ISSUES RELATING TO INITIAL APPEARANCES, PROBABLE CAUSE HEARINGS AND DETENTION HEARINGS

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This outline is created primarily for practitioners in the Fifth Circuit. Whenever controlling Fifth Circuit precedent has been found on a given issue, it has been cited. Cases from other circuits are cited in order to supplement Fifth Circuit case law or where no Fifth Circuit precedent exists.

PART I: INITIAL APPEARANCES

(Fed. R. Crim. P. 5)

INITIAL APPEARANCES

I. **Nature of Right**

A. Upon an arrest on federal charges, an arrestee shall be taken "without unnecessary delay" to appear before the nearest federal magistrate judge. See Fed. R. Crim. P. 5(a). If the magistrate judge is not "reasonably available," an arrestee should be taken before a state or local magistrate for an initial appearance. Id. See 18 U.S.C. § 3041 (describing powers of state magistrates regarding detention or release of federal arrestees).

1. Weekend and holiday periods are not valid reasons for delaying an initial appearance. United States v. Perez-Bustamante, 963 F.2d 48, 53-54 (5th Cir.), cert. denied, 113 S.Ct. 663 (1992) (five-day delay over New Year's weekend "not acceptable as standard operating procedure; far from it.").

B. If a defendant is arrested outside of the district he can be taken to an adjacent district for his appearance if the crime was committed in that district and the appearance can be made the same day of his arrest (*E.g.* Defendant arrested in Plano for an offense out of the Northern District of Texas can be taken to the Northern District of Texas for his initial appearance.)

C. Fed. R. Crim. P. 5(b) requires that a complaint be filed "promptly" if the arrestee has been arrested without an arrest warrant.

D. There is no constitutional right to counsel at an initial appearance. See United States v. Dohm, 557 F.2d 535, 543 (5th Cir.), cert. denied sub nom., Rowen v. United States, 444 U.S. 937 (1979). Nevertheless, this right is provided for in Fed. R. Crim. P. 44.

II. **Procedure**

A. When the offense charged is a felony, the arrestee shall be advised of: (1) the complaint against him together with any affidavit filed therewith; (2) his right to counsel or his right to have counsel appointed if he cannot obtain counsel; (3) the general circumstances under which he may secure pretrial release; (4) his right to remain silent; and (5) his right to a preliminary examination. See Fed. R. Crim. P. 5(c).

1. If an indictment has been returned, the magistrate judge will provide a copy of the indictment to the arrestee at his initial appearance.

B. If an arrestee informs the magistrate judge that he is unable to afford counsel, he will be required to submit a financial affidavit under oath. After reviewing the affidavit, the magistrate judge may appoint counsel and may, if appropriate, require the arrestee to make payments to the District Clerk's Office in partial payment toward counsel's costs. See 18 U.S.C. § 3006(A)(b) and (c).

1. Be aware that a terse Texas ethics opinion exists concluding that Section 3.03(a)(2) of the Texas Rules of Professional Conduct requires an attorney to make a disclosure to a court if 1) the attorney learns from his client that the client was not, in fact, indigent when the client prepared a financial affidavit seeking appointed counsel and can afford to retain counsel or 2) the attorney learns that his client, who was truly indigent at the time counsel was initially appointed, comes into assets that would enable the client to retain an attorney. See Tex. Ethics Op. 473 (1991).

C. The hearing can be done by video teleconference if the defendant consents. See Fed. R. Crim. P. 5 (f)

III. **Remedies for Violation**

A. Pursuant to 18 U.S.C. § 3501(c), if a defendant is not taken for an initial appearance before a magistrate judge within six hours of his arrest, any confession obtained more than six hours following the defendant's arrest may be suppressible. See, e.g., United States v. Wilson, 838 F.2d 1081 (9th Cir. 1988); United States v. Perez, 733 F.2d 1026 (2d Cir. 1984); United States v. Palacio, 735 F.Supp. 484 (D. Conn. 1990) (Unnecessary delay of more than seven hours was due to the fact that the government chose to continue questioning rather than proceed with the Defendant to the nearest courthouse).

1. Some courts have held that a waiver of a defendant's Miranda rights also constitutes a waiver of his right to a prompt initial appearance. See, e.g., United States v. Binder, 769 F.2d 595, 598-99 (9th Cir. 1985); But see Wilson, supra.

PART II: PRELIMINARY HEARINGS

(Fed. R. Crim. P. 5.1)

I. **Nature of Right**

A. A defendant is entitled to a preliminary hearing (commonly referred to as a "probable cause hearing") on any offense other than a petty offense, unless an indictment or criminal information has been returned against him before the preliminary hearing is held. See Fed. R. Crim. P. 5(c).

1. The preliminary hearing is generally scheduled by the magistrate judge at the initial appearance and must be held within a reasonable time not to exceed ten days following the initial appearance if the defendant is in custody and twenty days if the defendant is conditionally released. See Fed. R. Crim. P. 5(c). These time limits may be extended by the defendant only upon a showing of good cause. Id. The government may extend the time limits only for "extraordinary circumstances." Id.

a. It appears that weekends and holidays do not count for computing the ten day period but do count for computing the twenty day period. See Fed. R. Crim. P. 45(a).

b. A preliminary hearing will not be held if an indictment or information is filed prior to the date of the preliminary hearing.

i. Nevertheless, the government cannot continue a preliminary hearing just so that it can obtain an indictment. See United States v. Gurary, 793 F.2d 468, 473 (2d Cir. 1986).

2. A defendant has a right to counsel at a preliminary hearing. See Fed. R. Crim. P. 44.

B. A defendant may elect to have the preliminary hearing in the district of arrest *or* the district in which he is charged if he is arrested out of district. See Fed. R. Crim. P. 5.1(b).

II. **Procedure**

A. Fed. R. Crim. P. 5.1 governs conduct of the preliminary hearing. If the evidence presented at the preliminary hearing convinces the magistrate judge that probable cause exists that an offense was committed and that the defendant committed it, the defendant will be held to answer in district court. Id. at 5.1(e). If, on the other hand, the evidence presented at the preliminary hearing does not establish probable cause, the magistrate judge shall dismiss the complaint and discharge the defendant. Id. at 5.1(f).

1. Fed. R. Crim. P. 5.1(e) provides that a defendant can cross examine the government's witnesses at a preliminary hearing and can call witnesses and produce evidence in an attempt to show lack of probable cause.

a. Rarely, if ever, should you allow a defendant to testify at a preliminary hearing.

2. If the magistrate judge does find that there is no probable cause and dismisses the complaint, the government can still seek an indictment. See Fed. R. Crim. P. 5.1(f).

3. The Federal Rules of Evidence are not applicable to preliminary hearings. See Fed. R. Evid. 1101(d)(3).

a. Nevertheless, "[t]o provide that a probable cause finding may be based upon hearsay does not preclude the magistrate [judge] from requiring a showing that admissible evidence will be available at trial time." See Fed. R. Crim. P. 5.1, Notes of Advisory Committee on Rules.

4. An objection to evidence on the ground that it was acquired unlawfully is not properly made at a preliminary hearing. See Fed. R. Crim. P. 5.1(e). Nevertheless, as discussed below, counsel should be cognizant of potential suppression issues and develop them at the preliminary hearing so that a record will be developed for a future suppression motion in the district court.

B. Probable cause determinations are "in extraordinary cases" reviewable by the District Court prior to the submission of the case to the grand jury. See, e.g., United States v. Zerbst, 111 F. Supp. 807 (E.D. S.C. 1953).

C. Probable cause hearings, like detention hearings, are taped and copies of the tape will be provided to defense counsel upon a request made to the magistrate judge's courtroom

deputy. See Fed. R. Crim. P. 5.1(g).

III. **Do Not Waive a Preliminary Hearing**

A. Counsel many times advise clients to waive preliminary hearings because the evidence clearly establishes probable cause. Absent a sufficient incentive offered by the government to a defendant to waive a preliminary hearing, it is irresponsible for an attorney to advise a client to waive a preliminary hearing.

B. While dismissal of charges for lack of probable cause are rare at a preliminary hearing, the real reason that a good defense lawyer insists on a preliminary hearing is for **discovery**. Preliminary hearings provide excellent opportunities to "lock in" the testimony of a government witness, usually the case agent, while memories are fresh but before agents can get together to resolve inconsistencies in their reports. Other witnesses to the offense can be identified at preliminary hearings for further investigation. Early establishment under oath at preliminary hearings that a defendant made no damaging admissions prevents belated oral confessions from popping up just before trial. Not only can trial and possible suppression issues be fleshed out at preliminary hearings, sentencing factors such as a defendant's role in the offense, whether a defendant had a firearm, whether a defendant gave false information, etc... can be determined at preliminary hearings.

C. Moreover, Fed. R. Crim. P. 5.1(h)(1) extends Fed. R. Crim. P. 26.2 (involving production of government witness statements) to preliminary hearings and generally requires the production of prior statements of a government witness at the conclusion of his direct testimony.

PART III: DETENTION HEARINGS AND PRETRIAL RELEASE

(18 U.S.C. § 3142; Fed. R. Crim. P. 46)

Detention Hearings

I. **Nature of Right**

A. The Bail Reform Act (the "Act"), 18 U.S.C. § 3141, et seq., was enacted as part of the sweeping Comprehensive Crime Control Act of 1984. The constitutionality of the Act and its novel provision for detention upon a finding of prospective danger to the community was upheld by the Supreme Court in United States v. Salerno, 481 U.S. 739 (1987).

B. The primary purpose of the Act was to de-emphasize use of money bonds and to provide for pretrial detention of potentially dangerous defendants.

C. The Act provides that a person shall be released on his recognizance unless no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. See 18 U.S.C. § 3142(b).

D. Indeed, Congress retained the preference for the release of most defendants prior to trial. See United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992) ("There can be no doubt that this Act clearly favors non-detention."); United States v. Orta, 760 F.2d 887, 891 (8th Cir. 1985) (en banc) ("The wide range of restrictions available [under the Act] ensures, as Congress intended, that very few defendants will be subject to pretrial detention.").

E. Nevertheless, the Act was further intended to eliminate the practice of detaining dangerous defendants by the setting of high bail and to allow such defendants to be detained without bail. 18 U.S.C. § 3142(c)(2). See United States v. Orta, 760 F.2d 887, 880 (8th Cir. 1985) (en banc) (Act prohibits using high financial conditions to detain defendants).

1. The purpose of bail is to reasonably assure a defendant's appearance. If a defendant is dangerous and no conditions can be set to reasonably assure the safety of the community, the Act allows a defendant to be detained without bail.

a. Nevertheless, a defendant's bond can be forfeited for violations of pretrial release conditions not involving flight. See United States v. Gigante, 85 F.3d 83, 85 (2d. Cir. 1996); United States v. Dunn, 781 F.2d 447, 449-50 n. 9 (5th Cir. 1986).

F. It appears that Congress intended that if a court believes a monetary amount to be necessary to reasonably assure a defendant's appearance and the defendant cannot meet that amount, the court may detain the defendant. United States v. Mantecon-Zayas, 949

F.2d 548, 550 (1st Cir. 1991). The Fifth Circuit, as well as other courts, have also held that a court need not set bail in an amount a defendant can easily make. Nevertheless, financial conditions can only be imposed if no other conditions will reasonably assure a defendant's presence. See United States v. Westbrook, 780 F.2d 1185, 1188 (5th Cir. 1986); United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988).

1. A magistrate judge may not impose a financial condition that results in the pretrial detention of a defendant. See 18 U.S.C. § 3142(c)(2). Therefore, if a defendant is unable to post a required bond and a magistrate judge believes that such a condition is necessary to reasonably assure the defendant's appearance, the magistrate judge will enter a detention order. The detention order should set forth why the magistrate judge believes the financial condition is indispensable the least restrictive means necessary to reasonably assure the defendant's appearance. See United States v. Mantecon- Zayas 949 F.2d 548, 551 (1st Cir. 1991); United States v. McConnell, 842 F.2d 105, 110 (5th Cir. 1988). That detention order can then be challenged before the district court judge.

II. **Magistrate Judges Options Under the Act (18 U.S.C. § 3142(a))**

A. A magistrate judge has four options under the Act.

1. A defendant may be released on her personal recognizance or an unsecured appearance bond subject to the condition that she not commit a federal, state or local crime during the period of release. See 18 U.S.C. § 3142(b).

2. A defendant may be released on certain other conditions that may or may not include the posting of a bond. Id. at § 3142(c).

3. A defendant may be temporarily detained based upon a finding that she was on a) release pending trial for a felony under Federal, State, or local law; b) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or c) probation or parole for any offense under Federal, State, or local law; or d) is not a citizen of the United States or lawfully admitted for permanent residence. Id. at § 3142(d).

a. If temporary detention is sought on the ground that the defendant is not a citizen, the defendant has the burden of proving that she is a citizen or lawfully admitted to the United States in order to avoid temporary detention. Id.

4. A defendant may be detained until trial but only following a detention hearing. Id. at § 3142(e).

III. **Release on Personal Recognizance or Unsecured Appearance Bond (18 U.S.C. § 3142(b))**

A. "The judicial officer shall order the pretrial release of the [defendant] on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the [defendant] as required or will endanger the safety of any other person or the community." Id. at § 3142(b).

1. Note that an unsecured bond does not require the defendant to post any money but simply provides that if a defendant violates the conditions of her release that she agrees that she will be liable to pay the amount of the unsecured bond to the court.

B. A defendant cannot be detained merely if it is determined that a PR release will not reasonably assure the defendant's appearance or the safety of the community; the court must consider other conditions that could reasonably assure those things. See United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985) (en banc).

IV. **Release on Certain Other Conditions (18 U.S.C. § 3142(c))**

A. If a magistrate judge determines, either before or after a detention hearing, that a defendant should be released but also determines that other conditions are necessary to reasonably assure the defendant's appearance and/or the safety of the community, the magistrate judge shall order the release of the defendant.

B. Possible conditions of release are set forth at 18 U.S.C. § 3142(c) and include:

1. subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

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

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

b. maintain employment, or, if unemployed, actively seek employment;

c. maintain or commence an educational program;

d. abide by specified restrictions on personal associations, place of abode, or travel;

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

f. report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

g. comply with a specified curfew;

h. refrain from possessing a firearm, destructive device, or other dangerous weapon;

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

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

i. **Magistrate judges routinely require periodic drug testing of defendants released pretrial even where the charges against the defendant have no relation to drugs and the defendant has no history of drug use. At least one court has found this practice unconstitutional and it should be challenged in appropriate cases. See Portillo v. United States District Court for the District of Arizona, 15 F.3d 819 (9th Cir. 1994). See also Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987).**

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

l. execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

i. The court may upon its own motion and shall upon the government's motion conduct an inquiry into the source of any property designated for forfeiture. See 18 U.S.C. § 3142(g).

m. return to custody for specified hours following release for employment, schooling, or other limited purposes; and

n. satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

C. For certain charged offenses involving minor victims (including any type of distribution of child pornography), if a defendant is released, he *must* be put on electronic monitoring

D. This list is non exhaustive so don't hesitate to be creative by suggesting additional conditions, based upon the facts and circumstances of your client and/or your case, to persuade the court to release your client pending trial.

1. In United States v. Minns, 863 F. Supp. 360 (N.D. Tex. 1994), the Court ordered a defendant detained despite the defendant's willingness to fund elaborate security measures such as video, electronic and telephone monitoring. The Court noted that such conditions would "elaborately replicate a detention facility without the confidence of security such a facility instills" and that it would be "inimical to our system of justice to permit a defendant to 'buy' his release pending trial." Id. at 364 (citations omitted).

E. Note that any bail belonging to and/or deposited by or on behalf of a defendant can, on motion of the government, later be taken and applied to any assessment, fine, restitution or penalty imposed upon the defendant. See 28 U.S.C. § 2044.

1. This rule does not apply where money originally belonged to a third party. United States v. Equere, 916 F.Supp. 450, 452-54 (E.D. Pa. 1996); United States v. Sparger 79 F. Supp. 2d 714 (W.D. Tex. 1999) (Defendant's attorney).

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F. The conditions of release can be amended or added to at any time. See 18 U.S.C. § 3142(c)(3).

V. **Temporary Detention (18 U.S.C. § 3142(d)**

A. Magistrate judges will often enter a temporary detention order without deciding whether a defendant subject to temporary detention will be released if the other authorities fail to lodge a detainer against the defendant. If the other authorities do not lodge a detainer against the defendant, the magistrate judges will then either release the defendant from custody pending trial or hold a detention hearing. If, on the other hand, the other authorities do lodge a detainer against the defendant with the United States Marshal, the magistrate judges will often not hold a detention/release hearing and the defendant will stay in federal custody pending trial.

1. Obviously you want to keep your client in federal custody as opposed to state custody or INS custody. Nevertheless, if another authority does lodge a detainer against your client during the period of temporary detention and you are confident that the other authority will not act on the detainer or that the other authority will allow your client to post a bond, you should request a federal detention/release hearing and argue for your client's release from federal custody. *See Attachment A*

B. Under the temporary detention provisions of the Act, a defendant can be temporarily detained for not more than ten days, excluding weekends and holidays. See 18 U.S.C. § 3142(d).

C. During the period of temporary detention, the prosecutor will be directed to notify the appropriate authorities or agency to determine if they will lodge a detainer against the defendant.

VI. **Detention Hearing (18 U.S.C. § 3142(e) and (f))**

A. Procedure - Timing

1. The government must request the defendant's detention at his initial appearance. See 18 U.S.C. § 3142(f). If a defendant is temporarily detained pursuant to 18 U.S.C.§ 3142(d), the government can move for detention during the temporary detention period. See United States v. Becerra-Cobo, 790 F.2d 427, 429 (5th Cir. 1986).

a. Unfortunately, there is no remedy for a violation of this requirement. United States v. Montalvo-Murillo, 110 S.Ct. 2072, 2079-80 (1990).

b. A written motion is not required. See United States v. Volkson, 766 F.2d 190, 192 (5th Cir. 1985).

2. The detention hearing shall be held immediately upon the defendant's initial appearance unless the defendant or the government requests a continuance. See 18 U.S.C. § 3142(f).

a. Except for "good cause," a continuance request by the government may not exceed three days and a continuance request by a defendant may not exceed five days. Id.

i. It is unclear whether a three day continuance request by the government requires some justification.

ii. Weekend days are not be included when computing time periods allowed for continuances (i.e. if defendant makes his initial appearance on a Friday, a three day continuance is until Wednesday). 18 U.S.C. § 3142(f).

iii. A defendant still has a right to a prompt detention hearing even if his co-defendants move for a continuance of their detention hearings. See United States v. Araneda, 899 F.2d 368, 370 (5th Cir. 1990).

iv. If a defendant is not represented at his initial appearance, the magistrate judge may order a hearing held within five days if there is no objection. United States v. Fortna, 769 F.2d 243, 248-49 (5th Cir. 1985).

b. The Court shall order the defendant be detained until the detention hearing is held. See 18 U.S.C. § 3142(f). Once a hearing begins, however, the court may release the defendant pending the conclusion of the hearing. Id.

B. Procedure - Grounds

1. 18 U.S.C. § 3142(f) limits detention hearings to the following instances:

a. upon motion of the government in a case involving a crime of violence, § 3142(f)(1)(A);

i. A crime of "violence" is defined by 18 U.S.C. § 3156(a)(4) as a) an offense that has as an element of the use, attempted use, or threatened use of physical force against the person or property of another; b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or c) certain offenses involving sexual abuse or sexual exploitation.

ii. For this instance to apply, the defendant must actually be charged with an offense that "involves" violence. See United States v. Byrd, 969 F.2d 106, 109-10 (5th Cir. 1992) (Child molester's act of receiving pornographic videotape through the mail was neither crime of violence nor case involving crime of violence; detention order vacated. Not this occurred prior to the expansion of the definition of “crime of violence” to include such an offense); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985). Therefore, ironically, while a defendant can be held without bond if a court determines, by clear and convincing evidence, that he is a danger to the community, this is insufficient to trigger a motion for detention in the first instance.

a. Note that the Byrd court held that "it is not necessary that the charged offense be a crime of violence; only that the case involve a crime of violence...." Id. at 110. It did, however, make clear that "the proof of a nexus between the non violent offense charged and one or more of the six § 3142(f) factors is crucial." Id.

b. *See Attachment B*

b. upon motion of the government in an offense where the maximum sentence is life imprisonment or death, § 3142(f)(1)(B);

c. upon motion of the government in certain drug offenses, including a penalty of ten years or more, § 3142(f)(1)(C);

d. upon motion of the government in circumstances presented in § 3142(f)(1)(D).

i. § 3142(f)(1)(D) applies if the defendant has two previous convictions for offenses set forth in (a), (b) or (c) above;

e. upon motion of the government if the defendant is charged with possession or use of a firearm or destructive device. § 3142(f)(1)(E).

f. upon motion of the government or the court's own motion in a case that involves a serious risk of flight, § 3142(f)(2)(A) or

g. upon motion of the government or the court's own motion in a case that involves a serious risk that the defendant will obstruct or attempt to obstruct justice or intimidate or attempt to intimidate a witness or juror, § 3142(f)(2)(B).

C. Procedure - Hearing

1. The defendant has the right to counsel at a detention hearing. See 18 U.S.C. § 3142(f); Fed. R. Crim. P. 44.

2. The defendant may testify, present information, present witnesses and cross-examine witnesses who appear at a detention hearing. See 18 U.S.C. § 3142(f); United States v. O'Shaughnessy, 764 F.2d 1035, 1037-38 (5th Cir. 1985). Cf. United States v. Davis, 845 F.2d 412, 414-15 (2d Cir. 1988) (Defendant is entitled to a hearing and to testify. Detention cannot be ordered on the government's allegations alone).

3. The ability of the defendant to receive discovery under Fed. R. Crim. P. 16, Brady material, and to issue subpoenas for use at the detention hearing is subject to the discretion of the court. See United States v. Lewis, 769 F. Supp. 1189 (D.

Kan. 1991).

4. The defendant has the right to call government agents if they will testify about the "weight of evidence" - one of the considerations set forth in the Act. See United States v. Hurtado, 779 F.2d 1467, 1479-80 (11th Cir. 1985). But see United States v. Gaviria, 828 F.2d 667, 669-70 (11th Cir. 1987) (Defendant has only a conditional right to call adverse witnesses); United States v. Sanchez, 457 F.Supp. 2d 90 (D. Mass. 2006) ("In conclusion, in urging the Court to allow her to subpoena witnesses, Sanchez' counsel must give the Court some basis for believing that the witness would produce testimony favorable to her client or that there is some reason to question the reliability of hearsay evidence proffered by the Government. In the instant case, counsel has provided no such basis, and the Court sees none. Rather, defense counsel's purpose appears to be to have the ability to examine the Government's witness before trial. While this may be a laudable motive, the desire for discovery is simply not a sufficient basis under the law *94 for allowing defense counsel to subpoena prospective government witnesses into court to testify at a detention hearing.")

5. Either the government or the defendant can present information by proffer or through hearsay. See United States v. Parker, 848 F.2d 61, 63 (5th Cir. 1988) (Defendants can use proffers); United States v. Martir, 782 F.2d 1141, 1145 (2d Cir. 1986) (Government can use proffers); United States v. Gaviria, 828 F.2d 667, 669 (11th Cir. 1987) (Government can use proffers).

a. If the defendant asks to call witnesses, courts cannot force proffer instead. United States v. Torres, 929 F.2d 291 (7th Cir. 1991).

6. It is not advisable to actually call your client as a witness at a detention hearing. United States v. Ingraham, 832 F.2d 229, 237-39 (1st Cir. 1987) (Statements by defendant at detention hearing admissible at trial), cert. denied, 486 U.S. 1009 (1988).

7. The Federal Rules of Evidence do not apply at detention hearing. See Fed. R. Evid. 1101(d)(3); 18 U.S.C. § 3142(f).

8. Evidence that a defendant alleges was illegally seized can still be admitted at a detention hearing. United States v. Viers, 637 F. Supp. 1343, 1353 (W.D. Ky. 1986); United States v. Angiulo, 755 F.2d 969, 974 (1st Cir. 1985) (Court can use electronic surveillance evidence even if defendant challenges its legality).

9. **Fed. R. Crim. P. 46(j)(1) requires the government to produce all written statements in its possession that were prepared by any of its witnesses at a detention hearing that relate to the subject matter of the witness' testimony. The statements must be produced after the government witness has testified on direct examination. See Fed. R. Crim. P. 26.2(a).**

a. This rule also requires the defense, upon request by the government, to produce written statements in its possession prepared by any defense witness who testifies at a detention hearing.

b. If a party does not comply with a request made pursuant to Fed. R. Crim. P. 46(j)(1), the court may not consider the testimony of a witness whose statement is withheld. See Fed. R. Crim. P. 46(j)(2).

D. Standard for Ordering Detention

1. The Act provides that a defendant shall be detained if a magistrate judge finds 1) by clear and convincing evidence (see 18 U.S.C. § 3142(f)) that no condition or combination of conditions will reasonably assure the safety of the community, or 2) that no condition or combination of conditions will reasonably assure the appearance of the defendant as required. See 18 U.S.C. § 3142(e).

a. While not set forth in the Act, courts have held that flight risk must be found by a preponderance of the evidence, as opposed to clear and convincing evidence. See United States v. Araneda, 899 F.2d 368, 370 (5th Cir. 1990); United States v. Trosper, 809 F.2d 1107, 1109 (5th Cir. 1987); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985).

2. Arguably, if the government is allowed to seek detention only because a defendant is a potential flight risk, the defendant cannot be detained solely on the grounds that he is a danger to the community. See United States v. Himler, 797 F.2d 156 (3rd Cir. 1986); United States v. Ploof, 8851 F.2d 7, 11-12 (1st Cir. 1988). But see United States v. Holmes, 438 F.Supp. 2d 1340, 1341-51 (S.D. Fla. 2005).

3. It is important to recognize that it is not required that the magistrate judge be able to set conditions that guarantee a defendant's appearance as required and the safety of the community only that she be able to set conditions that "reasonably assure" them. See United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985); United States v. Orta, 760 F.2d 887, 891-92 (8th Cir. 1985) (en banc).

a. Of course, the burden is on the government to show that no such conditions could be set.

4. Remember that ability to flee is not synonymous with inclination to flee. A simple ability to flee does not justify detention. See United States v. Himler, 797 F.2d 156, 162 (3rd Cir. 1986).

E. Presumption in Favor of Detention in Certain Instances (18 U.S.C. § 3142(e))

1. There is a rebuttable presumption that a defendant be detained prior to trial because there is no condition or combination of conditions that will reasonably assure the safety of the community if:

a. The defendant has been convicted of a 1) violent crime, 2) capital offense, 3) drug offense, or 4) any felony after committing two violent crimes, two capital offenses or two drug offenses; and

b. The instant offense was committed while defendant was on bail; and

c. Less than five years has elapsed from the conviction date or date of release (whichever occurred last) for the offense described in paragraph (a) above.

2. There is also a rebuttable presumption that a defendant be detained prior to trial because there is no condition or combination of conditions that will reasonably assure the appearance of the defendant as required or will reasonably assure the safety of the community if the court has probable cause to believe that the defendant has committed a) a drug offense with a penalty of ten years or more[1]; b) an offense subject to prosecution under 18 U.S.C. § 924(c); c) certain "terrorism" offenses; or d) certain offenses involving sexual exploitation of children (but not simple possession of child pornography).

a. An indictment alone establishes probable cause needed for the presumption to apply. See United States v. Trosper, 809 F.2d 1107, 1110 (5th Cir. 1987).

b. A single drug charge must have a ten-year penalty for this presumption

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[1]Of the rebuttable presumptions that may apply, this is by far the most prevalent

to apply. The charges cannot be aggregated. See United States v. Hinote, 789 F.2d 1490, 1491 (11th Cir. 1986).

c. The presumption for drug offenses is arguably intended to prevent flight. See generally United States v. Jessup, 757 F.2d 378, 395-98 (1st Cir. 1985) (Remarks from hearings on Bail Reform Act).

i. It does not matter that there is no realistic exposure of ten years if that is the statutory penalty. See United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1991).

3. Read United States v. Jackson, 845 F.2d 1262, 1264-66 (5th Cir. 1988) on the effect of the presumption. Always argue that Jackson holds that the presumption is almost meaningless. But see United States v. Hare, 873 F.2d 796, 798-99 (5th Cir. 1989).

4. If the presumption does apply, the defendant need only present some credible evidence that he is not a flight risk or danger to the community (i.e. the defendant has the burden of production but he never has the burden of persuasion). See United States v. Rueben, 974 F.2d 580, 586 (5th Cir. 1992), cert. denied, 113 S.Ct. 1336 (1993); United States v. Fortna, 769 F.2d 243, 251 (5th Cir. 1985).

a. Use of electronic bracelet "arguably" rebuts the presumption. United States v. O'Brien, 895 F.2d 810, 816 (1st Cir. 1990).

F. Factors to be Considered at a Detention Hearing

1. The factors to be considered in determining whether there are conditions of release that will reasonably assure the appearance of the defendant at trial and reasonably assure the safety of the community are set out at 18 U.S.C. § 3142(g).

a. Nature of the offense, including whether offense is violent or involves a narcotic drug.

b. Weight of evidence.

i. This provision allows you to ask broad questions at a detention hearing and develop discovery because the magistrate judge must "discover the weight of the evidence."

ii. This is the least important factor because a court cannot make pretrial determination of guilt. See United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990); United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985).

c. History and characteristics of the defendant.

d. The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings.

i. Foreign nationality is not necessarily enough to indicate that a defendant is a flight risk. See United States v. Townsend, 897 F.2d 989, 995 (9th Cir. 1990); United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985).

ii. "Ties to community" means both the community where the defendant is arrested and the community where the defendant normally resides. United States v. Townsend, 897 F.2d 989, 995 (9th Cir. 1990).

iii. In an usual case, Saudi Arabia citizen, without standing to remain in the United States was released on $50,000 bond and allowed to return to Saudi Arabia and would be “paroled” back into the United States for trial. United States v. Almohandis, 297 F.Supp. 2d 404 (D. Mass. 2004). But see United States v. Magallon-Torro, 2002 U.S. Dist. LEXIS 23362 (N.D. Tex. 2002) (Fish, C.J.) (Where defendant was an alien under a final order detention no condition could reasonably assure his appearance at trial. Magistrate Judge’s release order revoked).

iv. Court must hear testimony of family members if the defendant asks to present witnesses. United States v. Torres, 929 F.2d 291 (7th Cir. 1991).

e. The defendant's probation/parole/release status.

f. Nature of danger posed to community if the defendant is released.

i. Economic crimes do not constitute a danger to the community

justifying a defendant's detention. See United States v. Himler, 797 F.2d 156 (3rd Cir. 1986).

g. "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..." United States v. El-Hage, 213 F.3d 74, 79-80 (2d Cir. 2000)

2. If you can roughly compute what a defendant's sentencing guidelines would be in the event she is convicted and the guidelines are low, you should argue that it would be ironic and a travesty if the defendant was detained pretrial and then found eligible and sentenced to probation or a short sentence.

G. Detention Order (18 U.S.C. § 3142(i))

1. If the court enters a detention order, the magistrate judge shall:

a. include written findings of fact and a written statement of the reasons for the detention;

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

c. direct that the defendant be afforded reasonable opportunity for private consultation with counsel; and

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

2. The Court must make specific factual findings when ordering detention. See United States v. Westbrook, 780 F.2d 1185, 1190 (5th Cir. 1986).

H. Temporary Release

1. Even if a defendant is detained following a detention hearing, a court may allow the defendant to be temporarily released in the custody of the United States

Marshal or another appropriate person if such temporary release is "necessary for preparation of the person's defense or for another compelling reason." See 18 U.S.C. § 3142(i).

I. Conditions of pretrial detention can be challenged by a habeas petition. See United States v. McGriff, 468 F.Supp. 2d 445, 447 (E.D..N.Y. 2007)

J. Strategy at a Detention Hearing

1. Whenever possible, talk to your client at least a day prior to a detention hearing and obtain background information. This will allow you to arrange to have family, friends and/or employers testify at her detention hearing. While not nearly as persuasive, if you talk to family and employers of your client prior to the hearing and it is absolutely impossible for them to attend the hearing, you can at least proffer the information they give you.

a. If there is a strong possibility that your client will be detained, it is better to request a continuance of the hearing than to go in empty handed.

2. The magistrate judge will rely heavily upon a background report prepared by the Pretrial Services division of the Probation Department in determining whether to release your client. You are entitled to review a copy of this report prior to a detention hearing and you should definitely do this. See 18 U.S.C. § 3153(c)(1). The report often has a more complete criminal history on a defendant than the NCIC report you will be provided by the government.

3. As noted above, Fed. R. Crim. P. 46(j)(1) requires the government to produce any written statements prepared by witnesses it calls at a detention hearing. Always avail yourself to this rule and ask the government witness on cross examination if all of his or her statements have been produced as required.

a. Arguably, because a government agent is allowed to testify as to hearsay statements made by another witness, the government should be required, under Rule 46(j)(1), to produce the written statements of the hearsay declarant in its possession, custody or control.

4. If all else is already lost and it is a foregone conclusion that your client will be detained, consider calling adverse witnesses on "the weight of the evidence" in order to obtain free discovery.

VII. **Reopening of Detention Hearings and Review of Detention Orders**

A. Either side may seek review of the conditions of release set by a magistrate judge. Id. at § 3145(a).

1. This is styled a "motion to amend release conditions." *See Attachment C*

B. The defendant or the government may also request a detention hearing be reopened at any time if based upon "new evidence." See 18 U.S.C. § 3142(f). But see United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989) (testimony of family member not new evidence).

1. This is different from a motion to amend release conditions (e.g to lower a bond) which can be brought at any time and does not require "new evidence." See 18 U.S.C. § 3142(c)(3) ("The judicial officer may at any time amend the order [setting conditions of release] to impose additional or different conditions of release.").A.

2. Suppression of evidence in a case was “new evidence” warranting the reopening of a detention hearing. United States v. Shareef, 907 F. Supp. 1481 , 1483 (D. Kan. 1995)

C. Likewise, either side may also seek a review of a magistrate judge’s order regarding a defendant’s release or detention. See 18 U.S.C. § 3145.

1. An appeal to the District Court of a magistrate judge's detention order is not an "appeal" at all but a "motion to revoke detention order." *See Attachment D*

i. Arguably, the review must be sought within 10 days of the magistrate judge’s order pursuant to Fed. R. Crim. P. 59(a). See United States v. Tooze, 236 F.R.D. 442, 443-45 (D. Ariz. 2006).

2. The review of a detention order, release order, or release conditions must be undertaken "promptly." See 18 U.S.C. § 3145(b).

a. Thirty day delay not "promptly" - defendant ordered released on conditions. United States v. Fernandez-Alfonso, 813 F.2d 1571, 1572 (9th Cir. 1987).

b. Two month delay may not be "promptly," but the Fifth Circuit refuses to release defendant because no remedies are contained in statute. United States v. Barker, 876 F.2d 475, 477 (5th Cir. 1989).

3. The District Court should review a magistrate judge's detention order, release order or release conditions de novo. See United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985).

a. To facilitate the review, have an unofficial transcript from the detention hearing before the magistrate judge prepared and attached it to your motion to revoke the detention order.

4. While it is not clear that a defendant has a right to a new hearing before the District Court, courts have generally held that parties are allowed to submit new evidence when moving to revoke a magistrate judge's order. See United States v. Delker, 757 F.2d 1390, 1393-94 (3rd Cir. 1985) (District Court may conduct new evidentiary hearing); United States v. Farguson, 721 F. Supp. 128, 129 n.1 (N.D. Tex. 1989) ("The Court need not, of course, conduct a second evidentiary hearing in the absence of newly developed evidence not presented at the prior hearing."); United States v. Baker, 703 F. Supp. 34, 36 (N.D. Tex. 1989) (same).

5. Where a release or detention hearing is set in an arresting district pursuant to Fed. R. Crim. P. 40 and not the district where the defendant will stand trial, at least three courts has held that a motion to review the conditions of release or detention resides with the District Court where the defendant will stand trial and not the District Court where defendant had his release or detention hearing. See United States v. El Edway, 272 F.3d 149 (2d Cir. 2001); United States v. Torres, 86 F.3d 1029 (11th Cir. 1996); United States v. Evans, 62 F.3d 1233 (9th Cir. 1995).

a. One court holds that, where a defendant is released in the district of arrest, the government may not seek to reopen the detention hearing *before a magistrate judge* in the district in which the defendant is charged. Government's remedy is to move to revoke the release order *before a district judge* in the district in which the defendant is charged. United States v. Cisneros, 328 F.3d 610 (10th Cir. 2003)

6. An appeal of the District Court's ruling on a motion to revoke a release order or a detention order or a motion to amend release conditions can be made to the Court of Appeals by either party. See 18 U.S.C. § 3145; Fed. R. App. P. 9.

a. A Notice of Appeal by defendant must be filed within ten days. See Fed. R. App. P. 4(b).

b. The appeal "shall be determined promptly." See 18 U.S.C. § 3145(c); Fed. R. App. P. 9. Indeed, the appeal should be heard on expedited basis. See United States v. Williams, 753 F.2d 329, 332 (4th Cir. 1985).

c. The appeal will usually be handled as a motion. See United States v. Perdomo, 765 F.2d 942 (9th Cir. 1985); Fed. R. App. P. 9.

d. The standard of review used by the Fifth Circuit in reviewing such an appeal is whether the District Court's ruling is "supported by the proceedings below." See United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985). This is the equivalent of an abuse of discretion standard. See United States v. Rueben, 974 F.2d 580, 586 (5th Cir. 1992).

5. *See Attachment E*

7. From the Court of Appeals, an Application can be filed with the Circuit Justice of the particular judicial circuit.

D. In some circumstances, the District Court may, after a hearing, order detention on its own motion of a defendant released by the magistrate judge. See United States v. Gebro, 948 F.2d 1118, 1120 (9th Cir. 1991); United States v. Maull, 773 F.2d 1479, 1486 (8th Cir. 1985) (en banc).

VIII. **Revocation of Release Order**

A. Pursuant to 18 U.S.C. § 3148(b), a court can revoke a defendant's release if it finds there is 1) probable cause to believe that the defendant has committed a new offense or 2) clear and convincing evidence that defendant has violated any other condition of release, and it determines 1) after review of factors in § 3142(g) (see VI. F. supra) that there is no condition or combination of conditions that will reasonably assure the defendant's appearance as required and the safety of the community or 2) the defendant is unlikely to abide by the conditions of release.

1. The defendant need not be convicted of new crime to revoke his release, probable cause that he committed a new crime is enough. See, e.g., United States v. Santiago, 826 F.2d 499, 503-05 (7th Cir. 1987).

2. If defendant is charged with a felony while on release, a rebuttable presumption arises that there are no conditions of release that will assure the safety of the community and that the defendant should not be released. 18 U.S.C. § 3148(b).

3. It is clear that a defendant's release cannot be revoked automatically if defendant is charged with new offense because section 3148(b) requires a court to examine factors in section 3142(g) before deciding whether to detain a defendant. See United States v. Davis, 845 F.2d 412, 414-15 (2d Cir. 1988); United States v. Higgs, 731 F.2d 167, 170 (3rd Cir. 1984).

IX. **Release Pending Sentencing, Appeal, or Revocation Hearing (18 U.S.C. § 3143)**

A. Pending Sentencing

1. There is a change in the presumption in favor of release after a conviction (be it by a guilty plea or by a verdict of guilty after a not guilty plea). See 18 U.S.C. § 3143(a). After a conviction, a defendant shall be detained unless her sentencing guidelines indicate probation is possible or she demonstrates by clear and convincing evidence that she is not a flight risk or danger to the community. Id. § 3143(a)(1).

2. If a defendant is convicted of a crime of violence, capital crime or a drug crime where the penalty is more than ten years, then release pending sentencing is possible only if the court finds by clear and convincing evidence that the defendant is not a flight risk or danger to the community and (1) the court finds that there is a substantial likelihood that it will grant a judgment of acquittal or new trial or (2) the government recommends no sentence of imprisonment be imposed. Id. at § 3143(a)(2).

-or she demonstrates by clear and convincing evidence that she is not a flight risk or danger to the community and "exceptional reasons" exist to support her release § 3145(c)

B. Pending Appeal

1. Following sentencing and pending appeal, a defendant must be detained if convicted of a crime of violence, capital crime or a drug crime for which the penalty is more than ten years. See 18 U.S.C. § 3143(b)(2).[2] Otherwise, a defendant can be released only if she 1) shows by clear and convincing evidence that she is not a flight risk or danger to the community; and) the appeal is not for purpose of delay; and 3) the appeal raises a "substantial question of law" likely to result in a reversal, new trial, sentence of probation, or reduced term less than the amount the defendant will spend in custody during the duration of the appeal. Id. at § 3143(b)(1).

a. A "substantial question of law" is one that will "more probable than not" result in a favorable ruling for the defendant. See United States v. Valera-Elizondo, 761 F.2d 1020 (5th Cir. 1985). See also United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985) (Substantial question is

[2] This mandatory rule may be excused in "extraordinary circumstances." See 18 U.S.C. § 3145(c).

"when the appeal presents a close question or one that could go either way."); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1231-32 (8th Cir. 1985) (same).

b. The burden is on the defendant to make the required showings for bail pending appeal. See United States v. Valera-Elizondo, 761 F.2d 1020, 1024-25 (5th Cir. 1985).

2. Generally, unless impracticable, an application for release pending appeal should be made to the District Court in the first instance. See Fed. R. App. P. 8(a).

a. If the application to the District Court is unsuccessful, an appeal may be taken to the Court of Appeals. Id.

b. The appeal will be treated as a motion. Id

C. Pending Revocation Hearing

1. Pursuant to Fed. R. Crim P. 32.1(a)(6) the standards for release pending a probation or supervised release revocation hearing are governed by the statute dealing with release pending sentencing or appeal. 18 U.S.C. § 3143. Therefore, a defendant arrested for a violation of probation or supervised released will be detained pending his revocation hearing unless he demonstrates by clear and convincing evidence that she is not a flight risk or danger to the community.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**3-93-370-M**
	)	
v.	)	
	)	
XXXXX,	)	
	)	
Defendant.	)	
	)	

MOTION FOR DETENTION HEARING

Defendant XXXXX, pursuant to 18 U.S.C. § 3142, hereby moves this Court to hold a detention hearing in the above-referenced matter. In support of this motion, Mr. XXXXX presents the following information and argument to the Court.

1. Mr. XXXXX made his initial appearance in this case on October 6, 1993. Although a detention hearing was required to be held upon Mr. XXXXX's initial appearance (see 18 U.S.C. § 3142(f)), no such hearing was held.

2. The Court took the position that "Defendant is subject to an I.N.S. hold and is not eligible for release." See Exhibit A (attached hereto).

3. Simply because Mr. XXXXX is subject to an I.N.S. hold does not make him ineligible for conditions to be set for his release on the instant criminal charges.

4. Mr. XXXXX requests that a detention hearing be held so that conditions can be set for his release on the instant criminal charges. Once Mr. XXXXX meets those conditions, he

will be taken into I.N.S. custody pursuant to the I.N.S. hold and then will be eligible to have conditions for release from I.N.S. custody set by an I.N.S. judge. See 8 U.S.C. § 1252(a). Of course, Mr. XXXXX cannot go before the I.N.S. judge until conditions are set forth for his release in the instant case.

WHEREFORE, Mr. XXXXX respectfully requests this Court to hold a detention hearing in this matter immediately.

Respectfully submitted,

_____

F. Clinton Broden

Attorney for Defendant
XXXXX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**3:94-CR-004-G**
	)	
v.	)	
	)	
XXXX,	)	
	)	
Defendant.	)	
	)	

MOTION TO REVOKE DETENTION ORDER AND MEMORANDUM OF LAW IN SUPPORT THEREOF

I. FACTS

On January 18, 1994, Mr. XXXX was arrested based upon a two count indictment charging him with possession of firearms by a felon. Mr. XXXX made his initial appearance before the Honorable Magistrate Judge Jane Boyle on the same day. Although the Government did not move for Mr. XXXX's pre-trial detention, Magistrate Judge Boyle set a detention hearing for January 21, 1994 and appointed Mr. XXXX counsel.

On January 21, 1994, a detention hearing was held. Mr. XXXX objected to the Magistrate Judge's authority to hold such a hearing on the ground that the Bail Reform Act only permits a Court to hold such a hearing, on its own motion, if there is 1) a serious risk a defendant will flee or 2) there is a serious risk that the defendant will obstruct justice. See Exhibit A (Unofficial Transcript of Detention Hearing) at 2-3. The Magistrate Judge overruled Mr.

XXXX's objection to the Court's jurisdiction. Id. at 3;7-8. The Government put on no evidence at the hearing and did not request that Mr. XXXX be detained. Id. at 2. Mr. XXXX put on evidence regarding his extensive ties to the community. Id. at 3-6.[1]

Following the hearing, the Magistrate Judge noted specifically that she did not believe Mr. XXXX was a flight risk. Id. at 8. Nevertheless, she detained Mr. XXXX without bond upon finding by clear and convincing evidence that Mr. XXXX was a danger to the community. See Exhibit B (Detention Order).

II. ARGUMENT[2]

The plain language of the Bail Reform Act (18 U.S.C. § 3141, et. seq.) as well as judicial opinions from the United States Courts of Appeals for the First, Third and Fifth Circuits clearly prohibit a court from holding a detention hearing on its own motion unless there is 1) a substantial likelihood that a defendant will flee or 2) a substantial likelihood that a defendant will obstruct justice.

18 U.S.C. § 3142 limits detention hearings to the following instances:

> 1) upon motion of the government in a case involving a crime of violence, § 3142(f)(1)(A);
>
> 2) upon motion of the government in an offense where the maximum sentence is life imprisonment or death, § 3142(f)(1)(B);
>
> 3) upon motion of the government in certain drug offenses, §

[1] While the report prepared by the Pretrial Services Agency indicated that Mr. XXXX had been convicted of murder and aggravated assault in the late 1970s and early 1980s respectively, the evidence produced at the detention hearing indicated that Mr. XXXX has held his present job for the past six years and is considered by his employer to be an excellent employee, that he has recently been married and owns his own home where he lives with his wife and three step-children, and that he is a decorated combat veteran from the Vietnam War. Indeed, there is every indication that Mr. XXXX has taken dramatic steps in changing his life around. See Exhibit A at 3-6.

[2] The Motion to Revoke Detention Order raises a pure matter of law in that it raises the issue of whether the Court had jurisdiction to even hold a detention hearing. In any event, Mr. XXXX notes that the detention order will be reviewed by this Court de novo. United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1993). Moreover, pretrial release should only be denied for the "strongest of reasons." Truong Dinh Hung v. United States, 439 U.S. 1326, 1329 (1978) (citation omitted).

3142(f)(1)(C);

4) upon motion of the government in the circumstances presented in § 3142(f)(1)(D);

5) upon motion of the government or the court's own motion in a case that involves a serious risk of flight, § 3142(f)(2)(A) or

6) upon motion of the government or the court's own motion in a case that involves a serious risk that the defendant will obstruct or attempt to obstruct justice or intimidate or attempt to intimidate a witness or juror, § 3142(f)(2)(B).

United States v. Ploof, 851 F.2d 7, 10 (1st Cir. 1988) (emphasis added). In the instant case, the first four instances for holding a detention hearing are inapplicable because there was, in fact, no motion by the Government. Moreover, the Magistrate Judge specifically stated that instance five was not a factor in her (see Exhibit A at 8) decision to hold a detention hearing and never even hinted that instance six was a factor. Indeed, Magistrate Judge Boyle conceded that the only reason she detained Mr. XXXX was because she felt he was a danger to the community. Id.

The instant issue was specifically addressed by the United States Court of Appeals for the Fifth Circuit in United States v. Byrd, 969 F.2d 106 (5th Cir. 1992). The Byrd Court considered whether a defendant could be detained on a danger to the community standard absent the presence of one of the six grounds for holding a detention hearing set forth in 18 U.S.C. § 3142(f). The Court began by noting that "[t]he First and Third Circuits have both interpreted the [Bail Reform] Act to limit detention to cases that involve one of the circumstances limited in [18 U.S.C. § 3142] (f)." Id. at 109, citing Ploof, 851 F.2d at 11 and United States v. Himler, 797 F.2d 156, 160 (3rd Cir. 1986). The Fifth Circuit then noted that it might be "surprising" that

detention "can be ordered only in certain designated and limited circumstances, irrespective of whether the defendant's release may jeopardize public safety." Id. at 109-110. Nevertheless, the Byrd Court found itself "in agreement with the First and Third Circuits: a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention." Id. at 110.

It is clear that Magistrate Judge Boyle could not detain Mr. XXXX on her own motion based upon evidence that Mr. XXXX is a danger to the community. While that might be "surprising," that is the law. The language of 18 U.S.C. § 3142(f) is clear as are the decisions in Byrd, Ploof, and Himler. In fact, no reported decision has been found to support the Magistrate Judge's actions in this case.

III. CONCLUSION

Since none of the six instances exist that would allow for Mr. XXXX's detention, this Court must revoke the detention order in this case. Upon revocation of the detention order, Mr. Medica respectfully requests that this Court set conditions for his release and that he be released from custody forthwith.

Respectfully submitted,

_____

F. Clinton Broden

Attorney for Defendant
XXXX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**3:96-CR-137-D**
	)	
v.	)	
	)	
XXXX,	)	
	)	
Defendant.	)	
	)	

MOTION TO AMEND PRETRIAL RELEASE CONDITION
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant XXXX hereby moves this Court to remove the pretrial release condition that he "[s]ubmit to random urinalysis at the discretion of Pretrial Services Agency" on the grounds that such a condition is not the least restrictive condition necessary to reasonably assure his appearance and protect the safety of the community while he is on pretrial release and that such a condition violates his right under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures.

I. FACTS

On April 8, 1996, Mr. XXXX was released pretrial on his personal recognizance by Magistrate Judge William F. Sanderson. See Order Setting Conditions of Release. Nevertheless, Magistrate Judge Sanderson imposed certain conditions on Mr. XXXX's release. Included among the conditions was that Mr. XXXX report in person at least once per week to the Pretrial

Services Agency and that he submit to random urinalysis testing at the discretion of the Pretrial Services Agency. Id. The reality of the situation is that Mr. XXXX has been required to give a urine sample on a weekly basis to the Pretrial Services Agency.

Mr. XXXX is charged with filing false income tax returns arising out of his practice as a tax preparer. Mr. XXXX has absolutely no history of drug use or alcohol abuse. In fact, Mr. XXXX does not use any alcohol because of medical problems and does not use drugs.

Mr. XXXX suffers from a spastic colon and possible prostate cancer. Significantly, Mr. XXXX has a "strangled urethra" that makes urination difficult, if not impossible, at times. As a result, Mr. XXXX is not able to "urinate on command" and has had difficulty providing urine specimens to the Pretrial Services Agency. Recently, Mr. XXXX was forced to spend hours at the Pretrial Services Agency and, when he could not produce a urine specimen, he was told that it would be reflected as a "positive" test and that he would be required to return the following morning.

In short, Mr. XXXX has suffered great embarrassment as well as a significant amount of stress as a result of his inability to "urinate on command." Moreover, as argued below, this condition of pretrial release is both unnecessary and unconstitutional.

II. ARGUMENT

A. Urinalysis testing is not the least restrictive pretrial release condition necessary to assure Mr. XXXX's appearance and protect the community

The Bail Reform Act provides that a person shall be released pending trial on his personal recognizance or upon execution of an unsecured bond unless a judicial officer determines that he needs to set additional conditions to reasonably assure the defendant's appearance as required and

the safety of another person or the community. 18 U.S.C. § 3142(b). If the judicial officer determines that he needs to set conditions on a defendant's release pending trial, the judicial officer may release the defendant subject to the condition that the person not commit a federal, state or local crime during the period of release and "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community..." Id. at § 3142(c) (emphasis added).[1]

In setting the condition in the instant case that Mr. XXXX submit to urinalysis testing, Magistrate Judge Sanderson had no evidence whatsoever that Mr. XXXX used drugs or alcohol. Moreover, Mr. XXXX is not charged with any offense related to drugs or alcohol. In short, there is no support for the proposition that urinalysis testing is "the least restrictive" condition necessary to assure Mr. XXXX's appearance in this case and the safety of the community. Indeed, such a condition is completely unnecessary and has caused Mr. XXXX a great deal of stress and embarrassment. Because urinalysis testing is not "the least restrictive" condition necessary to assure Mr. XXXX's appearance and the safety of the community, such a condition

---

[1] See also United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) ("The Bail Reform Act of 1984, 18 U.S.C. § 3141, et seq., requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community."); United States v. Himler, 797 F.2d 156, 159 (3rd Cir. 1986) ("If a judicial officer finds that release on personal recognizance or unsecured bond will not provide the requisite assurances, the judicial officer must impose the least restrictive bail conditions necessary to assure appearance and safety."); United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985) ("...Bail Reform Act of 1984...mandates release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required."); United States v. Lopez, 827 F. Supp. 1107, 1108 (D. N.J. 1993) ("Courts must strive to impose the least restrictive bail conditions necessary to assure the appearance of the defendant at trial and the safety of the public in the interim between arrest and trial.").

is inconsistent with the Bail Reform Act and should be deleted.

B. Urinalysis testing is also unconstitutional

Two other courts have considered the constitutionality of drug testing in contexts similar to the one that now confronts this Court. In Portillo v. United States District Court for the District of Arizona, 15 F.3d 819 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit was called upon to determine the constitutionality of drug testing where a defendant had been released pending sentencing on theft charges. In Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia Circuit considered the constitutionality of the District of Columbia's pretrial drug testing program in the context of a civil suit brought by a narcotics defendant.

In Portillo, the defendant had been ordered to submit to urine testing following his conviction on theft charges and pending sentencing. Id. at 821. Mr. Portillo sought a writ of mandamus. Id. The Ninth Circuit began its analysis by holding that the urinalysis testing was a search and, therefore, it was subject to certain Fourth Amendment protections. Id. at 822, citing, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). Nevertheless, the Ninth Circuit likened Portillo's status to that of an individual on probation. Id. at 822-24. Based upon Supreme Court precedent, the Ninth Circuit recognized that "the operation of a probation system presents ‘special needs, beyond the normal need for law enforcement that may justify departures from the usual warrant and probable cause requirements." Id. at 822, quoting, Griffin v. Wisconsin, 483 U.S. 868, 876-78 (1987). The Ninth Circuit concluded, therefore, that the urine testing need not be based upon probable cause but also concluded that the search must be

reasonable. Id. at 824. The Ninth Circuit then applied its analysis to the case before it and held that the testing in that case was not reasonable and, consequently, granted the writ of mandamus vacating the District Court's order.

> Here, the record does not indicate that the district court had any evidence that Portillo's crime of theft bore any correlation to drug usage. Prior to the court's order directing Portillo to submit to urine testing, the court had no information regarding Portillo's background, criminal history or potential prior drug use. Moreover, because the test was to be administered as a routine test, Portillo had advance notice of it, and no exigency existed which would jeopardize the government's interest. Therefore, the district court erred by requiring Portillo to submit to presentence urine testing.

Id. (footnote and citations omitted).

In Berry, the plaintiff appealed a ruling by the District Court that had concluded that the District of Columbia's pretrial drug testing of "nearly all persons arrested in the District" did not "raise issues of 'constitutional dimension.'" Berry, 833 F.2d at 1033-34. The District of Columbia Court of Appeals, as did the Ninth Circuit in Portillo, first concluded that "[m]andatory urinalysis clearly implicates rights secured under the Fourth Amendment." Id. at 1034. Nevertheless, the District of Columbia Court of Appeals was unable to pass judgment on the testing program because of the lack of an adequate record. Id. In giving "guidance" to the District Court on remand, however, the Court of Appeals commented that "[i]f the trial court finds that drug testing and treatment are only required when there is an individualized determination that an arrestee will use drugs while released pending trial, then the District's testing program will more likely than not be found reasonable." Id. at 1035. On the other hand, the Court noted that "questions will arise if it is found that arrestees are compelled to participate in the drug testing program even in the absence of individualized suspicion of potential drug use."

Id. at 1036.

Based upon Portillo and Berry, it is clear that the constitutionality of the urinalysis testing in the instant case must be weighed against Mr. XXXX's Fourth Amendment rights. The question then becomes, is it reasonable to order the testing of an individual who has no history of drug use or alcohol abuse and who is under indictment for preparing false tax returns in connection with his tax return practice? Clearly under the well reasoned Portillo decision, it is not. Indeed, in Portillo, the defendant had at least been convicted and was not, as is Mr. XXXX, presumed innocent. Nevertheless, even when dealing with a defendant pending sentencing, the Portillo Court found drug testing of a defendant with no record of prior drug use to be unreasonable. Similarly, the Berry Court clearly disapproved of pretrial drug testing in the absence of suspicion of potential drug use. In short, the drug testing condition in the instant case, given the record, is an unreasonable search and seizure in violation of Mr. XXXX's Fourth Amendment rights.

III. CONCLUSION

As discussed above, Magistrate Judge Sanderson has absolutely no reasonable basis for believing that Mr. XXXX will use drugs or abuse alcohol while on pretrial release. Moreover, Mr. XXXX's medical condition makes it embarrassing and stressful to provide urine samples on command during his weekly Pretrial Services visits. Clearly, the pretrial release condition is not the least restrictive condition to assure Mr. XXXX's appearance as required and the safety of the community. Also, given that Mr. XXXX's background contains no history of drug use or alcohol abuse and that the charges in the instant case are not related to drug use or alcohol abuse in any

way, this drug testing condition is unreasonable and violates Mr. XXXX's constitutional right to be free from unreasonable searches and seizures.

Therefore, Mr. XXXX respectfully requests that this Court amend his conditions of release to remove the condition that he submit to urinalysis testing.

Respectfully submitted,

_____

F. Clinton Broden

Attorney for Defendant
XXXX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**3:93-CR-361-T**
	)	
v.	)	
	)	
XXXX,	)	
	)	
Defendant.	)	
	)	

MOTION TO REVOKE DETENTION ORDER

Defendant XXXX hereby moves this Court pursuant to 18 U.S.C. § 3145(b) to revoke the detention order entered in this case by Magistrate Judge Tolle on October 25, 1993. In support of this motion, Mr. XXXX sets forth the following facts and argument.

1. A detention hearing was held in this matter on October 25, 1993. An unofficial transcript of the detention hearing is attached hereto as Attachment A. Following the hearing, the Magistrate Judge ordered Mr. XXXX be detained. See Attachment B (Detention Order).

2. Based upon the undersigned counsel's review of the Sentencing Guidelines in this case, Mr. XXXX's Criminal History Category is I and his offense level is 4 (assuming a two level reduction for acceptance of responsibility). Therefore, it is extremely likely Mr. XXXX would be given probation for this first time offense.

3. At the detention hearing, Mr. XXXX put on evidence he has been in the United States since January of 1990. See Exhibit B at 9. Mr. XXXX originally came to the United States to

study in the State of Washington. Id. Once his finances were depleted, however, Mr. XXXX was forced to get employment in order to continue his schooling. Id. at 10. Nevertheless, he was caught in a catch-22 situation because his student status did not allow him to get employment. Id. at 10; 17. Therefore, in order to get a job and save money to continue college, Mr. XXXX created one false identity. Id. at 10. However, Mr. XXXX continued to use his true name for other purposes. For example, his car was registered in his own name. Id. at 5.

4. Mr. XXXX has absolutely no criminal history. Id. at 10. Moreover, he has shown great remorse and contrition in the instant case. Id. at 18-19. Mr. XXXX has been employed at the same job at Mobil Oil in Dallas for two years. Id. at 14. Moreover, Mr. XXXX is married to a woman in Dallas - albeit under the false identity. Id. at 15. Mr. XXXX is continuing to take college courses at a local college (Richland College). Id. at 12.

5. Although there appears to be an I.N.S. detainer pending against Mr. XXXX, Mr. XXXX would be eligible to be released by the I.N.S. if he was first released in the instant case. See also 8 U.S.C. § 1251(a) (Procedure for bond in I.N.S. cases).

6. Absolutely no showing was made that Mr. XXXX was a danger to the community and, in any event, this is not a basis for detaining Mr. XXXX because Mr. XXXX was not charged with a crime of violence. See United States v. Byrd, 969 F.2d 106, 110 (5th Cir. 1992) (Defendant must be charged with a crime of violence in order to be detained on a "danger to the community" rationale.).

7. This Court must review the Magistrate Judge's detention order promptly and under a de novo standard of review. See 18 U.S.C. § 3145(b); United States v. Fortna, 769 F.2d 243, 249

(5th Cir. 1985). The only issue before the Court is whether the Government has proven by a preponderance of the evidence that Mr. XXXX is a flight risk and that no conditions or combination of conditions could reasonably assure Mr. XXXX's appearance at trial. See United States v. Orta, 760 F.2d 887, 890-91 (8th Cir. 1985) (en banc) (Court must consider all available conditions before it orders a defendant detained.). Indeed, "[t]he wide range of restrictions available ensures, as Congress intended, that **very few** defendants will be subject to pretrial detention." Id. (emphasis added). Moreover, it is not proper to require conditions that will "guarantee" a defendant's presence, but only conditions that will "reasonably assure" his presence. Id. at 890-92. Fortna, 769 F.2d at 250; 18 U.S.C. § 3142(c).

8. Pretrial release should only be denied for "the strongest of reasons." Truong Dinh Hung v. United States, 439 U.S. 1326, 1329 (1978) (citation omitted). The Government has not met its burden of proving that no condition or combination of conditions would reasonably assure Mr. XXXX's presence at trial. First, Mr. XXXX clearly has ties to the community and a foreign nationality is not enough to indicate a flight risk. See United States v. Motamed, 767 F.2d 1403, 1408 (9th Cir. 1985). Moreover, there are a myriad of conditions, beyond a PR release, that would reasonably assure Mr. XXXX's appearance. For example, Mr. XXXX could be placed on home monitoring or placed in the third party custody of his wife. In addition, Mr. XXXX can be required to maintain his employment and/or schooling. And, of course, in any event, Mr. XXXX would be required to report to the Pretrial Services Agency, if he was even released by I.N.S. following his release in this case.

9. Magistrate Judge Tolle found in his detention order that Mr. XXXX "has the

demonstrated ability to assume false identities." See Exhibit B at 1. First, Mr. XXXX only assumed one false identity and his only purpose of doing that was to secure employment. Second, the United States Court of Appeals for the Third Circuit in United States v. Himler, 797 F.2d 156 (3rd Cir. 1986), considered an almost identical case. The Third Circuit in reversing a district court's detention order wrote:

> The magistrate's risk of flight determination focuses on the nature of the defendant's past and present crimes, his apparent unwillingness to forego crimes of deceit, even while on probation, and the possibility that he would use his aliases to flee and avoid prosecution. While it is true that the defendant stands accused of an unlawful deceit, there is, of course, no per se presumption of flight where the crime charged involves the production of fraudulent identification. The defendant's past convictions do indicate a propensity over a period of time to engage in similar unlawful deceits. The purpose of a Section 3142(e) risk of flight determination, however, is not to detain habitual criminals or deceitful persons; it is to secure the appearance of the accused at trial.

Id. at 161.

10. Mr. XXXX is eligible for probation. He has shown great contrition in this case and has ties to Dallas in the areas of both his employment and schooling and is married to a Dallasite. Mr. XXXX's only crime is that he obtained and employed a false identification in order to secure employment thereby allowing him to continue his schooling. Mr. XXXX has neither the desire or financial ability to be a flight risk and nothing in his past would lead a court to believe that no conditions could be set to "reasonably assure" his appearance.

WHEREFORE, Mr. XXXX respectfully requests that this Court enter an order revoking the detention order entered in this case and setting conditions for his release.

Respectfully submitted,

_____

F. Clinton Broden

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,	)	**DISTRICT COURT NO.**
	)	**3:-01-CR-246-P**
Plaintiff,	)	
	)	
v.	)	
	)	
XXX,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S APPEAL OF DETENTION ORDER

I. Factual Background & Statement of the Case

On July 25, 2001, XXX was indicted for two counts of wire fraud, in violation of 18 U.S.C. § 1343. In the indictment, the government alleged that, although Ms. XXX relinquished insurance proceeds from her ex-husband's death in favor of her children, she, nevertheless, took control of those proceeds.

At Ms. XXX's initial appearance before the United States Magistrate Judge, the government moved to detain Ms. XXX and requested a three day continuance of the detention hearing. *See* Government's Motion for Detention, (attached hereto as Attachment A). In its Motion for Detention, the government claimed that Ms. XXX was "eligible[]" for detention because: 1) there was a serious risk that she would flee and 2) there was a serious risk that she would obstruct justice. *Id*. at 1. Significantly, although the Motion for Detention was a "fill in the blank" type form, the government did not check the box alleging that Ms. XXX was eligible

for detention based upon this case being a "crime of violence." *Id.*

At the beginning of the detention hearing held on August 2, 2001, the Magistrate Judge asked Assistant United States Attorney William McMurrey "for the record, what is the basis for the Government's motion for detention?" *See* Transcript of Detention hearing at 3. Mr. McMurrey responded:

> Our basis, Your Honor, is that the Defendant, as I put in the motion, is a threat to the community, threat to herself, as well as flight risk, and the government has concerns in both those areas. Also the Defendant could be considered, at least from the Government's theory is that she's also an economic threat to the community as well.

Id.

The government introduced evidence at the detention hearing that, for the purposes of this appeal, Ms. XXX concedes might support an argument that she was somehow connected to the death of her ex-husband.

At the conclusion of the detention hearing, the Magistrate Judge began by noting that "[t]he government has moved for detention as a flight risk and danger to community, and obstruction of justice." *Id.* at 81. She went on to note that "there doesn't appear any evidence was offered on obstruction" and that there was not "sufficient [evidence adduced at the detention hearing] to meet the Government's burden of establishing by a preponderance of the evidence that [Ms. XXX is] a flight risk." *Id*. at 81-82. Nevertheless, although the government did not allege that Ms. XXX was eligible for detention based upon the fact that this case supposedly involved "a crime of violence," the Magistrate Judge *sua sponte* found that, based upon *United States v. Byrd*, 962 F.3d 106, 109 (5th Cir. 1992), Ms. XXX was, in fact, eligible for detention

because the case involved "a crime of violence." *Id*. at 82-84. This, coupled with the fact that the Magistrate Judge believed that the government had been proven by clear and convincing evidence that Ms. XXX was a danger to the community, resulted in the Magistrate Judge ordering Ms. XXX detained prior to trial. *Id*. at 83-84. The following day, the Magistrate Judge entered a written order to this effect. *See* Attachment B hereto.

Shortly following the detention hearing, Ms. XXX's appointed attorney sought to withdraw from this case because of his limited knowledge in the area of criminal law. When that motion was granted, undersigned counsel was assigned to the case. Undersigned Counsel then sought to reopen the hearing because of the fact that the government did not base it detention motion on the allegation that the case involved "a crime of violence" and, therefore, the Magistrate Judge could not *sua sponte* hold that Ms. XXX was eligible for detention because this case allegedly involved "a crime of violence." The defense also argued that the Magistrate Judge reliance upon dicta from *Byrd* that was contrary to the Bail Reform Act.

Upon ruling on Ms. XXX's motion, the District Court noted that Ms. XXX's legal arguments did not qualify as a basis for "reopening" the detention hearing. *See* Attachment D hereto at 3.[2] Nevertheless, the District Court also considered Ms. XXX's legal argument on the

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[2]The motion was originally filed as a motion to reopen the detention hearing rather than a motion to revoke because of allegations that Ms. XXX was not receiving proper medical care when in custody. Because there is no jurisdictional time limit on filing a motion to revoke a detention order (*see* 18 U.S.C. § 3145), this seems to be a distinction without a difference since the District Court ultimately considered Ms. XXX's legal arguments on the merits. *See Fassler v United States* 858 F2d 1016 (5th Cir. 1988) ("[W]e decline to hold that § 3145 provides the *exclusive* means by which a person under indictment can challenge his pretrial detention...."), *cert. denied.,* 490 U.S.

merits and determined them to be "without merit." *Id.* On that basis, the District Court denied Ms. XXX's motion to reopen the detention hearing. *Id.* at 4.

II. Argument

It is well understood that, when Congress enacted the Bail Reform Act, it retained the preference for the release of most defendants prior to trial. *See Byrd,* 969 F.2d 106 at 109 ("There can be no doubt that this Act clearly favors non-detention."). Given that fact, the provisions of the Bail Reform Act should be narrowly construed in favor of release. *See,e.g., United States v. Singleton*, 182 F.3d 7, 23 (D.C. Cir. 1999); *United States v. Hinote*, 789 f.2d 1490, 1941 (11th Cir. 1986) (It is required "that we strictly construe provisions of the Bail Reform Act of 1984). *Cf. Williams v. United States*, 458 U.S. 279, 290 (1982) (Criminal statutes should be narrowly construed in favor of the defendant).

A. A Magistrate Judge May Not *Sua Sponte* Order Detention Based Upon a Defendant Being Involved in a Crime of Violence.

As noted above, in neither its written motion nor in its oral elucidation of its grounds for detention at the start of the detention hearing in this case did the government claim that it was moving for detention because Ms. XXX was involved with a "crime of violence." It was the Magistrate Judge who, *sua sponte,* found that Ms. XXX was eligible for detention because she was "involved in a crime of violence." Nevertheless,

> 18 U.S.C. § 3142(f) does not authorize a detention hearing whenever the government thinks detention would be desirable, but rather limits such hearings to the following instances:
>
> 1) *upon motion of the government* in a case involving a crime of violence, §

1099 (1989).

> 3142(f)(1)(A);
>
> 2) *upon motion of the government* in an offense where the maximum sentence is life imprisonment or death, § 3142(f)(1)(B);
>
> 3) *upon motion of the government* in certain drug offenses, § 3142(f)(1)(C);
>
> 4) *upon motion of the government* in the circumstances presented in § 3142(f)(1)(D);
>
> 5) *upon motion of the government or the court's own motion* in a case that involves a serious risk of flight, § 3142(f)(2)(A) or
>
> 6) *upon motion of the government or the court's own motion* in a case that involves a serious risk that the defendant will obstruct or attempt to obstruct justice or intimidate or attempt to intimidate a witness or juror, § 3142(f)(2)(B).

United States v. Ploof, 851 F.2d 7, 9 (1st Cir. 1988) (emphasis added). *See also United States v. Himler*, 797 F.2d 156 (3rd Cir. 1986). In short, for a defendant to be eligible for detention based upon being involved in "a crime of violence" the government, not the Court on its own motion, must make such a claim in its motion for detention. Here, it is undisputed that the government did *not* make such a claim in its motion. As noted above, the government only moved for detention based upon the allegations that there was (1) a serious risk that Ms. XXX would flee and (2) a serious risk that she would obstruct justice. Nevertheless, the Magistrate Judge rejected both of these grounds following the detention hearing.

The District Court, in its order continuing Ms. XXX's detention, noted that the government did argue that Ms. XXX was a danger to the community and, therefore, the Magistrate Judge was free to rely upon her finding that Ms. XXX was involved with "a crime of

violence" in order to make her eligible for detention and then could detain her upon finding that the government had shown that she was, in fact, a danger to the community. This argument turn the Bail Reform Act on its head.

Indeed, it now axiomatic that, even if Ms. XXX was a danger to the community, this *alone* cannot form the basis of detention if one of the six factors noted above are not present. *Byrd*, 969 F.2d 106; *Ploof*, 851 F.2d at 9; *Himler*, 797 F.2d at 159. Here, however, none of the six factors were present. There was no *motion of the government* that the case involved "a crime of violence." 18 U.S.C.§ 3142(f)(1)(A). Likewise, although there was a motion of the government that "the case that involve[d] a serious risk of flight" (*id.* at 3142(f)(2)(A)) and that the "case that involve[d] a serious risk that the defendant w[ould] obstruct or attempt to obstruct justice," (*id.* at 3142(f)(2)(B)), the Magistrate Judge found that these grounds were *not* present. In short, it cannot be the law that, in any case in which the government believes a defendant is a danger to the community, it can allege any of the six grounds that justify moving for detention, whether those grounds apply or not, and detention eligibility can then, nevertheless, be based upon a ground that the government did not raise and which the Court cannot raise on its own motion in the first instance.

B. The dicta in *Byrd* is Contrary to the Language and Spirit of the Bail Reform Act.

As noted above, Ms. XXX is only charged with wire fraud, clearly *not* a crime of violence. Nevertheless, the Magistrate Jude and the District Court cited dicta from *Byrd*, 969 F.2d 106 indicating that a defendant is eligible for pretrial detention if there is simply a nexus between the crime charged and "a crime of violence." While this is, indeed, a correct reading of

the *Byrd* dicta, such dicta tortures the reading of 18 U.S.C. § 3142(f) and does not carefully construe the Bail Reform Act to favor non-detention. Indeed, as noted in *United States v. DeBeir,* 16 F.Supp. 2d 592, 594 (D. Md. 1998):

> The Fifth Circuit appears to be the only circuit that gives meaning to the word "involves" in § 3142(f), finding that the phrase "involves ... a crime of violence" authorizes detention if the defendant perpetrated an act of violence that is sufficiently connected to the nonviolent charged offense. *Byrd, 969 F.2d at 110; United States v. Reinhart, 975 F. Supp. 834, 836 (W.D. La. 1997).* Although Byrd gives meaning to the word "involves," it ignores the word "crime," finding that a violent act, although uncharged and thus not technically a crime before the court, can support detention. Indeed, this proposition, in Byrd, appears to be dicta....

DeBeir is exactly right that the Fifth Circuit is the only court to engage in this tortured reading of 18 U.S.C. § 3142(f). Ms. XXX was *not* charged with any "crime" of violence. If Congress had wanted to base detention on allegations that an individual committed an act of violence associated with the charged crime, it could have easily done so. *See* Fed. R. Evid. 404(b) ("[C]rimes, wrongs or acts"). Its failure to do so is consistent with the fact that the Bail Reform Act favors non-detention. The *Byrd* dicta is, indeed, inconsistent with the plain language of 18 U.S.C. § 3142(f) and calls for an expansive reading of the Bail Reform Act despite that fact that, in order to effectuate the purpose of the Bail Reform Act, it should be narrowly construed.

III. Conclusion

Ms. XXX respectfully requests this Court to reverse the District Court's order of continued detention in this case and order that Ms. XXX be released from custody upon the setting of reasonable conditions.

Attachment E

Respectfully submitted,

F. Clinton Broden

Attorney for Defendant
XXX

Attachment E

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2001

XXXXX

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

EMERGENT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. Clinton Broden
Broden & Mickelsen
2707 Hibernia
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Counsel of Record for Petitioner

Attachment F

QUESTION PRESENTED

May a defendant who is not arrested for and not charged with a crime of violence, but who is charged with a crime "related" to a crime of violence, be detained, pursuant to 18 U.S.C. § 3142(f)(1)(a), pending trial?

TABLE OF CONTENTS

PAGE NO.

INDEX TO APPENDIX

TABLE OF AUTHORITIES

PAGE NO.

CASES

Statutes

Other

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2001

XXX,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

EMERGENT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, XXX, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States v. XXX*, No. 01-11278 (5th Cir. November 14, 2001).

OPINION BELOW

The Detention Order entered by Magistrate Judge of the United States District Court for the Northern District of Texas in *United States v. XXX*, No. 3-01-CR-246-P (August 3, 2001) is attached hereto as Appendix A.

The judgment and opinion in *United States v. XXX*, No. 01-11278 (5th Cir. November 14, 2001) is attached hereto Appendix B.

A copy of the Fifth Circuit's order denying a panel rehearing and denying a rehearing *en banc*, in *United States v. XXX*, No. 01-11278 (5th Cir. December 18, 2001) is attached hereto as Appendix C.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on November 14, 2001. On December 18 2001, the United States Court of Appeals for the Fifth Circuit denied Ms. XXX's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc.* The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is invoked pursuant to 28 U.S.C. § 1254(1) and 18 U.S.C. § 3145.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, *inter alia*:

> No person ...in any criminal case shall...be deprived of life, liberty, or property, without due process of law....

.

STATEMENT OF THE CASE

On July 25, 2001, XXX was indicted for two counts of wire fraud, in violation of 18 U.S.C. § 1343. In the indictment the government alleged that, although Ms. XXX relinquished insurance proceeds from her ex-husband's death in favor of her children, she, nevertheless, took control of those proceeds.

A detention hearing was held in the case on August 2, 2001. At the hearing, the government introduced evidence that might support an argument that Ms. XXX was somehow connected to the death of her ex-husband. At the conclusion of the hearing, the Magistrate Judge determined that Ms. XXX was neither a flight risk nor a danger to the community. Nevertheless, although Ms. XXX was only charged with wire fraud related to the insurance proceeds, the Magistrate Judge found that the wire fraud charges were "related" to a crime of violence. Therefore, relying upon *United States v. Byrd*, 969 F.2d 106 (5th Cir. 1992), the Magistrate Judge detained Ms. XXX finding by clear and convincing evidence that she was a danger to the community. The Magistrate Judge incorporated her ruling into a written order filed on August 3, 2001.

The defense later sought to reopen the detention issue and argued, *inter alia.*, that the *Byrd dicta* is contrary to the language and purpose of the Bail Reform Act.[3] The District Court

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[3]Ms. XXX originally filed her motion as a motion to reopen the detention hearing rather than a motion to revoke the detention order because the motion included allegations that she was not receiving proper medical care while in custody. When this issue was finally resolved, Ms. XXX did not believe it necessary to change the style of the pending motion given that the Fifth Circuit has refused to hold that 18 U.S.C. § 3145 "provides the *exclusive* means by which a person under indictment can challenge his pretrial detention...." *Fassler v United States*, 858 F2d 1016 (5th Cir. 1988), *cert. denied.*, 490 U.S. 1099 (1989). Ultimately, both the District Court

issued an order on September 28, 2001 denying the Motion. The District Court held that the Magistrate Judge correctly applied this Court's decision in *Byrd.*

On October 4, 2001, Ms. XXX filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. On November 14, 2001, the Fifth Circuit issued an opinion affirming the District Court's continued order of detention. The Court held that Ms. XXX "failed to show that the district court abused its discretion in applying *Byrd.*" On December 18, 2001, the Fifth Circuit denied Ms. XXX Petition for Panel Rehearing and Suggestion for Rehearing *En Banc.*

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and the Fifth Circuit considered the question raised herein on its merits.

REASONS FOR GRANTING THE WRIT

In upholding the constitutionality of the Bail Reform Act in *United States v. Salerno,* 481 U.S. 739, 750 (1987), this Court recognized that the Act "operates only on individuals *who have been arrested* for a specific category of extremely serious offenses (emphasis added)." Likewise, this Court, as well as various courts of appeals, have understood that when Congress enacted the Bail Reform Act it retained the preference for the release of most defendants prior to trial.[4] Indeed, courts have generally held that the provisions of the Bail Reform Act should be narrowly construed in favor of release.[5]

Nevertheless, in *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992), the United States Court of Appeals for the Fifth Circuit wrote:

> [I]t is not necessary that the charged offense be a crime of violence [in order to detain a defendant]; only that the case involve a crime of violence.... But the proof of a nexus between the non-violent offense charged and one or more of the six § 3142(f) factors is crucial.

As a result, individuals in the Fifth Circuit, such as Ms. XXX, who are *not* arrested for a specific category of offenses and who are *not* charged with violent crimes have been, and will continue to be, subject to detention, pursuant to 18 U.S.C. § 3142(f)(1)(a), on the theory that their crimes are

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[4] *See, e.g., Salerno,* 481 U.S. at 747 (1987) ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes."); *United States v. Orta*, 760 F.2d 887, 891 (8th Cir. 1985) (*en banc)* ("The wide range of restrictions [under the Bail Reform Act] ensures, as Congress intended, that very few defendants will be subject to pretrial detention.")

[5] *See,e.g., United States v. Singleton*, 182 F.3d 7, 23 (D.C. Cir. 1999); *United States v. Hinote*, 789 F.2d 1490, 1941 (11th Cir. 1986) (It is required "that we strictly construe provisions of the Bail Reform Act of 1984). *Cf. Williams v. United States*, 458 U.S. 279, 290 (1982) (Criminal statutes should be narrowly construed in favor of the defendant).

merely "related" to crimes of violence.[6]

The Fifth Circuit's interpretation of the Bail Reform Act is in conflict with the language contained in this Court's opinion in *Salerno* and is also in conflict with holdings from other United States courts of appeals. Given this conflict, as well the importance and fundamental nature of an individual's strong interest in liberty (*Salerno*, 481 U.S. 750), this Court should grant certiorari to determine whether individuals who are not charged with crimes of violence can, nevertheless, be detained pursuant to 18 U.S.C. § 3142(f)(1)(a). *See* Rules of the Supreme Court of the United States, Rules 10(a) and 10(c). Absent review by this Court, such detention will continue to be visited only upon defendants unlucky enough to be charged in the Fifth Circuit.

A. *Byrd* Conflicts with the Legislative History of the Bail Reform Act

As noted in *United States v. DeBeir*, 16 F.Supp. 2d 592, 594 (D. Md. 1998):

> The Fifth Circuit appears to be the only circuit that gives meaning to the word "involves" in § 3142(f), finding that the phrase "involves ... a crime of violence" authorizes detention if the defendant perpetrated an act of violence that is sufficiently connected to the nonviolent charged offense. Although Byrd gives meaning to the word "involves," it ignores the word "crime," finding that a violent act, although uncharged and thus not technically a crime before the court, can support detention. Indeed, this proposition, in Byrd, appears to be dicta.... (citations omitted)

Indeed, a review of the legislative history supports the conclusion reached in *DeBeir*. In the Senate Judiciary Committee Report accompanying the passage of the Bail Reform Act it was noted:

A pretrial detention hearing to determine whether there is any form of conditional

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6 *See, e.g., United States v. Kyle*, 49 F.Supp. 2d 526, 528 (W.D. Tx. 1999); *United States v. Reinhart*, 975 F.Supp. 835 (E.D. La. 1997).

> release that will reasonably assure the appearance of the defendant as well as the safety of the community shall be held upon the motion of the government in a case in which *the defendant is charged with an offense described in (f)(1).* The offenses set forth in subsection f(1) (A) though (C) are crimes of violence, offenses punishable by life imprisonment or death, or offenses for which a maximum 10-year imprisonment is prescribed in the Controlled Substances Act, the Controlled Substance Import and Export Act or Section 1 of the Act of September 15, 1980.

S. Rep. No. 98-225, at 20 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3203 (emphasis added). This is also the interpretation given to this provision of the Bail Reform Act last year by the United States Court of Appeals for the Second Circuit:

> Thus, a*n arrest for an offense* that falls within the statutory definition of "crime of violence" requires a hearing to determine whether there exists any "condition or combination of conditions" of release that would "reasonably assure" the defendant's appearance and the safety of the community. § 3142(e). Only if the court finds at the hearing that no combination of conditions will provide such reasonable assurance may the person be detained. On the other hand, if *the arrest offense* is not within the statutory definition of "crime of violence," no detention hearing will be held (unless the defendant comes within some other provision for detention), and the defendant must be released, no matter how violent and dangerous.

United States v. Dillard, 214 F.3d 88, 91 (2d Cir. 2000) (emphasis added), *cert. denied*, 131 U.S. 1232 (2001).

B. *Byrd* Conflicts with the Overwhelming Number of Courts that Apply the Categorical Approach to "Crime of Violence" Determinations Under the Bail Reform Act.

Almost all of the courts use a "categorical approach" as opposed to a "case by case approach" to determine whether a person is charged with a "crime of violence" for purposes of 18 U.S.C. § 3142(f)). Likewise, this Court has required a 'categorical approach" as opposed to a "case by case approach" when determining whether a crime qualifies as a "violent felony" for

purposes of the armed career criminal provision of 18 U.S.C. § 924(e). *United States v. Taylor*, 495 U.S. 575 (1990). However, such a "categorical approach" is contrary to the Fifth Circuit's decision in *Byrd* and creates a conflict among the circuits. *See United States v. Singleton*, 182 F.3d at 10 n.4 (noting that *Byrd* conflicts with the categorical approach to interpreting the Bail Reform Act); *United States v. Gloster*, 969 F.Supp. 92, 95 (D.D.C. 1997) (same).

For example, in *United States v. Hardon*, 6 F.Supp.2d 673 (W.D. Mich. 1988), the defendant was charged with being a felon in possession of a firearm in violation of 18 U.S.C.§ 922(g) and the government sought detention. In considering the issue, the Court noted:

> Under the case-by-case approach the court may consider the specific conduct of the defendant in committing the charged offense to determine whether there was a substantial risk of physical harm. In light of the evidence produced at the detention hearing to the effect that Defendant used a firearm in the course of a robbery and a sexual assault, and that he had been involved in two other gas station robberies, there is no question that the evidence was sufficient, under the case-by-case approach, to find that the case against Defendant involved a crime of violence.
>
> Most courts, however, favor applying the categorical approach to measure whether an offense is a "crime of violence" for purposes of the Bail Reform Act. Under the categorical approach the court looks only to the statutory definition of the offense itself and not to the specific circumstances under which the alleged offense was committed.

Id. at 675 (citations omitted). A case decided earlier this year, contained similar language:

> [T]he Court is bound to find that the offense charged against Mr. Silva is not a crime of violence, notwithstanding the facts surrounding the offense here. Stated differently, the Court cannot consider Mr. Silva's individual conduct in the course of committing the offense charged. "The question is not what happened in this case but what is the nature of the offense charged. . ." Thus, the frightening circumstances of the instant offense may not form the basis of finding whether, categorically speaking, the crime is one of violence.

United States v. Silva, 133 F.Supp. 104, 113 (D.Mass. 2001) (citations omitted). *See also, Gloster,* 969 F.Supp. at 92, 94 ("As an analytic matter, in deciding whether the felon-in-possession offense is a crime of violence, the Court is to follow a 'categorical approach,' that is, the Court shall look only to the statutory definition of the offense itself and not to the specific circumstances under which the alleged offense was committed."); *United States v. Johnson,* 704 F.Supp. 1398, 1400 (E.D. Mich 1988) ("Each generic offense must be categorized as either a 'crime of violence' or not a crime of violence; there cannot be a justification for *ad hoc* classification of criminal activity."); *United States v. Powell*, 813 F.Supp. 903, 909 (D. Mass. 1992) (Uses categorical approach to hold that 18 U.S.C.§ 922(g) is not a "crime of violence" despite the fact that there were evidence at the detention hearing that the gun the defendant illegally possessed was used in a murder.); *Singleton*, 182 at 11-12 (Applying categorical approach to 18 U.S.C. § 3142(f) determination); *United States v. Spry*, 76 F.Supp.2d 719, 721 (S.D. W.Va. 1999) (same); *United States v. Chappelle*, 51 F.Supp.2d 703, 704-05 (E.D. Va. 1998) (same); *United States v. Campbell*, 28 F.Supp.2d 805, 807 (W.D. N.Y. 1998) (same); *United States v. Washington*, 907 F.Supp. 476, 484 (D.D.C. 1995) (same); *United States v. Aiken*, 775 F.Supp. 855, 856 (D.Md. 1991) (same).

This Court in *Salerno,* noted the importance and fundamental nature of an individual's strong interest in liberty. *See Salerno,* 481 U.S. 750. Indeed, this interest in liberty is *too* important and *too* fundamental to be dependent upon the circuit in which a defendant is arrested. The conflict between *Byrd*'s "case by case approach" to the provisions of the Bail Reform Act and the myriad of other cases applying a "categorical approach" to the provisions Bail Reform

Act requires that this Court resolve the conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States v. XXX*, No. 01-11278 (5th Cir. November 14, 2001).

DATED: December 28, 2001.

Respectfully submitted,

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Attachment F