

Why Pretrial Release Really Matters

In any criminal case, there are a few “hinge” moments that determine whether there will be a trial and, trial or not, whether the sentence the court imposes will, in relative terms, be shorter or longer.

Whether there will be a trial depends on what happened after an agent either recites the Miranda warnings, or causes consent or other warrantless recording to occur, or a District Judge issues a Title III order. Defendants who have themselves, wittingly or not, presented the government with all the testimony it needs to convict rarely risk making things worse by standing trial. The *de facto* waiver of privilege against self-incrimination leads directly and unavoidably to the *de jure* waiver of the right to trial during the plea colloquy.

The hinge moment that most affects the length of sentence occurs when a Magistrate Judge decides whether to release or detain the defendant. Except for the District Judge’s decision at sentencing, no decision in any criminal case is more important or consequential. This is so for several reasons: principally this is so because a defendant who shows the District Judge that a different person is before the court than the person who first appeared before the Magistrate Judge has persuasive proof to present in mitigation, not just professed repentance and vague assurance that he’s learned his lesson. This opportunity is far more often available in federal than in state criminal cases.

Many attributes distinguish federal from state prosecutions and proceedings. None, though, is more substantive and significant than the length of time from initial appearance to sentencing. In federal court, the minimum period from start to finish is rarely less than six months. Indeed, such a relatively short gap is fairly unusual and typically occurs in relatively minor, single-defendant cases, such as bank embezzlement or postal thefts. Even in many such straightforward cases—and others like them, such as felons in possession of a firearm—often nine months or more goes by from initial appearance to final disposition. With the fairly commonplace multi-count, multi-defendant conspiracies involving drug, white collar, and, more recently, terrorism charges, eighteen months or more pass from charge to sentencing.

The number of charges and defendants, though a significant factor, is not the sole determinant of how long a case is likely to last. Before a grand jury returns the indictment in the big case, federal agents—often from more than one agency and often with state counterparts—

will have, with the assistance of federal prosecutors, conducted a wide-ranging and intense investigation. Their efforts will have accumulated large quantities of evidence by means, *inter alia*, of searches, grand jury and other subpoenas, internet searches, electronic surveillance, interviews, and informants. While the government amassed and analyzed all that evidence before indictment, the challenge for defense counsel after arraignment to do likewise can be as staggering as it will be time-consuming. Counsel must not only look ahead on the client’s behalf, they must also look sideways, keeping a wary and attentive eye on the client’s co-defendants. Pretrial motion practice is likely to be correspondingly multi-faceted, work-intensive, and time-consuming for all, including the judge.

Though in some cases, guilty plea agreements begin rolling in quickly and extensively, more often defense counsel are duty-bound to sift through the discovery and obtain rulings on pretrial motions before beginning to approach the prosecutor or focus on preparing for trial. Timing is everything; fail to learn or challenge enough, and your client may be worse off than if you knew or pushed back less; wait too long, and the price of the ticket to get on board may be much higher. No matter when they get underway or who takes the initiative, plea negotiations themselves can be time-intensive and another source of delay.

In any event, a dozen or more months may pass before counsel—and the court—have any real idea about the likelihood of trial. Courts usually want to know sooner, rather than later, whether they need to earmark weeks in anticipation of trial. Even where many or most defendants have pled in the large case, the government may want sentencings postponed to keep its Damoclean Sword suspended over its turncoat defendant witnesses. The court itself may not want to string sentencing hearings out over several months, as doing so impairs its ability to avoid disparities within the overall defendant roster. Of course, some defendants go to trial, even in federal cases, and even when faced with overwhelming odds. The time to prepare for and to conduct a trial adds its own measure of delay between charge and final outcome.

All that to one side, perhaps the most unique delay-producing aspect of a federal prosecution in comparison with state proceedings relates to the presentence report: specifically, the time taken, following a guilty plea or verdict, to prepare, disclose, review, object to, revise, make final disclosure of, review, and, perhaps, hold



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presentencing hearings on the presentence report. Fourteen weeks—three to four months—to prepare a federal presentence report is probably the norm in many cases, big or small.

The point of all this, and why I describe it in such detail, is to underscore and highlight an obvious, but all too often overlooked, opportunity. Whether sentencing occurs within six months or twenty-four months after a case begins, federal defendants, if not detained, have the opportunity to stand on the best, most upright footing of all when before the judge for sentencing. Most simply put, any defendant, regardless of charged crime, criminal history, or guideline range, who can show a court, often for the first time in his or her life, that he or she can be law-abiding offers the court the best of all possible records and reasons to consider leniency.

Courts with high detention rates fail to give the defendants who need it most the opportunity to live by, and to show the sentencing judge—and even the government—that they can (and more likely will) live by, society's rules and not, as they have in the past, their own outlaw rules. Every time a defendant is given that chance and succeeds, the community, not just the defendant and those dependent on him, benefits. Where not truly needed to ensure appearance and protect the community, pretrial detention withholds this opportunity and its benefits.

The Federal Bail Reform Act, as well as Pretrial Services Agencies and Officers, provide the framework and structure that enable federal Magistrate Judges and District Judges to make those benefits possible.

As a starting point, release, except where Congress unfortunately has mandated a contrary presumption, is the statutory and constitutional default. Undergirding that default, the Bail Reform Act provides options to reasonably ensure appearance and protect the community. Third-party custody can keep eyes on and electronic monitoring can keep track of the defendant. Those eyes will be especially watchful where the court, if it feels a need for additional security to assure appearance and community safety, accepts one or more property bonds. Property bonds typically come from those who know the defendant better than any state or federal law enforcement officer, prosecutor, defense attorney, or judge. The amount of equity is immaterial. For just about anyone, the home is his or her most valued, if not particularly valuable possession, regardless of the amount of equity. The act of putting a home at risk is an act of trust that deserves heed and, in almost every instance, acceptance. Those who post their homes have the most at stake if the defendant flees or violates a major condition of release.

Resources such as drug testing and treatment/counseling, alcoholism treatment, mental health and behavioral treatment, especially where a defendant has a history of domestic or other personal violence, can also help to protect the community from crime and harm. Where greater assurance seems necessary or useful, a court can condition release on home confinement with electronic monitoring

and impose restrictions on personal, telephonic, or digital contact with designated individuals and groups, not just victims and witnesses. In some communities, courts can use halfway houses as a midway point between pretrial detention and less confining restrictions.

Even when made, the decision to detain need not be immutable. Conditions not available, or apparently not available, earlier may become available later. It is incumbent on defense counsel and Pretrial Officers alike to learn whether that is so and, if so, to request a detention review hearing.

Mass incarceration is a consequence, in part, of mass, and often unnecessary, pretrial detention. Success on release means less prison time and may mean no prison time at all. Why, then, are detention rates in so many Districts so high, while in others they are significantly lower? The causes, I believe, are many. And many—Judges, Pretrial Service Officers, and defense counsel—may each have his or her own share of the responsibility for unnecessary detention and its impact on mass incarceration.

A bedrock reason, regardless of who and what else may be responsible for high detention rates, is that federal defendants, especially felons in possession and participants in drug conspiracies, often have records of multiple, often violent, felonies. The charged crimes, especially when combined with bad criminal records, create breathtakingly high tentative guideline ranges, with or without mandatory minimum sentences as part of the guideline mix. When someone is looking at a long time in prison, looking to cross over a far horizon if released can be an irresistibly tempting prospect.

In this era of post-*Booker* judicial discretion, courts and counsel can make defendants aware that if released and if successful, the prospect of what may happen at sentencing, if it occurs, will, in all likelihood, be less bleak and daunting.

In any event, for most defendants in most drug cases, especially those at the lower levels of culpability, there is no real risk of flight. Typically, those whom a federal defender or appointed counsel serve simply don't have the wherewithal to go very far, much less do so successfully. Real flight—taking off for parts unknown—is uncommon in federal court, even among defendants with bad records and histories of failures to appear in state courts. Indeed, a record of nonappearance in state court often deserves little consideration and less concern. This is especially so where the nonappearances were in misdemeanor, but not felony, courts, in which case, federal courts considering release should disregard those nonappearances, no matter how numerous, because, realistically, they indicate nothing about risk of nonappearance in the face of federal chag.

Further, once a federal defendant learns his or her likely guideline range from the court or government at initial appearance or arraignment, or from counsel shortly thereafter, a newcomer knows there's nothing but blue chips, and a lot of them, on the table and at risk. Moreover, the defendant also knows that successfully evading the U.S.

Marshals Service, with its national presence and reach, is unlikely.

So, as great a temptation to run that the tentative guideline range may instill, there are very pragmatic counterbalancing considerations that deflect and diminish that temptation. All involved in the detention process, especially Pretrial Service Officers and Judges, should take a clear-eyed view when assessing risk of flight. Often, even where the defendant is confronted with a prospective sentence of ten years or even substantially more, the risk of flight is, realistically, less than it may often seem. Ties to the community, especially where responsible persons are willing to act as third-party custodians and/or put their homes at risk, are better predictors of appearance than the apparent guideline range and past no-shows in lower courts.

Admittedly, this may not be so where the defendant, as many in white-collar prosecutions, has the means to flee. But in the drug conspiracies that fill our dockets, risk of flight by those with those kinds of ties is, in fact, slight.

There is, though, no gainsaying the need to protect the community. A record of violence, especially where firearms were a factor, cannot casually be overlooked. But even in such cases, conditions of release, particularly home confinement and restrictions on personal, phone, and digital contact, can often provide the reasonable assurance necessary to justify release.

Reducing detention rates is a threefold obligation that involves, at least in some instances, less risk-averseness and greater acknowledgement of the impact of mass detention on mass incarceration.

Change begins with judges more open to releasing defendants whose past records are, in a word, scary and whose tentative guideline ranges are, in a word, mind-boggling. They should keep in mind the opportunity that pretrial release under appropriate conditions and effective oversight offers to both the defendant and the Court. Moderation of risk-averseness is not only useful, but essential. This is especially so when the government appeals a Magistrate Judge's release decision.

It is particularly important for newly appointed Magistrate Judges to be alert to and implement alternatives to detention. This is so not only for those whose prior experience has been in a civil practice or on the state court bench, but also for those who come from the U.S. Attorney's Office. As I try to emphasize, the delay between charge and sentencing is long, often quite long, and the opportunities that such delay provides should always be kept in mind whenever detention/release is under consideration.

Judges should also take care to encourage Pretrial Service Officers to look past prior nonappearances when assessing the real risk of flight, and, more importantly, to view seeking out and proposing alternatives to detention as part of their job for the court. Most importantly, District Judges should stand behind Magistrate Judges and Magistrate Judges behind Pretrial Officers if something has gone wrong.

Admittedly, new Magistrate Judges—and, even more so, new Pretrial Officers—may, upon entering a courthouse with high detention rates, sense a need to be especially cautious, and err, if at all in doubt, on the side of detention. Expecting the newcomer independently to introduce a different mindset may not be realistic. It is, rather, incumbent on the Officers' Supervisor, on the one hand, and, on the other, District Judges—to the extent they are willing to acknowledge the need and usefulness of alternatives to detention—to work to overcome any such mindset.

In the end, it is the Judges, both Magistrate and District, who can make release, rather than detention, the norm. Unless they do, detention rates, where they are excessive, will not change. Nor, in the end, will mass incarceration.

Changing detention rates is not just for Pretrial Service Officers and Agencies and Magistrate and District Judges. Defense counsel also have an important responsibility, one which runs primarily in favor of the client. Often, however, defense counsel may assume that there's nothing he or she can do after an initial detention decision. Perhaps the lawyer, due to infrequency of appointment, does not know what alternatives the Pretrial Officer and Magistrate Judge might find acceptable, even with reservations. Quite possibly, defense counsel may assume, without trying, that an appeal to the District Judge would be fruitless, and an appeal to the Circuit, the most foolish of fool's errands.

If defense counsel has those assumptions, even if superficially plausible, on walking out of a detention hearing, he or she is overlooking at least two crucial things—and in so doing, is not providing fully competent representation when it is most needed and potentially useful.

The first of those things is the theme of this brief essay: *the decision to release or detain is the most important and consequential decision in any federal criminal case except the decision at sentencing—which the release/detention decision directly affects.* There is nothing more important that defense counsel can do for his or her client than securing and helping to ensure the success of pretrial release. No motion, no brief, no argument, no plea bargain, no performance at trial (except one ending with a not guilty verdict), no last-ditch plea in mitigation—none of those, no matter how brilliant or masterful—can do as much to benefit the client. Six months of good behavior is worth pointing to at sentencing. Twelve months is better. Eighteen or more months is best of all. At some point, even the most guideline-driven District Judge will vary downward. Others, whose default impulse may be to vary in that direction in any event, will be encouraged to do so to an even greater extent.

As a practical matter, there are impediments that counsel must take on in the essential effort to create the opportunity that pretrial release gives to the defendant.

First, the government will have sought and obtained initial detention at initial appearance. It may not be possible before the detention hearing itself for either counsel or the Pretrial Officer, or both jointly, to obtain reasonable alternatives to propose to the Magistrate Judge. Where that has been so and the Magistrate Judge has entered a detention

order, counsel cannot accept that as the end station. Indeed, it is the starting point.

Even where counsel has the good fortune to be in a court with a Pretrial Services Agency and Officers committed to taking initiative in seeking out and securing alternatives, that does not mean that defense counsel can leave the task to the Agency and Officers alone. In some courts, the task of finding, vetting, and presenting alternatives may fall primarily, even exclusively, on the attorney's shoulders. At the very least, it's up to counsel to get things underway and thereafter follow up diligently. The attorney, after all, has the most direct and potentially most frequent contact with the defendant and, possibly, the defendant's family. The family, in most cases, is the best place to begin seeking out possible custodians and suitable living places and conditions, as well as a person to post property or otherwise help ensure appearance and protect the public. Unless counsel himself or herself has well-founded concerns about the client—and, no doubt, there are clients who justify such concerns—working, when possible, to secure pretrial release remains of paramount importance.

Where the hearing results in a detention order, counsel should, if plausible grounds exist, appeal the denial of release to the District Judge. Such appeals appear to be rare events in many district courts. They should not be; counsel should be just as quick and determined where they believe release has been wrongly denied under the Bail Reform Act as they are to appeal any other apparent error.

The best approach is not to appeal on the record before the Magistrate Judge, which the District Judge may review deferentially, but to have a hearing *de novo*. Among other benefits, counsel can have proposed third-party custodians, owners who will post their property, and others appear. Under no circumstances should counsel assume that an appeal to the District Judge will be a waste of time. That attitude discounts the Judge's integrity and short-changes the defendant.

When successful, it is equally incumbent on counsel to make clear to the client just how much is at stake, and not just in terms of being certain to appear. For better or for worse, pretrial release orders contain many standard conditions, and the Officer may push for, or the court may *sua sponte* impose, others. Counsel should make clear that each and every condition is a court order; none is optional. On the other hand, counsel should encourage the defendant to reach out to the Pretrial Officer and even counsel the defendant himself or herself if problems arise. Telling the Officer and the court about problems beforehand is always better than doing so afterward.

The defendant should understand, as counsel no doubt will make clear, that failing to take advantage of the opportunities that pretrial release presents will have very unfortunate consequences, even if the defendant meets all court dates and avoids serious entanglement with the law. In imposing conditions of release, the court is setting rules of conduct; it's up to the defendant to show the court that he or she can comply with all the rules, not just the ones that may appear to matter most. For many District Judges, there is no such thing as a "technical" violation of a pretrial release order.

In conclusion, it bears repeating: Mass detention creates mass incarceration. There is no better way to begin to reduce mass incarceration than, whenever and however possible, to avoid pretrial detention. That job most often falls on the defendant's attorney. No one else is as duty-bound to do all that he or she can to secure the best possible outcome for the defendant. Not all defendants will take advantage of what release offers, and they will be worse off when it is time for them to be sentenced. But for those defendants who take advantage of the opportunity, as most often do (even those who appear most unlikely to do so), they will be better off than if they had remained in detention. Their community and society as a whole will be better off as well.