The Bail Reform Act of 1984

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Preface

The Bail Reform Act of 1984 (18 U.S.C. §§ 3141–3150) authorizes a judicial officer to order the release or detention of an arrested person pending trial, sentence, and appeal, and sets forth the procedures that must be followed and factors that must be considered.

The first edition of this monograph, published in 1987, was written by Deirdre Golash of the Federal Judicial Center. It was updated in a 1993 second edition by Alan Hirsch and Diane Sheehey of the Center. Much of the case law since then follows the principles established in the cases referenced in the second edition and often simply cites to those cases. In the third edition, David N. Adair, Jr., former associate general counsel of the Administrative Office of the United States Courts, primarily addressed areas that were changed by statute or case law since the second edition, and cited cases, through June 1, 2006, that discussed the substantive issues.

This fourth edition also includes statutory changes and newer case law, while additionally reflecting the federal judiciary's focus on promoting science-informed and evidence-based decision-making. Since the last edition, there has been a great deal of research on risk assessment and the effects of release or detention under the Bail Reform Act, including the effects of even short-term detention. Excerpts from this research are provided where appropriate to foster a better understanding of the release or detention decision and its ramifications.

This edition also addresses a growing concern that the pretrial detention rate is too high because some defendants, especially low-risk defendants, are being unnecessarily, and possibly incorrectly, detained under the Act. In affirming the constitutionality of the Act in 1987, the Supreme Court clearly stated that pretrial detention should be "the carefully limited exception,"[1] and appellate courts have similarly concluded that the "default position" of the Act is "that a defendant should be released pending trial."[2]

Far from being the "carefully limited exception" discussed in *Salerno*, however, for many years pretrial detention has been imposed in well over half of all criminal cases.[3] It is important to note that, as the *Salerno* opinion indicated, the intent of the 1984 Act was not to substantially increase pretrial detention but, rather, to grant judges the discretion to "deny release pending trial" of "a small but identifiable group of particularly dangerous defendants." It was anticipated

1. United States v. Salerno, 481 U.S. 739, 755 (1987).
2. *See* United States v. Stone, 608 F.3d 939, 940 (6th Cir. 2010), and cases cited at note 14, *infra*.
3. *See* notes 65–70, *infra*, and accompanying text.

that release—on personal recognizance, unsecured appearance bond, or under one or more conditions—would "continue to be appropriate for the majority of Federal defendants."[4]

The Criminal Law Committee of the Judicial Conference of the United States has expressed its concern that "the federal pretrial detention rate remains high," and that the presumption of detention in 18 U.S.C. § 3142(e) "is unnecessarily increasing pretrial detention rates," especially for low-risk defendants.[5] Working with the Committee, the Administrative Office of the United States Courts has undertaken several initiatives "focused on how to reduce unnecessary pretrial detention."[6]

The Bail Reform Act of 1984 has been amended several times. Unless otherwise noted, references in this monograph to the "Bail Reform Act" or the "Act" are to the amended version in effect as of December 31, 2021, and all cites to the U.S. Code are to the most current version in effect at the time of this printing.

Appendix A reproduces the Bail Reform Act of 1984, as amended, as of December 31, 2021. Appendix B sets forth a selected provision of the Sentencing Reform Act of 1984.

For this fourth edition, the author would like to thank the following for generously sharing their knowledge of and experience with pretrial release and detention matters: Magistrate Judge Lisa P. Lenihan (W.D. Pa.); James A. Chance, Mark A. Sherman, and Cassandra J. Snyder from the Center's Education Division; Professor Alison Siegler, University of Chicago Law School; and from the Probation and Pretrial Services Division of the Administrative Office of the United States Courts, William E. Hicks, Jr., Thomas H. Cohen, and Amaryllis Austin.

4. S. Rep. No. 98-225, at 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3206.

5. *See* Summary of the Report of the Judicial Conference Committee on Criminal Law, pp. 3–6 (September 2017).

6. *See* Criminal Operations Advisory Council Meeting Summary at 8 (October 20–21, 2021) (discussing current and planned programs), *available at* https://jnet.ao.dcn/sites/default/files/pdf/Fall_2021_COAC_Meeting_Summary.pdf. See also section I.E. Pretrial Services and Risk Assessment, *infra*, for a discussion of AO initiatives.

I. Pretrial Release

> In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.[7]

Presumption of release. The Bail Reform Act of 1984, in 18 U.S.C. § 3142, sets forth a general presumption that defendants "shall" be released before trial "unless" the government proves, at a detention hearing, that they should be detained.[8] In fact, if a case does not involve any of the factors in section § 3142(f) that authorize a detention hearing, release is mandatory, subject to certain terms and conditions. A defendant may be detained after a detention hearing *only* if the government overcomes the presumption of release by proving that no set of release conditions will "reasonably assure" the defendant's appearance when required and the safety of the community. If the government fails to meet its burden of proof at the hearing, the defendant must be released.

Release at the initial appearance. At a defendant's initial appearance, the court must determine whether to release the defendant or hold a detention hearing. If none of the factors listed in 18 U.S.C. § 3142(f)(1) or (2) are present, there is no authority to hold a detention hearing and therefore the defendant *must* be released at the initial appearance on personal recognizance or unsecured appearance bond, or subject to certain mandatory conditions and any additional conditions the court determines are necessary to "reasonably assure the appearance of the person as required and the safety of any other person and the community."[9] [See sections I.A and I.B, *infra*, for further discussion of release absent a detention hearing.]

Release after a detention hearing. Release may also occur after a detention hearing, which may be held *only* if the court finds that a section 3142(f) factor

7. United States v. Salerno, 481 U.S. 739, 755 (1987).

8. *See* United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) (Bail Reform Act of 1984 "codified . . . the traditional presumption favoring pretrial release 'for the majority of Federal defendants.'") (citation omitted); United States v. Holloway, 781 F.2d 124, 125 (8th Cir. 1986) ("The statute favors release over detention for the majority of accused persons . . . ."); United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985) ("the statutory scheme of 18 U.S.C. § 3142 continues to favor release over pretrial detention. . . . The wide range of restrictions available ensures, as Congress intended, that very few defendants will be subject to pretrial detention."). *See also* S. Rep. No. 98-225, at 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3206 [hereinafter Senate Report] ("It is anticipated that [release on personal recognizance or unsecured appearance bond] will continue to be appropriate for the majority of federal defendants."); John L. Weinberg and Evelyn J. Furse, Federal Bail and Detention Handbook 29 (Practising Law Institute 2021) ("[t]here is a presumption in favor of release on personal recognizance or 'an unsecured appearance bond'"); *Fiftieth Annual Review of Criminal Procedure*, 50 Geo. L.J. Ann. Rev. Crim. Proc. 403 (2021) ("in general the BRA contains a presumption of release").

9. 18 U.S.C. § 3142(a)–(c).

is present, that is: the offense involves one of the serious crimes specified in section 3142(f)(1); the defendant is charged with a felony and has prior convictions for two or more offenses listed in section 3142(f)(1) (or similar state or local offenses); or, there is a "serious risk" under section 3142(f)(2) that the defendant will flee, obstruct justice, or threaten or harm a prospective witness or juror.[10] At the hearing the court must consider the factors listed in section 3142(g), and if the court concludes that "there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," the defendant shall be released subject to those conditions. [See section II. Pretrial Detention, *infra*, for a discussion of the procedural requirements and substantive issues involved in a detention hearing.]

Note that a defendant may seek release after having been detained if previously unknown material information warrants a reopening of the detention hearing. See 18 U.S.C. § 3142(f) and section IV.A, *infra*.

Any discussion of possible conditions of release or whether a detention hearing may be held should occur only after a defendant has the opportunity to consult with an attorney. An indigent defendant is "entitled to have counsel appointed to represent the defendant at every stage of the proceeding *from initial appearance* through appeal,"[11] and "shall be represented at every stage of the proceeding *from initial appearance before the magistrate judge* or the court through appeal."[12]

A. Release on Personal Recognizance

For defendants who are not eligible for detention, 18 U.S.C. § 3142(b) requires that the defendant be released on personal recognizance or unsecured personal bond unless the judicial officer[13] determines "that such release will not reasonably assure the appearance of the person as required or will endanger the safety

10. 18 U.S.C. § 3142(f).

11. Fed. R. Crim. P. 44(a) (emphasis added). *See also id.*, advisory committee's notes to 1966 amendment (the right to counsel beginning from the initial appearance "is intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel"). *See also* Fed. R. Crim. P. 5(d)(2) (in a felony case, the court "must allow the defendant reasonable opportunity to consult with counsel").

12. 18 U.S.C. § 3006A(c) (emphasis added). *See also* Rothgery v. Gillespie County, 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").

13. Unless otherwise noted in a specific provision of the Act, a "judicial officer" may be a federal appellate, district, or magistrate judge; a state judge, justice, magistrate, or justice of the peace; or a city mayor. 18 U.S.C. §§ 3156(a), 3041; Fed. R. Crim. P. 1(b)(3), (b)(10)(A).

of any other person or the community." Therefore, "[t]he default position of the law . . . is that a defendant should be released pending trial."[14]

Release is always subject to the mandatory condition "that the person not commit a Federal, State, or local crime during the period of release, and . . . cooperate in the collection of a DNA sample" if such sample is authorized under 42 U.S.C. § 14135a.[15]

There are additional mandatory conditions that must be imposed on defendants who are accused of certain sex offenses involving minors or a failure to register as a sex offender. See the discussion in the next section at I.B.2.

B. Release with Conditions

> In making pretrial release or detention decisions, the courts are required to consider the least restrictive condition or combination of conditions to reasonably assure a defendant's appearance in court as required and the safety of any other person or the community. Despite these and other provisions designed to reduce unnecessary pretrial detention, the federal pretrial detention rate remains high.[16]

1. Least Restrictive Conditions

Under section 3142(c)(1), if the judicial officer determines that release of a defendant on personal recognizance or unsecured bond presents a risk of the defendant's nonappearance or a danger to any person or to the community, the judicial officer may impose additional conditions of release. The judicial officer must, however, choose "the least restrictive further condition, or combination of conditions, that . . . will reasonably assure the appearance of the person as required and

14. United States v. Stone, 608 F.3d 939, 940 (6th Cir. 2010). *See also Salerno*, 481 U.S. at 755 (pretrial detention should be "the carefully limited exception"); United States v. Barrera-Landa, 964 F.3d 912, 915 (10th Cir. 2020) (Bail Reform Act "requires the pretrial release of a defendant unless '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'"); United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015) ("Only in rare cases should release be denied, and doubts regarding the propriety of release are to be resolved in favor of the defendant."); United States v. Sabhnani, 493 F.3d 63, 75 (2d Cir. 2007) ("the law thus generally favors bail release"); United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992) ("There can be no doubt that this Act clearly favors nondetention."); United States v. Torres, 929 F.2d 291, 292 (7th Cir. 1991) (pretrial detention is "an exceptional step").

15. 18 U.S.C. § 3142(b), (c)(1)(A).

16. Summary of the Report of the Judicial Conference Committee on Criminal Law, Agenda E-7, September 2017, Appendix at 3 [hereinafter CLC Report (2017)].

the safety of any other person and the community."[17] Courts have emphasized that the "least restrictive" language "requires the judge to consider the possibility of less restrictive alternatives to detention."[18]

The statute includes a list of thirteen possible conditions of release that courts may impose in appropriate cases; it also empowers courts to impose "any other condition that is reasonably necessary" to assure appearance and protect the community.[19] Note that any optional release conditions must be relevant to the purpose of assuring appearance or public safety.[20] Various conditions that district courts have imposed under the catchall provision of the statute (for both pretrial and post-conviction release) include drug testing, house arrest,[21] submission to warrantless searches,[22] telephone monitoring, residence in a halfway

17. *Id.* § 3142(c)(1)(B). *See also* Department of Justice, *Justice Manual*, 26. Release and Detention Pending Judicial Proceedings 3 (updated January 16, 2020) [hereinafter DOJ Manual] ("the judicial officer *must impose the least restrictive condition or combination of conditions* necessary to 'reasonably assure' the defendant's appearance as required and to 'reasonably assure' the safety of any person and the community") (emphasis in original).

18. United States v. Infelise, 934 F.2d 103, 105 (7th Cir. 1991). *See also Holloway*, 781 F.2d at 125 (statute's "broad range of pre-trial release options . . . are to be considered sequentially, in order of severity, and the judicial officer is directed to select the option which is the least restrictive of the defendant but which will adequately assure his appearance for further judicial proceedings and will also protect the safety of the community"); United States v. Price, 773 F.2d 1526, 1528 (11th Cir. 1985) (per curiam) ("The policy of [the Act] is to permit release under the least restrictive condition compatible with assuring the future appearance of the defendant.").

19. *Id.* § 3142(c)(1)(B)(xiv).

20. *See, e.g.*, United States v. Goosens, 84 F.3d 697, 703 (4th Cir. 1996) (error to impose condition prohibiting cooperation with law enforcement officers without finding that such condition was "truly necessary to assure a defendant's appearance or to protect the public safety"); United States v. Brown, 870 F.2d 1354, 1358 n.5 (7th Cir. 1989) (error to require defendant either to accept court-appointed counsel or to remain in forum district "in order to ensure a fair and orderly trial. Although laudable in spirit, such concerns do not have . . . roots in the Bail Reform Act."); United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (condition that bail bond be retained by the clerk to pay any fine imposed on defendant was irrelevant to purpose of assuring appearance and thus violated Eighth Amendment prohibition on excessive bail).

21. United States v. Traitz, 807 F.2d 322, 325 (3d Cir. 1986). *Accord* United States v. Edwards, 960 F.2d 278, 283 (2d Cir. 1992). *See also* Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Federal Probation 13, 17 (Sept. 2018) ("Home detention, usually enforced through electronic and GPS monitoring devices, is common in higher risk cases.").

22. United States v. Kills Enemy, 3 F.3d 1201, 1203 (8th Cir. 1993) (search of defendant awaiting sentencing valid pursuant to warrantless search condition). *But see* United States v. Scott, 450 F.3d 863, 871–75 (9th Cir. 2006) (even though pretrial releasee had agreed to it, condition requiring submission to warrantless searches of his home and random drug testing was invalid without finding of probable cause or an individualized determination that it was necessary for public safety or to reasonably assure defendant's appearance).

house, electronic bracelet monitoring,[23] freezing of a defendant's assets,[24] limiting access to or monitoring a defendant's use of the Internet and computers,[25] and submission to random, unannounced visits by pretrial services officers.

While conditions of release and alternatives to detention cannot guarantee public safety or a defendant's future appearance in court, "when used individually and in combination to address identified risks, both have been shown to enhance the likelihood of appearance and community safety. The cost to implement these programs and supervise defendants is substantially lower than the cost of pretrial detention."[26] In fact, the average cost of supervision has been shown to be approximately one-eighth or less of the cost of pretrial detention.[27]

Several courts have stated that conditions of release vary with the circumstances of each case and should be based on an individual evaluation of the

23. *See* Kevin T. Wolff, Christine A. Dozier, Jonathan P. Muller, Margaret Mowry, and Barbara Hutchinson, *The Impact of Location Monitoring Among U.S. Pretrial Defendants in the District of New Jersey*, 81 Federal Probation 8, 13 (Dec. 2017) (describing and analyzing effectiveness of electronic monitoring programs in the district).

24. United States v. Welsand, 993 F.2d 1366, 1367 (8th Cir. 1993) (per curiam) (post-trial, pre-sentencing).

25. *Sabhnani*, 493 F.3d at 74 (monitoring "any computer activity" by defendants or their children). *Cf.* United States v. Legg, 713 F.3d 1129, 1132–34 (D.C. Cir. 2013) (supervised release condition restricting computer use affirmed where it was "reasonably related" to nature and circumstances of offense); United States v. Johnson, 446 F.3d 272, 281–83 (2d Cir. 2006) (same, and emphasizing that conditions "must impose no greater restraint on liberty than is reasonably necessary"). *See also* United States v. Albertson, 645 F.3d 191, 200 (3d Cir. 2011) (reversing as overbroad twenty-year limitation on internet use: "in a time where the daily necessities of life and work demand not only internet access but internet fluency, sentencing courts need to select the least restrictive alternative for achieving their sentencing purposes"). Though the imposition of restrictions on computer use and access to computers in supervised release and probation contexts may involve different considerations than in the pretrial release context, such cases may be helpful to judges considering these kinds of conditions in appropriate pretrial situations.

26. *Guide to Judiciary Policy*, Vol. 8B, "Alternatives to Detention and Conditions of Release" (Monograph 110) at § 150 ("by imposing conditions of release and alternatives to detention, judicial officers are able to promote the responsible use of public funding to protect the rights of defendants and to reasonably assure the appearance of the defendant and the safety of the community as required").

27. *See* Memorandum, "Costs of Community Supervision, Detention, and Imprisonment," Administrative Office of the United States Courts, August 27, 2021 (daily cost of supervision is $12 compared to $98 for pretrial detention); CLC Report (2017), *supra* note 16, Agenda E-7 at 11 (noting that the $10 per day cost of pretrial supervision is "substantially lower than the cost of pretrial detention" at $76 per day); Wolfe, et al, *supra* note 23, at 9 (location monitoring costs an average of $11 per day compared to $87 for pretrial detention); Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Federal Probation 52, 53 (Sept. 2017) (citing 2013 study showing an average cost of $73 per day for pretrial detention versus $7 for pretrial supervision).

defendant; the treatment of other defendants is generally not relevant.[28] Additionally, the court must be aware of the spectrum of conditions actually available in the district at the time of release—for example, substance abuse programs, mental health treatment, or halfway houses—and tailor those conditions to the unique risk posed by the person before the court.

Such an individualized assessment is essential to meeting the statute's requirement of imposing the "least restrictive" conditions of release and avoiding what one treatise terms "over-conditioning," the imposition of conditions of release that are stricter or more numerous than what is needed to "reasonably assure" public safety or a defendant's appearance.[29] This point was specifically referenced when the Act was passed:

> It must be emphasized that all conditions are not appropriate to every defendant and that the [Judiciary] Committee does not intend that any of these conditions be imposed on all defendants, except for the mandatory condition set out in subsection (c)(1). The Committee intends that the judicial officer weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant

28. *See* United States v. Munchel, 991 F.3d 1273, 1283 (D.C. Cir. 2021) (citing *Tortora*, *infra*, stating that "whether a defendant poses a particular threat depends on the nature of the threat identified and the resources and capabilities of the defendant"); *Stone*, 608 F.3d at 946 (with multiple defendants, "each defendant is entitled to an individualized determination of bail eligibility"); United States v. Hir, 517 F.3d 1081, 1091 n.8 (9th Cir. 2008) ("each case requires a fact-specific inquiry into the potential danger posed by the individual defendant"); United States v. Patriarca, 948 F.2d 789, 794 (1st Cir. 1991) (rejecting government's argument that because a defendant is a member of the same organized crime family as another detainee he should be "painted with the same brush and merit[s] the same treatment"); United States v. Tortora, 922 F.2d 880, 888 (1st Cir. 1990) (rejecting defendant's contention that he should be treated the same as his confederates: "Detention determinations must be made individually and . . . must be based on the evidence which is before the court regarding the particular defendant."); United States v. Spilotro, 786 F.2d 808, 816 (8th Cir. 1986) (applying same condition of release to all defendants in district was abuse of discretion).

29. Weinberg and Furse, *supra* note 8, at 29–30 ("Many courts have a 'standard set' of conditions which are part of every defendant's appearance bond. It seems likely these include some conditions which are not necessary for specific defendants."). *See also* Sara J. Valdez Hoffer, *Federal Pretrial Release and the Detention Reduction Outreach Program (DROP)*, 82 Federal Probation 46, 48 (Sept. 2018) ("it appears that [pretrial services] officers are often recommending a 'standard' set of conditions, usually based on their experience in court and their knowledge of what they believe the judge will most likely impose . . . [instead of] conducting an individual assessment of each case"); Timothy P. Cadigan and Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 Federal Probation 46, 47 (Sept. 2011) (unless additional conditions can "be demonstrated to increase the likelihood that the defendant will appear in court as required and/or reduce new offenses committed . . . , then the significant investment of pretrial release agencies and courts in these conditions and their enforcement is ineffective and unwise").

> before him and to the offense charged, and with specific reference to the factors set forth in subsection (g).[30]

Imposing excessive conditions can also be counterproductive, as recent research has indicated that "[e]ven when defendants are released rather than detained, unnecessary conditions of release can be harmful. This is particularly true of defendants who present with a low level of risk for pretrial supervision failure."[31] For example, one study of federal defendants "found that requiring location monitoring as a condition of release for low-risk defendants resulted in a 112 percent increase in the likelihood of pretrial supervision failure relative to low-risk defendants without this condition."[32]

2. Mandatory Conditions

As previously noted, all defendants on pretrial release are subject to a mandatory condition "that the person not commit a Federal, State, or local crime during the period of release" and, when authorized, required to submit a DNA sample. Since a 2006 amendment to § 3142(c)(1)(B), defendants accused of certain sexual

30. Senate Report, *supra* note 8, at 13–14 (1983). *See also* United States v. Diaz-Hernandez, 943 F.3d 1196, 1199 (9th Cir. 2019) ("the Bail Reform Act mandates an individualized evaluation guided by the factors articulated in § 3142(g)"); United States v. Hurtado, 779 F.2d 1467, 1472 (11th Cir. 1985) ("the criteria set forth at 18 U.S.C.A. § 3142(g)(3) and (4) pose factual questions pertaining to individual characteristics of the defendant and the threat posed by his release").

31. Patrick J. Kennealy, *Are Pretrial Services Officers Reliable in Rating Pretrial Risk Assessment Tools?*, 82 Federal Probation 35, 35 (Sept. 2018) (internal citations omitted). *See also Guide to Judiciary Policy*, Vol. 8C, Ch. 3, "Probation and Pretrial Services" at § 340(b)(1) ("Lower-risk defendants released with alternatives to detention conditions were more likely to experience pretrial failure (failure to appear, new criminal activity, or technical violations resulting in revocation) when compared to defendants released without these conditions."); Christopher T. Lowenkamp, Richard Lemke, and Edward Latessa, *The Development and Validation of a Pretrial Screening Tool*, 72 Federal Probation 2, 3 (Dec. 2008) ("providing intensive services and supervision to low-risk offenders does little to change their likelihood of recidivism and, worse, occasionally increases it").

32. Kennealy, *supra* note 31, at 35. *See also* Austin, *supra* note 27, at 58 ("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"). *See also* Wolfe, et al, *supra* note 23, at 13 ("appropriate use of [location monitoring] should account for the risk posed by the defendant . . . [to] avoid the risk of under-supervising high-risk participants and over-supervising low-risk defendants while accomplishing the goals of supervision").

offenses "that involve[] a minor victim" are subject to, "at a minimum, a condition of electronic monitoring" plus five other normally optional conditions.[33]

Although several district courts have declared these additional mandatory conditions to be unconstitutional, the only two appellate courts to decide the issue have upheld them against constitutional challenge. In rejecting a facial challenge, the Eighth Circuit stressed that defendants are still "entitled to a detention hearing and a large number of individualized determinations—including an individualized determination as to the extent of any mandatory conditions of release."[34]

The Ninth Circuit agreed with the Eighth in denying a facial challenge, and also rejected an as-applied challenge. The court construed the statute to "require the district court to exercise its discretion, to the extent practicable, in applying the mandatory release conditions . . . to each individual's circumstances," and the defendant did receive such an individualized determination.[35]

3. Financial Conditions

If the court determines that release on personal recognizance or an unsecured appearance bond will not reasonably assure the defendant's appearance or will endanger the safety of others, the defendant may be required to "execute a bail bond with solvent sureties."[36] Section 3142(c)(2), however, precludes a judicial officer from "impos[ing] a financial condition that results in the pretrial detention of the person." Thus, "bail is not to be set at a level that the defendant cannot make, so as to result in detention. If the judicial officer determines that some amount of money will assure the appearance of the defendant, then he must select an amount that is attainable."[37]

This provision does not, however, require bail to be set at a figure that the defendant can readily post: "a court must be able to induce a defendant to go to great lengths to raise the funds without violating the condition in § 3142(c)."[38]

33. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248; 18 U.S.C. § 3142. The other mandatory conditions are restrictions on personal associations, place of abode, and travel; avoiding contact with any alleged victim or witness; regular reporting to a designated law enforcement agency, pretrial services agency, or other agency; a specified curfew; and, prohibiting the possession of any dangerous weapon. *See* 18 U.S.C. § 3142(c)(1)(B)(iv)–(viii).

34. United States v. Stephens, 594 F.3d 1033, 1039 (8th Cir. 2010).

35. United States v. Peeples, 630 F.3d 1136, 1139 (9th Cir. 2010) (per curiam).

36. 18 U.S.C. § 3142(c)(1)(B)(xii).

37. *Holloway*, 781 F.2d at 127.

38. United States v. Szott, 768 F.2d 159, 160 (7th Cir. 1985) (per curiam) ($1 million bail upheld).

Even if the defendant cannot afford the bail amount, the condition might not run afoul of the statute.[39] Courts have held that section 3142(c)(2) prevents only the "'sub rosa use of money bond' to detain defendants whom the court considers dangerous."[40] Thus, although a court cannot intentionally detain the defendant by setting bail at an unaffordable level, it may set bail at whatever level it finds reasonably necessary to secure appearance; if the defendant cannot afford that amount, the defendant is detained not because they "cannot raise the money, but because without the money, the risk of flight is too great."[41] However, courts of appeals have held that if the defendant informs the trial court that they cannot make bail, "the court must explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release."[42]

Note that, although 28 U.S.C. § 2044 authorizes the court to require that a bond be held and applied toward payment of a criminal financial penalty, it is improper to impose as a condition of release that the property securing the bond be unencumbered if the purpose is protecting the government's property interest rather than ensuring the defendant's appearance.[43]

39. United States v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); United States v. McConnell, 842 F.2d 105, 108–10 (5th Cir. 1988) (en banc); United States v. Wong-Alvarez, 779 F.2d 583, 584 (11th Cir. 1985) (per curiam).

40. *Mantecon-Zayas*, 949 F.2d at 551 (quoting S. Rep. No. 98-225, at 16 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3199). *Accord* United States v. Fidler, 419 F.3d 1026, 1028 (9th Cir. 2005) ("provision was intended to prevent the practice of 'de facto preventative detention' . . . by granting bail but setting an exorbitant financial condition that the defendant could not meet"); *Holloway*, 781 F.2d at 125 ("The statute favors release over detention for the majority of accused persons, and also specifically forbids the use of prohibitively high money bail as a pretext for detention.").

41. United States v. Jessup, 757 F.2d 378, 388–89 (1st Cir. 1985) (also finding that "no other set of conditions is sufficient" to reasonably assure defendant's appearance). *Accord Fidler*, 419 F.3d at 1028 (higher bond than defendant can afford is proper if court determines that "the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community").

42. *McConnell*, 842 F.2d at 110. *Accord Mantecon-Zayas*, 949 F.2d at 550–51 (adding that court "must satisfy the procedural requirements for a valid *detention* order; in particular, the requirement in 18 U.S.C. § 3142(i) that the court 'include written findings of fact and a written statement of the reasons for the detention'"); *Wong-Alvarez*, 779 F.2d at 585 (must state reasons in writing). *Cf. Szott*, 768 F.2d at 160 (defendant's bare assertion that he could not post $1 million bail did not rebut government's assertion that the defendant may be able to raise the money).

43. United States v. Frazier, 772 F.2d 1451, 1452–53 (9th Cir. 1985) (per curiam). *See also* Fed. R. Crim. P. 46(e)(2) (court may require that a surety bond affidavit "describe . . . any encumbrance" on property used as security); 18 U.S.C. § 3142(c)(1)(B)(xi) (same, for property that defendant agrees to forfeit upon failure to appear as required).

If the defendant does post bail, but there are grounds to suspect that the source of funds offered is illegitimate, the court may, "in [its] sound discretion," hold a hearing to inquire into the matter.[44]

C. Written Findings Required

Federal Rule of Appellate Procedure 9(a)(1) requires that a court "must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case." In several circuits, a failure to comply with this requirement in contested cases results in a remand.[45] Some courts have, in the context of an order of detention, permitted transcribed oral findings and reasons to satisfy the similar requirements of 18 U.S.C. § 3142(i) for "written findings of fact and a written statement of the reasons for the detention."[46] Courts may use Form AO 472, "Order of Detention Pending Trial," which includes sections for findings of fact and statement of reasons for detention. Section 3142(h)(1) specifies that a release order must include "a written statement" that sets forth the conditions of release "in a manner sufficiently clear and specific to serve as a guide for the person's conduct."

The statement of reasons should also be specific enough to allow for meaningful appellate review. For example, where a district court stated that the listed conditions of release "will reasonably assure the safety of the community," the First Circuit remanded because this "conclusory language accomplished very little in the way of finding subsidiary facts or furnishing needed enlightenment to an appellate tribunal. The judge gave no explanation of why he believed the proposed conditions would prove adequate."[47]

44. *See, e.g.*, United States v. O'Brien, 895 F.2d 810, 817–18 (1st Cir. 1990) (district court erred in finding that "it was precluded from conducting a hearing once the set condition had been met"); United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1966) (seminal case suggesting court has discretion to hold such a hearing).

45. United States v. Blasini-Lluberas, 144 F.3d 881, 881 (1st Cir. 1998) (per curiam); United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997) (per curiam); United States v. Cantu, 935 F.2d 950, 951 (8th Cir. 1991) (per curiam); United States v. Wheeler, 795 F.2d 839, 841 (9th Cir. 1986); *Hurtado*, 779 F.2d at 1480.

46. United States v. English, 629 F.3d 311, 321 (2d Cir. 2011); United States v. Peralta, 849 F.2d 625, 626 (D.C. Cir. 1988).

47. *Tortora*, 922 F.2d at 883. *See also* United States v. Cook, 880 F.2d 1158, 1162 (10th Cir. 1989) (per curiam) (court should "furnish a brief statement of reasons for granting release or for denying a motion to revoke release" to facilitate appellate review); *Coleman*, 777 F.2d at 892 (although district court gave reasons why defendant was "not likely to flee to avoid trial, it fail[ed] to set forth any reasons supporting its conclusion that Coleman will not present a danger to the community").

D. Advising Defendant of Penalty

At the time of the defendant's release, the judicial officer must also advise the person of the possible penalties and consequences of violating a term of release, "including the penalties for committing an offense while on pretrial release."[48] The circuits disagree on whether a defendant must have been so informed before a penalty under 18 U.S.C. § 3147 may be imposed. Some circuits hold that a defendant must be specifically warned that a violation may result in arrest and additional imprisonment under § 3147 if the violation is an offense and the defendant is convicted.[49] Other circuits have held that failure to provide an explicit warning at the time of release does not bar the enhanced penalties of § 3147.[50]

A warning that does not specifically reference § 3147 has been held to be sufficient if it adequately puts a defendant on notice that an enhanced penalty could result.[51] Note that one of the standard forms a defendant is to read and sign

48. 18 U.S.C. § 3142(h)(2). AO Form 199C warns that violating a condition of release "may result in the immediate issuance of a warrant for your arrest, a revocation of your release, an order of detention, a forfeiture of any bond, and a prosecution for contempt of court and could result in imprisonment, a fine, or both."

49. *See* United States v. Onick, 889 F.2d 1425, 1433–34 (5th Cir. 1989) ("the releasing judge *must* comply with Section 3142(h)(2)(A) before the sentencing judge may apply Section 3147"); United States v. DiCaro, 852 F.2d 259, 264–65 (7th Cir. 1988) (same); United States v. Cooper, 827 F.2d 991, 994–95 (4th Cir. 1987) (same).

50. *See, e.g.*, United States v. Kentz, 251 F.3d 835, 840–41 (9th Cir. 2001) (agreeing with *Lewis* and *DiPasquale*, *infra*); United States v. Bozza, 132 F.3d 659, 661 (11th Cir. 1998) (notice provided in release bond for prior offense plus notice before sentencing sufficient); United States v. Browning, 61 F.3d 752, 756 (10th Cir. 1995) (notice in presentence report was adequate); United States v. Lewis, 991 F.2d 322, 324 (6th Cir. 1993) ("Section 3147 clearly and unambiguously mandates that the courts impose additional consecutive sentences on persons convicted of crimes they commit while released on bond."); United States v. DiPasquale, 864 F.2d 271, 281 (3d Cir. 1988) (same).

51. *See, e.g.*, United States v. Vasquez, 113 F.3d 383, 389 (2d Cir. 1997) (written warning signed by defendant that he "could be" subject to mandatory consecutive sentence adequate); United States v. Sturman, 49 F.3d 1275, 1283 (7th Cir. 1995) (notice that "felony conviction . . . could result" in sentence increase of two to ten years adequate); United States v. Kincaid, 964 F.2d 325, 329 (4th Cir. 1992) (oral warning that "there are minimum mandatory as well as increased maximum penalties that may apply" to any crime committed on release was adequate); United States v. Smitherman, 889 F.2d 189, 192 (8th Cir. 1989) (need not specifically mention section 3147 if defendant is otherwise provided notice of its provisions).

upon release warns that committing an offense while on release could result in additional imprisonment, but it does not specifically mention § 3147.[52]

E. Pretrial Services and Risk Assessment

1. Pretrial Services

The Pretrial Services Act of 1982 provided for the establishment of pretrial services in every judicial district.[53] Pretrial services officers provide information to judges about the defendant, including "information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release." 18 U.S.C. § 3154(1). Officers also provide information about possible alternatives to detention, such as residence in a halfway house or release to a third party custodian.[54]

The last decade has brought significant developments in the evaluation of defendants by pretrial service officers, the steps being taken to try to avoid unnecessary detention—especially for low-risk defendants—and research into the effects of pretrial detention. As awareness of these developments may help inform judges' decision-making, a brief overview is provided below.

2. Pretrial Risk Assessment

The Pretrial Risk Assessment tool (PTRA) is "an objective, actuarial instrument that provides a consistent and valid method of predicting risk of failure-to-appear, new criminal arrest, and technical violations that lead to revocation while on pretrial release."[55] Developed by the Probation and Pretrial Services Office in

52. *See* Form AO 199C ("While on release, if you commit a federal felony offense the punishment is an additional prison term of not more than ten years and for a federal misdemeanor offense the punishment is an additional prison term of not more than one year. This sentence will be consecutive (*i.e.*, in addition to) to any other sentence you receive."). *See also* Benchbook for U.S. District Judges 12 (Federal Judicial Center, 6th ed. 2013) (advising judges to explain to defendants prior to release "that committing a crime while on release may lead to more severe punishment than he or she would receive for committing the same crime at any other time").

53. 18 U.S.C. § 3152 (except for the District of Columbia, which has its own system).

54. For a comprehensive overview of the functions of pretrial services officers, see the *Guide to Judicial Policy*, Vol. 8, Part A: Pretrial Services Investigation and Report (Monograph 112).

55. Timothy P. Cadigan and Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 Federal Probation 46, 51 (September 2011).

the Administrative Office of the United States Courts, the PTRA was first introduced as a pilot program in 2009 and gradually adopted in all districts (except the District of Columbia). As of 2018, almost 90 percent of non-immigration offense defendants in federal district courts are assessed under the PTRA.[56]

Research has indicated that the PTRA is both accurate and unbiased. A study of 85,369 pretrial releasees that had been evaluated by the PTRA between 2009 and 2015 showed that "the PTRA effectively predicts pretrial violations irrespective of whether the outcome of interest involves revocation from pretrial release, rearrest for any felony or misdemeanor offenses, or a combination of these outcomes."[57] The results of the study indicate "that the PTRA can be used to empirically assess the odds of pretrial failure and . . . supports the position that judicial officials and pretrial services officers should weigh these odds against the decision to incarcerate persons charged with but not convicted of a crime."[58]

Significantly, the study also indicated "that the PTRA can predict violations irrespective of defendant's race, ethnicity, and sex," supporting a growing body of research indicating "that risk instruments like the PTRA can be used to assess recidivism risk and inform criminal justice decisions without exacerbating biases in the criminal justice system."[59] Note, however, that the PTRA is only one part of the assessment, and "should always be used in combination with a thorough pretrial investigation and the officer's professional judgment."[60]

In 2019 the Judicial Conference of the United States encouraged the use of the PTRA by revising the *Pretrial Services Investigation and Report* monograph in the *Guide to Judiciary Policy*. The revision, "consistent with the judiciary's efforts to reduce unnecessary pretrial detention, add[s] guidance recommending that the Federal Pretrial Risk Assessment be completed prior to completion of the pretrial services report."[61]

56. Thomas H. Cohen and Amaryllis Austin, *Examining Federal Pretrial Release Trends Over the Last Decade*, 82 Federal Probation 3, 5 (September 2018).

57. Thomas H. Cohen, Christopher T. Lowenkamp, and William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, 82 Federal Probation 23, 26 (September 2018) (the percentage of defendants with any violation, revocation, or rearrest increased incrementally "by PTRA risk category: 5 percent (PTRA ones), 11 percent (PTRA twos), 20 percent (PTRA threes), 29 percent (PTRA fours), and 36 percent (PTRA fives)").

58. *Id.* at 29.

59. *Id.* at 28. *See also* James L. Johnson and Laura M. Baber, *State of the System: Federal Probation and Pretrial Services*, 79 Federal Probation, 34, 34 (Sept. 2015) ("Coupled with officers' professional judgment, the PTRA provides officers with statistically valid and unbiased information to help the officer make a sounder recommendation to the court.").

60. Sara J. Valdez Hoffer, *Federal Pretrial Release and the Detention Reduction Outreach Program (DROP)*, 82 Federal Probation 46, 48 (September 2018).

61. Report of the Proceedings of the Judicial Conference of the United States, September 2019, at 12.

While judges themselves do not use the PTRA, and may not see the actual assessment, it is important to know that it will be reflected in the pretrial service officer's recommendation for release or detention and is designed to provide a more accurate assessment to use in making the release or detention decision. To further judges' understanding of the PTRA and how it is used, the Probation and Pretrial Services Office of the AO developed the Detention Reduction Outreach Program (DROP). While the main purpose of DROP is to reduce unnecessary pretrial detention (discussed below), it also provides judges, defense attorneys, and prosecutors with "education regarding better use of the . . . PTRA" and includes discussion about the development of the PTRA and its role in reducing unnecessary pretrial detention.[62] The Federal Judicial Center has also offered a program that discusses the PTRA as well as other aspects of the decision to release or detain a defendant.[63]

3. Avoiding Unnecessary Detention

In general, "statistics show that pretrial services supervision provides a safe and cost-effective alternative to pretrial detention"—for the one-year period ending March 31, 2016, "less than one percent of the defendants released to supervision were revoked due to a felony re-arrest and fewer than one percent failed to appear in court as directed. Even technical violations . . . were low at 12 percent."[64] Yet there has been a steady decline in release rates that has prompted concern that some defendants are being detained unnecessarily. At the beginning of fiscal

62. Valdez Hoffer, *supra* note 60, at 46. *See also* CLC Report (2017), Appendix at 1 ("DROP is an evidenced-based program developed by the AO to reduce unnecessary pretrial detention through collaboration with stakeholders and better use of the Pretrial Risk Assessment (PTRA).").

63. *See Pretrial Decision Making for Magistrate Judges and Pretrial Services Officers* (a seminar designed by judges, pretrial services officers, and the FJC that focuses on the requirements of the Bail Reform Act, use of the PTRA, and the role of probation and pretrial services officers in making an individualized assessment of a defendant and providing a recommendation to the court), *available at* https://fjc.dcn/content/309624/pretrial-decision-making-magistrate-judges.

64. CLC Report (2017), *supra* note 16, at 11. *See also* William E. Hicks, Jr., Sara J. Valdez Hoffer, and Thomas H. Cohen, *Pretrial Work in a COVID-19 Environment*, 85 Federal Probation 24, 29–30 (June 2021) ("for the 12-month period ending in March of 2021, national failure rates remained low as follows: failure to appear (1.7 percent), new criminal arrests (2.3 percent), and technical violations (4.1 percent)," and the increase in pretrial release rates during the COVID-19 pandemic came "without adverse effects on pretrial supervision outcomes"); George E. Brown and Suzanne M. Strong, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018*, U.S. Department of Justice Special Report 9 (March 2022) (out of 241,164 defendants who were released pretrial in fiscal years 2011–2018, "[f]ailing to appear in court (1%) and being rearrested for a new offense (2%) were the least common release violations").

year 2007, 60.6 percent of all defendants were detained, but by March 2016 that number had risen to 72.5 percent.[65]

While those numbers are inflated because of immigration cases, which tend to result in high rates of detention,[66] a study that excluded those cases and covered 531,809 defendants during fiscal years 2008 to 2017, showed that pretrial release rates declined from 55 percent to 47 percent (or from 54 to 50 percent when adjusted for criminal history and charged offense severity).[67] By 2019, the release rate for non-immigration offenses had fallen to 39 percent before rising to 42.1 percent in 2020 and 43.7 per cent in 2021,[68] possibly due to worries about crowded detention facilities during the COVID-19 pandemic.

There is a concern that low-risk defendants may be detained more often than is necessary to "reasonably assure" their appearance and public safety. The same study of non-immigration defendants from 2008 to 2017 showed that "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."[69] For example, the rate of release for defendants who had no history of felony arrest declined from 77 percent to 64 percent, and those with no prior felony convictions from 72 percent to 62 percent, but release rates for defendants with more severe criminal histories declined to a significantly lesser degree.[70]

An additional concern is that pretrial detention may have other significant consequences. Even short periods of detention can increase the likelihood of

65. CLC Report (2017), *supra* note 16, at 10. *See also* Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Federal Probation 13, 15 (Sept. 2018) ("pretrial detention rates are at record high levels and on an upward trend for all demographic groups").

66. For the period 2012 to 2017, the release rate for "illegal aliens" was less than two percent. *See* Cohen and Austin, *supra* note 56, at 6, Table 1. For 2018 to 2021, the release rate remained under two percent. *See* Admin. Office of the U.S. Courts, *Judicial Business: Federal Pretrial Services Tables*, Tables H-14 & H-14A, U.S. District Courts—Pretrial Services Release and Detention [hereinafter Judicial Business] (percentages calculated from figures given in the two tables for total cases and total "excluding immigration cases").

67. Cohen and Austin, *supra* note 56, at 6. *See also* Austin, *supra* note 27, at 53 (another study, covering cases from 2006 to 2016 (excluding immigration cases), showed that the pretrial detention rate increased from 53 percent to 59 percent).

68. *See* Judicial Business, *supra* note 66, at Table H-14A. *See also id.* at Table H-14B (release rates "excluding illegal alien cases" fell from 52 percent in 2012 to 46 percent in 2019, increasing to 48.2 percent in 2020 and 48.4 percent in 2021).

69. Cohen and Austin, *supra* note 56, at 10.

70. *Id.* at 8 & 10 at Table 3 ("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.").

recidivism. A 2013 study found that "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," those held for 8 to 14 days "were 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."[71] It should also be noted that, by 2016, "the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention."[72]

The decision to release or detain a defendant can also have significant effects on sentencing. Recent research indicates that "pretrial detention is itself associated with increased likelihood of a prison sentence and with increased sentence length. . . . Similarly, being released on pretrial services supervision was associated with a decrease in the likelihood of being sentenced to prison, and a decrease in sentence length."[73] A study of over 100,000 defendants sentenced in 71 of the 93 federal district courts from 2002 to 2014 concluded that pretrial detention "hamper[s] a defendant's ability to provide mitigating information at sentencing and [makes] it harder for a defendant to assist the government. [Such actions are] particularly important in federal cases, in which defendants often

71. Austin, *supra* note 27, at 54. *See also* Lowenkamp, Lemke, and Latessa, *supra* note 30, at 10 ("assigning intense supervision or preventative detention to low-risk defendants either removes the[m] from pro-social aspects of their life or exposes them to risk factors that were previously nonexistent . . . . Either way, these actions put the defendant at greater risk of recidivism or negative supervision outcomes.").

72. Austin, *supra* note 27, at 53. *See also* Alexander M. Holsinger and Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82 Federal Probation 39, 43 (2018) ("the longer someone spends in jail pretrial, the more likely the person is to experience disruption in employment, financial and residential stability, and negative impacts on dependents under age 18"); Judicial Business, *supra* note 66, Table H-9A (the average period was 253 days in 2019, but rose during the Covid-19 pandemic to 293 days in 2020 and 346 in 2021). *See also* notes 251–52, *infra*, and accompanying text.

73. James C. Oleson, Christopher T. Lowenkamp, John Wooldredge, Marie VanNostrand, and Timothy P. Cadigan, *The Sentencing Consequences of Federal Pretrial Supervision*, 63 Crime & Delinquency, 313, 325 (March 2017) (study of 90,037 federal defendants during FY 2011). *See also* Nancy Gertner, Judith Edersheim, Robert Kinscherff, and Cassandra Snyder, *Supporting Responsive Federal Drug Sentencing Through Education in the Workshop on Science-Informed Decision Making*, 34 Federal Sentencing Reporter 12, 19 (2021) (a defendant's behavior during pretrial release can "make or break a sentencing judge's assessment of the individual's prospects at sentencing"); Stephanie Holmes Didwania, *The Immediate Consequences of Pretrial Detention: Evidence from Federal Criminal Cases*, 22 Am. L. & Econ. Rev. 24, 47 (Spring 2020) ("pretrial release helps defendants at sentencing: significantly reducing sentence length and increasing the chance that a defendant will receive a below-Guidelines sentence and that they will avoid a mandatory minimum sentence").

face weighty sentences and judges routinely sentence defendants below the recommended sentencing range."[74] As one experienced district judge put it:

> Whether sentencing occurs within six months or twenty-four months after a case begins, federal defendants, if not detained, have the opportunity to stand on the best, most upright footing of all when before the judge for sentencing. Most simply put, any defendant, regardless of charged crime, criminal history, or guideline range, who can show a court, often for the first time in his or her life, that he or she can be law-abiding offers the court the best of all possible records and reasons to consider leniency. . . . Where not truly needed to ensure appearance and protect the community, pretrial detention withholds this opportunity and its benefits.[75]

In sum, "federal pretrial services officers and judges should be aware of the many links between pretrial detention, release, conviction, incarceration, sentence length, and success or failure on supervised release. . . . [Using] a federal pretrial risk assessment instrument . . . should provide . . . the necessary tools to make more informed release decisions."[76]

74. Didwania, *supra* note 73, at 26 (pretrial release offers "the opportunity to undertake mitigating activities such as maintaining a job and supporting dependents . . . . [I]n a recent survey, the defendant's post-offense rehabilitative effort was one of the factors about which federal judges reported caring the most in sentencing."). *See also* Joseph A. DaGrossa and Jonathan P. Muller, *Pretrial Detention and the Sentencing Variance: An Analysis of Fixed Effects Across U.S. District Courts*, 85 Federal Probation 27, 31 (December 2021) (examining data from 43,392 federal cases in 2019, concluding that "defendants detained pretrial are 49 percent less likely to receive a downward variance at sentencing than those released. Among . . . defendants who do receive downward variances, variances are 26 percent smaller for those defendants who are detained pending sentencing.").

75. James G. Carr, *Why Pretrial Release Really Matters*, 29 Federal Sentencing Reporter, 217, 218 (April 2017) ("*decision to release or detain is the most important and consequential decision in any federal criminal case except the decision at sentencing—which the release/detention decision directly affects*") (emphasis in original). *See also* Christine S. Scott-Hayward and Connie Ireland, *Reducing the Federal Prison Population: The Role of Pretrial Community Supervision*, 34 Federal Sentencing Reporter 327, 331 (June 2022) (from a survey of 241 cases in the Central District of California between January 1 and March 31, 2020, finding that "pretrial performance is an essential mitigation—arguably as important as, if not more important than, other mitigating factors considered by the court. In particular, judges seemed to respond positively to evidence that defendants have demonstrated rehabilitation while on pretrial supervision.").

76. Oleson, et al, *supra* note 73, at 327. *See also* Criminal Operations Advisory Council Meeting Summary at 8 (October 20–21, 2021) ("Reduction of unnecessary detention could bring about many benefits, including compliance of the law, cost-savings, increased ability for defense counsel to communicate with their clients and preparation of the case, and serve as a potential indicator of success while on pretrial release if eventually convicted."), *available at* https://jnet.ao.dcn/sites/default/files/pdf/Fall_2021_COAC_Meeting_Summary.pdf.

II. Pretrial Detention

> [T]here is a 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. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.[77]

A. Statutory Grounds

A pretrial detention hearing may *only* be held if there is sufficient information to show that section 3142(f)(1) or (f)(2) applies to the defendant. Whenever the government seeks pretrial detention, the court should verify that the case involves at least one of the specific circumstances listed in section 3142(f).[78] If not, a detention hearing is not authorized by the statute and the court must release the defendant with appropriate conditions.

Note that subsections (f)(1) and (f)(2) require different inquiries. The inquiry under (f)(1) can be considered categorical: If a defendant's offense or criminal history falls within the specific offenses or categories of offenses listed in the statute, a detention hearing is authorized. The inquiry under (f)(2), however, is not categorical but rather requires an individualized assessment of the particular defendant—whether *this* defendant is a *serious* risk to flee, or a *serious* risk to obstruct justice or cause or threaten harm to a prospective witness or juror.

Determining whether a detention hearing may be held is a significant step in the criminal process, and the court should ensure that a defendant has the opportunity to consult with an attorney. An indigent defendant is "entitled to have counsel appointed to represent the defendant *at every stage of the proceeding from initial appearance* through appeal,"[79] and "shall be represented at every stage of the proceeding *from initial appearance before the magistrate judge* or the court through appeal."[80]

77. Senate Report, *supra* note 8, at 6–7.

78. General allegations of "dangerousness" or risk of nonappearance, for example, are not factors under section 3142(f) and therefore do not provide a basis for holding a detention hearing. In one study of cases between late 2018 and early 2019, however, "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." Allison Siegler and Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, The Champion 46, 48 (July 2020) (cases were in the Northern District of Illinois).

79. Fed. R. Crim. P. 44(a) (emphasis added).

80. 18 U.S.C. § 3006A(c) (emphasis added). *See also* Rothgery v. Gillespie County, 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").

1. Section 3142(f) Factor Required for Detention Hearing

A defendant may be detained only after a detention hearing, and the Supreme Court stressed that the Bail Reform Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes,"[81] namely, the offenses and circumstances listed in section 3142(f)(1) & (2). "The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses."[82] This reflects the intent of Congress to limit the cases that may warrant detention: "Because detention may be ordered under section 3142(e) only after a detention hearing pursuant to subsection (f), the requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial."[83]

a. Specified offenses and criminal history

Section 3142(f)(1) provides that a detention hearing shall be held on the government's motion in a case involving:

> (1) a crime of violence carrying a maximum penalty of ten years or more;
>
> (2) an offense carrying a maximum penalty of life imprisonment or death;
>
> (3) a federal drug offense carrying a penalty of ten years or more;
>
> (4) any felony following convictions for two or more of the above three types of offenses, two or more comparable state or local offenses, or a combination of such offenses; or
>
> (5) any other felony that involves a minor victim, possession or use of a firearm or destructive device or other dangerous weapon, or failure to follow the federal sex offender registration statute.

An indictment is considered sufficient evidence to demonstrate that an offense is within section 3142(f)(1). Note that, "[b]ecause the requirements of subsection (e) must be met before a defendant may be detained, the fact that the defendant is charged with an offense described in subsection (f)(1) . . . is not, in itself, sufficient to support a detention order."[84]

81. United States v. Salerno, 481 U.S. 739, 747 (1987).

82. *Id.* at 750. See also cases cited at notes 85 & 87, *infra*.

83. Senate Report, *supra* note 8, at 20. *See also* United States v. Watkins, 940 F.3d 152, 158 (2d Cir. 2019) (section 3142(f)(1) "performs a gate-keeping function" by limiting circumstances that allow pretrial detention).

84. Senate Report, *supra* note 8, at 20.

b. "Serious risk" of flight or obstruction

A detention hearing may also be held if, under section 3142(f)(2), the case involves "(A) a serious risk that the person will flee; or (B) a serious risk that the person will obstruct justice or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." The court may hold a section 3142(f)(2) hearing on its own motion or on the government's motion. Note that the latter part of subsection (B) only applies when "a prospective witness or juror" is involved, not other individuals or the community.

Because subsection (f)(2) concerns a defendant's potential conduct and the risk must be "serious," an individualized assessment of the particular defendant is required. General claims that illegal immigration or wealthy fraud defendants, for example, present a risk of flight is not sufficient. Under section 3142(f)(2)(A) the government must present evidence that *this* defendant presents a *serious* risk to flee, to obstruct justice, or to "threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror."

c. "Dangerousness" does not authorize a detention hearing

Although some courts have detained defendants in circumstances other than those listed in section 3142(f), the circuits that have addressed the question directly held that defendants may not be detained "unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists."[85] "Danger to the community" or a general allegation of dangerousness, for example, which is a factor to be considered *during* a detention hearing,[86] is *not* a factor

85. United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) (evidence of defendant's plans to kill someone did not justify detention when charged offenses involved white-collar crimes not covered by section 3142(f)(1); but case remanded to see if the person whom defendant allegedly intended to harm was a "prospective witness" under section 3142(f)(2)(B)). *Accord* United States v. Twine, 344 F.3d 987, 987 (9th Cir. 2003) (per curiam) (cannot order detention "based solely on a finding of dangerousness" unless at least one condition listed in § 3142(f)(1) & (2) is present); United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) ("Absent one of the[] circumstances [listed in § 3142(f)], detention is not an option."); United States v. Byrd, 969 F.2d 106, 110 (5th Cir. 1992) (detention order vacated because charged offense was not covered by section 3142(f)); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (per curiam) ("motion seeking [pretrial] detention is permitted only when the charge is for certain enumerated crimes, . . . or when there is a serious risk that the defendant will flee, or obstruct or attempt to obstruct justice"); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (defendant charged with false identification could not be detained absent proof of serious risk of flight).

86. *See* 18 U.S.C. § 3142(g)(4) (court should consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release").

under section 3142(f) that authorizes a detention hearing to be held in the first place. "The question whether the defendant poses a danger to the safety of the community under subsection 3142(e) cannot be considered unless the defendant is found to be eligible for detention under subsection 3142(f). A defendant who is not eligible must be released, notwithstanding alleged dangerousness."[87]

2. Crime of Violence

A "crime of violence" under section 3142(f)(1)(A) is defined as

> (A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
>
> (C) any felony under chapter 77, 109A, 110, or 117.[88]

The Second Circuit has held that conspiracy to commit armed robbery is a crime of violence under section 3142(f).[89] That circuit has also held that a defendant charged with a RICO conspiracy can be considered to be charged with a crime of violence under this section even if he is not named in the indictment in a predicate act that constitutes a crime of violence.[90]

The determination of whether an offense meets the definition of a "crime of violence" in section 3156(a)(4) is based on an examination of the nature of the charged offense and not the specific facts and circumstances of the offense.

87. United States v. Dillard, 214 F.3d 88, 96 (2d Cir. 2000). *See also Twine*, 344 F.3d at 987; *Byrd*, 969 F.2d at 110 ("a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pretrial detention"); *Ploof*, 851 F.2d at 12 ("pre-trial detention solely on the ground of dangerousness to another person or to the community is not authorized"); *Friedman*, 837 F.2d at 49 ("the Bail Reform Act does not permit detention on the basis of dangerousness in the absence of [serious] risk of flight, obstruction of justice or an indictment for the offenses enumerated" in the statute); *Himler*, 797 F.2d at 160 (holding that statute does not authorize detention "upon proof of danger to the community other than from those offenses which will support a motion for detention"); DOJ Manual, *supra* note 17, at 5 ("the government may not request a detention hearing only on the allegations of danger to the community or another person. . . . Accordingly, the government must first prove one or more of the grounds listed in 3142(f)(1) or (2) *as a prerequisite* to the court considering the factor of danger to the community") (emphasis in original).

88. 18 U.S.C. § 3156(a)(4).

89. United States v. Chimurenga, 760 F.2d 400, 403–04 (2d Cir. 1985). *See also* United States v. Mitchell, 23 F.3d 1, 3–4 (1st Cir. 1994) (conspiracy to commit arson is crime of violence under § 3156(a)(4): "a conspiracy to commit a crime of violence is itself a crime of violence").

90. United States v. Ciccone, 312 F.3d 535, 541 (2d Cir. 2002).

In other words, the proper analytical approach is a "categorical" rather than a "case-by-case" approach.[91]

The Fifth Circuit concluded that an offense could be considered a "crime of violence" under section 3142(f)(1) if the case against the defendant "involves" a crime of violence, that is, if the charged offense is "reasonably connected" to acts of violence, even if the offense is not itself a crime of violence.[92]

Before the 2006 amendment that added § 3142(f)(1)(E), allowing detention hearings for "any felony that is not otherwise a crime of violence that . . . involves the possession or use of a firearm," the circuits had split on whether a violation of 18 U.S.C. § 922(g)(1), which prohibits possession of a firearm by a felon, constituted a crime of violence under section 3156(a)(4).[93]

B. Constitutionality

Even before the Bail Reform Act of 1984 was enacted, the Supreme Court had upheld the constitutionality of detention based on likelihood of flight.[94] In *United States v. Salerno*,[95] the Court upheld the Act itself against the claim that detention based on the defendant's dangerousness violates due process.

The Court based its decision, in part, on the limited nature of the Act and its procedural safeguards, reasoning that the Act "carefully limits the circumstances under which detention may be sought," provides a defendant with "a prompt detention hearing," and "operates only on individuals who have been arrested for a

91. United States v. Bowers, 432 F.3d 518, 520–21 (3d Cir. 2005); United States v. Johnson, 399 F.3d 1297, 1301 (11th Cir. 2005) (per curiam); United States v. Rogers, 371 F.3d 1225, 1229 n.5 (10th Cir. 2004); *Singleton*, 182 F.3d at 10–12.

92. *Byrd*, 969 F.2d at 110 (government presented evidence that defendant was a danger to the community because he was a child molester, but it did not show a sufficient nexus to the charged offense of receiving child pornography through the mail). *But cf. Watkins*, 940 F.3d at 164 (rejecting interpretation of "involves" that permits consideration of related but uncharged violent conduct—"the arrestee must actually be charged with the enumerated offense"). See also cases cited at note 128, *infra*, allowing use of evidence not related to charged offense to show dangerousness.

93. *Compare Dillard*, 214 F.3d at 96–97 (crime of violence) with United States v. Ingle, 454 F.3d 1082, 1086 (10th Cir. 2006) (not a crime of violence); *Bowers*, 432 F.3d at 521 (same); Johnson, 399 F.3d at 1298; (same); *Twine*, 344 F.3d at 988 (same); United States v. Lane, 252 F.3d 905, 907–08 (7th Cir. 2001) (same); *Singleton*, 182 F.3d at 17 (same). *Cf. Rogers*, 371 F.3d at 1230–32 (possession of firearm while subject to a domestic protection order, 18 U.S.C. § 922(g)(8), and after a misdemeanor conviction of domestic violence, 18 U.S.C. § 922(g)(9), is a crime of violence under section 3241(f)).

94. Bell v. Wolfish, 441 U.S. 520, 533–34 (1979).

95. 481 U.S. 739 (1987).

specific category of extremely serious offenses."[96] In holding that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment, the Court relied on the Act's "extensive safeguards . . . and the procedural protections it offers," such as the rights afforded to defendants, the evidence and level of proof the government must show, and the findings a court must make before a defendant can be detained.[97] This indicates that courts must carefully follow the Act's detailed provisions to avoid violating a defendant's due process rights.[98]

The Court, "intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged" and thus constitute a violation of due process.[99] It did, however, state its opinion that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."[100] Appellate courts since *Salerno* have held that due process challenges to the length of pretrial detention must be decided on a case-by-case basis. See the discussion in section IV.B, *infra*.

C. *Factors to be Considered*

Section 3142(g) sets forth the factors for the judicial officer to consider in determining whether to release or detain the defendant. These factors must be considered under section 3142 (pending trial), section 3143 (pending appeal or sentence), section 3144 (material witness), or section 3148(b) (violation of release condition).[101] They must also be considered when one of the rebuttable presumptions of section 3142(e) applies. See section II.G, *infra*. The factors are

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

96. *Id.* at 747, 750. *See also* United States v. Simpkins, 826 F.2d 94, 95–96 (D.C. Cir. 1987) ("An individual subject to the Bail Reform Act of 1984 may not be detained pending trial except under carefully defined circumstances.").

97. *Salerno*, 481 U.S. at 751–52. The Court also rejected the claim that the Act violates the prohibition against excessive bail.

98. *See also* Senate Report, *supra* note 8, at 8 ("a pretrial detention statute . . . may be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this [statute] have been carefully drafted with these concerns in mind.").

99. *Salerno*, 481 U.S. at 747 n.4.

100. *Id.* at 747.

101. *See* Senate Report, *supra* note 8, at 23.

> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including—
>
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
>
> (B) whether, at the time of the current offense or arrest, the person 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.[102]

The Seventh Circuit has warned that the trial court may not disregard any of these factors.[103] This is consistent with the original intention expressed by Congress that "a court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community."[104]

The Ninth Circuit has said that, of the four factors, the weight of the evidence against the defendant is the least important.[105] However, the weight of the evidence may still be a significant factor under certain circumstances.[106]

The First Circuit held that the court may consider prior arrests as part of criminal history even though the defendant was not convicted on the charges.[107] The D.C. and Third Circuits stated that findings should be based on evidence

102. 18 U.S.C. § 3142(g).

103. United States v. Torres, 929 F.2d 291, 291–92 (7th Cir. 1991) (error to disregard defendant's "family ties," § 3142(g)(3)(A), on the ground that defendant's love for his family "does not increase the likelihood of his appearance because prison, his alternative to flight, also would sever those bonds. . . . If, as the statute provides, family ties are relevant to the probability of flight, a judge may not rebuff all evidence about the subject.").

104. *See* Senate Report, *supra* note 8, at 24–25.

105. United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985).

106. United States v. Gebro, 948 F.2d 1118, 1121–22 (9th Cir. 1991) (weight of the evidence was significant factor in favor of detention for defendant who was being retried on same charges after successful appeal—defendant's "knowledge that a jury has previously rejected his duress defense and his knowledge of the fact that he was sentenced to a lengthy period of incarceration makes it more likely that he will flee").

107. United States v. Acevedo-Ramos, 755 F.2d 203, 209 (1st Cir. 1985) (citing legislative history that stated it would be inappropriate "to ignore a lengthy record of prior arrests," especially if there is evidence that "the failure to convict was due to the defendant's intimidation of witnesses").

presented at the detention hearing, not on extraneous information.[108] See also the discussion at section II.J. Evidence and Right to Counsel, *infra*.

Several courts have held that the probable length of pretrial detention is not a proper consideration in the judicial officer's determination of whether to release the defendant, because it has no bearing on the two concerns addressed by the Act: likelihood to flee and dangerousness.[109] However, where detention has in fact been prolonged, reconsideration of the detention order may be required. See section IV.B. Length of Detention, *infra*.

The Second Circuit found error where the district court relied primarily on the demeanor of the defendant, since demeanor is not one of the factors listed in the statute.[110]

The fact that a non-citizen defendant is subject to a possible United States Immigration and Customs Enforcement (ICE) detainer, and therefore may not be available for trial if released, is not a basis for detention. "The court may not . . . substitute a categorical denial of bail for the individualized evaluation required by the Bail Reform Act."[111]

Note that several circuits have also held that a district court cannot prohibit ICE from detaining a defendant after the court grants pretrial release. The Bail

108. United States v. Vortis, 785 F.2d 327, 329 (D.C. Cir. 1986) (per curiam) (serious likelihood of flight "cannot automatically be inferred from" previous pretrial proceedings); United States v. Accetturo, 783 F.2d 382, 392 (3d Cir. 1986) (determination should not be based on evidence produced at codefendant's hearing).

109. United States v. Quartermaine, 913 F.2d 910, 917–18 (11th Cir. 1990) ("the prospect of eight to ten months of pretrial detention, without more, does not mandate the release of a defendant for whom pretrial detention is otherwise appropriate"); United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989) ("length of [defendant's] current or potential future detention . . . is not material to the issue of risk of flight or dangerousness"); United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985); United States v. Colombo, 777 F.2d 96, 100–01 (2d Cir. 1985). *See also Accetturo*, 783 F.2d at 388 ("we decline to hold the Bail Reform Act unconstitutional for omitting the probable duration of pretrial incarceration from its enumeration of factors to be considered").

110. United States v. Shakur, 817 F.2d 189, 200 (2d Cir. 1987) ("[An] assessment of demeanor often may be a helpful aid to the court. . . . [H]owever, where the factors enunciated by Congress compel the conclusion that the defendant should be detained, the court may not second guess Congress by relying almost exclusively on an extrastatutory inquiry.").

111. United States v. Santos-Flores, 794 F.3d 1088, 1091–92 (9th Cir. 2015). *Accord* United States v. Ailon-Ailon, 875 F.3d 1334, 1337 (10th Cir. 2017). *Cf.* United States v. Diaz-Hernandez, 943 F.3d 1196, 1198–99 (9th Cir. 2019) (following *Santos-Flores*, rejecting defendant's argument that it was error to consider him a flight risk "because his immigration detainer, and detention by ICE should he be released on bail, eliminates any such risk"—a defendant's immigration detainer is not a factor in the individualized assessment required under 18 U.S.C. § 3142(g), "whether as evidence for or against a finding that the defendant poses a risk of nonappearance").

Reform Act "does not preclude the government from exercising its independent detention authority under the" Immigration and Naturalization Act.[112]

Before a defendant may be detained, the court must consider all reasonable, less-restrictive alternatives to detention.[113] A defendant may only be detained after a detention hearing if "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."[114] Thus, it appears that a showing of *either* the defendant's likelihood to flee *or* dangerousness to others may warrant detention. Courts have operated on this assumption, and a number have made it explicit.[115]

The First Circuit cautions that the Act "does not require release of a dangerous defendant if the only combination of conditions that would reasonably assure societal safety consists of heroic measures beyond those which can fairly be said to have been within Congress's contemplation."[116] At the same time, however,

112. United States v. Lett, 944 F.3d 467, 471 (2d Cir. 2019). *Accord* United States v. Baltazar-Sebastian, 990 F.3d 939, 945 (5th Cir. 2021); United States v. Barrera-Landa, 964 F.3d 912, 918–19 (10th Cir. 2020); United States v. Pacheco-Poo, 952 F.3d 950, 952 (8th Cir. 2020); United States v. Soriano Nunez, 928 F.3d 240, 247 (3d Cir. 2019); United States v. Vasquez-Benitez, 919 F.3d 546, 553 (D.C. Cir. 2019); United States v. Veloz-Alonso, 910 F.3d 266, 269–70 (6th Cir. 2018).

113. 18 U.S.C. § 3142(e). *See also* United States v. Infelise, 934 F.2d 103, 105 (7th Cir. 1991) (remanding because defendants proposed electronic surveillance anklets rather than detention, and trial court failed to consider whether it was a reasonable alternative); *Orta*, 760 F.2d at 891–92 ("The purpose of the hearing is to determine whether any of the release options available to defendants . . . will satisfy the statutory safety and appearance concerns. . . . The structure of the statute mandates every form of release be considered before detention may be imposed.").

114. 18 U.S.C. § 3142(e).

115. *See Santos-Flores*, 794 F.3d at 1089–90; United States v. Dillon, 938 F.2d 1412, 1417 (1st Cir. 1991) (per curiam); United States v. King, 849 F.2d 485, 488 (11th Cir. 1988); United States v. Ramirez, 843 F.2d 256, 257 (7th Cir. 1988); United States v. Sazenski, 806 F.2d 846, 848 (8th Cir. 1986) (per curiam); United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985) ("lack of reasonable assurance of *either* the defendant's appearance *or* the safety of others or the community is sufficient; both are not required").

116. United States v. Tortora, 922 F.2d 880, 887 (1st Cir. 1990) (finding that no conditions of release short of extraordinary would be adequate).

courts have recognized that "[p]retrial detention is still an exceptional step,"[117] and have emphasized that "reasonably assure" does not mean "guarantee."[118]

D. Standard of Proof

The statute specifies that a finding that no conditions will reasonably assure the safety of any other person or the community must be supported by clear and convincing evidence.[119] "This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary."[120]

It fails, however, to specify the standard of proof for a finding that a defendant presents a serious risk of flight and that no conditions will reasonably assure the defendant's appearance. The courts have held that such a finding must be supported only by a preponderance of the evidence.[121] The courts have reasoned that, in light of Congress's specification that a finding of dangerousness requires a high level of proof, its silence regarding risk of flight suggests that it did not intend to require a high level of proof for risk of flight.

117. *Torres*, 929 F.2d at 292 (citing *Salerno*). *Accord* United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) ("Only in rare cases should release be denied.").

118. *See* United States v. Hir, 517 F.3d 1081, 1092 n.9 (9th Cir. 2008) ("the Bail Reform Act contemplates only that a court be able to 'reasonably assure,' rather than guarantee, the safety of the community"); United States v. Xulam, 84 F.3d 441, 444 (D.C. Cir. 1996) (per curiam) ("Section 3142 speaks of conditions that will "reasonably" assure appearance, not guarantee it."); *Tortora*, 922 F.2d at 884 ("the safety of the community can be reasonably assured without being absolutely guaranteed. . . . Requiring that release conditions *guarantee* the community's safety would fly in the teeth of Congress's clear intent that only a limited number of defendants be subject to pretrial detention.") (emphasis in original); *Fortna*, 769 F.2d at 250 ("the standard is *reasonably assure* appearance, not 'guarantee' appearance") (emphasis in original); *Orta*, 760 F.2d at 891–92 (error to require release conditions that would "guarantee" appearance and safety: "The judicial officer cannot require more than an objectively reasonable assurance of community safety and the defendant's appearance at trial."). *See also Torres*, 929 F.2d at 291 ("Even the strongest affection for one's family does not *assure* appearance at trial, but the judge is supposed to consider probabilities.").

119. 18 U.S.C. § 3142(f).

120. Senate Report, *supra* note 8, at 22.

121. United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991); United States v. Aitken, 898 F.2d 104, 107 (9th Cir. 1990); United States v. King, 849 F.2d 485, 489 (11th Cir. 1988); United States v. McConnell, 842 F.2d 105, 110 (5th Cir. 1988) (en banc); United States v. Jackson, 823 F.2d 4, 5 (2d Cir. 1987); United States v. Himler, 797 F.2d 156, 161 (3d Cir. 1986); *Vortis*, 785 F.2d at 328–29; *Portes*, 786 F.2d at 765; *Orta*, 760 F.2d at 891 n.20. *See also Xulam*, 84 F.3d at 443–44 (revoking order of detention because government failed to sustain burden that there was no condition or combination of conditions that would reasonably assure the presence of the defendant at future proceedings).

In *Salerno*, the Supreme Court stated that a finding of dangerousness must be supported "by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community."[122] The D.C. Circuit added that "a defendant's detention based on dangerousness accords with due process only insofar as the district court determines that the defendant's history, characteristics, and alleged criminal conduct make clear that he or she poses a concrete, prospective threat to public safety."[123]

See also section II.G. Rebuttable Presumptions, *infra*, for a discussion of burden of proof in cases with a rebuttable presumption.

E. Definition of Dangerousness

Defendants who qualify for a detention hearing under section 3142(f) may be detained because of the risk of danger to the community even where there is no showing that they are likely to engage in physical violence. The legislative history of the statute indicates that Congress regards drug trafficking as a danger to the community.[124] The Ninth Circuit recognizes that economic danger to the community may require detention.[125]

The Third Circuit interprets the statute as authorizing pretrial detention based on danger to the community only upon a finding that the defendant is likely to commit one of the offenses specified in section 3142(f).[126] The Second Circuit appears to agree,[127] although it seems to reject the contention that evidence of

122. *Salerno*, 481 U.S. at 751. *See also* Senate Report, *supra* note 8, at 22 (for example, "if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense . . . that tend to indicate that the defendant will pose a danger to the safety of the community if released").

123. United States v. Munchel, 991 F.3d 1273, 1280, 1283 (D.C. Cir. 2021) ("a court must identify an articulable threat posed by the defendant to an individual or the community").

124. Senate Report, *supra* note 8, at 12–13; United States v. Williams, 753 F.2d 329, 335 (4th Cir. 1985) ("The risk that a defendant will continue to sell narcotics was repeatedly cited as an example of a danger to the 'safety of any other person or the community.'"). *Accord Hare*, 873 F.2d at 798–99; United States v. Perry, 788 F.2d 100, 113 (3d Cir. 1986); United States v. Leon, 766 F.2d 77, 81 (2d Cir. 1985).

125. United States v. Reynolds, 956 F.2d 192, 192 (9th Cir. 1992) (holding that "danger may, at least in some cases, encompass pecuniary or economic harm," agreeing that defendant convicted of thirteen counts of mail fraud posed an economic or pecuniary danger to the community).

126. *Himler*, 797 F.2d at 160 (likelihood that defendant would commit another crime involving false identification was insufficient basis for pretrial detention). *Accord Byrd*, 969 F.2d at 110 ("a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention"). The grounds specified in section 3142 are discussed in section II.A.

127. United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (per curiam) ("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)).

dangerousness must involve the likelihood of conduct related to the offense the defendant is charged with.[128]

F. Detention Hearing

1. Grounds for Detention

Although not specifically required by section 3142(f), the Second Circuit has held that the government's motion for a detention hearing must specify the grounds on which detention is sought, reasoning that Fed. R. Crim. P. 47 requires that a motion "'shall state the grounds upon which it is made.' . . . The requisite 'grounds' for a detention motion should include specification of flight, dangerousness, or both." The court added that, "if detention is sought under section 3142(f)(2)(B) on the ground of risk of threat or injury to a witness or juror, or other obstruction of justice, that specific ground should be alleged."[129] As noted above, if the government seeks detention under section 3142(f)(2), it must allege that defendant presents a *serious* risk.

The First Circuit, however, held that the specific ground does not need to be provided when a rebuttable presumption of risk of flight or danger to the community under section 3142(e) is at issue: "The statute already provides . . . notice that *either* or *both* grounds may be relied on by the government *or* by the judicial officer. No more is required."[130]

The government's motion for a detention hearing need not be in writing if permitted by the court and the defendant receives adequate notice.[131]

128. United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991) (district court erred in holding that evidence of defendant's violence was irrelevant because it was unconnected to his charged drug offense). *See also Stone*, 608 F.3d at 953 (may consider defendant's "statements indicating a violent intent toward his girlfriend" even though not related to charged offense); *Quartermaine*, 913 F.2d at 917 (drug defendant's acts of domestic violence could be considered as evidence of dangerousness).

129. United States v. Melendez-Carrion, 790 F.2d 984, 993 (2d Cir. 1986).

130. United States v. Perez-Franco, 839 F.2d 867, 871 (1st Cir. 1988) (emphasis in original).

131. United States v. Montalvo-Murillo, 876 F.2d 826, 831 (10th Cir. 1989) (notice adequate where "government's intention to move for pretrial detention . . . is clear enough"), *rev'd on other grounds*, 495 U.S. 711 (1990); *Melendez-Carrion*, 790 F.2d at 993–94; United States v. Volksen, 766 F.2d 190, 192 (5th Cir. 1985) ("§ 3142(f)(1) does not expressly require the government to make a written motion for pretrial detention"). See also Fed. R. Crim. P. 47(b) ("A motion . . . must be in writing, unless the court permits the party to make the motion by other means.").

2. Timing of Detention Motion and Hearing

a. Statutory requirement; remedy for a violation

A detention hearing "shall be held immediately upon the person's first appearance before the judicial officer" unless the defendant or the government seeks a continuance.[132] Note, however, that while the detention hearing may be held in conjunction with the initial appearance, they are distinct procedures and the defendant has certain rights during the detention hearing that are specified in section 3142(f).

Generally, "first appearance" means just that.[133] However, the Eighth Circuit suggested that this requirement is not violated when a detention hearing is held upon discovery of new evidence relevant to the likelihood of flight or obstruction of justice even if the defendant has already appeared before a judicial officer.[134] The Fifth Circuit disagreed.[135] The Third and Eighth Circuits have held that the first-appearance requirement is not violated when a detention hearing is held at the defendant's first appearance before the district judge even if the defendant has already appeared before a magistrate judge who did not hold a hearing.[136] A hearing may be reopened, either before or after a determination by the judicial officer, if the movant proffers material evidence that was previously unavailable.[137]

In *United States v. Montalvo-Murillo*,[138] the Supreme Court held that the failure to comply with the time requirements of section 3142(f) need not result in

132. 18 U.S.C. § 3142(f).

133. *See, e.g.*, United States v. Holloway, 781 F.2d 124, 126 (8th Cir. 1986) ("The 'first appearance' mentioned in the statute is obviously the 'initial appearance before the magistrate'"); United States v. Hurtado, 779 F.2d 1467, 1474–75 (11th Cir. 1985); United States v. Payden, 759 F.2d 202, 204–05 (2d Cir. 1985) (construing statute strictly). *Accord* United States v. O'Shaughnessy, 764 F.2d 1035, 1037–39 (5th Cir.), *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985) (adding that if government is "uncertain about the need for detention, it may protect its position by moving for detention and invoking, at the first appearance, its right to a three day continuance which can be extended for good cause"). Note, however, that there must be a valid ground to move for a detention hearing—a continuance may only be granted if a detention hearing is authorized under section 3142(f).

134. *Holloway*, 781 F.2d at 126–27.

135. *O'Shaughnessy*, 764 F.2d at 1037–39. *Cf. Fortna*, 769 F.2d at 248–49 (any error was harmless where magistrate judge ordered detention hearing held five days after defendant first appeared and expressed a desire to hire counsel).

136. United States v. Maull, 773 F.2d 1479, 1482–85 (8th Cir. 1985) (en banc); United States v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985).

137. 18 U.S.C. § 3142(f).

138. 495 U.S. 711 (1990).

a defendant's release.[139] The defendant had made several court appearances at proceedings that were not detention hearings. Eventually, a magistrate judge held a detention hearing and, finding that the defendant was neither a flight risk nor dangerous, ordered him released. On review of the order, the district court found that the defendant did, in fact, pose a danger to the community, but nevertheless ordered the defendant released because of noncompliance with section 3142(f)'s time requirements.[140] The Tenth Circuit affirmed.[141]

The Supreme Court reversed: "Neither the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained."[142] Thus, "once the Government discovers that the time limits have expired, it may ask for a prompt detention hearing."[143] The Court implied that such a hearing should be granted and that the timing error should ordinarily not result in release, but acknowledged that "[i]t is conceivable that some combination of procedural irregularities could render a detention hearing so flawed that it would not constitute 'a hearing pursuant to [section 3142] subsection (f).'"[144] The Court also left open the possibility of some remedy—other than release of the defendant—for a violation of the timing requirements of section 3142(f).[145] Thus, the Court made clear that, although a violation of section 3142(f) need not result in release, the timing requirements are nevertheless binding on the judicial officer.[146]

Courts have interpreted the requirement flexibly in one common circumstance, holding that where the defendant is arrested outside the charging district, the detention hearing may be held at the first appearance following removal.[147]

139. Prior to *Montalvo-Murillo*, untimely detention hearings had resulted in release in several cases. *See, e.g.*, United States v. Molinaro, 876 F.2d 1432, 1433 (9th Cir. 1989) (per curiam); United States v. Al-Azzawy, 768 F.2d 1141, 1145–46 (9th Cir. 1985); *Payden*, 759 F.2d at 203; *O'Shaughnessy*, 764 F.2d at 1036–37.

140. United States v. Montalvo-Murillo, 713 F. Supp. 1407 (D.N.M. 1989).

141. United States v. Montalvo-Murillo, 876 F.2d 826 (10th Cir. 1989).

142. United States v. Montalvo-Murillo, 495 U.S. 711, 716–17 (1990).

143. *Id.* at 721.

144. *Id.* at 717.

145. *Id.* at 721 ("Whatever other remedies may exist for detention without a timely hearing [is] . . . a matter not before us here.").

146. *Id.*

147. United States v. Valenzuela-Verdigo, 815 F.2d 1011, 1016 (5th Cir. 1987); *Melendez-Carrion*, 790 F.2d at 990; United States v. Dominguez, 783 F.2d 702, 704–05 (7th Cir. 1986).

b. Continuances

The detention hearing must be held immediately, unless the defendant or the government moves for a continuance. During a continuance, the person shall be detained,[148] and the statute sharply limits the length of continuances. Except for good cause, continuances may not exceed three days when requested by the government and five days when sought by the defendant.[149]

The statute limits only the maximum length of a continuance. The court retains discretion to grant a shorter continuance if it concludes that less time should be allowed. Because pretrial detention is supposed to be, as the Supreme Court stated in *Salerno*, "the carefully limited exception,"[150] and studies have indicated that even short periods of detention can have harmful effects on defendants,[151] courts should require the government to justify the length of any requested continuance. Note that, because weekends and legal holidays are not counted, the three and five day maximum continuances actually could be up to six and eight days, respectively.

Note that a continuance is allowed only if a detention hearing is authorized under section 3142(f)(1) or (2) and a motion for the hearing has been granted. The purpose of a continuance is to allow adequate time to prepare for the hearing and not, for example, to allow more time to determine whether to move for a hearing.

The Ninth and Eleventh Circuits have said that convenience of counsel or the court does not satisfy the good-cause requirement.[152] The Eleventh Circuit held that a magistrate judge erred in granting a continuance of more than five days to permit other defendants to obtain counsel.[153] The Second Circuit held the good-cause requirement to be satisfied by "substantial reasons pertinent to protection of the rights of the defendants"[154]—the need to obtain witnesses and affidavits from abroad and the need for defense counsel to obtain interpreters to help interview non–English-speaking clients.

148. 18 U.S.C. § 3142(f).

149. *Id.* This section was amended in 1996 to resolve a split in the circuits by clarifying that the five- and three-day limitations on the length of continuances of detention hearings do not include intermediate Saturdays, Sundays, and legal holidays.

150. 481 U.S. at 755.

151. *See* section I.E.3, *supra*.

152. *Al-Azzawy*, 768 F.2d at 1146; *Hurtado*, 779 F.2d at 1476.

153. *Hurtado*, 779 F.2d at 1474 n.7 (eight-day delay).

154. *Melendez-Carrion*, 790 F.2d at 991–92.

The First and Fifth Circuits deem defendants to have acquiesced in a continuance if they do not make a timely objection to a proposed continuance.[155]

The statute provides for a continuance on motion of defense counsel or the government, but makes no explicit provision for a continuance on the court's own motion. The Ninth and Eleventh Circuits have held that detention hearings may not be continued on the court's own motion.[156] The D.C. and Fifth Circuits have permitted such continuances in special circumstances.[157] The court may, on its own motion or the government's, order a medical examination of a person who appears to be a narcotics addict to determine whether such a person is one.

c. Waiver by defendant

There is some disagreement as to whether a defendant may waive the right to a detention hearing (or a hearing within the statutorily prescribed time frame). In a Fourth Circuit case, the defendants told the magistrate judge that they wanted to remain in custody for their own protection. As a result, the magistrate judge did not conduct an evidentiary hearing or make written findings. Later, however, the defendants moved for their immediate release on the ground that they had an unwaivable right to a detention hearing. The original panel agreed, but the en banc court held that defendants may waive both the time requirements and

155. United States v. Araneda, 899 F.2d 368, 370 (5th Cir. 1990) (it was error for court to grant continuance for all codefendants when only some requested it; court of appeals nevertheless affirmed because counsel were advised of the continuance and did not object); United States v. King, 818 F.2d 112, 115 n.3 (1st Cir. 1987) (failure to hold formal detention hearing prior to initial detention order not reversible error where defendant did not request such a hearing and was in state custody). *See also* United States v. Madruga, 810 F.2d 1010, 1014 (11th Cir. 1987) ("Unless a defendant objects to the proposed hearing date on the stated ground that the assigned date exceeds the three-day maximum, he is deemed to acquiesce in up to a five-day continuance."); United States v. Coonan, 826 F.2d 1180, 1184 (2d Cir. 1987) (defense counsel told the government that "bail was not an issue," thereby implicitly waiving defendant's right to a hearing within five days).

156. *Al-Azzawy*, 768 F.2d at 1146; *Hurtado*, 779 F.2d at 1475–76.

157. United States v. Alatishe, 768 F.2d 364, 369 (D.C. Cir. 1985) (seven-day continuance on motion of the court upheld; delay caused in part by confusion over requirements of the new statute, and neither party objected to continuance; court of appeals noted that "in future cases, except in the most compelling situations, the judicial officer should not act *sua sponte* to delay the detention hearing"). *See also Fortna*, 769 F.2d at 249 (magistrate judge permitted to set detention hearing for five days later to enable defendant to obtain counsel).

the detention hearing itself.[158] The First and Second Circuits reached similar conclusions.[159]

The Ninth Circuit, however, held that the Act "does not permit a waiver of time requirements by the defendant. . . . If the time constraints are violated in any material way, the district court should not order unconditional pretrial detention of the person."[160] The Fifth Circuit agreed that "the statute does not provide for voluntary waiver of the time requirement by the defendant."[161]

d. Defendant in State Custody

The timing provisions present special problems when a defendant is in state custody at the time that the detention hearing should be held. Any determination of release or detention in the federal case is moot if the defendant will be returned to custody in the other jurisdiction. If the defendant's status in the other jurisdiction changes, however, a detention hearing becomes meaningful. The First Circuit has suggested that in these situations the judge should either hold a provisional detention hearing, which would be effective upon any change in status, or postpone the detention hearing if the government and the defendant agree. If the defendant objects to any postponement of the hearing, the judge should assess whether the hearing should be continued for good cause pursuant to section 3142(f).[162] It should be noted that the Interstate Agreement on Detainers Act may be implicated upon the transfer of a defendant in custody from one jurisdiction to another.[163]

158. United States v. Clark, 865 F.2d 1433, 1436–37 (4th Cir. 1989) (en banc) (if the detention hearing is initially waived but defendant "later requests a hearing, one must be held within the procedural requirements of section 3142. . . . Defendants' 'waiver' of an immediate detention hearing can be viewed as a request for an indefinite continuance for good cause.").

159. *Coonan*, 826 F.2d at 1184 (to hold that hearing or time limit cannot be waived "would convert the time requirements of the act into a potential trap, available to defendants, that would undermine the functioning of the act, and would also require meaningless, ritualistic hearings in situations where no one wants them"). *See also King*, 818 F.2d at 115 n.3 (if defendant fails to object to government motion for continuance or postponement of hearing, "then he should be deemed to have waived § 3142(f)'s first appearance and time requirements").

160. *Al-Azzawy*, 768 F.2d at 1145.

161. *Hurtado*, 779 F.2d at 1474 n.7.

162. *King*, 818 F.2d at 115 n.3. *See also Coonan*, 826 F.2d at 1185.

163. 18 U.S.C. App. 2.

G. Rebuttable Presumptions

It is important to remember that the "presumption for detention" in section 3142(e) is not a mandate for detention nor conclusive evidence that a defendant should be detained. The presumption is *rebuttable*, the court must consider the factors in section 3142(g) to determine whether there are conditions of release for that particular defendant that would "reasonably assure" the defendant's appearance and the safety of the community, and the burden of proof remains on the government.[164]

1. The Two Presumptions

The statute creates two rebuttable presumptions in 18 U.S.C. § 3142(e): the "previous-violator presumption" and the "drug-and-firearm-offender presumption." The previous-violator presumption is that no conditions of release "will reasonably assure the safety of any other person and the community" where the defendant is accused of one of the numerous crimes specified in section 3142(f)(1), such as crimes of violence, *and* has previously been convicted of committing one of the specified crimes "while the person was on release pending trial for a Federal, State, or local offense."[165]

The drug-and-firearm-offender presumption is that no conditions of release will reasonably assure the defendant's appearance *and* the safety of the community where a judicial officer finds probable cause to believe that the defendant has committed certain enumerated offenses. The provision is often referred to as the drug-and-firearm-offender provision because it originally included only federal drug offenses carrying a maximum prison term of ten years or more and offenses in which the defendant is alleged to have used a firearm to commit the offense. Congress has since added, however, certain terrorism-related offenses and certain sex offenses involving minor victims.[166]

As of this writing, no published appellate case law specifically addresses the previous-violator presumption. However, the First Circuit has suggested that an

164. *See* Senate Report, *supra* note 8, at 18–19 ("the judicial officer is required to consider the factors set out in section 3142(g) . . . on a case-by-case basis" when making a finding of release or detention under section 3142(e), and facts supporting a finding of dangerousness "must, under subsection (f), be supported by clear and convincing evidence"). *See also* Notes 183–84, *infra*, and accompanying text.

165. 18 U.S.C. § 3142(e)(2).

166. 18 U.S.C. § 3142(e)(3).

analysis of the drug-and-firearm-offender presumption, discussed below, would also apply to the previous-violator presumption.[167]

There is a form courts may find helpful, AO Form 472, "Order of Detention Pending Trial." It includes checklists for, *inter alia*, defendant's eligibility for detention, the findings of fact and law required for the presumptions, and statement of reasons for detention.

2. Application of "Drug-and-Firearm-Offender Presumption"

a. Ten-year maximum charge required

The Eleventh Circuit held that for drug charges to trigger the drug-and-firearm-offender presumption, the defendant must be charged with at least one offense separately carrying a ten-year (or longer) maximum sentence. The presumption does not arise simply because the combined maximum sentences on all drug charges exceed ten years.[168]

The First Circuit held that the presumption applies whenever the offense carries a penalty of ten years or more, even if the defendant is unlikely to receive a ten-year sentence under the Sentencing Guidelines.[169] However, the sentence that the defendant is likely to receive can affect the weight given to the presumption.[170]

b. Probable cause and grand jury indictments

Most courts have held that where a grand jury has indicted a defendant on one of the predicate offenses, a judicial officer need not make an independent finding of probable cause to invoke the drug-and-firearm-offender presumption.[171] Rather, the indictment itself establishes probable cause that the defendant committed

167. United States v. Jessup, 757 F.2d 378, 381 (1st Cir. 1985).

168. United States v. Hinote, 789 F.2d 1490, 1491 (11th Cir. 1986).

169. United States v. Moss, 887 F.2d 333, 336–37 (1st Cir. 1989). *See also* United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1992) (per curiam) (same, for detention pending sentencing under 18 U.S.C. § 3143).

170. *Moss*, 887 F.2d at 337.

171. United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996); United States v. Stricklin, 932 F.2d 1353, 1355 (10th Cir. 1991); *King*, 849 F.2d at 488; United States v. Jackson, 845 F.2d 1262, 1265 (5th Cir. 1988); United States v. Vargas, 804 F.2d 157, 161 (1st Cir. 1986); United States v. Suppa, 799 F.2d 115, 118–19 (3d Cir. 1986); *Dominguez*, 783 F.2d at 706 n.7; United States v. Contreras, 776 F.2d 51, 54–55 (2d Cir. 1985); United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985); *Hurtado*, 779 F.2d at 1477–79.

the offense and triggers the presumption that the defendant poses a danger to the community and is a flight risk.

c. Formal charge required

The Second Circuit held that the drug-and-firearm-offender presumption cannot arise if the defendant has not yet been charged with the firearm offense by a "valid complaint or indictment," even if there may be probable cause to believe that the defendant appearing at a detention hearing on other charges has also committed a firearm violation.[172]

d. Effect of presumption; rebuttal

It must be emphasized that the drug-and-firearm-offender presumption imposes on defendants only a burden of *production*; the burden of *persuasion* concerning the risk of flight and dangerousness remains with the government.[173] Even if the presumption is not rebutted, a court must still consider the factors listed in section 3142(g) to determine whether a defendant may be released. See notes 181–84 and accompanying text.

To meet its burden, the defense must produce only "some [relevant] evidence."[174] "Any evidence favorable to a defendant that comes within a category listed in § 3142(g)" can rebut the presumption, "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)."[175] Because the drug-and-firearm presumption concerns risk of flight *and* danger to the community, a defendant may have to produce evidence that is relevant to both.

172. *Chimurenga*, 760 F.2d at 405.

173. *Stone*, 608 F.3d at 945; *Stricklin*, 932 F.2d at 1354–55; *Moss*, 887 F.2d at 338; *Hare*, 873 F.2d at 798; United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986); *Perry*, 788 F.2d at 115; *Dominguez*, 783 F.2d at 707; *Alatishe*, 768 F.2d at 371 n.14; *Chimurenga*, 760 F.2d at 405; *Hurtado*, 779 F.2d at 1470 n.4; *Orta*, 760 F.2d at 891 n.17.

174. *Jessup*, 757 F.2d at 381. *See also Stone*, 608 F.3d at 945 (defendant "must introduce at least some evidence" regarding risk of flight and danger to community); *Stricklin*, 932 F.2d at 1355 ("The defendant's burden of production is not heavy, but some evidence must be produced.").

175. *Dominguez*, 783 F.2d at 707 ("evidence of economic and social stability, coupled with the absence of any relevant criminal record," was sufficient to rebut presumption).

The introduction of such evidence, however, does not eliminate the presumption entirely.[176] Rather, the presumption "remains a factor to be considered among those weighed by the district court" under section 3142(g).[177] This ensures that the court takes note of the congressional findings that drug traffickers pose special flight risks.[178] Note, however, that a defendant's current offense and criminal history are already factors that must be accounted for under section 3142(g)(1) & (2) ("the nature and circumstances of the offense charged" and "past conduct, . . . criminal history, and record concerning appearance at court proceedings").

It is important to consider what a defendant does *not* have to show to rebut the presumption. The Seventh Circuit stressed that defendants need not produce evidence that they are innocent of the charged crime or that the alleged offense is not dangerous to the community—"few if any defendants in narcotics cases could ever rebut the presumption of dangerousness and thereby defeat pretrial detention."[179] Rather, it would suffice to show that "the specific nature of the crimes charged, or . . . something about their individual circumstances," suggests that the defendant is *neither* dangerous nor likely to flee.[180]

If the presumption is not rebutted. Courts that have decided the issue differ on whether an unrebutted presumption by itself can support detention. Two circuits have held that "the burden of persuasion always rests with the government and an unrebutted presumption is not, by itself, an adequate reason to order detention. . . . Rather, the presumption is considered together with the factors listed

176. *Dillon*, 938 F.2d at 1416 ("rebutted presumption retains evidentiary weight"); *Hare*, 873 F.2d at 798 ("presumption is not a mere 'bursting bubble' that totally disappears from the judge's consideration after the defendant comes forward with evidence"); *Martir*, 782 F.2d at 1144.

177. United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001). *Accord Stone*, 608 F.3d at 945; *Stricklin*, 932 F.2d at 1355; *Dominguez*, 783 F.2d at 707; *Jessup*, 757 F.2d at 383.

178. The First Circuit has stated that the remaining weight of the presumption "depend[s] on how closely defendant's case resembles the congressional paradigm." United States v. Palmer-Contreras, 835 F.2d 15, 18 (1st Cir. 1987).

179. *Dominguez*, 783 F.2d at 706. *But cf.* United States v. Rueben, 974 F.2d 580, 587 (5th Cir. 1992) (presumption unrebutted because defendants presented no evidence that they would not continue to engage in drug trafficking if released on bail).

180. *Dominguez*, 783 F.2d at 707. Defendants must rebut the presumption of both dangerousness and likelihood of flight. United States v. Daniels, 772 F.2d 382, 383 (7th Cir. 1985) (assuming defendant showed he was unlikely to flee, he could still be detained on unrebutted presumption of dangerousness). *Cf.* United States v. Carbone, 793 F.2d 559, 561 (3d Cir. 1986) (per curiam) (under the circumstances, evidence normally adduced to rebut presumption of flight also rebutted presumption of dangerousness). However, for the "previous violator presumption" in 18 U.S.C. 3142(e)(2), only the presumption of dangerousness must be rebutted.

in § 3142(g)."[181] However, two circuits have held that when a defendant provides no rebuttal evidence, the presumption alone can support the conclusion that no conditions of release would reasonably assure the appearance of the defendant and the safety of the community.[182]

It should be noted, however, that "detention may be ordered under section 3142(e) only after a detention hearing pursuant to subsection (f),"[183] and subsection (f) requires that evidence used to support a finding of danger to individuals or the community must be "clear and convincing." Both the statute and legislative history indicate that, even if a presumption is present and not rebutted, the requirements of subsections (f) and (g) still apply and the government's burden of proof does not change. In fact, the discussion of subsections (e), (f), and (g) in the legislative history clearly states that:

> Subsection (g) enumerates the factors that are to be considered by the judicial officer in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community. Since this determination is to be made *whenever a person is to be released or detained under this chapter*, consideration of these factors is required . . . [and] *a court is expected to weigh all the factors in the case* before making its decision as to risk of flight and danger to the community.[184]

181. United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021). *See also Jackson*, 845 F.2d at 1266 ("the government cannot reasonably argue that the § 3142(e) presumption, coupled with the allegations of the indictment against Jackson, are alone sufficient to satisfy § 3142(g). If this were so, there would be no need for Congress to have specified 'the weight of the evidence against the person' as a separate factor for the district court to consider in evaluating the risk of flight posed by the defendant. . . . Section 3142(g)(2) *requires* the court to consider such evidence, but the government furnished none here.") (emphasis in original); *Dominguez*, 783 F.2d at 706–07 ("[a] defendant cannot be detained as dangerous under § 3142(e), even if the presumption is not rebutted, unless a finding is made that no release conditions '*will* reasonably assure . . . the safety of the community'") (emphasis in original).

182. *Perry*, 788 F.2d at 115, 118 ("The clear and convincing standard does not even operate until the defendant has come forward with some evidence of lack of dangerousness." Because defendant "failed to overcome the presumption of dangerousness . . . he should have been detained."); *Alatishe*, 768 F.2d at 371 ("it was not the responsibility of the appellee to carry the Government's burden of proof or persuasion; nevertheless, the presumption operated *at a minimum* to impose a burden of production on the defendant to offer some credible evidence contrary to the statutory presumption") (emphasis in original).

183. Senate Report, *supra* note 8, at 20.

184. *Id.*, at 23–25 (emphasis added). Section 3142(g) states, in part: "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—(1) the nature and circumstances of the offense charged . . . ; (2) the weight of the evidence against the person; (3) the history and characteristics of the person . . . ; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *See also Jackson*, 845 F.2d at 1265 ("the language of § 1342(g) mandates district court review of certain factors ('The judicial officer *shall* . . . take into account the available information . . . .') (emphasis added)").

Therefore, if the defendant does not successfully rebut the presumption, the court should consider any "available information"—in the pretrial services report, for example—that was not offered by the defendant but may rebut the presumption or otherwise fall within the subsection (g) factors. If such information affects the court's decision, it should be included in the statement required by Federal Rule of Appellate Procedure 9(a)(1) to provide "in writing, or orally on the record, the reasons for an order regarding the release or detention of [the] defendant."

The Fifth Circuit held that circumstances are relevant only if germane to the likelihood of flight or a presumption of dangerousness; it therefore dismissed as irrelevant a defendant's contention that detention imposed a severe financial hardship.[185]

The Fifth Circuit also stated that, where there has been a full evidentiary hearing in which both sides have presented evidence, "the shifting of and the descriptions of evidentiary burdens become largely irrelevant and the question becomes whether the evidence as a whole supports the conclusions" reached by the trial court.[186]

e. Constitutionality

The First Circuit held that the presumption, when construed not to shift the burden of persuasion, does not violate the Due Process Clause of the Fifth Amendment.[187] The Third Circuit held that because the presumption of dangerousness may place the defendant in the position of risking self-incrimination or submitting to pretrial detention, the judicial officer should grant use immunity to a defendant who seeks to rebut the presumption through the defendant's own testimony.[188] In an unpublished opinion, the Sixth Circuit appeared to reject this approach.[189] In a case where the presumption did not apply, the Fifth Circuit rejected a facial challenge to the statute based on its alleged violation of

185. Fassler v. United States, 858 F.2d 1016, 1018 n.5 (5th Cir. 1988) (per curiam).

186. United States v. Trosper, 809 F.2d 1107, 1111 (5th Cir. 1987).

187. *Jessup*, 757 F.2d at 384–87.

188. *Perry*, 788 F.2d at 115–16.

189. United States v. Dean, 927 F.2d 605 (6th Cir.) (table), *cert. denied*, 502 U.S. 838 (1991) (rejecting claim that use of defendant's testimony at detention hearing in subsequent trial violated his right against self-incrimination—a defendant need not personally testify at the detention hearing to satisfy burden). *See also* United States v. Ingraham, 832 F.2d 229, 238 (1st Cir. 1987) (distinguishing *Perry* as not applying to case absent a rebuttable presumption).

the self-incrimination clause.[190] The Second Circuit held that it is not error to prohibit the government from cross-examining the detainee in order to prevent self-incrimination problems.[191]

H. Temporary Detention

In cases where another authority may have a claim to custody of a defendant, section 3142(d) authorizes a judicial officer to order an arrestee temporarily detained for up to ten days if the person is arrested while on release pending trial for a felony, post-trial release after conviction, probation, or parole, or is a non-citizen not admitted for permanent residence, *and* the judicial officer finds that the arrestee "may flee or pose a danger to any other person or the community."[192] If the person before the court was not arrested while on pretrial or post-trial release, or probation or parole, and is not an alien unlawfully in the United States, there is no authority to temporarily detain the person under Section 3142(d).

The court must direct the government to notify the appropriate authorities so that they can take the person into custody. If these authorities do not take the defendant into custody within the ten-day period, a section 3142(f) hearing may be held on the more recent offense. This hearing is separate from the section 3142(d) hearing, and the judicial officer cannot rely on facts that were previously found to support temporary detention after a hearing under section 3142(d).[193]

Moving from subsection (d) to subsection (f) is not, however, automatic. Before a detention hearing under section 3142(f) may be held the government must show proper grounds for doing so. Subsection (d) applies when "the offense" was committed while the defendant was on various kinds of release, or if the defendant is not a citizen or lawfully admitted to permanent residence. A detention

190. United States v. Parker, 848 F.2d 61, 62 (5th Cir. 1988) (per curiam) (defendant "need not personally testify because he may present evidence through hearsay or by proffer."). The court left open the possibility that use immunity might be required where the rebuttable presumption applies. *Id.* at n.1. *See also Ingraham*, 832 F.2d at 237–38 (rejecting the claim that use immunity should be granted in a case where the presumption did not apply; leaving open the possibility that it is required when the presumption applies).

191. *Shakur*, 817 F.2d at 200.

192. Note: the ten-day limit excludes weekends and holidays. *See also* AO Form 471, Order to Detain a Defendant Temporarily Under 18 U.S.C. § 3142(d).

193. *Alatishe*, 768 F.2d at 370 ("unlike subsection (e) detention, the decision to temporarily detain a defendant [under subsection (d) for dangerousness] need not be supported by clear and convincing evidence. . . . The defendant must have an opportunity, in a separate hearing in accordance with the procedures outlined in subsection (f), to rebut the facts offered by the prosecution to support detention pending trial.").

hearing under section 3142(f)(1), as noted in sections II.A and II.F, *infra*, is limited to certain specified offenses. Subsection (f)(2) is a more likely ground for a hearing, but as with all detention hearings under section 3142(f), evidence to support a finding of dangerousness must be "clear and convincing."

All the courts that have considered the question have interpreted section 3142(d) as permitting the government to move under section 3142(f) for a detention hearing at any time during the ten-day period, rather than at the defendant's first appearance as normally required by section 3142(f).[194] However, the Fifth and D.C. Circuits indicated that the better practice is for the government to move under both section 3142(d) and section 3142(f) at the defendant's initial appearance in order to provide notice that the government plans to seek detention.[195]

The Fifth, D.C., and Ninth Circuits indicated that continuances under section 3142(f) cannot extend the detention period beyond ten days.[196] The Seventh Circuit, however, held that when a continuance under section 3142(f) was requested, but two days later it sought detention under subsection (d), the latter "tolled the running of the limited continuances provided under § 3142(f)," leaving open the possibility of resuming the subsection (f) continuance after the end of the detention under subsection (d).[197]

The First Circuit has emphasized that it is important for the judicial officer to make clear under which provision detention is being considered. In *United States v. Vargas*,[198] defendants, already detained under section 3142(d), appeared before a magistrate judge for arraignment on another offense. The government indicated that it would "seek to detain" the defendants. The magistrate judge, apparently believing that defense counsel had waived argument on the detention issue, ordered the defendants detained. One of the defendants subsequently moved for release upon expiration of the ten-day period under section 3142(d), arguing that no timely motion for detention under section 3142(f) had been made. Although it upheld the detention order,[199] in order to avoid the type of confusion that led to the appeal, the First Circuit "emphasize[d] that in a situation involving the

194. United States v. Moncada-Pelaez, 810 F.2d 1008, 1010 (11th Cir. 1987); *Vargas*, 804 F.2d at 161; United States v. Becerra-Cobo, 790 F.2d 427, 430 (5th Cir. 1986); United States v. Lee, 783 F.2d 92, 94 (7th Cir. 1986); *Alatishe*, 768 F.2d at 368.

195. *Becerra-Cobo*, 790 F.2d at 430; *Alatishe*, 768 F.2d at 368.

196. *Becerra-Cobo*, 790 F.2d at 430; *Alatishe*, 768 F.2d at 368; *Al-Azzawy*, 768 F.2d at 1146.

197. *Lee*, 783 F.2d at 94.

198. 804 F.2d 157, 162 (1st Cir. 1986).

199. The court of appeals noted that the magistrate judge had offered the defendants an opportunity for additional, individual hearings; that the magistrate judge held a second hearing six days later, immediately upon expiration of the section 3142(d) detention period; and that the district judge also held a de novo hearing upon review of the magistrate judge's detention order. *Id.* at 160–62.

possibility of pretrial detention under section 3142(e), it is incumbent upon magistrates and district courts to adhere to the requirements of sections 3142(e) and 3142(f) and to clearly indicate when they are proceeding under those provisions so as to avoid the type of confusing circumstances that arose in this case."[200]

I. Detention Upon Review of a Release Order

Section 3145(a) permits either the government or the defendant to seek review of release conditions imposed by a magistrate judge or by a judicial officer other than the district court with original jurisdiction or an appellate court. Some circuits interpret this subsection as authorizing a trial court to conduct a de novo hearing and impose detention after such review.[201] The Eighth and Ninth Circuits have gone further, holding that district judges can review a magistrate judge's detention order sua sponte and impose detention when the court has authority to move for a hearing on its own motion under section 3142(f)(2).[202]

J. Evidence and Right to Counsel

In general, the rules governing admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the detention hearing.[203]

As of October 21, 2020, a new section was added to Rule 5 of the Federal Rules of Criminal Procedure:

> (f) REMINDER OF PROSECUTORIAL OBLIGATION.—
>
> (1) IN GENERAL.—In all criminal proceedings, *on the first scheduled court date when both prosecutor and defense counsel are present*, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.[204]

200. *Id.* at 162.

201. *Delker*, 757 F.2d at 1393–95; United States v. Medina, 775 F.2d 1398, 1400–02 (11th Cir. 1985). These courts observed that section 3145(a) authorizes the district judge to conduct de novo review of a magistrate judge's release order, and reasoned that the district judge should therefore have open all the options available to the magistrate judge.

202. *Gebro*, 948 F.2d at 1120; *Maull*, 773 F.2d at 1486. *See also* United States v. Cisneros, 328 F.3d 610, 616 (10th Cir. 2003) (agreeing that "it is within the district court's authority to review a magistrate's release or detention order sua sponte").

203. 18 U.S.C. § 3142(f).

204. Pub.L. 116-182, § 2, Oct. 21, 2020, 134 Stat. 894 (emphasis added).

If not done earlier, this order should be issued at the detention hearing. There is no specific rule for when *Brady* information must be provided, but any exculpatory material should be provided at the detention hearing if it might affect the court's decision.[205]

1. Right to Counsel

At the detention hearing, defendants have "the right to be represented by counsel" and the right to appointed counsel if they cannot afford one.[206] Note, however, that defendants should have counsel from the start of the initial appearance, well before a detention hearing occurs. "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."[207] Such a defendant "shall be represented at every stage of the proceeding from initial appearance before the magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings."[208]

The procedures and issues involved in pretrial detention or release are complex, as is the decision whether a detention hearing is even warranted. It is important to ensure that defendants are provided the opportunity to consult with an attorney at the earliest stage of criminal proceedings, before any decisions, or even discussions, regarding release or detention occur.

2. Hearsay Evidence

As noted above, the rules governing admissibility of evidence in criminal trials do not apply to detention hearings. Hearsay evidence, for example, has been found to be admissible at a detention hearing.[209] However, trial courts "should be sensitive to the fact that Congress' authorization of hearsay evidence does not represent a determination that such evidence is always appropriate."[210] The First

205. *See also* Benchboook for U.S. District Judges 172 (Federal Judicial Center, 6th ed. 2013) ("potential *Brady* material ordinarily should be disclosed as soon as reasonably possible after its existence is known by the government").

206. 18 U.S.C. § 3142(f).

207. Fed. R. Crim. P. 44(a) (emphasis added).

208. 18 U.S.C. § 3006A(c). *See also* Rothgery v. Gillespie County, 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").

209. United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986); *Fortna*, 769 F.2d at 250; *Delker*, 757 F.2d at 1397; *Acevedo-Ramos*, 755 F.2d at 208.

210. *Accetturo*, 783 F.2d at 389.

and Third Circuits advise courts to assess the reliability of hearsay evidence and require corroboration when necessary.[211]

3. Proffer Evidence

Section 3142(f) states that defendants may "present information by proffer or otherwise." The Third Circuit held that the judicial officer may require the defendant to proffer evidence rather than to present live testimony.[212] The Seventh Circuit held to the contrary.[213] Several circuits have held that the government may also proceed by way of proffer.[214] The Third Circuit, however, questioned the validity of relying on a proffer by the government to establish probable cause that the accused committed one of the offenses giving rise to the drug-and-firearm-offender presumption under section 3142(e).[215]

4. Cross-Examination

Section 3142(f) affords defendants an opportunity to cross-examine witnesses appearing at the hearing, but it makes no explicit provision for nonappearing witnesses. Several courts have held that, at least where the defendant makes no specific proffer of how cross-examination will counter the government's proffered evidence, the court is not required to subpoena the government witnesses.[216] The Third Circuit noted a few circumstances that militate in favor of subpoenaing a requested witness: the defendant's offer of specific evidence showing unreliability, the lack of a need to protect confidentiality, and the prospect of lengthy

211. *Id.*; *Acevedo-Ramos*, 755 F.2d at 207–08.

212. *Delker*, 757 F.2d at 1395–96.

213. *Torres*, 929 F.2d at 292 ("Section 3142(f) gives the defendant the right 'to present witnesses.' Defendants also may 'present information by proffer or otherwise.' Judges may not limit them to the latter option.").

214. *Stone*, 608 F.3d at 940; *Smith*, 79 F.3d at 1210; United States v. Gaviria, 828 F.2d 667, 669 (11th Cir. 1987); *Winsor*, 785 F.2d at 756; *Martir*, 782 F.2d at 1145–47.

215. *Suppa*, 799 F.2d at 118 (but indictment was sufficient in this case).

216. *Accetturo*, 783 F.2d at 388 (there was no error in failing to compel appearance of government witness for cross-examination where there was no reason to believe witness would have testified favorably to defendants); *Winsor*, 785 F.2d at 756–57 (where defendant did not make proffer to show that government's proffer was incorrect, defendant did not have right to cross-examine investigators); *Delker*, 757 F.2d at 1397–98 n.4 (there was no error in declining to subpoena witnesses; the question whether there is a right to cross-examine where defendant makes specific proffer negating government's case was left open). *See also* United States v. Cardenas, 784 F.2d 937, 938 (9th Cir.) (per curiam), *vacated as moot*, 792 F.2d 906 (9th Cir. 1986) (there was no error in refusing to subpoena witnesses where government withdrew proffered evidence challenged by defendant).

detention.[217] The Eleventh Circuit indicated that if a finding of dangerousness or likelihood of flight rests on the weight of the evidence against the defendant with respect to the charged crime, it would be reversible error not to give the defendant the opportunity to cross-examine witnesses.[218]

5. Ex Parte Evidence

The Bail Reform Act does not specifically address the use of evidence presented ex parte. The Second Circuit, in a post-conviction release hearing, held that the right to a fair hearing implicit in section 3143(a)(1) requires some notice to the defendant of the reasons for detention advanced by the government. Receipt of ex parte evidence should satisfy three criteria: (1) satisfaction of the factors outlined in *Waller v. Georgia*[219] to exclude the public from certain criminal proceedings; (2) disclosure to the defendant of the gist or substance of the government's ex parte submission; and (3) careful scrutiny by the district court of the reliability of the ex parte evidence.[220]

The Third Circuit has held that reliance on ex parte evidence presented is generally inconsistent with the Act's procedural protections.[221] The Third Circuit has also suggested that use of such testimony may run afoul of the confrontation clause.[222] In a brief opinion later vacated as moot, the Ninth Circuit rejected a due process challenge to the use of in camera evidence.[223]

217. *Accetturo*, 783 F.2d at 388.

218. *Hurtado*, 779 F.2d at 1479–80 (but holding it was harmless error for district court to quash subpoenas of Drug Enforcement Agency agents where a finding that defendant was likely to flee was based on nature of the offense and history and characteristics of defendants rather than on weight of the evidence).

219. 467 U.S. 39, 48 (1984) (the four factors for closure of a hearing are (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced," (2) "the closure must be no broader than necessary to protect that interest," (3) "the trial court must consider reasonable alternatives to closing the proceeding," and (4) "it must make findings adequate to support the closure"). For a case setting forth the factors relevant to restricting public access to pretrial records, including tapes played at the pretrial hearing that were not entered into evidence, see *United States v. Graham*, 257 F.3d 143, 149–56 (2d Cir. 2001).

220. United States v. Abuhamra, 389 F.3d 309, 329 (2d Cir. 2004).

221. *Accetturo*, 783 F.2d at 391 (presentation in camera appropriate only when there is a compelling need and no alternative means of meeting that need).

222. *Perry*, 788 F.2d at 117.

223. *Cardenas*, 784 F.2d at 938. *See also Acevedo-Ramos*, 755 F.2d at 207–09 (magistrate judges may test veracity of hearsay by inspection of evidence in camera where confidentiality of sources is necessary).

6. Challenged Evidence

The First and Eighth Circuits held that a district court may rely on evidence whose legality the accused has challenged, at least until a court rules that the material was not legally obtained.[224]

7. Electronic Surveillance

The use of wire, oral, or electronic communication obtained via a wiretap pursuant to 18 U.S.C. § 2518 may trigger the ten-day notice requirement set forth in section 2518(9). Both the First and Second Circuits have upheld the use of evidence obtained by electronic surveillance,[225] with the Second Circuit explicitly stating that such material is governed by the ten-day notice provision.[226] Acknowledging the potential conflict between the ten-day notice requirement and the requirement of a prompt detention hearing, the Second Circuit pointed out that if prejudice to the defendant would result from waiver of the ten-day notice period, the detention hearing may be continued for good cause under section 3142(f).[227]

8. Psychiatric Examination

The Second Circuit held that judicial officers may not order a psychiatric examination to determine the dangerousness of a defendant; they must base such a determination on evidence adduced at the detention hearing.[228]

K. Hearings Involving Multiple Defendants

Cases involving multiple defendants can pose problems. The Sixth Circuit held that "the dangerousness inquiry must be an individualized one. Just as at trial, in which courts and juries must resist the urge to find guilt or innocence by association, each defendant is entitled to an individualized determination of bail eligibility."[229]

224. United States v. Apker, 964 F.2d 742, 744 (8th Cir. 1992) (wiretap challenged); United States v. Angiulo, 755 F.2d 969, 974 (1st Cir. 1985) (electronic surveillance challenged).

225. United States v. Berrios-Berrios, 791 F.2d 246, 253 (2d Cir. 1986); *Angiulo*, 755 F.2d at 974.

226. *Berrios-Berrios*, 791 F.2d at 253.

227. United States v. Salerno, 794 F.2d 64, 70 (2d Cir. 1986) ("good cause . . . would presumably include prejudice to the defendant resulting from the government's inability to have provided him earlier with the surveillance order and application"), *rev'd on other grounds*, 481 U.S. 739 (1987).

228. United States v. Martin-Trigona, 767 F.2d 35, 38 (2d Cir. 1985).

229. *Stone*, 608 F.3d at 946. *See also* cases cited at note 28 and accompanying text.

The Eleventh Circuit recommends that the court make individual determinations on continuances rather than automatically schedule all hearings for the same date.[230] The Third Circuit held that evidence offered at hearings of codefendants may not be considered unless the defendant is given a confrontation opportunity at the defendant's own hearing.[231]

Where detention hearings are required for a large number of codefendants, the Second Circuit suggests the court consider alternatives to individual hearings before the same judicial officer: a joint hearing; consolidation to receive testimony of government witnesses common to all the defendants, followed by individual hearings to receive evidence peculiar to each defendant; and assignment of more than one judicial officer to the hearings.[232]

L. Written Findings

Under 18 U.S.C. § 3142(i)(1), a detention order must "include written findings of fact and a written statement of the reasons for detention."[233] However, Fed. R. App. P. 9(a)(1) also allows the reasons for release or detention to be stated "orally on the record," and some circuits have held that the writing requirement in § 3142(i)(1) is satisfied "where the court's findings and reasons for issuing a detention order are clearly set out in the written transcript of the hearing."[234] The Second Circuit also requires that these findings include a statement of the alternatives considered and the reasons for rejecting them.[235]

230. *Hurtado*, 779 F.2d at 1476.

231. *Accetturo*, 783 F.2d at 392.

232. *Melendez-Carrion*, 790 F.2d at 992–93.

233. *See also Moss*, 887 F.2d at 338 ("order of pretrial detention contain[ing] only the conclusory statement that the defendant had failed to rebut the presumption" required remand for "written statement of the reasons for the detention as required by 18 U.S.C. § 3142(i)"); *Vortis*, 785 F.2d at 329 (remanding for written findings to support detention order); United States v. Westbrook, 780 F.2d 1185, 1190 (5th Cir. 1986) (same); *Hurtado*, 779 F.2d at 1480–81 (same).

234. United States v. English, 629 F.3d 311, 320–21 (2d Cir. 2011). *Accord Cisneros*, 328 F.3d at 617 (citing Rule 9(a)(1)); United States v. Peralta, 849 F.2d 625, 626 (D.C. Cir. 1988) (per curiam).

235. *Berrios-Berrios*, 791 F.2d at 253–54 (remanding for statement of reasons). *See also* United States v. Nwokoro, 651 F.3d 108, 110–11 (D.C. Cir. 2011) (remanded: court failed to adequately assess alternatives to detention and factors that favored release).

III. The Crime Victims' Rights Act of 2004

The Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (CVRA), was enacted October 30, 2004[236] and can affect proceedings under the Bail Reform Act. The CVRA provides crime victims certain specific rights that attach as soon as the prosecution begins. It requires, in section 3771(b), that judges "ensure that the crime victim is afforded th[ose] rights," and provides the ways by which those rights may be enforced by the victim or the government in section 3771(d). A "crime victim" is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."[237]

The Department of Justice has the primary responsibility to determine whether there are any victims of the crime and, if so, "see that crime victims are notified of, and accorded, the rights described in subsection (a)."[238] The court, as part of its duty to ensure victims are afforded their rights, should ask the government at the first opportunity if there are any victims and whether they have been notified of their rights. Some of the rights attach even before the defendant appears in court, such as "reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime or of any release . . . of the accused."[239] Victims then have the right "not to be excluded from any such proceeding,"[240] and also "to be reasonably heard at any public proceeding . . . involving release" of the defendant.[241]

These rights clearly attach at the pretrial stage, including the initial appearance and any hearing involving release or detention. To fulfill its duty to ensure that victims are afforded their rights under the CVRA, before holding any public hearings the court should consult with the government about whether it has met its obligation to notify any victims of their rights. If release of the defendant is at issue, the court should ask the government if any victims wish to exercise their right "to be reasonably heard."

236. Justice for All Act of 2004, Pub. L. No. 108-405, Title I, § 102(a), 118 Stat. 2261 (Oct. 30, 2004).

237. 18 U.S.C. § 3771(e)(2)(A).

238. *Id.* § 3771(c)(1). *See also* § 3771(a)(10) (giving victims "the right to be informed of the rights under this section . . . and provided contact information for the Office of the Victims' Rights Ombudsman of the" DOJ).

239. *Id.* § 3771(a)(2).

240. *Id.* § 3771(a)(3) (however, a victim may be excluded if "testimony by the victim would be materially altered if the victim heard other testimony at that proceeding").

241. *Id.* § 3771(a)(4).

Courts must make every effort to permit the fullest possible attendance by victims, and if victims are excluded from any proceeding, courts must clearly state the reasons on the record.[242] The Ninth Circuit has held that the right to be reasonably heard requires that victims be given the right to speak at the hearing.[243] Victims also have the right to proceedings free from unreasonable delay,[244] the right to be reasonably protected from the accused,[245] and the right to be treated with fairness and with respect for their dignity and privacy.[246]

IV. Modification of Detention Order

A. Changed Circumstances

Section 3142(f) expressly authorizes reopening the detention hearing "before or after a determination by the judicial officer, at any time before trial," when material information "that was not known to the movant at the time of the hearing" comes to light. Thus, the D.C. Circuit upheld the reopening of a detention hearing when the government sought to put in evidence a ruling on a suppression motion made after the original hearing.[247] However, courts have interpreted this provision strictly, holding that hearings should not be reopened if the evidence was available at the time of the hearing.[248]

Note that, under section 3145(a), either the defendant or the government may file a motion in the district court "for amendment of the conditions of release."

242. *Id.* § 3771(b) (court shall also "consider reasonable alternatives" to exclusion).

243. Kenna v. United States Dist. Ct. for the C. Dist. of Cal., 435 F.3d 1011, 1016, 1018 (9th Cir. 2006). *Accord* United States v. Vampire Nation, 451 F.3d 189, 197 n.4 (3d Cir. 2006) ("Under the CVRA, courts may not limit victims to a written statement."). *See also* United States v. Ortiz, 636 F.3d 389, 393 (8th Cir. 2011) ("if a defendant's victim exercises his right to be reasonably heard at the defendant's sentencing hearing, the sentencing court *must* allow the victim to be reasonably heard").

244. 18 U.S.C. § 3771(a)(7).

245. *Id.* § 3771(a)(1).

246. *Id.* § 3771(a)(8).

247. United States v. Peralta, 849 F.2d 625, 626–27 (D.C. Cir. 1988) (per curiam).

248. *See* United States v. Dillon, 938 F.2d 1412, 1415 (1st Cir. 1991) (holding district court's refusal to reopen detention hearing not in error where information in affidavits and letters appellant sought to present was available to him at time of hearing) (relying on United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989) (affirming refusal to reopen hearing because "testimony of Hare's family and friends is not new evidence").

B. Length of Detention

Speedy Trial Act deadlines limit the length of pretrial detention. As a result of excludable-time provisions, however, defendants in complex cases may be detained far beyond the theoretical ninety-day maximum under the Speedy Trial Act, thus giving rise to due process concerns.

As noted in section II.B, *supra*, the Supreme Court has left open the possibility that detention could become so long that it would violate the defendant's substantive due process rights.[249] The Court thought, in part, that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."[250] In the first year the Act was effective, the average length of pretrial detention was 53 days.[251] That has steadily increased over the years: 87 days in 1997; 106 days in 2005; 243 days in 2013; and about 250 days from 2014 to 2019 before rising to 293 days in 2020 and 346 in 2021 during the COVID-19 pandemic.[252]

A number of circuit courts acknowledge that lengthy periods of detention may implicate due process concerns.[253] They appear to agree that there is no bright-line time limit for determining if the defendant has been denied due process, and that courts must decide on a case-by-case basis in light of all the circumstances.[254] The Supreme Court, in *United States v. Salerno*, indicated that the point at which the length of detention becomes constitutionally excessive is the point at which the length of detention exceeds the regulatory goals set by Congress.[255] This inquiry requires that courts balance those regulatory goals, and how the detention at issue furthers those goals, against the length of detention. However, no one analytical process or processes appear to have been established by the courts of appeals to aid courts in conducting this balancing in individual cases.

249. *See* United States v. Salerno, 481 U.S. 739, 747 & n.4 (1987).

250. *Id.* at 747.

251. U.S. Department of Justice Bureau of Justice Statistics, "Special Report: Pretrial Release and Detention: The Bail Reform Act of 1984" at 5 (February 1988).

252. Figures are from Judicial Business, *supra* note 66, Table H-9A, for the respective years. The "median" length of detention is lower, but still 185 days in 2019, 239 in 2020, and 259 in 2021.

253. United States v. El-Hage, 213 F.3d 74, 79–81 (2d Cir. 2000) (per curiam); United States v. Infelise, 934 F.2d 103, 104 (7th Cir. 1991); United States v. Tortora, 922 F.2d 880, 889 (1st Cir. 1990); *Hare*, 873 F.2d at 799; United States v. Gelfuso, 838 F.2d 358, 359 (9th Cir. 1988); United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986). *See also* DOJ Manual, *supra* note 17, at 8 ("there is no doubt that the longer the pretrial detention the more likely the denial of due process").

254. *See, e.g.*, *Hare*, 873 F.2d at 801; United States v. Ojeda Rios, 846 F.2d 167, 169 (2d Cir. 1986).

255. 481 U.S. at 747 n.4.

The factors to be considered in such a balancing, however, have been discussed by the courts of appeals. They include some of the factors relevant in the original detention decision—the seriousness of the charges, the strength of the government's case, the risk of flight or dangerousness to the community—as well as others unique to the due process inquiry. The first of these is the length of time the defendant has been in custody as well as the length of time the defendant is expected to remain in custody before trial. This factor, while important, is rarely dispositive.[256] Another very important factor is the extent to which the prosecution bears responsibility for the delay.[257] The strength of the evidence upon which the detention is based is the third additional factor. Though it is a factor in the initial decision to detain, the gravity of the charges can be a particularly important factor in the determination of the constitutionality of a lengthy detention. In *United States v. El-Hage*, for example, the court found that the defendant, who was charged with offenses in connection with terrorist activity, was a "substantial threat to national security interests."[258]

A few circuits are more specific regarding how these factors are considered. The Seventh Circuit has suggested that defendants cannot make a case that their detention is unconstitutional unless they can show that the prosecution, or the court, is unnecessarily delaying the trial regardless of the length of delay.[259] The Ninth Circuit does not go this far, but it does focus the due process inquiry on "the length of confinement in conjunction with the extent to which the prosecution bears responsibility for the delay."[260] The Fifth Circuit requires that the judicial officer considering a due process challenge examine the length of detention, the nonspeculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay.[261]

256. United States v. Millan, 4 F.3d 1038, 1044 (2d Cir. 1993) (lengthy period of detention, "while weighing in favor of release, does not, standing alone, establish that pretrial confinement has exceeded constitutional limits"); *Infelise*, 934 F.2d at 104 ("length of detention cannot be the only consideration").

257. *Gelfuso*, 838 F.2d at 359; United States v. Gonzales Claudio, 806 F.2d 334, 341 (2d Cir. 1986). *See also* United States v. Quartermaine, 913 F.2d 910, 918 (11th Cir. 1990) (citing *Gonzalez Claudio*).

258. 213 F.3d at 80. *See also* United States v. El-Gabrowny, 35 F.3d 63, 64 (2d Cir. 1994) (per curiam) ("extraordinarily serious" charges, combined with other factors, "justify continued detention").

259. *Infelise*, 934 F.2d at 104–05 ("If judge and prosecutor are doing all they reasonably can be expected to do to move the case along, and the statutory criteria for pretrial detention are satisfied, then we do not think a defendant should be allowed to maintain a constitutional challenge to that detention.").

260. *Gelfuso*, 838 F.2d at 359.

261. *Hare*, 873 F.2d at 801 (remanding because magistrate judge "failed to consider several of these factors").

The Seventh Circuit has noted that the remedy for an excessively long period of pretrial detention is not dismissal on due process or double jeopardy grounds. The proper remedy is review of the detention order.[262] After conviction, the claim that pretrial detention violated due process is moot.[263] However, defendants are free to argue that unlawful pretrial detention prejudiced their ability to defend themselves.[264]

V. Revocation and Modification of Release

A. Revocation for Violation of Release Conditions

If a condition of release is violated, the government may move for a revocation of the release order.[265] After a hearing, a court may revoke release if it finds

> (1) . . .
>
> (A) probable cause to believe that the person has committed a . . . crime while on release; or
>
> (B) clear and convincing evidence that the person has violated any other condition of release; and
>
> (2) . . .
>
> (A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or
>
> (B) the person is unlikely to abide by any condition or combination of conditions of release.[266]

A finding of probable cause[267] that the person committed a felony while on release gives rise to a rebuttable presumption that no release conditions can

262. United States v. Warneke, 199 F.3d 906, 908 (7th Cir. 1999).

263. Murphy v. Hunt, 455 U.S. 478, 481 (1982).

264. United States v. Vachon, 869 F.2d 653, 656 (1st Cir. 1989) (but rejecting the argument on the facts of that case).

265. 18 U.S.C. § 3148(b).

266. *Id.*

267. "Probable cause" under section 3148(b)(1)(A) means "that the facts available to the judicial officer 'warrant a man of reasonable caution in the belief' that the defendant has committed a crime while on bail." United States v. Gotti, 794 F.2d 773, 777 (2d Cir. 1986). *Accord* United States v. Aron, 904 F.2d 221, 224 (5th Cir. 1990); United States v. Cook, 880 F.2d 1158, 1160 (10th Cir. 1989) (per curiam). The Sixth Circuit has agreed, but in unpublished decisions. *See, e.g.*, United States v. Gentry, 156 F.3d 1233 (6th Cir. 1998) (unpublished order) (citing the cases above).

assure the safety of others.[268] If the defendant produces evidence to rebut the presumption, "the presumption remains a factor for consideration by the district court in determining whether to release or detain."[269]

There is disagreement about whether release should be revoked if the defendant does not come forward with any evidence to overcome the presumption. The Tenth Circuit held that the analysis under section 3142(f) and (g) "does not come into play *unless and until the* judicial officer finds under § 3148(b)(2)(B) that the *defendant has overcome the statutory rebuttable presumption*."[270] The Seventh Circuit concluded otherwise, holding that "the burden of persuasion always rests with the government and an unrebutted presumption is not, by itself, an adequate reason to order detention. . . . Rather, the presumption is considered together with the factors listed in § 3142(g)."[271]

If the court finds that some condition or conditions of release will assure the defendant's appearance and the community's safety, *and* finds that the defendant will abide by those conditions, the court may amend the conditions in accordance with section 3142.[272] Where the revocation hearing is precipitated by the defendant's arrest on a new charge, and the new charge is itself grounds for a detention hearing, the revocation determination is separate from the detention decision on the new charge.[273]

The Second and Fifth Circuits held that section 3148(b)(2) findings must be supported by a preponderance of the evidence.[274]

The Act does not address the nature of a section 3148 hearing or whether specific findings must be made. However, the Second Circuit has held that a section 3148 hearing and a section 3142 hearing offer the same protections, such

268. 18 U.S.C. § 3148(b).

269. United States v. Stricklin, 932 F.2d 1353, 1355 (10th Cir. 1991). *Accord*, United States v. Manafort, 897 F.3d 340, 344 (D.C. Cir. 2018) ("the presumption remained a relevant factor in the District Court's assessment of the danger Appellant may pose to the safety of the community").

270. *See Cook*, 880 F.2d at 1162 (reversing decision not to revoke where district court found the rebuttable presumption of dangerousness established and defendant offered no evidence to rebut it) (quoting United States v. McKethan, 602 F. Supp. 719, 721–22 (D.D.C. 1985) (emphasis added in *Cook*).

271. United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021) (reversing revocation of pretrial release where district court did not consider the section 3142(g) factors in determining that detention was necessary). See also cases at notes 181–82 and accompanying text.

272. 18 U.S.C. § 3148(b).

273. *See McKethan*, 602 F. Supp. at 721–22.

274. *Aron*, 904 F.2d at 224; *Gotti*, 794 F.2d at 778. *See also Manafort*, 897 F.3d at 344–45 & n.1 (affirming revocation of release where district court's use of preponderance standard was not contested, adding that "district courts would be well advised to state the standard of proof being employed on the record in future circumstances").

as the right to testify and present evidence.[275] As in section 3142 hearings, the government may proceed by proffer.[276] The section 3142 protections are discussed in section II. Pretrial Detention, *supra*.

The authorization of sanctions under section 3148(a) for violating a condition of release ("revocation of release, an order of detention, and a prosecution for contempt of court") does not preclude sanctions under Federal Rule of Criminal Procedure 46(f). That provision authorizes the court to order the forfeiture of a bail bond upon the breach of a condition of release.[277]

B. Modification or Revocation Where Defendant Has Not Violated Release Conditions

Under section 3142(c)(3), a judicial officer "may at any time amend the order to impose additional or different conditions of release." This provision recognizes "the possibility that a changed situation or new information" may come to the attention of the court.[278]

VI. Review by the District Judge

The district judge may review a magistrate judge's release order on motion by the government or the defendant,[279] but only a detainee may move the district judge to revoke or amend a magistrate judge's detention order.[280] Only the district court in the prosecuting district may reverse a release or detention order of a magistrate

275. United States v. Davis, 845 F.2d 412, 414 (2d Cir. 1988) (remanding a detention order where defendant had not been permitted to testify and present evidence and the trial court had not made explicit findings or given its reasons for revocation and detention). *See also Cook*, 880 F.2d at 1162 (citing *Davis* for allowing defendant to present evidence, and "suggest[ing] . . . that district courts furnish a brief statement of reasons for granting release or for denying a motion to revoke release"); United States v. Trudgen, 627 Fed. Appx. 156, 159 & n.7 (3d Cir. 2015) (citing *Davis* in affirming revocation where defendant was allowed to testify and present evidence and received a clear record of the court's findings).

276. United States v. LaFontaine, 210 F.3d 125, 130 (2d Cir. 2000).

277. United States v. Gigante, 85 F.3d 83 (2d Cir. 1996); United States v. Vaccaro, 51 F.3d 189, 191 (9th Cir. 1995).

278. Senate Report, *supra* note 8, at 16.

279. 18 U.S.C. § 3145(a)(1), (2).

280. *Id.* § 3145(b).

judge in the district of arrest.[281] Review in the prosecuting district must be before the district judge, not the magistrate judge.[282]

The review is de novo, and the district court "must make an independent determination of the proper pretrial detention or conditions for release."[283] The district judge need not defer to the magistrate judge's findings and conclusions or give specific reasons for rejecting them.[284] The district judge may take additional evidence or conduct a new evidentiary hearing when appropriate.[285] Following the hearing, the district judge should explain, on the record, the reasons for the court's decision.[286]

Review of a detention or release order "shall be determined promptly."[287] The statute does not define "promptly" or set forth a remedy for review that is not prompt. The Supreme Court has said that release is generally not the appropriate remedy for an untimely initial hearing.[288] The First Circuit held that, where the district judge "was attentive to the need for promptness, but unable to accommodate [the review] because of judicial travel commitments," delay was

281. United States v. Vega, 438 F.3d 801, 803 (7th Cir. 2006); United States v. Cisneros, 328 F.3d 610, 615 (10th Cir. 2003); United States v. El-Edwy, 272 F.3d 149, 153–54 (2d Cir. 2001); United States v. Torres, 86 F.3d 1029, 1031 (11th Cir. 1996); United States v. Evans, 62 F.3d 1233, 1237 (9th Cir. 1995).

282. *See Vega*, 438 F.3d at 802; *Cisneros*, 328 F.3d at 615; *Evans*, 62 F.3d at 1239.

283. United States v. Rueben, 974 F.2d 580, 585 (5th Cir. 1992). *Accord Cisneros*, 328 F.3d at 616 n.1; United States v. Tortora, 922 F.2d 880, 883 n.4 (1st Cir. 1990); United States v. Koenig, 912 F.2d 1190, 1191 (9th Cir. 1990); United States v. Clark, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc); United States v. King, 849 F.2d 485, 489–90 (11th Cir. 1988); United States v. Leon, 766 F.2d 77, 80 (2d Cir. 1985); United States v. Delker, 757 F.2d 1390, 1394–95 (3d Cir. 1985); United States v. Maull, 773 F.2d 1479, 1482 (8th Cir. 1985) (en banc).

284. *Koenig*, 912 F.2d at 1193; *Leon*, 766 F.2d at 80; *Delker*, 757 F.2d at 1394–95; United States v. Medina, 775 F.2d 1398, 1402 (11th Cir. 1985).

285. *Koenig*, 912 F.2d at 1193; *Delker*, 757 F.2d at 1393–94; United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985) (district judge should consider record plus additional evidence). The Third Circuit advises district judges to consider whether a transcript of the proceedings before the magistrate judge will help determine if more evidence is needed. *Delker*, 757 F.2d at 1395 n.3. The Eighth Circuit has held that the district judge should have a full de novo evidentiary hearing if either side requests one. *Maull*, 773 F.2d at 1481–82.

286. The Eleventh Circuit's rule is that the district judge may, after independent review, adopt the magistrate judge's pretrial detention order. The explicit adoption of that order eliminates the need for the district judge to prepare separate written findings of fact and a statement of reasons. *King*, 849 F.2d at 490.

287. 18 U.S.C. § 3145(c).

288. United States v. Montalvo-Murillo, 495 U.S. 711, 716–17 (1990), discussed *supra*, text accompanying notes 138–146.

excusable.[289] The Ninth Circuit held that a thirty-day delay violates the requirement and that conditional release is an appropriate remedy.[290] However, in a subsequent case, the Ninth Circuit limited this holding to cases where detention is based on risk of flight. The court held that where the detention is based on danger to the community, release is not a proper remedy.[291] The Fifth Circuit agrees.[292] The Fourth Circuit has said that automatic release is not an appropriate remedy for any violation of the Act.[293]

VII. Review by the Court of Appeals

The defendant and the government may directly appeal a trial court's release order, and the defendant may appeal a detention order, without first seeking reconsideration in the trial court. Such appeals are to be determined "promptly."[294]

The courts of appeals differ on the standard for reviewing trial court determinations under the Bail Reform Act. Though the articulation of the standards varies from circuit to circuit, the various statements of those standards may be summarized into three approaches. The Second, Fourth, and Fifth Circuits are the most deferential to the determinations of the district courts. The Second Circuit has indicated that it will examine the district courts' determinations for "clear error."[295] This deference is applicable to a district court's overall determination as well as specific factual determinations.[296] The D.C. and Fourth Circuits' "clearly

289. United States v. Palmer-Contreras, 835 F.2d 15, 19 (1st Cir. 1987) (stating further, "in the unique circumstances of this case, . . . the judge's attendance at the judicial conference constituted good cause for delay").

290. United States v. Fernandez-Alfonso, 813 F.2d 1571, 1572 (9th Cir. 1987).

291. United States v. Gonzales, 852 F.2d 1214, 1215 (9th Cir. 1988). Because defendant sought only conditional release, the court left open the question "whether there are other remedies for a district court's failure to determine promptly a motion for revocation of a detention order when the defendant poses a danger to the community."

292. United States v. Barker, 876 F.2d 475, 476 (5th Cir. 1989).

293. *Clark*, 865 F.2d at 1436 ("in cases where the requirements of the Bail Reform Act are not properly met, automatic release is not the appropriate remedy").

294. 18 U.S.C. § 3145(c). Section 3145(c) incorporates by reference the provisions of 18 U.S.C. § 3731 ("Appeal by the United States:" government may appeal a decision granting the release of a defendant or denying a motion for revocation or modification of release) and 28 U.S.C. § 1291. Such appeals are governed by Rule 9 of the Federal Rules of Appellate Procedure.

295. United States v. Ferranti, 66 F.3d 540, 542 (2d Cir. 1995). *See also* United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985). If a district court's findings raise constitutional issues, they are reviewed de novo. United States v. Millan, 4 F.3d 1038, 1043 (2d Cir. 1993).

296. United States v. Berrios-Berrios, 791 F.2d 246, 247 (2d Cir. 1986).

erroneous" standard is similar.[297] The Fifth Circuit reviews a district court's factual findings for clear error, and will affirm the court's detention order "if it is supported by the proceedings below."[298]

The First and Third Circuits take an intermediate approach. The First undertakes an independent review, but with some deference to the determinations made by the district court. This level of scrutiny is "more rigorous than the abuse-of-discretion or clear-error standards, but stopping short of plenary or *de novo* review."[299] The First Circuit emphasizes that the scope of review is less deferential if the district court does not provide detailed reasons for its decision.[300] The court of appeals is free to consider material not presented in the district court.[301] Similarly, the Third Circuit undertakes an independent review while giving "respectful consideration" to the lower court's determination.[302]

The Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits are the least deferential to the district courts' determinations. They review de novo the district court's ultimate determination (although they give deference to particular findings of fact).[303]

297. United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc); United States v. Simpkins, 826 F.2d 94, 96 (D.C. Cir. 1987). *See also* United States v. Weissberger, 951 F.2d 392, 399 (D.C. Cir. 1991) ("trial court's determination whether to deny bail on the grounds that the defendant poses a threat to the safety of the community must be upheld unless clearly erroneous").

298. United States v. Aron, 904 F.2d 221, 223 (5th Cir. 1990) (quoting United States v. Barker, 876 F.2d 475, 476 (5th Cir. 1989)). The Fifth Circuit has also equated its "narrow standard of review . . . to the abuse of discretion standard." United States v. Araneda, 899 F.2d 368, 370 (5th Cir. 1990) (quoting United States v. Jackson, 845 F.2d 1262, 1263 (5th Cir. 1988)).

299. United States v. Tortora, 922 F.2d 880, 883 (1st Cir. 1990).

300. *Id.*

301. Fed. R. App. P. 9(a); United States v. Patriarca, 948 F.2d 789, 795 n.6 (1st Cir. 1991); *Tortora*, 922 F.2d at 883; United States v. O'Brien, 895 F.2d 810, 814 (1st Cir. 1990).

302. *See* United States v. Delker, 757 F.2d 1390, 1399 (3d Cir. 1985); United States v. Traitz, 807 F.2d 322, 325 (3d Cir. 1986).

303. *See, e.g.*, United States v. Cantu, 935 F.2d 950, 951 (8th Cir. 1991); United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990); United States v. Montalvo-Murillo, 876 F.2d 826, 830 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711 (1990); United States v. Portes, 786 F.2d 758, 762 (7th Cir. 1985); United States v. Hurtado, 779 F.2d 1467, 1472 (11th Cir. 1985); United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985).

VIII. Release or Detention Pending Sentence

Section 3143(a) governs the release or detention of defendants "found guilty" and awaiting imposition or execution of a sentence of imprisonment. Neither section 3143(a) nor any other provision covers situations in which the Sentencing Guidelines do not recommend a term of imprisonment.[304] All convicted defendants, except those convicted of crimes of violence, offenses with a maximum sentence of life imprisonment or death, or certain drug-related offenses carrying a maximum term of ten years or more, shall be detained unless the judicial officer finds by clear and convincing evidence that the person is neither likely to flee nor pose a danger to the safety of any other person or the community if released.[305] For release to be in order, then, the judicial officer must find both nonlikelihood of flight and nondangerousness.[306] Release is made in accordance with section 3142.

Generally, defendants convicted of crimes of violence, offenses with a maximum sentence of life imprisonment or death, or drug-related offenses carrying a maximum term of ten or more years—crimes listed in sections 3142(f)(1)(A), (B), and (C)—must be detained unless the judicial officer finds (1) either "a substantial likelihood that a motion for acquittal or new trial will be granted," or the government recommends that imprisonment not be imposed; and (2) "by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community."[307]

The Fifth and Tenth Circuits held that defendants detained under section 3143(a)(2) may be released if the findings of section 3143(a)(1) on flight and danger are met and there are "exceptional reasons," under section 3145(c), as to why the defendant should be released.[308] Several circuits have held that district judges are "judicial officers" under section 3145(c) "and thereby authorized to release defendants under § 3145(c) when 'exceptional reasons' exist."[309]

304. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Sentencing Guidelines are advisory. Judges must therefore consult the Guidelines, but are not bound by them.

305. 18 U.S.C. § 3143(a)(1).

306. *See* United States v. Manso-Portes, 838 F.2d 889, 889–90 (7th Cir. 1987).

307. 18 U.S.C. § 3143(a)(2).

308. United States v. Jones, 979 F.2d 804, 806 (10th Cir. 1992) (per curiam); United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1992) (per curiam) (holding 18 U.S.C. § 3145(c) applies).

309. United States v. Goforth, 546 F.3d 712, 715–16 (4th Cir. 2008). *See also* United States v. Meister, 744 F.3d 1236, 1238–39 (11th Cir. 2013); United States v. Christman, 596 F.3d 870, 871 (6th Cir. 2010); United States v. Garcia, 340 F.3d 1013, 1014 n.1 (9th Cir. 2003); *Jones*, 979 F.2d at 806; United States v. Herrera-Soto, 961 F.2d 645, 647 (7th Cir. 1992); United States v. DiSomma, 951 F.2d 494, 496 (2d Cir. 1991). See also section IX.C *infra*, discussing "exceptional circumstances."

The Sixth Circuit found it error to release a convicted defendant without holding a hearing simply because the court believed that he was not dangerous; the government was entitled to an opportunity to respond to the defendant's evidence and offer its own.[310] The Seventh Circuit has gone further and interpreted section 3143 as establishing a rebuttable presumption of dangerousness, maintaining that the "clear and convincing" standard cannot be met if the defendant offers no evidence, even if the court does not believe the defendant is dangerous.[311]

The Second and Sixth Circuits have criticized district courts that relied too much on a defendant's demeanor or the opinions of family members concerning risk of flight or dangerousness.[312]

As with pretrial detention, dangerousness under section 3143 is not limited to physical danger.[313]

The Second Circuit held that, for the purposes of section 3143(a), a defendant is "found guilty" the moment a jury returns a guilty verdict, even before the court has entered judgment.[314] Once the defendant has filed an appeal, release under this section is no longer appropriate and section 3143(b) applies.

Legislative history suggests that section 3143(a) covers those awaiting "execution" of a sentence in order to make clear that a person may be released for a short period after sentencing "for such matters as getting his affairs in order prior to surrendering for service of sentence."[315]

The Seventh Circuit held that release pursuant to section 3143(a) is improper if the defendant awaits resentencing not because of an infirmity in the original sentence, but because the vacation of a concurrent sentence might lead the sentencing judge to reconsider a sentence not vacated.[316]

310. United States v. Vance, 851 F.2d 166, 168 (6th Cir. 1988).

311. *Manso-Portes*, 838 F.2d at 890.

312. United States v. London-Villa, 898 F.2d 328, 330 (2d Cir. 1990); *Vance*, 851 F.2d at 168. *See supra* note 110, concerning same point in connection with initial detention decision.

313. The legislative history specifically mentions drug trafficking as a danger to the community. *See* Senate Report, *supra* note 8, at 12–13. *See also Manso-Portes*, 838 F.2d at 890 (holding section 3143 applies to drug offenders).

314. United States v. Bloomer, 967 F.2d 761, 763 (2d Cir. 1992).

315. Senate Report, *supra* note 8, at 26.

316. United States v. Holzer, 848 F.2d 822, 824 (7th Cir 1988). *See also* United States v. Olis, 450 F.3d 583, 586–87 (5th Cir. 2006) (section 3143(a) does not apply to defendant whose conviction has been affirmed and he is "simply awaiting resentencing" and has served far less than his possible new sentence).

IX. Release or Detention Pending Appeal

A. Release Requirements

A defendant who has been sentenced for a crime not listed in section 3142(f)(1)(A), (B), or (C)—crimes of violence, offenses carrying a maximum sentence of life imprisonment or death, or drug offenses carrying a maximum sentence of ten years or more—and who is pursuing an appeal or a petition for certiorari[317]—must be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the community, and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in" reversal, a new trial, or a sentence of no imprisonment or imprisonment less than the time already served plus the expected length of an appeal.[318]

If a defendant is appealing conviction for a crime that is listed in section 3142(f)(1)(A), (B), or (C), detention is mandatory[319] unless the judicial officer finds no risk of flight or danger and a "substantial question" *and* finds that "there are exceptional reasons why such person's detention would not be appropriate."[320]

If the government is appealing a sentence of imprisonment, but the defendant is not, the defendant shall be detained during the appeal.[321]

If release is based on a likelihood of reversal, the court must find a likelihood of reversal on all counts for which imprisonment was imposed.[322]

317. In *United States v. Snyder*, 946 F.2d 1125, 1126 (5th Cir. 1991), the Fifth Circuit held that the district court, court of appeals, and Supreme Court have concurrent jurisdiction to decide whether to release a defendant on bail while a petition for certiorari is pending.

318. 18 U.S.C. § 3143(b)(1)(A) & (B).

319. *Id.* § 3143(b)(2).

320. *Id.* § 3145(c). *See also* United States v. Herrera-Soto, 961 F.2d 645, 646 (7th Cir. 1992) (section 3145(c) not limited to appeals of detention orders); United States v. DiSomma, 951 F.2d 494, 496 (2d Cir. 1991) (same).

321. 18 U.S.C. § 3143(c).

322. Morison v. United States, 486 U.S. 1306 (1987) (denying application for release because, although defendant raised substantial question with respect to his conviction on one count, he did not do so with respect to all counts for which imprisonment was imposed).

The burden is on the defendant to show that the criteria for release are met.[323] Section 3143(b)(1)(A) explicitly states that nonlikelihood of fleeing and nondangerousness must be established by clear and convincing evidence.[324] It does not address the standards for determining that the appeal is not for the purpose of delay and that the appeal raises a substantial question pursuant to section 3143(b)(1)(B). The Tenth Circuit, the only circuit to address this question, held that the "preponderance of evidence" standard applies.[325]

The district court must state on the record its reasons for denying release pending appeal.[326] The statement of reasons may be made either through written findings or through a transcript of an oral statement.[327] Noting the injustice of a defendant's prevailing on appeal only after serving most of a sentence, the Seventh Circuit urges district courts to "stat[e] in detail their reasons for denying a petition for release pending appeal, especially in a case . . . in which the defendants posed no danger to the community and apparently negligible threat of flight."[328]

Section 3143(b) applies only to a defendant "who has filed an appeal or a petition for a writ of certiorari."[329] It does not apply to defendants seeking post-conviction relief.[330] Thus, the D.C. Circuit held that release is not available pending appeal of the denial of a motion for a new trial made pursuant to Federal Rule of Criminal Procedure 33.[331]

323. United States v. Montoya, 908 F.2d 450, 451 (9th Cir. 1990); United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985); United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985); United States v. Valera-Elizondo, 761 F.2d 1020, 1025 (5th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985); United States v. Affleck, 765 F.2d 944, 953 (10th Cir. 1985) (en banc); United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc) (burden of showing merit of appeal); United States v. Giancola, 754 F.2d 898, 900–01 (11th Cir. 1985) (per curiam).

324. 18 U.S.C. § 3143(b)(1)(A).

325. *Affleck*, 765 F.2d at 953 n.15. *See also* United States v. Delanoy, 867 F. Supp. 114, 116 (N.D.N.Y. 1994) (stating section 3143(b)(1)(B) "must be analyzed under a preponderance of the evidence standard"), *aff'd* 60 F.3d 812 (1995).

326. Fed. R. App. P. 9(b); United States v. Wheeler, 795 F.2d 839, 840–41 (9th Cir. 1986) (remanding for statement of reasons). See also the discussion in section I.C. Written Findings Required, *supra*.

327. *Wheeler*, 795 F.2d at 841.

328. United States v. Harris, 942 F.2d 1125, 1135 n.7 (7th Cir. 1991). The court also urged counsel who believe their clients' petition for release should have been granted to renew the petition in their appellate briefs.

329. 18 U.S.C. § 3143(b).

330. Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985). *Accord* United States v. Dade, 959 F.3d 1136, 1139 (9th Cir. 2020).

331. United States v. Kelly, 790 F.2d 130, 139 (D.C. Cir. 1986). *Accord* United States v. Mett, 41 F.3d 1281, 1282 (9th Cir. 1994).

When a defendant is awaiting resentencing after an original sentence has been vacated, and the defendant has filed a petition for certiorari, the Seventh Circuit has held that section 3143(b) and not 3143(a) controls release. The court cautioned that "[a]n imprisoned person is not to be released pending further proceedings if it is a certainty that however those proceedings are resolved, he will have to be returned to prison."[332]

B. Definitions of "Substantial Question" and "Likely"[333]

Under section 3143(b)(1)(B), the appeal of a defendant seeking release while the appeal is pending must raise "a substantial question of law or fact likely to result in" reversal, a new trial, no imprisonment, or a term of imprisonment less than already served plus the time expected for the appeal.

The definition of "substantial question of law or fact" varies slightly among the circuits. Most circuits define it as "a 'close' question or one that very well could be decided the other way."[334] The Ninth Circuit declined to endorse the "close" question standard, holding instead that the question must be "fairly debatable" or "fairly doubtful."[335] The Third Circuit has indicated its preference for the "fairly debatable" criterion.[336]

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332. United States v. Krilich, 178 F.3d 859, 926 (7th Cir. 1999). See also *United States v. LaGiglio*, 384 F.3d 925 (7th Cir. 2004), where, in a decision after the Seventh Circuit decision in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), but before that decision was affirmed, 543 U.S. 220 (2005), the court remanded the issue of resentencing to the district court to determine, under section 3143(b), whether it was likely that a new sentence would already be served by the time the appeal was resolved.

333. Although the likelihood of prevailing on appeal is, by the terms of the statute, applicable only to determinations of release pending appeal, not determinations of release pending sentencing, the First Circuit has held that in the latter context it may be relevant to the issue of likelihood of flight. United States v. Castiello, 878 F.2d 554, 555 (1st Cir. 1989) (per curiam).

334. *Giancola*, 754 F.2d at 901. *Accord* United States v. Eaken, 995 F.2d 740, 741 (7th Cir. 1993); United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991); United States v. Perholtz, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); *Affleck*, 765 F.2d at 952; *Randell*, 761 F.2d at 125; *Valera-Elizondo*, 761 F.2d at 1024; *Powell*, 761 F.2d at 1231.

335. United States v. Handy, 761 F.2d 1279, 1281–83 (9th Cir. 1985). In a subsequent case, the Ninth Circuit held that the defendant must do more than identify the argument to be made in support of an appeal; the defendant must explain the basis for that argument and give at least some indication of why the argument is likely to prevail. *Montoya*, 908 F.2d at 450–51.

336. United States v. Smith, 793 F.2d 85, 87–90 (3d Cir. 1986) (also stressing that the question must be "significant."). An earlier Third Circuit case, *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985), defined a "substantial question" as "one which is . . . novel, which has not been decided by controlling precedent, or which is fairly doubtful."

The requirement that the substantial question be "likely" to result in reversal, a new trial, or a sentence without imprisonment is not as straightforward as it may seem. The Third Circuit rejected the literal interpretation, which implies that a court should grant bail pending appeal only if it finds its own rulings likely to be reversed, and held that the "likely" requirement is met as long as the substantial "question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction."[337] If the alleged error would be deemed harmless error, or was not adequately preserved for appeal, it does not meet this requirement.[338] Several courts have adopted the Third Circuit's approach.[339] Other courts have held that a determination that the defendant's appeal is "likely" to result in reversal, a new trial, or a sentence without imprisonment means this result is "more probable than not."[340] The Seventh Circuit specifies that "§ 3143(b) 'requires an affirmative finding that the chance for reversal is substantial. . . . [A] conviction is presumed to be correct.'"[341]

C. "Exceptional Reasons"

Defendants convicted of certain crimes, or crimes carrying certain sentences, must be detained absent "exceptional reasons" why their detention is inappropriate.[342] The Second Circuit has noted that because the "legislative history on the issue [of what constitutes exceptional reasons] is sparse and uninformative," a "case by case evaluation is essential" with broad discretion given to the trial judge.[343] The court defined exceptional circumstances as a "unique combination of circumstances giving rise to situations that are out of the ordinary," adding that "an unusual legal or factual question can be sufficient," and that there is no "requirement of absolute legal novelty."[344] The court upheld a district court's determination that exceptional circumstances were present where the defendant's

337. *Miller*, 753 F.2d at 23.

338. *Id.*

339. *Steinhorn*, 927 F.2d at 196; *Bayko*, 774 F.2d at 522; *Affleck*, 765 F.2d at 953; *Randell*, 761 F.2d at 125; *Handy*, 761 F.2d at 1283; *Giancola*, 754 F.2d at 900.

340. Pollard, 778 F.2d at 1182; *Bilanzich*, 771 F.2d at 299; *Valera-Elizondo*, 761 F.2d at 1025; *Powell*, 761 F.2d at 1233.

341. United States v. Ashman, 964 F.2d 596, 599 (7th Cir. 1992) (quoting *Bilanzich*, 771 F.2d at 298).

342. 18 U.S.C. § 3145(c).

343. United States v. DiSomma, 951 F.2d 494, 497 (2d Cir. 1991). *Accord* United States v. Herrera-Soto, 961 F.2d 645, 647 (7th Cir. 1992). *See also* United States v. Mutte, 383 Fed. Appx. 716, 718 (10th Cir. 2010) (agreeing with the "case by case evaluation" standard in *DiSomma*).

344. *DiSomma*, 951 F.2d at 497.

appeal challenged the very element of the crime that entailed the "violence" justifying detention. In another case, the Second Circuit reversed a district court's finding that exceptional circumstances existed because the defendant was employed full time and was a college student with no prior convictions. The court found that such circumstances were not exceptional and, citing a district court case that had collected and discussed a great many of the cases in this area, noted that "circumstances that are 'purely personal' do not typically rise to the level of 'exceptional' warranting release."[345]

The Ninth Circuit agreed that district courts should have "broad discretion . . . to consider all the particular circumstances of the case before it and draw upon its broad 'experience with the mainsprings of human conduct.'"[346] The court "place[d] no limit on the range of matters the district court may consider. [It] should examine the totality of the circumstances and . . . determine whether, due to any truly unusual factors or combination of factors . . . it would be unreasonable to incarcerate the defendant [pending] resolution of his appeal."[347] Examples of exceptional reasons, alone or in combination, could include aberrational conduct, that the offense was "sufficiently dissimilar from the others in that category," any "circumstances that would render the hardships of prison unusually harsh for a particular defendant," and the nature of defendant's arguments in the appeal.[348]

The Eighth Circuit has defined "exceptional" as "clearly out of the ordinary, uncommon, or rare," and concluded that a defendant's "compliance with the terms of his pretrial release, his lack of a criminal record, his payment of child support, and his ongoing employment are commendable," but not exceptional under section 3145(c).[349]

345. United States v. Lea, 360 F.3d 401, 403 (2d Cir. 2004) (quoting with approval United States v. Lippold, 175 F. Supp. 2d 537, 540 (S.D.N.Y. 2001)). *See also* United States v. Mostrom, 11 F.3d 93 (2d Cir. 1993).

346. United States v. Garcia, 340 F.3d 1013, 1018 (9th Cir. 2003).

347. *Id.* at 1018–19. *See also Mutte*, 383 Fed. Appx. at 718 (citing the *Garcia* standard with approval).

348. *Garcia*, 340 F.3d at 1019–21 (also emphasizing "that the factors we mention here are by no means exclusive").

349. United States v. Larue, 478 F.3d 924, 925 (8th Cir. 2007) (per curiam). *See also* United States v. Velarde, 555 Fed. Appx. 840, 841 (10th Cir. 2014) ("The statutory reference to *exceptional* reasons has real substance; circumstances that do not extend beyond the ordinary provide no basis for release under § 3145(c).").

X. Release or Detention of a Material Witness

A material witness is subject to detention if certain conditions, including the inadequacy of preserving the witness's testimony through deposition, are met.[350] Section 3144 provides that a material witness be treated in accordance with the provisions of section 3142. According to one district court, that directive includes a right to appointed counsel if the witness is unable to retain counsel.[351] The Second Circuit has held that section 3144 applies to grand jury proceedings.[352]

XI. Release or Detention Pending Revocation of Probation or Supervised Release

The Bail Reform Act does not specifically address the issue of bail pending hearings on violations of probation and supervised release. The provisions of section 3143, however, are incorporated by reference. Rule 46(d) of the Federal Rules of Criminal Procedure provides that "Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release." Under Rule 32.1(a)(6), a defendant awaiting a revocation hearing may be "release[d] or detain[ed] . . . under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person."

XII. Offense Committed While on Release

Under 18 U.S.C. § 3147, a person convicted of another offense while released under the Bail Reform Act shall receive up to a ten-year term of imprisonment if the offense is a felony and up to one year if a misdemeanor, to run consecutively with the sentence imposed for the original offense.[353] In a Ninth Circuit case,[354]

350. 18 U.S.C. § 3144.

351. *See In re* Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the W. Dist. of Tex., 612 F. Supp. 940, 942–43 (W.D. Tex. 1985).

352. United States v. Awadallah, 349 F.3d 42, 49 (2d Cir. 2003).

353. In *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam), the Supreme Court held that this term of imprisonment may be suspended and probation imposed under 18 U.S.C. § 3651. However, the Sentencing Reform Act of 1984 repealed section 3651, and the Supreme Court decision applies only to offenses committed before Nov. 1, 1987.

354. United States v. Galliano, 977 F.2d 1350 (9th Cir. 1992).

the defendant pled guilty to several offenses committed while on release and one that was not committed while on release. The latter carried the longest sentence, fifty-one months. The sentences were imposed concurrently, totaling fifty-one months, with a section 3147 enhancement of fourteen months to run consecutively. The defendant argued that section 3147 enhancements should run consecutively only to sentences for offenses committed during release on bail. The court disagreed: "The plain language of section 3147(1) requires the enhancement term to run consecutively to any other sentence of imprisonment regardless of when the underlying offense was committed."[355]

The Fifth Circuit clarified that a section 3147 enhancement applies to the sentence for the new crime committed while on release, not to the original crime for which the defendant was on release.[356] The Fifth Circuit also noted that section 3147 applies only to federal offenses committed while the defendant is on release, not to state offenses.[357]

The Fourth and Sixth Circuits have held that a defendant who fails to appear in violation of the provisions of 18 U.S.C. § 3146 is subject to an enhancement under section 3147.[358] The Sixth Circuit rejected the defendant's argument that such an interpretation of section 3147 amounted to a violation of the Double Jeopardy Clause.[359]

Several circuits disagree on whether section 3142(h)(2)(A)'s requirement that a releasing judge notify a person of "the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release," applies to the imposition of an additional sentence pursuant to section 3147. See notes 48–52, *supra*, and accompanying text.

A number of defendants have protested their enhanced sentences, arguing that section 3147 establishes an independent offense for which they cannot be punished absent separate indictment and trial. The courts have rejected that contention, holding that section 3147 is a sentence enhancement provision and does not establish a separate offense.[360]

355. *Id.* at 1351.

356. United States v. Pace, 955 F.2d 270, 278–79 (5th Cir. 1992).

357. *Id.*

358. United States v. Fitzgerald, 435 F.3d 484, 486 (4th Cir. 2006); United States v. Benson, 134 F.3d 787, 788 (6th Cir. 1998).

359. *Fitzgerald*, 435 F.3d at 487.

360. United States v. Browning, 61 F.3d 752, 756 (10th Cir. 1995); United States v. Jackson, 891 F.2d 1151, 1152–53 (5th Cir. 1989); United States v. DiPasquale, 864 F.2d 271, 279–80 (3d Cir. 1988); United States v. Feldhacker, 849 F.2d 293, 298–99 (8th Cir. 1988); United States v. Patterson, 820 F.2d 1524, 1526–27 (9th Cir. 1987).

This issue arose anew after the Supreme Court's decision in *Apprendi v. New Jersey*.[361] The defendants argued that the pre-*Apprendi* characterizations of sentencing factors and elements of the offense were no longer controlling and that section 3147 establishes a sentencing enhancement that requires the charging and proof of facts that increase the sentence above the otherwise applicable maximum. Courts that considered this issue, however, held that the Sentencing Commission essentially mooted the argument.[362] Originally, section 2J1.7 of the Sentencing Guidelines encouraged judges to sentence within the guideline range for the base offense of conviction (accordingly, within the statutory maximum for the new offense) and to use the section 3147 enhancement only to determine where a sentence should be imposed within that range. Sentencing in accordance with the Guidelines was not, therefore, found to have resulted in an enhancement that falls within the concerns of *Apprendi*.

Section 2J1.7 was replaced in 2006 by new section 3C1.3, which states that if the "enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels." Thus, it is possible that the enhanced guideline range and sentence could exceed the statutory maximum for the offense committed while on release, thereby violating *Apprendi*. In that case, the elements of § 3147 would have to be found by the jury. As the Third Circuit concluded, "when a sentencing enhancement would increase the maximum sentence to which a defendant is to be exposed, it must be submitted to the jury and its elements proven beyond a reasonable doubt."[363]

XIII. Sanctions

A. Failure to Appear

Section 3146 specifies the sanctions, including fines, imprisonment, and forfeiture, for failure to appear in court and failure to surrender for service of sentence.[364] Under section 3146(c), "uncontrollable circumstances" not caused by the defendant is an affirmative defense, provided the person appeared or surrendered as soon as the circumstances ceased to exist.

361. 530 U.S. 466 (2000).

362. United States v. Samuel, 296 F.3d 1169, 1172–75 (D.C. Cir. 2002); United States v. Randall, 287 F.3d 27, 30 (1st Cir. 2002). Several courts have also refused to reverse sentences under section 3147 because the complete sentence did not exceed the maximum statutory sentence for the base offense. *See* United States v. Gillon, 348 F.3d 755, 758 (8th Cir. 2003); United States v. Kentz, 251 F.3d 835, 844 (9th Cir. 2001); United States v. Ellis, 241 F.3d 1096, 1103 (9th Cir. 2001); United States v. Parolin, 239 F.3d 922, 929 (7th Cir. 2001).

363. United States v. Lewis, 660 F.3d 189, 195 (3d Cir. 2011).

364. *See* 18 U.S.C. § 3146(b), (d).

Courts require the failure to appear to be "willful" or "knowing."[365] However, the Tenth Circuit has twice sustained convictions where defendants lacked actual notice of the court proceeding in question. In one case, the defendant, a fugitive for an extended period, claimed he did not knowingly fail to appear on the date in question because he only subsequently learned the date. Finding that failure to appear is a continuing offense, the court held that the government need not prove an exact date for the completed offense and that the defendant should have contacted the court.[366] The Tenth Circuit rejected another defendant's contention that his failure to appear could not be willful because he never received notice of the proceeding: the defendant "was a fugitive as soon as he failed to comply with the terms of the supervised release and absented himself. . . . [He] made no attempt to contact his attorney or the court. . . . Under these circumstances no actual notice to the defendant was necessary. The notice to his attorney was sufficient."[367] In a somewhat analogous situation, the Ninth Circuit held that failure to appear on the date set for trial was a violation even though the defendant had been given conflicting information about that date because he "engage[d] in a course of conduct designed to avoid notice of his trial date."[368]

The Sixth, Seventh, Eighth, and Eleventh Circuits have rejected the claim that double jeopardy prohibits prosecution under section 3146 where the failure to appear was already the basis for an enhancement of the sentence for the original offense.[369]

The Sixth and Seventh Circuits held that when a court in one district orders a defendant to appear before a court in another district, either court has jurisdiction over a prosecution for failure to appear.[370]

B. Contempt

In addition to revocation of release, discussed in section V, *supra*, contempt proceedings may be initiated against a person who violates a release condition.[371]

365. *See, e.g.*, United States v. Simmons, 912 F.2d 1215, 1217 (10th Cir. 1990); United States v. Martinez, 890 F.2d 1088, 1091 (10th Cir. 1989).

366. *Martinez*, 890 F.2d at 1091–93.

367. *Simmons*, 912 F.2d at 1217.

368. Weaver v. United States, 37 F.3d 1411, 1413 (9th Cir. 1994).

369. United States v. Bolding, 972 F.2d 184, 185 (8th Cir. 1992); United States v. Carey, 943 F.2d 44, 46 (11th Cir. 1991); United States v. Mack, 938 F.2d 678, 679–81 (6th Cir. 1991); United States v. Troxell, 887 F.2d 830, 836 (7th Cir. 1989).

370. United States v. Chappell, 854 F.2d 190, 191–93 (7th Cir. 1988); United States v. Williams, 788 F.2d 1213, 1214 (6th Cir. 1986).

371. 18 U.S.C. § 3148(a), (c).

XIV. Credit Toward Detention

Section 3585(b) of the Sentencing Reform Act gives a defendant credit toward the term of imprisonment for time spent in official detention before the commencement of the sentence (1) for the offense for which the sentence was imposed, or (2) for any other charge for which the defendant was arrested after the defendant committed the offense for which the sentence was imposed, provided it has not been credited toward another sentence. [Reprinted in Appendix B, *infra*.]

In *United States v. Wilson*,[372] the Supreme Court resolved a circuit split, holding that the U.S. Attorney General has the authority to compute credit after a defendant begins serving a sentence.[373] (That authority has been delegated to the Bureau of Prisons.) Prisoners may seek administrative review of the computation of credit and, after exhausting administrative remedies, may pursue judicial review.[374]

Another circuit split was resolved by the Supreme Court in *Reno v. Koray*.[375] There, resolving the split in favor of the majority view, the Court upheld the Bureau of Prison's policy of not crediting as "official detention" time spent in community confinement as a condition of pretrial release. "Official detention" within the meaning of section 3585(b) refers to a court's order that a defendant be detained and committed to the custody of the Attorney General for confinement. Although that case specifically involved halfway house confinement, the holding clearly covers other restrictive conditions.

In her concurring opinion in *Reno*, Justice Ginsburg suggested that due process might require a warning to a defendant that time in a halfway house, or some other restrictive condition, would not result in credit against an eventual sentence.[376] The Second Circuit, however, rejected any due process right to such a warning.[377] Nonetheless, the court noted that judicial officers might wish to volunteer such a warning.[378]

372. 503 U.S. 329 (1992).

373. *Id.* at 335. Before the Sentencing Reform Act of 1984, the governing statute, 18 U.S.C. § 3568, explicitly gave the Attorney General this authority. The amended statute deleted this provision but did not substitute another authority to make that determination. 18 U.S.C. § 3585. In *Wilson*, the Supreme Court held that Congress did not intend to take the initial determination away from the Attorney General.

374. *Wilson*, 503 U.S. at 335.

375. 515 U.S. 50 (1995).

376. *Id.* at 65.

377. Cucciniello v. Keller, 137 F.3d 721, 724 (2d Cir. 1998).

378. *Id.* at 725.

Despite the rulings placing credit decisions within the authority of the Attorney General, a few of the earlier courts of appeals decisions are worth noting. The Eleventh Circuit, in *United States v. Harris*,[379] held, in a somewhat unusual factual situation, that time spent in a state prison can be credited if the defendants can establish that federal law enforcement officials took the initiative in getting the state to take the defendants into custody. In that case, a Drug Enforcement Agency agent asked local officers to obtain and execute a search warrant after he was unable to find an available federal judicial officer.[380] State officers arrested the defendants after they found contraband during the search of defendants' room, and the defendants remained in state custody. Because the time spent in state custody was exclusively the result of the federal agent's action, the defendants were entitled to credit against their eventual federal sentence for the time spent in pretrial detention.

The Fifth and Tenth Circuits have held that any credit for official detention is applied only to a term of imprisonment, not to a term of probation.[381]

The Second Circuit held that incarceration in civil contempt is not credited to the defendant's subsequent term for criminal contempt.[382]

379. 876 F.2d 1502 (11th Cir. 1989).

380. *Id.* at 1507.

381. United States v. Dowling, 962 F.2d 390, 393 (5th Cir. 1992); United States v. Temple, 918 F.2d 134, 136 (10th Cir. 1990).

382. Ochoa v. United States, 819 F.2d 366, 369–72 (2d Cir. 1987).

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Appendix A

The Bail Reform Act of 1984

18 U.S.C. §§ 3141–3150, 3156

§ 3141. Release and detention authority generally

(a) **Pending trial.**—A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter.

(b) **Pending sentence or appeal.**—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under this chapter.

§ 3142. Release or detention of a defendant pending trial

(a) **In general.**—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) **Release on personal recognizance or unsecured appearance bond.**—The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), 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.

(c) **Release on conditions.**—(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;

(xii) 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;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy 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.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) **Temporary detention to permit revocation of conditional release, deportation, or exclusion.**—If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) **Detention.**—(1) 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.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in paragraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (A), whichever is later.

(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.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(B) an offense under section 924(c), 956(a), or 2332b of this title;

(C) an offense listed in section 2332b(g)(5)(B) of title 18, the United States Code, for which the maximum term of imprisonment of ten years or more is prescribed;

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(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 the appearance of the 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—

(A) a crime of violence, or an offense listed in section 2332b(g)(5)(B) for which the maximum term of imprisonment of ten years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) 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;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(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 the person will flee; or

(B) a serious risk that the 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 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. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if

financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue 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.

(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—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, 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) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person 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 considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the

Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) **Contents of release order.**—In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) **Contents of detention order.**—In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person,

to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) **Presumption of innocence.**—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

§ 3143. Release or detention of a defendant pending sentence or appeal

(a) **Release or detention pending sentence.**—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. § 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

(A) (i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

(b) **Release or detention pending appeal by the defendant.**—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (b)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

(c) **Release or detention pending appeal by the government.**—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731 of this title, in accordance with section 3142 of this title, unless the defendant is otherwise subject to a release or detention order. Except as provided in subsection (b) of this section, the judicial officer, in a case in which an appeal has been taken by the United States under section 3742, shall—

(1) if the person has been sentenced to a term of imprisonment, order that person detained; and

(2) in any other circumstance, release or detain the person under section 3142.

§ 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

§ 3145. Review and appeal of a release or detention order

(a) **Review of a release order.**—If a person is ordered released by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) **Review of a detention order.**—If a person is ordered detained by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) **Appeal from a release or detention order.**—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

§ 3146. Penalty for failure to appear

(a) **Offense.**—Whoever, having been released under this chapter knowingly—

(1) fails to appear before a court as required by the conditions of release; or

(2) fails to surrender for service of sentence pursuant to a court order;

shall be punished as provided in subsection (b) of this section.

(b) **Punishment.**—(1) The punishment for an offense under this section is—

(A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for—

(i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both;

(ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;

(iii) any other felony, a fine under this title or imprisonment for not more than two years, or both; or

(iv) a misdemeanor, a fine under this title or imprisonment for not more than one year, or both; and

(B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.

(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) **Affirmative defense.**—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(d) **Declaration of forfeiture.**—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) of this title or is subject to the release condition set forth in clause (xi) or (xii) of section 3142(c)(1)(B) of this title, the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

§ 3147. Penalty for an offense committed while on release

A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

(1) a term of imprisonment of not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

[Section 3147 applicable to offenses committed prior to November 1, 1987

This section as in effect prior to amendment by Pub. L. No. 98-473, read as follows:

§ 3147. Penalty for an offense committed while on release

A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to—

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

For applicability of sentencing provisions to offenses, *see* Effective Date and Savings Provisions, etc., note, section 235 of Pub. L. No. 98-473, as amended, set out under section 3551 of this title.]

§ 3148. Sanctions for violation of a release condition

(a) **Available sanctions.**—A person who has been released under section 3142 of this title, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

(b) **Revocation of release.**—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

(1) finds that there is—

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

(B) clear and convincing evidence that the person has violated any other condition of release; and

(2) finds that—

(A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of section 3142 of this title and may amend the conditions of release accordingly.

(c) **Prosecution for contempt.**—The judicial officer may commence a prosecution for contempt, under section 401 of this title, if the person has violated a condition of release.

§ 3149. Surrender of an offender by a surety

A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person, and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of Rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

§ 3150. Applicability to a case removed from a State court

The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.

§ 3156. Definitions

(a) As used in sections 3141–3150 of this chapter—

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia;

(2) the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress;

(3) the term "felony" means an offense punishable by a maximum term of imprisonment of more than one year;

(4) the term "crime of violence" means—

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or

(C) any felony under chapter 77, 109A, 110, or 117; and

(5) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

[Note: Subsection (b), setting out definitions applicable to the pretrial services sections 3152 to 3155, is omitted.]

Appendix B

The Sentencing Reform Act of 1984

Selected Provision: 18 U.S.C. § 3585

§ 3585. Calculation of a term of imprisonment

(a) **Commencement of sentence.**—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) **Credit for prior custody.**—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

Table of Cases

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