

**FEDERAL PRETRIAL RELEASE**

**“NO, NO SAID THE QUEEN,  
FIRST THE PUNISHMENT, THEN THE VERDICT”**

Lewis Carroll, Alice in Wonderland

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## **INTRODUCTION**

Bail proceedings were originally intended to provide assurances that the accused would appear to answer the charges against her, and defendants had a right to bail pending trial. In more recent times defendants start serving their sentences at the time of arrest, prior to any adjudication of guilt. The current judicial system seems to mirror the judicial system of Lewis Carroll's mythical kingdom where the Queen of Hearts would dispense justice by yelling: "No, no . . . sentence first, verdict afterwards."<sup>1</sup>

## **THE HISTORY OF PRETRIAL RELEASE**

The Supreme Court has stated that "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The Court has also held that "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *U.S. v. Salerno*, 481 U.S. 739 (1987) (reserved on other grounds). (Included in study materials). Additionally, the Eighth Amendment states that "excessive bail shall not be required." U.S. Const. Amend. VIII. However, the courts have interpreted this constitutional provision to prohibit excessive bail without a right to bail. *See Salerno* at 754-55. Bail becomes excessive when courts set a higher than reasonably necessary amount to ensure that a defendant appears at trial.<sup>2</sup>

The Bail Reform Act of 1984 ("Act") governs release or detention determinations in federal courts. 18 U.S.C. §§3141-3150 (2006). Under this Act, an authorized judicial officer may order the release or detention of a defendant pending trial. This Act applies only to criminal proceedings. *See e.g., Guti v. INS*, 908 F.2d 495, 496 (9th Cir. 1990)(per curiam).<sup>3</sup> This Act may also be applied to material witnesses in criminal proceedings. 18 U.S.C. §§3144 (2006); *U.S. v.*

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<sup>1</sup>Carroll, Lewis. *Alice in Wonderland*

<sup>2</sup>*Stack v. Boyle*, 342 U.S. 1, 5 (1951).

<sup>3</sup>Person awaiting civil deportation hearing but not awaiting trial, sentencing, or outcome of appeal on any federal criminal charges not entitled to bail hearing under Act.

*Oliver*, 683 F.2d 224, 230 (7th Cir. 1982);<sup>4</sup> *U.S. Hazelett*, 32 F.3d 1313, 1317 (8th Cir. 1994).<sup>5</sup>

It had often been assumed that a criminal defendant had an absolute right, except in capital cases, to be released on bail pending trial. *Stack v. Boyle*, 342 U.S. 1 (1951);<sup>6</sup> *U.S. v. Townsend*, 897 F.2d 989, 993-94 (9th Cir. 1990);<sup>7</sup> *U.S. v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999).<sup>8</sup> Courts also held that this right is not only founded upon Rule 46 of the Federal Rules of Criminal Procedure<sup>9</sup>, and the Bail Reform Act, but also upon the constitutional guarantee of the Eighth Amendment which proves that “...excessive bail shall not be required.” *U.S. v. Fiala*, 102 F. Supp. 899 (W.D. Wash. 1951). Courts have further held that the Eighth Amendment’s prohibition against excessive bail also applies to the states through the Fourteenth Amendment. *See Sistrunk v. Lyons*, 646 F.2d 64, 66-67 (3rd Cir. 1981).

However, the courts have also spoken of a distinction between the right to bail and the right to be free from “excessive” bail. *U.S. v. Edwards*, 430 F. Supp. 1321, 1322-24 (D.C. 1981) (en banc). In fact, the Supreme Court declared that the Excessive Bail Clause “of course says nothing about whether bail shall be available at all.” *Salerno* at 752. Thus, the court have concluded that what defendants do have is a right to be free from excessive bail in those cases in which it is proper to grant bail. *See Carlson v. Landon*, 342 U.S. 524, 545-46 (1952).

*See* *Young v. Hubbard*, 673 F.2d 132, 134 (5 Cir. 1982) (regarding bail pending appeal).

*See also* *Carlson v. Candon*, 342 U.S. 543, 545 (1952);  
*Pena v. Mattox*, 84 F.3d 894 (7th Cir. 1996);

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<sup>4</sup>Court has power under Bail Reform Act to issue material witness arrest warrant.

<sup>5</sup>Government could detain material witness pursuant to Bail Reform Act.

<sup>6</sup>Defendant charged with noncapital offense shall be released on bail provided that defendant gives adequate assurance that he or she will appear at trial and submit to sentence if convicted.

<sup>7</sup>Courts should rarely detain defendants charged with noncapital offenses; doubts regarding propriety of release resolved in favor of defendant.

<sup>8</sup>Pretrial detention is difficult to impose.

<sup>9</sup>*Bandy v. U.S.*, 81 S.Ct. 197 (1960).

*Faheem-El v. Klincar*, 841 F.3d 712 (7th Cir. 1988);  
*U.S. v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991).

Nevertheless, it would seem to be a superfluous gesture for the framers of our Constitution to have insisted that bail not be “excessive” if there were no right to release on bail in the first place. However, courts reason that the Eighth Amendment’s prohibition was directed merely at dissuading potential abuse of discretion by the judiciary where bail is otherwise allowed. *U.S. v. Edwards*, 430 F.Supp. at 1330. Such views overlook the “traditional right to freedom before conviction” embodied in the Eighth Amendment, *Stack v. Boyle*, 342 U.S. 1 (1952), which “underlies the entire structure of the constitutional rights” designed to protect the citizen accused of crime. *U.S. v. Abrahams*, 604 F.2d 386 (5th Cir. 1979).

*See Goodman v. Kehl*, 456 F.2d 863, 868 (2nd Cir. 1972) (noting that there is no distinction between excessive bail and denial of bail without legitimate reason).

“The right to be free from excessive bail appears explicitly in the Bill of Rights. The right to be free from excessive bail underlies the entire structure of the constitutional rights enumerated in the Bill of Rights. This traditional right to freedom before conviction permits the unhampered preparation of the defense and serves to prevent the infliction of punishment prior to conviction....[T]he right to bail and the right to be free from excessive bail in accordance with the Eighth Amendment to the Constitution is implemented by Rule 46 of the Federal Rules of Criminal Procedure and by 18 U.S.C. §3146.” *Abrahams* at 393.

The act at 18 U.S.C. §3142(b) mandates pretrial release of one’s personal recognizance or an unsecured bond unless this will not reasonably “assure the person’s appearance” or will “endanger a person” or “the community”. Thus, four options are available to a Court:

1. Release of the accused on her personal recognizance;
2. Release on conditions;

3. Temporarily detaining to permit revocation of conditional release, deportation or exclusion; or
4. Detain her.

In making this determination the Court shall consider factors listed in 18 U.S.C. §3142(g):

1. The nature and circumstances of the charged offense;
2. The weight of the evidence supporting the charge;
3. The history and characteristics of the accused including character; physical and mental condition; family ties; employment; financial resources; length of residence in the community; community ties; past conduct; history of drug or alcohol abuse; criminal history; record of appearance at court proceedings; whether the accused was on probation, parole, or release at the time of the offense; and the nature and seriousness of danger that is posed by release of the accused.

### **NARROW SCOPE**

“In making pretrial detention determination, a judicial officer must bear in mind that ‘passage of the pretrial detention provision of the 1984 Act did not...signal a congressional intent to incarcerate wholesale the category of accused persons awaiting trial.’” *U.S. v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985). Rather, Congress was demonstrating its concern about a small but identifiable group of individuals as to whom pretrial release was inappropriate. S. Rep. No. 225 98th Cong. 1st Sess. 6-7, *reprinted in* 1984 Code Cong. And Ad. News at 3189. *U.S. v. Westbrook*, 780 F.2d 1185, 1189 (5th Cir. 1986).

### **REBUTTABLE PRESUMPTION**

Section 3142 (e) Contains a rebuttable presumption that where an accused is charged with: a crime of violence; an offense punishable by death or life imprisonment; a narcotics offense that carries a 10 year (or more) imprisonment term; or any combination of these offenses<sup>10</sup>; the accused shall be held without

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<sup>10</sup>18 U.S.C. §(f)(1)(A), (B), (C), (D)



bail. Stated another way, if one is charged with such an offense, there is a presumption that there are no conditions favorable to his or her release on bail.

The presumption will not arise unless the defendant is charged with one of the crimes defined in §3142 of the Act. *U.S. v. Chimurenga*, 760 F. 2d 400 (2nd Cir. 1985); *U.S. v. Shaker*, 665 F. Supp. 698 (N.D. Ind. 1987); *Contra U.S. v. Bess*, 678 F. Supp 929 (D.D.C 1988) (noting even if defendant is not charged with triggering offense the presumption applies where there is probable cause to believe the defendant is guilty of offenses demonstrating this dangerousness, such as threatening potential witnesses or jurors or having firearms).

While there is no such presumption as to provisions of §3142(f)(2)(A) and (B) relating to persons who pose a serious risk of flight or obstruction of justice, allegation that the accused poses a risk of flight or may injure or threaten witnesses under §3142(f)(2)(A) or (B) requires the Government to carry the burden of production as well as persuasion by clear and convincing evidence, to show that the accused should be confined pretrial.

**REBUTTABLE PRESUMPTION SHIFTS ONLY THE BURDEN OF PRODUCTION, NOT THE BURDEN OF PROOF OR PERSUASION**

Even as to the rebuttable presumption in favor of detention contained in §3142 (f)(1)(B) and (C), it has been held:

“...that Congress did not intend to shift the burden of persuasion to the defendant but intended to impose only a burden of production...”

Our reasons for believing that the burden of persuasion does not shift include the following. First, we are wary of interpreting ambiguous language to mandate pretrial confinement where evidence before a magistrate is indeterminate. Although pretrial confinement to prevent flight is not punishment, but rather one of various restrictions on the freedom of an accused person aimed at facilitating trial, ...it is still a most severe restriction requiring clear cause.

Second, the Senate Judiciary Committee Report explaining the new presumption, while arguably ambiguous, does not suggest that Congress mean to impose a burden of persuasion on the defendant.” *U.S. v. Jessup*, 757 F.2d 378, 381 (1st Cir. 1985).

The Eighth Circuit notes in *Orta*, 760 F.2d at 891, that “the majority of cases thus far addressing the issue that the presumption shifts only the burden of production to the defendant; the burden of persuasion remains with the government.” *Id.* The Fifth Circuit also noted that §3142's rebuttable presumption “does not shift the burden of persuasion” to the accused. *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985).

*See also U.S. v. Freitas*, 602 F. Supp. 1283, 1290, 1293 (N.D. Cal. 1985) (stating “The Court therefore concludes that the rebuttable presumption in the Bail Act shifts only the burden of production; not the burden of persuasion.”) As the District of Columbia Circuit reiterated “it is not the responsibility of the [accused] to carry the Government’s burden of persuasion.” *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985). In *U.S. v. Hazime*, 762 F.2d 34, 36 (6th Cir. 1985), the Court of Appeals remanded the cause for further hearing in order to afford the Government an opportunity to meet its clear and convincing burden of persuasion even though the magistrate found that:

“Hazime’s indictment for a drug offense under 21 U.S.C §801 *et seq.* established a presumption that there was no condition or combination of conditions favorable to his release on bond pending trial, a showing the magistrate found was met by the Government’s assertions that Hazime was unemployed was vague about his wife’s whereabouts, had a valid passport and had in the recent past pleaded guilty to charges of possession of a stolen credit card and resisting arrest, and Hazimes prehearing statement that ‘if I find out who the people are who testified against me, I will put my fingers through their eyes.’” *Hazime* at 36.

*See also* *U.S. v. Freitas*, 602 F.Supp 1283 (N.D. Cal. 1985);  
*U.S. v. Moore*, 607 F. Supp. 489 (N.D. Cal. 1985);  
*U.S. v. Trosper*, 809 F.2d 1107 (5th Cir. 1987).

**ACCUSED NEED ONLY PRODUCE “SOME EVIDENCE” TO SHIFT  
BURDEN OF PRODUCTION AND PROOF BACK TO PROSECUTION**

It is clear from cases and every other circuit, that the accused’s burden to rebut the Act’s presumption<sup>11</sup>, is slight. *Jessup* at 384.

*See also*                    *Orta*, 760 F.2d at 891;  
                                  *Hazime*, 762 F.2d at 37;  
                                  *Fortna*, 769 F.2d at 243;  
                                  *U.S. v. Aiello* 598 F.Supp 740 (S.D.N.Y 1984).

The First Circuit held in *Jessup* that “in order to rebut the presumption, the defendant must produce *some* evidence” noting that neither the presumption nor evidence relating to it precludes releasing the accused on bail “so long as the defendant has presented *some* evidence.” *Jessup*, 757 F.2d at 384.

The Fifth Circuit reiterated that while the Court may obviously consider Congress’ general consideration as to the risks associated with persons charged with such drug offenses in order “to rebut the presumption of flight or dangerousness” the accused need only “produce *some* evidence.” *Fortna*, 769 F.2d at 251.

*See also*                    *U.S. v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (stating “Any evidence favorable to a defendant that comes within a category listed in §3142(g) [*see infra* p.\_\_\_\_] can affect the operation of one or both of the presumptions, including evidence of their marital, family and employment status, ties to and roles within the community, clear criminal record and other types of evidence encompassed in §3142(g)(3).”);

*U.S. v. Jackson*, 845 F.2d 1262 (5th Cir. 1988) (noting Government introduced no evidence regarding defendant’s participation in offenses alleged in the indicted and rested on §3142(e)’s presumption. Court held that in light of defendant’s

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<sup>11</sup>18 U.S.C. §3142(e) [that he presents a substantial risk of flight or danger to the community].

ties in the community a detention order was not warranted.)

*But see*

*U.S. v. Viers*, 637 F. Supp. 1343 (W.D. Ky. 1986) (noting presumption is still a factor to be considered even if the defendant produces some evidence).

### **DANGEROUSNESS IS RELATIVE, NOT ABSOLUTE**

In a carefully reasoned order, at least one district court has held that the danger to the community addressed by the statute must be posed by the *release* of the defendant. Thus, if the defendant poses as great a danger to the community in jail as he does out on bail, the dangerous test under the statute has not been satisfied.

“Finally, it bears emphasis that the nature of the threatened harm to the community must be causally linked to the defendant’s release and to the defendant’s threatened behavior. That is, the issue that must be addressed is whether the defendant’s release would pose a danger to the community that would not exist if the defendant were held in pretrial preventive detention. Also, the court must focus on whether the *defendant*, if release, will commit serious crimes that would not otherwise occur. The court cannot constitutionally detain the defendant if the risk of harm to the community arises only from potential harm perpetrated by others, even if in some sense or to some extent in response to the defendant’s release. I thus conclude that the court must consider the substantiality of the *marginal* loss of safety created by the release of this defendant because of the defendant’s potential criminal conduct rather than the substantiality of the *absolute* level of threatened harm posed by the combination of this person’s release plus all other dangerous circumstances already existing independently of his release.” *U.S. v. Phillips*, 732 F.Supp. 255, 267 (D. Mass. 1990) (emphasis in original).

The government did not appeal this ruling. However, Carmen Tortora, an alleged soldier of the Patriarca Family, later raised the *Phillips* argument before the

First Circuit, maintaining that his mob connections allowed him to be every bit as dangerous from a jail cell as on the street. Thus, he reasoned, *Phillips* mandated his release. The Court called this argument “mind-boggling in its implication.” *U.S. v. Tortora*, 922 F.2d 880, 889 (1st Cir. 1990). Though the court did not expressly overrule *Phillips*, it did say that it found this principle “perverse,” and refused to release Tortora. *Id.* Thus, the continued vitality of *Phillips* is questionable.

### **GOVERNMENT MUST MEET BURDEN OF “CLEAR AND CONVINCING” EVIDENCE AS TO DANGEROUSNESS**

The “statute clearly requires that a finding that a defendant should be detained prior to trial because he is a danger to the community should be supported by clear and convincing evidence.” *U.S. v. Martin-Trigona*, 779 F.2d 35 (3rd Cir. 1985). This standard of “clear and convincing” evidence requires more proof than probable cause or even preponderance of the evidence, although less than the proof beyond a reasonable doubt that is required to demonstrate guilt. *Chimurenga*, 760 F.2d 400; *Fortna*, 769 F.2d at 405.

“[I]t was correct to place the burden of persuasion on the government. This would be proper even were the rebuttable presumption to apply...Thus, in either event the government continued to have the burden to prove by clear and convincing evidence that Chimurenga was dangerous...The ‘clear and convincing evidence’ with respect to a defendant’s danger to the community required by §3142(f)(2)(B) means something more than ‘preponderance of the evidence,’ and something less than ‘beyond a reasonable doubt.’ See *Addington v. Texas*, 441 U.S. 418, 431 (1979). To find danger to the community under this standard of proof requires that the evidence supports such a conclusion with a high degree of certainty.” *Chimurenga*, 760 F.2d at 405.

### **STANDARD APPLIED**

Where the government’s proof of dangerousness is “credible and clear and convincing” then the statutory presumptions have not been sufficiently rebutted.

*U.S. v. Rodriguez*, 803 F.2d 1102 (11th Cir. 1986).

*But see U.S. Millan*, 4 F.3d 1038 (2nd Cir. 1985);

*U.S. v. McGlothan*, No. H-82-198 (S.D. Tex. Jan. 25, 1985) (stating that prior felony convictions are not equated with “dangerousness”);

*U.S. v. Hall*, 651 F. Supp. 13 (N.D.N.Y. 1985) (noting that defendant’s showing that he was merely a “factory worker” and not a ringleader in a drug manufacturing scheme, that he had no prior record, that he had substantial ties in the community even though he was a Colombian citizen and that he was not a danger was sufficient to entitle him to bail).

*See also U.S. v. Gerard*, 664 F. Supp. 203 (E.D. Pa. 1987) (increasing of penalty for charged offenses could be considered in determining whether defendant was presumptively dangerous and could be detained pending trial).

### **INDICTMENT MAY RAISE PRESUMPTION**

The Fifth Circuit has held that the presumption against pretrial release arises when a defined drug crime is charged in the indictment. *U.S. v. Trooper*, 809 F.2d 1107 (5th Cir. 1987) (stating an indictment alleging possession of 12,000 tablets of MDMA, or ecstasy raises presumption).

*See also U.S. v. Volksen*, 766 F.2d 190 (5th Cir. 1985);  
*U.S. v. Payne*, 660 F. Supp. 288 (E.D. Mo.), *aff’d*, 822 F.2d 1098 (8th Cir. 1987).

### **HEARSAY MAY BE CONSIDERED**

Numerous courts have held that magistrates and trial judges may rely on hearsay evidence in denying release under the Act. In *U.S. v Acevedos-Ramos*, 755 F.2d 203 (1st Cir. 1985), the trial court denied bail based in part on hearsay. In affirming the trial court decision, the First Circuit concluded that:

“...Congress in enacting the new Bail Act, did not change pre-existing law, which, as a general matter, allowed a magistrate or judge to consider hearsay evidence and to rest a determination upon that evidence where it is sufficiently reliable.” *Acevedos-Ramos*, 755 F.2d at 208.

*See also* *Fortna* 769 F.2d 243 (5th Cir. 1985);  
*U.S. v. Cardenas*, 784 F.2d 937 (9th Cir. 1986);  
*U.S. v. Accefuro*, 783 F.2d 387 (3rd Cir. 1986);  
*U.S. v. Fisher*, 618 F. Supp. 536 (E.D. Pa.), *aff'd* 782 F.2d 1032 (3rd Cir. 1985).

### **HOWEVER, HEARSAY MAY NOT BE SUFFICIENT**

While it may be true that “hearsay evidence is admissible,” *Fortna* 769 F.2d 243 (5th Cir. 1985), where we are dealing with such serious questions as a presumptively innocent individual’s liberty, great care should be accorded to the process by which such a decision is made and as to meeting the burden of “clear and convincing evidence,” hearsay evidence may be sufficient. *Fisher*, 618 F. Supp. At 537-8; *U.S. v. Ridinger*, 623 F. Supp. 1386 (W.D. Mo. 1985).

“It must be remembered that we are dealing with the deprivation of the liberty of a citizen of the United States who is presumed to be innocent. In my judgment the clear and convincing evidence requirement rightly places a heavy burden upon the Government before this radical interference with freedom is imposed.”

The Government here again offered only hearsay testimony. That testimony consisted of public officers repeating what an informer had told them and in some instances what another police officer had told the witness the informer had told him..It is common experience of mankind that repetition of conversations, no matter how good the intention of the narrator may be, is subject to twists of wishful thinking, of interpretation or substitution of words or differences in phraseology,— in short, the conveyance of a completely erroneous version of...the actual conversation...All of the foregoing glaring deficiencies in the Government’ proof

seem to indicate that the Government treats deprivation of liberty as an automatic sequel [sic] of an indictment and that the deprivation of an individual's liberty is not a very serious thing. I disagree with the Government and I find that its evidence falls far short of the clear and convincing standards rightly demanded by the Act." *Fisher* at 537-8.

Moreover, the Bail Reform Act, 18 U.S.C §3142(f) expressly guarantees an accused the right to "cross-examine" witnesses against him to testify to present witnesses on his behalf, and to present information by proffer. These procedural safeguards were the reason the Supreme Court upheld the Act against a facial constitutional challenge. Referring to the hearing as a "full blown adversarial hearing" involving "extensive safeguards" the Supreme Court decision supports the motion that an accused's right to confront his accusers should significantly limit the government's ability to rely upon hearsay evidence. *Salerno*, 481 U.S. 739 (1987).

### **STATEMENTS MADE TO CURRY FAVOR WITH POLICE**

Moreover, Courts have held that "hearsay" statements made by an individual in custody to "curry favor" with police are not sufficiently reliable to constitute probable cause. *U.S. v. Martin*, 615 F.2d 318, 325 (5th Cir. 1980); *U.S. v. Koloziej*, 712 F.2d 975, 978 (5th Cir. 1983).

*See also* *U.S. v. Sarniento-Perez*, 633 F.2d 1092, 1096 (5th Cir. 1980); *U.S. v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977).

"...while the statements were against the informants' penal interests, this Court has held that tips made to curry favor with the police, although they 'do not eliminate the residual risk and opprobrium of having admitted criminal conduct, they certainly make the declaration less reliable.'" *Koloziej* at 978.

### **BAIL CANNOT BE USED TO PUNISH**

Furthermore, bail is not to be used to serve as a form of payment or to induce payment of fines or cost, *Cohen v. U.S.*, 82 S. Ct. 526 (1962), or as punishment for the defendant's activities. *U.S. v. Gamble*, 295 F. Supp. 1192 (S.D.



Tex. 1969).

Nor can the court order payment of any fines imposed upon a defendant's conviction out of funds on deposit, where there is no showing the defendant violated any of the terms or conditions of his release. *U.S. v. Powell*, 639 F. 2d 224 (5th Cir. 1981); *U.S. v. Jones*, 607 F. 2d 687 (5th Cir. 1979) (holding monies deposited by third parties); *U.S. v. Rose*, 791 F.2d 1477 (11th Cir. 1986) (noting requirement in appearance bond that funds shall be retained by clerk to pay any fine subsequently levied against defendant violates Bail Reform Act). [Nor can bail be excessive. 18 U.S.C. §3142(c)(2) prohibits a court from imposing a financial condition that results in the pretrial detention of the person].

The test for excessiveness of bail is not whether a defendant is financially able to satisfy the requirement, *U.S. v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988); *U.S. v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980), but whether bail is set at an amount higher than reasonably calculated to assure the presence of the accused. *Salerno* at 752; *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

Absolute certainty in assuring the defendant's presence is neither required nor is it possible. *Stack* at 1; *U.S. v. Alston*, 420 F.2d 176 (D.C. Cir. 1969). The judicial officer setting bail need only consider those factors set out in §3146(b) to determine which conditions will give a "reasonable assurance" of the defendant's presence and any consideration of factors other than those enumerated in §3146(b) are impermissible.

"Factors to be considered in imposing conditions of release are the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings...Contrary to the Government's assertion in the present case, the defendant's inclination to commit other crimes is not permissible consideration." *U.S. v. Beaman*, 631 F.2d 85 (6th Cir. 1980). *See also U.S. v. Jackson*, 823 F.2d 4 (2nd Cir. 1987).

Without deciding the issue of the complete denial of bail for “preventive detention” of dangerous offenders, the Fifth Circuit, *en banc*, previously held that the sole purpose of bail is to reasonably assure an accused’s presence at trial.

“Such requirement as is necessary to provide reasonable assurance of the accused’s presence at trial is constitutionally permissible. Any requirement in excess of that amount would be inherently punitive and run afoul of due process requirements.” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978).

### **SHOULD THE DEFENDANT TESTIFY AT HIS DETENTION HEARING?**

While arguably a defendant’s testimony at his bail hearing would not be admissible at his trial on the theory that an accused should not be required to forfeit one constitutional right (Eighth Amendment right to bail) in order to exercise another (Fifth Amendment privilege at trial); *Simmons v. U.S.*, 390 U.S. 377 (1968) (dealing with testimony at a suppression hearing). At least one court has held that because a Fourth Amendment Suppression Hearing differs from bail proceedings “testimony presented by a defendant to meet bail requirements may be admissible against him at trial”, at least where he was appropriately warned of such. *U.S. v. Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1981) (holding that because no warnings were given, the defendant’s bail hearing testimony was not admissible against him at trial).

“The *Simmons* rationale is inapplicable in this factual setting...Testimony at a Fourth Amendment suppression hearing differs in nature from that required at a bail bond hearing. In the former, the testimony given must necessarily go to the ultimate facts and issues in the case. A defendant at a bail bond hearing need not divulge the facts in his case in order to receive the benefits of the Eighth Amendment right to bail. We conclude that when proper warnings are given, testimony presented by a defendant to meet bail requirements may be admissible against him at trial. *Dohm* at 1173-74.

It would appear that putting your client on the stand at a bail hearing has

become risky business, and a disclaimer would be appropriate setting out the fact that you are doing so only to assert your client's Eighth Amendment right to bail and not with any intent or desire to waive and in fact that you reassert, your Fifth Amendment right at trial.

## **CONGRESS PASSES BAIL REFORM ACT: THE EIGHTH AMENDMENT DOES NOT MEAN WHAT IT SAYS**

### **DENIAL OF BAIL**

On October 12, 1984, Congress passed and the President signed into law the Comprehensive Crime Control Act Amendments to the Bail Reform Act, which provides for detaining presumptively innocent citizens without bail prior to a determination of guilt. 18 U.S.C. §3142. While the Eighth Amendment provides that: "excessive bail shall not be required"; Congress apparently decided that the Eighth Amendment does not mean that an accused person is entitled to bail. Thereafter, the Supreme Court agreed in *Salerno*, 481 U.S. 739 (1987) that the Eighth Amendment did not require an accused person be given bail. It only required that if bail was granted, that it must be reasonable.

### **PRETRIAL DETENTION INTENDED FOR LIMITED "SMALL BUT IDENTIFIABLE GROUP"**

As one court has noted, the Government's all inclusive concept of pretrial detention of presumptively innocent individuals awaiting trial without bail is contrary to the legislative history of the 1984 Bail Reform Act which states that "there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of release can reasonably assure the safety of the community or other persons." *Ridinger* at 1401 (noting that at the detention hearing the Magistrate should "insist that the government produce the testimony of live witnesses or, but conducting an appropriate preliminary inquiry, establish the reliability of the information upon which the government bases its claim").

*See also* *Acevedo-Ramos*, 755 F.2d 203 (5th Cir. 1985).

*But see* *U.S. v. Gaviria*, 828 F.2d 667 (11th Cir 1987) (noting Government merely proffered evidence and defendant was not permitted to call government agent in response to the proffer).

Furthermore, appropriate conditions of release (i.e. house arrest and monetary bond), that insure the safety of the community provide an alternative to pretrial detention.

*See* *U.S. v. Traitz*, 807 F.2d 322, 324-26 (3rd Cir. 1986).

In *U.S. v. Musgrave*, (order on certified question from magistrate) Cause No. SA-80-CR-70, the Chief Judge of this District court noted “ This Court also believes that due process requires the Defendant to be given the opportunity to review and cross-examine Special Agent Allen on the documents upon which he has based his testimony. Due Process requires an opportunity to be heard and for that opportunity to be meaningful...As has been said countless times, cross-examination is the best method of testing the credibility of a witness.” [Included in study materials]

**IF GOVERNMENT’S BURDENS ARE NOT MET, THE DEFENDANT  
NEED NOT REBUT THE PRESUMPTION**

At least one court has held that if the government fails to meet their burden of demonstrating that no combination of conditions will assure his appearance, the defendant in a drug case need not rebut the presumption of flight and dangerousness to the community.

“Upon considering all of the evidence presented, I conclude that the defendant has not rebutted the presumption that he presents a risk of flight and a danger to the community. I find, however, that the Government has not met its burden of producing clear and convincing evidence that not condition or combinations of conditions will assure his appearance or safety of the community...Accordingly, I will enter an order setting forth the terms of he defendant’s release, employing a combination of terms enumerated in §3142(C).” *U.S. v. Jones*, 614 F. Supp. 96, 98 (D.C. Pa. 1985).

## **PREPONDERANCE OF EVIDENCE STANDARD AS TO FLIGHT**

Courts have held that a “preponderance of evidence” standard will suffice to demonstrate that no conditions will “reasonably assure” the accused’s appearance. However, certainty that the accused will appear is not required. *Orta*, 760 F.2d 887 (8th Cir. 1985).

*See also* *U.S. v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985) (stating “clear preponderance” standard);

*U.S. v. Freitas*, 602 F. Supp. 1283 (N.D. Cal. 1985);

*U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985).

“Only if the government shows by clear and convincing evidence that no release condition or set of conditions will reasonably assure the safety of the community and by a preponderance of the evidence that no condition or set of conditions under subsection (C) will reasonably assure the defendant’s appearance can a defendant be detained before trial.

In this case, the district court erred in interpreting the ‘reasonably assure’ standard set forth in the statute as a requirement that release conditions ‘guarantee’ community safety and the defendant’s appearance. Such an interpretation contradicts both the framework and the intent of the pretrial release and detention provision of the 1984 Act.” *Orta* at 891.

## **PROCEDURAL SAFEGUARDS**

At the same time that it rejected a facial challenge to the constitutionality of §3142(e) of the Bail Reform Act, which permits detaining presumptively innocent citizens on a finding of dangerousness alone, the Supreme Court enumerated the procedural due process rights of such detainees.

“Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are

specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U.S.C §3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence the history and characteristics of the putative offender, and the danger to the community. §3142(g). The government must prove its case by clear and convincing evidence. §3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. §3142i. The Act’s review provisions, §3145 c, provide for immediate appellate review of the detention decision.” *Salerno*, 481 U.S. 739 (1987).

### **INDICTMENT MAY NOT BE USED AS EVIDENCE**

And the guarantee of such rights is consistent with Justices Marshall and Stevens’ real fear that majority’s holding will allow the government to use the indictment as evidence to detain the accused. The Supreme Court has expressed the danger inherent in allowing an indictment to constitute evidence to detain someone.

“The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the government to imprison someone for uncommitted crimes based upon ‘proof’ not beyond a reasonable doubt. The result must therefore be that once the

indictment has failed, detention cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. ‘If it suffices to accuse, what will become of the innocent?’” *Coffin v. U.S.*, 156 U.S. 432 (1895).

“To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it. Upon probable cause a warrant for the defendant’s arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. Once a defendant has been committed for trial he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial, and

‘release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.’ *Stack* at 4-5.

“The finding of probable cause conveys power to try, and the power to try imports of necessity the power to assure that the process of justice will not be evaded or obstructed. ‘Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested.’ 794 F.2d 64, 73 (2nd Cir. 1986) (quoting *U.S. v.*

*Melendez-Carrion*, 790 F.2d 984, 1002 (2nd Cir. 1986)). The detention purportedly authorized by this statute bears no relation to the government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.

“It is not novel that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of the American Communist Party convicted under the Smith Act, 18 U.S.C. §2385. Justice Jackson wrote:

‘Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is...unprecedented in this country and ...fraught with danger of excesses and injustice...’ *Williamson v. U.S.*, 95 L Ed 1379, 1382 (1950) (Jackson, J., in chambers).

“As Chief Justice Vinson wrote for the Court in *Stack v. Boyle*: ‘Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.’ 342 U.S. at 4.” *Salerno* at 719-21.

And Justice Stevens stated:

“If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense. In this case, for example, it is unrealistic to assume that the danger to the community that was present when respondents were at large did not justify their detention



before they were indicted but require that measure the moment that the grand jury found probable cause to believe they had committed crimes in the past. It is equally unrealistic to assume that the danger will vanish if a jury happens to acquit them. Justice Marshall has demonstrated that the fact of indictment cannot, consistent with the presumption of innocence and the Eighth Amendment's Excessive Bail Clause, be used to create a special class the members of which are, alone, eligible for detention because of future dangerousness.

“Several factors combine to give me an uneasy feeling about the case the Court decides today. The facts set forth in Part I of Justice Marshall's opinion strongly support the possibility that the Government is much more interested in litigation a 'test case' than in resolving an actual controversy concerning respondents' threat to the safety of the community. Since Salerno has been convicted and sentenced on other crimes, there is no need to employ novel pretrial detention procedures against him. Cafaro's case is even more curious because he is apparently at large and was content to have his case argued by Salerno's lawyer even though his interest would appear to conflict with Salerno's. But if the merits must be reached, there is no answer to the arguments made in Parts II and III of Justice Marshall's dissent. His conclusion, and not the Court's, is faithful to the 'fundamental principles as they have been understood by the traditions of our people and our law.' *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, I respectfully dissent.” *Salerno* at 722-23.

### **CONSTITUTIONALITY UNSETTLED AS IT MAY BE APPLIED TO A PARTICULAR SET OF FACTS**

Importantly, the defendants challenged §3142(e) on its face rather than as applied in *Salerno*. Thus, the Court left open the question of the constitutionality of the statute as applied to a particular set of facts:

“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be

valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment. *Schall v. Martin* at 269. We think respondents have failed to should their heavy burden to demonstrate that the act is ‘facially’ unconstitutional.” *Salerno* at 707-08.

*See also* *U.S. v. Simpkins*, 826 F.2d 94 (D.C. Cir. 1987) (rejecting Constitutional challenge citing *Salerno*).

### **AN EXERCISE IN OBFUSCATION**

In an opinion by Chief Justice Rehnquist, the court held that detaining citizens based on dangerousness does not violate the Fifth Amendment’s Due Process Clause since such “detention imposed by the [Bail Reform] Act falls on regulatory side of the dichotomy,” *Salerno* at 708, and hence, “the government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” *Salerno* at 709.

In a scathing dissent, Justice Marshall, joined by Justice Brennan, fiercely criticizes the majority’s argument as “merely an exercise in obfuscation.” *Salerno* at 717.

“On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation. The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement.

The absurdity of this conclusion arises, of course, from the majority’s cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as

‘regulation,’ and, magically, the Constitution no longer prohibits its imposition. Because, as I discuss in Part III, *infra*, the Due Process Clause protects other substantive rights which are infringed by this legislation, the majority’s argument is merely an exercise in obfuscation.” *Salerno* at 716-17.

### **THE EIGHTH AMENDMENT**

The high court rejected defendant’s contention that the Act contravenes the Eighth Amendment’s proscription against excessive bail, reasoning that:

“The Eighth Amendment addresses pretrial release by providing merely that ‘Excessive bail shall not be required. This Clause, of course, says nothing about whether bail shall be available at all.

While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.” *Salerno* at 712-13.

Again, in dissent, Justice Marshall rejects the Chief Justice’s reasoning as “mere sophistry”:

“The logic of the majority’s Eighth Amendment analysis is equally unsatisfactory. The Eighth Amendment, as the majority notes, states that ‘[e]xcessive bail shall not be required.’ The majority then declares, as if it were undeniable, that: “[t]his Clause, of course, says nothing about whether bail shall be available at all.’ *Salerno* at 712. If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the magistrate sets bail at \$1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter.” *Salerno* at 717.

## **DUE PROCESS: DURATION OF DETENTION**

The length of a defendant's pretrial detention may, of course, be challenged under the Due Process Clause. However, "the due process limit on the duration of preventive detention 'requires assessment on a case by case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement.'" *U.S. v. Gonzales Claudio*, 806 F.2d 334, 340 (2nd Cir. 1994) (quoting *Salerno*, 749 F.2d 64) *rev'd on other grounds*, 95 L.Ed. 2d 697 (1987). To determine whether the length of a pretrial detention violates a defendant's due process rights, the court weigh: (i) the length of detention; (ii) the extent of the prosecution's responsibility for the delay of the trial; and (iii) the strength of the evidence upon which the detention was based. *Melendez-Carrion v. U.S.*, 479 U.S. 978 (1986); see also *U.S. v. Ojeda Rios*, 846 F.2d 167 (2nd Cir. 1988) (applying the test to risk of flight); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991) (applying the test to dangerousness).

*See U.S. v. El-Hage*, 213 F.3d 74 (2nd Cir. 2000) (per curium)(pretrial detention over 30 months did not violate due process because prosecution bore little responsibility for delay, defendant was charged with playing important role in worldwide terrorist organization, defendant was capable of flight and had strong motive to flee given that he was facing life sentence);

*U.S. v. Infelise*, 934 F.2d 103 (7th Cir. 1991)(potential 2-year detention did not violate due process because prosecution was not responsible for delay and defendants were shown to be dangerousness);

*U.S. v. Tortora*, 922 F.2d 880 (1st Cir. 1990)(18-month detention on ground of dangerousness did not violate due process even when trial could last up to 8 months and not likely to start to start within 2 or 3 months);

*U.S. v. Quartermaine*, 913 F.2d 910 (11th Cir. 1990)(prospect of 8 to 10-month detention, without more, did not violate due process or mandate release);

*U.S. v. Mendoza*, No. 87-0005 (D.N.J. July 7, 1987)(holding that a

nine-month detention without trial was not the “draconian result intended by Congress”)

*But See* *U.S. v. Millan*, 4 F.3d 1038, 1044 (2nd Cir. 1993)(holding that while the length of pretrial detention is a factor in determining whether due process has been violated, the length of detention alone is not dispositive and “will rarely by itself offence due process.”)

*Salerno*, 481 U.S. 739 (stating the Due Process Clause clearly does not grant a person an absolute right to be free from detention, even when convicted of no crime).

Moreover, in order to detain a presumptively innocent citizen without bail the burden is on the prosecution and it should be substantial. Courts have recognized that procedures associated with such a process must provide substantially greater safeguards. *Musgrave*, Cause No. W-85-CR-25 (W.D. Tex., July 3, 1985), requiring pretrial disclosure to the accused of materials reviewed by magistrate at “detention hearing” noting that:

“This should be especially true where, as here, a presumptively innocent citizen is ordered detained before trial without bail, based upon the *ex parte* receipt of documentary evidence, without affording him the opportunity to review or rebut same.” *Musgrave*, Cause No. W-85CR-25 (W.D. Tex., July 3, 1985). [included in study materials]

### **DETENTION MUST BE REQUIRED AT THE EARLIEST POSSIBLE OPPORTUNITY**

Upon motion, the Act provides:

“The [detention] 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 the person may not exceed five days, and a continuance on motion of the attorney for the Government

may not exceed three days.” *U.S. v. O’Shaughnessy*, 764 F.2d 1035, 1037 (5th Cir. 1985)(emphasis in original).

In *O’Shaughnessy*, the court held the government must request detention, rather than bail under §3142(f) at the earliest possible opportunity or same is waived.

“Unless we find exceptional circumstances, we will not deviate from clear, unambiguous and mandatory statutory language. In considering the ‘first appearance’ requirement, the Second Circuit refused to weaken the Act’s procedural fabric by ‘encouraging imprecise application of procedural requirements...’ [W]e agree with its policy to strictly apply the ‘first appearance’ requirement.” *O’Shaughnessy* at 1038 (emphasis in original).

*See also* *U.S. v. Holloway*, 781 F.2d 124 (8th Cir. 1986)(noting Government could not request detention two days after bond set for defendant. Only evidence to come to light during interim was that defendant had greater net worth than originally supposed).

*But see* *U.S. v. Moneada-Palaez*, 810 F.2d 1008 (11th Cir. 1987)(stating as long as demand for detention hearing is made within the temporary detention period allowed by the Bail Reform Act the hearing is timely held).

### **THE “FIRST APPEARANCE” REQUIREMENT OF THE BAIL REFORM ACT**

In the Bail Reform Act’s infancy, circuit court were grappling with a fundamental problem – if the government cannot not proceed with a detention hearing within the time limitations prescribed by Section 3142(f), should the remedy of barring detention apply in all cases? See e.g. *U.S. v. Payden*, 759 F.2d 202 (2d Cir. 1985); *U.S. v. O’Shaughnessy*, 764 F.2d 1035 (5<sup>th</sup> Cir. 1985); *U.S. v. Mitchell*, 600 F. Supp. 164, 168 (N.D. Cal. 1985).

“We based our reversal upon material violations of the timeliness requirement of 18 U.S.C. § 3142(f) which

provides that a detention hearing ‘shall be heard immediately upon the person’s first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance’ . . . .

The Bail Reform Act does not permit a waiver of time requirements by the defendant. Congress, therefore, must have intended enforcement to be at least as strict as that under the Speedy Trial Act, where waiver by the defendant is permitted. We have held that court congestion does not excuse violations of time requirements under the Speedy Trial Act. *United States v. Nance*, 666 F.2d 353, 358 (9<sup>th</sup> Cir.), *cert. denied*, 456 U.S. 918 (1982).

We conclude that the procedures under section 3142 of the Act must be strictly followed as a precondition to detention under subsection (e). If the time constraints are violated in any material way, the district court should not order unconditional pretrial detention of the person.” *U.S. v. Al-Azzawy*, 768 F.2d 1141, 1145 (9<sup>th</sup> Cir. 1985) (emphasis added). *See also U.S. v. Payden*, 759 F.2d 202 (2d Cir. 1985); *U.S. v. Iturtado*, 779 F.2d 1467 (11<sup>th</sup> Cir. 1985).

The language of the Act is clear and straightforward. Nothing in the Act suggests that the initial requirement is mitigated in any way by any subsequent hearings. Where statutory language is clear and unambiguous, we are not at liberty to adopt an interpretation different from that directed by the language” *U.S. v. Payden*, 759 F.2d 202, 204 (2d Cir. 1985).

*Cf* *U.S. v. Fortna*, 769 F.2d 243 (5<sup>th</sup> Cir. 1985) (holding it is legally impossible to hold detention hearing at first judicial appearance when accused is not represented by counsel).

*See* *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985); *U.S. v. Resek*, 602 F.Supp. 1126 (S.D.N.Y. 1985).

*See also* *U.S. v. Valenzuela-Verdigo*, 815 F.2d 1011 (5th Cir. 1987) (stating where defendant requested and stipulated that the detention hearing would be held in San Antonio where the indictment was returned, rather than at place of arrest; and court found that initial appearance occurred in San Antonio, and resulting delay caused by transfer was not sufficient grounds to set aside the detention order).

*But see* *U.S. v. King*, 818 F.2d 112 (2d Cir. 1987) [holding that any error in failing to hold a detention hearing at the first appearance was harmless].

The Supreme Court put this matter somewhat to rest, however, in *United States v. Montalvo-Murrilo*, which held that the time table pronounced in subsection (f) of Section 3142 is not fatal to the Government's motion for detention, and that release predicated on non-compliance with the statute would only be appropriate if the defendant can demonstrate that the error (denoted "unconstitutional error") had a "substantial influence" on the outcome of the proceeding. *United States v. Montalvo-Murrilo*, 495 U.S. 711, 721 (1990).

However, a defendant might waive his right to a timely detention hearing. *U.S. v. Valenzuela-Verdigo*, 815 F.2d 1011 (5th Cir. 1987) (finding in substance defense counsel had asked for a continuance as provided by the Act court found counsel had waived the right); *U.S. v. Coonan*, 826 F.2d 1180 (2nd Cir. 1987) (holding the right was waived by a defendant whose attorney claimed that his client's federal bail status was not at issue since he was then in state custody); *U.S. v. Madruga*, 810 F.2d 1010 (11<sup>th</sup> Cir. 1987) (stating failure to specifically object to the date to which the hearing had been continued constituted waiver); *U.S. v. Araneda*, 899 F.2d 368 (5th Cir. 1990) (failure to object to continuance granted as to all defendants on motion of only some co-defendants constituted waiver).

## **REASONABLE ASSURANCE THAT DEFENDANT WILL APPEAR**



Under §3142(b) of the Bail Reform Act, the judicial officer “shall order the pretrial release of the person . . . unless . . . [he] 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.”

Reasonable assurance, however, does not require a guarantee of appearance. *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985). Rather, the standard required by the Act is that of an objectively reasonable assurance of community safety and appearance at trial. *U.S. v. Orta*, 760 F.2d 887 (8th Cir. 1985).

### **APPOINTMENT OF COUNSEL FOR INDIGENT MATERIAL WITNESS**

The provisions of 18 U.S.C.A. § 3142(f) also apply in cases where the government seeks to incarcerate an indigent as a material witness pursuant to 18 U.S.C.A. § 3144. In such an instance, appointment of counsel is required at the hearing to determine whether conditions can be imposed upon the witness that will reasonably assure his appearance at trial so as to allow pretrial release. *See In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the Western District of Texas*, 612 F. Supp. 940 (D.C. Tex. 1985) (holding that counsel must be appointed for indigent witness or due process is violated, and no immediate right to counsel exists, instead compliance would be required by a specified date).

### **FINDINGS OF FACTS AND REASONS FOR DETENTION MUST BE IN WRITING**

Section 3142(i)(1) required that “the judicial officer shall . . . include written findings of fact and a written statement of the reasons for the detention . . . ”

*See U.S. v. Westbrook*, 780 F.2d 1185, 1190 (5th Cir. 1986) (holding by Fifth Circuit to remand because of district court’s order of detention failed to “satisfy the strict procedural requirements contained in section 3142(i).”); *In re Smith*, 823 F.2d 401 (11th Cir. 1987) (stating District Court could not deny defendant bail pending

appeal without specifying its reasons in writing on the record). The order did not include the factual findings supporting same. *U.S. v. Coleman*, 777 F.2d 888 (3d Cir. 1985) (stating writing necessary for appellate review).

### **REQUISITES TO REOPENING HEARING**

Where the accused offered new evidence to rebut the government's allegations, the district court, within its discretion, reopen the detention hearing to consider the new evidence. *U.S. v. Shakur*, No. HCR 87-65-02 (N.D. Ind. July 16, 1987). This is whether the matter is before the magistrate judge of the district court.

*See also* *U.S. v. Gerken*, SA-88-CR-205 (W.D. Tex. 1988) (holding to reopen detention hearing under 18 U.S.C. § 3142(f), a judicial officer must find that information exists which was not shown to the movant at the initial hearing).

### **REVIEW OF THE MAGISTRATE'S ACTION IS TO BE CONDUCTED "DE NOVO" BY DISTRICT COURT**

Most detention hearings are conducted at the trial court level by Magistrate judges and are reviewable by District Court judges. Thereafter, the detention or release orders are reviewed by the circuit Courts of Appeal

The appeal of a magistrate's detention order under 18 U.S.C. §3145 is reviewed *de novo* by the District Court "mak[ing] an independent determination of the proper pretrial detention or conditions for release". *See U.S. v. Westbrook*, 780 F.2d 1185, 1188 (5th Cir. 1998); *U.S. v. Aron*, 904 F.2d 221, 223 (5th Cir. 1990).

### **MAXIMUM SENTENCE FOR EACH OFFENSE CHARGED MUST EXCEED TEN YEARS**

The maximum sentence for each offense charged must exceed ten years or the government may not detain a suspect without bail. 18 U.S.C. §3142(f)(1)(C); *U.S. v. Hinote*, 789 F.2d 1490 (11th Cir. 1986). In *Hinote*, the Eleventh Circuit held that the “district court acted improperly in adding together maximum sentences of each of [the] alleged offenses in order to invoke rebuttable presumption on basis that total sentences could exceed ten years.” *U.S. v. Hinote*, 789 F.2d 1490, 1491 (11th Cir. 1986).

### **APPELLATE REVIEW OF DISTRICT COURT BY COURT OF APPEALS**

The Courts of Appeals of three federal circuits review the overall propriety of pretrial detention orders, pursuant to the Bail Reform Act of 1984, by applying the “clearly erroneous” standard.

*U.S. v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985); *U.S. v. Chimurenga*, 760 F.2d 400, 405 (2nd Cir. 1985); *U.S. v. Williams*, 753 F.2d 329, 333 (4th Cir. 1985).

However, the majority of the Courts of Appeals now review such orders “*de novo*” as involving mixed questions of law and fact.

*U.S. v. Hurtado*, 779 F.2d 1467, 1472 (11th Cir. 1985); *U.S. v. Maull*, 773 F.2d 1479, 1487, 1488 (8th Cir. 1985) (*en banc*); *U.S. v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985); *Hazime* at 37; *Bayko* at 1399-1400.

### **REVOCAION OF BAIL**

#### **RULES FOR HEARING ON MOTION TO REVOKE BAIL**

The 1984 Bail Reform Act’s enumeration of a defendant’s rights at a hearing on pretrial release were not repeated when Congress turned to the hearings on bail revocation. To fill this gap, the Second Circuit has held that the defendant must be allowed to testify and present evidence, and the district court must make specific findings and give reasons if bail is revoked. *U.S. v. Davis*, 845 F.2d 412, 413 (2d

Cir. 1988). The Court held that a pretrial release hearing and a bail revocation hearing are similar and thus the same protections should be provided. *U.S. v. Davis*, 845 F.2d 412, 413 (2d Cir. 1988).

### **STANDARD OF REVIEW AT REVOCATION HEARING**

The Fifth Circuit has held that a preponderance of the evidence standard applies in revoking bail based on a belief that released defendant has violated his conditions of release. *U.S. v. Aron*, 904 F.2d 221(5th Cir. 1990) (revocation of release order allowed because defendant's attempt to intimidate witness violated release condition and was sufficient to establish by preponderance of evidence that defendant would violate conditions again); *See also U.S. v. Gatti*, 794 F.2d 773 (2d Cir. 1986) (noting government has lesser burden in revocation of bail than at initial detention hearing which requires clear and convincing evidence).

### **BAIL POST TRIAL PENDING APPEAL: A "CLOSE" CALL**

After trial, the Defendant may also seek release on Bail pending sentencing or otherwise, persons seeking bail pending appeal may obtain it upon showing that they will not flee, are not a danger to the community and that their appeals raise a substantial question of law which is likely to result in reversal or an order for a new trial.

The statute sounds as if bail is entirely unavailable in drug cases where the punishment exceeds 10 years; is a crime of violence or has a sentence of life or death. 18 U.S.C. § 3143 (b)(2). However 18 U.S.C. § 3143 (c) allows release of such persons if "there are exceptional reasons why such person's detention would not be appropriate." The fact that an appeal will likely be successful provides an "exceptional reason." *U.S. v. DiSomma*, 769 F. Supp. 575, 576 (S.D.N.Y.) *affirmed* 951F.2d 494 (2nd Cir. 1991).

### **QUESTION IS WHETHER DEFENDANT RAISES SUBSTANTIAL QUESTION**

Of course, the fact that the Trial Court has already ruled adversely on issues raised by a defendant's appeal is not the appropriate inquiry, *U.S. v. Valera-*

*Elizondo*, 761 F.2d 1020 (5th Cir. 1985)<sup>12</sup>, otherwise no Appellant would be eligible for bail pending appeal. The statute does not require a court to second guess its own decisions in order to determine that an individual should be released pending his appeal. Instead the court must make two inquiries. First, it must ask whether the appeal raises questions which could be decided either way. Second, it must assume such questions will be decided in Defendant's favor and then decide whether this will result in a reversal of the conviction or the grant of a new trial. *U.S. v. Powell*, 761 F.2d 1227, 1233-1234 (8th Cir. 1985).

### **“SUBSTANTIAL QUESTIONS”**

A substantial question is one that is either novel or is fairly debatable, not one which would require the District Court to determine the likelihood of its own error. *U.S. v. Handy*, 761 F.2d 1279 (9th Cir. 1985). Moreover, to be entitled release pending appeal the Defendant must demonstrate that this “fairly debatable” question is of the type that can result in a reversal of Defendant's conviction.

“‘Substantial’ defines the level of merit of the question presented and ‘likely to result in reversal or an order for a new trial’ defines the *type* of question that must be presented’... ‘[T]he statute simply requires the defendant demonstrate the existence of a substantial or ‘fairly debatable’ question of the type that calls into question the validity of the judgment.” *U.S. v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985) (quoting *U.S. v. Handy*, 753 F.2d 1487 (9th Cir. 1985)).

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<sup>12</sup> “‘The statutory language requiring a finding that the appeal “raises a substantial question of law or fact likely to result in reversal or an order for a new trial” cannot be read as meaning, as the district court apparently believed, that the district court must conclude that its own order is likely to be reversed...[W]e are willing to attribute to Congress the cynicism that would underlie the provisions were it to be read as requiring the district court to determine the likelihood of its own error. A district judge who, on reflection, concludes that s/he erred may rectify that error when ruling on post-trial motions. Judges do not knowingly leave substantial errors uncorrected, or deliberately misconstrue applicable precedent. Thus, it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.’” *U.S. v. Valera-Elizondo*, 761 F.2d 1020, 1022-1023 (5th Cir. 1985)[quoting *U.S. v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985).

This seminal case applying the statutory requirements for bond pending appeal, *U.S. v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985), sets out a “close question” test for determining whether a question is substantial.

“[A] defendant who wishes to be released on bail after the imposition of a sentence including a term of imprisonment must first show that the question presented by the appeal is substantial, in the sense that it is a close question or one that could go either way...If this part of the test is satisfied, the defendant must then show that the substantial question he or she seeks to present is so integral to the merits of the conviction that it is more probably than not that reversal or a new trial will occur if the question is decided in the defendant’s favor. In deciding whether this part of the burden has been satisfied, the court or judge to whom application for bail is made must assume that the substantial question presented will go the other way on appeal and then assess the impact of the assumed error on the conviction.”  
*Powell* at 1233-34.

*See also* *U.S. Giancola*, 754 F.2d 898 (11th Cir. 1985) (stating appeal must raise a “substantial question of law or fact, if resolved in favor of defendant, result will be reversal or new trial);

*U.S. v. Miller*, 753 F.2d 19 (3rd Cir. 1985)(maintaining a “substantial question of fact or law” must be either novel, not decided or controlling precedent, or fairly doubtful);

*U.S. v. Smith*, 793 F.2d 85 (3rd Cir. 1986)(clarifying *Miller*; a substantial question is one that is “fairly debatable among jurists of reason”);

*Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985)(following *Miller* subject to limitations imposed by *Giancola*);

*U.S. v. Lamp*, 606 F.Supp. 193 (W.D. Tex. 1985), *cert. denied*, 476 U.S. 1144 (1986), *cert. denied sub nom, Eberwine v. U.S.* 477 U.S. 908 (1986);

*U.S. v. Crabtree*, 754 F.2d 1200 (5th Cir. 1985); *U.S. v. Bayko*, 774 F.2d 516 (1st Cir. 1985); *U.S. v. Randell*, 761 F.2d 122 (2nd Cir. 1985); *U.S. v. Pollard*, 778 F.2d 1177 (6th Cir. 1985); *U.S. v. Bilanzich*, 771 F.2d 292 (7th Cir. 1985).

*But see* *U.S. v. McManus*, 651 F.Supp. 382, 383-4 (D.Md. 1987)(extenuating circumstances, innumerable letters showing community support, the defendant's charitable and civic work and his devotion to family and handicapped wife, entitled defendant to bail pending appeal).