

RETHINKING FEDERAL PRE-TRIAL RELEASE AND DETENTION

EDWARD J. RYMSZA
LORI J. ULRICH



IMPORTANCE OF PRE-TRIAL RELEASE



- ▣ Detention Rates in MDPA
 - More than 70% Pretrial Services and Government recommend detention

-

Consider 2019 MDPA:

- ▣ 445 cases
- ▣ PSO recommend detention 268 cases (71.3%)
- ▣ AUSA recommend detention 267 cases (72.2%)
- ▣ Release % = 27.8%

Source: 2019 AO - Table H-3, U.S. District Courts-Pretrial Services Recommendations Made for Initial Pretrial Release for 12-month Period Ending September 30, 2019

Why challenge detention?

- ▣ “Pretrial detention has also been found to correlate with a greater likelihood of receiving a custodial sentence, and one of greater length, than for defendants released on pretrial.”
- ▣ “[D]efendants who were detained for the entire pretrial period were 4.44 times more likely to receive a jail sentence”

▣ “In addition to making it more likely that a custodial term would be received, never being released pretrial was associated with significantly longer sentences. For those defendants not released pretrial who were later sentenced to jail, their sentences were 2.78 times longer than those of defendants who had been out on bond....”

■ Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, Fed. Probation, 52-53 (Sept. 2017).

- ▣ Other benefits:
 - Sets tone for relationship with client
 - Have client gain confidence in attorney
 - Getting client out is easier to assist with case and trial prep



APPLICABLE LAW

- ▣ The Bail Reform Act of 1984- 18 U.S.C. § 3142 et seq.
 - Prior to Act, less than *two percent* of federal defendants were detained.
 - ▣ 1983 = 1.7% defendants held on pretrial detention
 - ▣ 1985 = 28.8%
 - ▣ 2010 = 76%

Source: Bureau of Justice Statistics

- The act expressly provides a presumption of release without any conditions that a defendant *shall be* released on personal recognizance or unsecured bail *unless*: (1) defendant is serious flight risk or (2) is danger to the community. 18 U.S.C. § 3142(b).

PROCEDURAL ASPECTS

- A. Preliminary Note: Have low expectations;
Federal Court = release is exception not rule
- Varies from districts
 - Varies by judges
 - Depends on nature of crime
 - Depends on cooperation



- ▣ B. How to approach detention hearing - depends on whether client already in custody
 - ▣ If NOT in custody yet, always try to arrange a self-surrender whenever possible
 - ▣ Always try to speak with AUSA/Pre-trial Services Officer and try to secure release in advance
 - ▣ If client in custody try to meet with client early
 - ▣ Give bleak prospect of release
 - ▣ Get pre-trial service report
 - ▣ Advise client of pre-trial service officer and their role

- ▣ C. Beware of Pre-trial service Officer



- Responsible for gathering information about newly arrested defendant and prepares a report recommendation to court
- Counsel “*should be*” appointed counsel prior to pre-trial service officer interviews defendant - (CJA Plan MDPA, V, (c))
- Don’t discuss prior record
- Request to keep copy
- Government’s use of statements made to pre-trial service officer is restricted by 18 U.S.C. § 3153(c)(1)-(3)
- “materially false information” to the pre-trial services officer may later result in obstruction points in the PSR. See U.S.S.G. § 3C1.1 cmt. n. 4(H)

Request for detention

- ▣ A. Pre-trial detention cannot be ordered without providing the defendant the right to a hearing. 18 U.S.C. § 3142(e)
- ▣ B. Government must request the defendant's detention at the initial appearance. 18 U.S.C. § 3142(f)
- ▣ C. The hearing must be held at the initial appearance, except for good cause defendant may obtain a continuance of up to five days and the government up to three days. 18 U.S.C. § 3142(f)

- ▣ D. Government's Request for 3 Day continuance

- ▣ E. Grounds for Request (18 U.S.C. § 3142(f))
 - 1. Government believes person poses a serious flight risk
 - 2. Government believes defendant will threaten, intimidate, injure witnesses, obstruct justice etc...
 - 3. Person is *charged with* specific crime:
 - ▣ A. Crime of violence
 - ▣ B. Certain terrorist offenses
 - ▣ C. An offense involving death penalty or life imprisonment
 - ▣ D. A drug offense involving a penalty of ten years or more
 - ▣ E. Any felony after the defendant has committed two or more crimes of violence or drug offenses
 - ▣ F. Any crime which is not a crime of violence that involves a minor victim, possession of a firearm or destructive device, or failure to register as sex offender

The Detention Hearing

- ▣ A. Applicable Rules: Rule 46 Fed. R. Crim. P and 18 U.S.C. §§ 3142-3144
- ▣ B. Rules of evidence do not apply; hearsay admissible. 18 U.S.C. § 3142(f)
- ▣ C. Defendant can proceed by “proffer”
 - Can Government satisfy burden by proffer?
- ▣ D. Standard for detention
 - 1. Flight risk = preponderance
 - 2. Danger to community = clear and convincing
 - 3. Presumptions

- ▣ E. Take a hearing whenever possible; opportunity to gather information and get free discovery
- ▣ F. Defendant's rights:
 - Right to counsel
 - Right to testify (Never)
 - Right to confrontation (entitled to reports under Fed. R. Crim. P. 26.2)
 - Present witnesses
 - Proceed by proffer

- ▣ Interplay between hearing on a complaint and the detention hearing
- ▣ Rarely should you waive a probable cause hearing on a criminal complaint

Those “Ugly” Presumptions



- ▣ 1. Rebuttable Presumption that defendant *shall* be detained. *See* 18 U.S.C. § 3142(e)

- ▣ 2. Defendant only bears a limited burden of *production*, *not a burden of persuasion*.
 - ▣ “Even in a presumption case, the government retains the ultimate burden of persuasion.” *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001); *United States v. Hare*, 873 F.2d 796, 799 (5th Cir. 1989) (district court misunderstood burden and erroneously “[m]ay have placed the burden of persuasion, as well as production, on the defendant.”)
- ▣ 3. If presumption invoked – very little is required: defendant need only present *some credible evidence* to show defendant is not a flight risk or danger to community. *See United States v. Perry*, 788 F.2d 100 (3d Cir. 1986); *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (the burden of production “is not a heavy one to meet.”)

Detention Hearing Factors

18 U.S.C. § 3142(g)

- ▣ A. Keep in mind primary concern for court: (i) will your client return to court, and (ii) refrain from criminal activity.
- ▣ B. Factors
 - 1. Nature and seriousness of offense
 - 2. History/characteristics of defendant
 - 3. criminal history
 - 4. history of court appearances/probation record
 - 5. weight of evidence (least important)
 - 6. community ties (includes community where works or lives)
 - 7. financial assets
 - 8. employment
 - 9. amount of time before trial commences (due process)

- ▣ C. Be resourceful and creative – unlimited
 - Defendant's promise to appear with reasonable pretrial plan is sufficient to rebut presumption. *See United States v. Walters*, 89 F. Supp. 2d 1217, 1219-22 (D. Kan. 2000)
 - The offer of cash bail by the accused or sureties. *See United States v. Al-Arian*, 280 F. Supp. 2d 1345, 1359 (M.D. Fla. 2003)
 - Testimony regarding a defendant's good character. *See United States v. Suppa*, 799 F.2d 115 (3d Cir. 1986)

▣ D. Remind Court:

- ▣ To reject government argument that implies guilt as it is strictly prohibited by the Bail Reform Act. 18 U.S.C. § 3142(j).
- ▣ “weight of the evidence is the least important of the various factors.” *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985)
- ▣ Even in presumption case, the Bail Reform Act contains a “least-restrictive conditions requirement.” 18 U.S.C. § 3142(c)(1)
- ▣ Use empirical data and other supporting evidence to counter government arguments to show that 99% of individuals released on pretrial detention return to court and 98% do not reoffend (citing AO U.S. Courts Table H-15) (Dec. 31, 2019) (In 2019 in MDPA of the 1,368 open criminal cases, 405 individuals were released and of them, only 6 committed new violations).

Detention alternatives and Conditions of Release 18 U.S.C. § 3142(c)

- A. Need to be considered before detention ordered
- B. Variety of options:
 - electronic monitoring
 - **third party custodian
 - maintain employment
 - limitless restrictions (e.g. curfew, cell phones, computers, random home visits, urine tests, no contact with victim/witness, no weapons, no alcohol/drugs)
 - regular reporting to pre-trial services officer
 - psychological treatment
 - post bond

Review of Detention Order

- ▣ A. Government and defendant have right to seek review of detention order. 18 U.S.C. § 3145
- ▣ B. The motion should be determined “promptly.” *See United States v. Fernandez-Alfonso*, 813 F.2d 1571 (9th Cir. 1987) (delay of 30 days violated the “promptly” requirement).
- ▣ C. Review in district court is *de novo*. *See United States v. Delker*, 757 F.2d 1390 (3d Cir. 1985).
- ▣ D. Appellate review

The End

