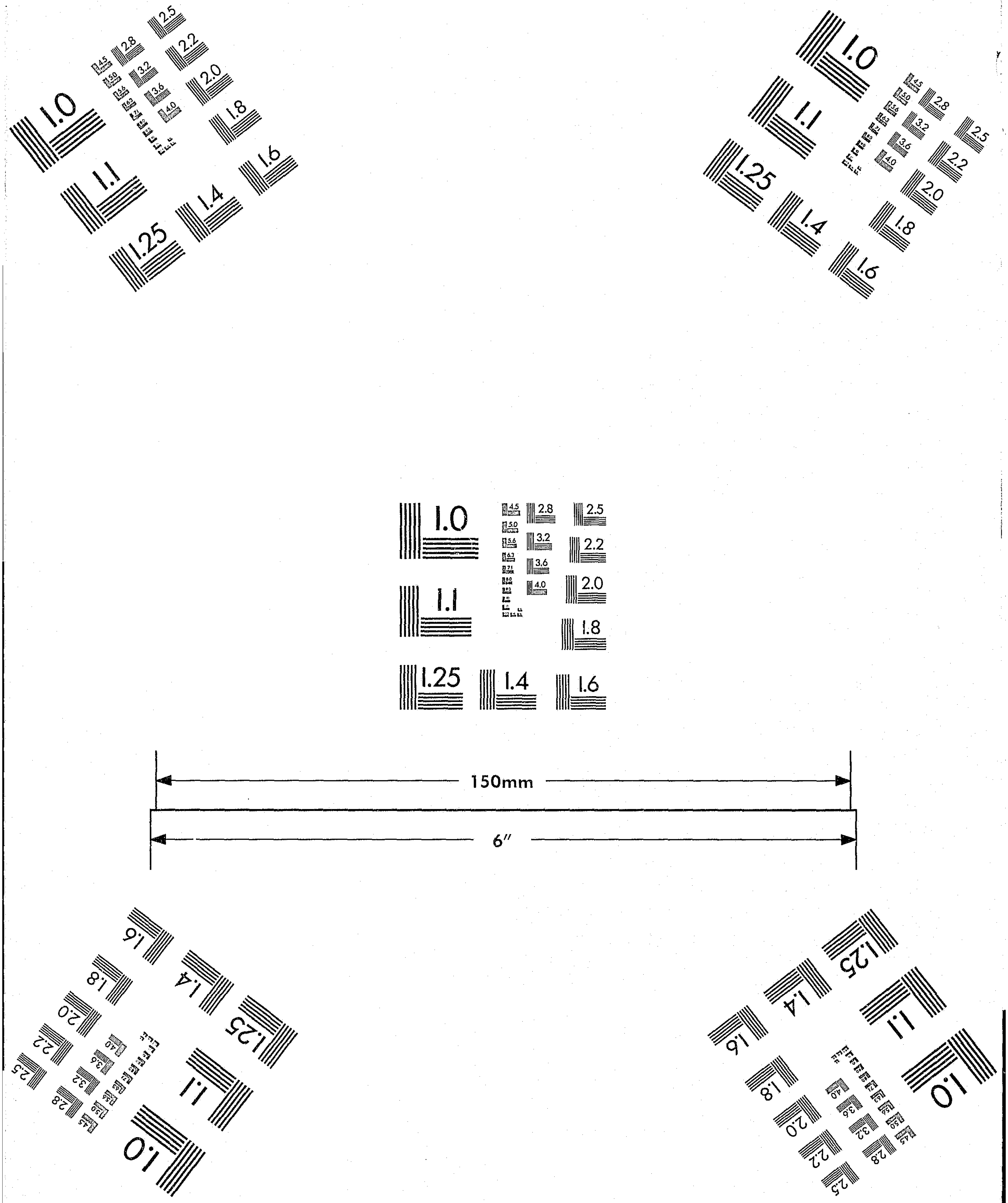

Education and Training Series

The Bail Reform Act of 1984

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THE BAIL REFORM ACT OF 1984

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PREFACE

Since publication of *The Crime Control and Fine Enforcement Acts of 1984: A Synopsis* (January 1985), by Anthony Partridge, numerous judges and magistrates have mentioned the value of that publication and their wish for an updated treatment of its contents. The present publication provides a summary of appellate case law interpreting various provisions of the Bail Reform Act of 1984 (18 U.S.C. §§ 3141–3150) from October 12, 1984, the effective date of the act, to January 13, 1987. It does not treat the other legislation covered by the synopsis, such as the insanity and forfeiture provisions, primarily because case law in areas other than bail reform is as yet relatively sparse. Other Federal Judicial Center educational programs and publications will cover these areas as appropriate. In particular, the Center plans to provide special educational programs to explicate the major changes that will ensue when sentencing guidelines become effective.

The Center's educational programs on all facets of the 1984 crime control legislation are the subject of continuing advice and direction from a Center committee appointed by Chief Justice Burger in 1985. Judge A. David Mazzone of the District of Massachusetts chairs the committee; it also includes Judges John D. Butzner, Jr. (Fourth Circuit), Edward R. Becker (Third Circuit), Gerald B. Tjoflat (Eleventh Circuit), and William H. Orrick, Jr. (Northern District of California). Members of the committee reviewed an earlier draft of this publication.

With few exceptions, this report provides only the holdings of cases; readers are urged to consult the cases themselves for a fuller understanding of the specific facts of a case and the reasoning of the court. Where there is disagreement among the circuits on a particular issue, the courts that have spoken on the issue are identified in the text. Where there is no disagreement, and the interpretation adopted by one or more courts appears uncontroversial, the specific courts that have addressed the issue may not be mentioned in the text. In every instance, the appropriate citations appear in the footnotes. A few district court cases are mentioned where they are considered particularly helpful, but no attempt has been made to provide a comprehensive treatment of cases at the trial court level.

New cases on the Bail Reform Act continue to appear with some regularity, although the initial spate of ground-breaking decisions has abated. The Supreme Court is expected to rule on the constitutionality of detention on the ground of dangerousness to the community early in 1987 (*United States v. Salerno,* 794 F.2d 64 (2d Cir.), *cert. granted,* 107 S. Ct. 397 (1986) (No. 86-87)). Oral argument was scheduled for January 21, 1987.

The Appendix reproduces the Bail Reform Act of 1984, as amended by the Criminal Law and Procedure Technical Amendments Act of 1986 (Pub. L. No. 99-646).

I. PRETRIAL RELEASE

A. Release on Personal Recognizance

Under section 3142(b), the defendant must be released on personal recognizance or unsecured personal bond unless the judicial officer determines "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[1]

B. Conditional Release

1. In General

If the defendant is not released on personal recognizance or unsecured personal bond, the judicial officer must impose the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person and the safety of any other person and the community.[2] The court should determine appropriate release conditions based on an individual evaluation of the defendant.[3] The conditions must be relevant to the purposes of assuring appearance and safety.[4] Conditions of release vary with the circumstances of the case. The Third Circuit has approved house arrest, in combination with other conditions, as a method of assuring the safety of the community in certain circumstances.[5] Perhaps the most commonly imposed release condition is drug testing of the defendant.

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1. 18 U.S.C. § 3142(b).

2. 18 U.S.C. § 3142(c)(1).

3. *See* United States v. Spilotro, 786 F.2d 808, 816 (8th Cir. 1986) (uniform application to all defendants in district of condition restricting association with felons was abuse of discretion).

4. *See* United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (condition that bail bond be retained by the clerk to pay any fine imposed on defendant was irrelevant to purpose of assuring appearance and thus violated Eighth Amendment prohibition on excessive bail).

5. United States v. Traitz, 807 F.2d 322, 326 (3d Cir. 1986) (2–1 decision).

2. Bail

The judicial officer "may not impose a financial condition that results in the pretrial detention of a person."[6] While acknowledging that bail may not be used to deny release altogether, the Seventh Circuit, in *United States v. Szott,* held that the statute does not require that a defendant be able to post bail "readily" and that "a court must be able to induce a defendant to go to great lengths to raise the funds without violating the condition in §3142(c)."[7] Several courts have held that a defendant may be detained where the posting of money bond is necessary to assure the defendant's appearance if released but the defendant is unable to post such a bond.[8]

The judicial officer must seek to impose conditions that will reasonably assure appearance and safety, but should not require a guarantee of either.[9]

C. Written Findings

Under Federal Rule of Appellate Procedure 9, district judges must provide written findings upon entry of an order imposing conditions of release, though no similar requirement is imposed on magistrates.[10] As the Third Circuit pointed out in *United States v. Coleman,* "when an order for release is contested, a statement of reasons is necessary so that we can intelligently perform our review function."[11]

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6. 18 U.S.C. § 3142(c)(2). *See* United States v. Holloway, 781 F.2d 124, 127 (8th Cir. 1986).

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

8. United States v. Westbrook, 780 F.2d 1185, 1188 (5th Cir. 1986); United States v. Jessup, 757 F.2d 378, 388–89 (1st Cir. 1985). *See* United States v. Wong-Alvarez, 779 F.2d 583, 584 (11th Cir. 1985) (per curiam) (rejecting contention that a defendant unable to post bail must be released without financial conditions).

9. United States v. Orta, 760 F.2d 887, 891–92 (8th Cir. 1985). *Accord* United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985).

10. United States v. Maull, 773 F.2d 1479, 1482 (8th Cir. 1985) (en banc); *see* United States v. Wong-Alvarez, 779 F.2d 583, 585 (11th Cir. 1985) (remand for statement of reasons for requiring particular type and amount of bond); United States v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985); United States v. Hurtado, 779 F.2d 1467, 1480–81 (11th Cir. 1985).

11. 777 F.2d 888, 892 (3d Cir. 1985). *See* United States v. Chimurenga, 760 F.2d 400, 406 (2d Cir. 1985) (absence of detailed findings supporting release order hampered review); United States v. Williams, 753 F.2d 329, 333 (4th Cir. 1985) (same).

D. Revocation and Modification of Release

1. Revocation for Violation of Release Conditions

Section 3148(b) provides for revocation of a release order upon motion of the government and after a hearing, if a condition of release is violated. A revocation order under section 3148(b) must be supported by the following findings:

> (1) . . .
> (A) probable cause to believe that the person has committed a . . . crime while on release; or
>
> (B) clear and convincing evidence that the person has violated any other condition of his release; and
> (2) . . .
> (A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or
>
> (B) the person is unlikely to abide by any condition or combination of conditions of release.[12]

"Probable cause" under section 3148(b)(1)(A) means "that the facts available to the judicial officer 'warrant a man of reasonable caution in the belief' that the defendant has committed a crime while on bail."[13] A finding of probable cause to believe that the person committed a *felony* while on release gives rise to a rebuttable presumption that no release conditions can assure the safety of others.[14] Where the new charge is grounds for a detention hearing, the revocation hearing is separate from the section 3142(f) hearing on the new charge.[15]

The standard of proof for the section 3148(b)(2) findings is by a preponderance of the evidence.[16]

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

Section 3142(c)(3) provides that the judicial officer "may at any time amend [the] order to impose additional or different conditions of release."[17] The legislative history of the statute indicates that

12. 18 U.S.C. § 3148(b).
13. United States v. Gotti, 794 F.2d 773, 777 (2d Cir. 1986).
14. 18 U.S.C. § 3148(b).
15. *See* United States v. McKethan, 602 F. Supp. 719, 721–22 (D.D.C. 1985).
16. United States v. Gotti, 794 F.2d 773, 778 (2d Cir. 1986).
17. 18 U.S.C. § 3142(c)(3), as amended by Pub. L. No. 99-646, § 55(c)(3) (Nov. 10, 1986). The amending statute deletes the word *his* throughout subsection (c); as no replacement is specified, the word *the* has been inserted in brackets in the quoted sentence to preserve its original meaning.

authorization for amendment under this section is "based on the possibility that a changed situation or new information" comes to the attention of the court.[18] The Eighth Circuit has held that the unexpected ability of the defendant to meet the terms of his or her bail does not satisfy this requirement.[19]

See section E.3.a(1) in chapter 2 (p. 9) for a discussion of imposition of detention upon review of an initial release order.

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18. United States v. Resek, 602 F. Supp. 1126, 1130 (S.D.N.Y. 1985), citing S. Rep. No. 225, 98th Cong., 1st Sess. 16 (1983). *See* United States v. Angiulo, 755 F.2d 969, 972 (1st Cir. 1985) (court has inherent power to modify or revoke previous bail orders; case concerns reconsideration of detention order).

19. United States v. Holloway, 781 F.2d 124, 126, 129 (8th Cir. 1986).

II. PRETRIAL DETENTION

A. Statutory Grounds

The judicial officer may order the defendant detained if he or she finds that no condition or combination of conditions will reasonably assure the appearance of the defendant and the safety of the community.[20] Thus, a showing either that the defendant is likely to flee or that release will endanger others is sufficient to justify detention.[21]

B. Factors to Be Considered

Section 3142(g) sets forth the factors for the judicial officer to consider in determining whether to release or detain the defendant. They are—

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person . . .; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.[22]

Of the four factors listed, the weight of the evidence against the defendant is considered least important.[23] The Second Circuit held in *United States v. Colombo* that the probable length of pretrial detention is not a proper factor to consider in determining whether to release or detain the defendant.[24]

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20. 18 U.S.C. § 3142(e).

21. United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985); United States v. Daniels, 772 F.2d 382, 383 (7th Cir. 1985).

22. 18 U.S.C. § 3142(g).

23. United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986); United States v. Cardenas, 784 F.2d 937, 939 (per curiam), *vacated as moot,* 792 F.2d 906 (9th Cir. 1986); United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985).

24. 777 F.2d 96, 100 (2d Cir. 1985). *See also* United States v. Accetturo, 783 F.2d 382, 387-88 (3d Cir. 1986) (Constitution does not require consideration of length of

C. Flight

1. Standard of Proof

Most circuits have interpreted the statute as requiring that a finding that no conditions will reasonably assure the appearance of the defendant must be supported by a preponderance of the evidence, rather than by clear and convincing evidence.[25]

2. Constitutionality

Courts have rejected the argument that there is an absolute right to bail under the Eighth Amendment.[26] Detention based on likelihood of flight has been upheld against constitutional challenge.[27] The Second Circuit has held that under some circumstances, lengthy pretrial detention on the ground of risk of flight violates the due process prohibition against punishment prior to an adjudication of guilt.[28]

D. Dangerousness

1. Definition

A defendant may be detained on the ground of danger to the community even where there is no showing that he or she is likely to engage in physical violence. The legislative history of the statute indicates that Congress also regards drug trafficking as a danger to the community.[29] The Third Circuit has interpreted the statute to

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pretrial detention). Where detention has in fact been prolonged, reconsideration of the detention order may be required. See section B, Length of Detention, in chapter 3 (p. 23).

25. United States v. Vortis, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied,* 107 S. Ct. 148 (1986); United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985); United States v. Orta, 760 F.2d 887, 891 n.20 (8th Cir. 1985); United States v. Motamedi, 767 F.2d 1403, 1407 (9th Cir. 1985).

26. Carlson v. Landon, 342 U.S. 524, 544-46 (1952).

27. Bell v. Wolfish, 441 U.S. 520, 533-34 (1979); United States v. Melendez-Carrion, 790 F.2d 984, 996-97 (2d Cir. 1986).

28. United States v. Gonzales Claudio, 806 F.2d 334, 343 (2d Cir. 1986). See section B, Length of Detention, in chapter 3.

29. S. Rep. No. 225, 98th Cong., 1st Sess. 12-13 (1983). *See* United States v. Williams, 753 F.2d 329, 335 (4th Cir. 1985) (district court erred in failing to take into account drug dealing as a danger to the community); United States v. Perry, 788 F.2d 100, 113 (3d Cir.) (dictum), *cert. denied,* 107 S. Ct. 218 (1986); United States v. Leon, 766 F.2d 77, 81 (2d Cir. 1985) (dictum).

authorize pretrial detention on grounds of danger to the community only upon proof that the defendant will likely commit one of the offenses listed in the statute as grounds for a detention motion.[30]

2. Standard of Proof

A finding that no conditions will reasonably assure the safety of any other person or the community must be supported by clear and convincing evidence.[31]

3. Constitutionality

The Second Circuit has held pretrial detention based on danger to the community (as opposed to danger to specific witnesses[32]) unconstitutional, as an unwarranted deprivation of liberty under the due process clause of the Fifth Amendment.[33] Four other circuits—the First, Third, Seventh, and Eleventh—have rejected similar challenges.[34]

E. Detention Hearing

1. Statutory Requirements

Section 3142(f) provides that a detention hearing shall be held—

a. Upon motion of the government[35] in a case that involves—

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30. United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (likelihood that defendant would commit another crime involving false identification was insufficient basis for pretrial detention).

31. 18 U.S.C. § 3142(f); United States v. Alatishe, 768 F.2d 364, 370 (D.C. Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985).

32. The Second Circuit upheld the constitutionality of detention based on danger to specific witnesses in United States v. Gotti, 794 F.2d 773, 779 (2d Cir. 1986).

33. United States v. Salerno, 794 F.2d 64 (2d Cir.), *cert. granted,* 107 S. Ct. 397 (1986) (No. 86-87); United States v. Romano, 799 F.2d 17, 18 (2d Cir. 1986) (defendant could not be detained on ground of failure to rebut presumption of dangerousness; issuance of mandate stayed pending issuance of mandate in *Salerno*); *see* United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986) (two members of three-judge panel found eight-month detention on ground of dangerousness unconstitutional; one of the judges based his conclusion on length of detention).

34. *See* United States v. Zannino, 798 F.2d 544, 546 (1st Cir. 1986) (adopting reasoning of *Salerno* dissent); United States v. Perry, 788 F.2d 100, 113 (3d Cir.) (no substantive due process violation in preventive detention where purpose is to protect community from distributors of dangerous drugs and users of firearms), *cert. denied,* 107 S. Ct. 218 (1986); United States v. Portes, 786 F.2d 758, 766 (7th Cir. 1985) (Congress may give courts power to deny bail under certain circumstances); United States v. Rodriguez, 803 F.2d 1102, 1103 (11th Cir. 1986).

35. The motion need not be in writing. United States v. Volksen, 766 F.2d 190, 192 (5th Cir. 1985).

(1) a crime of violence,
(2) an offense carrying a penalty of life imprisonment or death,
(3) a federal drug offense carrying a penalty of ten years or more, or
(4) any felony following convictions for two or more offenses of the above types, or two or more comparable state or local offenses, or a combination of such offenses;

b. Upon motion of the government *or* the court in a case that involves—
(1) serious risk of flight, or
(2) serious risk that the person will attempt to obstruct justice.[36]

2. Crime of Violence

The definition of "crime of violence" is limited by statute to:

> (A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[37]

The Second Circuit has held conspiracy to commit armed robbery to be a crime of violence under this section.[38]

3. Timing of Detention Motion and Hearing

a. "First appearance"

Under the statute, the detention hearing is to be held "immediately" upon the defendant's "first appearance before the judicial officer" unless the government or the defendant moves for a continuance.[39]

The present section outlines the holdings of the circuit courts on the following specific questions: (1) May the court impose detention upon review of a release order? (2) May the government move for detention at a time later than the initial appearance? (3) How soon after the detention motion must the detention hearing be held? It

36. 18 U.S.C. § 3142(f), as amended by Pub. L. No. 99-646, §§ 55(c)(6), 72 (Nov. 10, 1986).
37. 18 U.S.C. § 3156(a)(4).
38. United States v. Chimurenga, 760 F.2d 400, 403-04 (2d Cir. 1985).
39. 18 U.S.C. § 3142(f).

is important to note initially that the interpretation of the "first appearance" requirement is still in flux. Although no circuit court has directly rejected another circuit's interpretation of the requirement, there are indications that the law on this issue may develop differently in the various circuits. For example, a majority of the Eighth Circuit in *United States v. Maull,* in upholding a detention order on motion of the court, emphasized that the detention hearing must be held soon after the motion for detention, while apparently imposing no deadline for the making of the motion.[40] The Eleventh Circuit in *United States v. Medina* similarly indicated that a detention motion and hearing are required at the initial appearance only if the defendant "is to be detained following that appearance."[41] In contrast, the Second Circuit in *United States v. Payden* emphasized the "unambiguous" language of the statute and interpreted it to preclude detention where no detention motion was made at the initial appearance.[42] While these cases are distinguishable on their facts,[43] they also reflect marked differences in approach. It remains to be seen, therefore, whether the various circuits will choose to follow the language of their own earlier cases or the holdings of other circuits in future cases that are less readily distinguishable on the facts.[44]

(1) May the court impose detention upon review of a release order?

Courts have interpreted section 3145(a) of the statute, which permits either the government or the defendant to seek review of release conditions, to authorize the court to impose detention at the time of such review.

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40. 773 F.2d 1479, 1482-83 (8th Cir. 1985) (en banc).

41. 775 F.2d 1398, 1401 (11th Cir. 1985).

42. 759 F.2d 202, 204 (2d Cir. 1985) ("clear and unambiguous"); *see also* United States v. O'Shaughnessy, 764 F.2d 1035, 1038, *vacated on reh'g as moot,* 772 F.2d 112 (5th Cir. 1985) ("unambiguous mandatory language").

43. In *Payden,* the government first moved for detention two weeks after an arraignment at which neither party was aware of the availability of pretrial detention under the recently enacted Bail Reform Act of 1984. In *Maull,* detention was ordered on motion of the court upon defendant's section 3145(a) appeal of release conditions set by a magistrate. In *Medina,* the government first moved for detention at the defendant's first appearance before a second magistrate.

A number of courts have taken pains to distinguish *Payden. See* United States v. Dominguez, 783 F.2d 702, 704 n.2 (7th Cir. 1986); United States v. Fortna, 769 F.2d 243, 248 (5th Cir. 1985); United States v. Maull, 773 F.2d 1479, 1483-84 (8th Cir. 1985) (en banc); United States v. Medina, 775 F.2d 1398, 1400-01 (11th Cir. 1985).

44. The 5-4 decision in United States v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc), illustrates the potential for disagreement on application of the statute to one set of facts.

The Third, Eighth, and Eleventh Circuits have approved imposition of detention following an initial release order on the ground that section 3145(a) authorizes the district court to conduct de novo review of a magistrate's release order.[45] These courts have reasoned that in order to conduct de novo review, the district court must have open to it all the options available to the magistrate. The Eleventh Circuit has extended the principle of de novo review to a magistrate's reconsideration of another magistrate's release order.[46] The Eighth Circuit has permitted imposition of detention by the district court upon the defendant's motion to amend the conditions of release.[47]

(2) May the government move for detention at a time later than the initial appearance?

Untimely detention motions have resulted in reversal of detention orders in several cases.[48] Conditions under which delayed detention motions may be acceptable are discussed below.

(a) Motion for revocation of release

A delayed motion for detention may be construed as a motion for revocation of release under section 3145(a). On this ground, the Eleventh Circuit upheld a magistrate's detention order issued on the basis of the same facts presented before another magistrate, who had ordered release.[49] The Eighth Circuit has held that the

45. United States v. Delker, 757 F.2d 1390, 1393-95 (3d Cir. 1985) (district court could conduct second evidentiary hearing; holding of detention hearing not limited to the one held at defendant's first appearance); United States v. Maull, 773 F.2d 1479, 1481-85 (8th Cir. 1985) (en banc) (5-4 decision) (district court could move for detention upon review of defendant's motion to reduce bail); United States v. Medina, 775 F.2d 1398, 1400-02 (11th Cir. 1985) (no motion for detention at initial appearance; second magistrate could impose detention on motion of government). These courts read the statute as continuing prior law, under which de novo review was the rule. See chapter 4, Review by the District Court (p. 25).

46. United States v. Medina, 775 F.2d 1398, 1402-03 (11th Cir. 1985) (second magistrate's order approved by district court).

47. United States v. Maull, 773 F.2d 1479, 1481, 1484-85 (8th Cir. 1985) (en banc) (5-4 decision). Courts have held, however, that amendment of a release order by the same judicial officer under section 3142(c) requires changed circumstances or new information. United States v. Holloway, 781 F.2d 124, 126-27, 128-29 (8th Cir. 1986); United States v. Resek, 602 F. Supp. 1126, 1129 (S.D.N.Y. 1985).

48. United States v. Holloway, 781 F.2d 124, 126-27 (8th Cir. 1986) (government could not move for amendment of release order on sole ground that defendant was unexpectedly able to meet the terms of his release); United States v. Payden, 759 F.2d 202, 203 (2d Cir. 1985) (government moved for detention two weeks after arraignment); United States v. O'Shaughnessy, 764 F.2d 1035, 1036-37, *vacated on reh'g as moot*, 772 F.2d. 112 (5th Cir. 1985) (government moved for detention five days after initial appearance).

49. United States v. Medina, 775 F.2d 1398, 1401-02 (11th Cir. 1985).

government must present new evidence to support a detention motion before a court that has ordered release on motion of the government.[50] Similarly, if release was ordered following a detention hearing, the 1986 amendment to section 3142(f) permits the court to reopen the hearing where there is newly discovered evidence relevant to the detention issue.[51]

(b) Following removal

Other courts have permitted the government to make a delayed motion for detention without a showing of changed circumstances where the defendant is arrested outside the charging district. The Second and Seventh Circuits have held that the detention motion may in that circumstance be made at the first appearance following removal.[52]

The Second Circuit offered this advice:

> Where practical, consideration should be given to affording the defendant arrested in his district of residence an opportunity in that district promptly to present locally available evidence pertinent to the issue of pretrial release so that a transcript of such evidence can be prepared and furnished to the judicial officer making the detention decision in the district of prosecution.[53]

The court also cautioned that removal should be accomplished expeditiously where detention is an issue.[54]

(c) Where defendant is detained under section 3142(d)

Under section 3142(d), a defendant who is on conditional release may be temporarily detained for up to ten days at the time of arrest for another offense to permit the appropriate officials to take him or her into custody.[55] If these authorities do not move to take the defendant into custody, a section 3142(f) hearing may be held. This hearing is separate from, and in addition to, the section 3142(d) hearing. The judicial officer cannot rely on facts previously found to support a subsection (d) detention.[56] The First Circuit has

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50. United States v. Holloway, 781 F.2d 124, 129 (8th Cir. 1986).

51. 18 U.S.C. § 3142(f), as amended by Pub. L. No. 99-646, § 72(b) (Nov. 10, 1986).

52. United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986); United States v. Dominguez, 783 F.2d 702, 704-05 (7th Cir. 1986). *Cf.* United States v. Medina, 775 F.2d 1398 (11th Cir. 1985) (permitting government detention motion following transfer of defendant to another court within the same district).

53. United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986).

54. *Id.* at 992.

55. There are other categories of defendants who may be detained under section 3142(d). See section J of this chapter (p. 21) for a discussion of section 3142(d) detention.

56. United States v. Alatishe, 768 F.2d 364, 370 (D.C. Cir. 1985).

interpreted the statute as permitting the government to move for a section 3142(f) detention hearing at any time during the ten-day period.[57] The Fifth and District of Columbia Circuits, while interpreting the statute similarly, have indicated that the better practice is for the government to move under both sections at the defendant's initial appearance.[58] The Ninth Circuit has indicated in dictum that continuances under section 3142(f) should not be added to the ten-day detention period allowed by section 3142(d).[59]

The Seventh Circuit in *United States v. Lee* ruled that the government may move for pretrial detention under section 3142(f) while the defendant is detained under section 3142(d) and that the government's three-day continuance does not begin until the motion is made.[60]

As the First Circuit noted in *United States v. Vargas,* it is important for the judicial officer to make clear under which of the two provisions detention is being considered.[61] In that case, defendants already being detained under section 3142(d) appeared before a magistrate for arraignment. The government indicated that it would "seek to detain" the defendants. The magistrate, apparently believing that defense counsel had waived argument on the detention issue, ordered the defendants detained. One of the defendants subsequently moved for release upon expiration of the ten-day period under section 3142(d), arguing that no timely motion for detention under section 3142(e) had been made. While upholding the magistrate's detention order,[62] the First Circuit cautioned that

> in a situation involving the possibility of pretrial detention under section 3142(e), it is incumbent upon magistrates and district courts to adhere to the requirements of sections 3142(e) and 3142(f) and to clearly indicate when they are proceeding under those provisions so as to avoid the type of confusing circumstances that arose in this case.[63]

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57. United States v. Vargas, 804 F.2d 157, 161 (1st Cir. 1986).

58. United States v. Becerra-Cobo, 790 F.2d 427, 430 (5th Cir. 1986); United States v. Alatishe, 768 F.2d 364, 368 (D.C. Cir. 1985).

59. United States v. Al-Azzawy, 768 F.2d 1141, 1146 (9th Cir. 1985).

60. 783 F.2d 92, 94 (7th Cir. 1986).

61. 804 F.2d 157, 162 (1st Cir. 1986).

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

63. *Id.* at 162.

(3) How soon after the detention motion must the detention hearing be held?

Under the statute, the detention hearing must be held "immediately" unless the defendant or the government moves for a continuance. Because the defendant remains in custody during continuances, the statute sharply limits the circumstances in which they may be granted. Except for good cause, continuances are limited to three days on motion of the government and five days on motion of the defendant.

(a) Continuance on court's own motion

The statute provides for continuance of the detention hearing upon motion of defense counsel or the government, but makes no explicit provision for a continuance on the court's own motion. Two courts of appeals have held that detention hearings may not be continued on the court's own motion.[64] Other courts have permitted such continuances, but only in special circumstances.[65]

(b) Computation

Section 3142(f) provides that, except for good cause, a continuance on motion of the defendant may not exceed five days, and a continuance on motion of the government may not exceed three days.[66] There is some question whether the time computation for the short intervals set forth in section 3142(f) is covered by the exclusion of holidays and weekends under Federal Rule of Criminal Procedure 45(a). The two circuit courts that have ruled on this issue reached opposite conclusions. The Eleventh Circuit held in *United States v. Hurtado* that rule 45(a) is not applicable to this calculation.[67] The Second Circuit held to the contrary in *United States v. Melendez-Carrion.*[68]

64. United States v. Al-Azzawy, 768 F.2d 1141, 1146 (9th Cir. 1985); United States v. Hurtado, 779 F.2d 1467, 1475–76 (11th Cir. 1985).

65. United States v. Alatishe, 768 F.2d 364, 369 (D.C. Cir. 1985) (seven-day continuance on motion of the court upheld; delay caused in part by confusion over requirements of the new statute, and neither party objected to continuance) (court notes that "in future cases, except in the most compelling situations, the judicial officer should not act sua sponte to delay the detention hearing."). *See also* United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985) (magistrate permitted to set detention hearing for five days later to enable defendant to obtain counsel).

66. Where the government requested a continuance, and the defendant acquiesced in the setting of the hearing for the following Monday, four days later, the Eleventh Circuit held that the defendant's acquiescence was equivalent to a request for a continuance of four days rather than three to avoid a Sunday hearing. United States v. Malekzadeh, 789 F.2d 850, 851 (11th Cir. 1986).

67. 779 F.2d 1467, 1474 n.8 (11th Cir. 1985).

68. 790 F.2d 984, 991 (2d Cir. 1986).

(c) Good cause

Requests for continuances in excess of the time periods provided by the statute must be supported by a showing of good cause.[69] The Ninth and Eleventh Circuits have held that the convenience of counsel or the court is not by itself sufficient to satisfy the good-cause requirement.[70] The Eleventh Circuit also held that even assuming that defense counsel's suggestion of a hearing date constituted a motion for a continuance, it was error for the magistrate to grant a continuance of more than five days in order to permit other defendants to obtain counsel.[71] The Second Circuit held the good-cause requirement to be satisfied by "substantial reasons pertinent to protection of the rights of the defendants."[72]

F. Rebuttable Presumptions

1. The Two Presumptions

The statute creates two rebuttable presumptions:

- No conditions of release will reasonably assure the safety of the community where the defendant is accused of one of numerous specified crimes, such as crimes of violence, *and* has previously been convicted of committing one of the specified crimes while free on bail (the "previous-violator presumption").
- No conditions of release will reasonably assure the defendant's appearance and the safety of the community where a judicial officer finds probable cause to believe that the defendant has committed a federal drug offense carrying a maximum prison term of ten years or more or has used a firearm to commit a felony (the "drug-and-firearm-offender presumption").[73]

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69. 18 U.S.C. § 3142(f); United States v. Al-Azzawy, 768 F.2d 1141, 1146 (9th Cir. 1985) (eight-day continuance at the simple request of defense counsel was improper).

70. United States v. Al-Azzawy, 768 F.2d 1141, 1146 (9th Cir. 1985); United States v. Hurtado, 779 F.2d 1467, 1476 (11th Cir. 1985).

71. United States v. Hurtado, 779 F.2d 1467, 1474 n.7 (11th Cir. 1985) (eight-day delay).

72. United States v. Melendez-Carrion, 790 F.2d 984, 991–92 (2d Cir. 1986) (additional time necessary to obtain witnesses and affidavits from Puerto Rico and to enable English-speaking defense attorneys to obtain interpreters and effectively interview Spanish-speaking clients).

73. 18 U.S.C. § 3142(e).

As of this writing, there is no appellate case law specifically addressing the previous-violator presumption.[74]

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

a. Ten-year maximum

The Eleventh Circuit has held that in order for drug charges to trigger the drug-and-firearm-offender presumption, the defendant must be charged with at least one offense separately carrying a ten-year maximum sentence. The presumption does not arise simply because the combined maximum sentences on all drug charges exceed ten years.[75]

b. Probable cause and grand jury indictments

In cases in which a grand jury has returned an indictment charging a defendant with one of the predicate offenses, the statute does not require a judicial officer to make an independent finding of probable cause in order to invoke the drug-and-firearm-offender presumption. Most courts have held that the indictment by itself establishes probable cause to believe that the defendant committed the offense charged and triggers the presumption that the defendant constitutes a danger to the community and poses a risk of flight.[76]

c. Formal charge required

Even where there is probable cause to believe that a defendant appearing at a detention hearing on other charges may also have committed a firearm violation, the drug-and-firearm-offender presumption cannot arise if the defendant has not yet been charged with the firearm offense by a "valid complaint or indictment."[77]

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74. The First Circuit indicated in dictum that its analysis of the drug-and-firearm-offender presumption (see section F.2.d in this chapter) would also apply to the previous-violator presumption. United States v. Jessup, 757 F.2d 378, 381 (1st Cir. 1985).

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

76. United States v. Vargas, 804 F.2d 157, 161 (1st Cir. 1986); United States v. Suppa, 799 F.2d 115, 118–19 (3d Cir. 1986); United States v. Dominguez, 783 F.2d 702, 706 n.7 (7th Cir. 1986); United States v. Contreras, 776 F.2d 51, 54–55 (2d Cir. 1985); United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985); United States v. Hurtado, 779 F.2d 1467, 1477–79 (11th Cir. 1985) (2–1 decision); *contra* United States v. Cox, 635 F. Supp. 1047, 1052 (D. Kan. 1986).

77. United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985) (indictment for conspiracy to commit armed robbery; evidence indicated defendant had committed firearm offense in connection with conspiracy).

d. Effect of presumption

The drug-and-firearm-offender presumption imposes only a burden of production on defendants;[78] the burden of persuasion concerning the risk of flight and dangerousness remains with the government.[79] Those courts that have further elaborated on the meaning of the "burden of production" in this context have concluded that the introduction of relevant evidence by the accused does not eliminate the presumption entirely. Instead, the Second, Fifth, and Seventh Circuits have adopted the position, first articulated by the First Circuit in *United States v. Jessup,*[80] that the presumption "rebutted" by the defendant's evidence remains in the case as one factor of many to be considered by the judicial officer.[81] These courts have concluded that giving the presumption some weight, without shifting the burden of persuasion, accomplishes the legislative purpose of ensuring that judges and magistrates, "who typically focus only upon the particular cases before them,"[82] also take note of the congressional findings concerning the probable dangerousness and propensity to flee of offenders to whom the presumption is applicable.

On the question of what evidence is sufficient to rebut the presumption, the Seventh Circuit has held that the defendant need not produce evidence to rebut a finding of probable cause that he or she committed one of the predicate offenses or the general premise that, for example, drug trafficking is a danger to the community.[83] Rather, the defendant may produce evidence showing

78. Evidence rebutting the presumption of flight is not by itself sufficient to rebut the presumption of dangerousness. *See* United States v. Carbone, 793 F.2d 559, 561 (3d Cir. 1986) (per curiam) (2-1 decision) (under the circumstances, evidence normally adduced to rebut presumption of flight also rebutted presumption of dangerousness); United States v. Daniels, 772 F.2d 382, 383 (7th Cir. 1985) (assuming defendant showed he was unlikely to flee, he could still be detained on unrebutted presumption of dangerousness).

79. United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986); United States v. Perry, 788 F.2d 100, 115 (3d Cir.) (shifting burden of persuasion to defendant would increase due process concerns), *cert. denied,* 107 S. Ct. 218 (1986); United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986); United States v. Portes, 786 F.2d 758, 764 (7th Cir. 1985); United States v. Alatishe, 768 F.2d 364, 371 n.14 (D.C. Cir. 1985); United States v. Jessup, 757 F.2d 378, 381-84, 389 (1st Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985); United States v. Fortna, 769 F.2d 243, 253 n.11 (5th Cir. 1985); United States v. Diaz, 777 F.2d 1236, 1237 (7th Cir. 1985); United States v. Hurtado, 779 F.2d 1467, 1470 n.4 (11th Cir. 1985); United States v. Orta, 760 F.2d 887, 891 n.17 (8th Cir. 1985) (dictum).

80. 757 F.2d 378, 383-84 (1st Cir. 1985).

81. United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986); United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986); United States v. Portes, 786 F.2d 758, 764 (7th Cir. 1985); United States v. Fortna, 769 F.2d 243, 251 (5th Cir. 1985); United States v. Diaz, 777 F.2d 1236, 1239 (7th Cir. 1985).

82. United States v. Jessup, 757 F.2d 378, 384 (1st Cir. 1985).

83. United States v. Dominguez, 783 F.2d 702, 706 (7th Cir. 1986).

that "what is true in general is not true in the particular case,"[84] either because of the specific crimes charged or because of the defendant's particular circumstances. Section 3142(g) sets forth factors that may be relevant to establishing the defendant's circumstances, including marital status, employment, and lack of a prior criminal record.[85]

Where a defendant produces no evidence to rebut the drug-and-firearm-offender presumption, the Third, Seventh, and District of Columbia Circuits have held that the presumption alone is sufficient to support the conclusion that no conditions of release could reasonably assure the appearance of the defendant and the safety of the community.[86]

e. Constitutionality

The First Circuit has held that the presumption, when construed not to shift the burden of persuasion, does not violate the due process clause of the Fifth Amendment.[87]

The Third Circuit has held that because the presumption of dangerousness may place the defendant in the position of risking self-incrimination or submitting to pretrial detention, the judicial officer should grant use-fruits immunity to a defendant who seeks to rebut the presumption through his or her own testimony.[88]

G. Evidence

The Federal Rules of Evidence do not apply during a detention hearing.[89] The court has broad discretion to limit the presentation

84. *Id.* at 707, quoting United States v. Jessup, 757 F.2d 378, 384 (1st Cir. 1985).

85. *See* United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986) (burden of production was met by evidence of employment, marital status, and lack of prior criminal record).

86. United States v. Perry, 788 F.2d 100, 107 (3d Cir.), *cert. denied,* 107 S. Ct. 218 (1986); United States v. Alatishe, 768 F.2d 364, 371 (D.C. Cir. 1985); United States v. Daniels, 772 F.2d 382, 383 (7th Cir. 1985) (no evidence to rebut presumption of dangerousness). *See* United States v. Carbone, 793 F.2d 559, 561-63 (3d Cir. 1986) (Garth, J., dissenting) (although government failed to show dangerousness by clear and convincing evidence, presumption should be given effect where defendant failed to produce evidence relevant to dangerousness). *But see* United States v. Cox, 635 F. Supp. 1047, 1051-52 (D. Kan. 1986) (presumption, standing alone, is inadequate to prove dangerousness).

87. United States v. Jessup, 757 F.2d 378, 384-87 (1st Cir. 1985).

88. United States v. Perry, 788 F.2d 100, 115-16 (3d Cir.), *cert. denied,* 107 S. Ct. 218 (1986).

89. 18 U.S.C. § 3142(f).

of evidence at the hearing. The court should keep in mind, however, that "a pretrial detention hearing may restrict for a significant time the liberty of a presumably innocent person."[90]

1. Hearsay

Hearsay evidence is admissible at a detention hearing.[91] However, courts "should be sensitive to the fact that Congress' authorization of hearsay evidence does not represent a determination that such evidence is always appropriate."[92] The court should assess the reliability of hearsay evidence and require corroboration when necessary.[93]

2. Proffer

The court may require the defendant to present a proffer rather than live testimony, the Third Circuit has held.[94] The Second Circuit has held that the government as well as the defendant may proceed by way of proffer.[95] The Third Circuit, however, has questioned the validity of relying upon a proffer by the government to establish probable cause that the accused committed one of the offenses giving rise to the drug-and-firearm-offender presumption under section 3142(e).[96]

3. Cross-examination

Section 3142(f) affords the defendant an opportunity to cross-examine witnesses who appear at the hearing, but makes no explicit provision for nonappearing witnesses. At least where the defendant

90. United States v. Martir, 782 F.2d 1141, 1145 (2d Cir. 1986), quoting United States v. Delker, 757 F.2d 1390, 1398 (3d Cir. 1985). *See also* United States v. Perry, 788 F.2d 100, 114 (3d Cir.) (procedural due process requirements for pretrial detention hearing approach those for criminal trials), *cert. denied*, 107 S. Ct. 218 (1986).

91. United States v. Cardenas, 784 F.2d 937, 938 (per curiam), *vacated as moot*, 792 F.2d 906 (9th Cir. 1986); United States v. Acevedo-Ramos, 755 F.2d 203, 208 (1st Cir. 1985) (magistrates and district courts may rely on hearsay evidence at detention hearing, where reliable); United States v. Delker, 757 F.2d 1390, 1397 (3d Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985) (hearsay or other information not qualifying as admissible trial evidence is not necessarily an improper basis for a pretrial detention determination).

92. United States v. Accetturo, 783 F.2d 382, 389 (3d Cir. 1986).

93. *Id.* at 389, citing United States v. Acevedo-Ramos, 755 F.2d 203, 207–08 (1st Cir. 1985).

94. United States v. Delker, 757 F.2d 1390, 1395–96 (3d Cir. 1985).

95. United States v. Martir, 782 F.2d 1141, 1147 (2d Cir. 1986) (trial court need not require supporting evidence where accuracy of government's proffer is not challenged by defendant); *see also* United States v. Cardenas, 784 F.2d 937, 938 (per curiam), *vacated as moot*, 792 F.2d 906 (9th Cir. 1986) (government presentation of evidence by proffer was not due process violation).

96. United States v. Suppa, 799 F.2d 115, 118 (3d Cir. 1986) (dictum).

makes no specific proffer of how cross-examination will counter the government's proffered evidence, the court is not required to subpoena the government witnesses for cross-examination.[97] The Third Circuit noted, in upholding the district court's refusal to compel the appearance of a government witness, that defendants' offer of specific evidence showing unreliability, the lack of a need to protect confidentiality, and the prospect of lengthy detention were factors militating in favor of subpoenaing the requested witness.[98] The Eleventh Circuit has indicated that to the extent that a finding against the defendant rests on the weight of the evidence against him or her (section 3142(g)(2)), the defendant should have the opportunity to cross-examine witnesses.[99]

4. In Camera

The statute does not specifically address the use of evidence presented in camera. One court has held, and another has indicated in dictum, that reliance on evidence presented in camera is inconsistent with the Bail Reform Act's procedural protections, and both courts strongly discourage its use.[100] The Third Circuit has indicated that use of such testimony may compromise the constitutionality of the statute under the confrontation clause.[101] In a brief

97. United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986) (no error in failing to compel appearance of government witness for cross-examination where there was no reason to believe witness would have testified favorably to defendants); United States v. Winsor, 785 F.2d 755, 756–57 (9th Cir. 1986) (where defendant did not make proffer to show that government's proffer was incorrect, defendant did not have right to cross-examine investigators); United States v. Delker, 757 F.2d 1390, 1397–98 n.4 (3d Cir. 1985) (no error in declining to subpoena witnesses; question of whether there is a right to cross-examine where defendant makes specific proffer negating government's case left open). *See also* United States v. Cardenas, 784 F.2d 937, 938 (per curiam), *vacated as moot,* 792 F.2d 906 (9th Cir. 1986) (no error in refusing to subpoena witnesses where government withdrew proffered evidence challenged by defendant).

98. United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986) (no error in refusing to compel appearance because there was no reason to believe witness would have testified favorably to defendants).

99. United States v. Hurtado, 779 F.2d 1467, 1479–80 (11th Cir. 1985) (harmless error for district court to quash subpoenas of two Drug Enforcement Administration agents where finding that defendant was likely to flee was not predicated on weight of evidence).

100. United States v. Accetturo, 783 F.2d 382, 391 (3d Cir. 1986) (presentation in camera appropriate only when there is a most compelling need and no alternative means of meeting that need; district court erred in using such evidence); United States v. Leon, 766 F.2d 77, 80 n.3 (2d Cir. 1985) (ordinarily, court would remand for hearing question whether testimony presented in camera tainted conclusion of magistrate; here, nothing of consequence was revealed).

101. United States v. Perry, 788 F.2d 100, 117 (3d Cir.), *cert. denied,* 107 S. Ct. 218 (1986).

opinion later vacated on mootness grounds, the Ninth Circuit rejected a due process challenge to the use of evidence presented in camera.[102]

5. Electronic Surveillance

In *United States v. Angiulo,* the First Circuit held that the district court could rely on evidence obtained by electronic surveillance, the legality of which the accused had challenged, in considering whether to grant bail, at least until a court decided that the material was not legally obtained.[103] Use of such material is governed by the notice requirements of 18 U.S.C. § 2518(9).[104] Acknowledging the potential conflict between the ten-day-notice requirement of the latter statute and the requirement of a prompt detention hearing, the Second Circuit has pointed out that in cases in which prejudice to the defendant would result from waiver of the ten-day-notice period, the detention hearing may be continued for good cause under section 3142(f).[105]

6. Psychiatric Examination

The Second Circuit has held that the judicial officer may not order a psychiatric examination to determine the dangerousness of a defendant and must base that determination on evidence adduced at the detention hearing.[106]

H. Conduct of Hearings Involving Multiple Defendants

Cases involving multiple defendants pose special problems in complying with statutory requirements. Several circuits have cautioned district courts to treat such defendants individually, rather than making decisions about all defendants as a group. Specifically, the Eleventh Circuit has recommended that the court make indi-

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102. United States v. Cardenas, 784 F.2d 937, 938 (per curiam), *vacated as moot,* 792 F.2d 906 (9th Cir. 1986) (examination of government exhibits in camera did not violate due process). *See also* United States v. Acevedo-Ramos, 755 F.2d 203, 207–09 (1st Cir. 1985) (magistrate may test veracity of hearsay by inspection of evidence in camera where confidentiality of sources is necessary) (dictum).

103. 755 F.2d 969, 974 (1st Cir. 1985).

104. United States v. Berrios-Berrios, 791 F.2d 246, 253 (2d Cir.), *cert. dismissed,* 107 S. Ct. 562 (1986).

105. United States v. Salerno, 794 F.2d 64, 70 (2d Cir.) (dictum), *cert. granted,* 107 S. Ct. 397 (1986) (No. 86-87). A motion by the defendant may be required before the court can grant such a continuance. See section E.3.a(3)(a) in this chapter (p. 13), discussing rulings on continuances on motion of the court.

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

vidual determinations on continuances rather than scheduling all hearings for the same date.[107] The Third Circuit has held that evidence offered at the hearings of codefendants may not be considered unless the defendant is given an opportunity to confront it at his or her own hearing.[108] Where detention hearings are required for a large number of codefendants, the Second Circuit suggests that the court consider holding a joint hearing, consolidating repetitious testimony, or assigning more than one judicial officer to conduct the hearings.[109]

I. Written Findings

Written findings and a written statement of reasons for detention are required if detention is ordered.[110] These findings should include a statement of the alternatives considered and the reasons for rejecting them.[111]

J. Ten-Day Detention

Under section 3142(d), the judicial officer may order an arrestee detained for up to ten days if the person is arrested while on pretrial release, presentence release, probation, or parole, or is an alien not admitted to permanent residence, *and* the judicial officer finds that he or she "may flee or pose a danger to any other person or the community."[112] The court must direct the attorney for the government to notify the appropriate authorities so that they can take the person into custody. If those authorities do not act within the ten-day period, a section 3142(f) hearing may be held if the statutory requirements are met.[113]

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107. United States v. Hurtado, 779 F.2d 1467, 1476 (11th Cir. 1985).

108. United States v. Accetturo, 783 F.2d 382, 392 (3d Cir. 1986).

109. United States v. Melendez-Carrion, 790 F.2d 984, 992–93 (2d Cir. 1986) (individual hearings for large number of codefendants before one judicial officer took three weeks to complete).

110. 18 U.S.C. § 3142(i)(1); United States v. Vortis, 785 F.2d 327, 329 (D.C. Cir.) (per curiam) (remand for written findings to support detention order), *cert. denied,* 107 S. Ct. 148 (1986); United States v. Westbrook, 780 F.2d 1185, 1190 (5th Cir. 1986) (same); United States v. Hurtado, 779 F.2d 1467, 1480–81 (11th Cir. 1985) (same); United States v. Quinnones, 610 F. Supp. 74, 76 (S.D.N.Y. 1985) (magistrate failed to make written findings; defendant released).

111. United States v. Berrios-Berrios, 791 F.2d 246, 253–54 (2d Cir.) (remand for statement of reasons for rejecting release alternatives), *cert. dismissed,* 107 S. Ct. 562 (1986).

112. 18 U.S.C. § 3142(d).

113. See section E.3.a(2)(c) in this chapter (p. 11) for a discussion of the relationship between section 3142(d) and section 3142(f).

III. MODIFICATION OF DETENTION ORDER

A. Changed Circumstances

The First Circuit held in *United States v. Angiulo* that while no section of the statute authorized revocation of a detention order in light of changed circumstances, a court has inherent power to reconsider previous detention orders.[114] The 1986 amendment to section 3142(f) provides express authority for reopening the detention hearing when new information comes to light.[115]

B. Length of Detention

Speedy Trial Act[116] deadlines limit the length of pretrial detention under the statute. As a result of excludable-time provisions, however, defendants in complex cases may be detained far longer than the theoretical ninety-day maximum under the Speedy Trial Act, giving rise to due process concerns.

The Second Circuit has held that release of some defendants held for long periods may be required, whether detention is on the ground of dangerousness[117] or on the ground of flight risk.[118] That court emphasized that the determination of whether continued detention violates due process depends upon the particular circumstances of the case.[119] In evaluating whether continued detention

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114. 755 F.2d 969, 972 (1st Cir. 1985). *See also* United States v. Colombo, 777 F.2d 96, 98 (2d Cir. 1985) (district judge held that magistrate had jurisdiction to reconsider detention order; ruling not challenged on appeal).

115. 18 U.S.C. § 3142(f), as amended by Pub. L. No. 99-646, § 72(c) (Nov. 10, 1986).

116. 18 U.S.C. §§ 3161-3174.

117. United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986) (eight-month detention; remanded for setting of release conditions unless detention warranted on ground of flight); United States v. Frisone, 795 F.2d 1, 2 (2d Cir. 1986) (twelve-month detention; mandate stayed pending issuance of mandate in *Melendez-Carrion*).

118. United States v. Gonzales Claudio, 806 F.2d 334, 343 (2d Cir. 1986).

119. *Id.* at 340.

of defendants on the ground of flight risk exceeded due process limits, the Second Circuit considered the duration of the detention, the extent to which the prosecution was responsible for the delay, and the strength of the evidence indicating risk of flight.[120]

The First Circuit, in reversing a temporary release order granted to a defendant who had been confined for sixteen months, was careful to limit its holding to the unusual circumstances of the case, which concerned a dangerous defendant who, while physically unfit for trial, had continued to direct illegal activities from his hospital bed.[121]

The Third, Seventh, and Tenth Circuits have also indicated that lengthy pretrial detention may pose due process problems.[122]

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120. *Id.;* United States v. Berrios-Berrios, 791 F.2d 246, 253 (2d Cir.) (eight-month detention not unconstitutional under the circumstances; determinations must be made on case-by-case basis), *cert. dismissed,* 107 S. Ct. 562 (1986); United States v. Colombo, 777 F.2d 96, 100-01 (2d Cir. 1985) (in case of lengthy incarceration, detention "might not survive a proper due process challenge").

121. United States v. Zannino, 798 F.2d 544, 547-48 (1st Cir. 1986). The court also took into account the seriousness of the charges, which included murder and conspiracy to commit murder, and the short period (one month) for which continued pretrial detention was anticipated. *Id.* at 547, 549.

122. *See* United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986) ("at some point, due process may require a release . . . or . . . a fresh proceeding at which more is required of the government"); United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985) ("at some point the length of delay may raise due process objections"); United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986) (release or trial within thirty days required on Speedy Trial Act grounds for defendant detained for more than four months; continued detention would pose constitutional problems); United States v. Accetturo, 783 F.2d 382, 396 (3d Cir. 1986) (Sloviter, J., dissenting) (urging time limit on pretrial detention).

IV. REVIEW BY THE DISTRICT COURT

The statute provides for district court review, upon motion by the government or the defendant, of a magistrate's release or detention order.[123] Specific provision is made for revocation of a magistrate's release order by the district court.[124]

The district court should conduct a de novo review of the magistrate's determination[125] and need not defer to the magistrate's findings or give specific reasons for rejecting them.[126] The court may take additional evidence or conduct a new evidentiary hearing where appropriate.[127] Following the hearing, the court should explain on the record the reasons for its decision.[128]

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123. 18 U.S.C. § 3145.

124. 18 U.S.C. § 3145(a)(1). One court has held that a district court may impose detention on its own motion on a defendant's appeal of release conditions imposed by a magistrate. United States v. Maull, 773 F.2d 1479, 1482 (8th Cir. 1985) (en banc). See section E.3.a, "First Appearance," in chapter 2 (p. 8).

125. United States v. Delker, 757 F.2d 1390, 1394-95 (3d Cir. 1985); United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985); United States v. Maull, 773 F.2d 1479, 1482 (8th Cir. 1985) (en banc); United States v. Hurtado, 779 F.2d 1467, 1480 (11th Cir. 1985); United States v. Medina, 775 F.2d 1398, 1402 (11th Cir. 1985).

126. United States v. Leon, 766 F.2d 77, 80 (2d Cir. 1985); United States v. Delker, 757 F.2d 1390, 1394-95 (3d Cir. 1985); United States v. Medina, 775 F.2d 1398, 1402 (11th Cir. 1985).

127. United States v. Delker, 757 F.2d 1390, 1393-94 (3d Cir. 1985) (district court may conduct new evidentiary hearing even where there is no new evidence); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985) (district court should consider record plus additional evidence). The *Delker* court suggests that the district court consider whether a transcript of the proceedings before the magistrate would facilitate its determination of whether more evidence is needed. 757 F.2d at 1395 n.3.

128. See section I, Written Findings, in chapter 2 (p. 21).

V. RELEASE OR DETENTION PENDING SENTENCE

Under section 3143(a), the court must order the defendant detained while awaiting imposition or execution of sentence unless the judicial officer finds by clear and convincing evidence that the defendant is *not* likely to flee or pose a danger to the safety of any other person or the community if released.[129] The burden of persuasion is on the defendant.[130]

As with respect to pretrial detention, dangerousness is not limited to physical danger; the Third Circuit has noted that the legislative history specifically mentions drug trafficking as a danger to the community.[131]

The Seventh Circuit has held that once the defendant has filed an appeal, release under this section is no longer appropriate. Instead, the defendant must meet the criteria of section 3143(b), governing release or detention pending appeal.[132]

When sentencing guidelines take effect, the presumption favoring detention under this section will apply only if the applicable guideline recommends a term of imprisonment.[133] There is no explicit rule when the guideline does not recommend a term of imprisonment.

According to the legislative history of the statute, section 3143(a) covers those awaiting "execution" of sentence to make clear that a person may be released for a short period after sentence "for such matters as getting his affairs in order prior to surrendering for service of sentence."[134] The language appears to accommodate voluntary surrender.

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129. 18 U.S.C. § 3143(a).

130. United States v. Strong, 775 F.2d 504, 505 (3d Cir. 1985).

131. *Id.* at 507, citing S. Rep. No. 225, 98th Cong., 1st Sess. 12-13 (1983).

132. United States v. Thompson, 787 F.2d 1084, 1085 (7th Cir. 1986) (per curiam).

133. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 223(f)(1) (Oct. 12, 1984), 98 Stat. 2028.

134. S. Rep. No. 225, 98th Cong., 1st Sess. 26 (1983).

VI. RELEASE OR DETENTION PENDING APPEAL

A. Release Requirements

The judicial officer must order a convicted defendant detained pending appeal unless the judicial officer finds, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to others *and,* by a preponderance of the evidence,[135] that "the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment."[136] The burden is on the defendant to show that all of these criteria are met.[137]

In considering bail pending appeal, the courts have been most concerned with the meaning of the requirement that the appeal "raise a substantial question of law or fact likely to result in reversal or an order for a new trial." (All of the cases discussed here were decided before the 1986 amendment of section 3143(b), which added the phrase "or a sentence that does not include a term of imprisonment."[138])

The Third Circuit in *United States v. Miller* pioneered a two-step analysis of the passage.[139] *Miller*'s analysis requires that a con-

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135. United States v. Affleck, 765 F.2d 944, 953 n.15 (10th Cir. 1985) (en banc).

136. 18 U.S.C. § 3143(b), as amended by Pub. L. No. 99-646, § 51 (Nov. 10, 1986). The amendment added the final phrase "or a sentence that does not include a term of imprisonment."

137. United States v. Smith, 793 F.2d 85, 87-88 (3d Cir. 1986), *cert. denied,* 107 S. Ct. 877 (1987); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied,* 106 S. Ct. 533 (1985); United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985); United States v. Crabtree, 754 F.2d 1200, 1201 (5th Cir.), *cert. denied,* 105 S. Ct. 3528 (1985); United States v. Valera-Elizondo, 761 F.2d 1020, 1025 (5th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc) (burden of showing merit of appeal), *cert. denied,* 106 S. Ct. 1947 (1986); United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985); United States v. Affleck, 765 F.2d 944, 953 (10th Cir. 1985) (en banc); United States v. Giancola, 754 F.2d 898, 900-01 (11th Cir. 1985) (per curiam).

138. Pub. L. No. 99-646, § 51 (Nov. 10, 1986).

139. 753 F.2d 19 (3d Cir. 1985).

victed defendant seeking bail pending appeal show (1) that the pending appeal will involve a substantial question of law or fact, and (2) that if the question is decided in the defendant's favor, it will likely produce a reversal or a new trial of all counts on which imprisonment was imposed.[140] Other circuits have accepted the *Miller* approach, although some differ concerning the definition of "substantial question" and "likely."[141]

B. Definition of "Substantial Question"

The definition of "substantial question" has varied slightly among the circuits. The *Miller* court defined a substantial question as "one which is . . . novel, which has not been decided by controlling precedent, or which is fairly doubtful."[142] In response to the criticism that some questions meeting these criteria might nevertheless border on the frivolous, the Third Circuit stressed that the question must also be "significant."[143] The Eleventh Circuit, in *United States v. Giancola,* adopted the reasoning and conclusions of *Miller,* but defined a substantial question more strictly as "a 'close' question or one that very well could be decided the other way."[144] Most other circuits have adopted the *Giancola* test.[145] The Ninth

140. *Id.* at 24.

141. United States v. Shoffner, 791 F.2d 586, 588 (7th Cir. 1986) (per curiam); United States v. Bayko, 774 F.2d 516, 522-23 (1st Cir. 1985); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied,* 106 S. Ct. 533 (1985); United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985); United States v. Pollard, 778 F.2d 1177, 1181-82 (6th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985); United States v. Greenberg, 772 F.2d 340, 341 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1231 (8th Cir. 1985) (en banc), *cert. denied,* 106 S. Ct. 1947 (1986); United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985); United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985) (en banc); United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam).

142. United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985).

143. United States v. Smith, 793 F.2d 85, 87-89 (3d Cir. 1986), *cert. denied,* 107 S. Ct. 877 (1987).

144. 754 F.2d 898, 900-01 (11th Cir. 1985) (per curiam). There is disagreement about whether the *Giancola* definition is indeed different from that of *Miller. Compare* United States v. Smith, 793 F.2d 85, 89 (3d Cir. 1986) (rejecting *Giancola*), *cert. denied,* 107 S. Ct. 877 (1987), *and* United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985) (en banc) (*Giancola* is stricter than *Miller*), *with* United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied,* 106 S. Ct. 533 (1985) (*Miller, Handy,* and *Giancola* definitions do not differ significantly).

145. United States v. Shoffner, 791 F.2d 586, 589 (7th Cir. 1986) (per curiam); United States v. Thompson, 787 F.2d 1084, 1085 (7th Cir. 1986) (per curiam); United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied,* 106 S. Ct. 533 (1985); United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 298-99 (7th Cir. 1985); United States v. Greenberg, 772 F.2d 340, 341 (7th Cir. 1985); United States v. Molt, 758

Circuit, while agreeing with much of the *Giancola* court's reasoning, declined to endorse the characterization of a substantial question as a "close" question, holding instead that the proper formulation is that the question be "fairly debatable."[146] The Third Circuit has since indicated its preference for the "fairly debatable" criterion.[147] The Eighth Circuit has expressly rejected that standard.[148]

C. Definition of "Likely"

The *Miller* court expressly rejected the literal interpretation of "likely to result in reversal or an order for a new trial," which implies that a court should grant bail pending appeal only if it finds that its own rulings are likely to be reversed.[149] Instead, the Third Circuit held that reversal or a new trial is "likely" only if the substantial question to be raised on appeal is "so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction."[150] A substantial question concerning only harmless error, or a question not adequately preserved for appeal, would not meet this requirement.[151]

Several courts have adopted the *Miller* definition of "likely" without further elaboration.[152] Others have further defined

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F.2d 1198, 1200 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1231 (8th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1947 (1986); United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985) (en banc).

146. United States v. Handy, 761 F.2d 1279, 1281–83 (9th Cir. 1985). Judge Farris, dissenting, viewed the "fairly debatable" criterion as overly lenient and would have adopted the *Giancola* definition. *Id.* at 1285.

147. United States v. Smith, 793 F.2d 85, 89–90 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 877 (1987). Judge Mansmann's opinion for the court also emphasized that the question presented must be "significant." Of the three judges on the panel, two (Judge Mansmann and Judge Pollak, sitting by designation) agreed with this construction of the statute, but disagreed about its application to the facts of the case. The third judge (Judge Hunter) concurred in the result, but would have followed *Giancola* on the construction of the statute. *Id.* at 91.

148. United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1947 (1986).

149. United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985).

150. *Id.*

151. *Id.*

152. United States v. Bayko, 774 F.2d 516, 522 (1st Cir. 1985); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 106 S. Ct. 533 (1985); United States v. Affleck, 765 F.2d 944, 953 (10th Cir. 1985) (en banc); United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam).

"likely" in the context of reversal or remand as "more probable than not."[153]

D. Applicability

The provisions of the Bail Reform Act of 1984 concerning release or detention pending appeal apply only to "a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari."[154] They do not apply to convicted defendants seeking postconviction relief.[155]

The District of Columbia Circuit, in *United States v. Kelly,* held that, as under prior law, bail is not available pending appeal of the denial of a motion for a new trial made pursuant to Federal Rule of Criminal Procedure 33.[156]

E. Findings

The district court must state on the record its reasons for denying release pending appeal.[157]

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153. United States v. Valera-Elizondo, 761 F.2d 1020, 1025 (5th Cir. 1985); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1233 (8th Cir. 1985) (en banc), *cert. denied,* 106 S. Ct. 1947 (1986).

154. 18 U.S.C. § 3143(b).

155. Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985).

156. 790 F.2d 130, 139 (D.C. Cir. 1986).

157. United States v. Wheeler, 795 F.2d 839 (9th Cir. 1986) (remand for statement of reasons). The statement of reasons may be made either through written findings or through a transcript of an oral statement. *Id.* at 841.

VII. RELEASE OR DETENTION OF A MATERIAL WITNESS

As under prior law, material witnesses are subject to detention if certain conditions, including the inadequacy of preserving the witness's testimony through deposition, are met.[158] Material witnesses arrested pursuant to section 3144 have a right to a detention hearing and to appointed counsel where they are unable to retain counsel, one district court has held.[159]

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158. 18 U.S.C. § 3144.

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

VIII. SANCTIONS

A. Failure to Appear

Section 3146 specifies the sanctions for failure to appear in court and makes them explicitly applicable to failure to surrender for service of sentence.[160]

B. Offense Committed While on Release

If a person on release under the act commits another offense, a term of imprisonment in addition to that imposed for the offense itself is prescribed.[161] The Second Circuit held in *United States v. Rodriguez* that this portion of the prison term may not be suspended.[162]

C. Violation of Release Condition

In addition to revocation of release, discussed in section D.1 of chapter 1, the statute provides for prosecution for contempt for violation of a release condition.[163]

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160. 18 U.S.C. § 3146(b).

161. 18 U.S.C. § 3147. Note that the mandatory minimum terms (ninety days for a misdemeanor and two years for a felony) specified under this section are in effect only until sentencing guidelines become effective. Pub. L. No. 98-473, tit. II, § 223(g) (Oct. 12, 1984), 98 Stat. 2028; Pub. L. No. 99-217, § 4 (Dec. 26, 1985), 99 Stat. 1728.

162. 794 F.2d 24, 28 (2d Cir. 1986).

163. 18 U.S.C. § 3148(c).

APPENDIX
The Bail Reform Act of 1984

Pub. L. No. 98-473, tit. II (Oct. 12, 1984),
98 Stat. 1976, as amended by Pub. L. No. 99-217
(Dec. 26, 1985), 99 Stat. 1728, and Pub. L. No.
99-646 (Nov. 10, 1986)

THE BAIL REFORM ACT OF 1984

18 U.S.C. §§ 3141-3150, 3156
As Amended Through January 13, 1987

§ 3141. Release and detention authority generally

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

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

§ 3142. Release or detention of a defendant pending trial

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

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

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

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

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

(b) **Release on personal recognizance or unsecured appearance bond.**—The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appear-

ance of the person as required or will endanger the safety of any other person or the community.

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

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

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

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

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

(iii) maintain or commence an educational program;

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

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

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

(vii) comply with a specified curfew;

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

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

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol de-

pendency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

(xii) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

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

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

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person. (3) The judicial officer may at any time amend [the] order to impose additional or different conditions of release.

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

(1) the person—

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

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

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

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

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

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

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays,

and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) **Detention.**—If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial. In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

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

(2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of a person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of

the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

(f) Detention hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence;

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

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

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

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves—

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on the motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented

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

(g) **Factors to be considered.**—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

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

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an

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

Note: Pub. L. No. 99-646, § 55 (Nov. 10, 1986), redesignated subsections (c)(2)(K) and (c)(2)(L) as (c)(1)(B)(xi) and (c)(1)(B)(xii), respectively. No conforming change was made to the reference to those subsections in this paragraph.

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

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

(2) advise the person of—

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

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

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

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

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

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

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

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the

person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

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

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

(a) Release or detention pending sentence.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

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

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

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title.

(c) Release or detention pending appeal by the government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731 of this title, in accordance with the provisions of section 3142 of this

title, unless the defendant is otherwise subject to a release or detention order.

Note: When sentencing guidelines go into effect, this section will be amended, in subsection (a), by adding "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," after "sentence,"; and by adding at the end of subsection (c) the following:

"Except as provided in subsection (b) of this section, the judicial officer, in a case in which an appeal has been taken by the United States under section 3742, shall—

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

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

Pub. L. No. 98-473, tit. II, § 223(f) (Oct. 12, 1984), 98 Stat. 2028; Pub. L. No. 99-217, § 4 (Dec. 26, 1985), 99 Stat. 1728; Pub. L. No. 99-646, § 51 (Nov. 10, 1986).

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§ 3144. Release or detention of a material witness

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

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

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

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

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

The motion shall be determined promptly.

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

(c) Appeal from a release or detention order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

§ 3146. Penalty for failure to appear

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

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

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

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

(b) Punishment.—

(1) The punishment for an offense under this section is—

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

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

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

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

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

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

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

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

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

§ 3147. Penalty for an offense committed while on release

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

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

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor. A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

Note: When sentencing guidelines go into effect, this section will be amended as follows: in paragraph (1), by deleting "not less than two years and" and, in paragraph (2), by deleting "not less than ninety days and." Pub. L. No. 98-473, tit. II, § 223(f) (Oct. 12, 1984), 98 Stat. 2028; Pub. L. No. 99-217, § 4 (Dec. 26, 1985), 99 Stat. 1728.

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§ 3148. Sanctions for violation of a release condition

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

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

(1) finds that there is—

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

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

(2) finds that—

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

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

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

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

§ 3149. Surrender of an offender by a surety

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

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

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

§ 3156. Definitions

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

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

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

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

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

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

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

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