

# The Basics and the Breakout: Bail Reform Act and Expanding Advocacy for Release during COVID-19

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## FEDERAL PRETRIAL DETENTION IS IN A CRISIS



- ▶ Before 1984: 2% of defendants detained pretrial
- ▶ 1985: 19% detained
- ▶ 1996: 34% detained
- ▶ 2006: 63% detained
- ▶ **2017: 72% detained**

[Data source: 1984, 1985: https://www.pewresearch.org/pubs/2017/01/ \(Table 3\)](#)  
[1996: https://www.pewresearch.org/pubs/2017/01/ \(Table 3\)](#)  
[2006: https://www.pewresearch.org/pubs/2017/01/ \(Table 3\)](#)  
[2017: https://www.pewresearch.org/pubs/2017/01/ \(Table 3\)](#)

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## CRISIS in EDTN

Table #14 (December 30, 2019) - Continued

Circuit and District	Case*	Arrested and Not Released†		Released†	
		Total	Pre	Total	Pre
13th	25,629	21,468	98.8	4,161	96.4
14th	20,822	18,822	90.4	2,000	95.7
15th	18,822	17,822	94.7	1,000	95.7
16th	17,822	16,822	94.4	1,000	95.7
17th	16,822	15,822	93.5	1,000	95.7
18th	15,822	14,822	93.7	1,000	95.7
19th	14,822	13,822	93.3	1,000	95.7
20th	13,822	12,822	92.8	1,000	95.7
21st	12,822	11,822	92.2	1,000	95.7
22nd	11,822	10,822	91.6	1,000	95.7
23rd	10,822	9,822	90.8	1,000	95.7
24th	9,822	8,822	89.9	1,000	95.7
25th	8,822	7,822	88.8	1,000	95.7
26th	7,822	6,822	87.2	1,000	95.7
27th	6,822	5,822	85.4	1,000	95.7
28th	5,822	4,822	82.8	1,000	95.7
29th	4,822	3,822	79.3	1,000	95.7
30th	3,822	2,822	73.8	1,000	95.7
31st	2,822	1,822	64.6	1,000	95.7
32nd	1,822	822	45.1	1,000	95.7
33rd	822	222	27.1	1,000	95.7
34th	222	22	9.9	1,000	95.7
35th	22	2	9.1	1,000	95.7

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### Troubling 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.

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### What does Pretrial Detention mean for our Clients?

- ▶ 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

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### Impact on Sentencing

- ▶ 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)

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### Maybe your judge is a \$\$\$ person?

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

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

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**"So what are you going to do about it?"**



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### CHANGE THE CULTURE

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.
- ▶ We must file written bond motions & appeal

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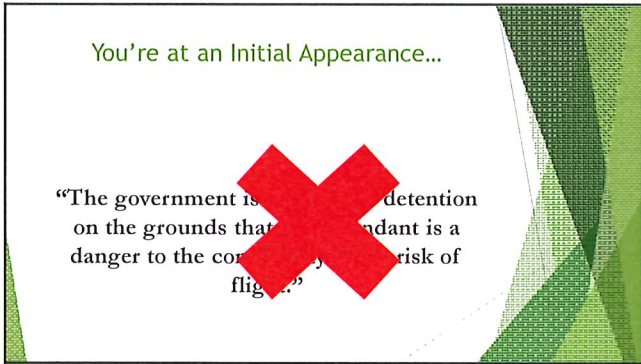
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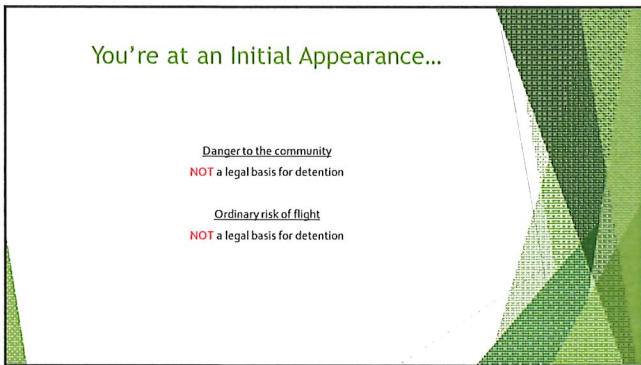
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### “F” Factors

- ▶ 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.

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### “F” Factors

- ▶ 3142(f)(1) Case specific
  - ▶ Drugs
  - ▶ Guns: 921(c), 922(g)
  - ▶ COV’s, bank robbery
  - ▶ Minor victim
  - ▶ Terrorism
  - ▶ Recent re-arrest (rare)
- ▶ 3142(f)(2) Subjective
  - ▶ “serious risk” of flight (SROF)
  - ▶ “serious risk” threat to victim/witness/jury

▶ **Note: DOES NOT SAY “DANGER TO THE COMMUNITY”**

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### “F” Factors: (f)(1)

No (F)(1) Factor*	Yes (F)(1) Factor
- Fraud/Financial Crime/Theft	- Drugs
- Extortion	- Guns: 924(c), 922(g)
- Threats	- Crimes of violence
- Alien smuggling	- Minor victim
- Illegal reentry (likely SROF)	- Terrorism

(\*except if SROF: serious risk of flight)

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### “F” Factors: (f)(2)(A)

(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.

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### “F” Factors

No “F” Factor  
=>  
No Detention Hearing  
=>  
IMMEDIATE RELEASE

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### “F” Factors

6 Courts of Appeals Agree it is illegal to detain without (f) factor:

- ▶ 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)

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**“F” Factors**

The Supreme Court upheld the B.R.A. as constitutional in *Salerno* because § 3142(f) serves as a gatekeeper.

- ▶ 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). *United States v. Salerno*, 481 U.S. 739, 747 (1987).
- ▶ “The [B.R.A.] narrowly focuses on a particularly acute problem. . . . The Act operates ONLY on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f)” *Id.* at 750.

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**“F” Factors: EDTN**

*United States v. Mendoza-Balleza, No. 4:19-cr-01*

“Given these undisputed facts, the Government cannot satisfy its threshold burden under Title 18, United States Code, Section 3142(f)(2)(A) to show that there is a serious risk Defendant will flee. Therefore, the court is not authorized to conduct a detention hearing.”

(Relying on *Byrd and Ploof*)

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**“F” Factors: Checklist for Initial Appearance**

1. Ask Gov't what (f) factor.
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 DCJ: 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)

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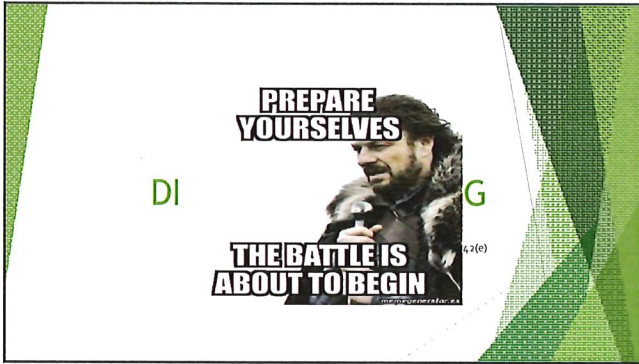
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### DETENTION HEARING: No Presumption

- ▶ Remind judge § 314.2(b) contains **presumption of release** on personal recognizance -- "SHALL ORDER . . . RELEASE"
  - ▶ "In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987)
- ▶ Remind judge to consider all possible conditions of release **and** impose "least restrictive" conditions under § 314.2(c)(1)(B)
- ▶ Remind judge that Government **bears the burden of proof**
  - ▶ Risk of flight by **preponderance**
  - ▶ Dangerousness by **clear and convincing**

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### DETENTION HEARING: No Presumption

- ▶ Remind judge we don't have to **guarantee** appearance/safety – the standard is, are there conditions that will **reasonably assure** appearance/safety
- ▶ Argue for appropriate conditions of release
  - ▶ Third party custodian
  - ▶ Maintain/get employment
  - ▶ Maintain/start education
  - ▶ Restrictions on travel/living/home detention
  - ▶ Curfew
  - ▶ Refrain from excessive alcohol/drugs
  - ▶ Psych treatment/drug treatment

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### DETENTION HEARING: No Presumption

#### Factors to be considered by Court

- ▶ Nature and circumstances of offense
- ▶ History & Characteristics, including:
  - ▶ Family ties
  - ▶ Employment ties
  - ▶ Length of time in the community
  - ▶ History of Alcohol/Drug Abuse
  - ▶ Physical/Mental condition
  - ▶ Criminal History
  - ▶ Release status, parole/probation, bond
  - ▶ Record on appearing in court
- ▶ Weight of evidence bearing on the factor
  - ▶ "Nothing in this section shall be construed as modifying or limiting the presumption of innocence" 48 USC § 3142(g) United States v. Gray 458 F. Supp. 131, 135 (DC Ark 1978)
  - ▶ United States v. Townsend, 831 F.2d 976, 994 (9<sup>th</sup> Cir 1988)

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### DETENTION HEARING: Presumption Cases

- ▶ "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." Anayyllis Austin, *The Presumption for Detention Statute's Relationship to Release Rate*, Federal Probation 52, 61 (Sept. 2017).
- ▶ The drug/gun presumption dramatically limits pretrial release for the lowest-risk offenders. *Id.* at 57 ("[W]here 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.")

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### DETENTION HEARING: Presumption Cases

- ▶ 18 USC § 3142(e)(3)
- ▶ Drugs- where MAX term of imprisonment is at least 10 years
- ▶ 924(c)
- ▶ Minor Victim- Child Pornography, Electronic Solicitation
- ▶ Terrorism

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### DETENTION HEARING: Presumption Cases

- ▶ File motions before hearing (consider)
- ▶ **"Any evidence** favorable to a defendant that comes within a category listed in § 314.2(g)" can rebut the presumption. *United States v. Dominguez*, 783 F.2d 702, 707 (7<sup>th</sup> Cir. 1986)
- ▶ Including any "evidence of economic and social stability"
  - ▶ Evidence of marital, family, and employment status
  - ▶ "ties to and role in the community"
  - ▶ "clean criminal record"; minimal criminal history
  - ▶ Lack of drug history
  - ▶ Lack of mental health history
  - ▶ ANYTHING ELSE in § 314.2 (g)

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### DETENTION HEARING: Presumption Cases

- ▶ After the presumption is rebutted, it "is not erased," but rather "remains in the case as an evidentiary finding militating against release, to be weighed along with the other evidence relevant to factors in § 314.2(g)"
- ▶ "[T]he burden of persuasion remains with the government" at all times and never shifts to the defense. *Dominguez*, 783 F.2d at 707.
- ▶ **\*Means government bears the burden of convincing the judge that detention is warranted despite all the evidence of social stability the client presents.**

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**Me after I eat all of my quarantine snacks in one night**




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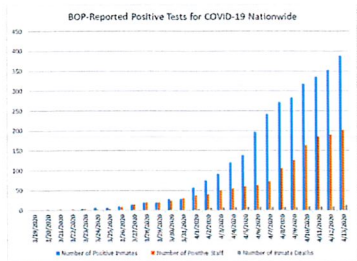
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### Achieving Release During COVID-19



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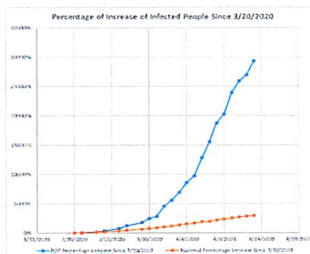
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### Achieving Release During COVID-19



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### Achieving Release During COVID-19

- ▶ What is happening in EDTH?
- ▶ What should you be doing?
- ▶ Practice Tips

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### Achieving Release During COVID-19

- ▶ File Motions for Pretrial Release or for Release pending Sentencing
- ▶ Consider prioritizing your filings
  - ▶ Is client over 60?
  - ▶ Does the client have any chronic health conditions?
  - ▶ Is the client considered at-risk per CDC guidelines?
- ▶ Reach out to FDESET for updated case law

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### Achieving Release During COVID-19

- ▶ Gather Medical Records- IMPORTANT
- ▶ If there is a PSR, review it for documented medical conditions
- ▶ Consider testimony or affidavit from family members about client's health conditions/treatment/medications

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### Achieving Release During COVID-19

- ▶ Have a release plan
- ▶ Where is your client going to live?
- ▶ Are they practicing CDC recommendations there?
  - ▶ Masks, social distancing, etc.
- ▶ Contrast conditions of release plan vs in-custody

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### Achieving Release During COVID-19

- ▶ How can we show what is going on in detention centers?
- ▶ Affidavit from client about conditions?
- ▶ Cross-examine Government witnesses about compliance with CDC guidelines?
- ▶ Reach out to FDSET about updated information from particular facility

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### QUESTIONS?

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