7. Pretrial Detention

STATUTE

§ 3142(e), (f) and (j)

(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) of this subsection 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) of this subsection, 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*.), or chapter 705 of title 46;

(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, United States Code, for which a 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, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a 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 the 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 the 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, the 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.

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

Legislative History: S. REP. NO. 225, 98th Cong. 1st Sess., 4–11, 17–22, and 25 (1983).
See Appendix II, *infra*.

7.01 Generally

The Act introduced into federal law specific authority for the court to order certain defendants detained prior to trial, without setting any conditions of release. Along with the related provisions for considering dangerousness of the defendant, this is the most innovative and important feature of the Act. It has also generated the most controversy and litigation.

The court can order pretrial detention only after conducting a "detention hearing." Section 3142(e) and (f) of the Act and the cases that have interpreted them, prescribe when, by whom, and in what cases a motion for a detention hearing can be made; when the hearing is to be held; the standards the court applies in determining whether to order detention; what information is to be considered and other matters of procedure at the hearing; the existence, nature, and effect of rebuttable presumptions against certain defendants; and the constitutionality of various aspects of pretrial detention. This chapter explores each of these matters in detail.

7.02 How and by Whom Motion for Detention Hearing Is Made

How: In most districts, the motion is made orally, although some districts require a written motion served prior to the initial appearance. A sample form of "check-off" motion generally used, but not required, in the Western District of Washington appears at the end of this chapter. The Fifth and Tenth Circuits have held that the Act does not require the motion to be in writing. *U.S. v. Volksen*, 766 F.2d 190 (5th Cir. 1985); *U.S. v. Montalvo-Murillo*, 876 F.2d 826 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711 (1990).

The Second Circuit, while permitting the motion to be made orally, has held that it should specify whether the government seeks detention for flight risk, dangerousness, or both; and if based on a threatened obstruction of justice, it should so specify. *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986) (*Melendez-Carrion I*).

Where serious drug offenses are charged, defendant has no due process right to be advised by the government which rebuttable presumption it will invoke (flight or dangerousness). The statute itself advises defendant that the government or the court may rely on either or both. *U.S. v. Perez-Franco*, 839 F.2d 867, 871 (1st Cir. 1988).

By Whom: A motion by the government will generally begin the process leading to a detention hearing. But the court can order a detention hearing on its own motion in cases eligible under the categories listed as (5) or (6) under "Eligible Cases," in Sec. 7.04. But *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985), held that the court, on its own motion, can order a detention hearing when defendant is charged with a ten-year drug offense. The court reasoned that such a charge gives rise to a rebuttable presumption (*see* Sec. 7.11) that defendant is a serious risk to flee. In effect, this would add category (3), as listed in Sec. 7.04, to the classes of cases in which the court can, on its own motion, order a detention hearing.

7.03 Timeliness of Motion for Detention Hearing

7.03(a) Generally

Section 3142(f) provides that any detention hearing "shall be held immediately upon the person's first appearance before the judicial officer" unless the court grants a request for a continuance, as authorized by the Act. Two circuits have uniformly held that this requires the government to make any motion for a detention hearing at defendant's initial appearance.

Other circuits have specified circumstances under which the motion can be made at a later time. The balance of this section discusses these cases.

Where the motion is not timely made, it is not clear what remedy, if any, exists. This issue is discussed in Sec. 7.05(k), *infra*.

7.03(b) Strict Compliance—Second and Ninth Circuits

The Second and Ninth circuits have held that the motion for a detention hearing must be made at the initial appearance, or it is waived. They have not, as yet, recognized any exceptions. *U.S. v. Payden*, 759 F.2d 202 (2d Cir. 1985) (*Payden I*); *U.S. v. Al-Azzawy*, 768 F.2d 1141(9th Cir. 1985); *U.S. v. Molinaro*, 876 F.2d 1432 (9th Cir. 1989).

The holding as to waivers is now very questionable, in light of *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990). *See* Sec. 7.05(k), *infra*.

7.03(c) After Temporary Detention Period—First, Fifth, Eleventh, and D.C. Circuits

The First, Fifth, Eleventh, and D.C. Circuits have permitted the government to move for detention during or at the conclusion of a period of temporary detention under § 3142(d). *U.S. v. Vargas (Juan)*, 804 F.2d 157 (1st Cir. 1986); *U.S. v. Becerra-Cobo*, 790 F.2d 427 (5th Cir. 1986); *U.S. v. Moncada-Pelaez*, 810 F.2d 1008 (11th Cir. 1987); and *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985). The Fifth Circuit, in an earlier case, had suggested a more rigid rule, but the appeal in that case was later dismissed as moot. *U.S. v. O'Shaughnessy*, 764 F.2d 1035, *appeal dismissed*, 772 F.2d 112 (5th Cir. 1985).

7.03(d) Rule 40, Charges in Another District—Seventh Circuit

The Seventh Circuit has held that when the arrest and initial appearance are in a district other than the charging district, it is not necessary that the government move for detention in the district of arrest. It is sufficient if the government so moves at the first appearance in the charging district. *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986).

See Sec. 7.05(i) for a discussion of cases considering which district should conduct the detention hearing where the government moves for detention in the district of arrest.

7.03(e) No Counsel Present at Initial Appearance—Eleventh Circuit

When neither the defendant nor the government was represented by counsel at the initial appearance, the Eleventh Circuit held that a motion for detention and a detention hearing at the next appearance were timely. *U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985). This ruling is significant in cases in which the initial appearance is before a part-time magistrate in an outlying area. The court also indicated that the government may move for detention when it seeks review of an order of conditional release.

7.03(f) Defendant in State Custody—First and Second Circuits

In *U.S. v. King (Christopher)*, 818 F.2d 112 (1st Cir. 1987), defendant was serving a state sentence at the time of his initial appearance. The government did not move for a detention hearing, and the magistrate returned him to state custody. Seven months later, as the end of defendant's state sentence approached, the government moved for a detention hearing. The First Circuit indicated the best procedure under these circumstances is to hold a provisional detention hearing at the time of the initial appearance. Alternatively, the hearing could be postponed until release from state custody approached, if the government so requested and either the defendant agreed or the court found "good cause." The court affirmed, however, finding waiver, lack of prejudice, and substantial compliance with the purposes of the Act.

In *U.S. v. Coonan*, 826 F.2d 1180 (2d Cir. 1987), the court and parties had basically followed the procedure the First Circuit had recommended in *King*, *supra*. Although defendant was in state custody, the government moved for detention at the initial appearance. Defense counsel stated that "bail was not an issue." When the detention hearing was not held within the five-day limit, defendant's new counsel asserted the court had lost jurisdiction to hold a detention hearing. The district court and the Second Circuit rejected the challenge. *See* Sec. 7.05(j), *infra*.

The Ninth Circuit has held that the motion for a detention hearing must be made at the first appearance, even if the defendant is in custody on other charges. *U.S. v. Molinaro*, 876 F.2d 1432 (9th Cir. 1989).

7.03(g) First Appearance After Detention Motion—Eighth Circuit

The Eighth Circuit, by a 5-4 vote, has held that the "first appearance" requirement does not mean that a detention hearing must be held immediately when defendant first appears in court. It requires only that the hearing occur promptly once a motion for detention is made. Thus, when a magistrate judge sets an amount of bail, and defendant seeks review by a district judge, the district judge can order a detention hearing, even if the government has never so moved. *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (en banc) (*rev'g U.S. v. Maull*, 768 F.2d 211 (8th Cir. 1985)). This decision gives an interpretation to the "first appearance" requirement that is distinctly different from those in other circuits.

7.03(h) New Evidence and the "First Appearance" Rule—Fifth and Eighth Circuits

If the government does not move for detention at initial appearance, but thereafter secures new evidence about the defendant, can it then move for detention? The Fifth and Eighth Circuits have reached conflicting conclusions.

In *U.S. v. O'Shaughnessy*, 764 F.2d 1035 (5th Cir. 1985), *appeal dismissed*, 772 F.2d 112 (5th Cir. 1985), the Fifth Circuit held that the statute was clear in prohibiting pretrial detention unless there was a motion at the first appearance in court.

But the Eighth Circuit, in *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985), applied its interpretation of the first appearance requirement discussed above and held that when the government discovers new evidence of danger or flight risk, it may move for detention of a defendant who has already appeared before the court.

In *U.S. v. Holloway*, 781 F.2d 124 (8th Cir. 1986), a panel of the same court held that when the new evidence is merely that defendant has a greater net worth than earlier believed, the government may not move for detention. The court may up the financial ante, so long as it is still within defendant's reach, but cannot switch to a detention order. In the *Holloway* case, however, the Eighth Circuit stated in dictum:

> We do not doubt that in the exceptional instance when a magistrate has made a decision to release and subsequently evidence comes to light which could not reasonably have been brought in at the first appearance, and that evidence indicates a strong likelihood that the defendant is a flight risk or a danger to the community, the magistrate or the district court would have power to order detention under § 3142(e), regardless of the fact that the time for a § 3142(f) hearing had passed.

Id. at 128–29.

The decision of the Supreme Court in *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990), while not directly in point, supports the argument that the government should be permitted to present the motion upon discovery of significant new evidence. *See* Sec. 7.05(k), *infra*. The 1986 amendments to § 3142(f) permit the court to reopen a detention hearing at any time prior to trial to consider newly discovered material evidence. *See* Sec. 7.09. But nothing in the amendments authorizes a motion for detention based on new evidence when there was no earlier motion or detention hearing.

7.04 Eligible Cases

Before conducting a detention hearing, the court must be satisfied that the case is "eligible" under § 3142(f). The case must meet one of the following tests:

1. Defendant is charged with a "crime of violence, a violation of section 1591, or an offense listed in 18 U.S.C. § 2332b(g)(5)(B), for which a maximum term of imprisonment of 10 years of more is prescribed." Section 1591 is titled "Sex trafficking of children or by force, fraud or coercion." Section 2332b(g)(5)(B) defines federal crimes of terrorism transcending national boundaries. The manner in which the statute developed leaves no doubt that Congress intended the limitation of ten years or more to apply only to charges under § 2332b(g)(5)(B); and that the government may move for detention in any case charging a "crime of violence," regardless of the maximum penalty. The definition of "crime of violence" is in § 3156(a)(4). (See the discussion in Sec. 5.02.) This includes a conspiracy to commit a crime of violence, *U.S. v.*

Chimurenga, 760 F.2d 400 (2d Cir. 1985), and aiding and abetting the commission of such an offense, *U.S. v. Mitchell,* 23 F.3d 1 (1st Cir. 1994). It is sufficient if defendant is charged with participation in a RICO enterprise, even if the indictment charges only codefendants with committing specific violent predicate acts in furtherance of the enterprise. *U.S. v. Ciccone*, 312 F.3d 535 (2d Cir. 2002). The D.C. Circuit has held that "crime of violence" does *not* include a charge of "felon in possession of a firearm." *U.S. v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999). The Third Circuit reached the same conclusion in *U.S. v. Bowers*, 432 F.3d 518 (3d Cir. 2005). But a Second Circuit panel, by a 2-1 vote, reached the opposite conclusion and rejected *Singleton*, in *U.S. v. Dillard*, 214 F.3d 88 (2d Cir. 2000). In a case considering post-conviction release pending appeal, the Seventh Circuit agreed with *Singleton* that a "felon in possession" offense is not a crime of violence. *U.S. v. Lane*, 252 F.3d 905 (7th Cir. 2001). The Ninth Circuit ruled in *U.S. v. Twine*, 344 F.3d 987 (9th Cir. 2003), *reh'g en banc denied*, 362 F.3d 1163 (9th Cir. 2004), that "felon in possession of a firearm" is not a "crime of violence" for purposes of the Bail Reform Act. The court regarded itself as bound by its earlier decision in *U.S. v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993). It is a "crime of violence" and a federal felony to possess a firearm while subject to a domestic protection order, or after a misdemeanor conviction of domestic violence, the Tenth Circuit held in *U.S. v. Rogers*, 371 F.3d 1225 (10th Cir. 2004). The court may therefore conduct a detention hearing.

2. The maximum penalty for the crime charged is life imprisonment or death.

3. Defendant is charged with a drug offense carrying a maximum penalty of ten years or more.

4. Defendant is charged with *any felony* and has two other convictions within the categories of serious crimes listed in (1) through (3) above.

5. Defendant is charged with a felony that involves a minor victim; or possession or use of a firearm, or a destructive device, or any other

dangerous weapon; or a violation of the federal statute requiring registration by a sex offender.

6. There is a serious risk that defendant will flee.

7. There is a serious risk that defendant will obstruct justice, or threaten, injure, or intimidate a prospective witness or juror. This carries forward the court's inherent power under prior law to detain on this basis. *U.S. v. Leon*, 766 F.2d 77 (2d Cir. 1985); *U.S. v. Payden*, 768 F.2d 487 (2d Cir. 1985) (*Payden II*); and *U.S. v. Gotti*, 794 F.2d 773 (2d Cir. 1986).

If the government asserts the case is eligible on one of the last two listed grounds, the court, in determining whether to schedule a detention hearing, is sometimes required to make a preliminary determination of an issue it will decide on the merits at the detention hearing.

Note that a case is not necessarily eligible for a detention hearing merely because defendant is generally a risk to other persons or to the community. The case must fit one of the seven eligibility categories. "Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists." *U.S. v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988). *Accord U.S. v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *U.S. v. Byrd*, 969 F.2d 106 (5th Cir. 1992). The Ninth Circuit reached the same conclusion in *U.S. v. Twine*, 344 F.3d 987 (9th Cir. 2003). As noted above, however, at the time of preparation of the 2004 supplement to this volume, the Ninth Circuit was considering the parties' briefs as to whether the court should rehear *Twine* en banc.

7.05 When Detention Hearing Is Held

7.05(a) Generally

As discussed in Sec. 7.03, the detention hearing is to be held at the first appearance, unless defendant or the government requests a continuance. § 3142(f).

7.05(b) Three- or Five-Day Continuances

Section 3142(f) provides: "Except for good cause, a continuance on motion of the [defendant] may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the [defendant] shall be detained. . . ." The Seventh Circuit reads the legislative history to suggest that these continuances are "automatic" upon request. *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986). In *U.S. v. Rivera (Luis)*, 837 F.2d 906 (10th Cir. 1988), defense counsel asked for a continuance and told the court he would contact the clerk to advise what portion of the five days he required. He never did so, and no detention hearing was ever held. The Tenth Circuit held that failure to conduct the hearing was inexcusable, but did not justify dismissal of the charges, particularly where defense counsel did not pursue the matter with the trial court. *See* Sec. 7.05(j), *infra*.

7.05(c) Do Saturdays, Sundays, and Holidays Count?

The Eleventh Circuit has held "yes," and a panel of the Tenth Circuit has impliedly agreed, without a discussion of the issue. The Second and Ninth Circuits, however, have held that intervening Saturdays, Sundays, and holidays do not count in complying with time limits for the detention hearing; and the Fourth Circuit seems inclined to agree.

In *U.S. v. Hurtado*, 779 F.2d 1467, 1474 n.8 (11th Cir. 1985), the Eleventh Circuit noted the absence of any language in § 3142(f) authorizing exclusion of these days, in contrast to the explicit exclusion in § 3142(d) relating to temporary detention. FED. R. CRIM. P. 45(a) does not apply, the court held. In a later Eleventh Circuit case, *U.S. v. Madruga*, 810 F.2d 1010 (11th Cir. 1987), one circuit judge indicated he would limit or overrule *Hurtado*. A panel of the Tenth Circuit observed in dictum that a delay of six days between a detention motion and a hearing would exceed the permissible five-day continuance following a defense request. While the period in question included a weekend, the court did not discuss whether those days were to be excluded in the computation. *U.S. v. Montalvo-Murillo*, 876 F.2d 826 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711 (1990).

In *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986) (*Melendez-Carrion I*), the Second Circuit reached a result the opposite of *Hurtado*, finding that Rule 45(a) does apply. The Ninth Circuit agreed in *U.S. v. Aitken*, 898 F.2d 104 (9th Cir. 1990).

The Fourth Circuit, in passing, indicated agreement with the Second Circuit that only "work days" are to be counted in applying the limitations. *U.S. v. Clark*, 865 F.2d 1433 (en banc) (4th Cir. 1989). Defense counsel waives any right to challenge the timeliness of a hearing held four or five days after the initial appearance by failing specifically to assert before the magistrate judge that the delay was longer than § 3142(f) permits. *Melendez-Carrion I*, *supra*. *Accord U.S. v. Madruga*, 810 F.2d 1010 (11th Cir. 1987); *U.S. v. Malekzadeh*, 789 F.2d 850 (11th Cir. 1986).

7.05(d) Strict Compliance with Time Limits—Ninth and Eleventh Circuits

The Ninth and Eleventh Circuits have held that the court must adhere strictly to the time limits set forth in the statute. *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985). Other circuits appear to be more flexible.

7.05(e) *Sua Sponte* Continuances

The Ninth, Tenth, and Eleventh Circuits have held that the court may not continue the detention hearing on its own motion. *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985); *U.S. v. Montalvo-Murillo*, 876 F.2d 826 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711, 109 L. Ed. 2d 720, 110 S. Ct. 2072 (1990); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985).

Where the district court has violated this rule, however, defendant is not entitled to release on some conditions. *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990). This issue is discussed in more detail in Sec. 7.05(k).

By contrast, the Fifth Circuit has held in two cases that, even in the absence of a specific request, accommodation of defense counsel will justify continuances of up to five days. These might be justified when defendant intends to retain counsel but has not yet done so at the initial appearance. *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985). Similarly, the hearing was properly continued four days to accommodate the travel

schedule of out-of-town counsel in *U.S. v. Valenzuela-Verdigo*, 815 F.2d 1011(5th Cir. 1987). The D.C. Circuit limits *sua sponte* continuances to the most compelling circumstances. *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985).

7.05(f) Can Defendant Waive Time Limits?

The Ninth and Eleventh Circuits have answered no. *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985); *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985). The First, Second, Fourth, and Fifth Circuits have held that defendant *can* waive the time limits. *U.S. v. King (Christopher)*, 818 F.2d 112 (1st Cir. 1987); *U.S. v. Coonan*, 826 F.2d 1180 (2d Cir. 1987); *U.S. v. Clark*, 865 F.2d 1433 (en banc) (4th Cir. 1989); *U.S v. Araneda*, 899 F.2d 368 (5th Cir. 1990). In *Clark*, the Fourth Circuit held that defendant can waive the hearing altogether. But if he later changes his mind and demands a detention hearing, the court must conduct it within the time limits prescribed in § 3142. The original waiver is like a request for an indefinite continuance for good cause. In *Araneda*, the Fifth Circuit held that defense counsel must interpose a timely objection, or waive any challenge to a continuance of excessive length. The Tenth Circuit discussed the issue, but was not required to resolve it, in *U.S. v. Montalvo-Murillo*, 876 F.2d 826 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711, 109 L. Ed. 2d 720, 110 S. Ct. 2072 (1990). *See* Sec. 7.05(j), *infra*.

7.05(g) Good Cause

In the Ninth and Eleventh Circuits, the convenience of the court or of defense counsel, without more, is not "good cause" for a continuance exceeding five days. *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985); *U.S. v. Hurtado*, 779 F. 2d 1467 (11th Cir. 1985). The court must make a specific "good cause" finding on the record before it can continue a detention hearing beyond the statutory limits. The Eleventh Circuit in *Hurtado* added that, in a multidefendant case, the court must consider the defendants independently. The court must proceed with the detention hearing as to one defendant even if there is good cause for a continuance exceeding five days as to another.

The Fifth Circuit in *U.S. v. Araneda*, 899 F.2d 368 (5th Cir. 1990) concurred that each defendant in a multidefendant case is entitled to a timely hearing, independent of the needs of the other defendants. The need for furnishing adequate notice, under 18 U.S.C. § 2518(9), of the intent to use intercepted communications at the detention hearing might constitute good cause, the Second Circuit ruled in *U.S. v. Salerno*, 794 F.2d 64 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 739 (1987). This issue is discussed further in Sec. 7.08.

Preparation of a pretrial services report, without more, does not constitute good cause for an extended continuance of the detention hearing. *U.S. v. Montalvo-Murillo*, 876 F.2d 826 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711 (1990).

A delay of the detention hearing to accommodate the judge's required attendance at the annual First Circuit Judicial Conference would constitute "good cause" where the hearing is scheduled as soon as possible after the judge's return. *U.S. v. Palmer-Contreras*, 835 F.2d 15 (1st Cir. 1987). Although the hearing in that case was a review of a magistrate's order of release rather than a detention hearing, the First Circuit assumed, without deciding, that the time limits and "good cause" provisions of § 3142(f) also applied to such a hearing.

7.05(h) After Temporary Detention

If defendant has already been held under the temporary detention provisions of § 3142(d), no further continuances of the detention hearing are permitted, the Ninth Circuit ruled in *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985).

7.05(i) Arrest in a Different District—Rule 40

When defendant is charged in one district but arrested in another, and the government moves for detention in the district of arrest, two circuits have held that the detention hearing will normally be deferred until defendant reaches the charging district. *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986) (*Melendez-Carrion I*); *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986). Information about the defendant and about the offense will generally be much more accessible and complete in the charging district. The Second Circuit added that the "clock" for the detention hearing only begins

to run upon defendant's first appearance in the charging district. *Melendez-Carrion I*, 790 F.2d at 992. The Fifth Circuit agreed with the latter conclusion in a case in which defendant agreed that the detention hearing should be held in the charging district. *U.S. v. Valenzuela-Verdigo*, 815 F.2d 1011 (5th Cir. 1987).

Neither these cases nor the Bail Reform Act provides much guidance as to the procedure or standards for the court in the district of arrest in ordering detention or release. Not every defendant charged in another district should be detained pending transportation by the marshal and a determination in that district. The process of transportation sometimes requires weeks. Many such defendants present little danger or risk of flight. On the other hand, custody is definitely appropriate for some defendants until a detention hearing can be held. Thus, the magistrate judge in the district of arrest must make a determination as to detention or conditions of release, notwithstanding cases holding that the detention hearing should be held in the charging district.

With due respect to the Second and Seventh Circuits, it is suggested that the same procedures and safeguards should govern bail hearings regardless whether the defendant was arrested on an out-of-district warrant or in a local case. If the government seeks detention, it should be required to move for it promptly. Both sides can obtain additional information about the defendant and the case by telephone, if necessary. The court in the district of arrest can then set conditions or order detention, as in any other case. The record transmitted to the charging district should reflect whether the government moved for detention. If the magistrate judge remands the defendant to custody, he should enter a full detention order.

These recommendations seem somewhat at odds with the holdings of the Second and Seventh Circuits, discussed above. But any differences could perhaps be resolved by permitting either side to request a de novo detention hearing upon defendant's arrival in the charging district.

As to review of the order of the magistrate judge in the district of arrest, see Sec. 9.02(a), *infra*. As to the effect in the district of arrest of an order of detention or release entered in the charging district, see Sec. 15.01, *infra*.

7.05(j) Waivers of Rights by Defendant

A number of appellate challenges have resulted from the willingness of defense counsel to waive procedural rights under the Act, up to and including stipulating to entry of a detention order. The Fourth Circuit has held that a defendant may waive a detention hearing altogether, or may waive the time limits for the hearing. *U.S. v. Clark*, 865 F.2d 1433 (en banc) (4th Cir. 1989). But in other circuits the issue is not so clear; and a magistrate judge who shortcuts required procedures based upon such concessions is inviting appellate trouble. New counsel for defendant might claim prejudice by reason of the court's failure to comply with the letter of the statute. A more likely source of problems is a line of authority in some circuits that procedural rights under the Act cannot be waived. Examples include an agreement that "detention is not an issue" as to a defendant already in state custody (*see* Sec. 7.03(f), *supra*); an agreement by defense counsel to contact the clerk later to schedule the detention hearing (*see* Sec. 7.05(b), *supra*); and attempted waivers by counsel of the statutory limitation on continuance (*see* Sec. 7.05(f), *supra*).

Even where counsel does not object, the magistrate judge should be very cautious about scheduling a detention hearing beyond the statutory continuances provided by the Act. And even where defense counsel does not contest a motion for detention, or stipulates to it, the magistrate judge should assure that the record is adequate, requiring government counsel to present evidence and/or proffer and admit into evidence the pretrial services report. The court should then enter an order that fully complies with § 3142(i).

7.05(k) Remedy for Excessive Delay

The Supreme Court addressed the question of the proper remedy where a detention hearing was not conducted within the time limits prescribed by the Act in *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990). In that case the government made a timely motion for detention; but the magistrate judge continued the hearing *sua sponte* beyond permissible limits. Reversing the Tenth Circuit, the Court held that the undue delay in the hearing did not entitle the defendant to release on conditions, regardless of his dangerousness and the risk of his flight. Justice Kennedy, for the majority, concluded

that requiring the release of such a defendant would defeat the purposes of the Act: to protect the public and assure that defendants will appear for court. The court did not identify any other remedy as more appropriate, and it in fact suggested that no remedy was necessary where the prosecution was not responsible for the delay. The Court concluded that, if at the tardy hearing the district court finds defendant should be detained, defendant has suffered no prejudice, and the error was "harmless." The Court acknowledged, however, that some remedy must be devised for a defendant whose hearing is unduly delayed and who is then found to be entitled to release on conditions under the standards of the Act.

The holding in *Montalvo-Murillo* would seem to overrule *U.S. v. Al-Azzazy*, 768 F.2d 1141 (9th Cir. 1985), at least insofar as the Ninth Circuit ordered the release on some conditions of defendant because the detention hearing was not timely held. It also undermines cases in three other circuits holding that the proper remedy is remand for another detention hearing. Those cases are *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985); *U.S. v. Clark*, 865 F.2d 1433 (4th Cir. 1989) (en banc); and *U.S. v. Vargas (Juan)*, 804 F.2d 157 (1st Cir. 1986).

Montalvo-Murillo also strongly suggests that release on conditions will not necessarily be required where there have been other failures to comply with the time deadlines of the Act.

Where the government has failed to move for detention at the first appearance, cases prior to *Montalvo-Murillo* have generally held that the district court must set conditions of release. *U.S. v. Holloway*, 781 F.2d 124 (8th Cir. 1986); *U.S. v. O'Shaughnessy*, 764 F.2d 1035, *appeal dismissed*, 772 F.2d 112 (5th Cir. 1985); *U.S. v. Molinaro*, 876 F.2d 1432 (9th Cir. 1989). These cases are discussed in Sec. 7.03, *supra*.

Similarly, where the district judge failed to provide defendant a "prompt review" of the magistrate judge's detention order, the Ninth Circuit ordered defendant's release on some conditions in *U.S. v. Fernandez-Alfonso*, 813 F.2d 1571 (9th Cir. 1987). *See* Sec. 9.02(b), *infra*.

The courts' rulings as to remedy in all of these cases are now of questionable authority, in light of *Montalvo-Murillo*.

The Tenth Circuit faced again the issue of remedies for an untimely detention hearing in *U.S. v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). In that case defendant was ordered detained in the district of arrest, but promptly upon arrival in the charging district he moved for release on conditions.

The court did not hear the motion until after defendant had been convicted at trial. While observing that the district court had failed to hold a pretrial detention hearing in a timely manner, the court held that in light of defendant's conviction the error was harmless and the issue was moot, citing *Montalvo-Murillo*. *Meyers,* 95 F.3d at 1488.

7.06 Examinations of Defendant During Continuance

During a continuance, the court "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." § 3142(f). But the Second Circuit has held that the court cannot order a psychiatric examination to assist in determining defendant's dangerousness. The court must determine this from the information available. *U.S. v. Martin-Trigona*, 767 F.2d 35 (2d Cir. 1985).

7.07 Determination of Motion Generally: Standards

The ultimate issue in ruling on a motion for pretrial detention is whether any condition or combination of conditions set forth in § 3142(c) will reasonably assure the appearance of the person as required, and the safety of any other person and the community. § 3142(f) (first sentence). In making this determination, the court must consider all of the factors in § 3142(g) (see chapter 5), and it must consider the possibility of less restrictive alternatives to detention. *U.S. v. Infelise*, 934 F.2d 103 (7th Cir. 1991). Detention can be based upon a showing either as to dangerousness or risk of nonappearance. Both are not required. *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Daniels*, 772 F.2d 382 (7th Cir. 1985); and *U.S. v. Sazenski*, 806 F.2d 846 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 148 (1986). The standard is "reasonable assurance." The court cannot order detention because there are no conditions that would guarantee appearance and safety. *U.S. v. Orta*, 760 F.2d 887 (8th Cir. 1985); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Ploof*, 851 F.2d 7 (1st Cir. 1988).

The court should consider any danger defendant presents to persons outside the United States, at least in a case where defendant has been charged with a violation of U.S. law, the effect of which occurs abroad. In such a case, "dangerousness" is not limited to the charging district, or even to the United States. *U.S. v. Hir*, 517 F.3d 1081 (9th Cir. 2008). Proposed conditions of release do not provide sufficient assurance of defendant's future appearances, and of the safety of other persons and the community, where those conditions are only effective if defendant complies with them in good faith. *Id*.

Standard of Proof: "§ 3142(f) provides that the court can find against the defendant on the issue of dangerousness only if it finds the facts by clear and convincing evidence." Although the Act does not prescribe a quantum of proof for a finding on likelihood to appear, the eight circuits that have addressed that question have all held that the standard as to flight risk is a preponderance of the evidence. *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *U.S. v. Himler*, 797 F.2d 156 (3d Cir. 1986); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1986); *U.S. v. Orta*, 760 F.2d 887(8th Cir. 1985); *U.S. v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985); *U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985); and *U.S. v. Vortis*, 785 F.2d 327 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 841 (1986). If a case does not carry a statutory presumption of flight risk (*see* Sec. 7.11, *infra*), the government bears the burden of proving, by a preponderance of the evidence, that defendant presents an actual risk of flight and that there are no conditions of release that would reasonably assure his presence in court. *U.S. v. Sabhnani*, 493 F.3d 63 (2d Cir. 2007).

If a case is eligible for a detention hearing, the court must consider any evidence of dangerousness, even if unrelated to the pending charges. *U.S. v. Rodriguez (Juan)*, 950 F.2d 85 (2d Cir. 1991). The Third Circuit has held that a defendant can be detained for dangerousness only on a showing that he is likely to commit the kind of offense that would make a case eligible for a detention hearing—*i.e.*, a crime of violence, a ten-year (or more) drug offense, or an offense for which the maximum penalty is life imprisonment or death. A likelihood that defendant will commit crimes involving false identification is insufficient. *U.S. v. Himler*, 797 F.2d 156 (3d Cir. 1986). *Accord U.S. v. Ploof, supra*.

7.08 "Evidence" and Procedure at Detention Hearing

7.08(a) Counsel

Defendant is entitled to be represented by counsel at the detention hearing. The court must appoint counsel, if necessary. § 3142(f).

7.08(b) Categories of "Evidence"

The parties are not limited to the presentation of sworn testimony and formal exhibits. Section 3142(f) authorizes defendant "to present information by proffer or otherwise." The Second, Ninth, Eleventh, and D.C. Circuits have held that the government also may do so. *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986); *U.S. v. Cardenas*, 784 F.2d 937, *vacated as moot*, 792 F.2d 906 (9th Cir. 1986); *U.S. v. Gaviria*, 828 F.2d 667 (11th Cir. 1987); *U.S. v. Smith (Gerald),* 79 F.3d 1208 (D.C. Cir. 1996). But the Third Circuit expressed "grave doubt" whether the Government can, by proffer, establish probable cause on the underlying charge sufficient to trigger the rebuttable presumption under § 3142(e). *U.S. v. Suppa*, 799 F.2d 115 (3d Cir. 1986).

The Federal Rules of Evidence as to admissibility do not govern what information may be presented. § 3142(f); FED. R. EVID. 1101(d)(3). Even if defendant challenges the admissibility of evidence, *e.g.*, the legality of a wiretap, the court should consider that evidence at a detention hearing, at least until the court determines at a suppression hearing that the evidence was unlawfully obtained. *U.S. v. Apker*, 964 F.2d 742 (8th Cir. 1992); *U.S. v. Angiulo*, 755 F.2d 969, 974 (5th Cir. 1985). But the Second Circuit held the Fifth Amendment prohibits the use of a coerced confession at a bail hearing. *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007). *Higazy* was a civil action for damages against an FBI Special Agent. The court offers no guidance as to the procedure the District Court should follow when defendant claims, at a bail hearing, that the government is using evidence unconstitutionally obtained. Nor does the court suggest what other categories of evidence should be excluded, *e.g.*, fruits of an unlawful search.

7.08(c) Testimony by Defendant

Defendant is entitled to testify at the detention hearing. § 3142(f). The courts have wrestled with the problem of how to protect defendant's Fifth Amendment rights on the merits of the charges if he testifies at the detention hearing. The Second Circuit in *U.S. v. Shakur*, 817 F.2d 189 (2d Cir. 1987), *cert. denied*, 484 U.S. 840 (1987), held that the district court may, if necessary, prohibit cross-examination of the defendant. The Third Circuit ruled that the court can grant "use-fruits immunity" with respect to defendant's testimony at the detention hearing. *U.S. v. Perry*, 788 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 864 (1986). The court did not specify whether the parties should address an application for such immunity to the United States Magistrate Judge at the detention hearing, nor did the court prescribe any other particulars as to the procedure for making and acting upon such an application.

If defendant does elect to testify at a detention hearing, perjured and material testimony can result in an enhancement of his offense level for "obstruction of justice," under § 3C1.1 of the Sentencing Guidelines. *U.S. v. Gunning,* 984 F.2d 1476 (7th Cir. 1993). Defendant is subject to the same enhancement if he furnishes materially false information to the magistrate judge at the initial appearance, even if he is not under oath. *U.S. v. Harrison,* 42 F.3d 427 (7th Cir. 1994). Providing a false name to a pretrial services officer and to the magistrate judge is also "obstruction of justice," even if nobody was fooled. *U.S. v. Restrepo*, 53 F.3d 396 (1st Cir. 1995); *U.S. v. Garcia (Alfonso),* 69 F.3d 810 (7th Cir. 1995); *U.S. v. St. James,* 38 F.3d 987 (8th Cir. 1994); *U.S. v. Magano-Guerrero*, 80 F.3d 398 (9th Cir. 1996). The Sixth Circuit approved a sentencing enhancement for obstruction of justice for a defendant who provided a false name to the magistrate judge and to the probation officer, and misled them as to his prior criminal history. *U.S. v. Wilson (Peter)*, 197 F.3d 782 (6th Cir. 1999).

7.08(d) Testimony by Other Witnesses

Section 3142(f) authorizes defendant, "to present witnesses on his own behalf [and] to cross-examine witnesses who appear at the hearing. . . ." The courts of appeals have been required to interpret both phrases.

Subpoenas—The Third Circuit has held that defendant has no right to subpoena witnesses. *U.S. v. Delker*, 757 F.2d 1390 (3d Cir. 1985). In a later case, however, that court rejected a challenge under the confrontation clause to the use of hearsay evidence by relying upon the fact that the magistrate judge did afford defendant the opportunity to subpoena the government witnesses. *U.S. v. Perry*, 788 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 864 (1986). The Eleventh Circuit has held that defendant may subpoena witnesses whose testimony relates to the weight of the evidence, at least in a case in which the government has invoked the rebuttable presumption. *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985). If the hearing is a combined preliminary examination and detention hearing (*see* Sec. 7.11(c), *infra*), defendant is entitled to subpoena witnesses, because he is entitled to do so at a preliminary examination.

If a witness other than defendant testifies at a detention hearing, on motion the court is required to order production of any statement by the witness that relates to the subject matter of the testimony. But the court can, for good cause, rule otherwise in a particular case. If the court orders production, and a party elects not to comply, the court may not consider the testimony of the witness whose statement is withheld. FED. R. CRIM. P. 46(i) and 26.2.

Cross-Examination Right Versus Proffers and Hearsay—Hearsay is generally admissible, despite the right to cross-examine. *U.S. v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985); *U.S. v. Delker*, 757 F.2d 1390 (3d Cir. 1985); and *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985). The Third Circuit has held, however, that the judicial officer has discretion to require, in an appropriate case, that the testimony of a witness be presented in person, rather than by hearsay evidence. *U.S. v. Accetturo*, 783 F.2d 382 (3d Cir. 1986). The First and Second Circuits reached similar conclusions. *Acevedo-Ramos*, 755 F.2d at 207–08; *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986). The Ninth Circuit has held that there is no right to cross-examine adverse "witnesses" who have not been called to testify. But when there is a proffer from defendant that the government's proffer was incorrect, the court might be required to allow cross-examination. *U.S. v. Winsor*, 785 F.2d 755 (9th Cir. 1986).

In 1994, Congress added special provisions as to the bail hearing in cases where defendant is charged under chapter 110A of title 18 U.S. Code.

That chapter, 18 U.S.C. § 2261 *et seq.*, prohibits "interstate domestic violence," "interstate stalking," and "interstate violation of a protective order." In such a case, at the hearing concerning detention or the setting of conditions of release, ". . . the alleged victim shall be given an opportunity to be heard regarding the danger posed by the defendant." 18 U.S.C. § 2263.

7.08(e) Discovery Proceeding

The hearing should not become a discovery tool for the defendant. *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986). The magistrate judge therefore properly prevented defense counsel from examining the FBI agent about the evidence that supported the charges in *U.S. v. Suppa*, 799 F.2d 115 (3d Cir. 1986). The Eleventh Circuit has held that the judicial officer presiding at the detention hearing is vested with the discretion whether to allow defense counsel to call an adverse witness with or without an initial proffer of the expected benefit of the witness's testimony. *U.S. v. Gaviria*, 828 F.2d 667 (11th Cir. 1987).

7.08(f) *Ex Parte* and *In Camera* Evidence

In conducting a hearing on detention or release, may the court consider evidence *ex parte* and *in camera—i.e.*, where the government presents information to the court that is not disclosed to the defendant, and at a proceeding that is not open to the public? The cases generally agree the courts should do so only in exceptional cases; but they are not in full agreement as to the showing required. The Second Circuit provided a careful and thorough discussion of the issues in *U.S. v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004). That case involved a hearing on release pending sentencing, but the opinion strongly suggested the same rules should apply at a pretrial detention hearing. The Second Circuit concluded that the district court should generally not entertain such submissions, because they compromise a defendant's due process right to a fair hearing as well as the public's interest in open criminal proceedings. An exception to this rule may be made only in rare cases where all of the following are met:

(1) the party seeking to close the hearing (presumably the government) must advance an overriding interest that is likely to be prejudiced;

(2) the closure must be no broader than necessary to protect that interest—*i.e.*, the court must carefully limit its sealing order to materials genuinely implicating the compelling need;

(3) the trial court must consider reasonable alternatives to closing the proceeding;

(4) the court must make findings adequate to support an *ex parte* proceeding;

(5) the government must (in all such cases) disclose to defendant the substance of the government's sealed submission; and

(6) the district court must engage in heightened scrutiny of the reliability of any *ex parte* submissions.

Further, if the court considers an *ex parte* submission, and defendant remains detained for several months, the court should periodically require the government to demonstrate the continued applicability of the first three factors.

The Second Circuit had condemned the use of *ex parte* evidence, in dictum, almost twenty years earlier, in *U.S. v. Leon*, 766 F.2d 77, 80 (n.3) (2d Cir. 1985).

The First Circuit approved the use of *ex parte* evidence in limited circumstances in *U.S. v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985), and the Ninth Circuit cited that case with approval in *U.S. v. Cardenas*, 784 F.2d 937, *vacated as moot*, 792 F.2d 906 (9th Cir. 1986). The Third Circuit has held that it is generally improper, even if defendant receives a general summary of the evidence. *U.S. v. Accetturo*, 783 F.2d 382 (3d Cir. 1986). In determining whether a defendant is to be released pending appeal, the district court should not consider letters submitted on behalf of defendant unless they are included in the record and the government has the opportunity to rebut them. *U.S. v. Vance*, 851 F.2d 166 (6th Cir.), *cert. denied*, 109 S. Ct. 231 (1988).

7.08(g) Intercepted Communications—18 U.S.C. § 2518(9)

When communications have been intercepted pursuant to court order under 18 U.S.C. § 2510 *et seq*., ten days' notice is required before the com-

munications can be used at any hearing, unless such notice is not possible and the person against whom it is introduced is not prejudiced by delayed notice. 18 U.S.C. § 2518(9). The Second Circuit considered this in the context of a detention hearing and held:

(1) the statute applies to a detention hearing;

(2) only a person who would have standing to move to suppress can invoke the ten-day rule; and

(3) the need for notice of use of intercepted communications might constitute "good cause" for longer continuance of a detention hearing.

U.S. v. Salerno, 794 F.2d 64 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 739 (1987).

7.08(h) Validity of Prior Convictions

It is not proper, as part of a detention hearing, to relitigate the validity of prior convictions. S. REP. NO. 225, *supra*, at 22.

7.08(i) Public Access to Hearings and Documents

Can the court hold a closed detention hearing or order related documents filed under seal? For several cases on this issue, *see* Sec. 7.08(f), *supra*. In a case involving only the sealing of documents, the Ninth Circuit held that there is a presumption that the public and press have a qualified right of access to pretrial release proceedings and documents and ordered the release of detention briefs which the district court, with the concurrence of all parties, had placed under seal. *Seattle Times Co. v. U.S. District Court for W. Dist. of Wash.*, 845 F.2d 1513 (9th Cir. 1988). Such access will heighten public understanding of the criminal justice system and will improve the quality of bail decisions, the court reasoned. Nevertheless, the right of access must be carefully balanced against the right to a fair trial.

Many courts admit the reports of the pretrial services agency under seal. Defendant and the government have access to copies during the hearing, but they are not available to the general public. This is consistent with the pretrial services statute, 18 U.S.C. § 3153(c) and regulations adopted by the Director of the Administration Office of the U.S. Courts.

7.09 Reopening the Hearing

Congress amended § 3142(f) in 1986 to add the last sentence, authorizing the court to reopen a detention hearing under certain circumstances. The court must be satisfied that information exists which, at the time of the hearing, was not known to the "movant." Presumably "movant" refers to the party moving to reopen. The information must have a material bearing on the issue of detention or release.

Either side may move to reopen. It is only necessary to show that the information was not "known" to the movant. It is not relevant that the movant could have, or even should have, known the information at the time of the hearing.

The party moving to reopen should file a written motion with a supporting affidavit indicating:

(1) what the new information is;

(2) that it was not known to the movant at the time of the hearing; and

(3) how the information is material.

The judicial officer can then either direct a response to the motion to reopen or can rule on it without a further response.

The district court properly denied a motion to reopen in *U.S. v. Dillon*, 938 F.2d 1412 (1st Cir. 1991), where new counsel offered eighteen affidavits from defendant's relatives and friends. This "information" was all available at the original hearing. But the district judge properly reopened the detention hearing after he had ruled against defendant on a suppression motion in *U.S. v. Peralta*, 849 F.2d 625 (D.C. Cir. 1988). The adverse ruling constituted previously nonexistent, material information bearing upon defendant's likelihood to appear at future hearings. But the length of current or potential future detention cannot be considered in deciding whether to reopen the hearing, as it is not material to the issue of risk of flight or dangerousness. *U.S. v. Hare*, 873 F.2d 796 (5th Cir. 1989).

7.10 Complex Cases

In a complex, multidefendant case, it is sometimes desirable to conduct the hearing jointly as to some or all issues or to have more than one judicial officer conducting hearings. *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986) (*Melendez-Carrion I*). But if separate hearings are conducted, the court cannot rely upon evidence received at a different detention hearing relating to a different defendant. *U.S. v. Acetturo*, 783 F.2d 382 (3d Cir. 1986).

7.11 Rebuttable Presumptions

7.11(a) Generally

Congress prescribed, in § 3142(e), a number of showings by the government that will trigger a rebuttable presumption against defendant on his dangerousness and, in some instances, the flight risk he poses. Section 3142(j) cautions, however, that nothing in § 3142 "shall be construed as modifying or limiting the presumption of innocence."

7.11(b) What Showing Triggers Which Presumption?

Analytically, there are four different showings that will trigger a rebuttable presumption:

1. *Certain Drug Offenses with Maximum Penalties of Ten Years or More*—If there is probable cause to believe that defendant committed one of the drug offenses listed in § 3142(e), and the offense carries a maximum penalty of ten years or more, a presumption arises as to both dangerousness and flight risk.

2. *Use of Firearm in Crime of Violence or in Drug Trafficking Crime*—If there is probable cause to believe defendant violated 18 U.S.C. § 924(c), a presumption arises as to both dangerousness and flight risk.

3. *Certain Other Offenses*—A rebuttable presumption as to both dangerousness and flight risk arises if there is probable cause to

believe defendant committed any of certain violations listed in § 3142(e). These include: participation in a conspiracy, wherever located, but subject to the jurisdiction of the United States, to kill, kidnap, or maim another person; violations involving "Peonage, Slavery, and Trafficking in Persons," for which a maximum term of up to twenty years or more is prescribed; acts of terrorism transcending national boundaries; or offenses involving a minor victim, including kidnapping, sex trafficking, sexual abuse, abusive sexual contact, sexual exploitation, selling or buying of children, certain child pornography offenses, and transportation for illegal sexual offenses and related crimes.

4. *Prior Conviction for Serious Offense While on Pretrial Release*— If defendant has been convicted for committing one of certain serious offenses while on pretrial release, a presumption arises as to dangerousness only.

See § 3142(e); S. REP. NO. 225, *supra* at 19.

7.11(c) Showing "Probable Cause"

In two of the three categories discussed above, the presumption arises only if the court finds probable cause to believe defendant committed specified offenses. Defendant must be charged in the case before the court with the specified offenses. *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985). The return of an indictment, ipso facto, is sufficient to establish probable cause, according to all nine circuits that have addressed the issue.

U.S. v. Vargas (Juan), 804 F.2d 157 (1st Cir. 1986)

U.S. v. Contreras, 776 F.2d 51 (2d Cir. 1985)

U.S. v. Suppa, 799 F.2d 115 (3d Cir. 1986)

U.S. v. Trosper, 809 F.2d 1107 (5th Cir. 1987)

U.S. v. Hazime, 762 F.2d 34 (6th Cir. 1985)

U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986)

U.S. v. Stricklin, 932 F.2d 1353 (10th Cir. 1991)

U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985)

U.S. v. Smith (Gerald), 79 F.3d 1208 (D.C. Cir. 1996)

No circuit has addressed whether an information establishes probable cause. When the charge is pending by complaint, the charging document alone is not sufficient to trigger the presumption. The government is required to establish probable cause in the same manner as at a preliminary examination. For the convenience of all, the court will therefore frequently conduct the preliminary examination concurrently with the detention hearing in such cases.

7.11(d) Maximum Sentence Required

It is not sufficient that defendant is charged with multiple offenses so that the total of the maximum sentences triggers the presumption. There must be probable cause to believe he committed at least one offense which itself carries a maximum sentence sufficient to trigger the presumption. *U.S. v. Hinote*, 789 F.2d 1490 (11th Cir. 1986).

It is the maximum penalty, and not the likely sentence under the Sentencing Guidelines, that determines whether the presumption applies. *U.S. v. Moss*, 887 F.2d 333 (1st Cir. 1989).

7.11(e) Effect of Rebuttable Presumption

Many cases have discussed the effect the court should give to the rebuttable presumption. The leading case is *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985). The First Circuit held that, when established, the presumption imposes upon defendant a "burden of production," not a "burden of proof." The presumption continues to carry weight, however, even after defendant makes a showing in opposition to it. The presumption is therefore not a "bursting bubble."

Three circuits have expressly followed *Jessup*:

U.S. v. Martir, 782 F.2d 1141 (2d Cir. 1986)

U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985)

U.S. v. Diaz, 777 F.2d 1236 (7th Cir. 1985)

Two other circuits have approved *Jessup* in dictum:

U.S. v. Carbone, 793 F.2d 559 (3d Cir. 1986)

U.S. v. Alatishe, 768 F.2d 364 (D.C. Cir. 1985)

The Eleventh Circuit approved the *Jessup* rule in dictum in *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), and applied the rule in *U.S. v. King (Frances)*, 849 F.2d 485 (11th Cir. 1988).

The Fifth Circuit has held that the government cannot rely solely upon the nature of the charges and the rebuttable presumption. The weight of the evidence against defendant is a required feature of the government's proof, the court held, because § 3142(g)(2) provides that the court shall "take into account the available information" as to the weight of the evidence and other listed factors. *U.S. v. Jackson (Patrick)*, 845 F.2d 1262 (5th Cir. 1988) is the only circuit case to so hold. The court does not explain why the government would not be required, by the same reasoning, to introduce evidence as to every other factor listed in § 3142(g).

7.11(f) How to Rebut

It is not necessary that defendant show that he is innocent of the crime charged. He can produce evidence relating to any of the factors listed in § 3142(g)—*e.g.*, marital, family, and employment status, community ties, lack of criminal record, etc. *U.S. v. Carbone*, 793 F.2d 559 (3d Cir. 1986); *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986). In *Carbone*, the Third Circuit held that the district judge could properly find that the willingness of defendant's friends to mortgage their homes to post a $1 million bond was sufficient to overcome the rebuttable presumption of dangerousness arising under § 3142 (e).

In *U.S. v. Hare*, 873 F.2d 796 (5th Cir. 1989), defendant rebutted the presumptions as to flight risk by claiming that he had self-reported to prison in prior cases and had no prior probation or parole violations.

The likely sentence under the Sentencing Guidelines can affect the weight to be given the presumption, but not its applicability. *U.S. v. Moss*, 887 F.2d 333 (1st Cir. 1989).

In *U.S. v. Ramirez*, 843 F.2d 256 (7th Cir. 1988), authorities seized $200 million worth of cocaine. Reversing the district judge, the Seventh Circuit held that a seizure of that size is not, by itself, conclusive evidence that the drug conspiracy was crippled and is not sufficient to rebut the presumption of dangerousness.

7.12 Constitutionality of Pretrial Detention

7.12(a) Generally

The courts have grappled with constitutional challenges to pretrial detention since the earliest decided cases under the Act. In summary, the Act seems to have passed constitutional muster in all respects, with one exception: when pretrial detention is of excessive length. The Tenth Circuit, however, in an unpublished order and judgment, has imposed a threshold requirement for such a claim. Before a court should even consider a claim that the length of defendant's detention violates his due process rights under the Fifth Amendment, defendant must first (or in the same proceeding) challenge his detention under the Bail Reform Act, the Speedy Trial Act, and under speedy trial guarantees of the Sixth Amendment. *U.S. v. Jarvis*, ___ F. App'x ___, 2008 WL 4889961 (10th Cir. Nov. 13, 2008). The court therefore refused to address the due process issue and remanded the case to the district court to afford defendant the opportunity to challenge his detention under those alternate grounds.

Courts that did reach the merits of the due process issue have reached varying results.

The Second and Tenth Circuits have held that prolonged pretrial detention violates constitutional rights. Six others—the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits—while not ruling directly on the issue, have recognized the problem. The cases conflict sharply, however, as to "how long is too long."

The balance of this section summarizes the specific cases on constitutionality decided in the Supreme Court and in each circuit that has addressed the issue.

7.12(b) The Supreme Court

In the most important decision relating to the Act, *U.S. v. Salerno*, 481 U.S. 739 (1987), the Supreme Court held that pretrial detention for dangerousness under the Act was not unconstitutional on its face. Writing for a 6-3 majority, Chief Justice Rehnquist found that the Act does not, on its face, violate due process rights under the fifth amendment. Pretrial detention of a narrow range of demonstrably dangerous defendants is a valid reg-

ulatory measure, serving a legitimate and compelling governmental interest. It is not a punitive measure. The procedural safeguards in the Act assure substantive due process. The Act also does not violate the "excessive bail" prohibition of the eighth amendment. That amendment does not mandate release on bail in all cases. Other situations previously held to justify detention without bail include defendants who pose extreme flight risks or threats to witnesses. The majority opinion addressed only the facial validity of pretrial detention for dangerousness. It expressed no view as to whether such detention might be unconstitutional as applied in a given case, *e.g.*, when it is of excessive duration.

7.12(c) The First Circuit

The First Circuit upheld the constitutionality of the rebuttable presumption in *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985). The circuit also held that pretrial detention to prevent obstruction of justice is constitutional. *U.S. v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985). In *U.S. v. Zannino*, 798 F.2d 544 (1st Cir. 1986) (*Zannino II*), the First Circuit rejected the holding of the Second Circuit in *U.S. v. Salerno*, 794 F.2d 64 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987), that pretrial detention for dangerousness was unconstitutional, regardless of duration. Assuming that pretrial detention of excessive duration is invalid, the court held that under the unique circumstances in *Zannino II*, detention exceeding sixteen months did not violate due process. Defendant was extremely dangerous, despite hospitalization for a cardiac arrest. The government had made every effort to bring him to trial promptly, but defendant had insisted he was physically unable to stand trial. Medical reports would soon permit the court to determine defendant's ability to stand trial.

7.12(d) The Second Circuit

The Second Circuit has seen the most litigation of the constitutionality of pretrial detention. As noted above, the Supreme Court reversed the Second Circuit decision in *U.S. v. Salerno*, 794 F.2d 64 (2d Cir. 1986), and impliedly overruled a similar holding in *U.S. v. Romano*, 799 F.2d 17 (2d Cir. 1986). In *U.S. v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986) (*Melendez-Carrion* I), the Second Circuit invalidated pretrial detention for dangerousness because it was of excessive duration (eight months). This holding

seems to survive *Salerno*. Detention for flight risk, although eight months in duration, was approved in *U.S. v. Berrios-Berrios*, 791 F.2d 246 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986), and in *U.S. v. Jackson*, 823 F.2d 4 (2d Cir. 1987). But in *U.S. v. Gonzales Claudio*, 806 F.2d 334 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986), the circuit held that detention on flight risk grounds for two years and two months before a determination of guilt or innocence violated due process rights. The circuit considered not only the duration of the confinement, but also the degree to which the Government contributed to the delay, and the strength of the evidence as to flight risk. Applying the same three standards, the circuit upheld pretrial detention on flight risk grounds for nineteen months in *U.S. v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987) (*Melendez-Carrion II*). But when his pretrial detention in that same case reached thirty-two months, with "many months" yet to go, one of the defendants persuaded the Second Circuit that further pretrial detention denied him due process. *U.S. v. Ojeda-Rios*, 846 F.2d 167 (2d Cir. 1988). The court ordered him released immediately on some conditions, despite his dangerousness and flight risk, and despite the fact that defendants were primarily responsible for the delay.

In *U.S. v. Orena*, 986 F.2d 628 (2d Cir. 1993), the court ordered detention, despite the fact that nine months had elapsed between arrest and the start of trial. "[T]he constitutional limits on a detention period based on dangerousness to the community may be looser than the limits on a detention period based solely on the risk of flight." *Id.* at 631. The court found the government was not primarily responsible for the delay and that there was very strong evidence that defendant was a danger to the community. Home detention, even with supervision, was held not to be an adequate substitute.

Later the same year, in *U.S. v. Millan*, 4 F.3d 1038 (2d Cir. 1993), the court ordered two defendants detained pending retrial, despite the fact that the delay between arrest and the conclusion of the retrial was likely to be at least thirty to thirty-one months. Reversing a release order entered by the district judge, the court of appeals found the government was somewhat responsible for the delay, but not to the extent the district judge had determined. The court also found that both defendants presented high risks of flight and of danger to the community. Weighing the three factors, the court

found that pretrial detention of these defendants did not deny them due process of law. The court reached a similar conclusion in *U.S. v. El-Gabrowny,* 35 F.3d 63 (2d Cir. 1994), upholding pretrial detention that had already reached eighteen months, and was predicted to total twenty-seven months through the end of trial.

The court approved pretrial detention expected to last thirty to thirty-three months in *U.S. v. El-Hage*, 213 F.3d 74 (2d Cir.), *cert. denied*, 531 U.S. 881 (2000). Identifying "gravity of the charges" as a fourth factor to consider, the court found the charges to be very serious; the government bore little responsibility for the delay; and defendant presented both a serious risk of flight and a risk of dangerousness if released. His dangerousness was enhanced because he could provide to his terrorist organization information about the government's investigation of its activities.

Pretrial detention to prevent intimidation of witnesses passed constitutional muster in *U.S. v. Gotti*, 794 F.2d 773 (2d Cir. 1986). When the government moves for pretrial detention, it has an obligation to arrange for the trial as quickly as possible, using "extraordinary means" if necessary. *U.S. v. Jackson (James)*, 823 F.2d 4 (2d Cir. 1987).

7.12(e) The Third Circuit

The Third Circuit, in *U.S. v. Accetturo*, 783 F.2d 382 (3d Cir. 1986), recognized that prolonged pretrial detention might raise constitutionality problems, but found that the question was premature in that case. In a later case, the circuit held that detention for dangerousness is constitutional, at least when the government shows probable cause to believe defendant committed a serious drug or firearms offense and there is no evidence that the detention will be of excessive length. *U.S. v. Perry*, 788 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986).

7.12(f) The Fifth Circuit

The Fifth Circuit rejected a challenge to the facial constitutionality of the Act in *U.S. v. Parker (Kenneth)*, 848 F.2d 61 (5th Cir. 1988), *cert. denied,* 493 U.S. 871 (1989). The court held the Act did not violate the fifth amendment right against self-incrimination because it did not require defendant to testify in seeking release. Although the case did not involve the rebuttable presumption, the court upheld its constitutionality and further

held that pretrial detention did not deprive a defendant of his constitutional right to counsel.

In determining whether extended pretrial detention violates due process rights, the issue is whether, by action of the Government, defendant has been deprived of constitutional rights, the Fifth Circuit has held. A court must consider all of the factors relevant at the initial detention decision, plus:

(1) the length of detention, past and future;

(2) the nonspeculative nature of future detention;

(3) the complexity of the case; and

(4) whether the strategy of one side or the other occasions the delay.

U.S. v. Hare, 873 F.2d 796 (5th Cir. 1989). The fact that detention exceeded the period permitted under the Speedy Trial Act (18 U.S.C. § 3161 *et seq*.) does not establish a per se violation either of due process rights or of statutory rights under the Bail Reform Act. *Id*.

7.12(g) The Seventh Circuit

The Seventh Circuit upheld the constitutionality of the Act in all respects in *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1986). The circuit noted, however, that at some point the length of pretrial detention might raise due process objections. The court again upheld the Act in *U.S. v. Pipito*, 861 F.2d 1006 (7th Cir. 1987). In *U.S. v. Infelise*, 934 F.2d 103 (7th Cir. 1991), the court held that "to get to first base" on a due process challenge to the length of pretrial detention, a defendant "must show that either the prosecution or the court has unnecessarily delayed in bringing the case to trial. . . ." *Id.* at 104–05. In that case detention was expected to reach two years by the end of trial. But neither the prosecution nor the court was implicated in the delay.

Pretrial detention, even for an excessive period, cannot form the basis for a double jeopardy challenge, as pretrial detention is not punishment. But it can be a denial of due process. The remedy is a motion for release, not a motion to dismiss. *U.S. v. Warneke*, 199 F.3d 906 (7th Cir. 1999).

In *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137 (7th Cir. 1995), defendant was detained in Marion, Illinois pending trial in the Southern District

of Florida. He claimed this denied his Sixth Amendment right to effective assistance of counsel. The Seventh Circuit denied his petition for a writ of habeas corpus, but pointed out that any order of detention must direct the Bureau of Prisons to provide defendant with "reasonable opportunity for private consultation with counsel." The district judge could order Falcon into the custody of the U.S. Marshal, if the judge determined that such action was necessary for preparation of the defense. *Id*. at 139.

7.12(h) The Eighth Circuit

The Eighth Circuit, sitting en banc in *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985), upheld the constitutionality of detention when necessary to assure future appearances. The circuit found that it was not a punitive measure but served a valid regulatory purpose.

7.12(i) The Ninth Circuit

The Ninth Circuit upheld the Act in *U.S. v. Winsor*, 785 F.2d 755 (9th Cir. 1986). In *U.S. v. Walker*, 808 F.2d 1309 (9th Cir. 1987), the circuit upheld the constitutionality of pretrial detention for dangerousness. The circuit followed similar holdings by the First, Third, Seventh, and Eleventh Circuits and rejected the holding of the Second Circuit in *Salerno*. In *U.S. v. Gelfuso*, 838 F.2d 358 (9th Cir. 1988), the court held that the due process limit on the length of pretrial detention requires assessment on a case-by-case basis. The length of confinement and the extent to which the government is responsible for the delay are important factors. In this case, where detention prior to trial was expected to be ten months, and the government was not responsible for the delay, there was no violation.

7.12(j) The Tenth Circuit

The Tenth Circuit, in *U.S. v. Theron*, 782 F.2d 1510 (10th Cir. 1986), held that pretrial detention for flight risk for a limited period is valid because it is for regulatory purposes, but pretrial detention becomes punitive when prolonged significantly. The circuit ordered that a defendant who had been in custody four months be released on bond or tried within thirty days.

7.12(k) The Eleventh Circuit

The Eleventh Circuit upheld detention, pursuant to the presumption, in a case involving findings as to flight risk only. *U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985). In *U.S. v. Rodriguez (Roman)*, 803 F.2d 1102 (11th Cir. 1986), the circuit summarily upheld the constitutionality of pretrial detention for dangerousness, agreeing with the Third and Seventh Circuit cases and disagreeing with those from the Second Circuit. Four years later, in *U.S. v. Quartermaine*, 913 F.2d 910 (11th Cir. 1990), the court recognized the line of Second Circuit cases on the constitutionality of extended pretrial detention, but it held "that 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." *Id*. at 918.

7.12(l) The District of Columbia Circuit

The U.S. Court of Appeals for the District of Columbia Circuit held that pretrial detention for dangerousness, on an adequate showing, did not deny substantive due process. *U.S. v. Simpkins*, 826 F.2d 94 (D.C. Cir. 1987).

7.12(m) The District of Columbia Court of Appeals

The District of Columbia Court of Appeals (to be distinguished from the United States Court of Appeals for the D.C. Circuit) upheld the constitutionality of the preventive detention provisions of the D.C. Code in *U.S. v. Edwards (Marvin*), 430 A.2d 1321 (D.C. 1980), *cert. denied*, 455 U.S. 1022 (1982). The D.C. Code provided a model for Congress in drafting the Bail Reform Act of 1984.

7.13 Practice Pointers—Pretrial Detention

US ATTORNEY

1. Prior to defendant's first court appearance, determine whether to move for pretrial detention. Be prepared to advise the court:

   (a) Whether you are alleging dangerousness, flight risk, and/or threatened obstruction of justice.

   (b) Under which of the six statutory categories is the case eligible for a detention hearing?

   (c) Whether you intend to rely on a rebuttable presumption, and if so, which one?

   (d) Whether you are prepared to conduct the detention hearing at the first appearance or are requesting a continuance for up to three days.

2. If your district so requires, file and serve your written motion for detention. Otherwise, make an oral motion for detention on the record *at the first court appearance*. Address specifically the items listed in pointer 1 above.

DEFENSE ATTORNEY

3. Identify for the court any reason the case is not eligible for a detention hearing.

4. If the government did not move for detention at defendant's first court appearance, challenge the timeliness of any later motion, unless the circumstances of the case fit an exception under the law of your circuit.

5. Advise the court whether you are prepared to proceed immediately with the detention hearing or request a continuance of up to five days.

US ATTORNEY	DEFENSE ATTORNEY
6. Review the factors the court considers in determining release or detention. § 3142(g). Be prepared to present proof or proffer as to the relevant ones.	6. Review the factors the court considers in determining release or detention. § 3142(g). Be prepared to present proof or proffer as to the relevant ones.
	7. Be prepared to propose to the court a specific set of release conditions. *See* § 3142(c) and chapter 6. Indicate why release on those conditions will reasonably assure safety and future appearances.
8. If there is a pretrial services report, review it and be prepared to present corrections or comments. The contents of the report can only be disclosed to law enforcement officers, however, with the approval of the court.	8. If there is a pretrial services report, review it and be prepared to present corrections or comments.
9. Be prepared to present all essential information by proffer or by direct evidence. As to disputed factual matters, live testimony is far preferable to proffers and counterproffers. Present proof, not proffers, to establish the probable cause needed to trigger a rebuttable presumption.	9. Be prepared to present all essential information by proffer or by direct evidence. As to disputed factual matters, live testimony is far preferable to proffers and counterproffers. Present proof, not proffers, to rebut the probable cause showing the government needs to trigger a rebuttable presumption.
	10. If testimony by defendant is desirable, consider whether to request the court, prior to the testimony, to limit cross-examination or to prohibit it altogether. Consider also a request for "use-fruits" immunity. *See* Sec. 7.08(c).
	11. If necessary, request leave to subpoena witnesses, unless such is prohibited in your circuit.
12. If the government intends to use wiretap evidence at the hearing, the United States Attorney should provide the statutory notice as early as possible.	12. If the government intends to use wiretap evidence at the hearing, the United States Attorney should provide the statutory notice as early as possible. Defense counsel should consider whether to: (1) waive the ten-day notice and proceed; (2) request a continuance; or (3) challenge the use of the wiretap evidence.

US ATTORNEY	DEFENSE ATTORNEY
13. If the opposing side calls a witness at the detention hearing, move for production of the witness's statements on related subject matter. *See* FED. R. CRIM. P. 26.2 and 46(i).	13. If the opposing side calls a witness at the detention hearing, move for production of the witness's statements on related subject matter. *See* FED. R. CRIM. P. 26.2 and 46(i).
14. After the hearing but prior to trial, if counsel learns of material information, he should consider moving to reopen the hearing. To do so, he should file a motion and affidavit. *See* Sec. 7.09.	14. After the hearing but prior to trial, if counsel learns of material information, he should consider moving to reopen the hearing. To do so, he should file a motion and affidavit. *See* Sec. 7.09.
15. If any detention is likely to be for a lengthy period, defense counsel should challenge its constitutionality. The United States Attorney should rebut that argument on the basis of the likely length of the detention, reasons for any delay, and on any other available ground.	15. If any detention is likely to be for a lengthy period, defense counsel should challenge its constitutionality. The United States Attorney should rebut that argument on the basis of the likely length of the detention, reasons for any delay, and on any other available ground.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA Plaintiff, v. Defendant	CASE NO. MOTION FOR DETENTION HEARING

The United States moves for pretrial detention of defendant, pursuant to 18 U.S.C. § 3142 (e) and (f).

1. *Eligibility of Case.* This case is eligible for a detention order because case involves (check all that apply):

   ____ Crime of violence (18 U.S.C. § 3142)

   ____ Maximum sentence life imprisonment or death

   ____ 10+ year drug offense

   ____ Felony, with prior convictions in above categories

   ____ Serious risk defendant will flee

   ____ Serious risk obstruction of justice

2. *Reason for Detention.* The court should detain defendant because there are no conditions of release which will reasonably assure (check one or both):

   ____ Defendant's appearance as required

   ____ Safety of any other person and the community

3. *Rebuttable Presumption.* The United States (will, will not) invoke the rebuttable presumption against defendant under § 3142(e). (If yes) The presumption applies because (check one or both):

   ____ Probable cause to believe defendant committed 10+ year drug offense or firearms offense, 18 U.S.C. § 924(c)

   ____ Previous conviction for "eligible" offense committed while on pretrial bond

4. *Time for Detention Hearing.* The United States requests the court conduct the detention hearing,

   ____ At first appearance

   ____ After continuance of days (not more than 3).

5. *Other Matters.*

   _____
   _____
   _____

DATED this _____ day of _____, 20____.

_____
Assistant United States Attorney