low release rates.[10] Even in districts that release two-thirds of all federal defendants on bond, fewer than 1% fail to appear in court and 2% are

[9] App. 1, AO Table H-15 (Dec. 31, 2019), *available at* Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

[10] The data showing near-perfect compliance on bond is illustrated in the chart, "Federal Clients on Bond Rarely Flee or Recidivate." The districts with the highest and lowest release rates were identified using the version of AO Table H-14A for the 12-month period ending December 31, 2019. *See* App. 2, AO Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42. The failure-to-appear and rearrest rates for these districts were calculated using App 1, AO Table H-15. With regard to flight, the ten federal districts with the lowest release rates (average 26.00%) have an average failure-to-appear rate of 1.37%, while the ten districts with the highest release rates (average 65.58%) have an *even lower* failure-to-appear rate of 0.87%. *See* App. 1; App. 2. With regard to recidivism, the ten districts with the lowest release rates have an average rearrest rate on bond of 1.19%, while the ten districts with the highest release rates have an average rearrest rate of 2.29%. *See* App. 1; App. 2. The districts with the lowest release rates are, from lowest to highest, S.D. California, W.D. Arkansas, E.D. Tennessee, S.D. Texas, E.D. Missouri, N.D. Indiana, E.D. Oklahoma, W.D. Texas, W.D. North Carolina, C.D. Illinois; the districts with the highest release rates are, from lowest to highest, E.D. Michigan, E.D. Arkansas, D. New Jersey, E.D. New York, D. Maine, D. Connecticut, W.D. New York, W.D. Washington, D. Guam, D. Northern Mariana Islands. *See* App. 2.

rearrested while released.[11] The below chart reflects this data:



The bond statistics for this district likewise strongly suggest that [CLIENT] should be released. In this district, released federal defendants appeared for court [calculate percentage of defendants who failed to appear while released using Appendix 1, Table H-15]% of the time in 2019, and only [calculate percentage of defendants who were rearrested while released using Appendix 1, Table H-15]% of defendants were rearrested on release. *See* App. 1, AO Table H-15. Yet despite the statistically low risk of flight and recidivism that defendants like [CLIENT] pose, the government recommends detention in 77% of cases nationwide and in [find percentage associated with your district in using Appendix 3, Table H-3]% of cases in this district. *See* App. 3, AO Table H-3. Clearly the government's detention requests are not tailored to the low risk of flight and recidivism that defendants in this district and elsewhere pose.

[CLIENT] must be released because the government has not presented evidence that shows that [he/she] would be among the approximately 1% of defendants who fail to appear in

[11] *See* App. 1; App. 2.

court. Detaining [CLIENT] without evidence that they pose a "serious risk" of flight violates their constitutionally protected liberty interest.

VI. 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 (1) 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/she] 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.

VII. [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].

VIII. 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.

Note to Counsel re Section V Data and the Appendices

- If you don't want to do the district-specific FTA/re-arrest calculations, you can cut that entire paragraph from Section V and leave the rest of that section as is.
- **To calculate the percentage of defendants in your district who failed to appear in court while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of failures to appear violations by going to the highlighted column, "FTA Violations."
    - Divide the total FTA Violations for your district by the total Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there was 1 FTA Violation and 262 Cases In Release Status. Divide 1 by 262, getting 0.0038. Multiply that value by 100 to get 0.38%.
- **To calculate the percentage of defendants in your district who were rearrested while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of people who violated bond by getting rearrested by going to the highlighted column, "Rearrest Violations."
        - Add up the 3 types of Rearrest Violations for your district by adding together the numbers in the columns titled Felony + Misdemeanor + Other. That sum represents the total Rearrest Violations for your district.
    - Divide the total Rearrest Violations for your district by the Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there were 9 Felony Rearrests, 2 Misdemeanor Rearrests, and 0 Other. The sum of these three values is 11. That is the total number of Rearrest Violations. There are 262 Cases In Release Status. Divide 11 by 262, getting 0.0419. Multiply that value by 100 to get 4.19%.

APPENDIX 1

AO TABLE H-15 (Dec. 31, 2019)

available at Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending December 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TOTAL	197,772	55,142	27.9	9,045	16.4	442	519	61	650	8,283	14,161
1ST	7,084	2,424	34.2	238	9.8	17	10	0	8	213	338
ME	572	262	45.8	63	24.0	9	2	0	1	55	84
MA	1,740	685	39.4	80	11.7	5	2	0	2	74	114
NH	559	245	43.8	29	11.8	2	4	0	1	24	31
RI	403	163	40.4	35	21.5	1	2	0	1	33	65
PR	3,810	1,069	28.1	31	2.9	0	0	0	3	27	44
2ND	11,394	5,178	45.4	773	14.9	78	95	16	58	644	1,157
CT	1,306	624	47.8	103	16.5	10	4	1	11	92	164
NY,N	926	304	32.8	50	16.4	2	8	0	15	39	64
NY,E	3,173	1,439	45.4	209	14.5	13	23	5	2	190	329
NY,S	4,209	1,914	45.5	212	11.1	39	36	4	29	149	303
NY,W	1,363	701	51.4	140	20.0	10	20	6	1	118	202
VT	417	196	47.0	59	30.1	4	4	0	0	56	95
3RD	8,792	3,633	41.3	451	12.4	39	26	6	23	422	711
DE	334	74	22.2	2	2.7	1	0	0	0	2	3
NJ	3,224	1,584	49.1	105	6.6	12	7	1	11	96	137
PA,E	2,026	742	36.6	138	18.6	5	6	2	4	134	287
PA,M	1,368	405	29.6	49	12.1	1	3	2	6	40	62
PA,W	1,563	693	44.3	140	20.2	19	10	1	1	134	203
VI	277	135	48.7	17	12.6	1	0	0	1	16	19
4TH	12,026	4,172	34.7	737	17.7	20	59	9	30	661	1,081
MD	1,596	611	38.3	112	18.3	4	8	0	1	110	201
NC,E	1,991	535	26.9	113	21.1	5	23	6	2	87	171
NC,M	743	242	32.6	46	19.0	0	1	0	1	43	61
NC,W	1,264	281	22.2	37	13.2	2	3	1	0	33	41
SC	2,228	814	36.5	111	13.6	2	3	0	10	101	141
VA,E	2,198	931	42.4	109	11.7	2	13	2	8	89	157
VA,W	724	248	34.3	40	16.1	3	3	0	7	36	55
WV,N	638	323	50.6	125	38.7	2	5	0	1	120	195
WV,S	644	187	29.0	44	23.5	0	0	0	0	42	59
5TH	43,756	7,287	16.7	867	11.9	43	33	5	66	789	1,013
LA,E	847	281	33.2	17	6.0	1	2	0	2	12	20
LA,M	442	163	36.9	24	14.7	2	3	0	0	20	30
LA,W	829	193	23.3	3	1.6	0	0	0	0	3	3
MS,N	418	176	42.1	30	17.0	3	3	0	1	25	38
MS,S	1,068	307	28.7	16	5.2	2	1	0	1	12	16
TX,N	2,442	895	36.7	118	13.2	3	2	5	7	111	145
TX,E	1,890	349	18.5	38	10.9	4	5	0	1	38	45
TX,S	18,370	2,629	14.3	276	10.5	27	16	0	28	234	295
TX,W	17,450	2,294	13.1	345	15.0	1	1	0	26	334	421
6TH	13,428	4,801	35.8	985	20.5	45	49	2	45	930	1,789
KY,E	1,122	305	27.2	33	10.8	0	0	0	1	32	39
KY,W	941	363	38.6	50	13.8	3	4	0	2	47	71
MI,E	2,382	1,109	46.6	287	25.9	11	6	0	7	284	611
MI,W	762	269	35.3	49	18.2	4	5	0	5	40	56
OH,N	1,970	660	33.5	72	10.9	1	3	1	19	67	116
OH,S	1,930	866	44.9	193	22.3	0	0	0	3	189	361

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending December 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TN,E	1,935	398	20.6	49	12.3	2	3	0	0	44	58
TN,M	938	333	35.5	110	33.0	20	15	0	2	98	215
TN,W	1,448	498	34.4	142	28.5	4	13	1	6	129	262
7TH	7,785	2,813	36.1	505	18.0	28	39	6	13	466	873
IL,N	2,876	1,260	43.8	245	19.4	20	27	0	7	224	462
IL,C	694	192	27.7	34	17.7	1	2	0	1	32	39
IL,S	662	219	33.1	47	21.5	1	6	1	1	43	81
IN,N	981	291	29.7	23	7.9	4	1	0	2	17	23
IN,S	1,470	395	26.9	74	18.7	0	0	0	1	73	117
WI,E	758	366	48.3	71	19.4	2	3	5	0	66	136
WI,W	344	90	26.2	11	12.2	0	0	0	1	11	15
8TH	14,263	4,457	31.2	1,341	30.1	77	106	14	64	1,256	2,793
AR,E	1,971	794	40.3	257	32.4	25	16	2	35	236	431
AR,W	675	127	18.8	8	6.3	0	0	0	4	7	6
IA,N	851	212	24.9	80	37.7	1	12	2	3	72	121
IA,S	1,163	326	28.0	109	33.4	2	11	8	0	104	185
MN	934	346	37.0	75	21.7	5	10	1	3	64	110
MO,E	3,246	920	28.3	418	45.4	18	9	0	9	407	1,344
MO,W	2,334	599	25.7	139	23.2	7	10	0	0	129	227
NE	1,186	413	34.8	73	17.7	8	12	1	3	65	97
ND	774	298	38.5	47	15.8	2	3	0	6	44	59
SD	1,129	422	37.4	135	32.0	9	23	0	1	128	213
9TH	51,712	12,431	24.0	1,998	16.1	36	38	0	255	1,849	2,844
AK	448	131	29.2	17	13.0	1	0	0	1	17	27
AZ	20,907	2,264	10.8	475	21.0	4	11	0	65	453	587
CA,N	2,577	1,208	46.9	161	13.3	0	0	0	11	156	307
CA,E	2,051	722	35.2	54	7.5	1	0	0	8	53	65
CA,C	6,070	2,205	36.3	219	9.9	13	7	0	25	195	304
CA,S	12,034	2,612	21.7	523	20.0	7	9	0	114	443	669
HI	545	284	52.1	39	13.7	0	0	0	0	40	50
ID	790	238	30.1	45	18.9	2	1	0	4	42	66
MT	760	271	35.7	55	20.3	2	3	0	0	53	69
NV	1,583	578	36.5	73	12.6	1	1	0	7	70	92
OR	1,413	696	49.3	178	25.6	4	4	0	10	172	299
WA,E	920	347	37.7	69	19.9	1	1	0	6	65	131
WA,W	1,439	745	51.8	70	9.4	0	1	0	4	70	136
GUAM	140	107	76.4	17	15.9	0	0	0	0	17	38
NM,I	35	23	65.7	3	13.0	0	0	0	0	3	4
10TH	13,088	3,225	24.6	523	16.2	16	17	0	65	481	721
CO	1,288	408	31.7	52	12.7	3	1	0	29	46	67
KS	1,173	406	34.6	92	22.7	2	3	0	3	92	151
NM	6,919	1,101	15.9	143	13.0	0	0	0	16	140	154
OK,N	580	215	37.1	75	34.9	1	0	0	3	70	153
OK,E	266	57	21.4	4	7.0	0	0	0	1	3	4
OK,W	1,258	502	39.9	64	12.7	2	3	0	4	57	85
UT	1,222	417	34.1	82	19.7	8	10	0	5	64	98
WY	382	119	31.2	11	9.2	0	0	0	4	9	9
11TH	14,444	4,721	32.7	627	13.3	43	47	3	23	572	841
AL,N	1,188	372	31.3	60	16.1	6	6	0	4	55	93
AL,M	355	159	44.8	13	8.2	0	0	0	1	12	21
AL,S	706	233	33.0	47	20.2	2	4	0	0	44	52
FL,N	831	360	43.3	33	9.2	5	3	2	1	26	44

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending December 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
FL,M	3,557	997	28.0	162	16.2	12	16	0	5	147	216
FL,S	3,967	1,319	33.2	161	12.2	1	0	0	2	159	200
GA,N	1,928	683	35.4	80	11.7	7	10	1	5	68	112
GA,M	977	373	38.2	52	13.9	8	6	0	2	45	77
GA,S	935	225	24.1	19	8.4	2	2	0	3	16	26

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

APPENDIX 2

AO TABLE H-14A (Dec. 31, 2019)

https://perma.cc/32XF-2S42

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
1ST	2,255	1,311	58.1	944	41.9
ME	224	89	39.7	135	60.3
MA	637	346	54.3	291	45.7
NH	221	90	40.7	131	59.3
RI	133	62	46.6	71	53.4
PR	1,040	724	69.6	316	30.4
2ND	3,330	1,463	43.9	1,867	56.1
CT	409	157	38.4	252	61.6
NY,N	308	181	58.8	127	41.2
NY,E	665	264	39.7	401	60.3
NY,S	1,357	636	46.9	721	53.1
NY,W	399	145	36.3	254	63.7
VT	192	80	41.7	112	58.3
3RD	2,923	1,454	49.7	1,469	50.3
DE	79	48	60.8	31	39.2
NJ	1,148	456	39.7	692	60.3
PA,E	724	396	54.7	328	45.3
PA,M	271	160	59.0	111	41.0
PA,W	600	344	57.3	256	42.7
VI	101	50	49.5	51	50.5
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
5TH	13,055	9,189	70.4	3,866	29.6
LA,E	282	175	62.1	107	37.9
LA,M	133	64	48.1	69	51.9
LA,W	228	146	64.0	82	36.0
MS,N	169	72	42.6	97	57.4
MS,S	435	260	59.8	175	40.2
TX,N	986	576	58.4	410	41.6
TX,E	691	476	68.9	215	31.1
TX,S	5,313	3,965	74.6	1,348	25.4
TX,W	4,818	3,455	71.7	1,363	28.3

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.
6TH	5,162	2,890	56.0	2,272	44.0
KY,E	452	273	60.4	179	39.6
KY,W	337	188	55.8	149	44.2
MI,E	743	296	39.8	447	60.2
MI,W	326	191	58.6	135	41.4
OH,N	814	477	58.6	337	41.4
OH,S	745	323	43.4	422	56.6
TN,E	872	656	75.2	216	24.8
TN,M	290	137	47.2	153	52.8
TN,W	583	349	59.9	234	40.1
7TH	2,556	1,464	57.3	1,092	42.7
IL,N	780	340	43.6	440	56.4
IL,C	258	184	71.3	74	28.7
IL,S	301	172	57.1	129	42.9
IN,N	360	261	72.5	99	27.5
IN,S	558	374	67.0	184	33.0
WI,E	230	101	43.9	129	56.1
WI,W	69	32	46.4	37	53.6
8TH	5,597	3,558	63.6	2,039	36.4
AR,E	499	198	39.7	301	60.3
AR,W	243	185	76.1	58	23.9
IA,N	352	217	61.6	135	38.4
IA,S	496	317	63.9	179	36.1
MN	349	197	56.4	152	43.6
MO,E	1,573	1,164	74.0	409	26.0
MO,W	875	604	69.0	271	31.0
NE	440	260	59.1	180	40.9
ND	253	138	54.5	115	45.5
SD	517	278	53.8	239	46.2
9TH	14,865	9,453	63.6	5,412	36.4
AK	152	95	62.5	57	37.5
AZ	3,004	1,767	58.8	1,237	41.2
CA,N	752	317	42.2	435	57.8
CA,E	489	320	65.4	169	34.6
CA,C	1,472	676	45.9	796	54.1
CA,S	6,393	5,156	80.7	1,237	19.3
HI	199	82	41.2	117	58.8
ID	297	174	58.6	123	41.4
MT	305	143	46.9	162	53.1
NV	376	175	46.5	201	53.5
OR	455	208	45.7	247	54.3
WA,E	273	143	52.4	130	47.6
WA,W	627	179	28.5	448	71.5
GUAM	57	16	28.1	41	71.9
NM,I	14	2	14.3	12	85.7

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.
10TH	3,943	2,188	55.5	1,755	44.5
CO	431	248	57.5	183	42.5
KS	433	231	53.3	202	46.7
NM	1,429	807	56.5	622	43.5
OK,N	290	146	50.3	144	49.7
OK,E	127	92	72.4	35	27.6
OK,W	522	215	41.2	307	58.8
UT	546	351	64.3	195	35.7
WY	165	98	59.4	67	40.6
11TH	5,309	2,821	53.1	2,488	46.9
AL,N	384	188	49.0	196	51.0
AL,M	105	47	44.8	58	55.2
AL,S	205	87	42.4	118	57.6
FL,N	400	172	43.0	228	57.0
FL,M	1,207	714	59.2	493	40.8
FL,S	1,683	954	56.7	729	43.3
GA,N	555	228	41.1	327	58.9
GA,M	389	182	46.8	207	53.2
GA,S	381	249	65.4	132	34.6

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."

APPENDIX 3

AO TABLE H-3 (Sept. 30, 3019)

https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf

Table H-3.
U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release
For the 12-Month Period Ending September 30, 2019

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	**108,163**	**97,784**	**90.4**	**69,571**	**71.1**	**28,213**	**28.9**	**98,071**	**90.7**	**75,365**	**76.8**	**22,706**	**23.2**
1ST	**2,730**	**2,342**	**85.8**	**1,450**	**61.9**	**892**	**38.1**	**2,330**	**85.3**	**1,754**	**75.3**	**576**	**24.7**
ME	298	202	67.8	93	46.0	109	54.0	202	67.8	135	66.8	67	33.2
MA	760	558	73.4	265	47.5	293	52.5	557	73.3	324	58.2	233	41.8
NH	280	216	77.1	108	50.0	108	50.0	214	76.4	111	51.9	103	48.1
RI	143	132	92.3	76	57.6	56	42.4	133	93.0	88	66.2	45	33.8
PR	1,249	1,234	98.8	908	73.6	326	26.4	1,224	98.0	1,096	89.5	128	10.5
2ND	**3,942**	**3,690**	**93.6**	**1,808**	**49.0**	**1,882**	**51.0**	**3,669**	**93.1**	**2,239**	**61.0**	**1,430**	**39.0**
CT	534	446	83.5	200	44.8	246	55.2	434	81.3	255	58.8	179	41.2
NY,N	442	416	94.1	313	75.2	103	24.8	411	93.0	315	76.6	96	23.4
NY,E	811	786	96.9	375	47.7	411	52.3	781	96.3	483	61.8	298	38.2
NY,S	1,403	1,376	98.1	601	43.7	775	56.3	1,375	98.0	738	53.7	637	46.3
NY,W	536	496	92.5	228	46.0	268	54.0	495	92.4	320	64.6	175	35.4
VT	216	170	78.7	91	53.5	79	46.5	173	80.1	128	74.0	45	26.0
3RD	**3,583**	**3,390**	**94.6**	**1,911**	**56.4**	**1,479**	**43.6**	**3,382**	**94.4**	**2,074**	**61.3**	**1,308**	**38.7**
DE	133	131	98.5	100	76.3	31	23.7	131	98.5	101	77.1	30	22.9
NJ	1,399	1,342	95.9	678	50.5	664	49.5	1,342	95.9	716	53.4	626	46.6
PA,E	866	853	98.5	492	57.7	361	42.3	853	98.5	554	64.9	299	35.1
PA,M	445	376	84.5	268	71.3	108	28.7	370	83.1	267	72.2	103	27.8
PA,W	592	567	95.8	304	53.6	263	46.4	566	95.6	352	62.2	214	37.8
VI	148	121	81.8	69	57.0	52	43.0	120	81.1	84	70.0	36	30.0

Table H-3. (September 30, 2019—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.
4TH	**6,411**	**4,872**	**76.0**	**3,069**	**63.0**	**1,803**	**37.0**	**5,093**	**79.4**	**3,678**	**72.2**	**1,415**	**27.8**
MD	668	631	94.5	423	67.0	208	33.0	629	94.2	432	68.7	197	31.3
NC,E	1,088	823	75.6	592	71.9	231	28.1	823	75.6	702	85.3	121	14.7
NC,M	412	388	94.2	236	60.8	152	39.2	386	93.7	279	72.3	107	27.7
NC,W	607	553	91.1	414	74.9	139	25.1	549	90.4	450	82.0	99	18.0
SC	948	685	72.3	369	53.9	316	46.1	680	71.7	411	60.4	269	39.6
VA,E	1,512	873	57.7	406	46.5	467	53.5	1,084	71.7	715	66.0	369	34.0
VA,W	406	319	78.6	243	76.2	76	23.8	309	76.1	243	78.6	66	21.4
WV,N	372	304	81.7	162	53.3	142	46.7	303	81.5	164	54.1	139	45.9
WV,S	398	296	74.4	224	75.7	72	24.3	330	82.9	282	85.5	48	14.5
5TH	**26,777**	**24,455**	**91.3**	**20,039**	**81.9**	**4,416**	**18.1**	**24,413**	**91.2**	**21,127**	**86.5**	**3,286**	**13.5**
LA,E	333	312	93.7	196	62.8	116	37.2	311	93.4	226	72.7	85	27.3
LA,M	186	136	73.1	67	49.3	69	50.7	136	73.1	84	61.8	52	38.2
LA,W	435	279	64.1	182	65.2	97	34.8	261	60.0	179	68.6	82	31.4
MS,N	225	174	77.3	77	44.3	97	55.7	174	77.3	82	47.1	92	52.9
MS,S	587	533	90.8	432	81.1	101	18.9	531	90.5	422	79.5	109	20.5
TX,N	1,084	1,031	95.1	561	54.4	470	45.6	1,017	93.8	720	70.8	297	29.2
TX,E	934	757	81.0	555	73.3	202	26.7	755	80.8	640	84.8	115	15.2
TX,S	11,479	9,884	86.1	8,350	84.5	1,534	15.5	9,875	86.0	8,703	88.1	1,172	11.9
TX,W	11,514	11,349	98.6	9,619	84.8	1,730	15.2	11,353	98.6	10,071	88.7	1,282	11.3
6TH	**6,518**	**5,548**	**85.1**	**3,511**	**63.3**	**2,037**	**36.7**	**5,651**	**86.7**	**3,978**	**70.4**	**1,673**	**29.6**
KY,E	642	512	79.8	378	73.8	134	26.2	514	80.1	390	75.9	124	24.1
KY,W	446	346	77.6	229	66.2	117	33.8	346	77.6	252	72.8	94	27.2
MI,E	1,045	967	92.5	512	52.9	455	47.1	966	92.4	583	60.4	383	39.6
MI,W	414	399	96.4	249	62.4	150	37.6	399	96.4	302	75.7	97	24.3
OH,N	1,020	868	85.1	562	64.7	306	35.3	879	86.2	616	70.1	263	29.9
OH,S	883	745	84.4	299	40.1	446	59.9	745	84.4	398	53.4	347	46.6
TN,E	996	954	95.8	774	81.1	180	18.9	954	95.8	805	84.4	149	15.6
TN,M	367	193	52.6	162	83.9	31	16.1	284	77.4	213	75.0	71	25.0
TN,W	705	564	80.0	346	61.3	218	38.7	564	80.0	419	74.3	145	25.7

Table H-3. (September 30, 2019—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.
7TH	**3,221**	**2,789**	**86.6**	**1,654**	**59.3**	**1,135**	**40.7**	**2,785**	**86.5**	**2,039**	**73.2**	**746**	**26.8**
IL,N	1,080	1,014	93.9	501	49.4	513	50.6	1,017	94.2	684	67.3	333	32.7
IL,C	285	273	95.8	220	80.6	53	19.4	272	95.4	232	85.3	40	14.7
IL,S	347	255	73.5	155	60.8	100	39.2	255	73.5	186	72.9	69	27.1
IN,N	372	352	94.6	261	74.1	91	25.9	353	94.9	286	81.0	67	19.0
IN,S	658	580	88.1	381	65.7	199	34.3	573	87.1	481	83.9	92	16.1
WI,E	304	232	76.3	100	43.1	132	56.9	232	76.3	133	57.3	99	42.7
WI,W	175	83	47.4	36	43.4	47	56.6	83	47.4	37	44.6	46	55.4
8TH	**6,711**	**5,967**	**88.9**	**3,931**	**65.9**	**2,036**	**34.1**	**5,940**	**88.5**	**4,698**	**79.1**	**1,242**	**20.9**
AR,E	686	516	75.2	271	52.5	245	47.5	521	75.9	335	64.3	186	35.7
AR,W	340	290	85.3	245	84.5	45	15.5	286	84.1	248	86.7	38	13.3
IA,N	446	387	86.8	274	70.8	113	29.2	388	87.0	297	76.5	91	23.5
IA,S	550	505	91.8	316	62.6	189	37.4	505	91.8	390	77.2	115	22.8
MN	457	401	87.7	214	53.4	187	46.6	387	84.7	270	69.8	117	30.2
MO,E	1,691	1,625	96.1	1,211	74.5	414	25.5	1,638	96.9	1,382	84.4	256	15.6
MO,W	998	904	90.6	566	62.6	338	37.4	890	89.2	749	84.2	141	15.8
NE	595	545	91.6	386	70.8	159	29.2	532	89.4	422	79.3	110	20.7
ND	345	232	67.2	126	54.3	106	45.7	230	66.7	149	64.8	81	35.2
SD	603	562	93.2	322	57.3	240	42.7	563	93.4	456	81.0	107	19.0
9TH	**32,846**	**30,960**	**94.3**	**22,474**	**72.6**	**8,486**	**27.4**	**30,897**	**94.1**	**23,397**	**75.7**	**7,500**	**24.3**
AK	188	169	89.9	119	70.4	50	29.6	165	87.8	134	81.2	31	18.8
AZ	16,929	16,260	96.0	15,104	92.9	1,156	7.1	16,266	96.1	15,514	95.4	752	4.6
CA,N	825	807	97.8	352	43.6	455	56.4	813	98.5	530	65.2	283	34.8
CA,E	629	619	98.4	434	70.1	185	29.9	618	98.3	524	84.8	94	15.2
CA,C	2,036	1,930	94.8	1,129	58.5	801	41.5	1,924	94.5	1,305	67.8	619	32.2
CA,S	8,671	8,077	93.1	3,666	45.4	4,411	54.6	8,007	92.3	3,353	41.9	4,654	58.1
HI	233	193	82.8	61	31.6	132	68.4	193	82.8	131	67.9	62	32.1
ID	428	297	69.4	176	59.3	121	40.7	311	72.7	245	78.8	66	21.2
MT	434	347	80.0	255	73.5	92	26.5	347	80.0	255	73.5	92	26.5
NV	584	546	93.5	328	60.1	218	39.9	545	93.3	392	71.9	153	28.1
OR	572	546	95.5	305	55.9	241	44.1	546	95.5	380	69.6	166	30.4
WA,E	430	320	74.4	234	73.1	86	26.9	316	73.5	290	91.8	26	8.2
WA,W	808	772	95.5	281	36.4	491	63.6	769	95.2	301	39.1	468	60.9
GUAM	63	61	96.8	21	34.4	40	65.6	61	96.8	32	52.5	29	47.5
NM,I	16	16	100.0	9	56.3	7	43.8	16	100.0	11	68.8	5	31.3

Table H-3. (September 30, 2019—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.
10TH	**7,927**	**7,353**	**92.8**	**5,846**	**79.5**	**1,507**	**20.5**	**7,349**	**92.7**	**6,196**	**84.3**	**1,153**	**15.7**
CO	658	516	78.4	290	56.2	226	43.8	509	77.4	378	74.3	131	25.7
KS	529	454	85.8	302	66.5	152	33.5	454	85.8	324	71.4	130	28.6
NM	4,760	4,634	97.4	4,128	89.1	506	10.9	4,629	97.2	4,221	91.2	408	8.8
OK,N	370	318	85.9	193	60.7	125	39.3	318	85.9	214	67.3	104	32.7
OK,E	136	124	91.2	81	65.3	43	34.7	124	91.2	98	79.0	26	21.0
OK,W	680	595	87.5	292	49.1	303	50.9	602	88.5	327	54.3	275	45.7
UT	585	549	93.8	438	79.8	111	20.2	549	93.8	481	87.6	68	12.4
WY	209	163	78.0	122	74.8	41	25.2	164	78.5	153	93.3	11	6.7
11TH	**7,497**	**6,418**	**85.6**	**3,878**	**60.4**	**2,540**	**39.6**	**6,562**	**87.5**	**4,185**	**63.8**	**2,377**	**36.2**
AL,N	656	400	61.0	237	59.3	163	40.8	400	61.0	250	62.5	150	37.5
AL,M	125	109	87.2	59	54.1	50	45.9	109	87.2	63	57.8	46	42.2
AL,S	427	263	61.6	162	61.6	101	38.4	261	61.1	176	67.4	85	32.6
FL,N	481	452	94.0	249	55.1	203	44.9	452	94.0	286	63.3	166	36.7
FL,M	1,780	1,642	92.2	969	59.0	673	41.0	1,641	92.2	1,208	73.6	433	26.4
FL,S	2,270	2,043	90.0	1,233	60.4	810	39.6	2,230	98.2	1,123	50.4	1,107	49.6
GA,N	735	653	88.8	367	56.2	286	43.8	641	87.2	445	69.4	196	30.6
GA,M	448	354	79.0	210	59.3	144	40.7	330	73.7	232	70.3	98	29.7
GA,S	575	502	87.3	392	78.1	110	21.9	498	86.6	402	80.7	96	19.3

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.

DETENTION HEARING MATERIALS

Detention Hearing In-Court Checklist & Flowchart

DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

IF NO STATUTORY PRESUMPTION OF DETENTION APPLIES

☐ **No presumption of detention in the following types of cases:**
- Crimes of violence (robbery, etc.), felon in possession under § 922(g), illegal reentry, fraud.
- Non-citizen cases; removable alien cases. *See United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) ("[A]lthough Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list.").

☐ **In non-presumption cases, remind judge that the statute contains a presumption of release on personal recognizance without *any* conditions.**
- 18 U.S.C. § 3142(b): The judge "shall order the pretrial release of the [client] on personal recognizance . . . unless" there are absolutely NO conditions of release that would reasonably assure (1) that the client will return to court and (2) that the client will not pose a danger to the community (emphasis added).
- "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).
- Under the federal statutory scheme, "it is only a 'limited group of offenders' who should be [detained] pending trial." *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987) (quoting S. Rep. N. 98-225 at 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189); *see also United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992) ("There can be no doubt that this Act clearly favors nondetention.").

☐ **Argue that the government has not met its burden of proof regarding the safety of community and assuring appearance in court.**
- For the safety of community, government must prove by "clear and convincing evidence," § 3142(f), that there are no conditions of release that will "reasonably assure" the safety of the community. *See United States v. Patriarca*, 948 F.2d 789, 792–93 (1st Cir. 1991).
- For assuring appearance in court, government must prove by a preponderance of the evidence that there are no conditions of release that will reasonably assure your client's appearance in court. *See Patriarca*, 948 F.2d at 792–93.

☐ **Argue that there *are* conditions of release that will "reasonably assure" appearance and safety, and therefore that detention is illegal. § 3142(e)(1).**
- Remind judge that the statute contains a "least restrictive conditions" requirement and that the conditions need only "reasonably assure" appearance and safety.
- Request that the judge release client on the least restrictive conditions that will "reasonably assure" appearance and safety.
- Cite to statute:
  - The judge "shall order the pretrial release of the person," § 3142(c)(1) "subject to the least restrictive further condition, or combination of conditions that . . . will reasonably assure the appearance of the person . . . and the safety of any other person and the community," § 3142(c)(1)(B).
  - The judge is only allowed to detain a client after a detention hearing if the judge finds that no condition or combination of conditions will reasonably assure the appearance of the person . . . and the safety of any other person and the community." § 3142(e)(1).

☐ **Propose pretrial release conditions that will "reasonably assure" appearance and safety, and contest conditions that are overly "restrictive" or are not necessary to meet those goals.**

- **Under § 3142(c)(1)(B), available conditions include:**
  - Place client in custody of third-party custodian "who agrees to assume supervision and to report any violation of a release condition to the court" [(i)]
  - Maintain or actively seek employment [(ii)]
  - Maintain or commence an educational program [(iii)]
  - Follow restrictions on "personal associations, place of abode, or travel" [(iv)]
    - Can include electronic monitoring, GPS monitoring, home detention (which allows defendant to leave for employment/schooling/etc.), home incarceration (24-hour lockdown)
    - Can include residence at a halfway house or community corrections center
  - Avoid "all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense" [(v)]
  - Report on a "regular basis" to PTS or some other agency [(vi)]
  - Comply with a curfew [(vii)]
  - Refrain from possessing "a firearm, destructive device, or other dangerous weapon" [(viii)]
  - Refrain from "excessive use of alcohol" [(ix)]
  - Refrain from "any use of a narcotic drug or other controlled substance . . . without a prescription" [(ix)]
  - Undergo "medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency" [(x)]
  - Post "property of a sufficient unencumbered value, including money" [(xi)]
  - Post a "bail bond with solvent sureties" [(xii)]
  - Require the client to "return to custody for specified hours following release for employment, schooling, or other limited purposes" [(xiii)]
  - Or "<u>any other condition</u> 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)]

➢ **<u>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:</u>**

☐ **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)]

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

DETENTION HEARING CHECKLIST FOR DEFENSE ATTORNEYS

IF AUSA ARGUES THAT A STATUTORY PRESUMPTION OF DETENTION APPLIES

☐ **Ask AUSA to specify which presumption of detention applies.**

☐ **Analyze and dispute whether a presumption of detention even applies.**

- For the § 3142(e)(3) presumption of detention, the following must be satisfied:
  1. Current charge is a:
     - Drug case charged under 21 U.S.C. §§ 801–41 or 951 et seq. with maximum penalty of 10 years or more [§ 3142(e)(3)(A)]
     - Gun case charged under 18 U.S.C. § 924(c) [§ 3142(e)(3)(B)]
     - Terrorism case charged under 18 U.S.C. § 2332b [§ 3142(e)(3)(B) & (C)]
     - Case involving a minor victim, mostly charged under 18 U.S.C. § 2241–425 [§ 3142(e)(3)(E)]
  2. There is probable cause to believe the client committed current offense.
  - ***NOTE:*** **The following offenses do not automatically trigger a presumption of detention: crimes of violence (robbery, etc.), felon in possession under § 922(g), illegal reentry.**

- The § 3142(e)(2) presumption of detention is extremely rare. It only applies when the client is charged with one of a few serious crimes and the client has a prior conviction for a specified offense that was committed recently and while on pretrial release in another case. Specifically, the following conditions must be satisfied:
  1. Current charge is a:
     - Crime of violence
     - Sex trafficking of children
     - Terrorism
     - Crime with maximum punishment of life or death
     - Drug offense with maximum penalty of 10 years or more
     - Felony case where the client has two priors that are either (1) a crime of violence or drug offense with maximum penalty of 10 years or more; or (2) felony involving a minor victim or gun.
  2. Client has prior conviction of:
     - Crime of violence
     - Sex trafficking of children
     - Terrorism
     - Crime with maximum punishment of life or death
     - Drug offense with maximum penalty of 10 years or more
  3. The prior offense was committed while the client was on pretrial release.
  4. It has been five years or less since the date of conviction/release for that prior offense.

☐ **Ask AUSA to specify what the presumption entails in your particular case and be prepared to explain it to the judge.**

- For the § 3142(e)(3) presumption: the rebuttable presumption is that no conditions will reasonably assure appearance and safety of the community.
- For the § 3142(e)(2) presumption (very rare): the rebuttable presumption is that no conditions will reasonably assure safety of any other person and the community.

☐ **Explain that, under the law, it takes very little evidence to rebut the presumption.**

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

☐ **Rebut the presumption by offering "evidence favorable to a defendant that comes within a category listed in § 3142(g)"**

- Nature and circumstances of offense charged [(g)(1)]
- The "weight of evidence against the person" [(g)(2)]
  - **Argue that placing too much emphasis on the weight of the evidence is akin to applying a presumption of guilt, which is forbidden under § 3142(j).**
  - ***NOTE:*** According to case law, this is the least important factor. *See, e.g.*, *United States v. Townsend,* 897 F.2d 989, 994 (9th Cir. 1990) ("The weight of the evidence against the defendant is a factor to be considered but it is 'the least important' of the various factors.").

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

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

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

☐ **Explain that, once the presumption is rebutted it's just one factor in the analysis**

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

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

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

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

- This finding must be made by clear and convincing evidence. *United States v. Patriarca*, 948 F.2d 789, 792–93 (1st Cir. 1991) (citing § 3142(f)); *Dominguez*, 783 F.2d at 707.
- *See, e.g.*, *United States v. Dodd*, 2010 U.S. Dist. LEXIS 30830, at *9 (D. Me. Mar. 29, 2010) (releasing defendant despite prior flight and eluding authorities on the ground that there were conditions of release that could nevertheless reasonably assure appearance in court).

☐ **Remind judge that, even in a presumption case, the statute contains a "least restrictive conditions" requirement.**
- The judge "shall order the pretrial release of the person," § 3142(c)(1), "subject to the least restrictive further condition, or combination of conditions that . . . will reasonably assure the appearance of the person . . . and the safety of any other person and the community," § 3142(c)(1)(B).

☐ **Propose pretrial release conditions that would "reasonably assure" appearance and safety and contest conditions that are overly "restrictive" or are not necessary to meet those goals. (See conditions listed on pp. 1-2.)**

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

☐ **Object**, citing § 3142(c)(2): "The judicial officer may not impose a financial condition that results in the pretrial detention of the person."
- "[T]he Government confirmed that it would not oppose release with significant conditions, if appropriate financial security were available to assure Mr. Dodd's appearance. . . . [However,] the Court became concerned that if not released, the critical factor for his continued incarceration would be his and his family's lack of wealth or property, a circumstance the Court considered to be potentially contrary to § 3142(c)(2) and basic concepts of equal justice." *United States v. Dodd*, 2010 U.S. Dist. LEXIS 30830, at *7 (D. Me. Mar. 29, 2010).

☐ **Tell the judge the Judicial Conference of the United States, led by Chief Justice John Roberts, recently asked Congress to limit the presumption of detention in drug cases to people with very serious criminal records.** *See* Report of the Proceedings of the Judicial Conference of the United States, September 12, 2017, at 10, http://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf.
- This reform was proposed after a government study concluded that the presumption was unnecessarily increasing the detention rates for low-risk defendants, in particular those charged with drug crimes. *Id.*

☐ **Inform the judge that research favors limiting the presumption of detention.**
- A government study found that presumption cases had a lower re-arrest rate than non-presumption cases for almost every risk level. The study found that presumption cases in the lowest risk category were re-arrested at slightly higher rates than non-presumption cases. But for all other risk categories, presumption cases had lower rates of re-arrest than non-presumption cases. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Federal Probation 52, 58 (2017), https://www.uscourts.gov/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates.
- Furthermore, "across all of the risk categories, there was no significant difference in rates of

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***

Federal Criminal Justice Clinic
2019

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

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

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 proferred 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).

Template Motion for Release in a Presumption Case

IN THE
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

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

DEFENDANT'S MOTION FOR PRETRIAL RELEASE IN PRESUMPTION CASE

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court release [him/her] on bond pursuant to the Bail Reform Act, 18 U.S.C. § 3142 and *United States v. Salerno*, 481 U.S. 739 (1987). [CLIENT] has rebutted the presumption of detention with evidence that [short summary of evidence under 3142(g) that rebuts the presumption—see Part IV]. 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 skyrocketed since the BRA was enacted, rising from 19% in 1985 to 75% in 2019.[2] A recent study by the Administrative Office

[1] Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. 52, 56–57 (2017), archived at https://perma.cc/9HGU-MN2B.

[2] *Pretrial Release and Detention: The Bail Reform Act of 1984*, Bureau of Just. Stat. Special Rep., at 2 (Feb. 1988), https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf (Table 1) (18.8% of defendants detained pretrial in 1985); *Judicial Business: Federal Pretrial Services Tables*, Admin. Off. U.S. Courts ("AO Table"), Table H-14 (Sept. 30, 2019) https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2019.pdf (74.8% of defendants detained pretrial in 2019); *see also* AO Table H-14A (Sept. 30, 2019),

of the Courts (AO) attributed this "massive increase"[3] in detention rates to the presumptions of detention, especially as they are applied to low-risk defendants.[4] The statutory presumptions in drug and firearm cases applied to *nearly half* of all federal cases each year.[5] The presumptions of detention have thus become "an almost de facto detention order for almost half of all federal cases."[6]

The study further found that the presumptions increase the detention rate without advancing community safety. Rather than jailing the worst of the worst, the presumptions over-incarcerate the lowest-risk offenders in the system, people who are stable, employed, educated, and have minimal to no criminal history.[7] When a low-risk individual is not facing a presumption, they're released 94% of the time.[8] Yet an identically low-risk individual in a presumption case is released just 68% of the time.[9] Recent testimony before Congress relied on this government study to call for reform: "These presumptions must be changed because they've had far-reaching and devastating consequences that were unforeseen and unintended by Congress."[10] Moreover, "[t]he BRA's legislative history demonstrates that Congress did not

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https://www.uscourts.gov/sites/default/files/data_tables/jb_h14a_0930.2019.pdf (61% detention rate *excluding immigration cases*).

[3] Austin, *supra* note 1, at 61.

[4] *Id.* at 57.

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

[6] *Id.* at 61.

[7] *Id.* at 57.

[8] *Id.*

[9] *Id.*

[10] *See The Administration of Bail by State and Federal Courts: A Call for Reform*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (2019), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2256; *Testimony of Alison Siegler* at PDF 6–7 (Nov. 14, 2019), https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-TTF-SieglerA-20191114.pdf; *see also Written Statement of Alison Siegler* at 13–17 (Nov. 14, 2019), https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf (calling for the complete elimination of the presumptions in drug and gun cases).

intend the drug presumption to apply so broadly," and only intended it to apply to "major drug traffickers," not people like [CLIENT].[11]

[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 of low-risk defendants, particularly in drug trafficking cases."[12] 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 or another person."[13] 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. Based on the proposed legislation, commentators have urged judges to give "little, if any, weight to the drug presumption of detention at the detention hearing stage."[14]

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."[15] For example, the study explains that "[e]very day that a defendant remains in custody, he or she may lose employment which in turn

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[11] Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 Ohio St. J. Crim. L. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589862, PDF at 7–9 (analyzing legislative history of presumptions in detail).

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

[13] *Id.*

[14] Zunkel & Siegler, *supra* note 11, PDF at 4.

[15] Austin, *supra* note 1, at 61.

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."[16] 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.[17] [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%.[18]] The other emotional and psychological harms visited upon the children of incarcerated parents are well-documented.[19]

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 phase as well as in the years following case disposition."[20] More recent studies have confirmed that pretrial detention is criminogenic[21] and cautioned that "lower crime rates should not be

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[16] *Id.* at 53; *see also* Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) Fed. Prob. 39, 42 (2018), archived at https://perma.cc/LQ2M-PL83 (finding that for people detained pretrial for at least three days, 76.1% had a negative job-related consequence and 37.2% had an increase in residential instability).

[17] 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.

[18] *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 (2014); *for* partners, *see* Amanda Geller & Allyson Walker Franklin, *Paternal Incarceration and the Housing Security of Urban Mothers*, 76 J. Fam. & Marriage 411, 420 (2014).

[19] *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).

[20] Austin, *supra* note 1, at 54 (citing Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (The Laura and John Arthur Foundation 2013), archived at https://perma.cc/8RPX-YQ78).

[21] 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

tallied as a benefit of pretrial detention."[22] One reason why pretrial detention is criminogenic is because jails' physical and mental health screenings and treatment offerings are often inadequate.[23] 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.[24] 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.[25] 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 averaged over 400 days in pretrial detention).[26] Pretrial detention costs an average of $73 per day per detainee, while pretrial supervision costs an average of just $7 per day.[27]

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. Legal Stud. 471, 496 (2016) ("[O]ur results suggest that the assessment of money bail yields substantial negative externalities in terms of additional crime.").

[22] Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & Econ. 529, 555 (2017).

[23] *See* Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Just. Stat., at 9 (2015), 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 J. Substance Abuse Treatment 239, 247, 249 (2007), archived at https://perma.cc/G55Z-4KQH.

[24] James C. Oleson et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 Crime & Delinquency 313, 325 (2014), archived at https://perma.cc/QAW9-PYYV.

[25] Thomas H. Cohen et al., *Revalidating the Federal Pretrial Risk Assessment Instrument: A Research Summary*, 82(2) Fed. Prob. 23, 26 (2018), archived at https://perma.cc/8VM9-JH9T.

[26] Austin, *supra* note 1, at 53.

[27] *Id.* 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.

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 § 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 *Salerno*, "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." 481 U.S. 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 condition[s]" 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 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, 109 (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. In addition, it is impermissible 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

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." *Dominguez*, 783 F.2d at 707; *see also United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985), *abrogated on other grounds by United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990) ("[T]o rebut the presumption, the defendant must produce some evidence."); *United States v. Gamble*, No. 20-3009, 2020 U.S. App. LEXIS 11558 at *1–2 (D.C. Cir. Apr. 10, 2020) (holding that "[t]he district court erred in concluding that appellant failed to meet his burden of production to rebut the statutory presumption" regarding dangerousness because "appellant did 'offer some credible evidence contrary to the statutory presumption,'" including information that he had a job offer) (unpublished) (quoting *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985)).

This "burden of production is not a heavy one to meet." *Dominguez*, 783 F.2d at 707. 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)(3)." *Id*. (emphasis added); *Jessup*, 757 F.2d at 384. Any "evidence of economic and social stability" can rebut the presumption. *Dominguez*, 783 F.2d at 707. 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 *Jessup*, 757 F.2d at 384); *see also O'Brien*, 895 F.2d at 816 (finding presumption of flight risk rebutted by evidence of effectiveness of electronic monitoring ankle bracelet together with posting of defendant's home).[28] The government bears the burden of *persuasion* at all times. *Id.*; *Jessup*, 757 F.2d at 384; *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985).

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. 783 F.2d at 707. 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 and had family members in the United States; both were employed. *Id.* These facts alone were sufficient for the Seventh Circuit to find that defendants had rebutted the presumption. *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)."); *Jessup*, 757 F.2d at 384 (holding that the judge should consider the rebutted presumption along with the § 3142(g) factors). The Court should not give the presumption undue weight if evidence relating to other § 3142(g) factors supports release.

[28] 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.

C. Forbidden Considerations in a Presumption Case

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. 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 narcotics trafficking [or another serious crime] is not dangerous to the community." *Id.* at 706. 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." *Id.*

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

The foregoing facts definitively rebut the presumption of detention in this case.

V. Regardless of the Presumption, [CLIENT] Must Be Released Because There are Conditions That Will Reasonably Assure Appearance and Safety.

Regardless of whether this Court finds that the presumption of detention is rebutted, [CLIENT] must 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.]

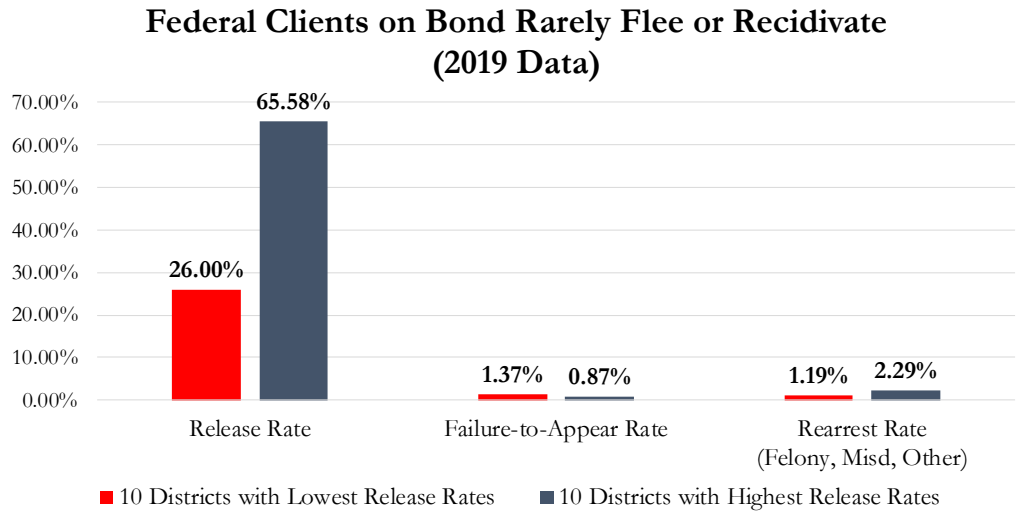
Because there are conditions of release that will reasonably assure [CLIENT'S] appearance in court and the safety of the community, [he/she] should be released.

VI. Statistics Showing that It Is Extraordinarily Rare for Defendants on Bond to Flee or Recidivate Further Demonstrate that the Foregoing Conditions of Release Will Reasonably Assure Appearance and Safety.

It is not necessary to detain [CLIENT] to meet the primary goals of the BRA, which are to reasonably assure appearance in court and community safety. In this case, this Court should be guided by AO statistics showing that nearly everyone released pending trial in the federal system

appears in court and does not reoffend. In fact, in 2019, 99% of released federal defendants nationwide appeared for court as required and 98% did not commit new crimes on bond.[29]

Moreover, when release rates increase, crime and flight do not. A near-perfect compliance rate on bond is seen equally in federal districts with very high release rates and those with very low release rates.[30] Even in districts that release two-thirds of all federal defendants on bond, fewer than 1% fail to appear in court and 2% are rearrested while released.[31] The below chart reflects this data:



[29] App. 1, AO Table H-15 (Dec. 31, 2019), *available at* Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

[30] The data showing near-perfect compliance on bond is illustrated in the chart, "Federal Clients on Bond Rarely Flee or Recidivate." The districts with the highest and lowest release rates were identified using the version of AO Table H-14A for the 12-month period ending December 31, 2019. *See* App. 2, AO Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42. The failure-to-appear and rearrest rates for these districts were calculated using App 1, AO Table H-15. With regard to flight, the ten federal districts with the lowest release rates (average 26.00%) have an average failure-to-appear rate of 1.37%, while the ten districts with the highest release rates (average 65.58%) have an *even lower* failure-to-appear rate of 0.87%. *See* App. 1; App. 2. With regard to recidivism, the ten districts with the lowest release rates have an average rearrest rate on bond of 1.19%, while the ten districts with the highest release rates have an average rearrest rate of 2.29%. *See* App. 1; App. 2. The districts with the lowest release rates are, from lowest to highest, S.D. California, W.D. Arkansas, E.D. Tennessee, S.D. Texas, E.D. Missouri, N.D. Indiana, E.D. Oklahoma, W.D. Texas, W.D. North Carolina, C.D. Illinois; the districts with the highest release rates are, from lowest to highest, E.D. Michigan, E.D. Arkansas, D. New Jersey, E.D. New York, D. Maine, D. Connecticut, W.D. New York, W.D. Washington, D. Guam, D. Northern Mariana Islands. *See* App. 2.

[31] *See* App. 1; App. 2.

The bond statistics for this district likewise strongly suggest that [CLIENT] should be released. In this district, released federal defendants appeared for court [calculate percentage of defendants who failed to appear while released using Appendix 1, Table H-15]% of the time in 2019, and only [calculate percentage of defendants who were rearrested while released using Appendix 1, Table H-15]% of defendants were rearrested on release. *See* App. 1, AO Table H-15. Yet despite the statistically low risk of flight and recidivism that defendants like [CLIENT] pose, the government recommends detention in 77% of cases nationwide and in [find percentage associated with your district in using Appendix 3, Table H-3]% of cases in this district. *See* App. 3, AO Table H-3. Clearly the government's detention requests are not tailored to the low risk of flight and recidivism that defendants in this district and elsewhere pose.

[CLIENT] must be released because the government has not established that [he/she] would be among the approximately 1% of defendants who fail to appear in court or the 2% who are rearrested on bond. Detaining [CLIENT] without such evidence violates their constitutionally protected liberty interest.

VII. 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]

Note to Counsel re Section VI Data and the Appendices

- If you don't want to do the district-specific FTA/re-arrest calculations, you can cut that entire paragraph from Section VI and leave the rest of that section as is.
- **To calculate the percentage of defendants in your district who failed to appear in court while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of failures to appear violations by going to the highlighted column, "FTA Violations."
    - Divide the total FTA Violations for your district by the total Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there was 1 FTA Violation and 262 Cases In Release Status. Divide 1 by 262, getting 0.0038. Multiply that value by 100 to get 0.38%.
- **To calculate the percentage of defendants in your district who were rearrested while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of people who violated bond by getting rearrested by going to the highlighted column, "Rearrest Violations."
        - Add up the 3 types of Rearrest Violations for your district by adding together the numbers in the columns titled Felony + Misdemeanor + Other. That sum represents the total Rearrest Violations for your district.
    - Divide the total Rearrest Violations for your district by the Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there were 9 Felony Rearrests, 2 Misdemeanor Rearrests, and 0 Other. The sum of these three values is 11. That is the total number of Rearrest Violations. There are 262 Cases In Release Status. Divide 11 by 262, getting 0.0419. Multiply that value by 100 to get 4.19%.

APPENDIX 1

AO TABLE H-15 (Dec. 31, 2019)

available at Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending December 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TOTAL	197,772	55,142	27.9	9,045	16.4	442	519	61	650	8,283	14,161
1ST	7,084	2,424	34.2	238	9.8	17	10	0	8	213	338
ME	572	262	45.8	63	24.0	9	2	0	1	55	84
MA	1,740	685	39.4	80	11.7	5	2	0	2	74	114
NH	559	245	43.8	29	11.8	2	4	0	1	24	31
RI	403	163	40.4	35	21.5	1	2	0	1	33	65
PR	3,810	1,069	28.1	31	2.9	0	0	0	3	27	44
2ND	11,394	5,178	45.4	773	14.9	78	95	16	58	644	1,157
CT	1,306	624	47.8	103	16.5	10	4	1	11	92	164
NY,N	926	304	32.8	50	16.4	2	8	0	15	39	64
NY,E	3,173	1,439	45.4	209	14.5	13	23	5	2	190	329
NY,S	4,209	1,914	45.5	212	11.1	39	36	4	29	149	303
NY,W	1,363	701	51.4	140	20.0	10	20	6	1	118	202
VT	417	196	47.0	59	30.1	4	4	0	0	56	95
3RD	8,792	3,633	41.3	451	12.4	39	26	6	23	422	711
DE	334	74	22.2	2	2.7	1	0	0	0	2	3
NJ	3,224	1,584	49.1	105	6.6	12	7	1	11	96	137
PA,E	2,026	742	36.6	138	18.6	5	6	2	4	134	287
PA,M	1,368	405	29.6	49	12.1	1	3	2	6	40	62
PA,W	1,563	693	44.3	140	20.2	19	10	1	1	134	203
VI	277	135	48.7	17	12.6	1	0	0	1	16	19
4TH	12,026	4,172	34.7	737	17.7	20	59	9	30	661	1,081
MD	1,596	611	38.3	112	18.3	4	8	0	1	110	201
NC,E	1,991	535	26.9	113	21.1	5	23	6	2	87	171
NC,M	743	242	32.6	46	19.0	0	1	0	1	43	61
NC,W	1,264	281	22.2	37	13.2	2	3	1	0	33	41
SC	2,228	814	36.5	111	13.6	2	3	0	10	101	141
VA,E	2,198	931	42.4	109	11.7	2	13	2	8	89	157
VA,W	724	248	34.3	40	16.1	3	3	0	7	36	55
WV,N	638	323	50.6	125	38.7	2	5	0	1	120	195
WV,S	644	187	29.0	44	23.5	0	0	0	0	42	59
5TH	43,756	7,287	16.7	867	11.9	43	33	5	66	789	1,013
LA,E	847	281	33.2	17	6.0	1	2	0	2	12	20
LA,M	442	163	36.9	24	14.7	2	3	0	0	20	30
LA,W	829	193	23.3	3	1.6	0	0	0	0	3	3
MS,N	418	176	42.1	30	17.0	3	3	0	1	25	38
MS,S	1,068	307	28.7	16	5.2	2	1	0	1	12	16
TX,N	2,442	895	36.7	118	13.2	3	2	5	7	111	145
TX,E	1,890	349	18.5	38	10.9	4	5	0	1	38	45
TX,S	18,370	2,629	14.3	276	10.5	27	16	0	28	234	295
TX,W	17,450	2,294	13.1	345	15.0	1	1	0	26	334	421
6TH	13,428	4,801	35.8	985	20.5	45	49	2	45	930	1,789
KY,E	1,122	305	27.2	33	10.8	0	0	0	1	32	39
KY,W	941	363	38.6	50	13.8	3	4	0	2	47	71
MI,E	2,382	1,109	46.6	287	25.9	11	6	0	7	284	611
MI,W	762	269	35.3	49	18.2	4	5	0	5	40	56
OH,N	1,970	660	33.5	72	10.9	1	3	1	19	67	116
OH,S	1,930	866	44.9	193	22.3	0	0	0	3	189	361

Table H-15.
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Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TN,E	1,935	398	20.6	49	12.3	2	3	0	0	44	58
TN,M	938	333	35.5	110	33.0	20	15	0	2	98	215
TN,W	1,448	498	34.4	142	28.5	4	13	1	6	129	262
7TH	7,785	2,813	36.1	505	18.0	28	39	6	13	466	873
IL,N	2,876	1,260	43.8	245	19.4	20	27	0	7	224	462
IL,C	694	192	27.7	34	17.7	1	2	0	1	32	39
IL,S	662	219	33.1	47	21.5	1	6	1	1	43	81
IN,N	981	291	29.7	23	7.9	4	1	0	2	17	23
IN,S	1,470	395	26.9	74	18.7	0	0	0	1	73	117
WI,E	758	366	48.3	71	19.4	2	3	5	0	66	136
WI,W	344	90	26.2	11	12.2	0	0	0	1	11	15
8TH	14,263	4,457	31.2	1,341	30.1	77	106	14	64	1,256	2,793
AR,E	1,971	794	40.3	257	32.4	25	16	2	35	236	431
AR,W	675	127	18.8	8	6.3	0	0	0	4	7	6
IA,N	851	212	24.9	80	37.7	1	12	2	3	72	121
IA,S	1,163	326	28.0	109	33.4	2	11	8	0	104	185
MN	934	346	37.0	75	21.7	5	10	1	3	64	110
MO,E	3,246	920	28.3	418	45.4	18	9	0	9	407	1,344
MO,W	2,334	599	25.7	139	23.2	7	10	0	0	129	227
NE	1,186	413	34.8	73	17.7	8	12	1	3	65	97
ND	774	298	38.5	47	15.8	2	3	0	6	44	59
SD	1,129	422	37.4	135	32.0	9	23	0	1	128	213
9TH	51,712	12,431	24.0	1,998	16.1	36	38	0	255	1,849	2,844
AK	448	131	29.2	17	13.0	1	0	0	1	17	27
AZ	20,907	2,264	10.8	475	21.0	4	11	0	65	453	587
CA,N	2,577	1,208	46.9	161	13.3	0	0	0	11	156	307
CA,E	2,051	722	35.2	54	7.5	1	0	0	8	53	65
CA,C	6,070	2,205	36.3	219	9.9	13	7	0	25	195	304
CA,S	12,034	2,612	21.7	523	20.0	7	9	0	114	443	669
HI	545	284	52.1	39	13.7	0	0	0	0	40	50
ID	790	238	30.1	45	18.9	2	1	0	4	42	66
MT	760	271	35.7	55	20.3	2	3	0	0	53	69
NV	1,583	578	36.5	73	12.6	1	1	0	7	70	92
OR	1,413	696	49.3	178	25.6	4	4	0	10	172	299
WA,E	920	347	37.7	69	19.9	1	1	0	6	65	131
WA,W	1,439	745	51.8	70	9.4	0	1	0	4	70	136
GUAM	140	107	76.4	17	15.9	0	0	0	0	17	38
NM,I	35	23	65.7	3	13.0	0	0	0	0	3	4
10TH	13,088	3,225	24.6	523	16.2	16	17	0	65	481	721
CO	1,288	408	31.7	52	12.7	3	1	0	29	46	67
KS	1,173	406	34.6	92	22.7	2	3	0	3	92	151
NM	6,919	1,101	15.9	143	13.0	0	0	0	16	140	154
OK,N	580	215	37.1	75	34.9	1	0	0	3	70	153
OK,E	266	57	21.4	4	7.0	0	0	0	1	3	4
OK,W	1,258	502	39.9	64	12.7	2	3	0	4	57	85
UT	1,222	417	34.1	82	19.7	8	10	0	5	64	98
WY	382	119	31.2	11	9.2	0	0	0	4	9	9
11TH	14,444	4,721	32.7	627	13.3	43	47	3	23	572	841
AL,N	1,188	372	31.3	60	16.1	6	6	0	4	55	93
AL,M	355	159	44.8	13	8.2	0	0	0	1	12	21
AL,S	706	233	33.0	47	20.2	2	4	0	0	44	52
FL,N	831	360	43.3	33	9.2	5	3	2	1	26	44

Table H-15.
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Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
FL,M	3,557	997	28.0	162	16.2	12	16	0	5	147	216
FL,S	3,967	1,319	33.2	161	12.2	1	0	0	2	159	200
GA,N	1,928	683	35.4	80	11.7	7	10	1	5	68	112
GA,M	977	373	38.2	52	13.9	8	6	0	2	45	77
GA,S	935	225	24.1	19	8.4	2	2	0	3	16	26

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

APPENDIX 2

AO TABLE H-14A (Dec. 31, 2019)

https://perma.cc/32XF-2S42

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
1ST	2,255	1,311	58.1	944	41.9
ME	224	89	39.7	135	60.3
MA	637	346	54.3	291	45.7
NH	221	90	40.7	131	59.3
RI	133	62	46.6	71	53.4
PR	1,040	724	69.6	316	30.4
2ND	3,330	1,463	43.9	1,867	56.1
CT	409	157	38.4	252	61.6
NY,N	308	181	58.8	127	41.2
NY,E	665	264	39.7	401	60.3
NY,S	1,357	636	46.9	721	53.1
NY,W	399	145	36.3	254	63.7
VT	192	80	41.7	112	58.3
3RD	2,923	1,454	49.7	1,469	50.3
DE	79	48	60.8	31	39.2
NJ	1,148	456	39.7	692	60.3
PA,E	724	396	54.7	328	45.3
PA,M	271	160	59.0	111	41.0
PA,W	600	344	57.3	256	42.7
VI	101	50	49.5	51	50.5
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
5TH	13,055	9,189	70.4	3,866	29.6
LA,E	282	175	62.1	107	37.9
LA,M	133	64	48.1	69	51.9
LA,W	228	146	64.0	82	36.0
MS,N	169	72	42.6	97	57.4
MS,S	435	260	59.8	175	40.2
TX,N	986	576	58.4	410	41.6
TX,E	691	476	68.9	215	31.1
TX,S	5,313	3,965	74.6	1,348	25.4
TX,W	4,818	3,455	71.7	1,363	28.3

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.
6TH	5,162	2,890	56.0	2,272	44.0
KY,E	452	273	60.4	179	39.6
KY,W	337	188	55.8	149	44.2
MI,E	743	296	39.8	447	60.2
MI,W	326	191	58.6	135	41.4
OH,N	814	477	58.6	337	41.4
OH,S	745	323	43.4	422	56.6
TN,E	872	656	75.2	216	24.8
TN,M	290	137	47.2	153	52.8
TN,W	583	349	59.9	234	40.1
7TH	2,556	1,464	57.3	1,092	42.7
IL,N	780	340	43.6	440	56.4
IL,C	258	184	71.3	74	28.7
IL,S	301	172	57.1	129	42.9
IN,N	360	261	72.5	99	27.5
IN,S	558	374	67.0	184	33.0
WI,E	230	101	43.9	129	56.1
WI,W	69	32	46.4	37	53.6
8TH	5,597	3,558	63.6	2,039	36.4
AR,E	499	198	39.7	301	60.3
AR,W	243	185	76.1	58	23.9
IA,N	352	217	61.6	135	38.4
IA,S	496	317	63.9	179	36.1
MN	349	197	56.4	152	43.6
MO,E	1,573	1,164	74.0	409	26.0
MO,W	875	604	69.0	271	31.0
NE	440	260	59.1	180	40.9
ND	253	138	54.5	115	45.5
SD	517	278	53.8	239	46.2
9TH	14,865	9,453	63.6	5,412	36.4
AK	152	95	62.5	57	37.5
AZ	3,004	1,767	58.8	1,237	41.2
CA,N	752	317	42.2	435	57.8
CA,E	489	320	65.4	169	34.6
CA,C	1,472	676	45.9	796	54.1
CA,S	6,393	5,156	80.7	1,237	19.3
HI	199	82	41.2	117	58.8
ID	297	174	58.6	123	41.4
MT	305	143	46.9	162	53.1
NV	376	175	46.5	201	53.5
OR	455	208	45.7	247	54.3
WA,E	273	143	52.4	130	47.6
WA,W	627	179	28.5	448	71.5
GUAM	57	16	28.1	41	71.9
NM,I	14	2	14.3	12	85.7

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.
10TH	3,943	2,188	55.5	1,755	44.5
CO	431	248	57.5	183	42.5
KS	433	231	53.3	202	46.7
NM	1,429	807	56.5	622	43.5
OK,N	290	146	50.3	144	49.7
OK,E	127	92	72.4	35	27.6
OK,W	522	215	41.2	307	58.8
UT	546	351	64.3	195	35.7
WY	165	98	59.4	67	40.6
11TH	5,309	2,821	53.1	2,488	46.9
AL,N	384	188	49.0	196	51.0
AL,M	105	47	44.8	58	55.2
AL,S	205	87	42.4	118	57.6
FL,N	400	172	43.0	228	57.0
FL,M	1,207	714	59.2	493	40.8
FL,S	1,683	954	56.7	729	43.3
GA,N	555	228	41.1	327	58.9
GA,M	389	182	46.8	207	53.2
GA,S	381	249	65.4	132	34.6

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."

APPENDIX 3

AO TABLE H-3 (Sept. 30, 3019)

https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf

Table H-3.
U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release
For the 12-Month Period Ending September 30, 2019

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	**108,163**	**97,784**	**90.4**	**69,571**	**71.1**	**28,213**	**28.9**	**98,071**	**90.7**	**75,365**	**76.8**	**22,706**	**23.2**
1ST	**2,730**	**2,342**	**85.8**	**1,450**	**61.9**	**892**	**38.1**	**2,330**	**85.3**	**1,754**	**75.3**	**576**	**24.7**
ME	298	202	67.8	93	46.0	109	54.0	202	67.8	135	66.8	67	33.2
MA	760	558	73.4	265	47.5	293	52.5	557	73.3	324	58.2	233	41.8
NH	280	216	77.1	108	50.0	108	50.0	214	76.4	111	51.9	103	48.1
RI	143	132	92.3	76	57.6	56	42.4	133	93.0	88	66.2	45	33.8
PR	1,249	1,234	98.8	908	73.6	326	26.4	1,224	98.0	1,096	89.5	128	10.5
2ND	**3,942**	**3,690**	**93.6**	**1,808**	**49.0**	**1,882**	**51.0**	**3,669**	**93.1**	**2,239**	**61.0**	**1,430**	**39.0**
CT	534	446	83.5	200	44.8	246	55.2	434	81.3	255	58.8	179	41.2
NY,N	442	416	94.1	313	75.2	103	24.8	411	93.0	315	76.6	96	23.4
NY,E	811	786	96.9	375	47.7	411	52.3	781	96.3	483	61.8	298	38.2
NY,S	1,403	1,376	98.1	601	43.7	775	56.3	1,375	98.0	738	53.7	637	46.3
NY,W	536	496	92.5	228	46.0	268	54.0	495	92.4	320	64.6	175	35.4
VT	216	170	78.7	91	53.5	79	46.5	173	80.1	128	74.0	45	26.0
3RD	**3,583**	**3,390**	**94.6**	**1,911**	**56.4**	**1,479**	**43.6**	**3,382**	**94.4**	**2,074**	**61.3**	**1,308**	**38.7**
DE	133	131	98.5	100	76.3	31	23.7	131	98.5	101	77.1	30	22.9
NJ	1,399	1,342	95.9	678	50.5	664	49.5	1,342	95.9	716	53.4	626	46.6
PA,E	866	853	98.5	492	57.7	361	42.3	853	98.5	554	64.9	299	35.1
PA,M	445	376	84.5	268	71.3	108	28.7	370	83.1	267	72.2	103	27.8
PA,W	592	567	95.8	304	53.6	263	46.4	566	95.6	352	62.2	214	37.8
VI	148	121	81.8	69	57.0	52	43.0	120	81.1	84	70.0	36	30.0

Table H-3. (September 30, 2019—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.
4TH	**6,411**	**4,872**	**76.0**	**3,069**	**63.0**	**1,803**	**37.0**	**5,093**	**79.4**	**3,678**	**72.2**	**1,415**	**27.8**
MD	668	631	94.5	423	67.0	208	33.0	629	94.2	432	68.7	197	31.3
NC,E	1,088	823	75.6	592	71.9	231	28.1	823	75.6	702	85.3	121	14.7
NC,M	412	388	94.2	236	60.8	152	39.2	386	93.7	279	72.3	107	27.7
NC,W	607	553	91.1	414	74.9	139	25.1	549	90.4	450	82.0	99	18.0
SC	948	685	72.3	369	53.9	316	46.1	680	71.7	411	60.4	269	39.6
VA,E	1,512	873	57.7	406	46.5	467	53.5	1,084	71.7	715	66.0	369	34.0
VA,W	406	319	78.6	243	76.2	76	23.8	309	76.1	243	78.6	66	21.4
WV,N	372	304	81.7	162	53.3	142	46.7	303	81.5	164	54.1	139	45.9
WV,S	398	296	74.4	224	75.7	72	24.3	330	82.9	282	85.5	48	14.5
5TH	**26,777**	**24,455**	**91.3**	**20,039**	**81.9**	**4,416**	**18.1**	**24,413**	**91.2**	**21,127**	**86.5**	**3,286**	**13.5**
LA,E	333	312	93.7	196	62.8	116	37.2	311	93.4	226	72.7	85	27.3
LA,M	186	136	73.1	67	49.3	69	50.7	136	73.1	84	61.8	52	38.2
LA,W	435	279	64.1	182	65.2	97	34.8	261	60.0	179	68.6	82	31.4
MS,N	225	174	77.3	77	44.3	97	55.7	174	77.3	82	47.1	92	52.9
MS,S	587	533	90.8	432	81.1	101	18.9	531	90.5	422	79.5	109	20.5
TX,N	1,084	1,031	95.1	561	54.4	470	45.6	1,017	93.8	720	70.8	297	29.2
TX,E	934	757	81.0	555	73.3	202	26.7	755	80.8	640	84.8	115	15.2
TX,S	11,479	9,884	86.1	8,350	84.5	1,534	15.5	9,875	86.0	8,703	88.1	1,172	11.9
TX,W	11,514	11,349	98.6	9,619	84.8	1,730	15.2	11,353	98.6	10,071	88.7	1,282	11.3
6TH	**6,518**	**5,548**	**85.1**	**3,511**	**63.3**	**2,037**	**36.7**	**5,651**	**86.7**	**3,978**	**70.4**	**1,673**	**29.6**
KY,E	642	512	79.8	378	73.8	134	26.2	514	80.1	390	75.9	124	24.1
KY,W	446	346	77.6	229	66.2	117	33.8	346	77.6	252	72.8	94	27.2
MI,E	1,045	967	92.5	512	52.9	455	47.1	966	92.4	583	60.4	383	39.6
MI,W	414	399	96.4	249	62.4	150	37.6	399	96.4	302	75.7	97	24.3
OH,N	1,020	868	85.1	562	64.7	306	35.3	879	86.2	616	70.1	263	29.9
OH,S	883	745	84.4	299	40.1	446	59.9	745	84.4	398	53.4	347	46.6
TN,E	996	954	95.8	774	81.1	180	18.9	954	95.8	805	84.4	149	15.6
TN,M	367	193	52.6	162	83.9	31	16.1	284	77.4	213	75.0	71	25.0
TN,W	705	564	80.0	346	61.3	218	38.7	564	80.0	419	74.3	145	25.7

Table H-3. (September 30, 2019—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.
7TH	**3,221**	**2,789**	**86.6**	**1,654**	**59.3**	**1,135**	**40.7**	**2,785**	**86.5**	**2,039**	**73.2**	**746**	**26.8**
IL,N	1,080	1,014	93.9	501	49.4	513	50.6	1,017	94.2	684	67.3	333	32.7
IL,C	285	273	95.8	220	80.6	53	19.4	272	95.4	232	85.3	40	14.7
IL,S	347	255	73.5	155	60.8	100	39.2	255	73.5	186	72.9	69	27.1
IN,N	372	352	94.6	261	74.1	91	25.9	353	94.9	286	81.0	67	19.0
IN,S	658	580	88.1	381	65.7	199	34.3	573	87.1	481	83.9	92	16.1
WI,E	304	232	76.3	100	43.1	132	56.9	232	76.3	133	57.3	99	42.7
WI,W	175	83	47.4	36	43.4	47	56.6	83	47.4	37	44.6	46	55.4
8TH	**6,711**	**5,967**	**88.9**	**3,931**	**65.9**	**2,036**	**34.1**	**5,940**	**88.5**	**4,698**	**79.1**	**1,242**	**20.9**
AR,E	686	516	75.2	271	52.5	245	47.5	521	75.9	335	64.3	186	35.7
AR,W	340	290	85.3	245	84.5	45	15.5	286	84.1	248	86.7	38	13.3
IA,N	446	387	86.8	274	70.8	113	29.2	388	87.0	297	76.5	91	23.5
IA,S	550	505	91.8	316	62.6	189	37.4	505	91.8	390	77.2	115	22.8
MN	457	401	87.7	214	53.4	187	46.6	387	84.7	270	69.8	117	30.2
MO,E	1,691	1,625	96.1	1,211	74.5	414	25.5	1,638	96.9	1,382	84.4	256	15.6
MO,W	998	904	90.6	566	62.6	338	37.4	890	89.2	749	84.2	141	15.8
NE	595	545	91.6	386	70.8	159	29.2	532	89.4	422	79.3	110	20.7
ND	345	232	67.2	126	54.3	106	45.7	230	66.7	149	64.8	81	35.2
SD	603	562	93.2	322	57.3	240	42.7	563	93.4	456	81.0	107	19.0
9TH	**32,846**	**30,960**	**94.3**	**22,474**	**72.6**	**8,486**	**27.4**	**30,897**	**94.1**	**23,397**	**75.7**	**7,500**	**24.3**
AK	188	169	89.9	119	70.4	50	29.6	165	87.8	134	81.2	31	18.8
AZ	16,929	16,260	96.0	15,104	92.9	1,156	7.1	16,266	96.1	15,514	95.4	752	4.6
CA,N	825	807	97.8	352	43.6	455	56.4	813	98.5	530	65.2	283	34.8
CA,E	629	619	98.4	434	70.1	185	29.9	618	98.3	524	84.8	94	15.2
CA,C	2,036	1,930	94.8	1,129	58.5	801	41.5	1,924	94.5	1,305	67.8	619	32.2
CA,S	8,671	8,077	93.1	3,666	45.4	4,411	54.6	8,007	92.3	3,353	41.9	4,654	58.1
HI	233	193	82.8	61	31.6	132	68.4	193	82.8	131	67.9	62	32.1
ID	428	297	69.4	176	59.3	121	40.7	311	72.7	245	78.8	66	21.2
MT	434	347	80.0	255	73.5	92	26.5	347	80.0	255	73.5	92	26.5
NV	584	546	93.5	328	60.1	218	39.9	545	93.3	392	71.9	153	28.1
OR	572	546	95.5	305	55.9	241	44.1	546	95.5	380	69.6	166	30.4
WA,E	430	320	74.4	234	73.1	86	26.9	316	73.5	290	91.8	26	8.2
WA,W	808	772	95.5	281	36.4	491	63.6	769	95.2	301	39.1	468	60.9
GUAM	63	61	96.8	21	34.4	40	65.6	61	96.8	32	52.5	29	47.5
NM,I	16	16	100.0	9	56.3	7	43.8	16	100.0	11	68.8	5	31.3

Table H-3. (September 30, 2019—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.
10TH	**7,927**	**7,353**	**92.8**	**5,846**	**79.5**	**1,507**	**20.5**	**7,349**	**92.7**	**6,196**	**84.3**	**1,153**	**15.7**
CO	658	516	78.4	290	56.2	226	43.8	509	77.4	378	74.3	131	25.7
KS	529	454	85.8	302	66.5	152	33.5	454	85.8	324	71.4	130	28.6
NM	4,760	4,634	97.4	4,128	89.1	506	10.9	4,629	97.2	4,221	91.2	408	8.8
OK,N	370	318	85.9	193	60.7	125	39.3	318	85.9	214	67.3	104	32.7
OK,E	136	124	91.2	81	65.3	43	34.7	124	91.2	98	79.0	26	21.0
OK,W	680	595	87.5	292	49.1	303	50.9	602	88.5	327	54.3	275	45.7
UT	585	549	93.8	438	79.8	111	20.2	549	93.8	481	87.6	68	12.4
WY	209	163	78.0	122	74.8	41	25.2	164	78.5	153	93.3	11	6.7
11TH	**7,497**	**6,418**	**85.6**	**3,878**	**60.4**	**2,540**	**39.6**	**6,562**	**87.5**	**4,185**	**63.8**	**2,377**	**36.2**
AL,N	656	400	61.0	237	59.3	163	40.8	400	61.0	250	62.5	150	37.5
AL,M	125	109	87.2	59	54.1	50	45.9	109	87.2	63	57.8	46	42.2
AL,S	427	263	61.6	162	61.6	101	38.4	261	61.1	176	67.4	85	32.6
FL,N	481	452	94.0	249	55.1	203	44.9	452	94.0	286	63.3	166	36.7
FL,M	1,780	1,642	92.2	969	59.0	673	41.0	1,641	92.2	1,208	73.6	433	26.4
FL,S	2,270	2,043	90.0	1,233	60.4	810	39.6	2,230	98.2	1,123	50.4	1,107	49.6
GA,N	735	653	88.8	367	56.2	286	43.8	641	87.2	445	69.4	196	30.6
GA,M	448	354	79.0	210	59.3	144	40.7	330	73.7	232	70.3	98	29.7
GA,S	575	502	87.3	392	78.1	110	21.9	498	86.6	402	80.7	96	19.3

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.

APPENDIX 3

AO TABLE H-3 (Sept. 30, 3019)

https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf

Table H-3.
U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release
For the 12-Month Period Ending September 30, 2019

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	**108,163**	**97,784**	**90.4**	**69,571**	**71.1**	**28,213**	**28.9**	**98,071**	**90.7**	**75,365**	**76.8**	**22,706**	**23.2**
1ST	**2,730**	**2,342**	**85.8**	**1,450**	**61.9**	**892**	**38.1**	**2,330**	**85.3**	**1,754**	**75.3**	**576**	**24.7**
ME	298	202	67.8	93	46.0	109	54.0	202	67.8	135	66.8	67	33.2
MA	760	558	73.4	265	47.5	293	52.5	557	73.3	324	58.2	233	41.8
NH	280	216	77.1	108	50.0	108	50.0	214	76.4	111	51.9	103	48.1
RI	143	132	92.3	76	57.6	56	42.4	133	93.0	88	66.2	45	33.8
PR	1,249	1,234	98.8	908	73.6	326	26.4	1,224	98.0	1,096	89.5	128	10.5
2ND	**3,942**	**3,690**	**93.6**	**1,808**	**49.0**	**1,882**	**51.0**	**3,669**	**93.1**	**2,239**	**61.0**	**1,430**	**39.0**
CT	534	446	83.5	200	44.8	246	55.2	434	81.3	255	58.8	179	41.2
NY,N	442	416	94.1	313	75.2	103	24.8	411	93.0	315	76.6	96	23.4
NY,E	811	786	96.9	375	47.7	411	52.3	781	96.3	483	61.8	298	38.2
NY,S	1,403	1,376	98.1	601	43.7	775	56.3	1,375	98.0	738	53.7	637	46.3
NY,W	536	496	92.5	228	46.0	268	54.0	495	92.4	320	64.6	175	35.4
VT	216	170	78.7	91	53.5	79	46.5	173	80.1	128	74.0	45	26.0
3RD	**3,583**	**3,390**	**94.6**	**1,911**	**56.4**	**1,479**	**43.6**	**3,382**	**94.4**	**2,074**	**61.3**	**1,308**	**38.7**
DE	133	131	98.5	100	76.3	31	23.7	131	98.5	101	77.1	30	22.9
NJ	1,399	1,342	95.9	678	50.5	664	49.5	1,342	95.9	716	53.4	626	46.6
PA,E	866	853	98.5	492	57.7	361	42.3	853	98.5	554	64.9	299	35.1
PA,M	445	376	84.5	268	71.3	108	28.7	370	83.1	267	72.2	103	27.8
PA,W	592	567	95.8	304	53.6	263	46.4	566	95.6	352	62.2	214	37.8
VI	148	121	81.8	69	57.0	52	43.0	120	81.1	84	70.0	36	30.0

Table H-3. (September 30, 2019—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.
4TH	**6,411**	**4,872**	**76.0**	**3,069**	**63.0**	**1,803**	**37.0**	**5,093**	**79.4**	**3,678**	**72.2**	**1,415**	**27.8**
MD	668	631	94.5	423	67.0	208	33.0	629	94.2	432	68.7	197	31.3
NC,E	1,088	823	75.6	592	71.9	231	28.1	823	75.6	702	85.3	121	14.7
NC,M	412	388	94.2	236	60.8	152	39.2	386	93.7	279	72.3	107	27.7
NC,W	607	553	91.1	414	74.9	139	25.1	549	90.4	450	82.0	99	18.0
SC	948	685	72.3	369	53.9	316	46.1	680	71.7	411	60.4	269	39.6
VA,E	1,512	873	57.7	406	46.5	467	53.5	1,084	71.7	715	66.0	369	34.0
VA,W	406	319	78.6	243	76.2	76	23.8	309	76.1	243	78.6	66	21.4
WV,N	372	304	81.7	162	53.3	142	46.7	303	81.5	164	54.1	139	45.9
WV,S	398	296	74.4	224	75.7	72	24.3	330	82.9	282	85.5	48	14.5
5TH	**26,777**	**24,455**	**91.3**	**20,039**	**81.9**	**4,416**	**18.1**	**24,413**	**91.2**	**21,127**	**86.5**	**3,286**	**13.5**
LA,E	333	312	93.7	196	62.8	116	37.2	311	93.4	226	72.7	85	27.3
LA,M	186	136	73.1	67	49.3	69	50.7	136	73.1	84	61.8	52	38.2
LA,W	435	279	64.1	182	65.2	97	34.8	261	60.0	179	68.6	82	31.4
MS,N	225	174	77.3	77	44.3	97	55.7	174	77.3	82	47.1	92	52.9
MS,S	587	533	90.8	432	81.1	101	18.9	531	90.5	422	79.5	109	20.5
TX,N	1,084	1,031	95.1	561	54.4	470	45.6	1,017	93.8	720	70.8	297	29.2
TX,E	934	757	81.0	555	73.3	202	26.7	755	80.8	640	84.8	115	15.2
TX,S	11,479	9,884	86.1	8,350	84.5	1,534	15.5	9,875	86.0	8,703	88.1	1,172	11.9
TX,W	11,514	11,349	98.6	9,619	84.8	1,730	15.2	11,353	98.6	10,071	88.7	1,282	11.3
6TH	**6,518**	**5,548**	**85.1**	**3,511**	**63.3**	**2,037**	**36.7**	**5,651**	**86.7**	**3,978**	**70.4**	**1,673**	**29.6**
KY,E	642	512	79.8	378	73.8	134	26.2	514	80.1	390	75.9	124	24.1
KY,W	446	346	77.6	229	66.2	117	33.8	346	77.6	252	72.8	94	27.2
MI,E	1,045	967	92.5	512	52.9	455	47.1	966	92.4	583	60.4	383	39.6
MI,W	414	399	96.4	249	62.4	150	37.6	399	96.4	302	75.7	97	24.3
OH,N	1,020	868	85.1	562	64.7	306	35.3	879	86.2	616	70.1	263	29.9
OH,S	883	745	84.4	299	40.1	446	59.9	745	84.4	398	53.4	347	46.6
TN,E	996	954	95.8	774	81.1	180	18.9	954	95.8	805	84.4	149	15.6
TN,M	367	193	52.6	162	83.9	31	16.1	284	77.4	213	75.0	71	25.0
TN,W	705	564	80.0	346	61.3	218	38.7	564	80.0	419	74.3	145	25.7

Table H-3. (September 30, 2019—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.
7TH	**3,221**	**2,789**	**86.6**	**1,654**	**59.3**	**1,135**	**40.7**	**2,785**	**86.5**	**2,039**	**73.2**	**746**	**26.8**
IL,N	1,080	1,014	93.9	501	49.4	513	50.6	1,017	94.2	684	67.3	333	32.7
IL,C	285	273	95.8	220	80.6	53	19.4	272	95.4	232	85.3	40	14.7
IL,S	347	255	73.5	155	60.8	100	39.2	255	73.5	186	72.9	69	27.1
IN,N	372	352	94.6	261	74.1	91	25.9	353	94.9	286	81.0	67	19.0
IN,S	658	580	88.1	381	65.7	199	34.3	573	87.1	481	83.9	92	16.1
WI,E	304	232	76.3	100	43.1	132	56.9	232	76.3	133	57.3	99	42.7
WI,W	175	83	47.4	36	43.4	47	56.6	83	47.4	37	44.6	46	55.4
8TH	**6,711**	**5,967**	**88.9**	**3,931**	**65.9**	**2,036**	**34.1**	**5,940**	**88.5**	**4,698**	**79.1**	**1,242**	**20.9**
AR,E	686	516	75.2	271	52.5	245	47.5	521	75.9	335	64.3	186	35.7
AR,W	340	290	85.3	245	84.5	45	15.5	286	84.1	248	86.7	38	13.3
IA,N	446	387	86.8	274	70.8	113	29.2	388	87.0	297	76.5	91	23.5
IA,S	550	505	91.8	316	62.6	189	37.4	505	91.8	390	77.2	115	22.8
MN	457	401	87.7	214	53.4	187	46.6	387	84.7	270	69.8	117	30.2
MO,E	1,691	1,625	96.1	1,211	74.5	414	25.5	1,638	96.9	1,382	84.4	256	15.6
MO,W	998	904	90.6	566	62.6	338	37.4	890	89.2	749	84.2	141	15.8
NE	595	545	91.6	386	70.8	159	29.2	532	89.4	422	79.3	110	20.7
ND	345	232	67.2	126	54.3	106	45.7	230	66.7	149	64.8	81	35.2
SD	603	562	93.2	322	57.3	240	42.7	563	93.4	456	81.0	107	19.0
9TH	**32,846**	**30,960**	**94.3**	**22,474**	**72.6**	**8,486**	**27.4**	**30,897**	**94.1**	**23,397**	**75.7**	**7,500**	**24.3**
AK	188	169	89.9	119	70.4	50	29.6	165	87.8	134	81.2	31	18.8
AZ	16,929	16,260	96.0	15,104	92.9	1,156	7.1	16,266	96.1	15,514	95.4	752	4.6
CA,N	825	807	97.8	352	43.6	455	56.4	813	98.5	530	65.2	283	34.8
CA,E	629	619	98.4	434	70.1	185	29.9	618	98.3	524	84.8	94	15.2
CA,C	2,036	1,930	94.8	1,129	58.5	801	41.5	1,924	94.5	1,305	67.8	619	32.2
CA,S	8,671	8,077	93.1	3,666	45.4	4,411	54.6	8,007	92.3	3,353	41.9	4,654	58.1
HI	233	193	82.8	61	31.6	132	68.4	193	82.8	131	67.9	62	32.1
ID	428	297	69.4	176	59.3	121	40.7	311	72.7	245	78.8	66	21.2
MT	434	347	80.0	255	73.5	92	26.5	347	80.0	255	73.5	92	26.5
NV	584	546	93.5	328	60.1	218	39.9	545	93.3	392	71.9	153	28.1
OR	572	546	95.5	305	55.9	241	44.1	546	95.5	380	69.6	166	30.4
WA,E	430	320	74.4	234	73.1	86	26.9	316	73.5	290	91.8	26	8.2
WA,W	808	772	95.5	281	36.4	491	63.6	769	95.2	301	39.1	468	60.9
GUAM	63	61	96.8	21	34.4	40	65.6	61	96.8	32	52.5	29	47.5
NM,I	16	16	100.0	9	56.3	7	43.8	16	100.0	11	68.8	5	31.3

Table H-3. (September 30, 2019—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.
10TH	**7,927**	**7,353**	**92.8**	**5,846**	**79.5**	**1,507**	**20.5**	**7,349**	**92.7**	**6,196**	**84.3**	**1,153**	**15.7**
CO	658	516	78.4	290	56.2	226	43.8	509	77.4	378	74.3	131	25.7
KS	529	454	85.8	302	66.5	152	33.5	454	85.8	324	71.4	130	28.6
NM	4,760	4,634	97.4	4,128	89.1	506	10.9	4,629	97.2	4,221	91.2	408	8.8
OK,N	370	318	85.9	193	60.7	125	39.3	318	85.9	214	67.3	104	32.7
OK,E	136	124	91.2	81	65.3	43	34.7	124	91.2	98	79.0	26	21.0
OK,W	680	595	87.5	292	49.1	303	50.9	602	88.5	327	54.3	275	45.7
UT	585	549	93.8	438	79.8	111	20.2	549	93.8	481	87.6	68	12.4
WY	209	163	78.0	122	74.8	41	25.2	164	78.5	153	93.3	11	6.7
11TH	**7,497**	**6,418**	**85.6**	**3,878**	**60.4**	**2,540**	**39.6**	**6,562**	**87.5**	**4,185**	**63.8**	**2,377**	**36.2**
AL,N	656	400	61.0	237	59.3	163	40.8	400	61.0	250	62.5	150	37.5
AL,M	125	109	87.2	59	54.1	50	45.9	109	87.2	63	57.8	46	42.2
AL,S	427	263	61.6	162	61.6	101	38.4	261	61.1	176	67.4	85	32.6
FL,N	481	452	94.0	249	55.1	203	44.9	452	94.0	286	63.3	166	36.7
FL,M	1,780	1,642	92.2	969	59.0	673	41.0	1,641	92.2	1,208	73.6	433	26.4
FL,S	2,270	2,043	90.0	1,233	60.4	810	39.6	2,230	98.2	1,123	50.4	1,107	49.6
GA,N	735	653	88.8	367	56.2	286	43.8	641	87.2	445	69.4	196	30.6
GA,M	448	354	79.0	210	59.3	144	40.7	330	73.7	232	70.3	98	29.7
GA,S	575	502	87.3	392	78.1	110	21.9	498	86.6	402	80.7	96	19.3

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.

SUPPORTING MATERIALS FOR PRESUMPTION CASES

The Smarter Pretrial Detention for Drug Charges Act and one-pager

The Smarter Pretrial Detention for Drug Charges Act of 2020

Pretrial detention rates in the federal system are at record high levels and on an upward trend across all demographic groups, which is undermining efforts to combat the spread of COVID-19 in federal prisons. The Smarter Pretrial Detention for Drug Charges Act of 2020 is a targeted bill that would eliminate the blanket presumption of pretrial detention for most federal drug charges. This would permit federal courts to make individualized determinations regarding whether pretrial detention is appropriate for each defendant charged with a nonviolent drug offense. Any defendant found to be a flight risk or a threat to public safety would be detained.

The Bail Reform Act of 1984 governs federal release and pretrial detention proceedings, and under its provisions, release is generally presumed unless a judge finds risk of flight or potential danger to the community, which is the appropriate standard for defendants with the presumption of innocence. However, this release presumption is reversed for certain criminal charges, creating a presumption of detention without regard to the circumstances and background of the accused.

One of these "presumption" charges is any drug offense that is punishable by 10 years or more (the vast majority of federal drug offenses). This presumption, a relic of an antiquated and failed approach to combatting the last drug epidemic, treats nonviolent drug offenses like terrorism, hijacking and other serious violent crimes. According to the Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts, this presumption has "become an almost de facto detention order for almost half of all federal cases." It has also emerged as a significant impediment to ongoing bipartisan efforts to reduce the number of people in federal detention during the COVID-19 pandemic.

A 2017 Probation and Pretrial Services Office study found that this drug presumption does not correctly identify which defendants are higher risk. For example, it found no significant difference in rates of failures to appear between presumption and non-presumption cases, and presumption cases had fewer violent re-arrests than non-presumption cases. The study concludes that the drug presumption has been an "unsuccessful attempt" to identify high-risk defendants based primarily on the charge, and "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." Also, racial disparities in pretrial release rates are evident in drug cases, with white defendants more likely to receive pretrial release than black defendants.

As a result of the presumption, defendants charged with drug offenses are detained in two-thirds of cases. Pretrial supervision only costs $7 per day, compared to $73 per day for pretrial detention, per detainee. In 2016, the average period of detention for a pretrial defendant reached 255 days, costing an average of $18,615 per defendant. 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.

The Smarter Pretrial Detention for Drug Charges Act would address these concerns by eliminating the presumption of pretrial detention for drug offenses. This would allow courts to make an individualized determination regarding whether pretrial detention is appropriate for each defendant charged with a nonviolent drug offense. A defendant would be detained if the court found he or she was a flight risk or posed a threat to public safety.

116TH CONGRESS
2D SESSION

S. _____

To give Federal courts additional discretion to determine whether pretrial detention is appropriate for defendants charged with nonviolent drug offenses in Federal criminal cases.

IN THE SENATE OF THE UNITED STATES

Mr. DURBIN (for himself, Mr. LEE, and Mr. COONS) introduced the following bill; which was read twice and referred to the Committee on

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A BILL

To give Federal courts additional discretion to determine whether pretrial detention is appropriate for defendants charged with nonviolent drug offenses in Federal criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Smarter Pretrial Detention for Drug Charges Act of 2020".

SEC. 2. RELEASE CONDITIONS AND DETENTION IN FEDERAL CRIMINAL CASES.

Section 3142 of title 18, United States Code, is amended—

(1) by striking "(42 U.S.C. 14135a)" each place it appears and inserting "(34 U.S.C. 40702)"; and

(2) in subsection (e)(3)—

(A) by striking subparagraph (A); and

(B) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively.

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

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 nonappearance 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 PTRA and Risk Categories

The Pretrial Risk Assessment Tool (PTRA) was used to identify defendants' risk level. The PTRA 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 PTRA 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).

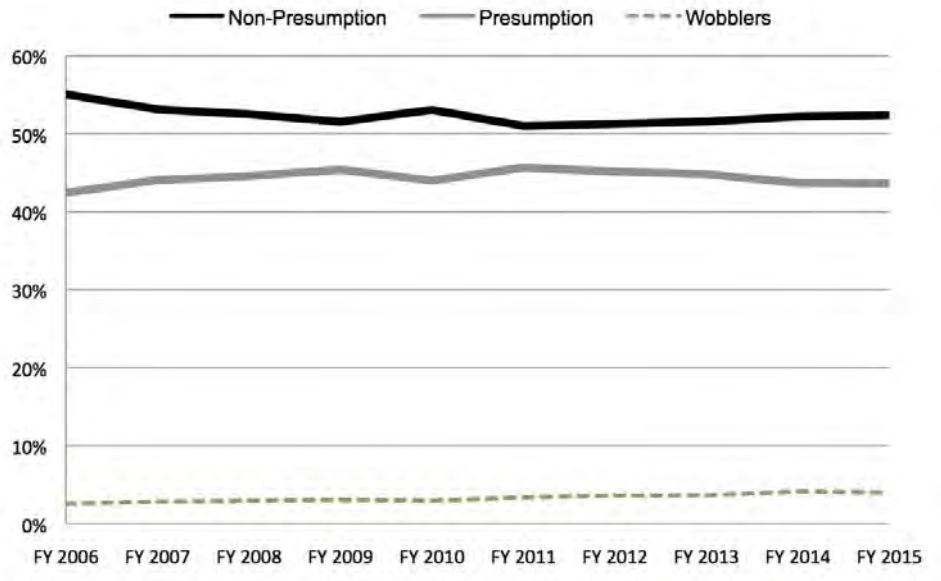
Presumption cases were also compared to non-presumption cases by offense type and PTRA category (Table 1). Presumption cases accounted for 93 percent of drug offenses; 77 percent of sex offenses, 17 percent of all weapons offenses, and only 2 percent of all violence charges (however, an additional 44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

		Percent of defendants with		
PTRA category	Number	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

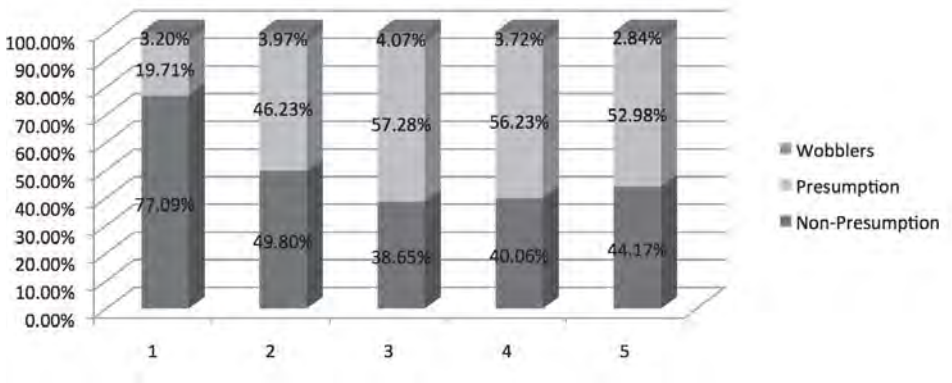
The intended purpose of the presumption was to detain high-risk defendants who were likely to pose a significant risk of danger to the

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

		Percent of released defendants with:			
Presumption and PTRA category	**Number on release**	**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 PTRA 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 PTRA 4 cases released was 33 percent, while the percentage of PTRA 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 PTRA 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

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

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

PTRA 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***
PTRA ones			
Non-presumption	18,648	83.7%	7.5
Presumption	3,204	98.1%***	11.5***
Wobbler	713	96.1%***	9.3***
PTRA twos			
Non-presumption	11,918	90.4%	8.6
Presumption	6,882	98.2%***	10.9***
Wobbler	687	97.5%***	10.5***
PTRA threes			
Non-presumption	7,756	96.4%	9.7
Presumption	8,779	98.4%***	11.1***
Wobbler	651	97.9%	11.3***
PTRA fours			
Non-presumption	3,396	97.0%	10.4
Presumption	4,464	98.4%***	11.2***
Wobbler	219	96.8%	12.1***
PTRA 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 PTRA category

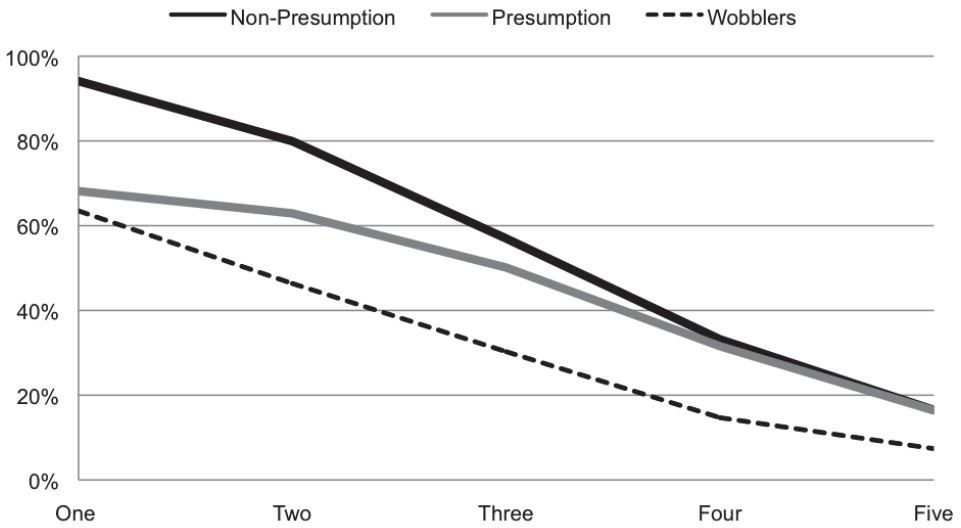
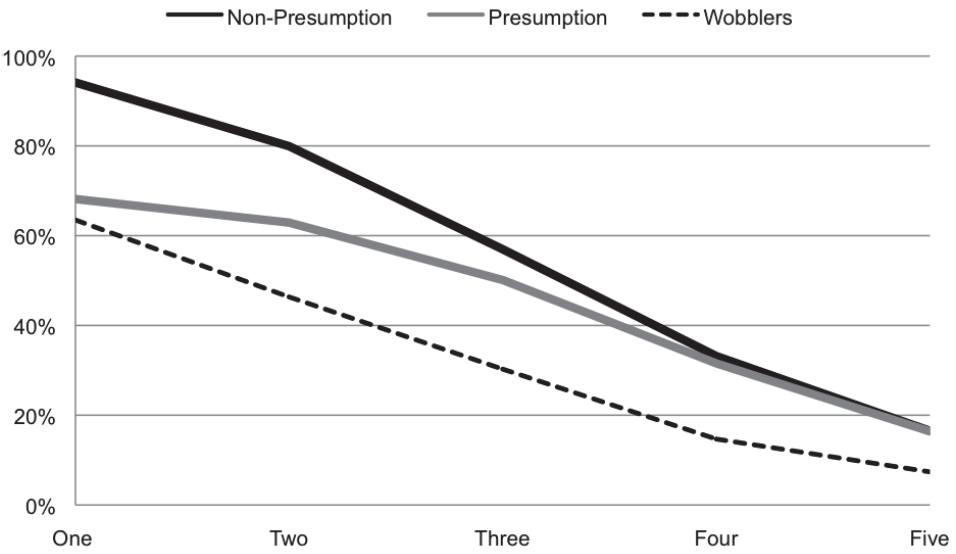


TABLE 4.
Types of pretrial special conditions for presumption and non-presumption cases, by PTRA category

	Types of pretrial special conditions				
PTRA categories	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 level[5] (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 PTRA 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 PTRA Categories 1 and 2 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTRA 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, PTRA Categories 1-3 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTRA 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 PTRA. 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 over-detention 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.

References

Administrative Office of the United States Courts, Office of Probation and Pretrial Services (2011). An overview of the federal Post Conviction Risk Assessment.

Andrews, D. R., Bonta, J., & Hoge, R. D. (1990). Classification for effective rehabilitation: Rediscovering psychology. *Criminal Justice and Behavior, 17*, 19-52.

Cadigan, T., Johnson, J., & Lowenkamp, C. (2012). The re-validation of the federal Pretrial Services Risk Assessment (PTRA). *Federal Probation*, *76*(2), 3-12

Cohen, T. H. (2013). Pretrial detention and misconduct in federal district courts, 1995-2010. Bureau of Justice Statistics. Retrieved from https://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf

Cohen, T., Cook, D., Lowenkamp, C. (2016). The supervision of low-risk federal offenders: How the low-risk policy has changed federal supervision practices without compromising community safety. *Federal Probation, 80*(1), 3-11.

Cohen, T., Spidell, M. (2016). How dangerous are they? An analysis of sex offenders under federal post-conviction supervision. *Federal Probation, 80*(2), 21-32.

Hughes, J., Henkel, K. (2015). The federal probation and pretrial services system since 1975: An era of growth and change. *Federal Probation, 79*(3), 48-54.

LII/Legal Information Institute (2017) 18 U.S. Code § 3142 - Release Or Detention Of A Defendant Pending Trial.

Lowenkamp, C., Flores, A., Holsinger, A., Makarios, M., & Latessa, E. (2010). Intensive supervision programs: Does program philosophy and the principles of effective interventions matter? *Journal of Criminal Justice, 38*(4): 368-375.

Lowenkamp, C., Latessa, E., & Holsinger, A. (2006). The risk principle in action: What have we learned from 13,676 offenders and 97 correctional programs? *Crime and Delinquency, 51*(1): 1-17.

Lowenkamp, C., & Latessa, E. (2004). Increasing the effectiveness of correctional programming through the risk principle: Identifying offenders for residential placement. *Criminology and Public Policy, 4*(2): 263-290.

Lowenkamp, C., & Whetzel, J. (2009). The development of an actuarial risk assessment instrument for U.S. pretrial services. *Federal Probation, 73*(2), 33-36.

Lowenkamp, C., VanNostrand, M., & Holsinger, A. (2013a). Investigating the impact of pretrial detention on sentencing outcomes. The Laura and John Arnold Foundation.

Lowenkamp, C., VanNostrand, M., & Holsinger, A. (2013b). The hidden costs of pretrial detention. The Laura and John Arnold Foundation.

Schnacke, T. R., Jones, M. R., & Brooker, C. B. (2010). The history of bail and pretrial release. Pretrial Justice Institute. Print.

Scott, T. (1989). Pretrial detention under the Bail Reform Act of 1984: An empirical analysis. *American Criminal Law Review, 27*(1), 1-52.

Stevenson, M., & Mayson, S. G. (2017). Bail reform: New directions for pretrial detention and release (2017). In Academy for Justice, *A report on scholarship and criminal justice reform* (Erik Luna ed., 2017, forthcoming). U of Penn Law School, Public Law Research Paper No. 17-18. Available at SSRN: https://ssrn.com/abstract=2939273

"Supervision Costs Significantly Less Than Incarceration In Federal System." (2013). *United States Courts*.

"The Socioeconomic Impact of Pretrial Detention." (2010). *Open Society Justice Initiative*.

U.S. Department of Justice. (1981). *Attorney General's Task Force on Violent Crime.* Washington, DC: National Institute of Justice. Print.

United States General Accounting Office Report to Congress. (1978). *The federal bail process fosters inequities*. Print.

Washington, E. (2016). State courts and the promise of pretrial justice in criminal cases. *New York University Law Review, 91*(5), 1087-1103.

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
18:1958
18:1959
18:2111
18:2113
18:2114(a)
18:2118
18:2119
18:2241
18:2242
18:2243
18:2244
18:2261
18:2262
18:241
18:242
18:2422
18:2426
18:245 (b)
18:247(a)(2)
18:249
18:36
18:372
18:373
18:871
18:872
18:875
18:876
18:892
18:894
21:675
42:3631

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
42:2111
42:2284
49:46502
49:46504
49:46505(b)(3)
49:46505(c),
49:46506
49:60123(b)

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 felony involving a minor victim not previously mentioned:
18:1461
18:1462
18:1465
18:1466
18:1470

Any felony involving the possession or use of a firearm or destructive device:
18:844
18:921
18:922
18:924
18:930
26:5845
26:5861

Failure to Register as a Sex Offender
18:2250

ANY felony with a potential sentence of life or death

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.

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

Judicial Conference Recommendation Re Presumptions of Detention During COVID-19 (4/28/20)

Keeping Non-Dangerous Defendants Out of Prison Prior to Trial

Description: Reduce unnecessary pretrial detention of certain low-risk defendants charged with drug trafficking offenses by: (1) limiting the application of the presumption of detention to defendants whose criminal history suggests that they pose a higher risk of failing to appear for court proceedings or that they may be a danger to the community; and (2) removing the presumption from other low-risk defendants.

Justification: The COVID-19 pandemic has created dire circumstances in many federal prisons, including those in which the Attorney General has declared an emergency. This proposal would help by allowing some defendants, who would ordinarily be required to be detained, to be placed under community supervision while awaiting trial. Efforts are being made at the Bureau of Prisons, pursuant to the Attorney General's directives, to release as many prisoners as possible to home confinement under the compassionate release program and to take the virus into account when making pre-trial release recommendations. Congress has also authorized additional compassionate releases in the CARES Act.

Application: This provision reduces unnecessary pretrial detention of certain low-risk defendants charged with drug trafficking offenses by limiting the application of the presumption of detention to defendants whose criminal history suggests that they pose a higher risk of failing to appear for court proceedings or that they may be a danger to the community. Section 3142(e) of Title 18 creates a presumption that certain defendants should be detained pending trial because a court cannot craft conditions of community supervision that would reasonably assure both the safety of the community and the defendant's appearance at court proceedings. The statute identifies several categories of defendants to whom this presumption applies, including those charged with specific drug trafficking offenses, and places the burden on a defendant to rebut the presumption for detention. In keeping with its support of evidence-based supervision practices, the Administrative Office of the U.S. Courts conducted a study analyzing data collected from a ten-year period. The study reveals that a sizeable segment of low-risk defendants falls into the category of drug traffickers subject to the presumption of detention. The study concluded that these defendants are detained at a high rate, even when their criminal histories and other applicable risk factors indicate that they pose a low risk of either reoffending or absconding while on pretrial release, and arguably should be released for pretrial supervision.

Legal, policy, and budgetary factors—including the presumption of innocence and the relative costs of incarceration versus pretrial supervision— support reducing unnecessary pretrial detention. Therefore, the Judicial Conference endorsed limiting the application of the presumption of detention to defendants who meet these particular criteria, which would enable judges to make pretrial release decisions for low-risk defendants on a case-by-case basis. No defendant would be automatically released into the community if this proposal were enacted.

Proposed Legislative language:

SEC.____REDUCING UNNECESSARY PRETRIAL DETENTION OF LOW-RISK DEFENDANTS.

Section 3142(e)(3)(A) of title 18, United States Code, is amended by inserting the following before the semicolon: "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".

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	)	
	)	Case No. 4:19CR68
v.	)	
	)	
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.Sup.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 country[2] 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

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[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 charges[5] 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.***

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[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 release[8] 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.

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[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,

LEONARDO MELO-RAMIREZ

By: _____/s/_____

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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:

Jeremy I. Franker
United States Attorney Office (Newport News)
721 Lakefront Commons, Suite 300
Newport News, VA 23606
Email: jeremy.franker2@usdoj.gov

_____/s/_____

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The Smarter Pretrial Detention for Drug Charges Act and one-pager

The Smarter Pretrial Detention for Drug Charges Act of 2020

Pretrial detention rates in the federal system are at record high levels and on an upward trend across all demographic groups, which is undermining efforts to combat the spread of COVID-19 in federal prisons. The Smarter Pretrial Detention for Drug Charges Act of 2020 is a targeted bill that would eliminate the blanket presumption of pretrial detention for most federal drug charges. This would permit federal courts to make individualized determinations regarding whether pretrial detention is appropriate for each defendant charged with a nonviolent drug offense. Any defendant found to be a flight risk or a threat to public safety would be detained.

The Bail Reform Act of 1984 governs federal release and pretrial detention proceedings, and under its provisions, release is generally presumed unless a judge finds risk of flight or potential danger to the community, which is the appropriate standard for defendants with the presumption of innocence. However, this release presumption is reversed for certain criminal charges, creating a presumption of detention without regard to the circumstances and background of the accused.

One of these "presumption" charges is any drug offense that is punishable by 10 years or more (the vast majority of federal drug offenses). This presumption, a relic of an antiquated and failed approach to combatting the last drug epidemic, treats nonviolent drug offenses like terrorism, hijacking and other serious violent crimes. According to the Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts, this presumption has "become an almost de facto detention order for almost half of all federal cases." It has also emerged as a significant impediment to ongoing bipartisan efforts to reduce the number of people in federal detention during the COVID-19 pandemic.

A 2017 Probation and Pretrial Services Office study found that this drug presumption does not correctly identify which defendants are higher risk. For example, it found no significant difference in rates of failures to appear between presumption and non-presumption cases, and presumption cases had fewer violent re-arrests than non-presumption cases. The study concludes that the drug presumption has been an "unsuccessful attempt" to identify high-risk defendants based primarily on the charge, and "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." Also, racial disparities in pretrial release rates are evident in drug cases, with white defendants more likely to receive pretrial release than black defendants.

As a result of the presumption, defendants charged with drug offenses are detained in two-thirds of cases. Pretrial supervision only costs $7 per day, compared to $73 per day for pretrial detention, per detainee. In 2016, the average period of detention for a pretrial defendant reached 255 days, costing an average of $18,615 per defendant. 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.

The Smarter Pretrial Detention for Drug Charges Act would address these concerns by eliminating the presumption of pretrial detention for drug offenses. This would allow courts to make an individualized determination regarding whether pretrial detention is appropriate for each defendant charged with a nonviolent drug offense. A defendant would be detained if the court found he or she was a flight risk or posed a threat to public safety.

116TH CONGRESS
2D SESSION

S. _____

To give Federal courts additional discretion to determine whether pretrial detention is appropriate for defendants charged with nonviolent drug offenses in Federal criminal cases.

IN THE SENATE OF THE UNITED STATES

Mr. DURBIN (for himself, Mr. LEE, and Mr. COONS) introduced the following bill; which was read twice and referred to the Committee on

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A BILL

To give Federal courts additional discretion to determine whether pretrial detention is appropriate for defendants charged with nonviolent drug offenses in Federal criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Smarter Pretrial Detention for Drug Charges Act of 2020".

SEC. 2. RELEASE CONDITIONS AND DETENTION IN FEDERAL CRIMINAL CASES.

Section 3142 of title 18, United States Code, is amended—

(1) by striking "(42 U.S.C. 14135a)" each place it appears and inserting "(34 U.S.C. 40702)"; and

(2) in subsection (e)(3)—

(A) by striking subparagraph (A); and

(B) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively.

FEDERAL PRETRIAL DETENTION AND RELEASE STATISTICS

Federal Release Rates by District, excluding immigration cases

AO TABLE H-14A (Dec. 31, 2019)
https://perma.cc/32XF-2S42

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
1ST	2,255	1,311	58.1	944	41.9
ME	224	89	39.7	135	60.3
MA	637	346	54.3	291	45.7
NH	221	90	40.7	131	59.3
RI	133	62	46.6	71	53.4
PR	1,040	724	69.6	316	30.4
2ND	3,330	1,463	43.9	1,867	56.1
CT	409	157	38.4	252	61.6
NY,N	308	181	58.8	127	41.2
NY,E	665	264	39.7	401	60.3
NY,S	1,357	636	46.9	721	53.1
NY,W	399	145	36.3	254	63.7
VT	192	80	41.7	112	58.3
3RD	2,923	1,454	49.7	1,469	50.3
DE	79	48	60.8	31	39.2
NJ	1,148	456	39.7	692	60.3
PA,E	724	396	54.7	328	45.3
PA,M	271	160	59.0	111	41.0
PA,W	600	344	57.3	256	42.7
VI	101	50	49.5	51	50.5
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
5TH	13,055	9,189	70.4	3,866	29.6
LA,E	282	175	62.1	107	37.9
LA,M	133	64	48.1	69	51.9
LA,W	228	146	64.0	82	36.0
MS,N	169	72	42.6	97	57.4
MS,S	435	260	59.8	175	40.2
TX,N	986	576	58.4	410	41.6
TX,E	691	476	68.9	215	31.1
TX,S	5,313	3,965	74.6	1,348	25.4
TX,W	4,818	3,455	71.7	1,363	28.3

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.
6TH	5,162	2,890	56.0	2,272	44.0
KY,E	452	273	60.4	179	39.6
KY,W	337	188	55.8	149	44.2
MI,E	743	296	39.8	447	60.2
MI,W	326	191	58.6	135	41.4
OH,N	814	477	58.6	337	41.4
OH,S	745	323	43.4	422	56.6
TN,E	872	656	75.2	216	24.8
TN,M	290	137	47.2	153	52.8
TN,W	583	349	59.9	234	40.1
7TH	2,556	1,464	57.3	1,092	42.7
IL,N	780	340	43.6	440	56.4
IL,C	258	184	71.3	74	28.7
IL,S	301	172	57.1	129	42.9
IN,N	360	261	72.5	99	27.5
IN,S	558	374	67.0	184	33.0
WI,E	230	101	43.9	129	56.1
WI,W	69	32	46.4	37	53.6
8TH	5,597	3,558	63.6	2,039	36.4
AR,E	499	198	39.7	301	60.3
AR,W	243	185	76.1	58	23.9
IA,N	352	217	61.6	135	38.4
IA,S	496	317	63.9	179	36.1
MN	349	197	56.4	152	43.6
MO,E	1,573	1,164	74.0	409	26.0
MO,W	875	604	69.0	271	31.0
NE	440	260	59.1	180	40.9
ND	253	138	54.5	115	45.5
SD	517	278	53.8	239	46.2
9TH	14,865	9,453	63.6	5,412	36.4
AK	152	95	62.5	57	37.5
AZ	3,004	1,767	58.8	1,237	41.2
CA,N	752	317	42.2	435	57.8
CA,E	489	320	65.4	169	34.6
CA,C	1,472	676	45.9	796	54.1
CA,S	6,393	5,156	80.7	1,237	19.3
HI	199	82	41.2	117	58.8
ID	297	174	58.6	123	41.4
MT	305	143	46.9	162	53.1
NV	376	175	46.5	201	53.5
OR	455	208	45.7	247	54.3
WA,E	273	143	52.4	130	47.6
WA,W	627	179	28.5	448	71.5
GUAM	57	16	28.1	41	71.9
NM,I	14	2	14.3	12	85.7

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.
10TH	3,943	2,188	55.5	1,755	44.5
CO	431	248	57.5	183	42.5
KS	433	231	53.3	202	46.7
NM	1,429	807	56.5	622	43.5
OK,N	290	146	50.3	144	49.7
OK,E	127	92	72.4	35	27.6
OK,W	522	215	41.2	307	58.8
UT	546	351	64.3	195	35.7
WY	165	98	59.4	67	40.6
11TH	5,309	2,821	53.1	2,488	46.9
AL,N	384	188	49.0	196	51.0
AL,M	105	47	44.8	58	55.2
AL,S	205	87	42.4	118	57.6
FL,N	400	172	43.0	228	57.0
FL,M	1,207	714	59.2	493	40.8
FL,S	1,683	954	56.7	729	43.3
GA,N	555	228	41.1	327	58.9
GA,M	389	182	46.8	207	53.2
GA,S	381	249	65.4	132	34.6

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."

AUSA & Pretrial Services Release Recommendations by District, excluding immigration cases

AO TABLE H-3 (Sept. 30, 3019)
https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf

Table H-3A.

U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release Excluding Immigration Cases
For the 12-Month Period Ending September 30, 2019

Circuit and District	Cases Activated	Type of PSO[1] Recommendation Made[3]								Type of AUSA[2] Recommendation Made[3]					
		PSO Recommended		Detention		Release		Release Without Supervision		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
TOTAL	**108,163**	**62,125**	**57.4**	**34,148**	**55.0**	**27,977**	**45.0**	**0**	**.0**	**62,170**	**57.5**	**40,285**	**64.8**	**21,885**	**35.2**
1ST	**2,730**	**2,088**	**76.5**	**1,212**	**58.0**	**876**	**42.0**	**0**	**.0**	**2,076**	**76.0**	**1,509**	**72.7**	**567**	**27.3**
ME	298	189	63.4	80	42.3	109	57.7		.0	189	63.4	122	64.6	67	35.4
MA	760	526	69.2	237	45.1	289	54.9		.0	525	69.1	295	56.2	230	43.8
NH	280	200	71.4	95	47.5	105	52.5		.0	198	70.7	98	49.5	100	50.5
RI	143	122	85.3	66	54.1	56	45.9		.0	123	86.0	78	63.4	45	36.6
PR	1,249	1,051	84.1	734	69.8	317	30.2		.0	1,041	83.3	916	88.0	125	12.0
2ND	**3,942**	**3,437**	**87.2**	**1,561**	**45.4**	**1,876**	**54.6**	**0**	**.0**	**3,415**	**86.6**	**1,991**	**58.3**	**1,424**	**41.7**
CT	534	436	81.6	192	44.0	244	56.0		.0	424	79.4	246	58.0	178	42.0
NY,N	442	334	75.6	232	69.5	102	30.5		.0	329	74.4	233	70.8	96	29.2
NY,E	811	725	89.4	315	43.4	410	56.6		.0	720	88.8	424	58.9	296	41.1
NY,S	1,403	1,326	94.5	552	41.6	774	58.4		.0	1,325	94.4	691	52.2	634	47.8
NY,W	536	452	84.3	185	40.9	267	59.1		.0	451	84.1	276	61.2	175	38.8
VT	216	164	75.9	85	51.8	79	48.2		.0	166	76.9	121	72.9	45	27.1
3RD	**3,583**	**3,086**	**86.1**	**1,612**	**52.2**	**1,474**	**47.8**	**0**	**.0**	**3,078**	**85.9**	**1,775**	**57.7**	**1,303**	**42.3**
DE	133	89	66.9	58	65.2	31	34.8		.0	89	66.9	59	66.3	30	33.7
NJ	1,399	1,274	91.1	611	48.0	663	52.0		.0	1,274	91.1	649	50.9	625	49.1
PA,E	866	782	90.3	422	54.0	360	46.0		.0	782	90.3	484	61.9	298	38.1
PA,M	445	297	66.7	191	64.3	106	35.7		.0	291	65.4	190	65.3	101	34.7
PA,W	592	554	93.6	291	52.5	263	47.5		.0	553	93.4	339	61.3	214	38.7
VI	148	90	60.8	39	43.3	51	56.7		.0	89	60.1	54	60.7	35	39.3
4TH	**6,411**	**4,466**	**69.7**	**2,675**	**59.9**	**1,791**	**40.1**	**0**	**.0**	**4,551**	**71.0**	**3,144**	**69.1**	**1,407**	**30.9**
MD	668	629	94.2	421	66.9	208	33.1		.0	627	93.9	430	68.6	197	31.4
NC,E	1,088	746	68.6	516	69.2	230	30.8		.0	746	68.6	626	83.9	120	16.1
NC,M	412	366	88.8	215	58.7	151	41.3		.0	364	88.3	258	70.9	106	29.1
NC,W	607	499	82.2	360	72.1	139	27.9		.0	495	81.5	396	80.0	99	20.0
SC	948	556	58.6	244	43.9	312	56.1		.0	548	57.8	281	51.3	267	48.7
VA,E	1,512	830	54.9	366	44.1	464	55.9		.0	907	60.0	538	59.3	369	40.7
VA,W	406	265	65.3	192	72.5	73	27.5		.0	256	63.1	194	75.8	62	24.2
WV,N	372	297	79.8	155	52.2	142	47.8		.0	296	79.6	157	53.0	139	47.0
WV,S	398	278	69.8	206	74.1	72	25.9		.0	312	78.4	264	84.6	48	15.4

Table H-3A. (September 30, 2019—Continued)

Circuit and District	Cases Activated	Type of PSO[1] Recommendation Made[3]								Type of AUSA[2] Recommendation Made[3]					
		PSO Recommended		Detention		Release		Release Without Supervision		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
5TH	**26,777**	**11,539**	**43.1**	**7,167**	**62.1**	**4,372**	**37.9**	**0**	**.0**	**11,508**	**43.0**	**8,263**	**71.8**	**3,245**	**28.2**
LA,E	333	270	81.1	155	57.4	115	42.6		.0	269	80.8	184	68.4	85	31.6
LA,M	186	126	67.7	57	45.2	69	54.8		.0	126	67.7	74	58.7	52	41.3
LA,W	435	236	54.3	139	58.9	97	41.1		.0	227	52.2	145	63.9	82	36.1
MS,N	225	173	76.9	76	43.9	97	56.1		.0	173	76.9	82	47.4	91	52.6
MS,S	587	442	75.3	341	77.1	101	22.9		.0	443	75.5	334	75.4	109	24.6
TX,N	1,084	1,024	94.5	555	54.2	469	45.8		.0	1,010	93.2	714	70.7	296	29.3
TX,E	934	676	72.4	474	70.1	202	29.9		.0	674	72.2	559	82.9	115	17.1
TX,S	11,479	3,991	34.8	2,481	62.2	1,510	37.8		.0	3,989	34.8	2,836	71.1	1,153	28.9
TX,W	11,514	4,601	40.0	2,889	62.8	1,712	37.2		.0	4,597	39.9	3,335	72.5	1,262	27.5
6TH	**6,518**	**5,001**	**76.7**	**2,973**	**59.4**	**2,028**	**40.6**	**0**	**.0**	**5,098**	**78.2**	**3,429**	**67.3**	**1,669**	**32.7**
KY,E	642	441	68.7	307	69.6	134	30.4		.0	443	69.0	319	72.0	124	28.0
KY,W	446	325	72.9	208	64.0	117	36.0		.0	326	73.1	232	71.2	94	28.8
MI,E	1,045	815	78.0	365	44.8	450	55.2		.0	814	77.9	431	52.9	383	47.1
MI,W	414	324	78.3	174	53.7	150	46.3		.0	324	78.3	227	70.1	97	29.9
OH,N	1,020	803	78.7	498	62.0	305	38.0		.0	810	79.4	548	67.7	262	32.3
OH,S	883	706	80.0	260	36.8	446	63.2		.0	706	80.0	359	50.8	347	49.2
TN,E	996	877	88.1	698	79.6	179	20.4		.0	877	88.1	729	83.1	148	16.9
TN,M	367	172	46.9	141	82.0	31	18.0		.0	260	70.8	189	72.7	71	27.3
TN,W	705	538	76.3	322	59.9	216	40.1		.0	538	76.3	395	73.4	143	26.6
7TH	**3,221**	**2,610**	**81.0**	**1,478**	**56.6**	**1,132**	**43.4**	**0**	**.0**	**2,605**	**80.9**	**1,859**	**71.4**	**746**	**28.6**
IL,N	1,080	925	85.6	415	44.9	510	55.1		.0	927	85.8	594	64.1	333	35.9
IL,C	285	253	88.8	200	79.1	53	20.9		.0	252	88.4	212	84.1	40	15.9
IL,S	347	227	65.4	127	55.9	100	44.1		.0	227	65.4	158	69.6	69	30.4
IN,N	372	341	91.7	250	73.3	91	26.7		.0	342	91.9	275	80.4	67	19.6
IN,S	658	557	84.7	358	64.3	199	35.7		.0	550	83.6	458	83.3	92	16.7
WI,E	304	224	73.7	92	41.1	132	58.9		.0	224	73.7	125	55.8	99	44.2
WI,W	175	83	47.4	36	43.4	47	56.6		.0	83	47.4	37	44.6	46	55.4
8TH	**6,711**	**5,518**	**82.2**	**3,485**	**63.2**	**2,033**	**36.8**	**0**	**.0**	**5,491**	**81.8**	**4,249**	**77.4**	**1,242**	**22.6**
AR,E	686	462	67.3	217	47.0	245	53.0		.0	467	68.1	281	60.2	186	39.8
AR,W	340	249	73.2	204	81.9	45	18.1		.0	245	72.1	207	84.5	38	15.5
IA,N	446	338	75.8	225	66.6	113	33.4		.0	339	76.0	248	73.2	91	26.8
IA,S	550	470	85.5	281	59.8	189	40.2		.0	470	85.5	355	75.5	115	24.5
MN	457	389	85.1	203	52.2	186	47.8		.0	375	82.1	258	68.8	117	31.2
MO,E	1,691	1,581	93.5	1,167	73.8	414	26.2		.0	1,594	94.3	1,338	83.9	256	16.1
MO,W	998	870	87.2	534	61.4	336	38.6		.0	856	85.8	715	83.5	141	16.5
NE	595	433	72.8	274	63.3	159	36.7		.0	420	70.6	310	73.8	110	26.2
ND	345	196	56.8	90	45.9	106	54.1		.0	194	56.2	113	58.2	81	41.8
SD	603	530	87.9	290	54.7	240	45.3		.0	531	88.1	424	79.8	107	20.2

Table H-3A. (September 30, 2019—Continued)

Circuit and District	Cases Activated	Type of PSO[1] Recommendation Made[3]								Type of AUSA[2] Recommendation Made[3]					
		PSO Recommended		Detention		Release		Release Without Supervision		AUSA Recommendation		Detention		Release	
		Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
9TH	**32,846**	**15,248**	**46.4**	**6,870**	**45.1**	**8,378**	**54.9**	**0**	**.0**	**15,177**	**46.2**	**8,296**	**54.7**	**6,881**	**45.3**
AK	188	168	89.4	118	70.2	50	29.8		.0	164	87.2	133	81.1	31	18.9
AZ	16,929	2,889	17.1	1,754	60.7	1,135	39.3		.0	2,880	17.0	2,144	74.4	736	25.6
CA,N	825	773	93.7	326	42.2	447	57.8		.0	779	94.4	499	64.1	280	35.9
CA,E	629	581	92.4	397	68.3	184	31.7		.0	580	92.2	486	83.8	94	16.2
CA,C	2,036	1,806	88.7	1,008	55.8	798	44.2		.0	1,800	88.4	1,182	65.7	618	34.3
CA,S	8,671	6,325	72.9	1,962	31.0	4,363	69.0		.0	6,261	72.2	2,204	35.2	4,057	64.8
HI	233	185	79.4	53	28.6	132	71.4		.0	185	79.4	123	66.5	62	33.5
ID	428	259	60.5	139	53.7	120	46.3		.0	272	63.6	206	75.7	66	24.3
MT	434	328	75.6	236	72.0	92	28.0		.0	328	75.6	236	72.0	92	28.0
NV	584	462	79.1	244	52.8	218	47.2		.0	461	78.9	308	66.8	153	33.2
OR	572	455	79.5	229	50.3	226	49.7		.0	455	79.5	289	63.5	166	36.5
WA,E	430	214	49.8	139	65.0	75	35.0		.0	212	49.3	188	88.7	24	11.3
WA,W	808	728	90.1	237	32.6	491	67.4		.0	725	89.7	257	35.4	468	64.6
GUAM	63	61	96.8	21	34.4	40	65.6		.0	61	96.8	32	52.5	29	47.5
NM,I	16	14	87.5	7	50.0	7	50.0		.0	14	87.5	9	64.3	5	35.7
10TH	**7,927**	**3,726**	**47.0**	**2,233**	**59.9**	**1,493**	**40.1**	**0**	**.0**	**3,724**	**47.0**	**2,576**	**69.2**	**1,148**	**30.8**
CO	658	426	64.7	203	47.7	223	52.3		.0	418	63.5	288	68.9	130	31.1
KS	529	420	79.4	268	63.8	152	36.2		.0	420	79.4	291	69.3	129	30.7
NM	4,760	1,296	27.2	795	61.3	501	38.7		.0	1,294	27.2	888	68.6	406	31.4
OK,N	370	284	76.8	159	56.0	125	44.0		.0	284	76.8	180	63.4	104	36.6
OK,E	136	123	90.4	80	65.0	43	35.0		.0	123	90.4	97	78.9	26	21.1
OK,W	680	517	76.0	215	41.6	302	58.4		.0	524	77.1	250	47.7	274	52.3
UT	585	532	90.9	421	79.1	111	20.9		.0	532	90.9	464	87.2	68	12.8
WY	209	128	61.2	92	71.9	36	28.1		.0	129	61.7	118	91.5	11	8.5
11TH	**7,497**	**5,406**	**72.1**	**2,882**	**53.3**	**2,524**	**46.7**	**0**	**.0**	**5,447**	**72.7**	**3,194**	**58.6**	**2,253**	**41.4**
AL,N	656	359	54.7	196	54.6	163	45.4		.0	359	54.7	209	58.2	150	41.8
AL,M	125	97	77.6	47	48.5	50	51.5		.0	97	77.6	51	52.6	46	47.4
AL,S	427	222	52.0	121	54.5	101	45.5		.0	220	51.5	135	61.4	85	38.6
FL,N	481	370	76.9	167	45.1	203	54.9		.0	370	76.9	204	55.1	166	44.9
FL,M	1,780	1,263	71.0	598	47.3	665	52.7		.0	1,263	71.0	833	66.0	430	34.0
FL,S	2,270	1,742	76.7	940	54.0	802	46.0		.0	1,826	80.4	840	46.0	986	54.0
GA,N	735	589	80.1	303	51.4	286	48.6		.0	576	78.4	380	66.0	196	34.0
GA,M	448	319	71.2	175	54.9	144	45.1		.0	295	65.8	197	66.8	98	33.2
GA,S	575	445	77.4	335	75.3	110	24.7		.0	441	76.7	345	78.2	96	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.

Pretrial Services Violations Summary Report

AO TABLE H-15 (Dec. 31, 2019)

https://perma.cc/LYG4-AX4H

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending December 31, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TOTAL	197,772	55,142	27.9	9,045	16.4	442	519	61	650	8,283	14,161
1ST	7,084	2,424	34.2	238	9.8	17	10	0	8	213	338
ME	572	262	45.8	63	24.0	9	2	0	1	55	84
MA	1,740	685	39.4	80	11.7	5	2	0	2	74	114
NH	559	245	43.8	29	11.8	2	4	0	1	24	31
RI	403	163	40.4	35	21.5	1	2	0	1	33	65
PR	3,810	1,069	28.1	31	2.9	0	0	0	3	27	44
2ND	11,394	5,178	45.4	773	14.9	78	95	16	58	644	1,157
CT	1,306	624	47.8	103	16.5	10	4	1	11	92	164
NY,N	926	304	32.8	50	16.4	2	8	0	15	39	64
NY,E	3,173	1,439	45.4	209	14.5	13	23	5	2	190	329
NY,S	4,209	1,914	45.5	212	11.1	39	36	4	29	149	303
NY,W	1,363	701	51.4	140	20.0	10	20	6	1	118	202
VT	417	196	47.0	59	30.1	4	4	0	0	56	95
3RD	8,792	3,633	41.3	451	12.4	39	26	6	23	422	711
DE	334	74	22.2	2	2.7	1	0	0	0	2	3
NJ	3,224	1,584	49.1	105	6.6	12	7	1	11	96	137
PA,E	2,026	742	36.6	138	18.6	5	6	2	4	134	287
PA,M	1,368	405	29.6	49	12.1	1	3	2	6	40	62
PA,W	1,563	693	44.3	140	20.2	19	10	1	1	134	203
VI	277	135	48.7	17	12.6	1	0	0	1	16	19
4TH	12,026	4,172	34.7	737	17.7	20	59	9	30	661	1,081
MD	1,596	611	38.3	112	18.3	4	8	0	1	110	201
NC,E	1,991	535	26.9	113	21.1	5	23	6	2	87	171
NC,M	743	242	32.6	46	19.0	0	1	0	1	43	61
NC,W	1,264	281	22.2	37	13.2	2	3	1	0	33	41
SC	2,228	814	36.5	111	13.6	2	3	0	10	101	141
VA,E	2,198	931	42.4	109	11.7	2	13	2	8	89	157
VA,W	724	248	34.3	40	16.1	3	3	0	7	36	55
WV,N	638	323	50.6	125	38.7	2	5	0	1	120	195
WV,S	644	187	29.0	44	23.5	0	0	0	0	42	59
5TH	43,756	7,287	16.7	867	11.9	43	33	5	66	789	1,013
LA,E	847	281	33.2	17	6.0	1	2	0	2	12	20
LA,M	442	163	36.9	24	14.7	2	3	0	0	20	30
LA,W	829	193	23.3	3	1.6	0	0	0	0	3	3
MS,N	418	176	42.1	30	17.0	3	3	0	1	25	38
MS,S	1,068	307	28.7	16	5.2	2	1	0	1	12	16
TX,N	2,442	895	36.7	118	13.2	3	2	5	7	111	145
TX,E	1,890	349	18.5	38	10.9	4	5	0	1	38	45
TX,S	18,370	2,629	14.3	276	10.5	27	16	0	28	234	295
TX,W	17,450	2,294	13.1	345	15.0	1	1	0	26	334	421
6TH	13,428	4,801	35.8	985	20.5	45	49	2	45	930	1,789
KY,E	1,122	305	27.2	33	10.8	0	0	0	1	32	39
KY,W	941	363	38.6	50	13.8	3	4	0	2	47	71
MI,E	2,382	1,109	46.6	287	25.9	11	6	0	7	284	611
MI,W	762	269	35.3	49	18.2	4	5	0	5	40	56
OH,N	1,970	660	33.5	72	10.9	1	3	1	19	67	116
OH,S	1,930	866	44.9	193	22.3	0	0	0	3	189	361

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						Felony	Misde-meanor	Other			
TN,E	1,935	398	20.6	49	12.3	2	3	0	0	44	58
TN,M	938	333	35.5	110	33.0	20	15	0	2	98	215
TN,W	1,448	498	34.4	142	28.5	4	13	1	6	129	262
7TH	7,785	2,813	36.1	505	18.0	28	39	6	13	466	873
IL,N	2,876	1,260	43.8	245	19.4	20	27	0	7	224	462
IL,C	694	192	27.7	34	17.7	1	2	0	1	32	39
IL,S	662	219	33.1	47	21.5	1	6	1	1	43	81
IN,N	981	291	29.7	23	7.9	4	1	0	2	17	23
IN,S	1,470	395	26.9	74	18.7	0	0	0	1	73	117
WI,E	758	366	48.3	71	19.4	2	3	5	0	66	136
WI,W	344	90	26.2	11	12.2	0	0	0	1	11	15
8TH	14,263	4,457	31.2	1,341	30.1	77	106	14	64	1,256	2,793
AR,E	1,971	794	40.3	257	32.4	25	16	2	35	236	431
AR,W	675	127	18.8	8	6.3	0	0	0	4	7	6
IA,N	851	212	24.9	80	37.7	1	12	2	3	72	121
IA,S	1,163	326	28.0	109	33.4	2	11	8	0	104	185
MN	934	346	37.0	75	21.7	5	10	1	3	64	110
MO,E	3,246	920	28.3	418	45.4	18	9	0	9	407	1,344
MO,W	2,334	599	25.7	139	23.2	7	10	0	0	129	227
NE	1,186	413	34.8	73	17.7	8	12	1	3	65	97
ND	774	298	38.5	47	15.8	2	3	0	6	44	59
SD	1,129	422	37.4	135	32.0	9	23	0	1	128	213
9TH	51,712	12,431	24.0	1,998	16.1	36	38	0	255	1,849	2,844
AK	448	131	29.2	17	13.0	1	0	0	1	17	27
AZ	20,907	2,264	10.8	475	21.0	4	11	0	65	453	587
CA,N	2,577	1,208	46.9	161	13.3	0	0	0	11	156	307
CA,E	2,051	722	35.2	54	7.5	1	0	0	8	53	65
CA,C	6,070	2,205	36.3	219	9.9	13	7	0	25	195	304
CA,S	12,034	2,612	21.7	523	20.0	7	9	0	114	443	669
HI	545	284	52.1	39	13.7	0	0	0	0	40	50
ID	790	238	30.1	45	18.9	2	1	0	4	42	66
MT	760	271	35.7	55	20.3	2	3	0	0	53	69
NV	1,583	578	36.5	73	12.6	1	1	0	7	70	92
OR	1,413	696	49.3	178	25.6	4	4	0	10	172	299
WA,E	920	347	37.7	69	19.9	1	1	0	6	65	131
WA,W	1,439	745	51.8	70	9.4	0	1	0	4	70	136
GUAM	140	107	76.4	17	15.9	0	0	0	0	17	38
NM,I	35	23	65.7	3	13.0	0	0	0	0	3	4
10TH	13,088	3,225	24.6	523	16.2	16	17	0	65	481	721
CO	1,288	408	31.7	52	12.7	3	1	0	29	46	67
KS	1,173	406	34.6	92	22.7	2	3	0	3	92	151
NM	6,919	1,101	15.9	143	13.0	0	0	0	16	140	154
OK,N	580	215	37.1	75	34.9	1	0	0	3	70	153
OK,E	266	57	21.4	4	7.0	0	0	0	1	3	4
OK,W	1,258	502	39.9	64	12.7	2	3	0	4	57	85
UT	1,222	417	34.1	82	19.7	8	10	0	5	64	98
WY	382	119	31.2	11	9.2	0	0	0	4	9	9
11TH	14,444	4,721	32.7	627	13.3	43	47	3	23	572	841
AL,N	1,188	372	31.3	60	16.1	6	6	0	4	55	93
AL,M	355	159	44.8	13	8.2	0	0	0	1	12	21
AL,S	706	233	33.0	47	20.2	2	4	0	0	44	52
FL,N	831	360	43.3	33	9.2	5	3	2	1	26	44

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						Felony	Misde-meanor	Other			
FL,M	3,557	997	28.0	162	16.2	12	16	0	5	147	216
FL,S	3,967	1,319	33.2	161	12.2	1	0	0	2	159	200
GA,N	1,928	683	35.4	80	11.7	7	10	1	5	68	112
GA,M	977	373	38.2	52	13.9	8	6	0	2	45	77
GA,S	935	225	24.1	19	8.4	2	2	0	3	16	26

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

Table H-15.
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						Felony	Misde-meanor	Other			
TOTAL	173,067	52,527	30.4	8,222	15.7	471	502	46	617	7,469	13,240
1ST	6,387	2,400	37.6	282	11.8	19	15	0	7	251	420
ME	507	247	48.7	54	21.9	6	4	0	0	44	82
MA	1,707	768	45.0	102	13.3	9	7	0	6	87	163
NH	539	257	47.7	40	15.6	1	2	0	1	40	65
RI	397	166	41.8	28	16.9	1	2	0	0	25	44
PR	3,237	962	29.7	58	6.0	2	0	0	0	55	66
2ND	10,427	5,020	48.1	681	13.6	62	82	11	49	566	1,003
CT	1,192	607	50.9	97	16.0	12	9	1	12	84	143
NY,N	874	307	35.1	51	16.6	2	7	0	11	43	73
NY,E	2,924	1,450	49.6	175	12.1	13	21	3	3	153	274
NY,S	3,758	1,806	48.1	178	9.9	26	25	5	20	127	240
NY,W	1,283	654	51.0	120	18.3	8	15	2	3	102	176
VT	396	196	49.5	60	30.6	1	5	0	0	57	97
3RD	8,523	3,712	43.6	439	11.8	47	38	4	31	393	681
DE	250	56	22.4	3	5.4	1	0	0	0	1	3
NJ	3,320	1,709	51.5	127	7.4	20	16	0	15	109	154
PA,E	1,758	640	36.4	112	17.5	2	3	0	3	112	214
PA,M	1,273	404	31.7	37	9.2	3	1	0	4	30	53
PA,W	1,701	791	46.5	145	18.3	21	17	4	8	127	242
VI	221	112	50.7	15	13.4	0	1	0	1	14	15
4TH	11,025	3,918	35.5	581	14.8	24	52	7	30	524	876
MD	1,409	553	39.2	95	17.2	2	9	1	6	92	200
NC,E	2,127	645	30.3	87	13.5	5	21	3	1	68	139
NC,M	680	231	34.0	44	19.0	1	2	0	1	42	54
NC,W	1,304	264	20.2	36	13.6	4	2	0	1	31	40
SC	1,731	670	38.7	71	10.6	7	2	0	8	62	99
VA,E	1,858	786	42.3	78	9.9	2	10	2	2	71	120
VA,W	717	272	37.9	40	14.7	2	1	1	9	35	50
WV,N	632	315	49.8	88	27.9	0	5	0	2	82	116
WV,S	567	182	32.1	42	23.1	1	0	0	0	41	58
5TH	39,192	6,858	17.5	728	10.6	42	41	5	57	644	857
LA,E	717	246	34.3	12	4.9	0	0	0	0	12	16
LA,M	346	137	39.6	20	14.6	4	1	0	0	16	26
LA,W	700	159	22.7	1	0.6	0	0	0	0	1	1
MS,N	305	129	42.3	25	19.4	3	5	0	0	21	37
MS,S	948	312	32.9	13	4.2	2	0	0	3	10	12
TX,N	2,511	891	35.5	95	10.7	8	8	4	5	77	108
TX,E	1,899	389	20.5	33	8.5	3	6	1	1	28	32
TX,S	17,405	2,625	15.1	251	9.6	21	21	0	28	206	279
TX,W	14,361	1,970	13.7	278	14.1	1	0	0	20	273	346

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						Felony	Misde-meanor	Other			
6TH	11,960	4,376	36.6	822	18.8	57	53	3	40	761	1,456
KY,E	1,004	300	29.9	30	10.0	1	2	0	0	27	35
KY,W	877	339	38.7	37	10.9	3	3	1	2	29	54
MI,E	2,029	940	46.3	213	22.7	8	7	0	7	210	465
MI,W	651	214	32.9	54	25.2	5	12	0	1	49	78
OH,N	1,857	698	37.6	62	8.9	0	4	1	20	50	89
OH,S	1,782	807	45.3	156	19.3	0	0	0	3	150	267
TN,E	1,659	369	22.2	44	11.9	3	1	0	1	41	52
TN,M	907	320	35.3	102	31.9	26	13	0	0	94	180
TN,W	1,194	389	32.6	124	31.9	11	11	1	6	111	236
7TH	7,761	2,941	37.9	534	18.2	37	21	5	15	492	913
IL,N	2,882	1,334	46.3	257	19.3	25	14	1	9	236	531
IL,C	741	186	25.1	29	15.6	2	2	0	1	27	41
IL,S	648	218	33.6	56	25.7	4	0	0	0	52	83
IN,N	944	274	29.0	16	5.8	1	2	0	2	13	17
IN,S	1,427	434	30.4	90	20.7	0	0	0	1	86	125
WI,E	823	415	50.4	81	19.5	5	3	4	1	73	111
WI,W	296	80	27.0	5	6.3	0	0	0	1	5	5
8TH	13,436	4,272	31.8	1,152	27.0	67	85	7	73	1,065	2,510
AR,E	1,998	827	41.4	235	28.4	16	21	1	50	213	424
AR,W	590	122	20.7	8	6.6	0	0	0	3	8	10
IA,N	751	188	25.0	63	33.5	1	7	1	1	61	92
IA,S	1,113	257	23.1	72	28.0	3	8	2	0	68	123
MN	882	312	35.4	61	19.6	4	4	0	4	53	79
MO,E	2,835	784	27.7	347	44.3	22	5	1	4	340	1,245
MO,W	2,316	599	25.9	133	22.2	9	14	1	1	123	236
NE	1,072	395	36.8	63	15.9	3	10	0	2	52	77
ND	768	337	43.9	53	15.7	3	2	0	3	45	58
SD	1,111	451	40.6	117	25.9	6	14	1	5	102	166
9TH	40,817	11,861	29.1	1,996	16.8	48	55	2	252	1,864	3,088
AK	408	140	34.3	26	18.6	0	0	0	0	26	35
AZ	13,671	1,844	13.5	388	21.0	6	7	1	78	372	518
CA,N	2,016	1,119	55.5	218	19.5	0	1	0	15	212	397
CA,E	1,904	667	35.0	39	5.8	2	1	0	6	37	42
CA,C	5,642	2,090	37.0	208	10.0	14	11	0	33	180	330
CA,S	10,210	2,903	28.4	603	20.8	16	15	0	90	539	898
HI	552	273	49.5	41	15.0	0	0	0	0	41	63
ID	708	230	32.5	45	19.6	2	4	0	4	39	68
MT	706	277	39.2	48	17.3	1	1	1	0	49	58
NV	1,494	533	35.7	68	12.8	2	1	0	9	64	90
OR	1,449	805	55.6	183	22.7	3	5	0	7	181	329
WA,E	740	310	41.9	56	18.1	1	4	0	6	54	141
WA,W	1,163	551	47.4	58	10.5	1	5	0	4	55	96
GUAM	119	91	76.5	12	13.2	0	0	0	0	12	18
NM,I	35	28	80.0	3	10.7	0	0	0	0	3	5

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						Felony	Misde-meanor	Other			
10TH	11,300	3,094	27.4	476	15.4	14	19	0	41	443	722
CO	1,153	364	31.6	68	18.7	3	1	0	19	62	99
KS	1,044	368	35.2	78	21.2	4	2	0	2	75	157
NM	5,498	1,108	20.2	150	13.5	0	0	0	8	148	169
OK,N	612	208	34.0	56	26.9	1	0	0	3	51	138
OK,E	299	51	17.1	4	7.8	0	0	0	0	4	4
OK,W	1,180	462	39.2	40	8.7	1	4	0	2	37	59
UT	1,151	437	38.0	72	16.5	5	12	0	3	60	88
WY	363	96	26.4	8	8.3	0	0	0	4	6	8
11TH	12,239	4,075	33.3	531	13.0	54	41	2	22	466	714
AL,N	1,016	332	32.7	55	16.6	5	5	0	1	48	78
AL,M	272	110	40.4	11	10.0	2	1	0	1	8	13
AL,S	571	183	32.0	33	18.0	2	2	0	1	29	37
FL,N	739	329	44.5	37	11.2	3	3	1	0	35	46
FL,M	2,977	846	28.4	136	16.1	22	12	0	6	119	200
FL,S	3,034	987	32.5	100	10.1	2	1	1	4	97	124
GA,N	1,905	719	37.7	82	11.4	4	9	0	4	72	110
GA,M	912	338	37.1	67	19.8	14	8	0	3	50	93
GA,S	813	231	28.4	10	4.3	0	0	0	2	8	13

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

Memo: Right to Counsel at Initial Appearance

FEDERAL CRIMINAL JUSTICE CLINIC MEMO

SUBJECT: **Right to Counsel at Initial Appearance**

FROM: Federal Criminal Justice Clinic at the University of Chicago Law School (alisonsiegler@uchicago.edu)

DATE: March 25, 2020

This memo establishes that people charged in federal criminal cases have the right to be represented by an attorney during the Initial Appearance under at least four statutes and constitutional provisions: Fed. R. Crim. P. 44, 18 U.S.C. § 3006A, the Sixth Amendment, and the Due Process Clause.

During the COVID-19 pandemic, attorneys may prefer to appear virtually by phone or videoconference. That may well be an appropriate substitute for an in-person appearance by counsel in the face of these extraordinary and unusual circumstances; we have not researched that question. The point of this memo is to establish that judges are forbidden from holding Initial Appearances hearings when a client is entirely unrepresented, meaning no lawyer is present in person or virtually.

This memo was prepared by the Federal Criminal Justice Clinic: Director Alison Siegler, Associate Director Erica Zunkel, and students Elisabeth Mayer, Anna Porter, and Allie Van Dine, with help from Anjali Biala, Staff Attorney at the Federal Defender Program in Chicago. We can be reached at alisonsiegler@uchicago.edu or (773) 834-1680.

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I. Counsel's Obligations at Initial Appearance

Before addressing the arguments for the right to representation at the Initial Appearance, it is important to discuss the legal obligations a lawyer owes their client at the Initial Appearance stage.

The Initial Appearance is akin to the initial bail hearing in state cases. The Initial Appearance is the moment at which the prosecutor must offer a specific, statutorily authorized basis to detain the defendant pending a Detention Hearing. *See* 18 U.S.C. § 3142(f). If the prosecutor cannot advance a legitimate statutory basis under § 3142(f), the court is forbidden from holding a Detention Hearing at all, and is also forbidden from detaining the defendant. The Initial Appearance is thus the first opportunity for judicial review of any request for detention. That judicial review is limited by the specific criteria for detention and holding a Detention Hearing under § 3142(f).[1]

Under the BRA, the court is only allowed to detain someone at the Initial Appearance and only allowed to hold a Detention Hearing if:

- The person is charged with an offense listed in § 3142(f)(1), including crimes of violence, drug crimes, gun crimes, crimes involving minor victims, and terrorism, or
- If the person poses a **serious** risk of flight or a **serious** risk of obstructing justice under § 3142(f)(2).
    - Ordinary flight risk and danger to the community are not grounds for detention at the Initial Appearance.[2]
- If no factors under § 3142(f) apply, the person must be released immediately either on personal recognizance or conditions under § 3142(b) or § 3142(c).

Defense counsel has an ethical obligation to be present at the Initial Appearance and to zealously represent their client during that proceeding. The Initial Appearance is a vital and legally complicated moment in the proceedings. Social science is clear that defendants released pending trial have better outcomes, both in the adjudication of their guilt and in the

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[1] The Bail Reform Act of 1984 uses the term "first appearance" instead of "Initial Appearance." Rule 44 uses the term "initial appearance." Rule 5 has treated the two terms as interchangeable since the 1972 amendments to place the rule in compliance with the Bail Reform Act of 1966. *See* Notes of Advisory Committee to Fed. R. Crim. P. 5 (1972) ("Subsection (c) [of the Rule] provides that the defendant should be notified of the general circumstances under which he is entitled to pretrial release under the Bail Reform Act of 1966.").

[2] Every court of appeals to address the issue agrees that it is illegal to detain a defendant when there is no statutory basis under § 3142(f). *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) ("Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists."); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 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).

setting of their sentence.[3] Accordingly, defense attorneys must do everything in their power at this stage to prevent their client from being detained.

In practice, illegal detentions at the Initial Appearance sometimes occur even when counsel is present, demonstrating that it is crucially important that defendants be represented by counsel at this stage. After observing Initial Appearances in the U.S. District Court for the Northern District of Illinois, the FCJC's Courtwatching Project found that defendants were illegally detained in approximately 10% of cases.

II. Rule 44 Requires Representation by Counsel During Initial Appearance.

Rule 44, on its face and by its plain language, requires counsel at the Initial Appearance. It clearly states, "A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding *from initial appearance through appeal*, unless the defendant waives this right." Fed. R. Crim. P. (emphasis added). Although case law interpreting Rule 44 wavers on whether counsel must be appointed *prior to* the Initial Appearance, it is clear that counsel must be appointed **at the Initial Appearance** at the very latest. *See, e.g.*, *United States v. Perez*, 776 F.2d 797, 800 (9th Cir. 1985), *overruled on other grounds* by *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003). We have not yet located a single published case suggesting that Rule 44 does not entitle a defendant to counsel for the purposes of the bail determination occurring at the Initial Appearance.[4]

Courts have emphasized Rule 44's central purpose of providing counsel in proceedings where defendants might suffer prejudice due to a lack of representation. *See, e.g.*, *McGill v. United States*, 348 F.2d 791, 793 (D.C. Cir. 1965) (explaining that "[t]he general language in Johnson v. Zerbst and Rule 44 must be read in the light of their **fundamental**

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[3] *See, e.g.*, Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. OF L. ECON. & ORG. 511, 512 (2018) (finding that pretrial detention leads to a 13% increase in the likelihood of conviction using data from state-level cases in Philadelphia); 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, 225 (2018) (finding that a person who is initially released pretrial is 18.8% less likely to plead guilty in Philadelphia and Miami-Dade counties); Mary T. Phillips, *A Decade of Bail Research in New York City*, N.Y.C. CRIM. JUST. AGENCY, at 116 (Aug. 2012), archived at https://perma.cc/A3UM-AHGW ("[A]mong nonfelony cases with no pretrial detention [in New York City], half ended in conviction, compared to 92% among cases with a defendant who was detained throughout," and in the felony context "[o]verall conviction rates rose from 59% for cases with a defendant who spent less than a day in detention to 85% when the detention period stretched to more than a week."). For sentencing, *see* Stephanie Didwania, *The Immediate Consequences of Pretrial Detention*, AM. L. & ECON. REV., at 30 (forthcoming 2020), available at https://ssrn.com/abstract=2809818.

[4] One district court case, *United States v. Hooker*, 418 F. Supp. 476 (M.D. Penn. 1976), states that a violation of Rule 44(a) "would not mandate a dismissal of the charges without a showing of prejudice."

purpose to provide the guiding hand of counsel at **every step where an accused who is without counsel may be prejudiced**.") (emphasis added) (case from before 1984).

The Advisory Committee notes to Rule 44 support this understanding as well. A note to the 1966 Amendment to the Federal Rules of Criminal Procedure notes that "[t]he phrase 'from his initial appearance before the commissioner or court' is intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel." Fed. R. Crim. P. 44.

The Ninth Circuit's holding in *United States v. Perez*, 776 F.2d at 800 (9th Cir. 1985), does not authorize judges to deny counsel at Initial Appearance. *Perez* interprets Rule 44 to mean that counsel must be appointed, at the very latest, **at** the Initial Appearance. Importantly, its Rule 44 holding is more nuanced than the cases citing it seem to suggest. *See, e.g.*, *Agadaga v. United States*, No. 95-35935, 1997 WL 669951 (9th Cir. Oct. 27, 1997); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1473 (11th Cir. 1992) *abrogated on other grounds, Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994). With regard to Rule 44, the *Perez* court concludes:

> We must give [Rule 44] a common sense interpretation. One of the tasks performed at an initial appearance is the appointment of counsel. To require that counsel be appointed before the judge asks routine questions such as the defendant's name and financial ability would be self-defeating.

Id. at 800. Under this reading of Rule 44, counsel still must be appointed **at** the Initial Appearance **at the latest**. The *Perez* court is merely restating how courts work—since counsel will be appointed **at** the Initial Appearance in any case, that appointment need not necessarily happen before the judge asks the defendant a few basic questions.

To that end, the court's finding that Mr. Perez had failed to show he suffered prejudice due to a lack of counsel was **quite limited**. The Court noted that Mr. Perez had not shown "prejudice due to the court's failure to appoint counsel **before asking the defendant his name.**" This is a narrow conclusion—especially when taken with the court's recognition that "**[s]ignificantly**, counsel was appointed when the proceedings may have affected his rights following the initial determination of the defendant's name." *Id.* Accordingly, *Perez* seems to contemplate that counsel must be appointed before the proceedings reach a place where they impact a defendant's rights. The arguments that take place at the Initial Appearance, as prescribed by the Bail Reform Act, can absolutely impact a defendant's rights in a very real way—they can lead to his or her pretrial detention or release.[5]

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[5] A later, unpublished Ninth Circuit case, *Agadaga v. United States*, No. 95-35935, 1997 WL 669951 (9th Cir. Oct. 27, 1997), not only misunderstands *Perez*'s Rule 44 holding, but is clearly distinguishable due to its facts and procedural posture. In footnote 1, the *Agadaga* court cites *Perez* as standing for the proposition that nothing happens at an Initial Appearance that could impair the accused's defense. This is demonstrably not what *Perez* stands for— after all, the *Perez* court found it "significant" that counsel was appointed for the part of the Initial Appearance when the accused's

The Eleventh Circuit has cited *Perez* for the proposition that counsel need not be appointed **before** the Initial Appearance. However, it seems to agree that counsel should be appointed **at** this stage. *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1473 (11th Cir. 1992) *abrogated on other grounds, Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994). At note 5, the *Mendoza-Cecelia* court explains:

> We do not interpret [Rule 44] to mean that a court must have appointed counsel prior to even this "initial" proceeding. *Accord Perez*,776 F.2d at 800. One of the duties of the court during this appearance is to appoint counsel. *See* Fed. R. Crim. P. 5. Moreover, as a practical matter, it is both necessary and appropriate for a court to ask at least routine background questions and to ascertain financial ability before deciding to appoint counsel.

Id. at n. 5 (internal citations omitted). By noting that one of the court's "duties" at the Initial Appearance is to appoint counsel—and only interpreting Rule 44 to not require the appointment of counsel **before** the Initial Appearance—the *Mendoza-Cecelia* court seems to agree that counsel is appointed **at** the initial appearance. Moreover, in noting that the lower court determined that the defendant at issue in that case was entitled to appointed counsel for the bail colloquy (but refused counsel), the *Mendoza-Cecelia* court seems to suggest that Rule 44 **does require** appointment of counsel for that stage of the proceedings.

One possible remedy for violation of Rule 44 is a new initial appearance. *See Gadsden v. United States*, 223 F.2d 627 (D.C. Cir. 1955) (where court did not satisfy obligation under Fed. R. Crim. Pro. 32(a), requiring that it provide the defendant an opportunity to speak at sentencing, new sentencing was ordered).

III. 18 U.S.C. § 3006A Grants Indigent Defendants the Right to be Represented by Counsel During Initial Appearance.

The statute providing for the adequate representation of defendants in federal court, 18 U.S.C. § 3006A, states that "[a] person for whom counsel is appointed shall be represented at every stage of the proceedings **from his initial appearance** before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings." 18 U.S.C. § 3006A(c). On its face, this statute requires all

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rights were implicated. *Perez*, 776 F.2d at 800. Moreover, *Agadaga*'s posture makes it inapposite. It is an appeal from the denial of a *coram nobis* petition, which occurs in the postconviction context and is a rare, unique procedure on its own. *Agadaga*, 1997 WL 669951 at *1. Additionally, the *Agadaga* court takes issue with the fact that the *pro se* petitioner filing this appeal did not explain how he was prejudiced, exactly, by not having counsel at the Initial Appearance, other than saying that he was generally denied justice. *Id.* Thus, the *Agadaga* court seems to leave the door open for a more specific articulation of how a failure to appoint counsel at the Initial Appearance prejudiced the defendant.

defendants entitled to appointed counsel to be represented by a lawyer during the Initial Appearance.

The statute explicitly references Initial Appearance as the first stage at which appointed counsel is required. That should be the end of the inquiry. It is worth noting that courts have read § 3006A as "confer[ring] broad authority to appoint counsel," sometimes even in situations where an individual is under investigation by federal authorities but has yet to be indicted. *United States v. Robertson*, 410 F. Supp. 3d 1114, 1117 (D. Mont. 2019) (appeal has been filed). This statute is referenced in parole statutes and implementing regulations as providing the procedure by which indigent *parolees* can obtain counsel. *See United States v. Valesquez*, No. 20-CV-583, 2020 WL 565407 (E.D.N.Y. Feb. 4, 2020). Judges also use this statute to appoint counsel in habeas proceedings, *see, e.g.*, *Wofford v. Woods*, 352 F. Supp. 3d 812, 825 (E.D. Mich. 2018), and for petitioning for a writ of certiorari from the United States Supreme Court, *see, e.g.*, *Taylor v. United States*, 822 F.3d 84 (2d Cir. 2016). If the rights conferred by § 3006A extend to these unique situations outside of the traditional federal case timeline, they must extend to the Initial Appearance. Moreover, the Eleventh Circuit has clarified that the statute's language encompasses "procedural mechanisms employed within the context of a federal action to insure the protection of a person's rights in that action" and "extend[s] to matters that are part of the original action, such as sentencing and resentencing." *United States v. Webb*, 565 F.3d 789, 795 (11th Cir. 2009) (citing *In re Lindsey*, 875 F.2d 1502, 1508 (11th Cir. 1989) (per curiam)). The Initial Appearance is certainly part of the original action.

Some Circuit courts have reversed convictions or ordered new proceedings in cases where the lower court failed in its duty to ensure representation under § 3006A.

- *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985) (failure of duty of court to appoint expert, in violation of 3006A(e)(1), warranted reversal of conviction and remand for new trial).
- *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967) (where court appointed same counsel to represent two defendants, in violation of 3006A(b), conviction was reversed and new trial ordered).
- *United States v. Smith*, 387 F.2d 268 (6th Cir. 1967) (citing 3006A(c), the Sixth Circuit held that where the district court did not advise the defendant of the right to appeal at time of sentencing, a resentencing was warranted).

IV. <u>Sixth Amendment</u>: The Initial Appearance is a "Critical Stage" During Which Representation by Counsel is Required Under the Sixth Amendment.

It is undisputed that the Sixth Amendment right to counsel "attaches" at the Initial Appearance. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."). However, *Rothgery v. Gillespie County*

separated attachment of the right from entitlement to appointed counsel. The Court found that "the accused is at least entitled to the presence of appointed counsel during 'any critical stage' of the postattachment proceedings." *Rothgery*, 544 U.S. at 212; *see also Tobin v. United States*, 402 F.2d 307, 309 (7th Cir. 1968) (noting that "[s]tarting with *Gideon v. Wainwright* . . . the Supreme Court has repeatedly emphasized that the appointment of counsel is an absolute right, and that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a defendant may be affected." (internal citations omitted)). After Rothgery, whether a bail hearing is a "critical stage" at which a defendant is entitled to representation by counsel is somewhat of an open question, and no court has addressed whether the Initial Appearance in a federal case is a critical stage. This memo establishes that the Initial Appearance in a federal case is a critical stage.

First, an Initial Appearance on an indictment is clearly a critical stage because the Supreme Court held arraignment to be a critical stage in *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961). Second, even though the Initial Appearance on a complaint does not require the taking of a plea, it is nevertheless a critical stage similar to the bail hearings state courts have found to be critical stages post-*Rothgery*.

A. The Supreme Court holds that counsel is required at arraignment, which is simply an Initial Appearance on an indictment.

- The Supreme Court in *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961), held that the arraignment in that case was a critical stage requiring the presence of counsel precisely because "[o]nly the presence of counsel could have enabled th[e] accused to know all the defenses available to him and to plead intelligently."; see id. at 55 n.4 ("Under federal law an arraignment is a sine qua non to the trial itself—the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried.").

- In 2012, the Supreme Court reaffirmed the *Hamilton* Court's finding that an arraignment is a critical stage. *Missouri v. Frye*, 566 U.S. 134, 140 (2012). ("**Critical stages include arraignments,** postindictment interrogations, postindictment lineups, and the entry of a guilty plea. See *Hamilton v. Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (arraignment); *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (postindictment interrogation); *Wade, supra* (postindictment lineup); *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (guilty plea).").

- An Initial Appearance on an indictment always includes an arraignment and plea. *See* Federal Judicial Center, Benchbook for U.S. District Court Judges, Rule 1.07 (Mar. 2013). This amounts to a critical stage requiring the presence of counsel.

- The Initial Appearance is arguably also a critical stage because it is a "step of a criminal proceeding, such as arraignment, that h[olds] significant consequences for

the accused." *Bell v. Cone*, 535 U.S. 685, 696 (2002) (defining "critical stage"). This argument is discussed further in Part B.

B. An Initial Appearance on a complaint is a "critical stage" because it involves a detention determination.

An Initial Appearance is like a bail hearing, which recent state court cases have found to be a critical stage requiring the presence of counsel. The Initial Appearance holds considerable similarities to a bail hearing, which recent state cases have found to be a critical stage entitling the defendant to counsel. Like those hearings, the Initial Appearance is a critical stage under Supreme Court analysis because: (1) the defendant's liberty interests are at stake, (2) counsel is necessary to ensure that the requisite legal standard is met before the person is detained, (3) and the detention decision "holds significant consequences for the accused," both for the guilt/innocence determination and sentencing.

- The Supreme Court in *Rothgery* left open the question of whether a bail hearing before a magistrate judge is a critical stage requiring the presence of counsel. At the initial appearance at issue in *Rothgery*, the defendant "was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail." *Rothgery*, 554 U.S. at 199. Crucially, the defendant waived his right to counsel at this hearing, and the Court did not decide whether this was a critical stage requiring the presence of counsel. *Id.* at 236 n.5.

- Several state courts have held, post-*Rothgery*, that an initial bail hearing is a critical stage. Principles in these cases apply equally to Initial Appearances in the federal system.

- New York Court of Appeals: *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010).
    - "As is here relevant, arraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs, a circumstance which would undoubtedly require the "critical stage" label (*see Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 [1970]), it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated (*see also* CPL 180.10[6]) with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents. There is no question that "a bail hearing is a critical stage of the State's criminal process" (*Higazy v. Templeton*, 505 F.3d 161, 172 [2d Cir.2007] [internal quotation marks and citation omitted])."

- *Booth v. Galveston Cnty.*, No. 3:18-CV-00104, 2019 WL 3714455 (S.D. Tex. Aug. 7, 2019) *report and recommendation adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019) ("[I]t should come as no surprise that the Court

concludes that a hearing at which bail is set is a "critical stage," requiring the appointment of counsel for indigent defendants. Not only is a bail hearing *a* 'critical stage' in the criminal process, but it is arguably the *most* 'critical stage.'") (currently on appeal to the 5th Cir.).

  - The District Court was facing a challenge to lack of counsel at an initial bail hearing in state court. As further discussed below, the court found that it was a critical stage because of the need for an attorney to help a defendant make legal decisions as well as to avoid irreparably prejudicing the case. *Id.* at *16, *20 n.8.

- *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019) (finding that the initial appearance in Louisiana state court is a critical stage because "[t]here is no question that the issue of pretrial detention is an issue of significant consequence for the accused").

- Connecticut Supreme Court: *Gonzalez v. Commissioner of Correction*, 68 A.3d 624 (Conn. 2013), *cert. denied* 134 S. Ct. 639 (2013). (finding that an arraignment in which bond was set and presentence confinement credit calculated was a critical stage requiring effective assistance of counsel "because it is clear that potential substantial prejudice to the petitioner's right to liberty inhered to the arraignment proceedings and the petitioner's counsel had the ability to help avoid that prejudice by requesting that the bond on his first arrest and second arrest be raised at the arraignment on his third arrest").

(1) Recent state court decisions have highlighted that liberty interests at stake in the bail hearing make it a critical stage requiring the assistance of counsel.

- Summary of Argument: As with state court bail hearings, the possibility of pretrial detention at the Initial Appearance affects a person's liberty interests under the Due Process Clause.

- New York's highest court found that there was "no question" that a bail hearing was a critical stage regardless of whether a plea was entered because "plaintiffs' pretrial liberty interests were . . . regularly adjudicated . . . with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents." *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010).

- Similarly, Massachusetts's highest court found that a bail hearing is a critical stage requiring the assistance of counsel "[b]ecause a defendant's liberty, a fundamental right, is at stake," implicating the defendant's due process interests under the Massachusetts's Declaration of Rights. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 902 (Mass. 2004).

- These interests are implicated in the Initial Appearance. If a prosecutor requests a Detention Hearing, and the judge agrees, the person may be detained up to five days under the Bail Reform Act pending a Detention Hearing. 18 U.S.C. § 3142(f)(2)(B). Although the BRA imagines that the Detention Hearing will be held the same day, prosecutors routinely ask for and are granted continuances.
    - Pretrial detention's imposition on a person's liberty interests can have devastating consequences, as social science research highlights.
        - Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017).
        - Human Impact Partners, Liberating Our Health: Ending the Harms of Pretrial Incarceration and Money Bail (Feb. 2020), available at https://humanimpact.org/wp-content/uploads/2020/02/HIP_HealthNotBailNationalReport_2020.02_reduced.pdf.
        - Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) Fed. Probation 39, 41–2 (2018).
    - State courts have also recognized these consequences. *See Hurrell-Harring v. State*, 930 N.E.2d 217, 233 (N.Y. 2010) (finding that the detention decision at arraignment is a critical stage because it involves "serious consequences, both direct and collateral, including loss of employment and housing, and inability to support and care for particularly needy dependents").

(2) The Initial Appearance in a federal case is a critical stage because counsel is necessary to "help the accused 'in coping with legal problems or . . . meeting [their] adversary.'" *Rothgery*, 544 U.S. at 236 n.16, quoting *United States v. Ash*, 413 U.S. 300 (1973).

- Summary of Argument: An attorney is required at the Initial Appearance because of the legal determination made at that stage that determines whether a Detention Hearing will be held. Further, an attorney can provide evidence to support the defendant's release that a defendant either may not be able to access or that may be in conflict with a defendant's right to remain silent.

- One District Court recently recognized this concern in the state system. *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 3714455, at *11 (S.D. Tex. Aug. 7, 2019*), report and recommendation adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019) ("[C]ompetent counsel is necessary to help a defendant navigate the complicated, treacherous and, oftentimes, confusing landscape of the criminal justice system. A defendant cannot be reasonably presumed to make critical decisions concerning his case without the advice of counsel.").
    - The court described the critical stage analysis in the following way: "To assess whether a bail hearing is a "critical stage" of a criminal prosecution, the Court must first inquire as to whether counsel would be needed to help a defendant cope with complex legal problems raised during such a hearing.

The answer is a no-brainer. Unrepresented defendants, especially those that have had no experience in the criminal justice system, are in no position at an initial bail hearing to present the best, most persuasive case on why they should be released pending trial. A lawyer would unquestionably provide invaluable guidance to a criminal defendant facing a bail determination." *Id.* at *11.

- This court also cited testimony from magistrate judges in Galveston County who said that "they [we]re reluctant to engage a defendant in conversation at the initial bail hearing, given the repeated admonitions to arrestee of his right to remain silent." *Id.* at *12. Without counsel a person is thus less likely to present a case for release. Statements at the initial hearing can also later be used against him. *Id.* at *13.
  - An amicus brief in the pending appeal highlighted the implications of this: "Defendants are faced with the difficult decision of either waiving their constitutional right to remain silent or discussing the facts of their case in hopes of securing release. They also lose the opportunity to have counsel address the prosecutor's recommendation and the factors that the magistrate is required to consider in reaching a bail determination." Brief for Ariel S. Glasner et al. as Amici Curiae Supporting Appellee, *Booth v. Galveston County*, No. 3:18-cv-00104 (2020).
- *See also Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018). ("[W]ithout representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.").

- The Supreme Court has held that the Bail Reform Act sets a legal standard at the Initial Appearance and requires the judge to engage in a legal analysis at that stage to determine whether a Detention Hearing is even authorized. *United States v. Salerno*, 481 U.S. 739, 750 (1987) (discussing the gate-keeping role of the legal standard laid out in § 3142(f)). Defense counsel is necessary to ensure that the required legal standard is met before a defendant is detained.
  - The Supreme Court has held that, under the BRA, the prosecutor can only request a Detention Hearing at the Initial Appearance—and a judge can only set a Detention Hearing—if one of the seven factors in 18 USC § 3142(f) is present. *Salerno*, 481 U.S. at 750 (stating that the BRA "operates only on individuals who have been arrested for a specific category of extremely serious offenses" listed in § 3142(f)); *id.* (stating that the BRA targets individuals whom Congress considered "far more likely to be responsible for dangerous acts in the community after arrest") (citing S. Rep. No. 98–225, at *6–7).

- Six federal courts of appeals agree that there is no legal basis for detention without the presence of one of the factors listed in § 3142(f). *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *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. 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); *see also United States v. Gibson*, 384 F. Supp. 3d 955 (N.D. Ind. 2019) ("There can be no detention hearing—and therefore no detention—unless an (f)(1) or (f)(2) criterion is met.").

- Whether one of the seven factors authorizing detention pending a Detention Hearing is present in the case is a legal determination that requires the assistance of counsel.
  - Defendants cannot be expected to understand constitutional and federal law that favors release. They cannot be expected to quote to a magistrate judge at an Initial Appearance the Supreme Court's admonition that "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *Salerno*, 481 U.S. at 755.

- Studies of state systems show that the presence of counsel at the Initial Appearance makes a significant difference in pretrial release outcomes.
  - A report on a pilot program funded through a DOJ grant that provided counsel at felony arraignments in Alameda County found that when attorneys were provided at the arraignment, the percentage of cases in which motions to release were filed increased from 0% to 27%. Impact Justice, Representation at Arraignment: The Impact of "Smart Defense" on Due Process and Justice in Alameda County, at 3 (2018), available at https://impactjustice.org/wp-content/uploads/Smart-Defense-Report-2019.pdf.
    - The release rate increased from less than 1% to 20% (Chart 1.D: Released, page 20), and motions to reduce bail had an 83% success rate (page 23). The study further found that this saved the county over $400,000 in one year. *Id.* at 27. Although this study does not speak directly to the federal system, it highlights the difference counsel can make at initial hearings.

(3) The Initial Appearance is also a critical stage because the detention decision at issue involves "potential substantial prejudice to defendant's rights" that could be avoided with the assistance of counsel. *United States v. Wade*, 388 U.S. 218, 227 (1967).

- Summary of Argument: The Initial Appearance is a critical stage because it is a pretrial proceeding that "may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented [there] to enjoy genuinely effective assistance at trial." *Rothgery*, 554 U.S. at 217 (Alito, J.

concurring). Evidence shows that the federal bail determination directly impacts sentencing outcomes, with pretrial detention resulting in higher sentences. Further evidence from state systems demonstrates that the bail determination can impact the guilt/innocence determination.

- In cases regarding the prosecution's suppression of evidence, the Supreme Court has recognized that suppression of favorable evidence "violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). That is, the Court recognizes that something can prejudice the outcome of a case if it either relates to determining a person's guilt/innocence or if it relates to their sentencing. *Id.*

- The pretrial detention determination at the Initial Appearance can irreparably prejudice the outcome of a case, both in terms of guilt and of sentencing.
    - *See Booth*, 2019 WL 3714455 at *20 n.8 (rejecting the idea that having a bail review hearing roughly 12 hours after the initial hearing could "cure any potential damage or prejudice that may arise from the lack of counsel at an initial bail hearing").
        - The District Court recognized the potential irreversible "harm caused by uncounseled statements at magistration" as well as the possible "anchoring effect" of the initial bail determination. *Id.* at *16.
        - This "anchoring effect" is similarly likely to affect judges facing defendants at the Detention Hearing. As discussed above, many defendants are detained at the Initial Appearance for reasons not authorized by the Bail Reform Act. This initial decision may have the same anchoring effect on judges at the Detention Hearing.

- Pretrial detention is linked to higher sentences. A recent study of pretrial detention in the federal system found that pretrial detention can prejudice sentencing outcomes: "federal pretrial detention appears to significantly increase sentences, decrease the probability that a defendant will receive a below-Guidelines sentence, and decrease the probability that they will avoid a mandatory minimum sentence if facing one." Stephanie Didwania, *The Immediate Consequences of Pretrial Detention*, AM. L. & ECON. REV., at 30 (forthcoming 2020), available at https://ssrn.com/abstract=2809818.

- Studies of state systems have found that pretrial detention can prejudice the guilt/innocence determination, leading to a higher incidence of conviction.
    - A study of state-level cases in Philadelphia found that pretrial detention leads to a 13% increase in the likelihood of conviction. Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. OF L. ECON. & ORG. 511, 512 (2018).
    - Another study of defendants in Philadelphia and Miami-Dade counties found that people who are initially released pending their trials are 18.8% less likely to plead guilty. Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction,*

Future Crime, and Employment: Evidence from Randomly Assigned Judges, 108(2) AM. ECON. REV. 201, 225 (2018).

- A study of cases in New York City found that "among nonfelony cases with no pretrial detention, half ended in conviction, compared to 92% among cases with a defendant who was detained throughout." The same study found that in the felony context, "[o]verall conviction rates rose from 59% for cases with a defendant who spent less than a day in detention to 85% when the detention period stretched to more than a week." Mary T. Phillips, *A Decade of Bail Research in New York City*, N.Y.C. CRIM. JUST. AGENCY, at 116 (Aug. 2012), archived at https://perma.cc/A3UM-AHGW.

C. Cases in the federal system finding that a bail hearing is not a critical stage misunderstand the role of the Initial Appearance.

Federal system:

- *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1473–74 (11th Cir. 1992), *abrogated on other grounds, Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994).
  - The court found that a defendant's "initial appearance before a magistrate judge pursuant to Rule 5 of the Federal Rules of Criminal Procedure is not . . . a 'critical proceeding.'" *Id.* at 1473.
  - The *Mendoza-Cecelia* court explained its decision that the initial appearance was not a critical stage by continuing: "The initial appearance is largely administrative. In Greenberg's case, the court read the charges, ascertained his name, recited his *Miranda* rights, appointed counsel and set bail. Although the court in the initial appearance must consider the weight of the evidence against the defendant as one of many factors in setting bail, the bail hearing is not a trial on the merits in which the guilt of the accused is adjudicated." *Id.*
  - In referring to it as "administrative," the court fundamentally misunderstands the Initial Appearance. The Initial Appearance requires the judge to make a legal determination as to whether a Detention Hearing is available given the facts of the case. 18 U.S.C. § 3142(f); *see also Salerno*, 481 U.S. at 750 ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to 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).") (emphasis added).
  - Further important, the court notes that after the judge determined that Greenberg was entitled to appointed counsel, Greenberg "expressly refused the assistance of appointed counsel for the bail colloquy." *Id.* at 1481 n.5. Any case in which the defendant did not waive counsel is therefore factually distinguishable.
  - A recent District Court decision criticized the Eleventh Circuit's decision in *Mendoza-Cecelia*, finding "that the 11th Circuit erroneously focused on the similarities between an initial appearance and an actual trial without properly

analyzing whether the denial of counsel at a bail hearing can irreparably prejudice the outcome of the case." *Booth*, 2019 WL 3714455 at *20 n.8.

- Some sources cite *United States v. Perez*, 776 F.2d 797 (9th Cir. 1985), *overruled on other grounds* by *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) for the proposition that there is no constitutional right to counsel at a defendant's initial appearance in federal court. *See Mendoza-Cecilia*, 963 F.2d at 1473; *Agadaga v. United States*, No. 95-35935, 1997 WL 669951 at *2 n.1 (9th Cir. Oct. 27, 1997); *see also* John Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 885 n.34 (2017) (citing *Perez* for the proposition "that there is no constitutional right to counsel at a defendant's initial appearance").
    - However, as discussed above, the court in *Perez* only says that there is no constitutional right to counsel during "[a]n initial appearance before a magistrate at which the indictment is read, the name of the defendant asked, the defendant is apprised of his *Miranda* rights, and counsel is appointed." *Perez*, 776 F.2d at 800. The court went on to clarify that "Nothing at **this stage** of the proceedings (at least before counsel takes over) impairs the defense of the accused and therefore there is no constitutional right for counsel to be present. (Significantly, counsel was appointed when the proceedings may have affected his rights following the initial determination of the defendant's name)."
    - This suggests that counsel may be constitutionally required for **other stages of the Initial Appearance**. The legal determination required by § 3142(f) and the decision whether to hold a Detention Hearing clearly "affect[s] [the defendant's] rights." *Id.*

- *Wallace v. United States*, 2019 WL 5445294 (E.D. Va. Oct. 22, 2019).
    - Wallace petitioned for habeas relief based in part on ineffective assistance of counsel. He challenged in part the timing of counsel as no attorney was present at the Initial Appearance.
    - The court noted that, although the right attaches at the Initial Appearance, "[i]n order for a defendant to invoke their right to counsel, there must be some event where the defendant can request counsel, which is often the initial appearance."
    - The court rejected this argument, finding that "[w]hile it is true that his initial appearance on March 20, 2017 triggered his right to counsel, it was also at that hearing where he was advised of that right and stated that he wished to have counsel. ECJ No. 13. After his initial appearance, Petitioner was represented at all subsequent proceedings beginning with his arraignment on March 23, 2017."
    - The court did not address the legal determination that happens at the Initial Appearance under § 3142(f) or the liberty interests at stake.

State system:

- *Farrow v. Lipetzky*, 637 F. App'x 986, 988 (9th Cir. 2016), cert. denied, 137 S.Ct. 82 (2016). ("The hearing did not 'test[] the merits of the accused's case'; 'skilled counsel' was not necessary to 'help[] the accused understand' the proceedings; and there was no risk that an uncounseled defendant would permanently forfeit 'significant rights.' Nor did the preliminary bail determination made at the initial appearance render that hearing a critical stage.") (internal citations omitted).
    - This case is reviewing a state court initial appearance in which the "'magistrate inform[ed] the defendant of the charge[s]' against him and 'determine[d] the conditions for pretrial release.'" *Id.* at 988 (quoting *Rothgery*, 554 U.S. at 199).
        - "On the facts alleged in the complaint, the initial appearance was not a critical stage." *Id.* (citing *Gerstein*, 420 U.S. at 122–23, *Perez*, 776 F.2d at 800).
    - We can argue both that counsel is required to help the defendant understand legal rights at the Initial Appearance and that the potential unlawful detention at that stage does affect significant rights.

D. Remedy for Violation of 6th Amendment Right to Counsel

Possible remedies: (1) reversal of conviction; or (2) reversal of conviction and remand for a new "critical stage" proceeding.

- *Hamilton v. State of Ala*, 368 U.S. 52 (1961) (conviction reversed where defendant was arraigned "without having counsel at his side," because "[o]nly the presence of counsel could have enabled this accused to know all the defenses available to him and to plea guilty").
- *White v. State of Md*, 373 U.S. 59 (1963) (lack of counsel at preliminary hearing required reversal of conviction); *Coleman v. Alabama*, 399 U.S. 1 (1970) (lack of counsel at preliminary hearing required conviction to be reversed and remand was required for determination of whether error was harmless).
- *Moore v. Michigan*, 355 U.S. 155, 156 (1957) (conviction reversed where entry of plea was invalid due to lack of counsel).
- *Townsend v. Burke*, 334 U.S. 736 (1948) (conviction reversed where counsel was not present at plea/sentencing).
- *Mempa v. Rhay*, 389 U.S. 128 (1967) (case was remanded for new probation revocation proceeding where counsel was not present at proceeding).
- *United States v. Pleitez*, 876 F.3d 150 (5th Cir. 2017) (ordered, in part, new restitution proceeding where counsel did not have the benefit of a lawyer at the proceeding).

V. <u>Due Process Clause</u>: There is a Procedural Due Process Right to be Represented by Counsel at the Initial Appearance

Recent cases have addressed a procedural due process right to counsel in state court proceedings that are analogous to the Initial Appearance in a federal case. We can make three different arguments that Due Process likewise requires counsel at a federal Initial Appearance. First, we can rely on the due process balancing in *Salerno* and § 3142(f) standard. Second, we can cite cases that find constitutional deficiencies in state Initial Appearance process. Third, we can connect our arguments about the right to counsel at Initial Appearance to the cash-bail litigation and *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell* II). There are separate due process and equal protection arguments based on the right to not be imprisoned because of indigency.

Summary of the argument:

Due process analysis asks (1) whether the client has been deprived of a liberty or property interest, and (2) if so, whether the government procedures were "constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). Once the court identifies a liberty interest, the court balances the interests of the criminal defendant in liberty against the government interests to determine the sufficient procedure. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). The scope and importance of the protected interest are relevant to the balancing test and constitutionally sufficient level of process. When balancing interests, "courts consider (1) 'the private interest' at issue, (2) 'the risk of an erroneous deprivation' absent the sought-after procedural protection, and (3) the state's interest in not providing the additional procedure. *Maranda Lynn ODonnell; Robert Ryan Ford; Loetha Shanta McGruder, Plaintiffs-Appellees, v. Harris County, Texas, et al.*, Defendants-Appellants., 2017 WL 3440587 (C.A.5), 41 (citing *Mathews*, 424 U.S. at 334–35). Criminal defendants have a liberty interest protected by the Due Process Clause of the Fifth Amendment. The Supreme Court has recognized that the BRA aims to protect liberty as the norm.

The right to counsel at the Initial Appearance is essential to enforce defendants' recognized interest in pretrial liberty. Although most cases deal with state pretrial procedures, the federal Constitution determines required procedures under the Due Process Clause. *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 3714455, at *8 (S.D. Tex. Aug. 7, 2019), *report and recommendation adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019) ("[The Fifth Circuit's] analysis of the procedures required to meet constitutional muster was guided by the Constitution, as opposed to state law."). Analogizing from state procedures will help, but the legal standards required at federal Initial Appearances make the right to counsel particularly essential. Focusing on the legal standard and § 3142(f) analysis will also help us distinguish federal court from unfavorable decisions about state procedures. We can also point to the statistical evidence (cited in the Sixth Amendment section above) that shows the impact of pretrial detention on the guilt/innocence and sentencing determinations. Finally, we can analogize to the state cash-bail cases. The due process constitutional argument is particularly appealing because it is not foreclosed by the Supreme Court's decision in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

A. Defendants have a constitutionally protected interest in pretrial liberty.

Liberty interests "may arise from two sources—the Due Process Clause itself and the laws of the States." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908, 104 L. Ed. 2d 506 (1989). The Supreme Court, in *United States v. Salerno*, recognized that defendants have a "strong interest in liberty. We do not minimize the importance and fundamental nature of this right." 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987).

- The scope of the liberty interest has been discussed by federal courts.
    - When defining the liberty interest in a case involving Louisiana state courts, a federal district court judge relied, in part, on "the principles of *Salerno*." *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 312 (E.D. La. 2018); *see also Salerno*, 481 U.S. at 750 ("On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right."). *Salerno* recognized and firmly established the liberty interest of federal criminal defendants in pretrial liberty. *Caliste*, 329 F.3d at 310 (citing *Salerno*, 481 U.S. at 750) ("Additionally, Plaintiffs have been deprived of their fundamental right to pretrial liberty.").
    - *See also Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 651 (E.D. La. 2017), *aff'd sub nom. Cain v. White*, 937 F.3d 446 (5th Cir. 2019) ("[Criminal defendants'] interest in securing their 'freedom "from bodily restraint[ ]" lies "at the core of the liberty protected by the Due Process Clause.'" *Turner*, 564 U.S. at 445, 131 S. Ct. 2507 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)). [Criminal defendants'] liberty interest weighs heavily in favor of procedural safeguards provided before imprisonment.")).

B. The right to counsel represents an essential procedural protection for defendants' pretrial liberty interest because of the legal standard that applies at a federal Initial Appearance.

Procedures at the Initial Appearance are not "constitutionally sufficient" without the right to counsel. Clients are deprived of due process if they are detained without representation while waiting for counsel to be appointed.

- One of the main reasons that the Supreme Court upheld the BRA against a Due Process challenge was its narrow scope under § 3142(f). *See Salerno*, 481 U.S. 739 at 750. When balancing interests to determine whether the BRA contained constitutionally sufficient procedural protections, the Court relied on the fact that "[t]he Bail Reform Act . . . 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." *Salerno*, 481 U.S. 739 at 750. Thus, the Court found that the narrow grounds for detention under § 3142 constitute an essential procedural protection for defendants.
    - A federal magistrate judge found that a "broad reading of the Bail Reform Act [that deviates from the limited § 3142(f) grounds for detention] 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." *United States v. Gibson*, 384 F. Supp. 3d 955, 963 (N.D. Ind. 2019). This judge recognizes that without adherence to the text of § 3142(f), the BRA does not sufficiently protect defendants' interest in pretrial freedom.

    - "Indeed, Salerno presents another example: the right to pretrial liberty. The Court there analyzed the deprivation of that "fundamental" right under both substantive due process and the Eighth Amendment." *Maranda Lynn ODonnell; Robert Ryan Ford; Loetha Shanta McGruder, Plaintiffs-Appellees, v. Harris Cnty., Texas, et al.*, Defendants-Appellants., 2017 WL 3440587 (C.A.5), 29.

- The importance of the § 3142(f) standard reinforces the need for counsel. Defendants' interest in pretrial liberty cannot be adequately protected without legal representation. We can argue that the narrow focus of the BRA cannot be realized without adequate counsel for the defense to ensure that the government justifies detention under the correct standard.
    - Section 3142(f) requires a legal determination and statistics show that pretrial detention can be outcome determinative for both guilt/innocence determinations and sentencing. As all the cases we have found discuss state systems, they are analogous but distinguishable. *See Schultz v. State*, 330 F. Supp. 3d 1344, 1374 (N.D. Ala. 2018) (recognizing that the inquiry into constitutionally sufficient procedures depends on the existing procedure at issue). This means we do not have on point cases, but also that cases holding no due process right to an attorney are distinguishable.
    - By requiring a legal standard at the initial appearance, the BRA places federal criminal defendants in exactly the same position.
        - A defendant's lawyer needs to interview the defendant and, ideally, family members, employers, or others in his or her life to gather all of the info that's relevant to the detention/release determination under § 3142(g). This work is especially important in cases where there is no (f)(1) factor present and the judge is being asked to make a subjective determination of serious risk of flight under (f)(2)(A).

C. Federal courts in state cases have recognized that due process requires the right to counsel in analogous initial appearances involving bail determinations.

- We can also analogize to state cases where courts have held that the right to counsel is required to protect defendants' interest in pretrial liberty in state initial appearances.
    - The district court in *Schultz v. State* called "the requirement of counsel at an initial bail hearing [ ] perhaps the most significant safeguard." 330 F. Supp. 3d at 1374.

        - The court held that the plaintiff "demonstrated a substantial likelihood of success on the merits of his due process claim." *Id.*
        - The court contrasted the state procedure at issue with the procedure upheld by the Eleventh Circuit in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), because the *Walker* procedure required counsel at the initial appearance. *Schultz*, 330 F. Supp. 3d at 1374.
    - In *Caliste v. Cantrell*, "the Court finds that in the context of hearings to determine pretrial detention Due Process requires . . . representative counsel." 329 F. Supp. 3d 296, 315 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).
        - "The Court finds that the right to counsel at a bail hearing to determine pretrial detention is also required by due process. The interests of the government are mixed regarding provision of counsel at this stage. It is certainly a financial burden on the state to provide attorneys for the indigent. However, this burden is outweighed not only by the individual's great interest in the accuracy of the outcome of the hearing, but also by the government's interest in that accuracy and the financial burden that may be lifted by releasing those arrestees who do not require pretrial detention. Accordingly, the *Mathews* test demonstrates that due process requires representative counsel at pretrial detention hearings." *Id.* at 314.
    - Another district court, ruled against the criminal defendant in a habeas case on his due process claim while noting that the process at issue was constitutionally sufficient in part because the defendant was represented by counsel: "This court is persuaded that, procedurally, [the defendant] received all the process to which he was due: an individualized hearing of which he had adequate advance notice and where he was represented by counsel and permitted to present witnesses and cross-examine the government's witnesses." *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915, at *16 (M.D. Tenn. Oct. 7, 2019).

- However, a federal district court recently held that the procedure at the initial appearance could be constitutionally sufficient for due process without the right to appointed counsel. *Booth v. Galveston County*, No. 3:18-CV-00104, 2019 WL 3714455, at *8 (S.D. Tex. Aug. 7, 2019), *report and recommendation adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019).
    - The plaintiffs in *Booth* argued that procedural due process creates the right to counsel at an initial appearance in Galveston County. The court held that the *ODonnell II* procedures are constitutionally sufficient without specifically addressing the right to counsel. *Id.* at *8. The court found that although the plaintiffs were likely to succeed in their argument that "the absence of court-appointed counsel at the time of an initial bail hearing . . . [v]iolates an arrestee's right to counsel under the Sixth Amendment," due process does not mandate the same result. *Id.* at *8, 9.

        - "To be clear, the Fifth Circuit in *ODonnell II* clearly explained that its analysis of the procedures required to meet constitutional muster was guided by the Constitution, as opposed to state law. *See id.* Those same procedures seem to have been implemented by Galveston County in this case. Given that *ODonnell II* recognized an arrestee's pretrial liberty right before delineating the procedures as adequate to satisfy procedural due process, the Court is not convinced that the Constitution requires more. Thus, as to this claim, the Court cannot conclude that Booth has a substantial likelihood of success."
    - Given that *Booth* considered both constitutional claims and only held for the plaintiffs on the Sixth Amendment claim, this case presents a challenge to our due process argument. We could likely distinguish the federal system from the state system in Texas. However, the court in *Booth* thought that *ODonnell II* precluded additional minimal procedures under the Due Process Clause.

D. Without the right to counsel, the federal system denies indigent defendants adequate procedural protections.

- A second liberty interest requires the right to have counsel appointed at or prior to the Initial Appearance: the right to not be detained based on wealth.
    - It is a longstanding substantive due process principle that a person cannot be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 397–98 (1971).
        - In fact, the Supreme Court has relied on this principle "to strike down state and local practices imprisoning indigent individuals solely due to their inability to pay a fine in *Tate*, *Williams v. Illinois*, 399 U.S. 235 (1970), and *Bearden v. Georgia*, 461 U.S. 660 (1983)." *Maranda Lynn ODonnell; Robert Ryan Ford; Loetha Shanta McGruder, Plaintiffs-Appellees, v. Harris Cnty., Texas, et al.*, Defendants-Appellants., 2017 WL 3440587 (C.A.5), 18

- The Fifth Circuit in *ODonnell II* recognized the distinct liberty interest for indigent defendants. *See ODonnell v. Harris Cty.*, 892 F.3d 147, 158 (5th Cir. 2018) ("[W]hen the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order.").
    - The court held that the county's procedures were insufficient under the Due Process balancing test because "[j]udges almost always set a bail amount that detains the indigent." *Id.* at 159 ("In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an "instrument of oppression.").

- To argue by analogy, we should discuss detention rates in districts without duty/counsel at the Initial Appearance. If we can demonstrate a significant difference, we could analogize to the "automatic" detention in *ODonnell.*

- Even without statistical evidence, indigent defendants cannot obtain the necessary legal representation to rebut (or insist on) the government's § 3142(f) grounds for detention.
    - We should again rely on the statistics showing the detrimental effects of pretrial detention on guilt/innocence and sentencing determinations. Without the right to an attorney at the Initial Appearances, indigent defendants are at a higher risk of these adverse outcomes.

- Under the *Mathews* balancing test, we can argue that the government does not have an interest in improper detentions. If the prosecution can prove that an (f) factor justifies detention by clear and convincing evidence, detention would be legal. Costs of representation should not be prohibitive as the vast majority of federal district courts provide counsel at the Initial Appearance. Error costs would be particularly high for indigent defendants, especially since the standard at Initial Appearance determines whether or not the case proceeds to a Detention Hearing. In light of the defendant's strong interest in not being subjected to detention on the basis of indigency, the government's existing obligation to show that a § 3142(f) factor is present, high error costs, and the minimal costs to the government, procedural due process requires representation at the Initial Appearance.

- For the related equal protection argument, see *ODonnell*, 892 F.3d at 163 ("[T]he wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree."). See also *M.L.B. v. S.L.J.*, 519 U.S. 102, 1210 (1996).
    - Cases recognizing the right to not be detained for indigency "reflect both equal protection and due process concerns." *M.L.B. v. S.L.J.*, 519 U.S. 102, 1210 (1996). However, the Court has held that these cases are not limited by *Washington v. Davis*: "such cases are not limited by the ordinary equal protection rule excluding disparate-impact liability. *See M.L.B.*, 519 U.S. at 125-127 (distinguishing *Washington v. Davis*, 426 U.S. 229 (1976), on the ground that '[s]anctions of the *Williams* genre ... are wholly contingent on one's ability to pay and thus ... apply to all indigents and do not reach anyone outside that class'); see also *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (striking down a scheme in which '[t]hose with means avoid imprisonment [while] the indigent cannot escape imprisonment')." *Maranda Lynn ODonnell; Robert Ryan Ford; Loetha Shanta McGruder, Plaintiffs-Appellees, v. Harris Cnty., Texas, et al.*, Defendants-Appellants., 2017 WL 3440587 at 19 (5th Cir.).

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

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

Opinion by: JOSHUA P. KOLAR

Opinion

OPINION AND ORDER

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

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

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

Gibson requested a continuance of the detention hearing to allow for a home visit to determine eligibility for electronic monitoring. After the home [*3] visit, the United States Probation Officer's ultimate recommendation for Gibson's detention remained.[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 by 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. ODonnell v. Harris Cty., Tex.*, 251 F. Supp. 3d 1052, 1075 (S.D. Tex. 2017) ("Congress wanted to address the alarming problem of crimes committed by persons on release and to give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." (internal quotation marks omitted)), Individuals have a "strong interest in liberty," but this interest "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater [*8] needs of society." *Salerno*, 481 U.S. at 750-51. This balancing of liberty interests versus public safety led to a narrowly crafted set of conditions under which detention is permitted. Pretrial detention can impact a defendant's ability to prepare a defense, is costly, and while not intended as punishment nonetheless cabins a defendant's freedom, imposing a hardship on both the defendant and the defendant's family. *See Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); *Schultz v. State*, 330 F. Supp. 3d 1344, 1374-75 (N.D. Ala, 2018), *appeal docketed*, No. 18-13898 (11th Cir. Sept. 13, 2018).

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

Even then, detention is only proper where, after a hearing, "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." *Id.* § 3142(e). Here, while the government has moved to detain Gibson only because the (f)(2) predicate of serious risk of flight was met, the government also argues for Gibson's detention because he is a danger to the community. The law is unclear regarding whether a judge may detain a defendant in such a case solely because the defendant is such a danger to the community that no conditions can reasonably assure public safety. That is, after holding a detention hearing on the basis that the defendant is a serious risk of flight, if a judge is convinced that the government has not met its burden of showing that there is no condition or combination of conditions that can reasonably assure the defendant's appearance as required, is that the end of the analysis, or is the judge to move on to consider danger to the community as the sole reason to detain the defendant pending trial?[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

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[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 firemarm]
> >
> > **(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

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

language interpretation of the Bail Reform Act that involves no such constitutional issue, the Court will not follow the *Holmes* interpretation. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez, 543 U.S. 371, 380-81 (2005)*.[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. 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.

[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.

[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

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[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

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

Legislative Reform & Congressional Testimony re: Federal Pretrial Detention

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

order for almost half of all federal cases," and have "contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration."[25]

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

Thank you, and I look forward to your questions.

[1] 18 U.S.C. § 3142.

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

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

[4] *Salerno*, 481 U.S. at 755.

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

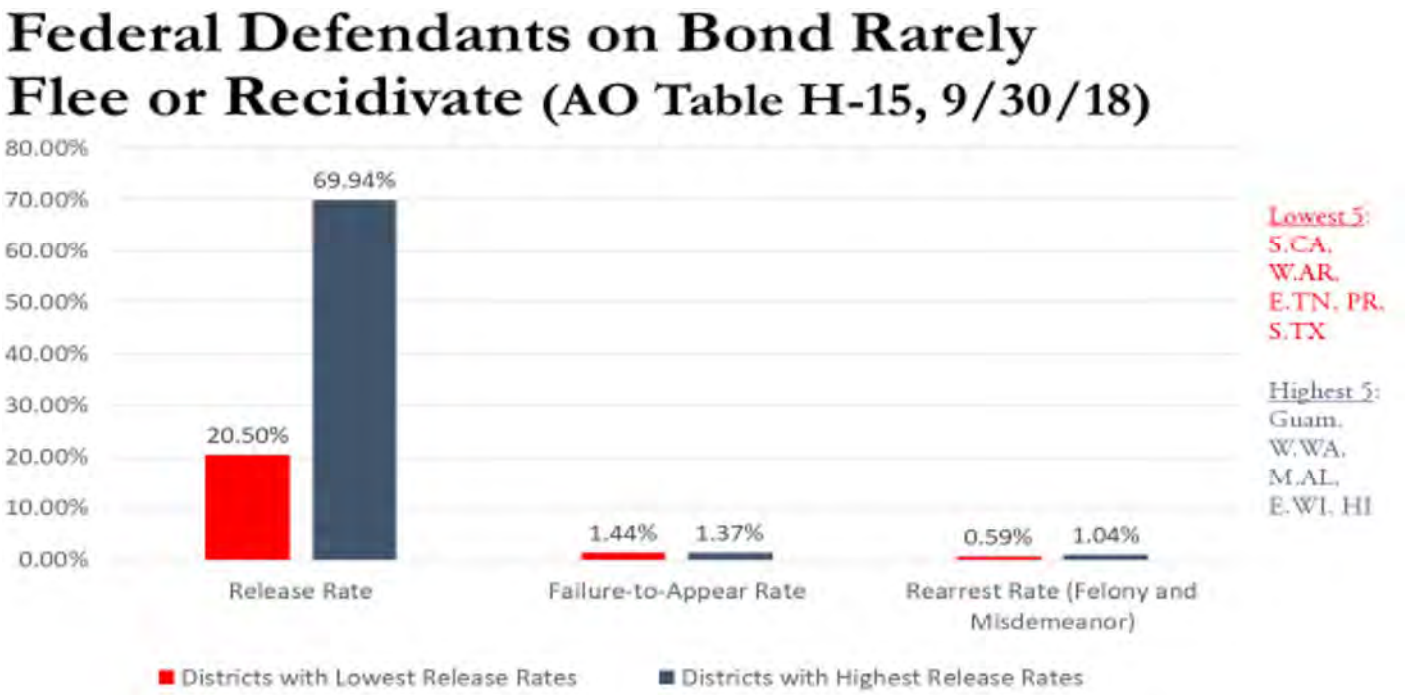
[6] *See, e.g.*, Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017), archived at https://perma.cc/R99T-5F2J (finding that, eighteen months post-hearing, pretrial detention is associated with a 30% increase in new felony charges and a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

[7] *Felony Defendants in Large Urban Counties, 2009*, BUREAU OF JUSTICE STATISTICS, at 2 (2013).

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

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

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



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

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

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

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

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

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

[15] Heaton, et al., *supra* note 6, at 713.

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

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

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

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

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

[21] 18 U.S.C. § 3142(e)(2), (e)(3).

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

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

[23] *Id.* at 60–61.

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

[25] Austin, *supra* note 10, at 61.

Written Statement of Alison Siegler,
The Administration of Bail by State and Federal Courts: A Call for Reform: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019),
https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf

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

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

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

November 14, 2019

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] 481 U.S. 739, 747 (1987).

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

[8] *Id*. at 748.

[9] *Id*. at 749.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] § 3142(f)(2)(A) (emphasis added).

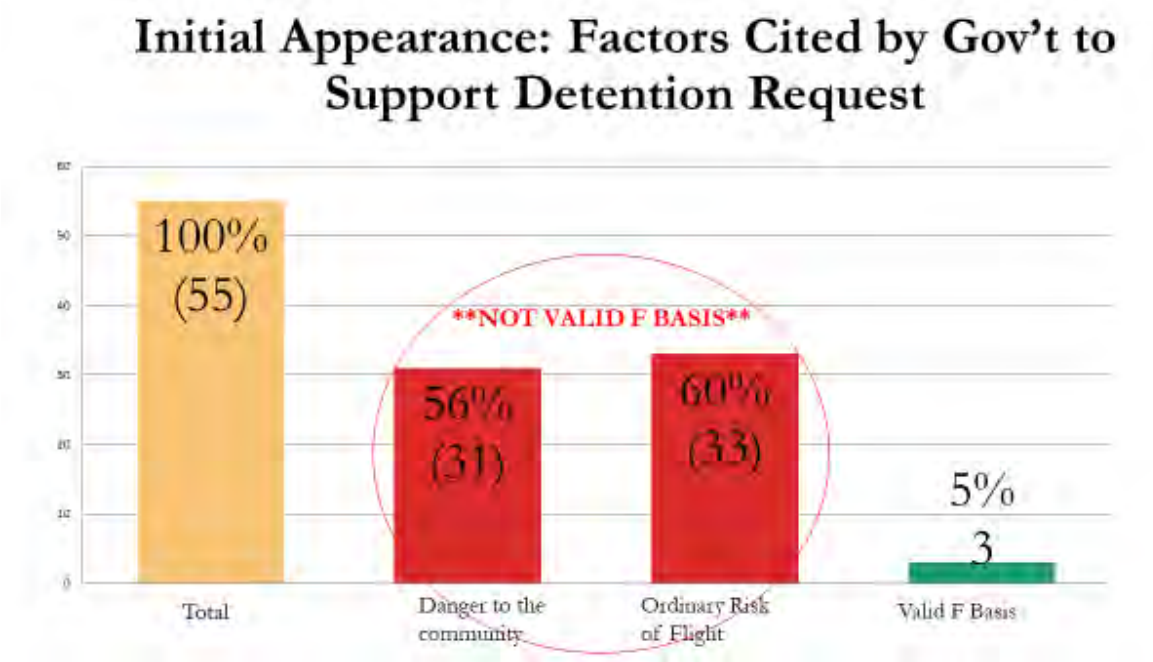
[14] *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("One of the most basic interpretative canons" is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

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

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

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

The chart below illustrates the problem:



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

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

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

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

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

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

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

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

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

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

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

[18] *United States v. Gibson*, 384 F. Supp. 3d 955, 964 (N.D. Ind. 2019).

[19] 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010).

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

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

IV. Financial Conditions of Release Should Be Eliminated.

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

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

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

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

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[21] Pub. L. No. 89-465, 80 Stat. 214, 214 (1996).

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

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

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

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

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

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

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

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

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

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

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

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

[28] *Id.* at 726.

"detention should be reserved for those who cannot be prevented or dissuaded from leaving the jurisdiction using less intrusive interventions."[29]

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

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

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

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

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

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

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

[32] Gouldin, *supra* note 27, at 732.

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

[34] *Id.* at 33 (statement of Ramsey Clark) (emphasis added).

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

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

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

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

A. Eliminate or Limit Certain Presumptions Of Detention.

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

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[35] *1984 Hearings*, *supra* note 23, at 233 (Statement of James I.K. Knapp).
[36] *Id.*
[37] *See 1965 Hearings, supra* note 33, at 211 (text of S. 1357) (emphasis added).
[38] *Id.* at 16 (emphasis added).
[39] *Id.* at 33.
[40] 18 U.S.C. § 3142(e)(3).

at the Detention Hearing.[41] And, even without the presumptions, judges will retain the authority to detain defendants in serious cases.

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

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

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

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

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[41] 18 U.S.C. § 3142(g).

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

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

[44] *Id.* at 56.

[45] *Id.*

[46] *Id.* at 57.

[47] *Id.* at 56–57.

[48] *Id.* at 57.

[49] *Id.* at 58.

[50] *Id.* at 59–60.

there was no significant difference in rates of failure to appear between presumption and non-presumption cases.[51]

The study concluded that "the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant's charge was a good proxy for that defendant's risk."[52] The study goes on to state that the presumption has become "an almost de facto detention order in almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration."[53]

B. Clarify the Presumptions to Grant Judges More Discretion and Bring the Statute In Line With Case Law.

Even if certain presumptions are not eliminated, the statutory language should be clarified to ensure that judges have the authority to make individualized, discretionary decisions in presumption cases. This will also promote judicial efficiency, ensuring that courts of appeals are not required to clarify the meaning of the statute for lower courts.

Moreover, the rules in § 3142(e)(2) and (3) should not be called "presumptions" at all, because that is not how they operate. A presumption typically shifts the burden of proof to one party; the presumption in § 3142(e) does not. Instead, the burden of proof/persuasion continues to rest with the government at all times. This presumption merely imposes on the defendant a burden of *production*, requiring the defendant to present some evidence that he/she will not flee and some evidence that he/she will not pose a danger to the community.[54]

Given the confusing language of the statute, courts have struggled with how to interpret and apply the presumption. Tellingly, a seminal case on the issue begins its extensive discussion of the presumption by saying, "We must first decide what the rebuttable presumption means," and continues, "Congress did not precisely describe how a magistrate will weigh the presumption, along with (or against) other § 3142(g) factors."[55]

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[51] *Id*. at 60.

[52] *Id*.

[53] *Id*. at 61.

[54] *See, e.g.*, *United States v. Jessup*, 757 F.2d 378, 380–84 (1st Cir. 1985) (holding that the government bears the burden of *persuasion* at all times while a defendant just bears a burden of *production*, which entails producing "some evidence" under § 3142(g)); *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (engaging in lengthy analysis of the different burdens the presumption places on each party, explaining that the defendant rebuts the presumption by producing "some evidence" under § 3142(g), and concluding that after it is rebutted, "the presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)"); *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (holding that the defendant has a burden of production and only needs "to offer some credible evidence contrary to the statutory presumption"); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (holding that the burden of *persuasion* rests with the government, not the defendant).

[55] *Jessup*, 757 F.2d at 380, 384.

Anecdotal information gathered during our courtwatching reveals that courts rarely understand how the presumption is supposed to operate, resulting in its misapplication in practice. For example, it is rare for judges to follow the two-step process of first analyzing whether the presumption has been rebutted and then weighing the presumption against the other evidence under § 3142(g). In practice, many judges feel that the presumption is a de facto directive by Congress that ties their hands and requires detention. For these reasons, the wording of the presumption should be changed to make it easier for judges to understand how it is supposed to work in practice.

C. Eliminate or Substantially Limit The Presumption Of Detention That Specifically Applies to People Charged in Federal Drug and Gun Cases.

Section 3142(e)(3) contains a presumption of pretrial detention in drug and gun cases that applies in approximately 45% of all federal cases. The AO study found that the presumption applied in 93% of all federal drug cases.[56] The presumption has resulted in high detention rates. From 1995 to 2013, the percentage of people charged with drug crimes who were jailed while awaiting trial increased from 76% to 84%.[57]

It is important to address the drug presumption because drug crimes make up nearly 30% of the federal docket nationwide.[58] In contrast, when the BRA was enacted in 1984, drug crimes made up just 18% of the federal docket.[59] Moreover, in the ensuing years men of color have borne the brunt of our federal drug laws; data shows that they ultimately face longer prison terms than whites arrested for the same offenses with the same prior records.[60]

The drug and gun presumptions should be eliminated or substantially limited because they sweep too broadly. The BRA's drug presumption applies to any drug offense for which the maximum term of imprisonment is ten years or more—not just those that carry a mandatory minimum penalty.[61] This encompasses virtually all federal drug offenses, including all offenses involving any amount of a drug stronger than marijuana and 50 kilograms or more of marijuana.[62]

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[56] Austin, *supra* note 42, at 55.

[57] *Id.* at 53.

[58] U.S. SENT'G COMM'N, *Overview of Federal Cases—Fiscal Year 2018*, at 4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

[59] John Scalia, *Federal Drug Offenders, 1999 with Trends 1984-99*, U.S. Dep't of Justice Bureau of Justice Statistics Special Report at 1 (Aug. 2001), https://www.csdp.org/research/fdo99.pdf.

[60] *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1349 (2014); *see also* Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 Judicature 6 (July–Aug. 2010) ("Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system."); U.S. SENT'G COMM'N, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 350 (Oct. 2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf (finding that the cumulative sentencing impacts of criminal history and weapon involvement are "particularly acute for Black drug offenders").

[61] *See* 18 U.S.C. § 3142(e)(3)(A).

[62] *See* 21 U.S.C. §§ 841(b), 960(b).

Because it covers so many drug offenses, the drug presumption applies to kingpins and couriers alike, regardless of culpability. This is not what the Congress that passed the BRA intended. In fact, the drug presumption was not part of the original bill, and was only added later in the drafting stages.[63] Senator Strom Thurmond, the Chair of the Senate Judiciary Committee, remarked that a presumption of detention for "grave drug offense[s]" was needed because "[i]t is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity" and "these persons have both the resources and foreign contacts to escape to other countries with relative ease[.]"[64] But, today, the drug presumption applies equally to a poor person with no criminal history who is alleged to possess only 1 gram of cocaine as it does to a true "kingpin" like Joaquin "El Chapo" Guzman. Likewise, we have heard from judges that the gun presumption is overbroad because it applies to cases in which a person may have possessed a weapon in a way that is only tangentially related to the underlying crime.

VII. The Definition of Dangerousness Should Be Modified.

The statutory language that allows judges to detain anyone who "will endanger the safety of any other person or the community" is vague, overbroad, and results in more detention than is necessary to protect the community. The statute should be modified to comport with the original intent of Congress—that judges use this prong to detain only the "small but identifiable group of particularly dangerous defendants [for] whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."[65]

A. Congress Intended Only a Small Minority of Defendants to Be Detained Based on Dangerousness, and Put Procedural Protections in Place to Ensure That Happened.

From the Founding until the passage of the Bail Reform Act in 1984, judges were only permitted to detain people in order to mitigate their risk of flight, not on dangerousness grounds. Congress justified its departure from this historic norm in two ways. First, it pointed to the "growing problem of crimes committed by persons on release."[66] Second, it found that judges were already detaining people they considered dangerous, even without statutory authorization, by setting high money bond that defendants could not pay. The hope was that formally authorizing the detention of dangerous defendants would allow Congress to deal with the problem of crimes committed by defendants released pretrial, and would ensure that detention decisions were happening in a transparent manner.

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[63] *See Senate Report of the Committee on the Judiciary on S. 1554, Subcommittee on the Constitution*, November 3, 1981 ("Senator DeConcini also offered an amendment which was approved 5-0, creating a rebuttable presumption that an individual charged with a grave drug-related offense, for which a maximum penalty of 10 years or more may be imposed, is not likely to appear for trial and is likely to pose a risk to community safety if not detained. The Subcommittee then approved S. 1554, as amended by a recorded vote of 4-0.").

[64] S. Rep. No. 98-147, at 45–47

[65] S. Rep. No. 98-225, at 6.

[66] *Id.* at 6, 7, 10.

The legislative history of the BRA reveals that Congress expected only a small minority of defendants to be detained as dangerous. The Senate Judiciary Committee Report described the defendants eligible for detention under this prong as the "small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."[67]

The design of the statute reflected this intention on the part of Congress to carefully limit the pool of people who could be detained as dangerous. For example, as noted above, to detain a person at the Initial Appearance, the government must prove that the defendant satisfies one of the factors laid out in § 3142(f). Generalized dangerousness is not one of the factors. Instead, the government must prove that the person is charged with a particular type of crime or that there is a serious risk that the person will obstruct justice.

Testimony from the Department of Justice in the lead-up to the passage of the BRA reveals a clear understanding that the government would have to carry a heavy burden to successfully detain someone based on dangerousness. Deputy Attorney General James Knapp testified that under this new regime the Department felt detention would "require clear and convincing evidence and . . . require something tangible in a particular case. It is going to have to be something very tangible demonstrated to the judge before he is going to make this finding [that a defendant is so dangerous that detention is required]."[68]

B. Congress Should Modify the BRA's Definition of Dangerousness.

To better reflect Congressional intent and ensure that defendants who pose a true danger are being detained, the definition of dangerousness could be modified to require the government to identify an individual's specific risk of physical harm to another reasonably identified person or persons in order to detain an individual as dangerous.[69]

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[67] *Id.* at 6. The House Judiciary Committee Report described them as "*the dangerous few* who will commit offenses while on bail." H.R. Rep. No. 98–1121, at 60 (emphasis added).

[68] *1984 Hearings*, *supra* note 23, at 223.

[69] *See, e.g.*, *Blackson v. United States*, 897 A.2d 187, 194 (D.C. 2006) (interpreting similar "dangerousness" language in the D.C. bail statute to mean that "[t]he trial court . . . need[s] clear and convincing evidence that appellant pose[s] an identified and articulable threat to an individual or the community and that nothing short of detention [will] reasonably suffice to disable [him] from executing that threat.").

ADDITIONAL STATISTICS AND DATA
(compiled by the FCJC)

MEMO: Race and Federal Pretrial Detention Statistics

Race & Federal Pretrial Detention Statistics

(Prepared by Elisabeth Mayer and Alex Schrader for the Federal Criminal Justice Clinic, 2/3/20)

Studies consistently find racial disparities in federal pretrial detention.

Few empirical studies address the important issue of racial disparities in federal pretrial detention. Even so, all studies find that white defendants are less likely to be detained pretrial than black or Hispanic defendants.[1] Detention rates have increased for all groups, but sizable differences remain between white defendants and defendants of color.

- *Race, Gender, and Detention in the Federal Courts: Lessons for the Future of Bail Reform*, Stephanie Holmes Didwania (unpublished as of 2/4/20).
    - Detention Rates by Race, All Defendants (Figure 1, p. 22):
        - Black Defendants: 68%
        - Hispanic Defendants: 64%
        - White Defendants: 51%
    - Detention Rates by Race, Male Defendants (Figure 1, p. 22)
        - Black Male Defendants: 74%
        - Hispanic Male Defendants: 69%
        - White Male Defendants: 54%
    - Detention Rates by Race, Female Defendants (Figure 1, p. 22)
        - Black Female Defendants: 30%
        - Hispanic Female Defendants: 39%
        - White Female Defendants: 36%
    - "Particularly, the paper finds that black-white and Hispanic-white disparity in the full data are driven by disparity among *male* defendants (who constitute around 85 percent of all federal defendants).
- Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, Fed. Probation, September 2018, https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf.
    - Detention Rates by Race, 2008:
        - White: 33%
        - Black: 55%
        - Hispanic: 79%
    - Detention Rates by Race, 2018:
        - White: 45%
        - Black: 60%
        - Hispanic: 88%
- Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008–2010* (2012), https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf.
    - Detention Rates by Race:

[1] When comparing these studies, please note that each study may have a different methodology or have controlled for different variables.

        - White: 35%
        - Black: 57%
        - Hispanic/Latino: 80%
    - "Hispanic defendants had the lowest rates of pretrial release and were less likely to be released than white defendants for all major federal offense categories." At 10.
        - Practice tip: Cite this study when seeking release of a Latinx client.
    - "Black defendants were also less likely than white defendants to be released pretrial for all major federal offense categories. The differences in pretrial release rates between black and white defendants were particularly large for drug offenses, as white defendants (60%) were more than one and a half times more likely to receive a pretrial release than black defendants (36%)." At 10.
        - Practice tip: Cite this study when seeking release of a black client, especially in drug cases.
- Cassia Spohn, *Race, Gender, and Pretrial Detention: Indirect Effects and Cumulative Disadvantage*, 57 Kan. L. Rev. 879 (2009).
    - Detention Rates by Race:
        - White: 53.3%
        - Black: 67.7%
    - "[Findings that black defendants and male defendants were more likely to be detained] may reflect judges' interpretation and application of the criteria set forth in the Bail Reform Act. Although the statute does not, of course, allow judges to consider the offender's race or sex, it does permit them to take the offender's dangerousness into consideration when deciding between pretrial release and detention." At 898.
    - "I found that black male offenders were more likely than all other offenders to be held in custody prior to trial and that white female offenders faced lower odds of pretrial detention than did white male offenders." At 899.
        - Practice tip: Cite this study when seeking release of a black client.
- John Scalia, *Federal Pretrial Release and Detention, 1996* (1999).
    - Detention Rates by Race:
        - White: 19.3%
        - Black: 35.9%
        - Hispanic: 46.7%
- *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 117 (1997).
    - Detention Rates by Race:
        - White: 33.5%
        - Black: 61.5%
        - Hispanic: 74.5%
    - "The most significant factor in the racial and ethnic disparity in bail decisions was the recommendations of pretrial service officers and Assistant U.S. Attorneys." At 318.
    - "[O]ne factor considered in the detention decision was home ownership--the assumption being that people who do not own homes are less likely to return to court. But such an assumption impacts differently on people of different races and

ethnic groups: in 1996, 33% of white arrestees owned a home, whereas only 7% of African-American arrestees and 9% of Hispanic/Latino arrestees were home-owners." At 317–18.

- Practice tip: The results of this study are extremely concerning. The law is clear that "the judicial officer may not impose a financial condition that results in the detention of the person." 18 U.S.C. § 3142(c)(2). Any reliance on property as a condition of release raises a serious concern that the judge is conditioning release on wealth in violation of this provision, and is imposing a financial condition that results in the detention of a person who does not have property to post. Cite this study when seeking release of any client who is a person of color and does not own property, especially if the judge or prosecutor suggests that property would facilitate release.

- *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias Special Committee on Race and Ethnicity*, 64 Geo. Wash. L. Rev. 189 (1996).
  - Detention Rates by Race:
    - White Men: 20%
    - White Women: 20.9%
    - Black Men: 43.6%
    - Black Women: 24%
- Brian A. Reaves, *Pretrial Release of Federal Felony Defendants*, 1990 (1994), https://www.bjs.gov/content/pub/pdf/prffd.pdf.
  - Detention Rates by Race:
    - White: 37%
    - Black: 43%
    - Other nonwhite: 31%

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 PTRA 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

Examining Federal Pretrial Release Trends over the Last Decade

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WHEN A PERSON (i.e., a defendant) is charged with committing a federal offense, judicial officials have the discretion to determine whether that defendant should be released pretrial, subject to the criteria required by the Eighth Amendment and under 18 U.S.C. §3142 of the federal statute. Under both guiding documents, the right to bail is clear and paramount, with detention reserved only for rare cases where "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." (see 18 U.S.C. §3142). When ordering release, judicial officials are required to determine why a personal recognizance bond will not suffice and what conditions, if any, should be set to allow for federal pretrial release (18 U.S.C. §3142).

The decision to release a defendant into the community or detain the defendant until his or her case is disposed is of crucial importance. Not only can a defendant's liberty, and therefore, constitutional rights, be constrained by the detention decision, but research has shown that subsequent case outcomes (including the likelihood of conviction, severity of sentence, and long-term recidivism) can be negatively affected when pretrial detention is mandated (Gupta, Hansman, & Frenchman, 2016; Heaton, Mayson, & Stevenson, 2017; Oleson, VanNostrand, Lowenkamp, Cadigan, & Wooldredge, 2014; Lowenkamp, VanNostrand, & Holsinger, 2013). Additionally, the pretrial release decision is often the defendant's first interaction with the federal criminal justice system and can set a positive or a negative tone that may affect his or her cooperation with the system and attitude going into post-conviction supervision, if ultimately convicted. Hence, the process by which federal defendants are released or detained pretrial represents an important component of the federal criminal justice system.

Since the early 1980s, the federal criminal justice system has undergone numerous changes that have influenced pretrial release decisions and patterns. Specifically, it has moved from a system that primarily focused on fraud, regulatory, or other offenses within the original jurisdiction of the federal government to one directed at prosecuting defendants for crimes involving drug distribution, firearms and weapon possession, and immigration violations (VanNostrand & Keebler, 2009). As the offenses charged within the federal system changed, so too did the legal structure that undergirded pretrial release and detention decisions. The advent of the Pretrial Services Act of 1982 and more importantly the Bail Reform Act of 1984 constructed a legal framework where judges were instructed to weigh several elements when considering a defendant's flight risk; in addition, for the first time in federal law, judges were allowed to weigh potential danger to the community (AO, 2015). Moreover, the 1984 Act contained provisions involving the presumption of detention that shifted the burden of proof from the prosecution to the defendant in proving the appropriateness of pretrial release for certain offenses (Austin, 2017). How and to what extent these changes manifested themselves in federal pretrial release decisions and violation outcomes has been periodically examined, but there has been little recent research on this topic.

In this article we will update recent federal pretrial trends by examining key patterns within the federal pretrial system during a ten-year period spanning fiscal years 2008 through 2017. Initially, this paper will detail major legal/structural changes that occurred within the federal pretrial system since the 1980s that have influenced the pretrial release process. Next, a brief summary of prior studies examining federal pretrial trends will be provided for background purposes. Included in this overview will be a discussion of how rising pretrial detention rates led to the development of an actuarial tool—the federal Pretrial Risk Assessment (PTRA) instrument—meant to guide release recommendations and decisions. Afterwards, we will explicate research questions and the data used to examine federal

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pretrial trends. Major findings will then be presented and the report will conclude by discussing the study's implications for the federal pretrial system. It should be noted that, for the most part, illegal aliens will be omitted from the study, since most of these defendants are never released pretrial (see Table 1).

Overview of Federal Pretrial Legislation

In 1982, following the perceived success of the 10 pretrial demonstration districts, Ronald Reagan signed the Pretrial Services Act of 1982 (Byrne & Stowel, 2007). This legislation established pretrial services agencies within each federal judicial district (with the exception of the District of Columbia) and authorized federal pretrial and probation officers to collect and report on information pertaining to release decisions, make release recommendations, supervise released defendants, and report instances of noncompliance (see 18 U.S.C. §3152). The Act's primary purpose was to increase pretrial release rates by diverting defendants who would ordinarily have been detained into pretrial supervision programs (Byrne & Stowel, 2007).

Shortly after the passage of the Pretrial Services Act of 1982, Congress passed the Bail Reform Act of 1984 (see 18 U.S.C. §3141-3150). This Act marked a significant turning point in the federal pretrial system and laid the groundwork for current detention rates. The Bail Reform Act of 1984 included two major modifications: 1) the inclusion of the danger prong, in addition to flight risk, as a consideration in making the release decision, and 2) two presumptions for detention where, instead of assuming a defendant would be granted pretrial release, the assumption was that he or she would be detained (Austin, 2017). Moreover, the 1984 Act identified several factors federal judges should consider when making pretrial release/detention decisions; many of these factors became integrated into the federal bail report.[2]

[2] The factors are: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the financial resources of the defendant; (4) the character and physical and mental condition of the defendant; (5) family ties; (6) employment status; (7) community ties and length of residency in the community; (8) record of appearances at court proceedings; (9) prior convictions; (10) whether, at the time of the current offense, the defendant was under criminal justice supervision; and (11) the nature and seriousness of the danger to the community or any person that the defendant's release would pose. (AO, 2015); see also 18 U.S.C. §3141 – 3150 for a detailed list of factors courts should consider.

Crucially, the Bail Reform Act of 1984 created two scenarios in which the assumed right to pretrial release was reversed, with the burden shifting to the defendant to prove he or she was not a risk of nonappearance or danger to the community. Creating the presumptions—before the advent of actuarial pretrial risk assessment—was Congress' effort to identify high-risk cases in which defendants would be required to overcome an assumption in favor of pretrial detention (Austin, 2017). It should be noted that the presumptions were also created in the midst of the "War on Drugs"; therefore, the cases targeted by these presumptions were largely drug offenses. At the time the presumptions were created, cases in the federal system were primarily fraud and regulatory and therefore, the presumptions did not affect a majority of cases (VanNostrand & Keebler, 2009). However, as drug prosecutions increased to the point where they became the largest case category in the federal system besides immigration, the presumption evolved into a more important component of the detention decision (Austin, 2017).

Overview of Prior Studies Examining Federal Pretrial Trends

Since the passage of the Pretrial Services Act of 1982 and the Bail Reform Act of 1984, little research has been conducted into whether the objectives of these laws were met and what potential unanticipated consequences might have arisen. The limited research conducted to date has been primarily initiated by the Administrative Office of the U.S. Courts (AO) Pretrial and Probation system itself, the Bureau of Justice Statistics (BJS) under the Department of Justice, and a few outside academic sources.

In 2007, James Byrne and Jacob Stowell published a paper in *Federal Probation* analyzing the impact of the Federal Pretrial Services Act of 1982. In their paper, they observed that the Act led to significant increases in the number of people under federal pretrial supervision. The authors concluded that this result occurred because of defendants being placed on pretrial supervision who would previously have been released on their own recognizance. Second, they concluded that the Act failed to reduce the rate of pretrial detention. In fact, between 1982 and 2004, federal pretrial detention rates rose from 38 percent to 60 percent (including illegals). In explaining these changes, the authors hypothesized that the risk profile for federal defendants changed significantly in the intervening years, with large increases in drug and immigration cases. However, the detention rates went up across all sub-categories, including defendants with no prior criminal record and those who were employed. The authors concluded that the rising detention rate cannot be explained by the changing risk profile, but rather by changes in how the system regarded pretrial release and those entitled to it (Byrne & Stowel, 2007).

In 2013, BJS published a special report on pretrial detention and misconduct from 1995 to 2010. The findings were similar to those reported by Byrne and Stowell. Notably, from 1995 to 2010, the federal detention rate rose from 59 percent to 75 percent (including illegals). The study concluded that the rise in detention was driven primarily by a 664 percent increase in immigration cases, from 5,103 in 1995 to 39,001, in 2010 (Cohen, 2013). Despite this increase in immigration cases, the study also found that detention rates went up across case types, with detention rates for immigration cases increasing from 86 percent to 98 percent, from 76 percent to 84 percent for drug offenses, and from 66 percent to 86 percent for weapons offenses.

Development of the Federal Pretrial Risk Assessment Instrument

As these and other similar studies emerged, various entities within the federal system became concerned with the rising federal detention rate. In response to this concern, the Office of the Federal Detention Trustee, in collaboration with the AO, embarked on a project to "identify statistically significant and policy relevant predictors of pretrial risk outcome [and] to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community …" (VanNostrand & Keebler, 2009: 3).

One of the key recommendations of this study was that the federal system create an actuarial risk assessment tool to inform pretrial release decisions (Cadigan, Johnson, & Lowenkamp, 2012; VanNostrand & Keebler, 2009). The aim of the tool was to assist officers in making their recommendations by cutting through beliefs and implicit biases and presenting an objective assessment of an individual defendant's risk of nonappearance, danger to the community, and/or committing a technical violation that resulted in

revocation (VanNostrand & Keebler, 2009). The tool also had to be short enough to be completed as part of the pretrial investigation process, which was often limited to a few hours from start to finish.

The Pretrial Risk Assessment Tool (PTRA) was created in 2009 by analyzing about 200,000 federal defendants released pretrial between fiscal years 2001 and 2007 from 93 of the 94 federal districts (Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). Using a variety of multivariate models, the final tool included 11 questions measuring a defendant's criminal history, instant conviction offense, age, educational attainment, employment status, residential ownership, substance abuse problems, and citizenship status.[3] Responses to the questions generates a raw score ranging from 0-15 which then translates into five risk categories, with Category 1 being the lowest risk and Category 5 the highest. Once trained and certified, a federal pretrial services officer could complete the tool in under five minutes.

Although the PTRA was initially deployed to the field in fiscal year 2010 and both the initial and revalidation studies showed this tool to be an excellent predictor of pretrial violation outcomes (see Cadigan et al., 2012; Lowenkamp & Whetzel, 2009),[4] implementation by the districts was slow, as it was perceived to be replacing, not augmenting, officer discretion. For example, the percentage of defendants (excluding illegals) with PTRA assessments rose from 35 percent in fiscal year 2011 to 77 percent in fiscal year 2013 (data not shown in table). However, by 2014, implementation of the tool had grown sufficiently to be used for outcome measurement purposes. At present, nearly 90 percent of defendants with cases activated in federal district courts have PTRA assessments. While the PTRA is now used nearly universally in the federal pretrial system, it is unclear whether its deployment has been associated with changes in federal pretrial release patterns. We intend to explore whether previously documented trajectories of increasing detention rates have changed with the PTRA's implementation.

Present Study

The present study will detail major trends occurring within the federal pretrial system over a 10-year period encompassing fiscal years 2008 through 2017. Specifically, we will explore the following research issues about the decision to release defendants charged with federal crimes:

- What percentage of federal defendants are being released pretrial and how have federal release patterns changed over the last 10 years? To what extent are federal pretrial release decisions influenced by citizenship status? How do pretrial officer and U.S. Attorney release recommendations align with actual release decisions?
- Are defendants more or less likely to be released depending upon their most serious offense charges (e.g., drugs, weapons/firearms, financial, sex, etc.), and have release rates changed over time within the specific offense categories? Relatedly, have the types of offenses associated with higher release rates increased or decreased during the study time frame?
- Have the criminal history profiles of federal defendants (e.g., prior arrest and/or conviction history) become more or less severe since 2008? To what extent does criminal history influence release decisions, and have release rates changed or remained the same over time for defendants with similar criminal history profiles?
- Has implementation of the PTRA been associated with an increasing, decreasing, or stabilizing pretrial release rate? If national federal pretrial release rates have remained stable or continued to decline, have districts incorporating this instrument in their bail reports witnessed increases in their release rates?
- Last, this study will investigate trends in the percentage of released defendants who committed pretrial violations. Defendants are considered to have garnered a pretrial violation if they were revoked while on pretrial release, had a new criminal rearrest, or failed to make a court appearance (i.e., FTA). The next section examines the data used in the current study.

Data and Method

Data for this study were obtained from 93[5] U.S. federal judicial districts and comprised 531,809 defendants, excluding illegals, with cases activated within the federal pretrial system between fiscal years 2008 through 2017. These pretrial activations were drawn from a larger dataset containing 1.1 million pretrial defendants with cases opened between fiscal years 2008 and 2017. From this larger dataset, all pretrial defendants classified as illegal immigrants were excluded from the analysis (*n* lost = 459,442). The illegal aliens were removed because, as will be shown, very few illegal aliens were placed on pretrial release. Non-citizen defendants considered legal aliens, however, were included in the study. Legal aliens encompass non-citizen defendants with the status of humanitarian migrant (e.g., refugee), permanent resident (e.g., green card), or temporary resident (e.g., in U.S. for travel, educational, or employment purposes). In addition, we removed all courtesy transfer cases (*n* lost = 72,183) with the exception of rule 5 cases with a full bail report. Last, we omitted cases that fell into the following classification categories: collaterals, diversions, juveniles, material witnesses, and writs (*n* lost = 41,975). The transfers and these other cases were removed because they did not involve defendants being charged with new offenses within the federal system. Rather, they encompass case events in which the defendant was transferred from another district, was serving as a material witness, was placed into a diversion program, or was currently incarcerated on a prior conviction, nullifying the bail decision on the current federal matter. Hence, the report focuses on only those defendants prosecuted by U.S. Attorneys for new offenses in the federal court system and who had a reasonable expectation of bail.[6]

Data for this study were extracted from the Probation and Pretrial Services Automated Case Tracking System (PACTS), the case management system used by federal probation and pretrial officers. PACTS provides a rich dataset containing detailed information on the most serious offense charges, criminal history profiles, release/detention decisions, and violation outcomes for released defendants. The current study primarily uses descriptive statistics to explore pretrial release and violation trends in federal district courts.

[3] For a list of specific items in the PTRA, see Cadigan et al. (2012) and Lowenkamp and Whetzel (2009).

[4] It should be noted that the PTRA was recently revalidated off a larger sample of officer-completed PTRA assessments (n = approx. 85,000). Findings from this study are highlighted in the current *Federal Probation* issue (see Cohen, Lowenkamp & Hicks, 2018).

[5] It should be noted that although there are 94 federal judicial districts, the District of Columbia (D.C.) has its own separate pretrial system. Hence, the federal judicial district in D.C. is omitted from this analysis.

[6] Because of the use of these filters, the pretrial release rates displayed in this report will most likely differ from those published by other federal statistical agencies.

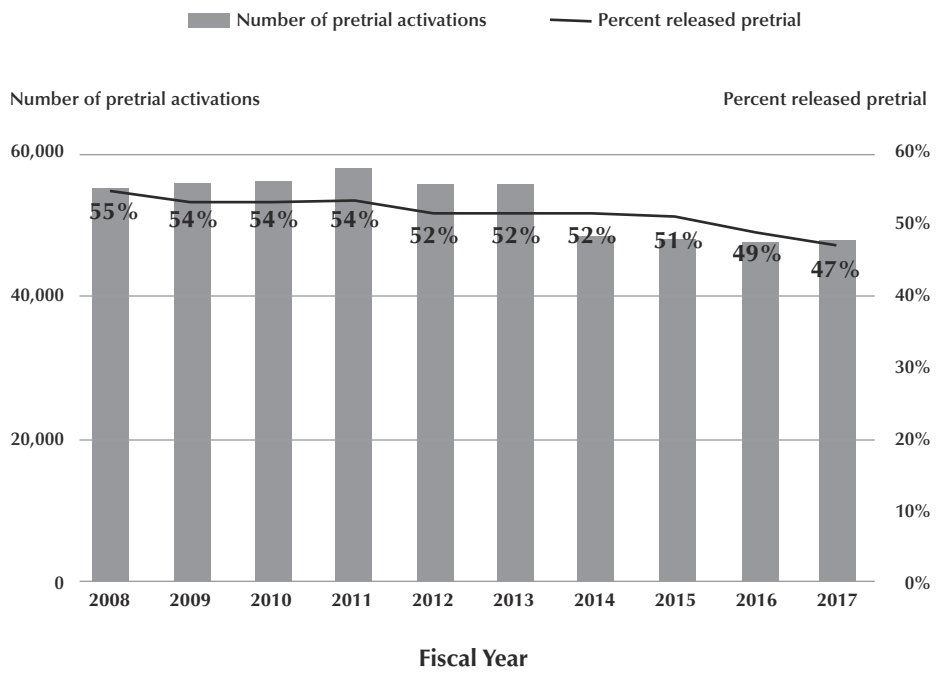
Results

Overall Pretrial Trends

In general, the number of defendants with pretrial activations and the percentage released pretrial has declined during the 10-year period spanning fiscal years 2008 through 2017. Between fiscal years 2008 through 2017, the number of defendants with pretrial activations declined by 13 percent, from 55,578 cases in 2008 to 48,181 cases in 2017 (see Figure 1). Interestingly, most of this decline occurred between fiscal years 2013 and 2014, when budget sequestration cuts were enacted. In this report, defendants with pretrial activations include U.S. or naturalized citizens or legal aliens charged with federal offenses. Illegal aliens are omitted from most of this analysis, with the exception of Table 1.

FIGURE 1

Number of federal defendants (excluding illegals) with pretrial activations and percent released pretrial in U.S. district courts, FY 2008–2017



Note: Includes U.S./naturalized citizen defendants or legal aliens with cases opened between fiscal years 2008 - 2017.

TABLE 1.

Percent of U.S. or naturalized citizens, legal aliens, or illegal aliens released pretrial in cases activated within U.S. district courts, FY 2008–2017

	U.S. or naturalized citizen		Legal aliens		Illegal aliens	
Fiscal year	Number of defendants	Percent released	Number of defendants	Percent released	Number of defendants	Percent released
2008	50,366	55.9%	4,300	44.9%	38,931	--
2009	51,348	55.2%	3,887	39.9%	46,599	4.5%
2010	51,040	55.8%	4,405	37.1%	52,206	2.6%
2011	53,111	55.6%	4,769	34.6%	52,274	2.3%
2012	50,917	53.2%	4,641	35.3%	50,086	1.6%
2013	51,075	53.3%	4,311	36.5%	49,777	1.5%
2014	44,911	52.6%	3,742	37.5%	48,184	1.4%
2015	44,353	52.0%	3,436	38.0%	43,714	1.6%
2016	43,319	50.2%	3,850	36.4%	40,602	1.8%
2017	43,768	48.1%	3,380	33.8%	37,069	1.7%

Note: The release rates for illegal aliens for fiscal year 2008 not shown because of a change in the way pretrial release was coded for these cases. Prior to 2009, some border districts were coding illegal aliens released to U.S. Immigration and Customs Enforcement (ICE) as released even if they remained detained until deportation. After 2008, the coding methodology was changed so that only illegal aliens released into the community were coded as released.

In addition to declining caseloads, the percentage of defendants released pretrial decreased by 8 percentage points from 55 percent in 2008 to 47 percent in 2017. As will be shown, many factors can influence pretrial release trends, including defendant criminal history profiles and most serious offense charges. If the criminal history profiles of federal defendants are becoming more serious, for example, that trend could exert downward pressures on federal pretrial release rates. Hence, we calculated an adjusted pretrial release rate that accounts for changes in the criminal history profiles and most serious offense charges filed in the federal courts. When adjusted by criminal history and offense severity charges, the federal pretrial release rates declined from 54 percent in 2008 to 50 percent in 2017, representing a 4-percentage point decrease (data not shown in table).

Pretrial Release and Defendant Citizenship Status

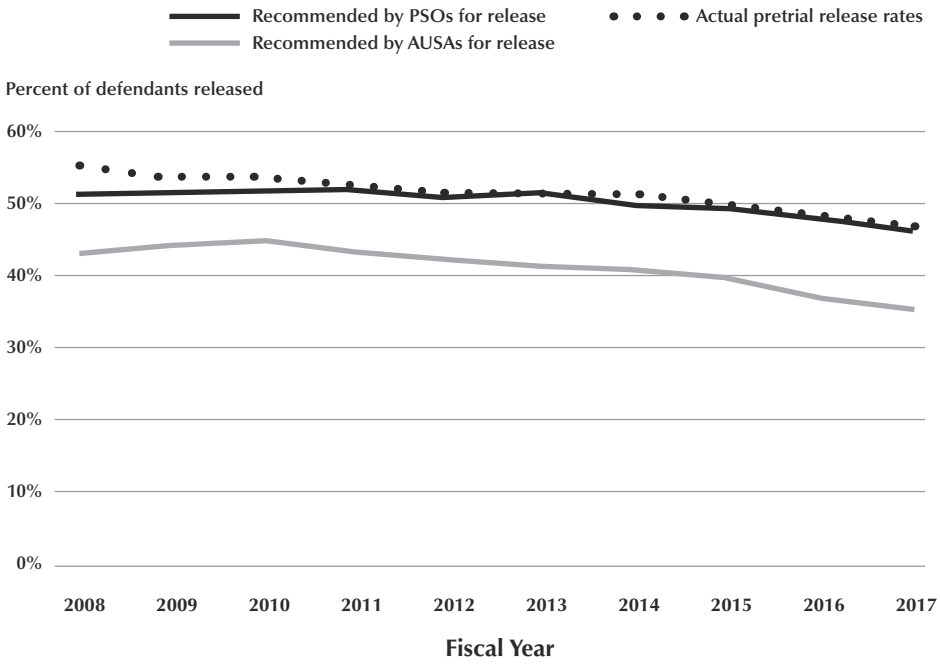
A defendant's citizenship status, including whether they are a U.S. or naturalized citizen, legal alien, or illegal alien, is strongly associated with the release decision. As shown in Table 1, very few illegal aliens are released pretrial; the release rates for illegal aliens has remained unchanged at about 2 percent since 2011. Given their low release rates, illegal aliens are excluded from the remainder of this report. If illegal aliens were included, the overall release rate would have declined from 38 percent in 2008 to 28 percent in 2017 (see table H-14 at the Administrative Office of the U.S. Courts statistics webpage: http://www.uscourts.gov/data-table-numbers/h-14).

In comparison to illegal aliens, the release rates for legal aliens or U.S. born and naturalized citizens are substantially higher, although these release rates have also declined over the past decade. For example, over half of U.S. born or naturalized citizens were released pretrial between fiscal years 2008 through 2015, while by 2017, the release rate for these defendants had dropped to 48 percent.

Pretrial Release Recommendations

At the bail hearing, pretrial officers (PSOs) and U.S. Attorneys (AUSAs) make recommendations to release or detain defendants pretrial and these recommendations can influence release decisions. Over the past decade, PSOs

FIGURE 2
Percent of federal defendants (excluding illegals) recommended for release by PSOs and AUSAs and actually released pretrial in cases activated within U.S. district courts, 2008–2017



Note: Includes U.S./naturalized citizen defendants or legal aliens with cases opened between fiscal years 2008 - 2017.

have consistently recommended defendants for release at higher rates than AUSAs (see Figure 2). In 2008, PSOs recommended 51 percent of defendants for release, while the release recommendation rate for AUSAs was 43 percent. By 2017, 48 percent of defendants were recommended for release by PSOs compared to 36 percent of defendants recommended for release by AUSAs. The actual release rates have generally tracked the PSO release recommendation rates between 2008 to 2017.

Pretrial Release and Most Serious Offense Charge

The decision to release a defendant pretrial varies substantially by the most serious offense charges. For instance, about four-fifths of defendants charged with financial crimes were released pretrial, and this release rate has remained relatively stable over the past decade (see Table 2). By comparison, approximately a third or less of defendants charged with weapons/firearms or violence offenses were released pretrial during the study coverage period. While financial offenses have higher release rates than most federal offenses, it is notable that fewer of these cases are being activated within the federal pretrial system. From 2008 through 2017, the number of pretrial activations involving financial offenses declined by 34 percent. Conversely, there were increases in pretrial activations among several offense categories with relatively low or declining release rates, including weapons/firearms and sex offenses.

Some offense categories have witnessed appreciable decreases in their pretrial release rates. For example, from 2008 through 2017, defendants charged with sex offenses saw a 15-percentage-point decline in their pretrial release rates, from 55 percent to 40 percent. In addition, defendants charged with weapons/firearms offenses have witnessed an 8-percentage-point drop in their release rates, from 36 percent to 29 percent.

While drug cases continue to remain one of the largest offense categories within the federal system, the number of pretrial activations involving these offenses has declined by 15 percent between 2008 and 2017. Interestingly, the percentage of drug defendants released pretrial decreased by 4 percentage points, from 45 percent in 2008 to 41 percent in 2016 and 2017.

Pretrial Release and Defendant Criminal History Profiles

According to the 1984 Bail Reform Act, judges and magistrates are required to consider a defendant's criminal history when making pretrial release decisions. Following the Act's guidance, defendants with more serious criminal histories should have a lower probability of pretrial release than those with less serious criminal histories. Hence, a worsening criminal history profile for federal defendants could influence the overall federal pretrial release rates.

There is mixed evidence that the criminal history profiles of federal defendants have become more serious during the last 10 years. This is displayed by figures 3 and 4, which show changes in the arrest and conviction history of federal defendants from 2008 through 2017. The percentage of defendants with 5 or more prior felony arrests increased from 21 percent in 2008 to 26 percent in 2017 (see Figure 3). Moreover, between 2008 and 2017, the percentage of defendants with 5 or more prior felony convictions increased from 8 percent to 10 percent (see Figure 4). Although the portion of defendants with extensive criminal histories has grown in the federal system, there have been few changes in the overall percentages of defendants with any prior felony arrest or conviction history. For example, since 2012, the percentage of defendants with no prior felony arrest history has remained stable at about 45 percent to 46 percent. Similar patterns are manifested when examining trends in the percentage of defendants without any prior felony convictions.

The relationship between criminal history and pretrial release is illustrated by the federal data, which show defendants with serious or lengthy criminal histories having lower pretrial release rates than those with less serious criminal backgrounds. In 2008, 77 percent of defendants with no felony arrest history were released pretrial, 40 percent of defendants with two to four prior felony arrests were released pretrial, and 23 percent of defendants with five or more prior felony arrests were released pretrial (see Table 3). By 2017, the percentage of defendants released pretrial was 64 percent for defendants with no prior felony arrests, 54 percent released for defendants with two to four prior felony arrests, and 21 percent released for defendants with 5 or more prior felony arrests.

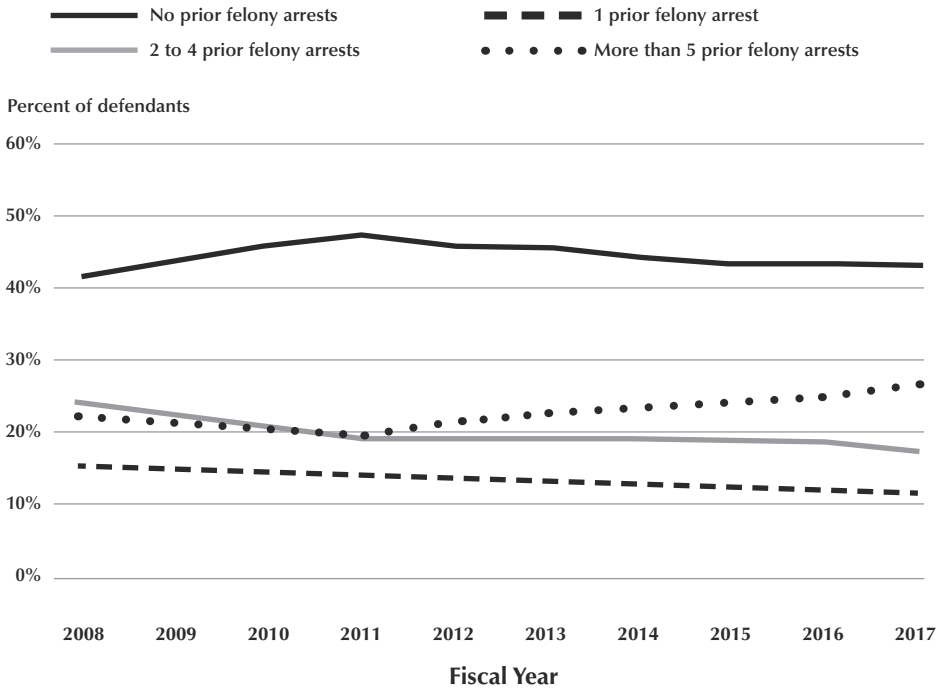
An interesting pattern involves the steeper declines in pretrial release rates for defendants with less severe criminal history profiles between 2008 and 2017. There was a 13-percentage-point decline in the pretrial release rates for defendants with no prior felony arrest

history, from 77 percent in 2008 to 64 percent in 2017. In comparison, the probability of being released pretrial for defendants with 5 or more prior felony arrests declined from 23 percent in 2008 to 21 percent in 2017, representing a 2-percentage-point decrease. The larger declines in pretrial release rates for defendants with less serious criminal histories also occurred among the other criminal history measures, including number of prior felony convictions, most serious conviction history, and court appearance record.

Table 4 examines pretrial release trends by the defendant's most serious offense charges and criminal history profile. In a pattern similar to that shown in the previous table, the release rates declined to a greater extent for defendants with less serious criminal histories than for their counterparts with more severe criminal histories. This finding was particularly apparent for defendants charged with weapons/firearms, sex, or drug offenses. The percentage of defendants charged with weapons/firearms offenses with no felony arrest history released pretrial decreased from 75 percent in 2008 to 49 percent in 2017. In contrast, the pretrial release rates for weapons/firearm defendants with five or more prior arrests declined from 19 percent in 2008 to 17 percent in 2017. A similar trend occurred for defendants charged with sex offenses. Sex offenders without any prior felony arrests saw their pretrial release rates decline from 70 percent in 2008 to 52 percent in 2017. In comparison, the percentage of sex offenders with five or more prior felony arrests released pretrial decreased from 19 percent to 12 percent between 2008 and 2017. Last, the percentage of drug defendants without any record of prior felony arrests released pretrial declined by 10 percentage points from 63 percent in 2008 to 53 percent in 2017, while their counterparts with 5 or more prior felony arrests were released at comparable rates (21 percent in 2008 vs. 20 percent in 2017) during the study coverage period.

FIGURE 3

Felony arrest history of federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008 - 2017



Note: Includes U.S. or naturalized citizens or legal aliens.

TABLE 2.

Percent of federal defendants (excluding illegals) released pretrial for cases activated in U.S district courts by most serious offense charge, FY 2008 - 2017

	Drugs		Financial		Weapons/Firearms		Violence		Immigration/a		Sex Offenses	
Fiscal year	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released
2008	22,557	44.6%	13,419	81.6%	6,676	36.3%	--	--	2,996	48.4%	2,544	54.6%
2009	23,145	43.8%	12,334	82.0%	6,591	36.3%	3,707	34.5%	2,791	47.3%	2,559	53.7%
2010	22,522	43.6%	13,304	84.4%	6,307	33.8%	3,477	35.0%	3,092	47.8%	2,409	51.9%
2011	24,564	43.3%	13,482	83.9%	6,473	35.4%	3,519	35.3%	2,800	50.9%	2,654	53.4%
2012	23,070	42.2%	12,438	82.6%	6,911	32.5%	3,540	31.4%	2,732	52.8%	2,518	47.9%
2013	22,736	42.4%	12,739	82.9%	6,599	31.7%	3,532	36.0%	2,919	50.5%	2,847	44.8%
2014	19,287	43.2%	11,225	82.7%	5,932	29.5%	3,359	32.1%	2,853	53.7%	2,692	41.5%
2015	18,850	42.9%	10,398	83.8%	6,136	29.6%	3,285	29.7%	2,978	52.3%	3,050	42.0%
2016	18,678	40.6%	9,397	83.1%	6,455	29.1%	3,646	32.9%	3,221	50.7%	2,806	41.5%
2017	19,244	40.8%	8,820	80.3%	7,228	28.6%	3,490	30.5%	3,228	49.4%	2,799	40.0%
Percent change pretrial activations												
2008-2017	-14.7%		-34.3%		8.3%		-5.9%		7.7%		10.0%	

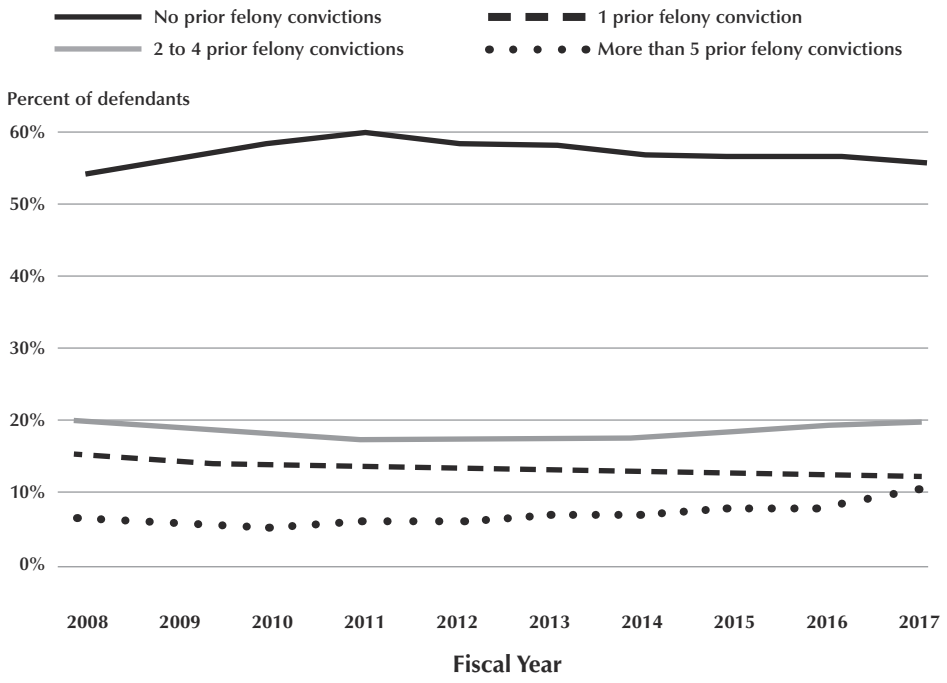
Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017. Obstruction, traffic/DWI, and public-order offenses not shown. Most serious offense charges sorted by most to least frequent among cases activated in FY 2017. Percent changes in violent activations covers period from 2009 to 2017.
-- Data not available.
a/ Includes only U.S. or naturalized citizens or legal aliens charged with immigration offenses. Illegal aliens not included in these rates.

Pretrial Release in Districts that Have Placed the PTRA in the Bail Report

The above documented declines in federal pretrial release took place during a period in which federal officers began using a risk assessment instrument (i.e., the PTRA) to inform pretrial release recommendations and decisions. Although the PTRA was developed to bring evidence-based practices into the federal pretrial system, federal judges or magistrates are not required to consider this instrument when making release decisions (Cadigan & Lowenkamp, 2011). In five federal districts, however, the decision was made to include the PTRA assessment score in the bail report. Bail reports are prepared by pretrial officers and provide judges with information about the risk of flight and dangerousness to the community for persons charged with federal crimes.

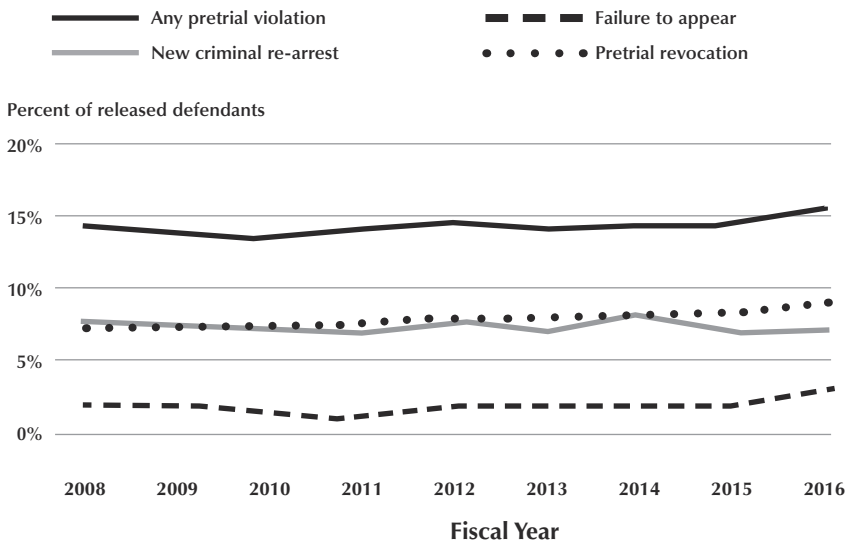
An examination of release rates for districts that included the PTRA in their bail reports shows a general trend of these districts initially experiencing some increases in their overall release rates, which are then followed by declines. In one district,[7] for example, the release rates increased by 12 percentage points, from 45 percent to 57 percent, during the first year this district included PTRA assessments in their bail reports; since then, the release rates in this district have trended downwards (data not shown in table). Similar trends have manifested in other districts using the PTRA in the bail reports.

FIGURE 4
Felony conviction history of federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008 - 2017



Note: Includes U.S. or naturalized citizens or legal aliens.

FIGURE 5
Percent of federal defendants (excluding illegals) released pretrial who committed pretrial violations for cases closed FY 2008 - 2016



Note. Includes U.S. or naturalized citizens or legal aliens released pretrial. Unlike previous tables/ figures, this figure uses the closed rather than activation date as the case anchor.

**Percentages won't sum to pretrial violation totals as defendants can commit multiple types of pretrial violations..*

Pretrial Violation Trends

Last, we explored the percent of release defendants who violated their terms of pretrial release through a revocation, new criminal arrest, or FTA. Unlike the previous analyses, this part investigates violations for defendants released pretrial with cases closed between fiscal years 2008 through 2016. We used the closed rather than activation date because that allowed for an examination of pretrial violations during a case's life course. Since the closed date anchored this component of the study, we could only report on pretrial violation activity up until 2016. Violation data were unavailable for fiscal year 2017.

From 2008 to 2015, the percentage of released defendants with any pretrial violation remained fairly stable at about 14 percent (see Figure 5). In 2016, there was a slight rise in the overall violation rates, which increased to about 16 percent. The percentage of released defendants revoked from pretrial supervision rose incrementally from 7 percent in 2008 to 9 percent in 2016. Importantly, the percent of released defendants arrested for new criminal conduct ranged from 7 percent to 8 percent during the study coverage period. Relatively few released defendants (about 2-3 percent) FTA between 2008 and 2016.

[7] Given that these districts are still experimenting with methods that allow for the most beneficial and informative use of the PTRA in their bail decisions, we kept their names out of this report.

Conclusions and Implications

Our examination of federal pretrial trends over the last decade revealed several key findings. Specifically, the federal pretrial release rates have declined during the period spanning 2008 through 2017, and this trend holds even adjusting for the changing composition of the federal defendant population. Generally, release rates have tracked the release recommendation decisions by PSOs; moreover, PSOs have consistently recommended defendants for release at higher rates compared to AUSAs. Another important finding involves changes in the most serious offenses filed in the U.S. court system. There are fewer cases associated with higher release rates (i.e., financial offenses) filed in federal courts at present than in the past. Conversely, several case types with low or declining pretrial release rates, including weapons/firearms and sex offenses, have increased during the ten-year timeframe.

We also examined the criminal history profiles of federal defendants and found some evidence that they have worsened over time. Interestingly, the percentage of defendants released pretrial has declined to a greater extent among defendants with less severe criminal profiles than among defendants with more substantial criminal histories. The pattern of falling pretrial release rates for defendants with "light" criminal histories mostly centers on those charged with weapons/firearms, sex, and drug offenses. Another key component involved an examination of whether districts including the PTRA in their bail reports witnessed any increases in their release rates. While these districts experienced some increases in their overall release rates, these changes were not sustaining, as release rates fell over time. Last, there has been stability in the proportion of released defendants committing pretrial violations involving revocations, new criminal arrests, and FTAs.

This article shows that the federal system has become more oriented towards pretrial detention than release over the last 10 years. Federal statutes, including the 1984 Bail Reform Act and the presumption of detention, most likely laid the groundwork for the reported increases in federal pretrial detention. While there is some evidence that the profiles of defendants have become more severe, these trends do not completely explain the downward trajectories of federal pretrial release rates. For some offense types, particularly defendants charged with sex offenses, the decreases in pretrial release occurred concurrently with extensive media coverage of sex offenders committing violent crimes (see O'Brien, 2015). Nevertheless, even defendants charged with non-sex-related crimes have witnessed growing rates of pretrial detention, especially those with light criminal history profiles.

When the PTRA was initially deployed, there was some hope that the instrument could influence federal pretrial release decisions (Cadigan & Lowenkamp, 2011). If officers could base their decisions and release recommendations on an actuarial instrument, that might lead to an increase in release rates for defendants classified as either low (e.g., PTRA ones or twos) or moderate risk (PTRA threes) by the PTRA. While defendants placed into the lower risk categories are more likely to be released than their higher risk counterparts (Austin, 2017), the PTRA's implementation has not been associated with rising pretrial release rates. Rather, release rates have declined during the period coinciding with PTRA implementation.

There are a variety of reasons why the

TABLE 3.
Relationship between criminal history and pretrial release for federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008, 2011, 2014, & 2017

	2008		2011		2014		2017	
Defendant criminal history	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released
Number of prior felony arrests								
None	23,087	77.1%	27,366	71.4%	22,401	69.9%	21,657	64.4%
1	8,521	58.3%	8,163	56.0%	6,263	57.5%	5,407	53.9%
2 to 4	12,133	40.3%	11,430	40.2%	9,524	39.0%	8,814	37.3%
5 or more	11,663	23.2%	11,403	23.3%	10,889	21.3%	12,303	20.7%
Number of prior felony convictions								
None	30,932	72.3%	34,959	68.3%	28,759	66.8%	27,727	62.0%
1	8,822	45.1%	8,396	44.0%	6,608	42.4%	6,083	38.4%
2 to 4	11,224	29.0%	10,626	28.5%	9,316	27.0%	9,355	25.4%
5 or more	4,426	17.0%	4,381	17.6%	4,394	17.0%	5,016	15.9%
Most serious prior convictions								
None	21,018	74.2%	24,773	69.3%	20,745	67.2%	20,795	62.0%
Misdemeanor-only conviction	9,914	68.3%	10,186	65.7%	8,014	65.8%	6,932	61.9%
Felony conviction	24,472	32.6%	23,403	32.0%	20,318	29.9%	20,454	26.9%
Court appearance history								
None	43,416	60.1%	46,674	58.1%	38,305	55.9%	37,212	52.0%
1	4,870	40.2%	4,626	40.8%	4,046	41.5%	3,944	35.7%
2 or more	7,118	32.3%	7,062	33.3%	6,726	32.5%	7,025	27.8%

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017.

PTRA has not been associated with rising pretrial release rates. Specifically, this instrument was developed without any judicial involvement, impeding its potential adoption (Cadigan & Lowenkamp, 2011). In addition, there is no requirement that federal judges consider PTRA assessments when making release decisions (PJI, 2018). Rather, the Bail Reform Act of 1984 and federal statutes detail specific processes and elements judges must take into consideration when making pretrial release decisions, none of which involve the PTRA. The inability to integrate the PTRA into the judicial decision-making process has resulted in this risk tool having a relatively minimal role in federal judicial release decisions (PJI, 2018). Moreover, release rates have not changed appreciably even among those

TABLE 4.
Relationship between criminal history, most serious offense charges, and pretrial release for federal defendants with cases activated in U.S. district courts, FY 2008, 2011, 2014, & 2017

	2008		2011		2014		2017	
Defendant criminal history and most serious offense charges	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released
Drugs								
Number of prior felony arrests								
None	7,578	62.8%	9,928	56.1%	7,798	56.5%	8,067	52.7%
1	3,898	53.0%	3,830	49.4%	2,595	54.3%	2,223	51.1%
2 to 4	5,847	36.1%	5,700	36.5%	4,232	37.3%	3,771	37.0%
5 or more	5,187	21.1%	5,106	21.4%	4,662	20.2%	5,183	20.4%
Financial								
Number of prior felony arrests								
None	7,988	92.0%	8,759	91.8%	7,098	90.8%	5,476	88.6%
1	1,856	81.3%	1,675	82.5%	1,362	84.1%	1,020	82.3%
2 to 4	1,878	69.8%	1,650	73.4%	1,478	72.3%	1,157	70.5%
5 or more	1,654	45.7%	1,398	48.9%	1,287	49.0%	1,167	48.9%
Weapons/Firearms								
Number of prior felony arrests								
None	931	75.1%	1,295	65.1%	1,235	55.8%	1,588	49.0%
1	717	59.0%	649	55.5%	490	48.4%	526	47.3%
2 to 4	2,032	36.2%	1,709	34.0%	1,423	28.7%	1,604	28.8%
5 or more	2,961	18.5%	2,820	18.1%	2,784	14.9%	3,510	16.6%
Violence								
Number of prior felony arrests								
None	1,342	59.3%	1,344	57.6%	1,248	55.6%	1,311	50.1%
1	572	36.4%	531	35.4%	426	36.4%	416	37.5%
2 to 4	854	22.1%	773	24.1%	756	19.3%	758	22.0%
5 or more	935	9.1%	871	10.9%	929	8.8%	1,005	8.6%
Immigration								
Number of prior felony arrests								
None	1,506	66.8%	1,561	63.4%	1,440	70.7%	1,639	66.3%
1	526	43.0%	429	51.5%	445	53.3%	488	48.2%
2 to 4	612	28.9%	508	31.5%	594	33.3%	617	31.3%
5 or more	346	11.0%	302	18.2%	374	20.9%	484	16.9%
Sex offenses								
Number of prior felony arrests								
None	1,517	70.2%	1,690	65.1%	1,612	55.0%	1,655	52.2%
1	482	42.1%	488	44.1%	469	32.2%	424	35.1%
2 to 4	360	23.9%	305	22.6%	379	16.1%	397	17.1%
5 or more	181	18.8%	171	19.3%	232	8.2%	323	12.1%

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017. Defendants charged with traffic/DWI, public-order, and escape/obstruction not shown.

few districts that have included the PTRA scores in their bail reports. In sum, this report shows that changing court culture is a difficult task and developing and implementing a risk assessment instrument is not sufficient when attempting to make systematic changes to complex systems such as pretrial decision processes (Stevenson, in press).

Despite the challenges inherent in reforming the federal pretrial system, more effort should be placed on attempting to reduce unnecessary pretrial detention because of the crucial role the release decision can have both for the individual defendant and for the system as a whole. Specifically, the bail decision is the opportunity for the court system to conserve financial resources, uphold the individual's constitutional right to bail and the presumption of innocence, set a positive, rehabilitative tone for the individual and his or her families, and, in low-risk cases where it is merited, divert individuals altogether from incarceration. Moreover, and perhaps even more importantly, a growing number of research studies have shown pretrial detention being associated with higher rates of failure at the post-conviction stage (Gupta et al., 2016; Heaton et al., 2017; Oleson et al., 2014). Given the resources being expended on supervising federal offenders at the post-conviction stage with the aim of reducing recidivism—including education programs, vocational training, halfway house and other transitional housing, specialized probation officers who use cognitive behavior training, and motivational interviewing—it is important to understand and accept the fact that any reentry effort meant to affect recidivism should take into consideration maximizing pretrial release rates.

Taken together, this study shows that systematic and permanent changes in the federal pretrial system can only occur if all key actors, including judges, U.S. Attorneys, federal defenders, and pretrial officers, are involved in an effort to actively and continuously integrate evidence-based practices into federal pretrial decision-making and view release as a favorable option whenever it can be established that the risk of flight or danger to the community are not overtly present. Recently, the AO initiated the Detention Reduction Outreach Program (DROP), whose purpose is to safely reduce pretrial detention in federal districts. This effort involves outreach and collaboration with all stakeholders in the federal system, including the U.S. Attorney's Office, the Federal Defenders Office, the U.S. Marshals Service, the Probation and Pretrial Services Office, and other actors. Over the past few years, AO staff began visiting individual districts and initiating discussions with all pertinent stakeholders on the importance of integrating the PTRA into the pretrial decision and encouraging districts to use alternatives to detention (such as special conditions) as a mechanism for increasing release rates. If DROP can help bridge the gap between these various court actors, we may be able to work together to find compromises in cases that previously would have been detained and encourage a move to higher release rates. Additionally, these consultations encourage officers to make better use of their data by closely monitoring release and release recommendation rates to try to forestall any downward trends in these rates after a DROP consultation. The hope is that over time the DROP program will begin altering current release and detention trends.

References

Administrative Office of the U.S. Courts (AO) (2015). *Detention Reduction Outreach Program (DROP): Risk Assessment as the Foundation*. Washington, D.C.: Administrative Office of the U.S. Courts.

Administrative Office of the U.S. Courts (AO). (2018). *Table H-14: Defendants Released and Detained—During the 12-Month Periods Ending*: Selected years 1998 through 2017. Retrieved from http://www.uscourts.gov/statistics/table/h-14/judicial-business/2017/09/30

Austin, A. (2017). The presumption for detention statute's relationship to release rates. *Federal Probation, 81*(2), 52-63.

Byrne, J., & Stowell, J. (2007). The impact of the Federal Pretrial Services Act of 1982 on the release, supervision, and detention of pretrial defendants. *Federal Probation, 71,* 31-38.

Cadigan, T. P., & Lowenkamp, C. T. (2011). Implementing risk assessment in the federal pretrial system. *Federal Probation, 75*(2), 30-34.

Cadigan, T. P., Johnson, J. L., & Lowenkamp, C. T. (2012). The re-validation of the federal pretrial services risk assessment (PTRA). *Federal Probation, 76(2),* 3-9.

Cohen, T. H. (2013). *Pretrial detention and misconduct in federal district courts, 1995-2010.*Washington, D.C.: Bureau of Justice Statistics.

Gupta, A., Hansman, C., & Frenchman, E. (2016). The heavy costs of high bail: Evidence from judge randomization. *Journal of Legal Studies, 45,* 471-505.

Heaton, P., Mayson, S. G., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review, 69*(3), 711-794.

Lowenkamp, C. T., & Whetzel, J. (2009). The development of an actuarial risk assessment instrument for U.S. pretrial services. *Federal Probation, 73*(2), 33-36.

Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). *Investigating the impact of pretrial detention on sentencing outcomes*. Houston, TX: Laura and John Arnold Foundation.

O'Brien, J. (2015, September 28). David Renz: Probation's inattention emboldened me before murder and rape (videos). *Syracuse.com*. Retrieved from http://www.syracuse.com/crime/index.ssf/2015/09/david_renz_probations_inattention_emboldened_me_before_murder_and_rape_videos.html.

Oleson, J. C., VanNostrand, M., Lowenkamp, C. T., Cadigan, T. P., & Wooldredge, J. (2014). Pretrial detention choices and federal sentencing. *Federal Probation, 78*(1), 12-18.

Pretrial Justice Institute. (2018). False equivalence: Local, state, and federal detainees. Rockville, MD: Pretrial Justice Institute.

Stevenson, M. (in press). Assessing risk assessment in action. *Minnesota Law Review*.

VanNostrand, M., & Keebler, G. (2009). Pretrial risk assessment in the federal court. *Federal Probation, 73*(2), 3-29.

Federal Statutes

Pretrial Services Act of 1982, 18 U.S.C. §§ 3152.

Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150