

Expanding Advocacy for Pretrial Release

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Federal Pretrial Detention CRISIS

- Before 1984: 2% of defendants detained pretrial
- 1985: 19% detained
- 1996: 34% detained
- 2006: 63% detained
- **2014: 72% detained**

➤ Data sources

- 1983, 1985: <https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf> (Table 1)
- 1996: <https://www.bjs.gov/content/pub/pdf/fprd96.pdf> (Table 1)
- 2006: <https://www.bjs.gov/content/pub/html/fjsst/2006/fjs06st.pdf> (Table 3.1)
- 2014: <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf> (Table 3.1)

Pretrial release rates vary considerably across the federal judicial districts even when illegal alien cases are excluded

Pretrial release rates (excluding illegal aliens) for districts with the highest and lowest release rates, FY 2018

Federal districts	Number	% released
Districts with highest release rates (averages)		
	457	65.7%
1	682	74.0%
2	448	67.6%
3	203	67.0%
4	1,010	65.6%
5	270	65.2%
6	430	64.4%
7	206	63.6%
8	180	63.3%
9	422	63.3%
10	722	63.2%
Districts with lowest release rates (averages)		
	561	26.5%
1	737	31.5%
2	484	30.6%
3	270	29.6%
4	264	28.4%
5	328	28.0%
6	1,453	27.8%
7	132	27.3%
8	1,091	24.2%
9	684	18.9%
10	165	18.8%

Source: Table H-14B
US territories excluded from calculations with **exception of PR**

Summary of Trends

- Federal pretrial release rates have declined over last decade.
- PSO release recommendation rates track actual release rates though they are higher than release recommendations by AUSAs.
- Fewer activations for case types (i.e., financial, public-order) associated with higher release rates.
- Increasing activations for case types (i.e., sex, weapons) associated with lower or declining release rates.
- Criminal profiles of federal defendants becoming slightly more severe, BUT release rates decline more for defendants with “light” criminal profiles.
- Pretrial violations mostly unchanged, despite slight increase in risk profiles.

Impact of Pretrial Detention

Human Cost of Pretrial Detention

Defendants who are detained pretrial receive sentences approximately two to three times longer than those released on bond.

Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, Federal Probation 52, 54 (Sept. 2017) (citing studies)

Numerous Consequences for the Defendant

Compared to defendants released at some point prior to trial, defendants held for the entire pretrial period had:

4x greater likelihood of being sentenced to jail

3x longer jail sentences

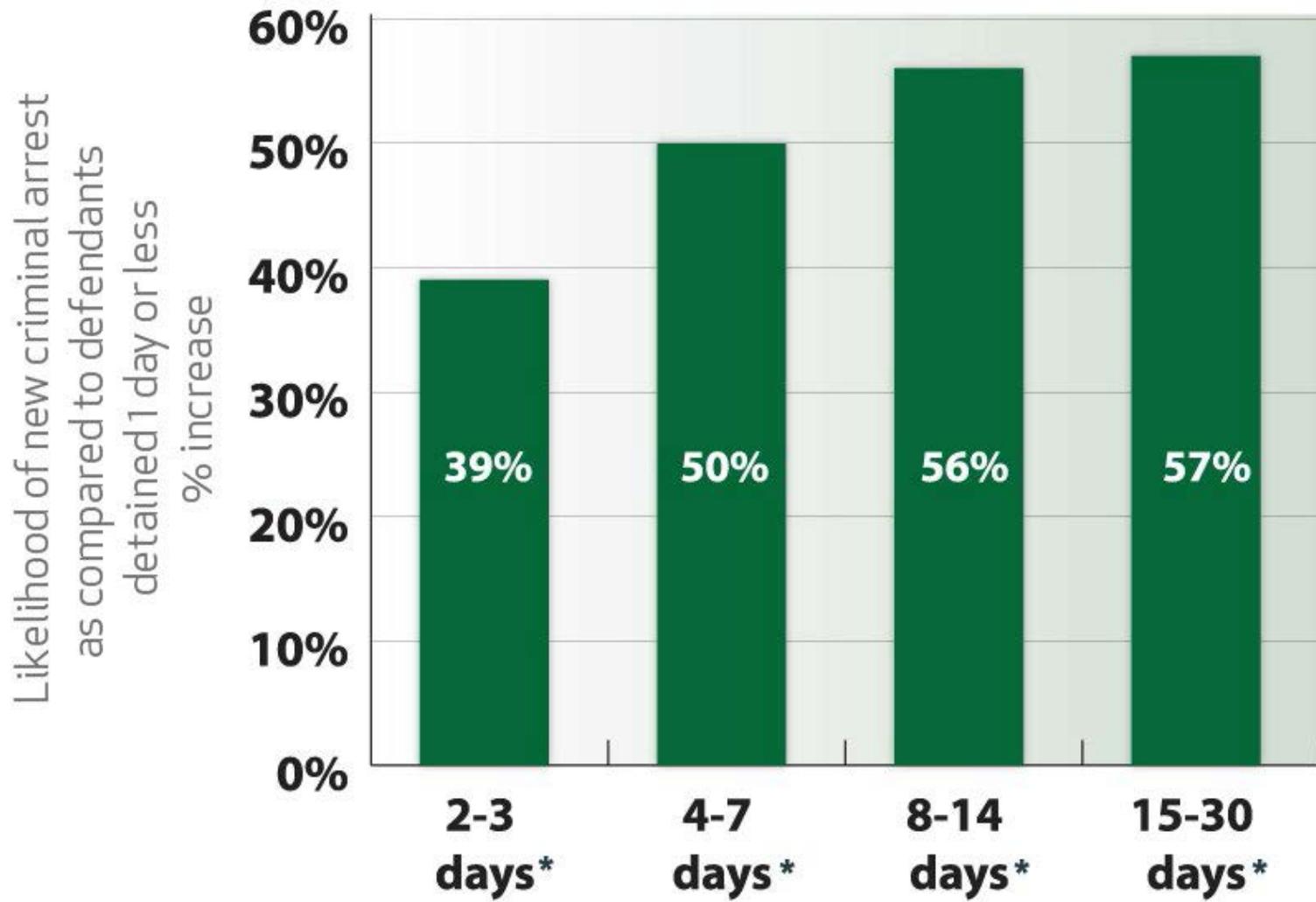
3x greater likelihood of being sentenced to prison

2x longer prison sentence

24 hours or more=

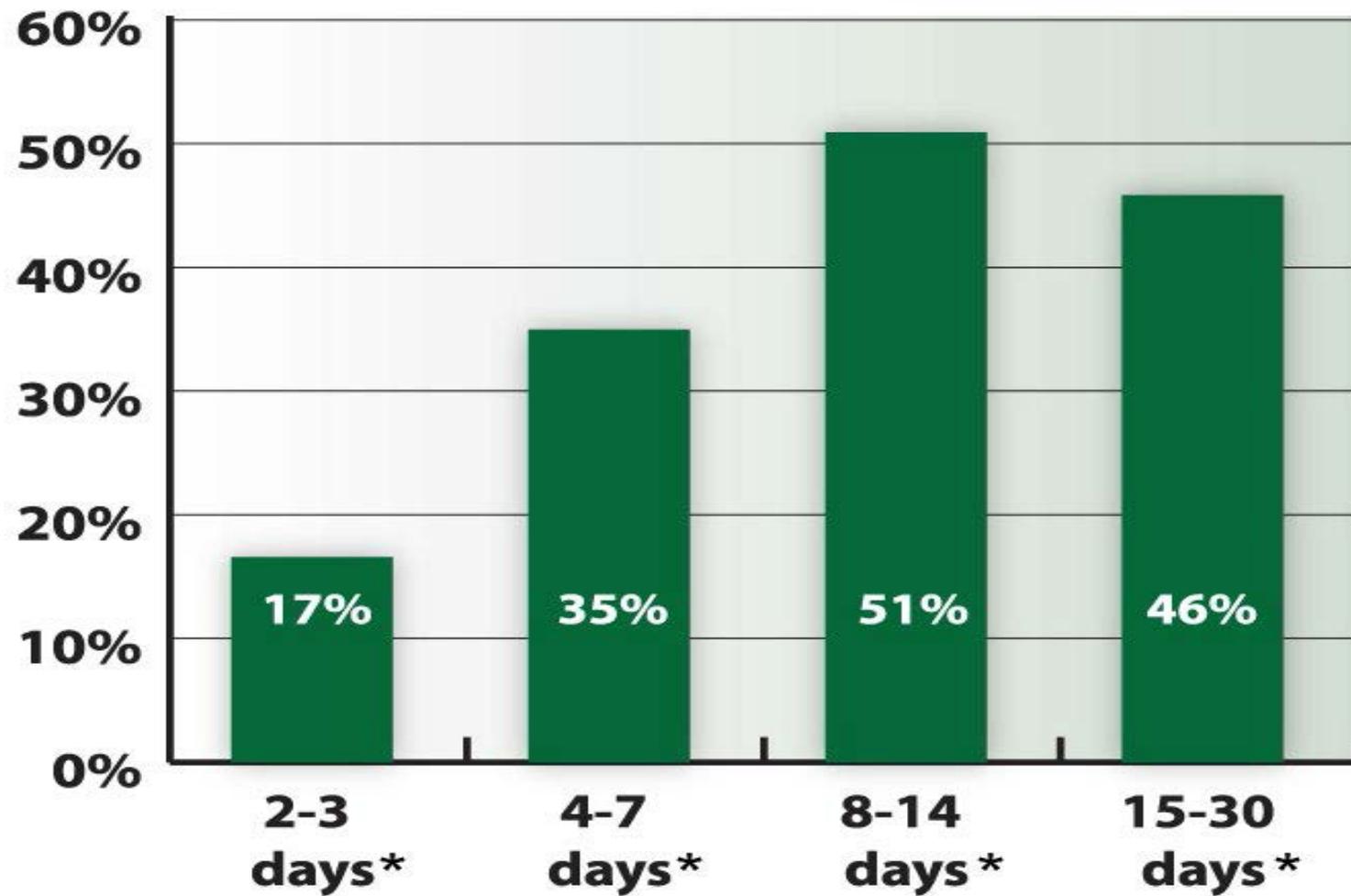
For low risk defendants:

- 1) More likely to commit new crimes not only while their cases were pending, but also years later.
- 2) More likely to miss their day in court.



* = statistically significant at the .01 level or lower

Likelihood of 2-year recidivism as compared to defendants detained 1 day or less



* = statistically significant at the .01 level or lower

Sentencing Consequences of Federal Pretrial Supervision

Pretrial release was a statistically significant predictor of whether a prison sentence was imposed

Pretrial release was a statistically significant predictor on sentence length

Having pretrial supervision revoked nearly doubled likelihood of a sentence to incarceration

(n=94,229)

Impact of pretrial detention on post-conviction supervision

Controlling for risk level, defendants detained pretrial **2x** more likely to fail on post-conviction supervision than those released during pretrial period.

Cost to Taxpayers of Pretrial Detention

- Pretrial Detention
 - **\$31,842/year**
- Pretrial supervision on bond
 - **\$4,026/year**

<http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>

WHAT'S A MOTHER TO DO?

Government & Judges Violate Bail Reform Act (18 U.S.C. § 3142)

- We must remind everyone that B.R.A. is the law.
- We must remind everyone of what the statute says.
- **CHANGE THE CULTURE**

INITIAL APPEARANCE PROBLEM:

B.R.A. Not Followed

➤ **Illegal Detention**

Initial Appearance

“The government is moving for detention on the grounds that the defendant is a danger to the community and a risk of flight.”

Initial Appearance: Law (18 U.S.C. § 3142)

**Danger to the community and ordinary
risk of flight are **NOT** legal bases for
detention under the B.R.A!**

Illegal to Detain Client w/o “F” Factor:

- Plain language of statute
- *United States v. Salerno*, 481 U.S. 739, 747 (1987) (emphasis added):
 - The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. See 18 U.S.C. § 3142(f) (*detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders*).”
- **6 COAs**
 - 1st Circuit: *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)
 - 2nd Circuit: *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988)
 - 3rd Circuit: *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986)
 - 5th Circuit: *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992)
 - 9th Circuit: *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003)
 - DC Circuit: *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999)

Initial Appearance Law: 7 “F” Factors

- Detention is only legally authorized if one of the 7 “**(f) factors**” is present.
- 3142(f): “The judicial officer shall hold a [detention] hearing” only “in a case that involves” one of seven factors.

Initial Appearance Law: 7 “F” Factors

- 3142(f)(1): Case specific
 - Drugs
 - Guns: 924(c), 922(g)
 - COVs, bank robbery
 - Minor victim
 - Terrorism
 - Recent recidivists (rare)
- 3142(f)(2): Subjective
 - “serious risk” of flight (SROF)
 - “serious risk” threat to victim/witness/juror.
- **Note: DOES NOT SAY “NOT DANGER TO THE COMMUNITY”**

No “F” Factor

=>

No Detention Hearing!

Illegal to Detain Client w/o “F” Factor

“[T]here is authority for the proposition that the government is entitled to a detention hearing (and up to 3 days to prepare for that hearing absent good cause) only if it shows that the charged crime is one of the offenses enumerated in 18 U.S.C. 3142(f)(1).”

United States v. Mays, 18-CR-737, Dkt. No. 7 (N.D. Ill. Nov. 8, 2018)

“F” Factor: Types of Cases

No (F)(1) Factor*

- Fraud/Financial Crime/Theft
- Extortion
- Threats
- Alien smuggling
- Illegal reentry (likely SROF)

Yes (F)(1) Factor

- Drugs
- Guns: 924(c), 922(g)
- Crimes of violence
- Minor victim
- Terrorism

(*except if SROF: serious risk of flight)

NO “F” FACTOR:

Financial Danger to Community/Fraud Cases

“The govt is moving for
detention on grounds that the
defendant is **FINANCIAL DANGER**
to community.”

Illegal to Detain Client as Danger

“[W]e find ourselves in agreement with the First and Third Circuits: a defendant’s threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention.”

United States v. Byrd, 969 F.2d 106, 110 (5th Cir. 1992)

NO “F” FACTOR:

Financial Danger to Community/Fraud Cases

(f)(2)(A): “Serious risk that such person will flee”

- Only possible basis for detention
- Requires government to present EVIDENCE
- Present evidence client not SROF (length of residence, record of court appearances, etc)
- If weak/no (f) factor, fight harder against conditions of release.

Courtwatching Data: Initial Appearance

Out of the 64 initial appearances/arraignments

- Gov't sought detention in 81% (52)
- Gov't cited (F) Factor in 1 case!
- Defense objected to detention in 9%

Courtwatching Data: Initial Appearance

Out of the 52 cases in which govt seeking detention

- Gov't cited danger to community in 44% (28):
 - **NOT A VALID F BASIS!**
- Gov't cited ordinary risk of flight in 58% (30)
- Gov't cited serious risk of flight in 3% (2)
- Gov't provided evidence re risk of flight in **4 cases**

Courtwatching Data: Initial Appearance

**Clients were ILLEGALLY detained
in 21% of cases**

No (f)(1) factor and no evidence of (f)(2) SROF

ACTION STEPS: Initial Appearance

- 1) Ask Gov't what (f) factor: see Checklist & Flowchart
- 2) If no (f)(1) factor, OBJECT to detention hearing/detention as illegal!
- 3) File written motion: Template Defendant's Motion for Immediate Release With Conditions (if SROF): "rare and unusual circumstances"
- 4) Appeal to DCT: Template Defendant's Appeal of Magistrate Judge's Detention Order (if danger)
- 5) Appeal to COA
- 6) Ask USAO to file motion listing (f) factor(s)

USAO Motion re (F) Factors (WDWA)

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

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

- 22 Crime of violence (18 U.S.C. 3156).
23 Crime of Terrorism (18 U.S.C. 2332b (g)(5)(B)) with a maximum sentence
24 of ten years or more.
25 Crime with a maximum sentence of life imprisonment or death.
26 Drug offense with a maximum sentence of ten years or more.
27
28



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When “F” Factor is Met:

Request Detention Hearing Immediately/Soon

- § 3142(f): “The judicial officer shall hold a hearing The hearing shall be held immediately upon the person’s first appearance before the [judge] unless that person, or the attorney for the Government, seeks a continuance...may not exceed 5 days.”
- Judge has discretion to continue for less than 3 days

**DETENTION HEARING
PROBLEM:**

Presumption of Detention

DETENTION HEARING PROBLEM:

Drugs/Guns Presumption of Detention
applied to 42-45% of cases
(2005-2015)

Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, Federal Probation 52, 55 (Sept. 2017)

Presumption Criticized Empirically

- **“The presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.”** Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, Federal Probation 52, 61 (Sept. 2017).
- **The drug/gun presumption dramatically limits pretrial release for the lowest-risk offenders.** *Id.* at 57 (“[W]ere it not for the existence of the presumption, these defendants might be released at higher rates.”).
- **The presumptions do a bad job of predicting whether clients on pretrial release will recidivate or FTA.** *Id.* at 58 (“[H]igh risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, being rearrested for a violent offense, failing to appear, or being revoked for technical violations.”).

Presumption Criticized By Judiciary

In 2017, the Judicial Conference of the United States asked Congress to amend the BRA to **limit the presumption of detention in drug cases to people with very serious criminal records.**

(This rec was based on the study in the previous slide.)

http://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf

ACTION STEPS:

Presumption of Detention

- 1) File written motions in presumption cases (template motion in materials)
- 2) Explain problems w/presumption and Judicial Conference recommendation to eliminate in most drug cases
- 3) Cite good COA law re easy to rebut the presumption; present facts to show we've rebutted it (orally & in motion)
 - a. D only has burden of production: Produce some evidence re community ties, employment, etc.—3142(g)
 - b. Once presumption is rebutted, it carries a lot less weight
- 4) Detention Hearing Checklist for Defense Attorneys
- 5) Appeal to DCT & COA

PROBLEM: Waiver of Preliminary Hearing

- Courtwatching: Waived 72% of the time

Solution

- **REQUEST PRELIMINARY HEARINGS!!**

*****How Can We Increase Pretrial
Release?**

Advocate to Pretrial/USAO

