No. 21-

IN THE

Supreme Court of the United States

LUIS ALONSO SAM-PENA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Bail Reform Act of 1984, a judicial officer may order pretrial detention only if, after a hearing, the judicial officer finds that no condition or combination of conditions would reasonably assure the presence of the defendant and the safety of any person or the community. 18 U.S.C. § 3142(e)(1). The Act authorizes detention only for certain of the "most serious" charges and certain other "serious" cases, and in that way carefully limits the circumstances in which pretrial detention is authorized. *See United States v. Salerno*, 481 U.S. 739, 747 (1987) (citing 18 U.S.C. § 3142(f)). This case presents two questions:

1. May a judicial officer order an accused person detained pending trial without determining that the person falls into one of the "serious" cases in which Congress has authorized a detention hearing?

2. If so, may a judicial officer order that person detained without addressing whether release conditions might mitigate any flight risk or danger, particularly when Pretrial Services has interviewed the defendant and recommended release with conditions?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover of this document.

RELATED PROCEEDINGS

- *United States v. Luis Alonso Sam-Pena*, No. 21-10327 (9th Cir. Dec. 13, 2021)
- *United States v. Luis Alonso Sam-Pena*, No. 2:21-cr-888-PHX-GMS (D. Ariz. pending)

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Petitioner Luis Sam-Pena respectfully asks the Court to review a decision of the United States Court of Appeals for the Ninth Circuit that allowed a district court to deviate from the procedure described in the Bail Reform Act of 1984 for ordering pretrial detention. The Ninth Circuit routinely blesses such deviations, and this Court's intervention will correct that court's repeated error.

PROCEEDINGS BELOW

The court of appeals's order affirming the district court's detention order is unreported, but reproduced in the appendix at 1a. The district court's detention order is likewise unreported, but reproduced in the appendix at 3a.

STATEMENT OF JURISDICTION

The court of appeals entered its order affirming the detention order on December 13, 2021. (App. 1a) The court of appeals denied a timely filed petition for rehearing and rehearing en banc on March 8, 2022. (App. 8a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved are reproduced in the appendix.

STATEMENT OF THE CASE

According to the criminal complaint, in January of 2021, Phoenix police "encountered" Mr. Sam at a traffic accident. Eight months later, agents of the Bureau of Immigration and Customs Enforcement arrested him on suspicion of being "illegally present in the United States."

On September 2, 2021, an ICE deportation officer filed a complaint that accused Mr. Sam of illegal reentry following deportation, in violation of 8 U.S.C. § 1326(a). At his initial appearance the next day, Mr. Sam was temporarily detained pending a hearing on the issue of pretrial detention. *See* 18 U.S.C. § 3142(d)(1)(B).

Congress has given U.S. Pretrial Services the responsibility to "collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense." 18 U.S.C. § 3154(1). Along with the report, Pretrial Services may, "where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release." *Id.* Pretrial Services is "supervised by a chief pretrial services officer appointed by the district court." 18 U.S.C. § 3152(c). Pretrial Services is thus an "arm of the court," not an "investigative arm for the prosecution," and its reports are prepared "exclusively at the discretion of and for the benefit of the court." *Tripati v. INS*, 784 F.2d 345, 348 (10th Cir. 1986).

Pretrial Services in the District of Arizona interviewed Mr. Sam in advance of the detention hearing. It reported that Mr. Sam moved to Phoenix in 2004, and lives with his girlfriend of eight years and their six children in a home they have rented for four years. Mr. Sam makes a living fixing and reselling used cars. He has a checking account with Wells Fargo. His girlfriend is also undocumented; some of the children are U.S. citizens; some are not. He has a sibling who lives in Douglas, Arizona; his parents and other siblings live in Mexico. He owns two vacant lots in the Mexican state of Sinaloa. According to the report, Mr. Sam was sentenced in 2009 to five years in prison for kidnapping, in violation of Ariz. Rev. Stat. § 13-1304(A)(1),

and a week after sentencing he was removed to Mexico. His girlfriend reported no mental health issues on Mr. Sam's part. Mr. Sam reported a single instance of using marijuana when he was 16 years old.

After interviewing Mr. Sam, Pretrial Services concluded that he posed a flight risk and a danger under the Bail Reform Act. In the agency's expert opinion, however, those risks could be adequately mitigated during pretrial release. It recommended release conditions to include reporting regularly to Pretrial Services, communicating regularly with Pretrial Services and with defense counsel, providing a DNA sample, limiting travel outside of Arizona without court permission, prohibiting him from possessing a firearm or a controlled substance, and participating in mental health treatment.

At the detention hearing, the government asked the judge to order pretrial detention, notwithstanding the recommendation of Pretrial Services. The government asked for detention based solely on its contention that Mr. Sam posed a flight risk. The government did not seek detention based on Mr. Sam's dangerousness, despite the conclusion of Pretrial Services that he did pose a danger. Mr. Sam is not accused of any dangerous crime that might allow the government to seek detention, *see* 18 U.S.C. § 3142(f)(1)(A)–(E), and there is no evidence that he might obstruct justice or tamper with witnesses, *see* § 3142(f)(2)(B). Thus the only available basis for holding a detention hearing at all in this case was that there was a "serious risk" that Mr. Sam would "flee" before trial. 18 U.S.C. § 3142(f)(2)(A).

The magistrate judge agreed with the government that Mr. Sam was a flight risk. He concluded that the "evidence and the risk is simply too strong," and ordered

pretrial detention. According to the magistrate judge, the "ties" suggested "on balance and certainly by a preponderance of the evidence" that "Mr. Sam would be a flight risk."

The magistrate judge did not discuss whether holding a detention hearing in the first instance was proper under 18 U.S.C. § 3142(f)(2)(A), which allows for a detention hearing in cases where the defendant poses a "serious risk" of flight. Nor did the magistrate judge discuss whether any condition or combination of conditions, such as those recommended by Pretrial Services, would adequately ameliorate flight risk. *See* 18 U.S.C. § 3142(e)(1).

Mr. Sam sought review of the detention order before a district judge. *See* 18 U.S.C. § 3145(b). He argued that the magistrate judge's detention order should be set aside because § 3142(f) did not authorize a detention hearing in the first instance where there was no evidence that Mr. Sam posed a "serious risk" of flight under § 3142(f)(2)(A). He also argued that conditions, such as those recommended by Pretrial Services, would adequately mitigate any flight risk.

The district judge held a hearing on Mr. Sam's request for review of the detention order. He then affirmed the detention decision in a written order. The district judge did not address Mr. Sam's argument that a detention hearing was not authorized because there was no evidence that Mr. Sam posed a "serious risk" of flight under § 3142(f)(2)(A). Even so, the judge found that Mr. Sam's criminal history, his prior removal, and the potential 3-year sentence that he faced suggested that Mr. Sam might pose a flight risk. He concluded that, although Mr. Sam has "strong ties to his community in Phoenix, it cannot be said that those ties are necessarily stable given his

family's immigration status, and the possibility of prison and near-certain removal." (App. 6a) He thus concluded that Mr. Sam was a flight risk, and that "no condition or combination of conditions is likely to reasonably assure the appearance" of Mr. Sam as required. (App. 7a)

Mr. Sam appealed the district judge's order to the court of appeals. *See* 18 U.S.C. § 3145(c); Fed. R. App. P. 9(a). He again argued that the district court was not authorized to convene a detention hearing because there was no evidence—and thus no valid finding—that Mr. Sam posed a "serious risk" of flight under § 3142(f)(2)(A). He also argued that the district court improperly balanced the factors that guide the detention decision, *see* 18 U.S.C. § 3142(g), and that it wrongly failed to consider whether conditions would adequately mitigate the risk of flight.

A motions panel of the court of appeals affirmed the detention order. The panel ruled that the district court "correctly found that the government had met its burden of showing, by a preponderance of the evidence, that no condition or combination of conditions will reasonably assure the defendant's appearance, and that appellant therefore poses a flight risk." (App. 2a (quoting 18 U.S.C. § 3142(e) and citing *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985))) It did not discuss Mr. Sam's argument that the district court was not authorized to convene a detention hearing in the first place because there was not even an implicit finding of a "serious risk" of flight under § 3142(f)(2)(A). Mr. Sam pointed out this omission in a petition for rehearing en banc, which the panel denied on behalf of the court. (App. 8a)

REASONS FOR GRANTING THE WRIT

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Thirty-five years ago, this Court upheld the Bail Reform Act of 1984 because the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes." *Id.* at 747 (citing 18 U.S.C. § 3142(f)). Yet here, the court of appeals discarded the Act's careful limitation on pretrial detention, and approved a district court decision that ordered pretrial detention of a person for whom neither it nor the district court found to present a "serious risk" of flight. *Cf.* 18 U.S.C. § 3142(f)(2)(A). In so doing, the court of appeals inverted the statutory procedure for making pretrial detention decisions, and thus improperly discarded Congress's judgment that only "serious" cases warrant pretrial detention. The court of appeals's ruling calls out for this Court's review.

1. All courts—except the Ninth Circuit—agree that under the Bail Reform Act of 1984, pretrial detention is authorized only in limited classes of "serious" cases.

When a person is charged with a federal crime, he must be brought before a judicial officer "without unnecessary delay." Fed. R. Crim. P. 5(a)(1)(A). That judicial officer may order that person detained pending trial, *see* 18 U.S.C. § 3142(a)(4), and the procedures are described in 18 U.S.C. § 3142(e). "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." 18 U.S.C. § 3142(e)(1).

The pretrial detention decision thus proceeds in two stages. The first stage is "a hearing pursuant to the provisions of subsection (f)" of § 3142, which may take place only in discrete and limited circumstances. If § 3142(f) does not authorize a detention hearing, there can be no detention under § 3142(e). The second stage is a finding, based on the evidence at that hearing, 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." 18 U.S.C. § 3142(e)(1). The Act sets forth burdens of proof and presumptions that govern the second stage of the detention decision, *see* § 3142(e)(2), (3), as well as factors to consider at the second stage, *see* § 3142(g).

The first stage of the detention decision authorizes a hearing in seven categories[1] of cases. Five of these categories require a motion from the government, and all of those involve certain of the "most serious" crimes, *see Salerno*, 481 U.S. at 747:

> (A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

[1] As originally enacted, the Act described six categories of cases in which a detention hearing was authorized. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1837, 1979 (codifying 18 U.S.C. § 3142(f)(1)(A)–(D), (f)(2)(A), (B)). Congress added the seventh in 2006. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 216(2)(B), 120 Stat. 587, 617 (adding 18 U.S.C. § 3142(f)(1)(E)).

(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 chapter 705 of title 46;

(D) any felony if such 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 a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code.

18 U.S.C. § 3142(f)(1). (The term "crime of violence" is defined separately in 18 U.S.C. § 3156(a)(4).)

Two remaining categories do not necessarily require a motion from the government; in these situations the judicial officer may convene a detention hearing on his or her own initiative:

(A) cases in which there is a "serious risk" that the person accused "will flee;" or

(B) cases in which there is a "serious risk" that the person accused "will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror."

18 U.S.C. § 3142(f)(2).

Mr. Sam is charged with illegal reentry, which is not one of the "most serious" of crimes that Congress included in the list of offenses that allow the government to seek a detention hearing under § 3142(f)(1). There was no evidence that he would attempt to tamper with witnesses or obstruct justice within the meaning of § 3142(f)(2)(B). Thus a detention hearing was authorized in this case, if at all, only if there was a "serious risk" that Mr. Sam would "flee."

Other courts outside the Ninth Circuit recognize the two-stage detention framework of the Bail Reform Act. For instance, the D.C. Circuit has observed that "detention is not an option" in the absence of "one of six [now, seven[2]] circumstances triggering a detention hearing." *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999). Likewise, the Fifth Circuit has noted that detention is available "only in a case that involves one of the six [now, seven] circumstances listed in" § 3142(f). *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992). The Second Circuit has described the very same "two-step inquiry" for pretrial detention that Mr. Sam reads in the Act. *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988) (per curiam). The First Circuit has said that the two-stage detention framework is "clear" from the "structure of the statute and its legislative history." *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988). "A request to detain

[2] *See supra* note 1.

a defendant pending trial under § 3142(e) triggers a two-step inquiry." *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1124 (N.D. Iowa 2018) (citing *United States v. Delgado*, 985 F. Supp. 2d 895, 897 (N.D. Iowa 2013)). By 2005, one district court said that it was "uniformly accepted" that "there are only six [now, seven] instances that permit a court to convene a detention hearing." *United States v. Giordano*, 370 F. Supp. 2d 1256, 1260 (S.D. Fla. 2005); *accord United States v. Powers*, 318 F. Supp. 2d 339, 341 (W.D. Va. 2004).

The Ninth Circuit, however, has not expressly endorsed this framework. As Mr. Sam will show, it instead routinely collapses the two-stage detention framework into a single inquiry that allows the second stage to swallow the first.

2. The court of appeals authorized pretrial detention in this case without requiring any judicial officer to determine that this is among the "most serious" of cases in which Congress authorized pretrial detention.

But this apparently "uniform[] accept[ance]" of the two-stage detention framework has not reached the Ninth Circuit. To be sure, that court has said it would eschew an "interpretation of the Act" that would make § 3142(f) "meaningless." *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003) (per curiam). At the same time, however, the only caselaw it relied on to affirm the detention order here, *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985), does not focus on the serious-risk-of-fleeing category of persons for whom Congress authorized pretrial detention in § 3142(f)(2)(A). *Motamedi* instead focuses on the government's burden of proving "that no condition or combination of conditions will reasonably assure" the defendant's attendance as required. 767 F.2d

at 1407. The upshot is that the Ninth Circuit upheld a detention order without any meaningful review of the question whether the defendant presented a "serious risk" that he would "flee," in contravention of the statutory framework. And the Ninth Circuit regularly avoids conducting that meaningful review in detention appeals.

In upholding the detention order here, the court of appeals made two grave errors. First, it conflated the two stages of the detention decision, and allowed the district court's conclusion that release conditions would not reasonably assure Mr. Sam's attendance at future court proceedings to substitute for the separate question whether there was a "serious risk" that he would "flee." Second, by finding no error in the district court's reasoning, the court of appeals allowed the district court's tallying of Mr. Sam's "ties" to the Phoenix area and to Mexico to substitute for a finding that he would voluntarily flee the jurisdiction. The net result is that the court of appeals expanded the category of cases in which a detention hearing is authorized beyond the careful limitation that Congress established in the Bail Reform Act. Along the way, the court of appeals disregarded its own dictum that § 3142(f) is not "meaningless."

A. The court of appeals's conclusion that Mr. Sam is a flight risk because release conditions would not reasonably assure his attendance at future court proceedings erases one of Congress's express limitations on pretrial detention.

The court of appeals held that because the government had shown by a preponderance of the evidence that no release conditions would mitigate Mr. Sam's risk of flight, he was a flight risk. (App. 2a) This holding placed the cart before the horse. Under the careful limitation on pretrial

detention established by the Bail Reform Act, the question whether release conditions will mitigate an accused person's flight risk is supposed to *follow*, not *precede*, the question whether that person presents a "serious risk" that he will "flee." The plain text of the statute requires that the inquiry be conducted in that order. It also makes sense: whether release conditions may reasonably prevent flight is of no moment if the defendant does not present a serious risk of doing so.

It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (quoting *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.)). Every "word and every provision" of a statute "is to be given effect," and none should be "given an interpretation that causes it to duplicate another provision or to have no consequence." *Id.* (quoting Antonin Scalia & Bryan Garner, *Reading Law*, at 174 (2012)). This Court usually gives effect, "if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Each "word Congress uses is there for a reason." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). The court's task is to avoid "an interpretation that renders" words in a statute "pointless." Scalia & Garner, *supra*, at 176.

In affirming the detention decision here, the court of appeals flouted this cardinal rule. By inverting the statutory procedure for making a pretrial detention decision, the court of appeals relieved the district court of having to decide whether there was a "serious risk" that Mr. Sam would "flee," § 3142(f)(2)(A), before it concluded that release conditions would not reasonably mitigate that risk, § 3142(e)(1). Under the court of appeals's logic, it would have affirmed the detention decision based solely

on the district court's conclusion that no condition or combination of conditions would have mitigated even a vanishingly small risk that the defendant would flee. And so under the court of appeals's reading of the statute, Congress's limiting of detention hearings—and hence of pretrial detention—to cases in which there is a "serious risk" that the defendant will "flee" became entirely pointless.

The court of appeals's inverted methodology bypasses one of Congress's express limitations on pretrial detention. Saying that a person is a flight risk—not even a "serious" flight risk—because a preponderance of the evidence shows that release conditions would not reasonably mitigate that risk simply jettisons Congress's express limitation on pretrial detention to persons who pose a "serious" risk of absconding before trial. This Court has stressed that it is not "free to rewrite the statute to the Government's liking." *National Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 630 (2018). Likewise, the court of appeals here was not free to do so either.

The court of appeals's decision here thus undermines the careful limitation on pretrial detention that Congress established in the Bail Reform Act. Pretrial detention is constitutional because it is regulatory in nature, rather than punitive. *See United States v. Salerno*, 481 U.S. 739, 747 (1987). It is regulatory because Congress authorized pretrial detention "as a potential solution to a pressing societal problem"—"preventing danger to the community." *Id.* The Bail Reform Act likewise recognizes the government's "substantial interest in ensuring that persons accused of crimes are available for trials," and that "confinement of such persons pending trial is a legitimate means of furthering that interest." *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). However, absent a

"serious risk" that an accused person will "flee" before trial, there is no statutory or constitutional justification in overriding that person's "strong interest in liberty" and jailing him. *Salerno*, 481 U.S. at 750. Congress recognized as much when it authorized a detention hearing—the statutory prerequisite for pretrial detention—only in cases where the accused person presents a "serious risk" of fleeing.

The district court refused to consider whether Mr. Sam posed a "serious risk" of flight, and the court of appeals here blessed that refusal. This Court should intervene to correct this serious and recurring error in Ninth Circuit law and practice.

B. Tallying up a person's "ties" to a particular place is not the same as assessing whether that person is likely to flee voluntarily, and says nothing about whether there is a "serious risk" that that person will flee.

The crux of the district court's assessment that Mr. Sam posed a flight risk that could not be mitigated through release conditions was simple scorekeeping. The district court counted up Mr. Sam's "ties" to Mexico and his "ties" to Phoenix. It discounted his "ties" to Phoenix because some members of his immediate family were undocumented. Having put its thumb on the scale to connect Mr. Sam more to more distant relatives in Mexico than his immediate family in Phoenix, the district court concluded that whatever "flight risk" these "ties" gave rise to could not be mitigated through release conditions. The court of appeals implicitly blessed this reasoning by calling Mr. Sam a "flight risk" based on this scorekeeping.

Before turning to the district court's scorekeeping, it is necessary to address a central fallacy in the district court's detention order. As the district judge did here

(App. 5a–6a), courts frequently point to the "seriousness of the offense and the weight of the evidence" as providing "incentives to flee the jurisdiction or otherwise to avoid court." Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 704 (2018). But "decades of bail studies" have shown that there is no correlation between "offense seriousness" and "flight risk." *Id.* at 705. Defendants who are "charged with more serious offenses like murder or rape do not, in fact, fail to appear at higher rates than those with lesser charges." *Id.* Some courts accordingly require "more than evidence of the commission of a serious crime and the fact of a potentially long sentence to support a finding of risk of flight." *United States v. Friedman*, 837 F.2d 48, 50 (2d Cir. 1988) (per curiam). The district judge here looked to more evidence than that as well. The district judge also relied on his tallying of Mr. Sam's "ties" to Phoenix and to Mexico to support the detention order. But this reliance is insufficient in light of the lack of correlation between the seriousness of the crime and the potential flight risk.

The category of pretrial detention described in § 3142(f)(2)(A) limits a judge's authority to order detention only to those people who pose a "serious risk" that they will "flee." By focusing judges on a "serious risk," the statute calls for a focus on "those defendants who are *likely* to flee and not simply those who are *able* to flee." Gouldin, *supra*, at 707.

As the court of appeals has recognized elsewhere, the "risk of nonappearance" referenced in the Bail Reform Act "must involve an element of volition." *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015); *see also United States v. Ailon-Ailon*, 875 F.3d 1334, 1339 (10th Cir. 2017) (per curiam) (holding that the "risk that a defendant will flee" described in § 3142(f)(2) "does not include the risk that ICE will involuntarily remove the

defendant"); *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1125 (N.D. Iowa 2018) (observing that a "number of courts have held that the risk of flight that triggers the option of detention must be a risk of *volitional* flight"). Just because Mr. Sam's "ties" to Mexico might "suggest opportunities for flight, they hardly establish any inclination on" his part to flee voluntarily. *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1329 (1978) (Brennan, J., in chambers). Access to money coupled with "personal contact with fugitives from justice" suggest only that "*if* [a person] wished to flee, she might be able to do so successfully," not that she "would be *likely* to flee or go underground." *Bacon v. United States*, 449 F.2d 933, 944 (9th Cir. 1971). Evidence of an actual inclination to flee is required. *See United States v. El-Hage*, 213 F.3d 74, 80 (2d Cir. 2000) (evidence of "access to false documents" and an "extensive history of travel and residence in other countries" supported inclination to flee).

A holistic examination of flight risk would look to factors that help a judge distinguish between a defendant's mere *ability* to flee and the actual *likelihood* that he will do so. One scholar has observed that when courts look to a defendant's "ties" in assessing risk of flight, they consider three things—the accused person's "family and financial circumstances," his "travel history," and "the jurisdiction's extradition practices." Gouldin, *supra*, at 708–09 (citing Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act & the Importance of Bail from Defense Attorneys' Perspectives*, 32 Pace L. Rev. 800, 829–33 (2012)). But the district judge here did not make a holistic assessment of flight risk that weighed these three factors. The judge simply discounted Mr. Sam's ties to his immediate family in Phoenix because of his girlfriend's and the children's immigration status, and did not

examine either Mr. Sam's travel history or what steps the U.S. Marshal in Arizona might take to have Mr. Sam extradited from Mexico if in fact he did flee to his family there. The judge thus did not adequately examine whether there was a "serious risk" that Mr. Sam might flee before trial.

Moreover, the district court's flight-risk conclusion overlooks Mr. Sam's modest means. Like most criminal defendants, Mr. Sam is indigent and thus eligible for appointed counsel; indeed, the magistrate judge appointed counsel without the benefit of the usual financial affidavit.[3] So while impecunious defendants like Mr. Sam "may pose risks of nonappearance, their socioeconomic status makes it unlikely that they could flee from the jurisdiction. Successful flight from the jurisdiction suggests access to networks and resources that are not part of the equation for the vast majority of nonappearing defendants." Gouldin, *supra*, at 710.

By limiting pretrial detention to persons who pose a "serious risk" that they will "flee," 18 U.S.C. § 3142(f)(2)(A), Congress directed judicial officers tasked with making pretrial detention decisions to focus on that small category of defendants for whom the only means for

[3] As is standard practice in illegal-reentry cases in the District of Arizona, the magistrate judge who conducted Mr. Sam's initial appearance simply placed him under oath and asked questions intended to confirm that he is "financially unable to obtain adequate representation" in connection with the felony illegal-reentry charge, 18 U.S.C. § 3006A(a), in lieu of requiring him to submit a financial affidavit. *See* D. Ariz. Gen. Ord. 18-12, *Plan for Composition, Administration, & Management of the Panel of Private Attorneys Under the Criminal Justice Act* ¶ IV.B.2.b ("The determination of eligibility for representation under the CJA is a judicial function to be performed by the Court after making appropriate inquiries concerning the person's financial eligibility.").

assuring their appearance at future court hearings is to detain them. This requires, as one scholar has suggested, the judicial officer to distinguish between the risk of "true flight," "which includes defendants who leave the jurisdiction," and the risk of becoming a "local nonappearance," which includes both "local absconding" and "low-cost nonappearing." Gouldin, *supra*, at 725. As she emphasizes, "treating all nonappearances the same ignores the long-standing statutory and doctrinal focus on flight risk." *Id.*

C. At least some undocumented defendants pose a flight risk that is manageable with appropriate release conditions, yet the scorekeeping here did not allow for an inquiry along those lines.

Even if a person presents a "serious risk" of fleeing before trial—because they have demonstrated some actual inclination to flee rather than some mere ability to do so—the Bail Reform Act requires that person to be released if release conditions cannot "reasonably assure the appearance of the person as required." 18 U.S.C. § 3142(e)(1). The Act "does not seek ironclad guarantees, and the requirement that the conditions of release 'reasonably assure' a defendant's appearance cannot be read to require guarantees against flight." *United States v. Chen*, 820 F. Supp. 1205, 1208 (N.D. Cal. 1992). "The structure of the statute mandates every form of release be considered before detention may be imposed. That structure cannot be altered by building a 'guarantee' requirement atop the legal criterion erected to evaluate release conditions in individual cases." *United States v. Orta*, 760 F.2d 887, 892 (8th Cir. 1985). "Mere opportunity for flight is not sufficient grounds for pretrial detention." *United States v. Himler*, 797 F.2d 156, 162 (3d Cir. 1986).

Indeed, the court of appeals has recognized that "many undocumented immigrants are not unmanageable flight risks." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014) (en banc). When the Ninth Circuit held that an Arizona law that categorically denied bail to undocumented immigrants was unconstitutional, it examined the legislative record and concluded that there was "no evidence that undocumented status correlates closely with unmanageable flight risk." *Id.* at 786. Assuming that all undocumented immigrants "lack strong ties to the community and have a "home" in another country to which they can flee" "ignores those undocumented immigrants who do have strong ties to their community or do not have a home abroad." *Id.* Many "undocumented immigrants were brought here as young children and have no contacts or roots in another country." *Id.* "Many have children born in the United States and long ties to the community." *Id.* (quoting *Arizona v. United States*, 567 U.S. 387, 396 (2012)). Undocumented immigrants "are a fairly settled population." *Id.* Nearly half "have been in the country for more than 10 years, and over 17 percent of household heads are homeowners." *Id.* (quoting M. Pastor & E. Marcelli, *What's at Stake: Undocumented Californians, Immigration Reform, and Our Future Together* 9 (May 2013), available at <https://bit.ly/3KMvOUb>).

In holding Arizona's no-bail-for-undocumented-immigrants law to be unconstitutional, the Ninth Circuit stressed that an individualized inquiry about a particular person's flight risk might lead to the conclusion that his or her flight risk is not unmanageable even though he or she is undocumented. The "pertinent inquiry" respecting pretrial detention is not merely whether an "undocumented immigrant arrestee[]" presents a "flight risk," but "whether the arrestee is an *unmanageable* flight risk." *Id.* "There are a variety of methods to manage

flight risk, such as bond requirements, monitoring and reporting requirements." *Id.* Arizona's law was unconstitutional because it foreclosed the kind of individualized inquiry that the Constitution requires. *Id.* at 788 (holding that the law did not "satisfy the heightened substantive due process scrutiny" required by *United States v. Salerno*, 481 U.S. 739 (1987)).

If the Ninth Circuit is willing to tell a sovereign state that it must conduct an individualized assessment of flight risk and danger with respect to each bail determination for undocumented immigrants, it should be equally willing to ensure that the judges it directly supervises do the same. Pretrial Services conducted the statutorily-required investigation and prepared a report in which it recommended release on conditions despite the flight risk it found Mr. Sam to pose. Neither judge of the district court engaged with the recommendation in any meaningful way. So by allowing the district court's scorekeeping about Mr. Sam's "ties" to replace the individualized assessment of whether his flight risk is manageable with release conditions, the Ninth Circuit allowed a federal judge to do what it will not allow a state judge to do—dispense with the individualized assessment of suitability for pretrial release required by the Bail Reform Act and the Constitution. This Court should intervene to remind the Ninth Circuit that judges in both systems are required to make individualized pretrial detention decisions. *Cf. Lopez-Valenzuela*, 770 F.3d at 787 ("The federal criminal justice system does not categorically deny bail to undocumented immigrant arrestees.") (citing 18 U.S.C. § 3142(d)).

3. The issues presented by this petition are important and recurring.

In enacting the Bail Reform Act, Congress intended that "very few defendants will be subject to pretrial detention." *Orta*, 760 F.2d at 891. Even so, "rates of pretrial detention have actually increased over time," and in 2014 stood at "66.2 percent." J.C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, 78:1 Fed. Probation 12, 14 (Jun. 2014) (citations omitted). In fiscal year 2021, the U.S. Marshals Service spent $2.21 billion on prisoner detention (for both pretrial detainees and for individuals awaiting transport to a Bureau of Prisons facility), with an average daily population of 63,679. U.S. Marshals Service, *Fact Sheet: Prisoner Operations 2022*, at <https://bit.ly/3rqT9Dn>.

Pretrial detention "rates are at record high levels and on an upward trend for all demographic groups." Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82:2 Fed. Probation 13, 15 (Sept. 2018). In fiscal year 2021, Pretrial Services in the District of Arizona recommended pretrial detention in 76.9% of cases, and federal prosecutors asked for detention in 83.7% of cases.[4] Federal prosecutors asked for detention in 43.0% of all cases brought in the Southern District of California, 80.9% in the District of New Mexico, 91.2% in the Western District of Texas, and 88.0% in the Southern District of Texas.[5] In fiscal years 2011–2018, only 11.9% of

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[4] Admin. Ofc. of the U.S. Courts, *Caseload Statistics Data Tables*, Table H-3: U.S. District Courts—Pretrial Services Recommendations Made for Initial Pretrial Release for the 12-Month Period Ending September 30, 2021, at <https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2021.pdf>.

[5] *Id.*

all defendants charged with immigration offenses nationwide were released pending trial.[6]

Even so, a defendant's immigration status is not a factor that Congress dictated should play into the detention decision under the Bail Reform Act. *See United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015); *United States v. Motamedi*, 767 F.3d 1403, 1408 (9th Cir. 1985) (holding that, under the circumstances of the case, the factor of alienage "does not tip the balance either for or against detention"); *see also United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001) (explaining that a "defendant is not barred from [pretrial] release because he is a deportable alien"). The opportunity thus frequently arises for judicial offers all along the southwest border to conflate "ties" to another country with the voluntary decision to flee from prosecution.

Similarly, the Ninth Circuit's cart-before-the-horse reasoning relating to flight risk appears in numerous orders affirming district courts' detention decisions. Between April 2021 and March 2022, the first sentence in the first paragraph of App. 2a, or some slight variation on that sentence (while still addressing pretrial flight risk), appeared in seven such orders.[7] This Court's intervention

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[6] Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018*, at <https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf>.

[7] *United States v. Michael Dunbar*, No. 22-50020 (9th Cir. Mar. 18, 2022) (Dkt. #10); *United States v. Kimberly Rosas*, No. 22-10016 (9th Cir. Mar. 30, 2022) (Dkt. #18); *United States v. Javier Durazo-Miranda*, No. 21-50292 (9th Cir. Jan. 21, 2022) (Dkt. #6); *United States v. Lokesh Tantuwaya*, No. 21-50135 (9th Cir. Jul. 16, 2021) (Dkt. #16); *United States v. Thomas Murphy*, No. 21-30095 (9th Cir. May 26, 2021) (Dkt. #7); *United States v. Francisco Aguilar-Marquez*, No. 21-50095 (9th Cir. May 27, 2021) (Dkt. #7); *United*

would help correct the Ninth Circuit's oft-repeated legal error, and thereby focus the district courts in that circuit on the proper sequence for making a detention decision under the Bail Reform Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

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States v. George Turner, Jr., No. 21-10075 (9th Cir. Apr. 8, 2021) (Dkt. #9).

The court of appeals also uses the same language when affirming findings of dangerousness that support a pretrial detention order. *See United States v. Michael Dunbar*, No. 22-50020 (9th Cir. Mar. 18, 2022) (Dkt. #10); *United States v. Martel Nelson*, No. 21-10313 (9th Cir. Dec. 7, 2021) (Dkt. #9); *United States v. Jace Wong*, No. 21-10157 (9th Cir. Jul. 6, 2021) (Dkt. #7); *United States v. Thomas Murphy*, No. 21-30095 (9th Cir. May 26, 2021) (Dkt. #7); *United States v. Justin Miller*, No. 21-50060 (9th Cir. Apr. 15, 2021) (Dkt. #8).

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, vs. LUIS ALONSO SAM-PENA, Defendant - Appellant.	No. 21-10327 D.C. No. 2:21-cr-888-GMS District of Arizona, Phoenix ORDER

Before: O'SCANNLAIN, THOMAS, and TALLMAN, Circuit Judges.

This is an appeal from the district court's pretrial detention order. We have jurisdiction pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291.

We review the district court's factual findings concerning risk of flight under a "deferential, clearly erroneous standard." *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990). The conclusions based on such findings, however, present a mixed question of fact and law. *Id.* Thus, "the question of whether the district court's factual determinations justify the pretrial detention order is reviewed de novo." *United States v. Hir*, 517 F.3d 1081, 1086–87 (9th Cir. 2008) (citations omitted).

The district court correctly found that the government had met its burden of showing, by a preponderance of the evidence, that "no condition or combination of conditions will reasonably assure the [defendant's] appearance," 18 U.S.C. § 3142(e), and that appellant therefore poses a risk of flight. *See United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985). We therefore affirm the district courts pretrial detention order.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Luis Alonso Sam-Pena, Defendant.	No. CR-21-888-PHX-GMS ORDER

Pending before the Court is Defendant Luis Alonso Sam-Pena's ("Defendant") Motion for Review of Detention Order (Doc. 14). For the reasons stated below, Defendant's motion is denied.

BACKGROUND

Defendant is charged with one count of Illegal Reentry in violation of 8 U.S.C. 1326(a) and (b)(1). (Doc. 1.) Previously, in 2009, Defendant was convicted of felony kidnapping pursuant to A.R.S. § 13-1304. (Doc. 19-4 at 1.) Defendant was removed on January 30, 2013, (Doc. 19-5 at 1), and notified that he was prohibited from ever reentering the United States due to his prior felony conviction. (Doc. 19-6 at 1.) At some point following his removal, Defendant reentered the United States, and was arrested by ICE at a traffic stop in Phoenix in January 2021. (Doc. 1 at 2.) On September 17, Defendant appeared at a Detention Hearing before a Magistrate Judge, who found no condition or combination of conditions could assure Defendant's appearance at trial and ordered him detained. (Doc. 22 at 6:2–4.) Defendant appealed the

Magistrate Judge's decision to the Court. (Doc. 14.) After full briefing, (Doc. 19; Doc. 21), the Court held a hearing on October 18, 2021 and subsequently granted supplemental briefing on the potential punishment Defendant faced were he to be convicted. (Doc. 24; Doc. 30.) The Court has considered the relevant briefing, the Pretrial Services bail report, (Doc. 6), and the transcript of the hearing below. (Doc. 22.)

DISCUSSION

I. Legal Standard

The Bail Reform Act of 1984 reflects Congress's determination that "any person charged with an offense under the federal criminal laws shall be released pending trial, subject to appropriate conditions, unless a '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.'" *United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) (quoting 18 U.S.C. § 3142(e)). When, as in this case, the original detention decision is made by a magistrate judge, the person ordered detained "may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order." 18 U.S.C. § 3145(b). The review of the Magistrate Judge's decision is de novo. *United States v. Koenig*, 912 F.2d 1190, 1193 (9th Cir. 1990).

"On a motion for pretrial detention, the government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk." *Santos-Flores*, 794 F.3d at 1090; *see also United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The statute requires the Court to consider various factors in determining whether the defendant poses a flight risk. *Gebro*, 948 F.2d at 1121. Those factors include: (1) the nature and

circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the history and statutorily specified characteristics of the defendant, and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. 18 U.S.C. § 3142(g). "Alienage may be taken into account, but it is not dispositive." *Santos-Flores*, 794 F.3d at 1090.

II. Analysis

Turning first to the nature and circumstances of the offense, Defendant faces one count of Illegal Reentry pursuant to 8 U.S.C. § 1326(a) and (b)(1). Given Defendant's prior felony conviction and failure to comply with the terms of his removal order, this factor weighs in favor of detention. *See Santos Flores*, 794 F.3d at 1092–93 (finding district court properly considered violation of defendant's order of removal in determining the nature and circumstances of the offense, even when violation of a prior removal order was common to all defendants under 8 U.S.C. § 1326).

Next, the weight of the evidence suggests Defendant is likely to face a substantial punishment if convicted. While the weight of the evidence is the least important of the various factors, the potential punishment faced by the defendant may be considered "in terms of the likelihood that the person will fail to appear." *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). In doing so, the Court is careful to avoid making a "preliminary determination of guilt." *Id.*

Were Defendant to be convicted, he is likely to face a sentence of between 24 and 37 months in custody.[1] (Doc.

[1] The parties dispute whether Defendant's conviction under A.R.S. § 13-1304 is an aggravated felony under the INA. For the

24 at 2; Doc. 30 at 1). The Government also represents to the Court that "it is nearly inevitable that Defendant will be removed . . . after serving any term of imprisonment," (Doc. 30 at 2,) and that "ICE will likely seek Defendant's removal" even if he is not convicted (Doc. 30 at 2 n.3.) In other words, were Defendant to be convicted, he faces upwards of two years—and potentially over three years—in prison. Whether or not he is convicted, it appears likely he will be removed again. As a result, the Court finds that the potential punishment faced provides a sufficient incentive for Defendant not to appear for trial, and weighs in favor of pretrial detention.

Third, Defendant's history and statutorily defined characteristics paint a mixed picture. For one, the Court is mindful that Defendant appears to be a well-regarded presence in his local community. Defendant's children attend local public schools, he has lived in the same residence with his partner for several years, and he owns property. (Doc. 14 at 4; Doc. 13 (sealed)). Defendant also appears to be active in his community's religious life and has a sister in the United States who is a citizen. (Doc. 14 at 5.) On the other hand, Defendant's partner is also present in the country without authorization, as are three of his six children. (Doc. 22 at 5:19–20; 6:11–13.) Defendant's parents, and his other sibling, both live in Mexico. (Doc. 14 at 5.) Defendant also owns property in Mexico. *Id.* While Defendant does have strong ties to his community in Phoenix, it cannot be said that those ties are necessarily stable given his family's immigration status, and the possibility of prison and near-certain removal.

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purposes of this motion, the Court need not reach this issue, as the parties are in agreement as to the potential term of imprisonment Defendant would face if convicted.

Finally, the Court does not believe Defendant poses a danger to the community. Defendant has one felony conviction from over a decade ago, and otherwise does not appear to have faced any subsequent legal trouble. Therefore, this factor weighs against pretrial detention.

CONCLUSION

Given the foregoing, the Court finds by a preponderance of the evidence that no condition or combination of conditions is likely to reasonably assure the appearance of Defendant at trial.

IT IS THEREFORE ORDERED that Defendant's Motion for Review of Detention Order (Doc. 14) is **DENIED.**

Dated this 3rd day of November, 2021.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, vs. LUIS ALONSO SAM-PENA, Defendant - Appellant.	No. 21-10327 D.C. No. 2:21-cr-888-GMS District of Arizona, Phoenix ORDER

Before: O'SCANNLAIN, S.R. THOMAS, and TALLMAN, Circuit Judges.

Appellant's petition for rehearing is denied and the petition for rehearing en banc (Docket Entry No. 12) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

Appellant's motion to expedite (Docket Entry No. 13) is denied as moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 3142:

(e) DETENTION.—

(1) 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.

(2) 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—

(A) 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;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) 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 subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the 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—

(A) 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 chapter 705 of title 46;

(B) an offense under section 924(c), 956(a), or 2332b of this title;

(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(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 such 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, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(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 chapter 705 of title 46;

(D) any felony if such 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 a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; 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 such person will flee; or

(B) a serious risk that such 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 such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on 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 such 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, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(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 or 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)(1)(B)(xi) or (c)(1)(B)(xii) 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.