

Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis

**Conference for Chief Federal Defenders
Feb. 23, 2023**

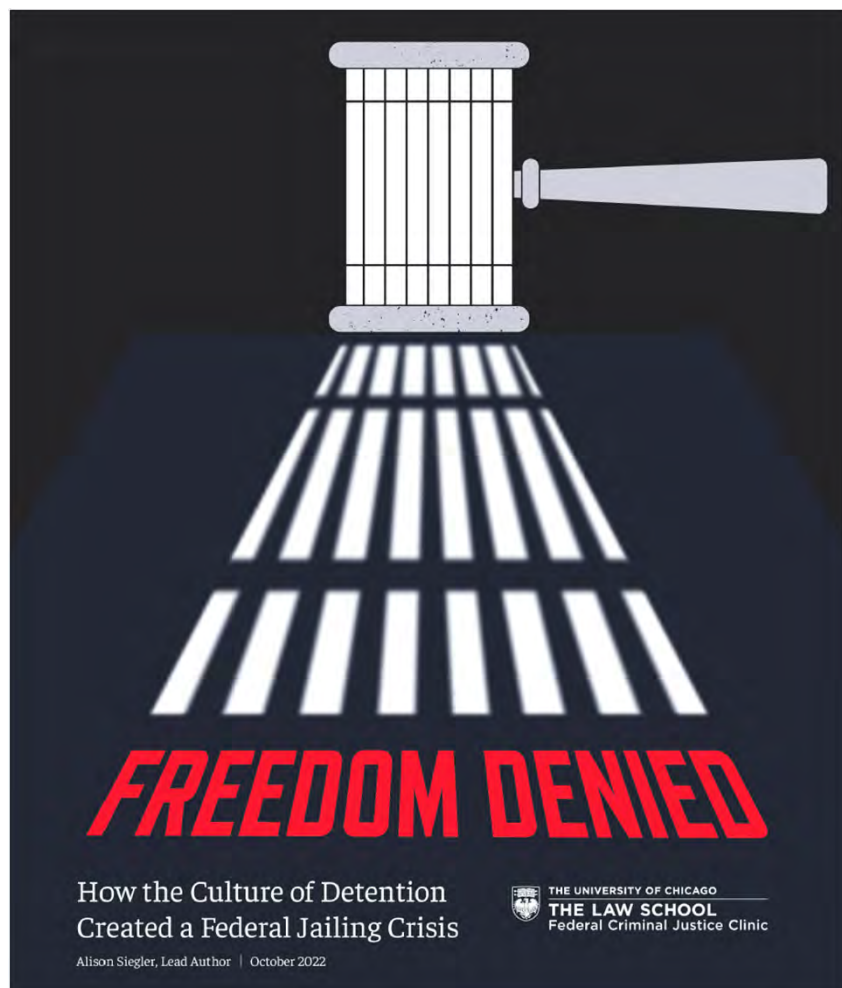
Alison Siegler
Federal Criminal Justice Clinic, University of Chicago Law School
alisonsiegler@uchicago.edu
Twitter @SieglerAlison

TAKEAWAYS

1. Initial Appearance: If no valid 3142(f) factor is present, your client must be released. No detention. No detention hearing.
2. Non-Citizen Cases: At Initial Appearance and Detention Hearing, fight for release for all clients, including non-citizen clients.
3. Counsel at Initial Appearance: The law requires that every person be represented by counsel.
4. Never Consent to Detention or Waive Release.
5. Object to Financial Conditions that your client can't meet.
6. Detention Hearings and Presumption Cases: Always present evidence to rebut the presumption at Step 1 and hold government to its burden at Step 2.

FEDERAL JAILING CRISIS





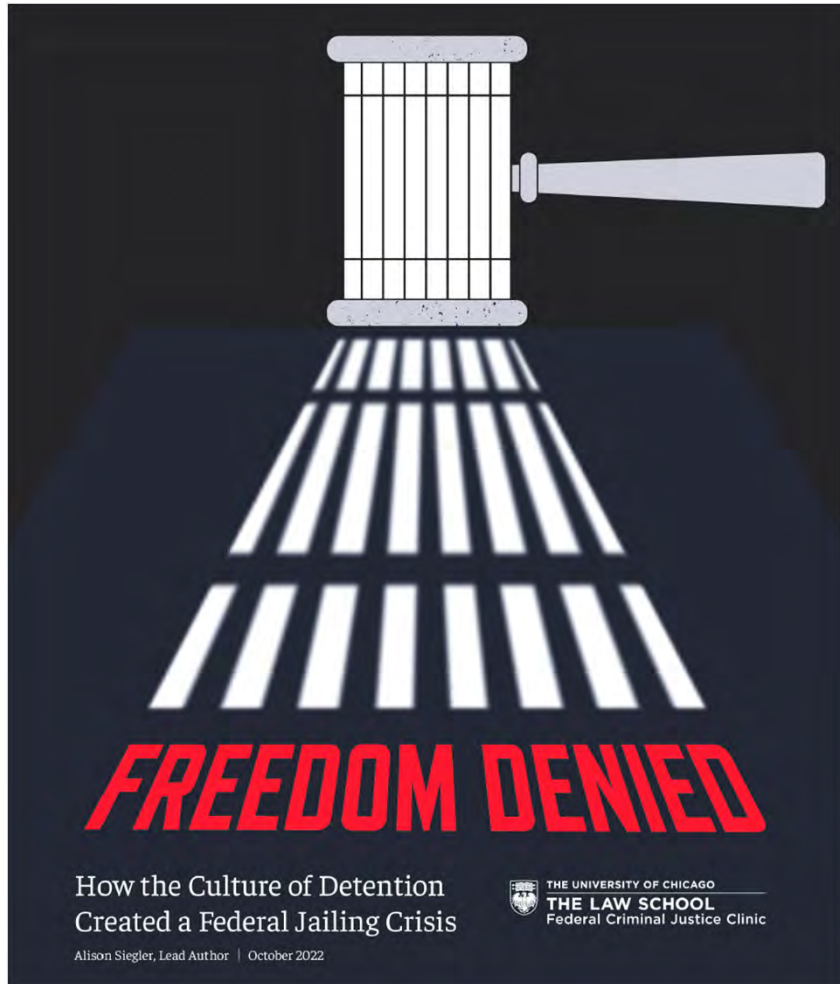
Changing the System: *Freedom Denied Report*

- First comprehensive national investigation of federal pretrial detention
- Quantitative: Watched hundreds of federal bond hearings on Zoom in 4 federal districts: Baltimore, Boston, Miami, and Salt Lake City.
- Qualitative: Interviewed 48 federal judges and Chief Defenders; from 36 districts.

Freedom Denied Findings

- Judges regularly violate the Bail Reform Act.
- Instead of following the law, judges' decisions are driven by habit and courtroom custom.
- Those customs drive up jailing rates, exacerbate racial disparities, and prejudice non-citizens.

The Culture of Detention



Official citation for Report:

Alison Siegler, *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis* (2022),
<https://freedomdenied.law.uchicago.edu/report>.

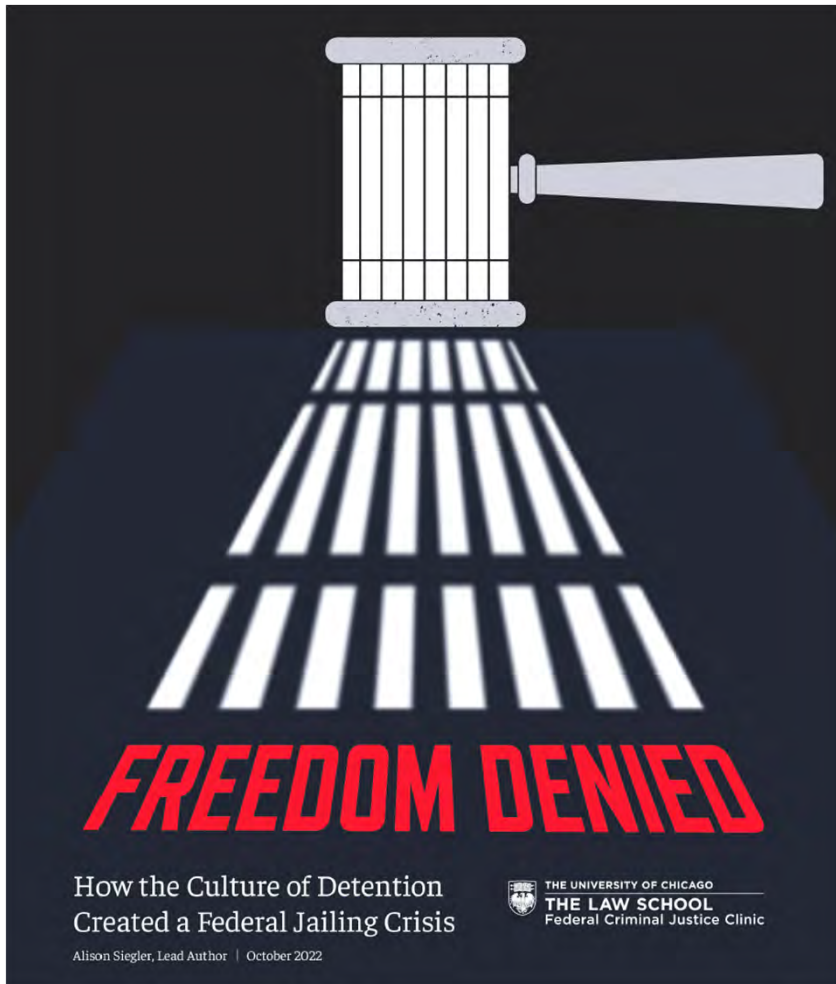


PRETRIAL DETENTION

**Human beings locked
in jail federally in 2022:
>119,000**

Source: AO Table H-15, 9/30/2022 (119,196).

**INTERRUPT AND
CHANGE THE
CULTURE OF
DETENTION!**



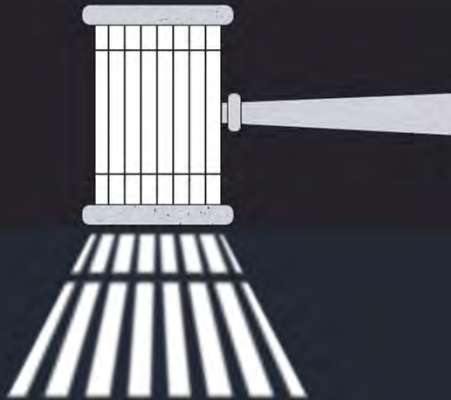
Changing the System

- **Shift the culture via trainings**
 - Federal judges
 - Federal Public Defenders & CJA
 - Federal Probation/Pretrial
- **Rewrite the law**
 - Federal Bail Reform Act of 2020 (introduced by Nadler)



Study: Federal magistrates, prosecutors misunderstand bail law, jailing people who should go free

Despite the study, the Administrative Office of the U.S. Courts says the federal judiciary has worked hard to make sure defendants aren't detained "unless the law identifies a specific need to protect the public."



New DOJ Pretrial Release Directive (2023)



THE UNITED STATES
DEPARTMENT OF JUSTICE

ABOUTOUR AGENCYOUR WORKNEWSRESOURCESCAREERSCONTACT

Home » Resources » Justice Manual » Title 9: Criminal

SHARE

▼ Justice Manual

▶ Title 1: Organization and Functions

▶ Title 2: Appeals

▶ Title 3: EOUSA

▶ Title 4: Civil

▶ Title 5: ENRD

▶ Title 6: Tax

▶ Title 7: Antitrust

▶ Title 8: Civil Rights

▼ Title 9: Criminal

9-6.000 - RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

9-6.100Introduction

9-6.110Continuances Pending Detention Hearings

9-6.200Pretrial Disclosure of Witness Identity

9-6.100 - INTRODUCTION

The release and detention of defendants pending judicial proceedings is governed by the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Bail Reform Act of 1984. The Bail Reform Act of 1984 provides procedures to detain a dangerous offender, as well as an offender who is likely to flee pending trial or appeal. *See United States v. Salerno*, 481 U.S. 739 (1987).

“Instead of maintaining a default position that most people awaiting trial should be jailed, [AG] Garland should enact policy changes that limit pretrial jailing to cases where it is genuinely necessary, eliminate all financial considerations from the detention calculus and aim to reduce racial disparities in pretrial detention.”



Opinion

How Did the ‘Worst of the Worst’ Become 3 Out of 4?

Merrick Garland can bring bail reform to the federal justice system.

By Alison Siegler and Kate M. Harris

Ms. Siegler is the founder and director of the Federal Criminal Justice Clinic at the University of Chicago Law School and has testified before Congress about federal bail reform. Ms. Harris is a third-year law student and a student attorney in the clinic.

Feb. 24, 2021

New DOJ Pretrial Release Directive (2023)



“There are also cases in which detention is not warranted.”

- ▶ Title 7: Antitrust
- ▶ Title 8: Civil Rights
- ▼ Title 9: Criminal

The release and detention of defendants pending judicial proceedings is governed by the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Bail Reform Act of 1984. The Bail Reform Act of 1984 provides procedures to detain a dangerous offender, as well as an offender who is likely to flee pending trial or appeal. *See United States v. Salerno*, 481 U.S. 739 (1987).

New DOJ Pretrial Release Directive (2023)

- **REQUIRES** AUSAs to conduct a “case- and defendant-specific” analysis in deciding whether to seek detention.
- “[A] weighing of all the facts and circumstances including, but not limited to what charges or violations a defendant presently faces, and the strength of the evidence in support of those charges or violations, is **required**.” (emphasis added).

U.S. Dep’t of Just., Just. Manual § 9-6.100 (2023), <https://www.justice.gov/jm/jm-9-6000-release-and-detention-pending-judicial-proceedings>.

Home Tools Chief Defender an... x

1 / 547 120%

Bookmarks

- Client Interview Form
- Initial Appearance Hearing Materials
- Detention Hearing Materials
- Freedom Denied Report
- BRA Requirements at Initial Appearance and Detention Hearings
- New DOJ Policy Directive re: Pretrial Detention
- Access to Counsel Proposal to Judicial Conference
- Key Federal Pretrial Statistics
- Articles, Studies, and Testimony About Federal Pretrial Detention

Handout Materials
Federal Defender and CJA Panel Representatives
Conference
Alison Siegler, UChicago Federal Criminal Justice Clinic
(February 2023—Philadelphia, PA)

Essential Resource for Litigating Federal Pretrial Release:

Alison Siegler, *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis* (2022),
<https://freedomdenied.law.uchicago.edu/report>.

Report Website:
<https://freedomdenied.law.uchicago.edu>

The Bail Reform Act of 1984

Fourth Edition

Federal Judicial Center
2022

Bail Book for Judges:

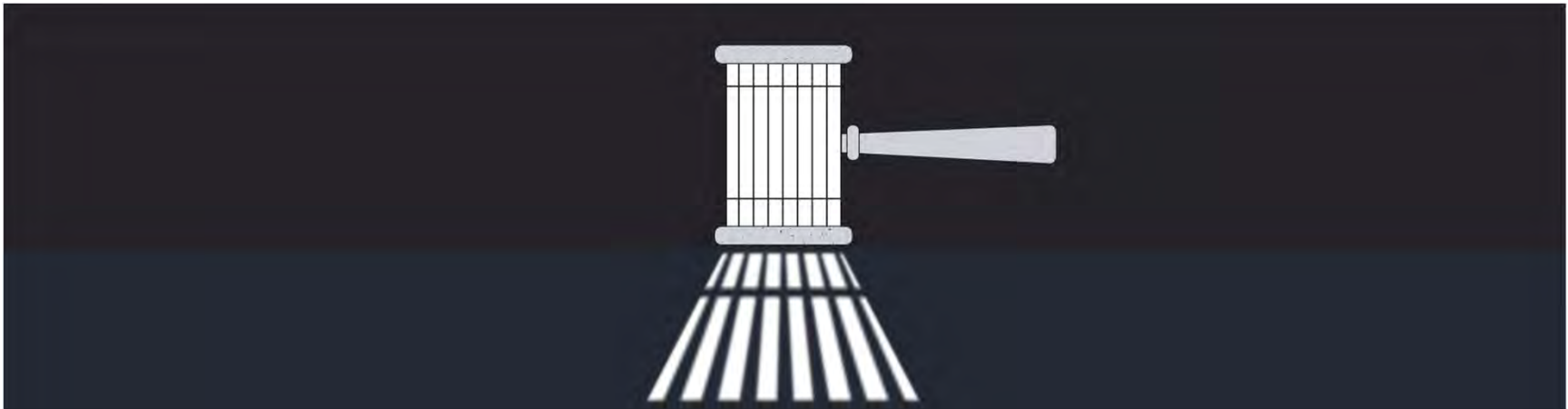
**Fantastic online resource for
bond arguments and motions!**

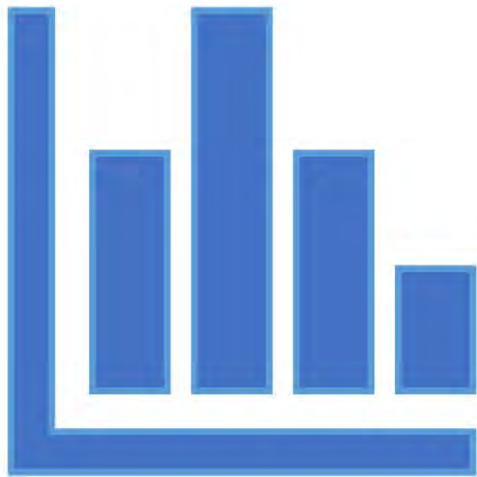
*Pretrial Release (Chapter 1) & Pretrial Detention (Chapter 2),
in THE BAIL REFORM ACT OF 1984, FED. JUDICIAL
CTR. (4th ed. 2022),*

<https://www.fjc.gov/content/373297/bail-reform-act-1984-fourth-edition>.

April 24 Webinar for Defenders
1:00-3:00 pm ET

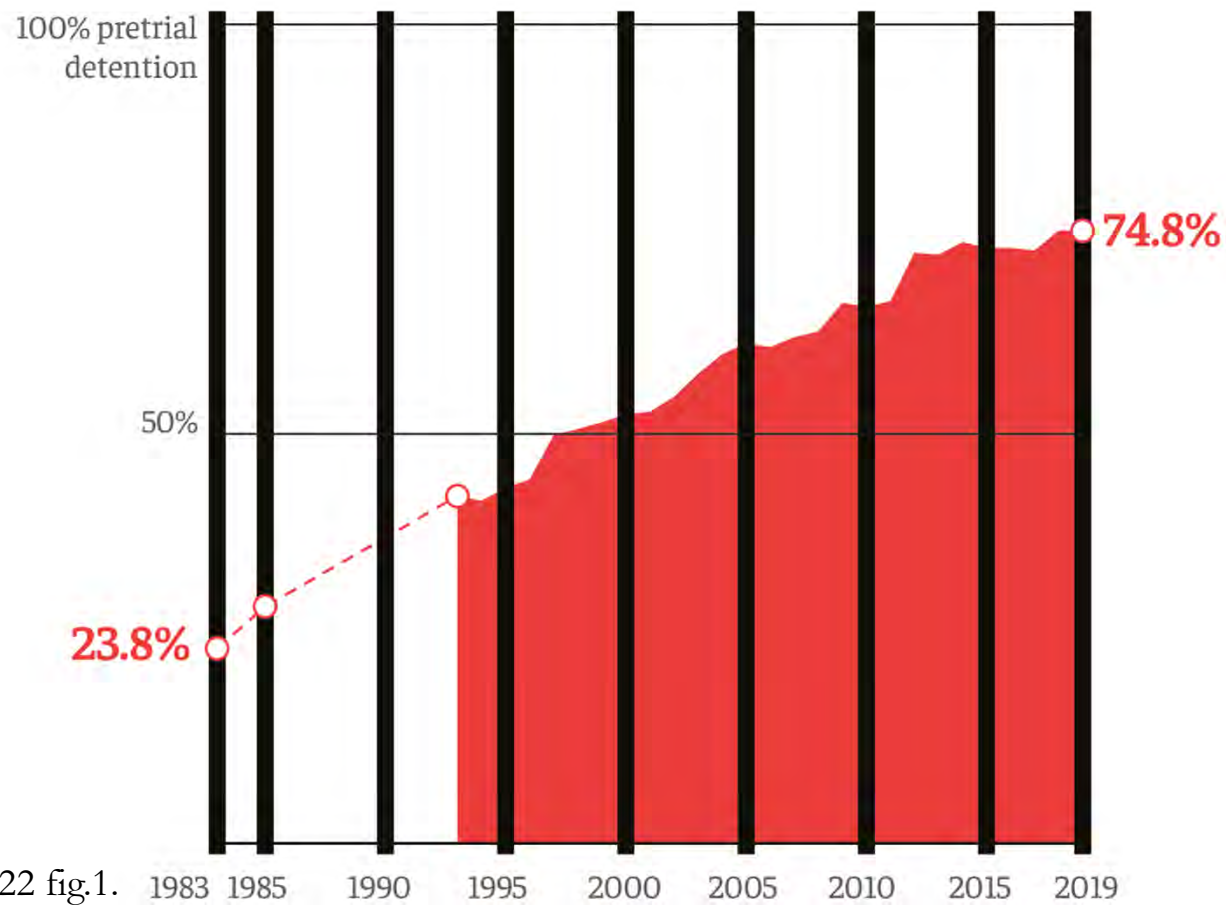
<https://www.fd.org/training-events/training-division-webinars/freedom-denied-combating-pretrial-detention>





The Federal Bail Crisis: NATIONAL STATS

Figure 1: Federal Pretrial Detention Rates Have Skyrocketed Since the BRA Was Enacted (1983–2019).



Source: *Freedom Denied* at 22 fig.1.

Federal System Less Violent Than State But Higher Detention Rates

- **Detention Rates**

- **State: 45%** of people charged with state-level violent felonies are detained pretrial.
- **Federal: 75%** pre-pandemic federal detention rate (2019).

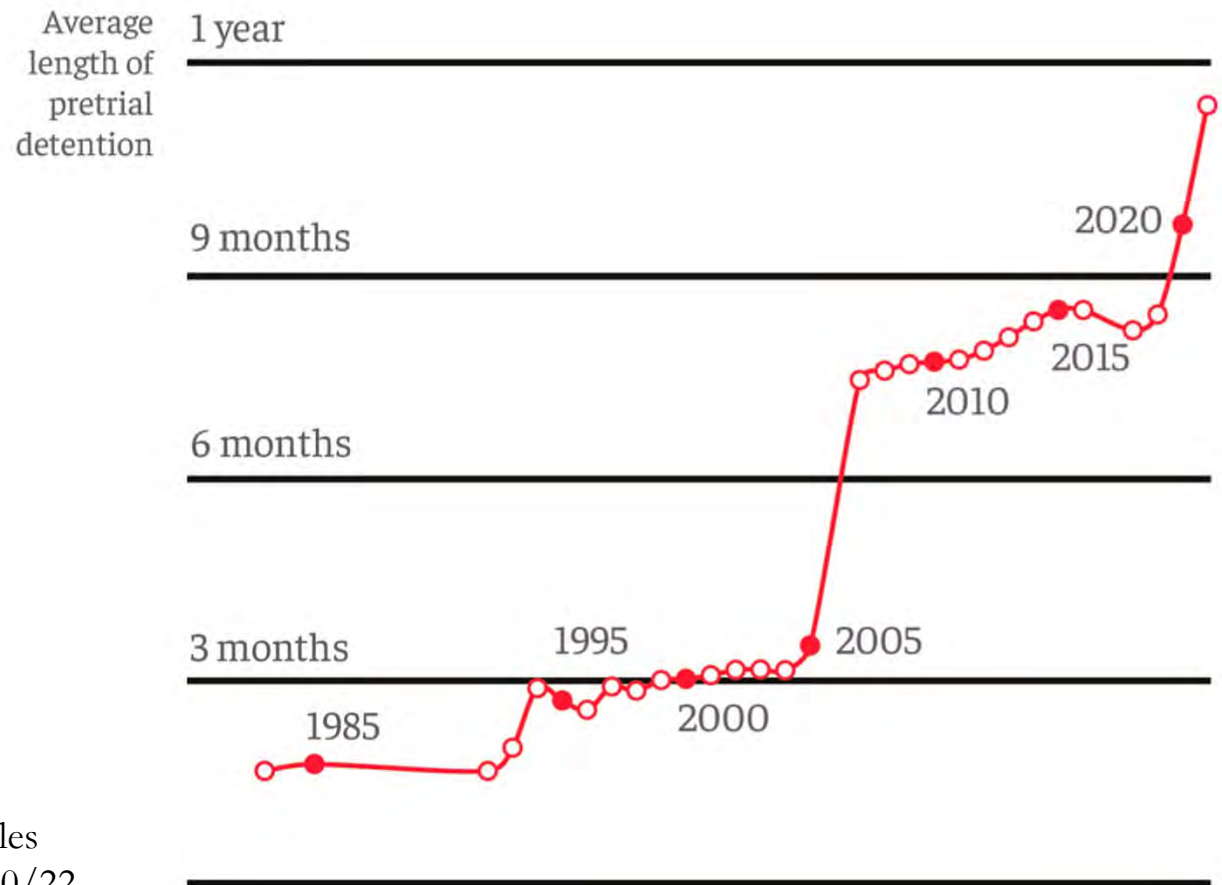
- **Violent Crime Rates**

- **State: 25%** of felony cases involve violent crimes.
- **Federal: 2%** of arrestees are violent offenders.

Freedom Denied at 22.

Figure 2: The Average Length of Federal Pretrial Detention Has Ballooned Since the BRA Was Enacted (1983–2021).

National Average
Time in Jail:
One Year
(2022 data: 362 days)



Sources: *Freedom Denied* at 23 fig.2 (citing AO Tables H-9A, 9/30 for 1983-2021); AO Table H-9A 9/30/22.

Almost Everyone on Bond Appears & Does Not Reoffend

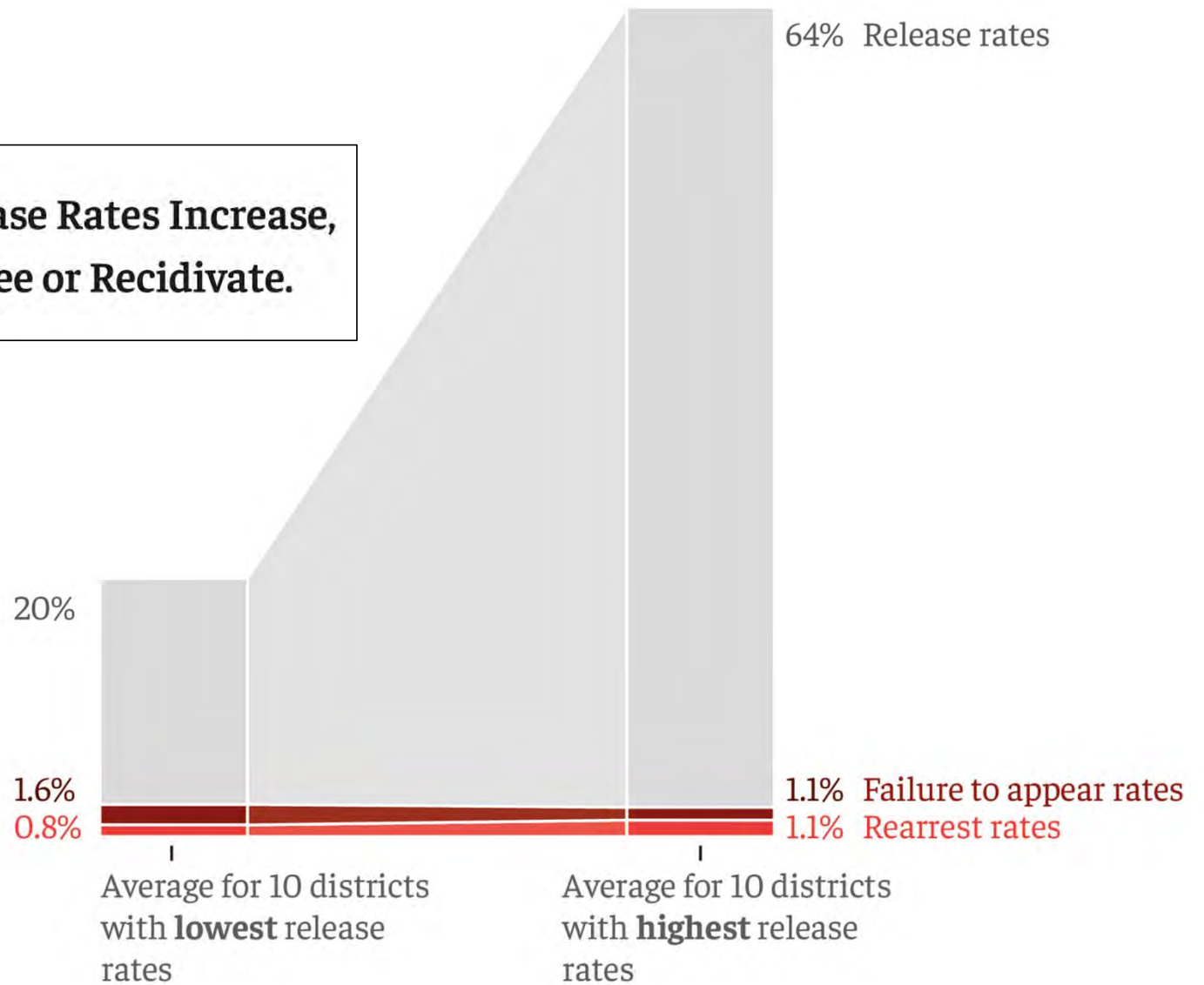
Federal clients released on bond

- **99%** appear for court as required
- **98%** are not arrested while on bond

Sources: AO Table H-15 (9/30/19, 9/30/20, 9/30/21, 6/30/22).

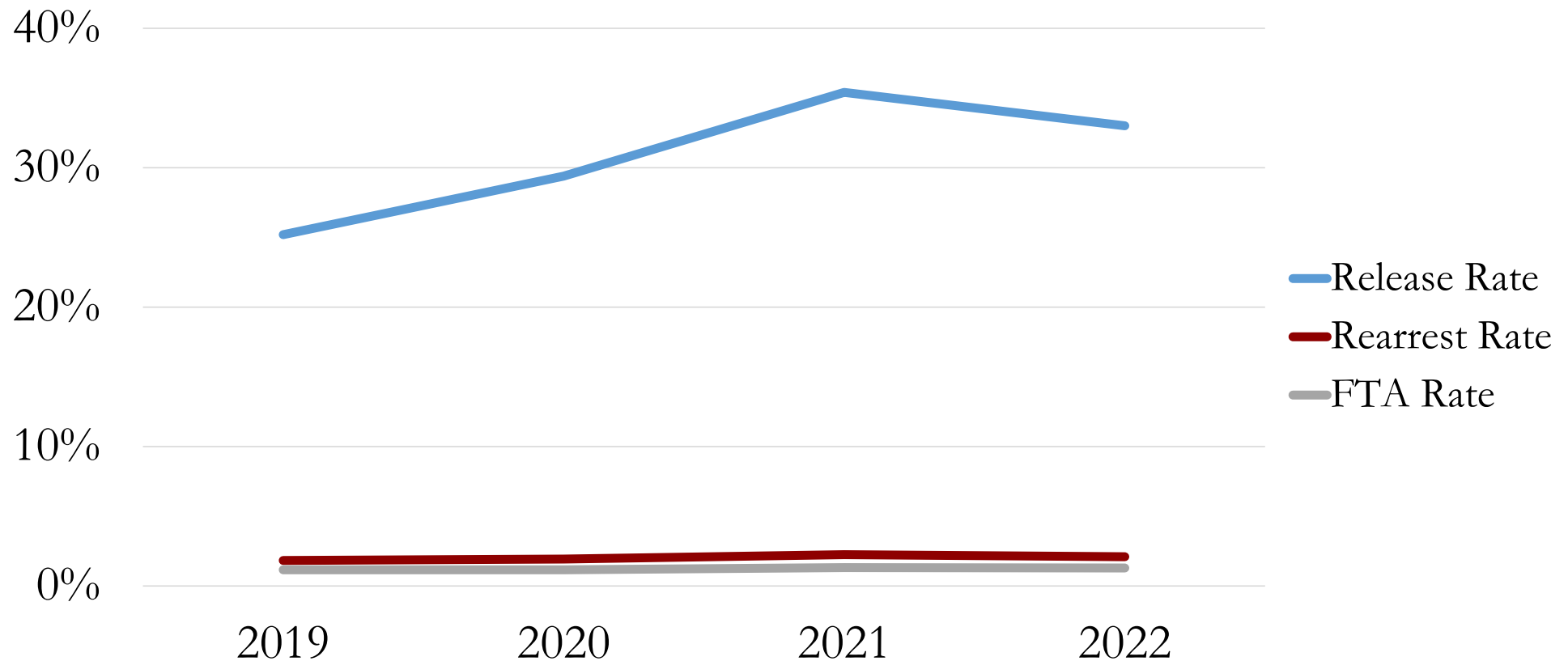
Statement by Rep. David Trone (D-MD), FY 2022 Budget Proposal Request for DOJ, before the House Subcommittee on Commerce, Justice, Science, and Related Agencies, May 4, 2021, <https://appropriations.house.gov/events/hearings/fiscal-year-2022-budget-request-for-the-department-of-justice>.

Figure 4: Even When Release Rates Increase, Arrestees Almost Never Flee or Recidivate.



Source: *Freedom Denied* at 25 fig.4.

As Release Rates Increased 2019-2021, Rearrest and FTA Rates Did Not Increase



Source: AO Table H-15; *Freedom Denied* at 246 n.42.

Almost Everyone on Bond Appears & Does Not Reoffend!!

- This data proves that when release rates increase, **crime** and **flight** do not.
 - The 2 measures the BRA cares about most!
- We have a responsibility to tell our judges about these stats.
 - In Template Motions in Handouts.

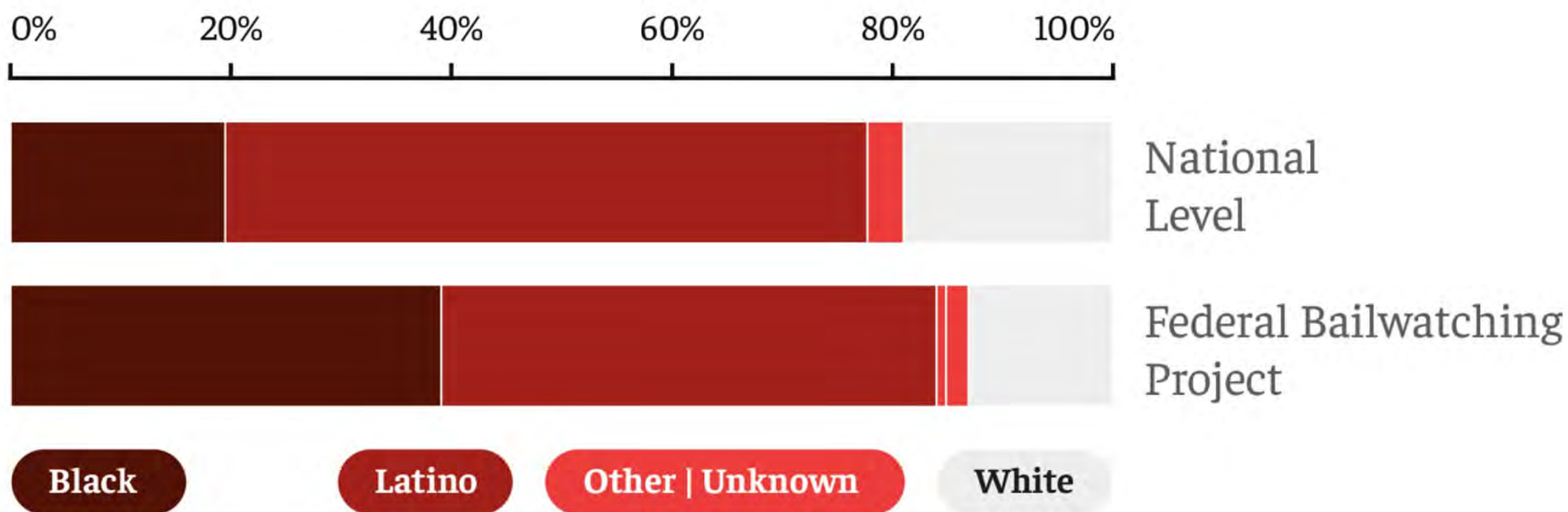
Detention → Society Less Safe by Increasing Recidivism

Although federal judges
may believe that detaining
more arrestees will
ensure community safety,
evidence shows that
**pretrial detention is instead
criminogenic, harming
individuals** and imposing
additional costs on society.

Source: *Freedom Denied* at 26.

Racial Disparities **in Federal Pretrial Detention**

Figure 3: People of Color Are Disproportionately Charged with Crimes in the Federal System.

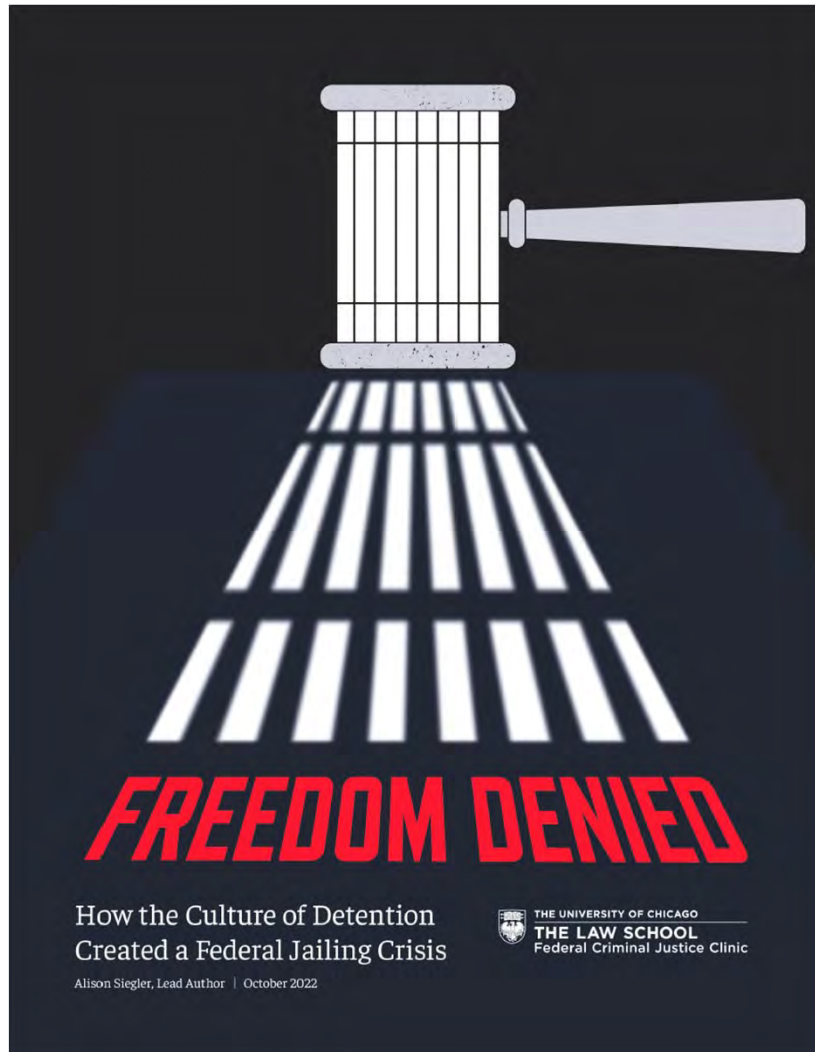


Source: *Freedom Denied* at 24 fig.3.

Freedom Denied Findings: Racial Disparities

People of color were significantly more likely:

- To be illegally jailed at the Initial Appearance;
- To be jailed without a lawyer at the Initial Appearance;
- To be detained in presumption cases; and
- To be jailed unlawfully on financial conditions they could not meet.



“The brutal reality is that people detained pretrial in federal jails are deprived of necessary medical care, live in dangerously overcrowded conditions, are subjected to violence, and suffer high rates of COVID-19 infection.”

Freedom Denied at 63.

Racial Disparities in Federal Pretrial Detention

A black male client is **20 percentage points** more likely to be detained than a white male client.

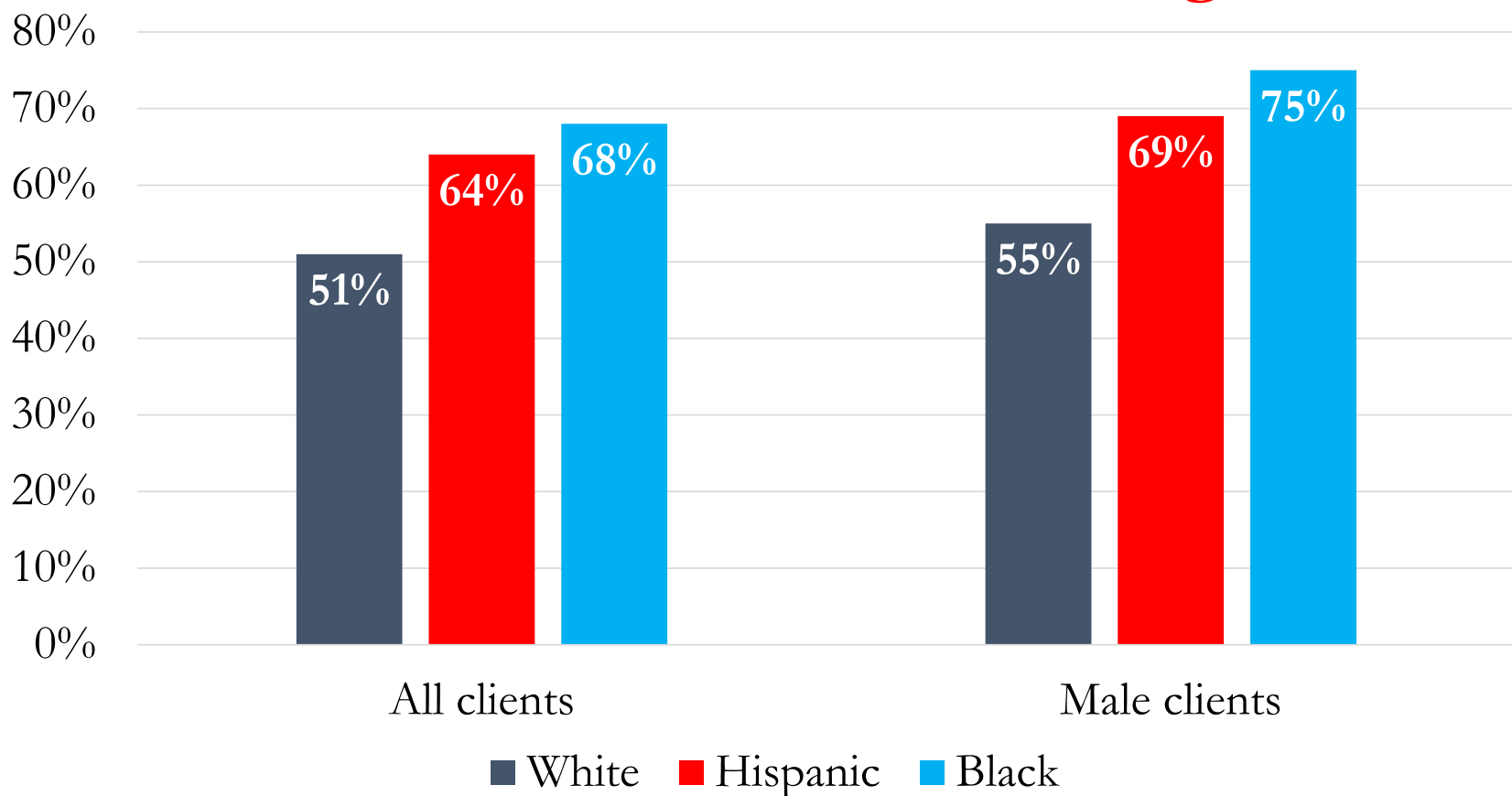
A Hispanic male client is almost **15 percentage points** more likely to be detained than a white male client.

Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1291 & Figure 1 (2021),

<https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss5/1/>

Federal Pretrial Detention Rates by Race:

Male clients of color detained at higher rates



Source: Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1291 (Figure 1).

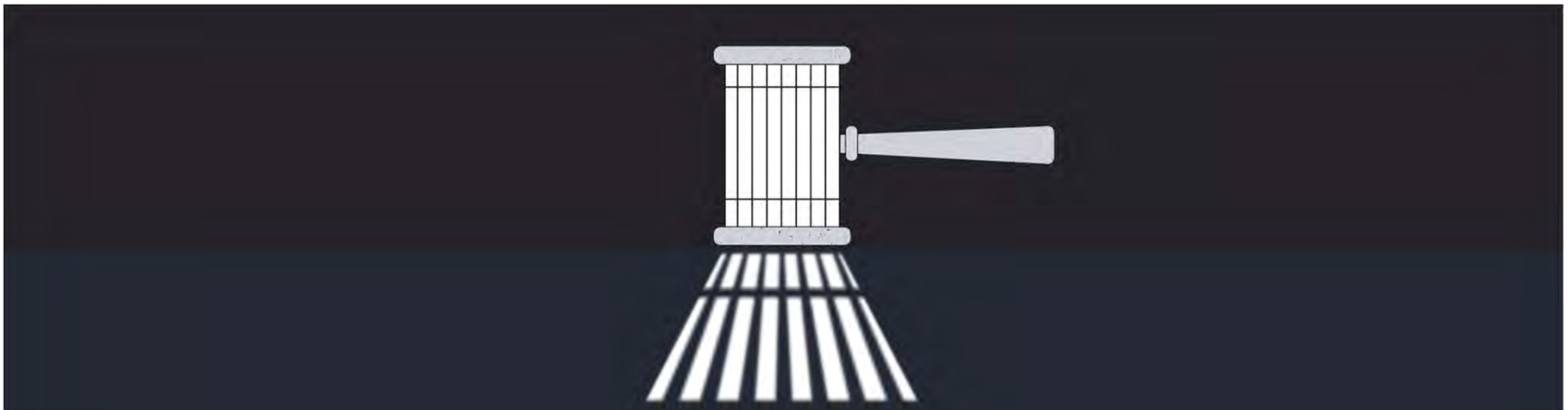
**To address racial disparities:
FIGHT FOR OUR CLIENTS' RELEASE**



BRA Presumption of Release

- BRA § 3142(b): “shall order . . . release” on personal recognizance.
- “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).

Why do judges lock so many of our clients in jail pending trial?



FILE WRITTEN BOND MOTIONS & APPEAL

Booker sentencing revolution

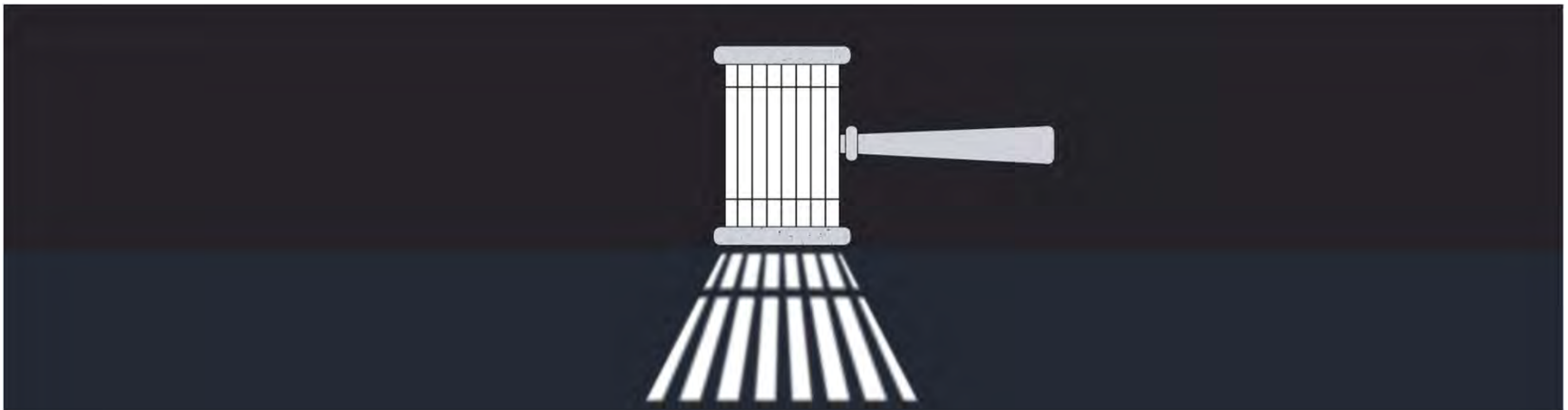
=

POWER of written advocacy

ROADMAP

- Initial Appearance Hearing
 - Require judges to follow the law
 - Fight for release for non-citizen clients
 - Prevent jailing without lawyers at Initial Appearance
- Stop Waiving Release
- Object to financial conditions to prevent jailing for poverty
- Detention Hearings & Presumption Cases
 - Require judges to follow the law

Initial Appearance Hearing



See Freedom Denied at 84–109.

Initial Appearance: Legal Standard

There is a widespread misperception that the government is entitled to a Detention Hearing every time they request one.

But that is simply not what the law says.

CAUTION!

If Initial Appearance and Detention Hearing happen on the same day...

We must insist that judges follow the legal standard that limits jailing at the Initial Appearance and **not** simply move every case forward to a Detention Hearing.

If we don't, clients will be jailed illegally.

Initial Appearance Hearing: NOT OK!!

JUDGE: *Government, what is your position on bond?*

PROSECUTOR: *We request pretrial detention based on risk of flight and danger to the community.*

JUDGE: *Okay sounds good to me. The Detention Hearing is scheduled for next Wednesday, February 2. Anything further?*

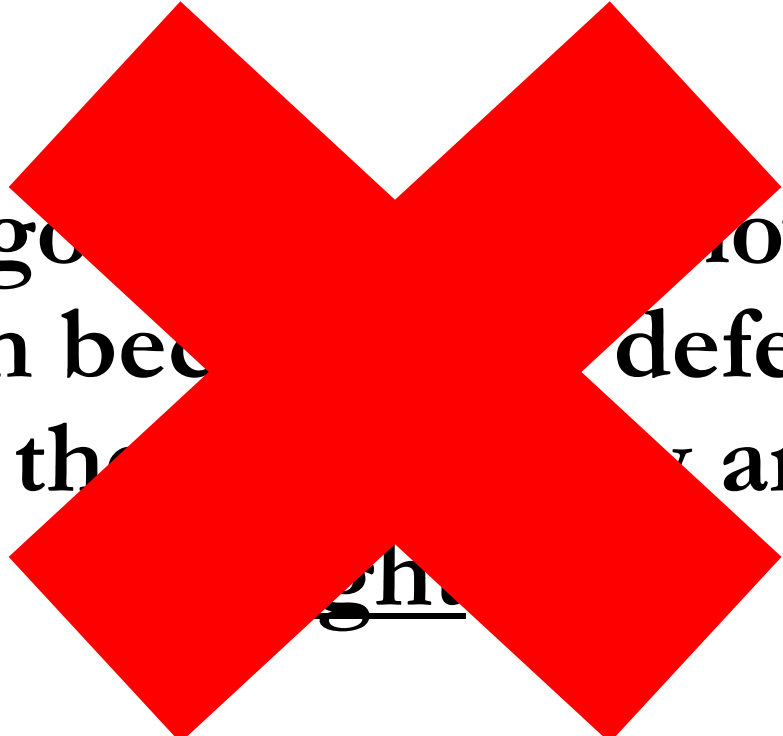
PROSECUTOR: *No.*

DEFENSE COUNSEL: *No, your honor.*²⁵⁹

Freedom Denied at 94.

Initial Appearance Hearing: Gov't Asking Judge to Violate the Law

“The govt is asking for
detention because the defendant is a
danger to the community and a risk of
flight.”



Initial Appearance Hearing: Problem

Danger to the community

NOT a legal basis for holding a
Detention Hearing

Ordinary risk of flight

NOT a legal basis for holding a
Detention Hearing

Initial Appearance Hearing: Problem

Government seeks to hold Detention Hearing on grounds not authorized in the BRA.

Result: Clients jailed illegally

**The Law: The Bail Reform Act Carefully
Limits the Cases Eligible for Detention.**

Freedom Denied at 87–92.

Initial Appearance: Legal Standard

- Under the law, the government may only move for jailing at the Initial Appearance if authorized by one of the factors in §3142(f)—the “(f) Factors.” *See Freedom Denied* at 87.
- If no (f) Factor applies
 - Judge is not even allowed to hold a Detention Hearing
 - Instead, client must be released at the Initial Appearance
- (f) Factors do not include danger to community. *Id.* at 91.
- (f) Factors do not include ordinary risk of flight. *Id.*
 - (Only “serious” risk—§ 3142(f)(2)(A))

BRA Only Allows Judge to Hold Detention Hearing if “F” Factor at Initial Appearance

1. Plain language of BRA § 3142(f)
2. *United States v. Salerno*, 481 U.S. 739, 747 (1987)
3. Court of Appeals caselaw
 - 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).

Illegal to Hold Detention Hearing without “F” Factor at Initial Appearance

All 3 sources agree:

A judge can only jail client at Initial
Appearance & hold a Detention Hearing
if one of

7 factors in § 3142(f)
applies.

Illegal to Hold Detention Hearing without “F” Factor at Initial Appearance

STATUTE: § 3142(f)

“The judicial officer shall hold a [detention] hearing” only “in a case that involves” one of the 7 “f” factors.

Salerno Affirms Limitations on Holding a Detention Hearing

“[D]etention hearings [are only] available if [the] case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders”

United States v. Salerno, 481 U.S. 739, 747 (1987).

Illegal to Hold Detention Hearing without “F” Factor at Initial Appearance

Every COA to consider the issue has held:

If there is no (f) factor, the judge is not allowed to jail a client at the Initial Appearance and is not allowed to hold a Detention Hearing at all—not even a same-day Detention Hearing.

Our client must be released at the Initial Appearance!

Illegal to Hold Detention Hearing without “F” Factor

- “Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists.”
 - *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988).
- “[D]etention is permitted only when the charge is for certain enumerated crimes, 18 U.S.C. § 3142(f)(1)..., or when there is a serious risk that the defendant will flee or obstruct . . . justice. *Id.* § 3142(f)(2).”
 - *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

BRA Only Allows Judge to Hold Detention Hearing if “F” Factor

- § 3142(f)(1): Offense-specific

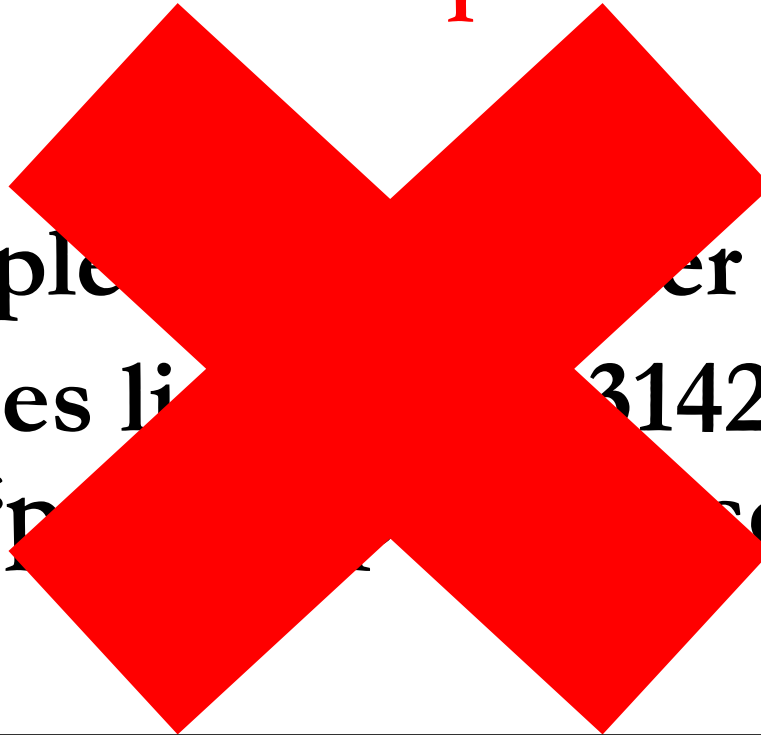
- (A) Crimes of violence (no presumption under § 3142(e))
- (B) Offense with max of life or death
- (C) Drugs
- (D) Certain recidivists (rare)
- (E) § 924(c) Guns, § 922(g) Guns, Minor victim, Terrorism

Offense must be actually charged

See U.S. v. Watkins, 940 F.3d 152 (2d Cir. 2019) (rejecting government’s argument that uncharged conduct triggers (f)(1)).

**§ 3142(f)(1) Offenses Are
NOT “Presumption” Cases!!!**

People v. [redacted] er to the
offenses listed in § 3142(f)(1) as
“presumption” cases”



**The BRA does NOT prescribe any presumption
of detention at the Initial Appearance.**

Some § 3142(f)(1) Offenses do NOT Trigger a Presumption of Detention Under § 3142(e)(3)

Presumption Applies at DH

- (A) Drugs
- (B) § 924(c) Gun
- (C) Terrorism
- (D) Kidnapping
- (E) Minor victim
- These are the only offenses in § 3142(e)(3)(A)-(E)

Presumption DOES NOT Apply

- Crime of Violence
- § 922(g) Gun
- Illegal Reentry
- Money Laundering
- Any offense not in § 3142(e)(3)(A)-(E)

BRA Only Allows Judge to Hold Detention Hearing if “F” Factor

- **§ 3142(f)(1): Offense-specific** — not same as “presumption”
 - (A) Crimes of violence (no presumption under § 3142(e))
 - (B) Offense with max of life or death
 - (C) Drugs
 - (D) Certain recidivists (rare)
 - (E) § 924(c) Guns, § 922(g) Guns, Minor victim, Terrorism
- **§ 3142(f)(2): Subjective**
 - “serious risk” client “will flee” (SROF)
 - “serious risk” of obstruction of justice

USE CAUTION in Non-(f)(1) Cases

No (f)(1) Factor*

- Fraud/Financial crime
- Postal theft/bank theft/ID theft
- Alien smuggling
- Illegal reentry
- Money laundering
- Any offense that COA has deemed not to be a COV

Yes (f)(1) Factor

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

USE CAUTION in Non-(f)(1) Cases

- Judge is only allowed to hold a Detention Hearing if govt establishes that client poses a “serious risk” of flight or obstruction under 3142(f)(2).
- Gov’t must prove “serious risk” by preponderance.
 - *See United States v. Friedman*, 837 F.2d 48, 49 (2d. Cir 1988).
- **It is illegal for a judge to hold a Detention Hearing**
 - **DANGER TO THE COMMUNITY**
 - **NON-SERIOUS RISK OF FLIGHT**
- High risk of unlawful jailing in non-(f)(1) cases

Illegal to Hold Detention Hearing Based on ~~DANGER~~

Courts of Appeals agree

DANGER TO THE COMMUNITY

- Is not one of the (f) factors, and
- Is never a legitimate basis for holding a Detention Hearing

Illegal to Hold Detention Hearing Based on ~~DANGER~~

When none of the “subsection (f)(1) conditions [are] met, pretrial detention [at initial appearance] solely on the ground of dangerousness to another person or to the community is not authorized.”

United States v. Ploof, 851 F.2d 7, 12 (1st Cir. 1988)

- “[T]he [BRA] **does not permit detention on the basis of dangerousness**”—detention is only available under (f)(1) or (f)(2). *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *see also United States v. Dillard*, 214 F.3d 88, 96 (2d Cir. 2000) (“A defendant who is not eligible [for detention under § 3142(f)] **must be released, notwithstanding alleged dangerousness.**”).
- “We are not persuaded that the [BRA] authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. 3142(f)(1) and (2).” *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003).
- *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) (agreeing with 1st and 3d Cir.)
- *United States v. Himler*, 797 F.2d 156 (3d Cir. 1986)

Illegal to Hold Detention Hearing Based on ~~Ordinary Risk of Flight~~

- If case is not covered by (f)(1), can only jail someone at IA and hold a Detention Hearing if “serious risk” of flight/obstruction, (f)(2).
- **And the government must present EVIDENCE to prove that the client poses a “serious” risk, rather than an ordinary risk.**
 - Basic statutory construction argument: the word “serious” must be doing some work.

Illegal to Hold Detention Hearing without “F” Factor

- Remind judges that it is **ILLEGAL** to hold a Detention Hearing or detain our client in jail when no F Factor applies.
- Our client must be released immediately
 - Personal recognizance/unsecured bond: § 3142(b); OR
 - Release on conditions: § 3142(c)

INITIAL APPEARANCE HEARING

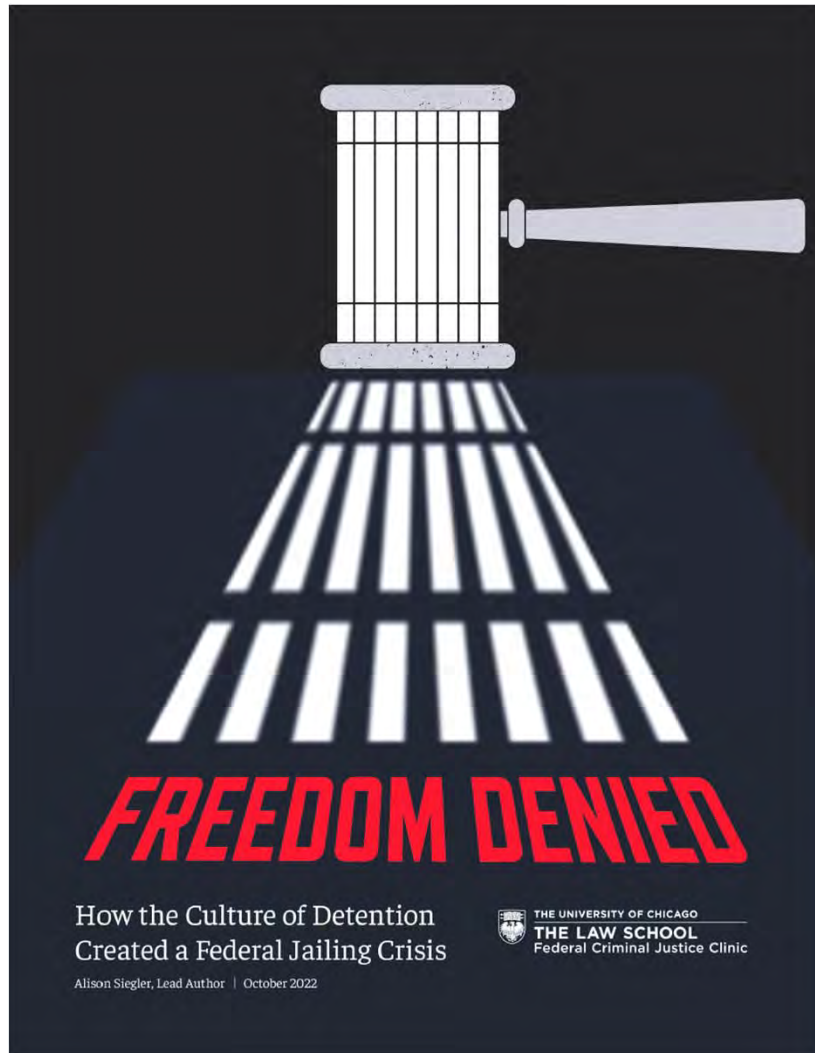
No “F” Factor



No Detention Hearing



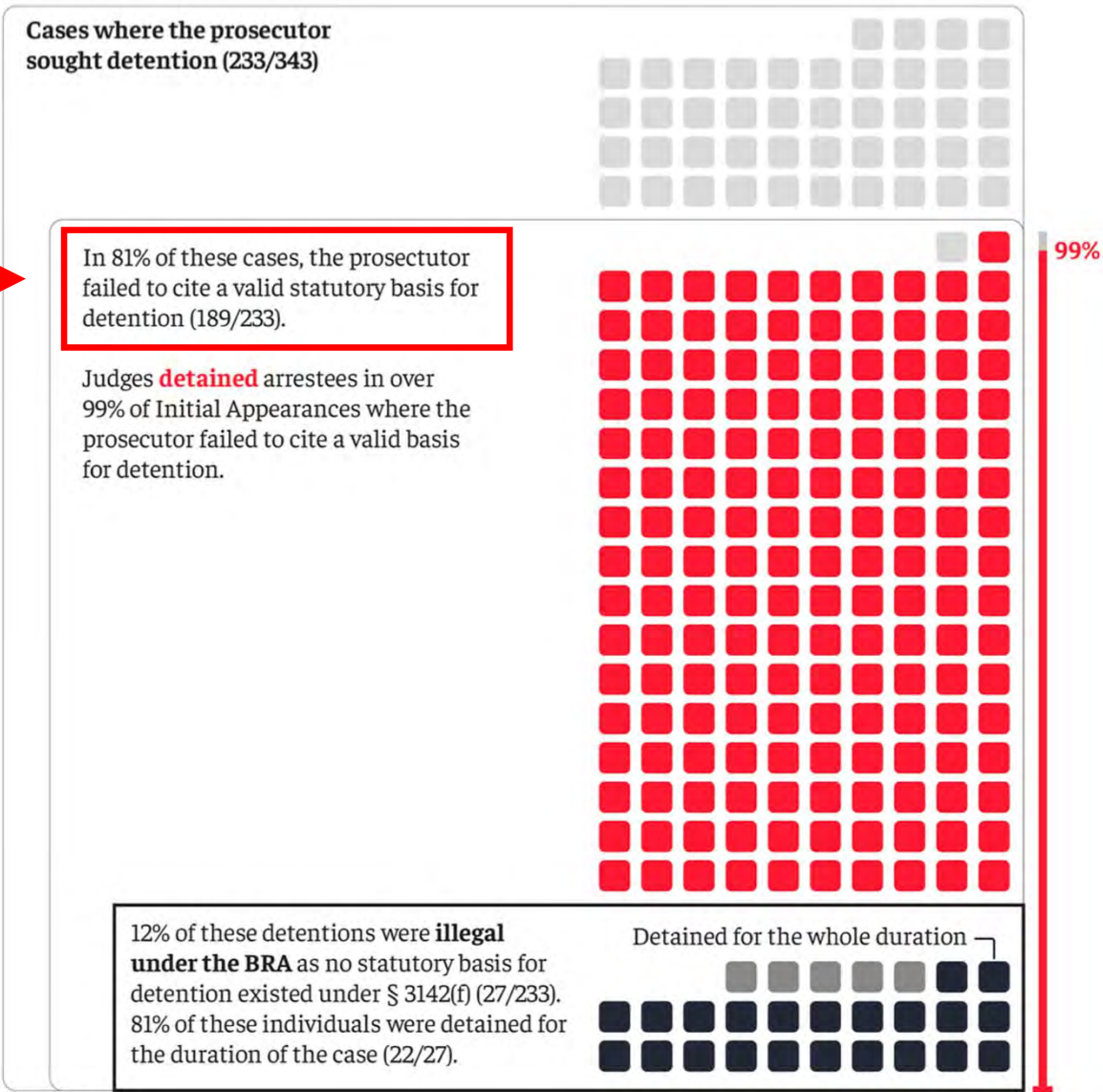
IMMEDIATE RELEASE



The Practice: At the Initial Appearance Hearing, Federal Judges Jail People Unlawfully.



Figure 9: At the Initial Appearance, Prosecutors Regularly Request Detention on Improper Grounds and Judges Detain People Unlawfully.



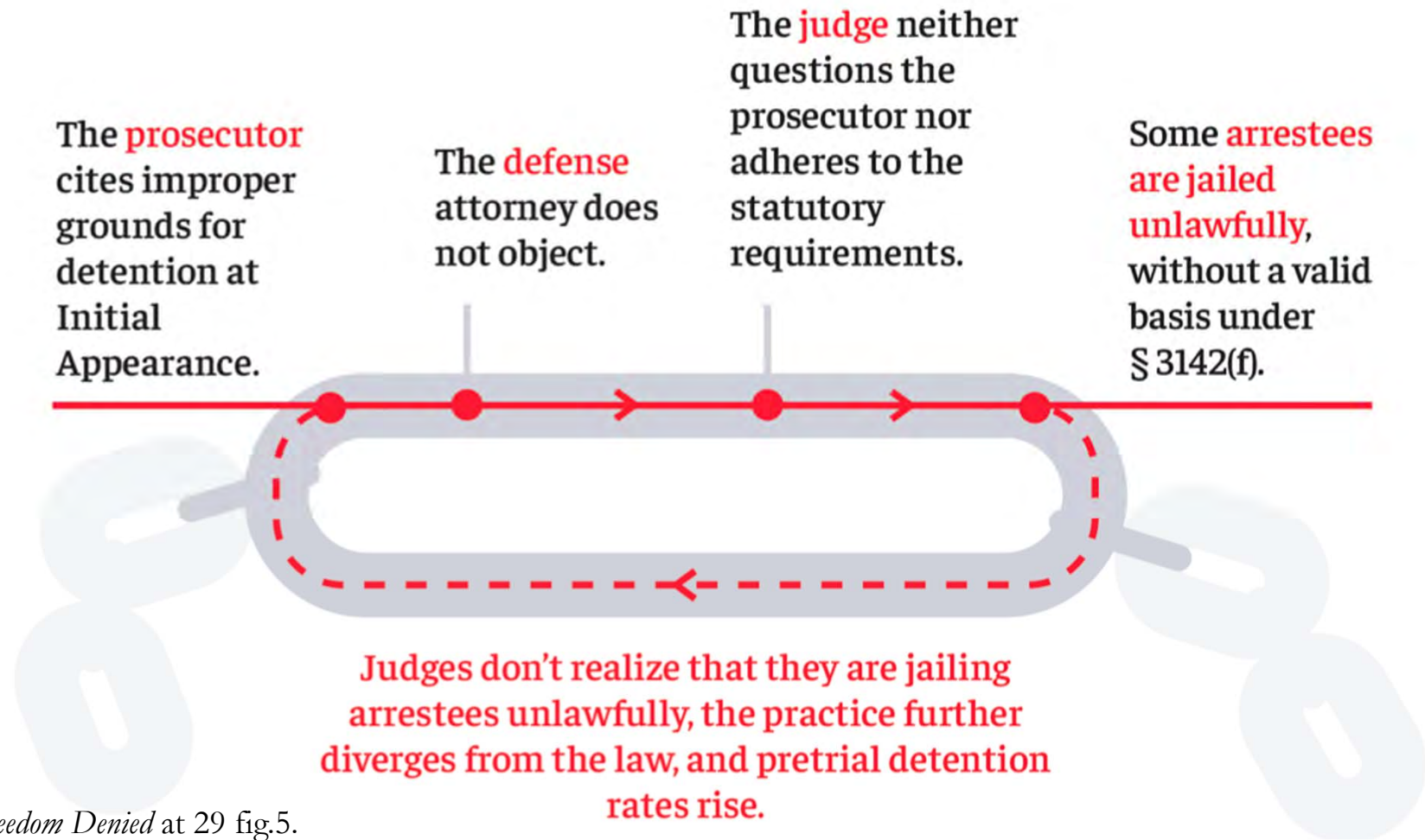
Source: *Freedom Denied* at 95 fig.9.

Figure 9: At the Initial Appearance, Prosecutors Regularly Request Detention on Improper Grounds and Judges Detain People Unlawfully.



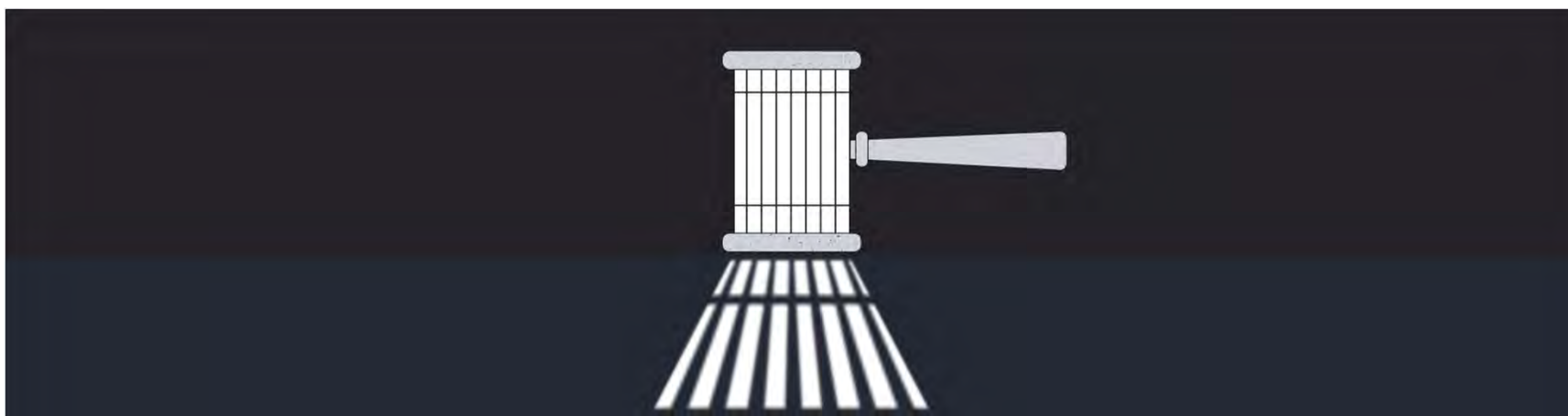
Source: *Freedom Denied* at 95 fig.9.

Figure 5: Problematic Feedback Loop at Initial Appearance



Source: *Freedom Denied* at 29 fig.5.

Judges Jail People Illegally at Initial Appearance Hearings



See Freedom Denied at 93–109.

Illegal Detention Order in Fraud Case: There's no (f)(1) factor for fraud!

ORDER OF DETENTION PENDING TRIAL

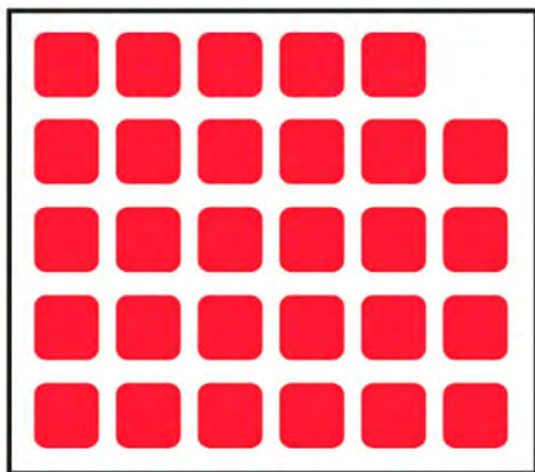
Part I - Eligibility for Detention

Upon the

- ☒ Motion of the Government attorney pursuant to 18 U.S.C. § 3142(f)(1), or
- ☐ Motion of the Government or Court's own motion pursuant to 18 U.S.C. § 3142(f)(2),

the Court held a detention hearing and found that detention is warranted. This order sets forth the Court's findings of fact and conclusions of law, as required by 18 U.S.C. § 3142(i), in addition to any other findings made at the hearing.

Figure 12: At the Initial Appearance, Prosecutors' Improper Detention Requests in Non-(f)(1) Cases Lead Judges to Detain People Unlawfully.



Despite the government providing **no legitimate basis for detention** in 97% of non-(f)(1) cases, **every single arrestee was detained** and subjected to an improper Detention Hearing.

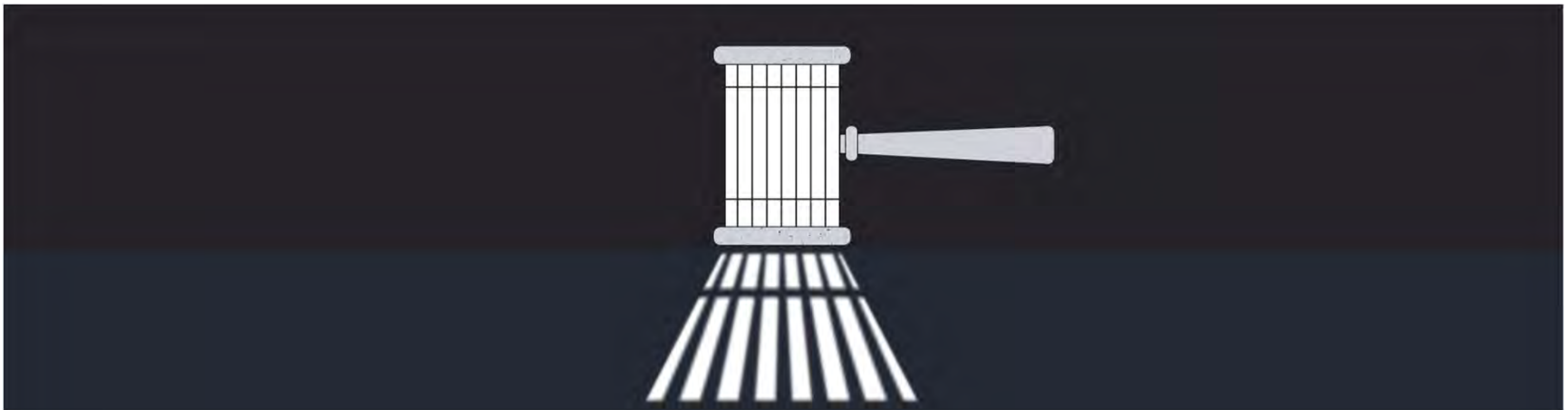
Figure 9: At the Initial Appearance, Prosecutors Regularly Request Detention on Improper Grounds and Judges Detain People Unlawfully.

12% of these detentions were **illegal under the BRA** as no statutory basis for detention existed under § 3142(f) (27/233). 81% of these individuals were detained for the duration of the case (22/27).

Source: *Freedom Denied* at 95 fig.9.

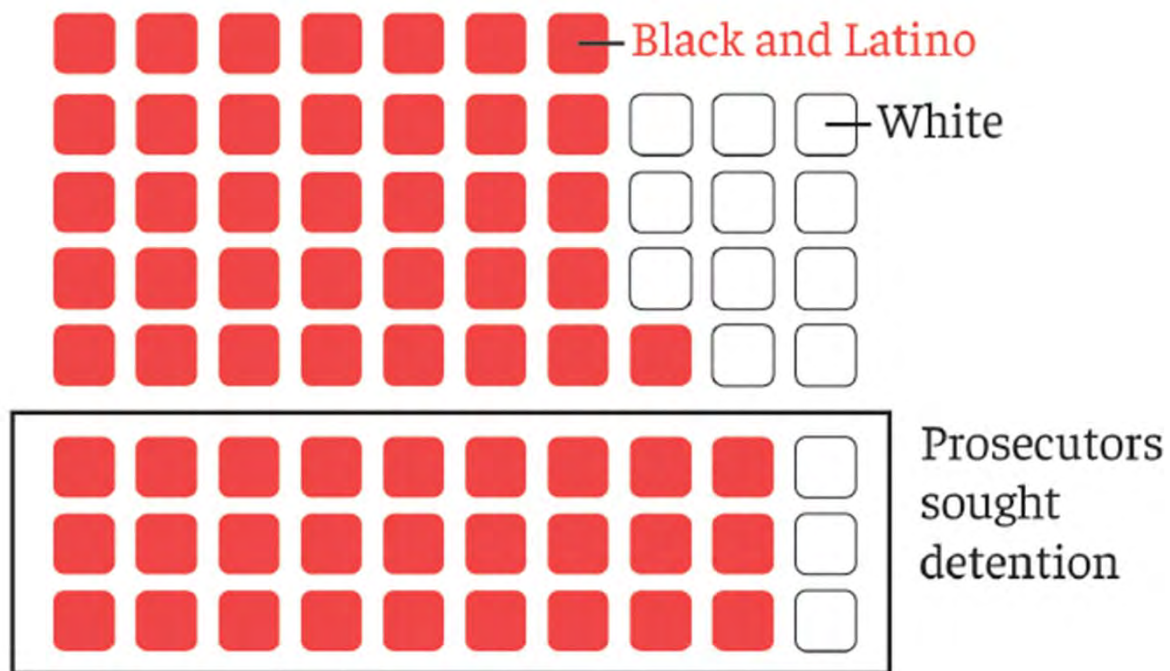


Racial Disparities in Illegal Jailing at Initial Appearance



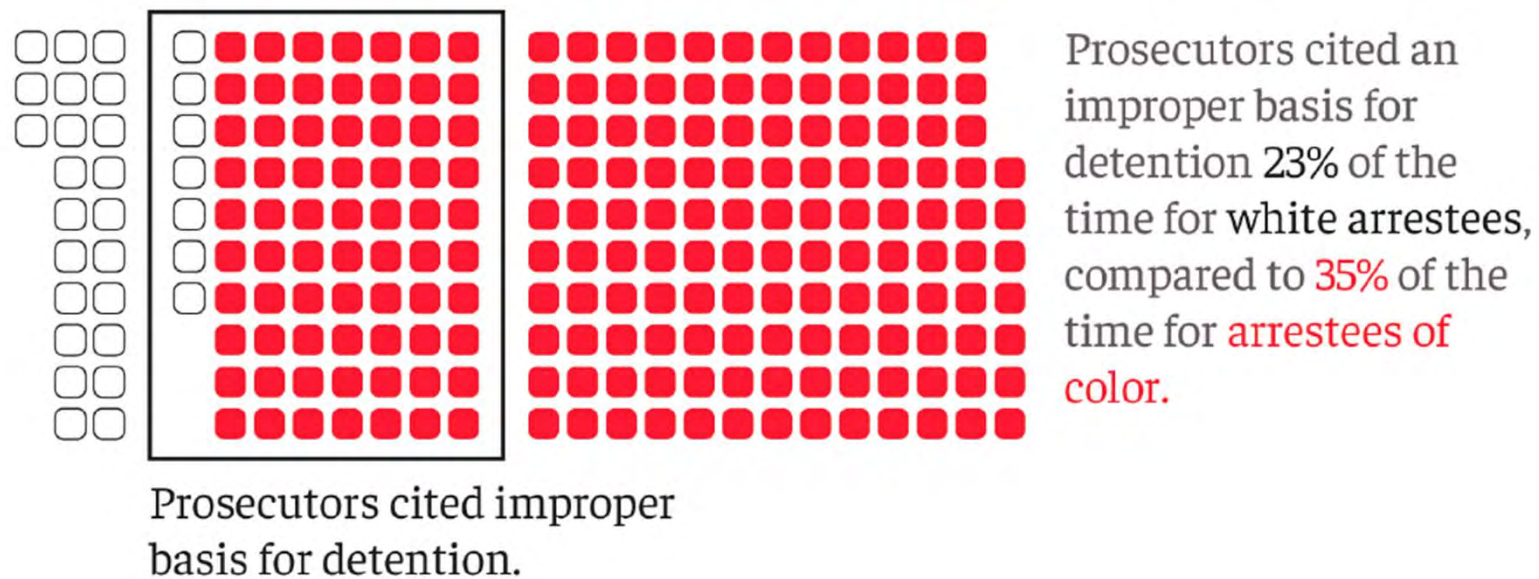
Source: *Freedom Denied* at 97, 100.

Figure 10: Prosecutors Sought Detention in Non-(f)(1) Cases More Than Twice as Frequently Against People of Color Than Against White Arrestees.



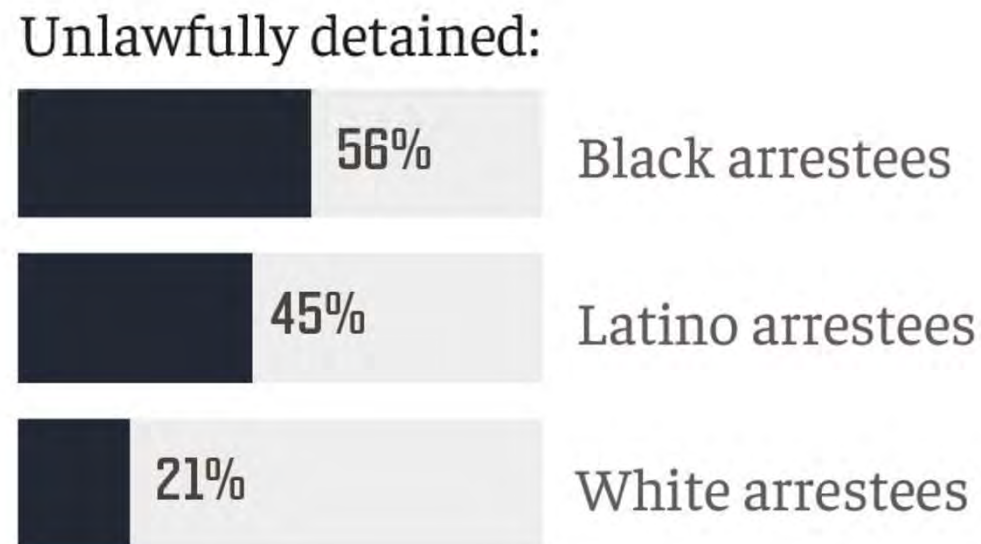
Source: *Freedom Denied* at 97 fig.10.

Figure 11: Prosecutors Are More Likely to Request Detention at the Initial Appearance on Improper Grounds for People of Color.



Source: *Freedom Denied* at 97 fig.11.

Figure 13: Unlawful Detentions Are Carried Out in a Racially Disparate Way.



Source: *Freedom Denied* at 100 fig.13.

Freedom Denied Study Findings

When clients were jailed illegally, the defense never objected.

OBJECT TO ILLEGAL JAILING!

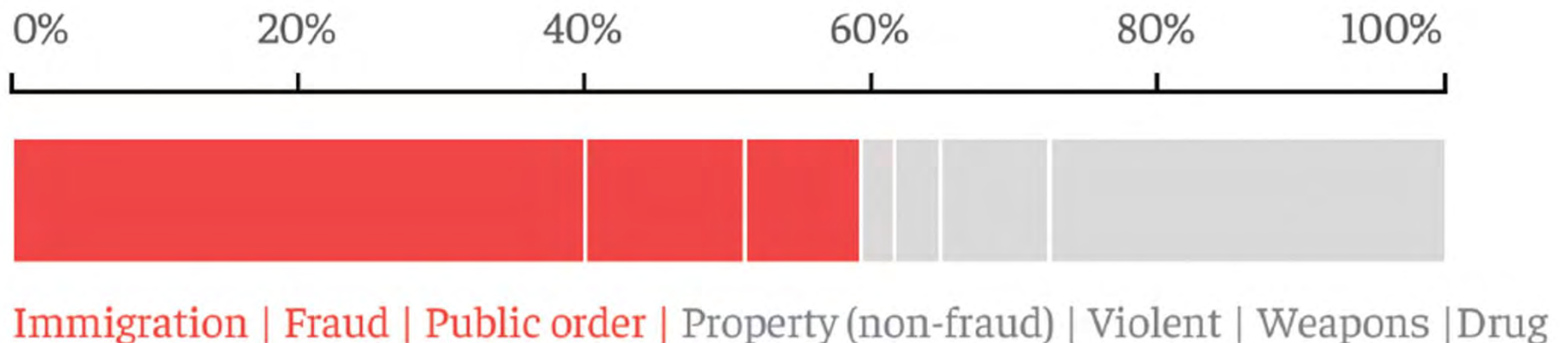
Illegal Detention in Non-(f)(1) Case

- Mail fraud case; not an (f)(1) offense
- Prosecutor: “We seek pretrial detention based on risk of flight and danger to the community”
- **Defense: Did not object**
- **Judge: IMPROPERLY set DH for 5 days later and locked the client in jail.**

Defense must put a stop to these illegal practices!

Nearly 60% of Federal Cases: No (f)(1) Factor

Figure 8: Non-(f)(1) Cases Where Judges Are Not Automatically Authorized to Hold a Detention Hearing Comprise Nearly 60% of All Federal Pretrial Cases.



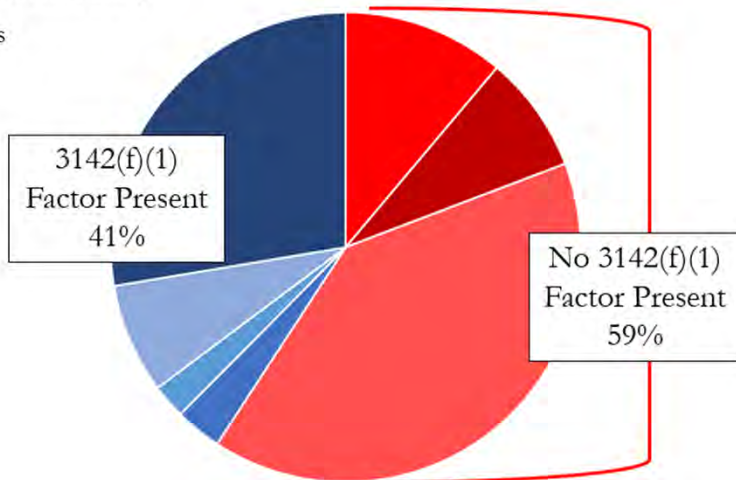
Source: *Freedom Denied* at 92 fig.8.

Nearly 60% of Federal Cases: No (f)(1) Factor

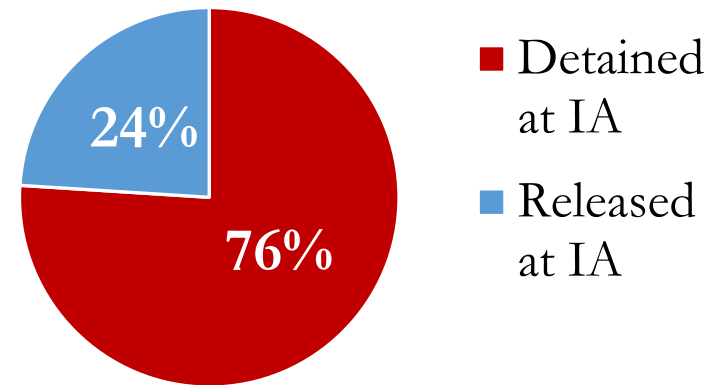
**In more than half of all cases nationwide,
there's a real question of whether the law
allows the judge to hold a Detention
Hearing at all!**

76% of Non-(f)(1) Cases Nationwide: Clients Jailed at IA

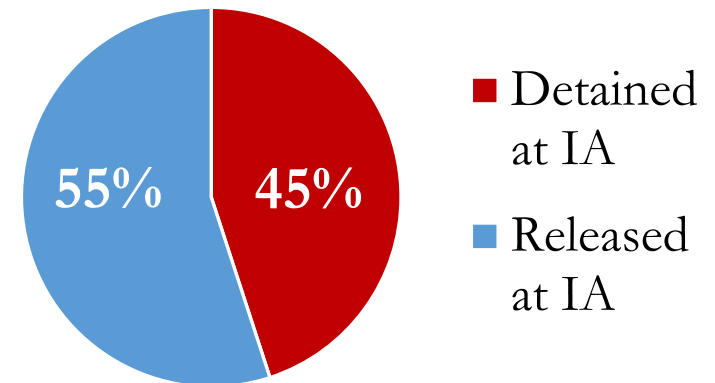
- Fraud
- Public order
- Immigration
- Violent
- Property (Non-Fraud)
- Weapons
- Drug



All Non-F(1) Cases

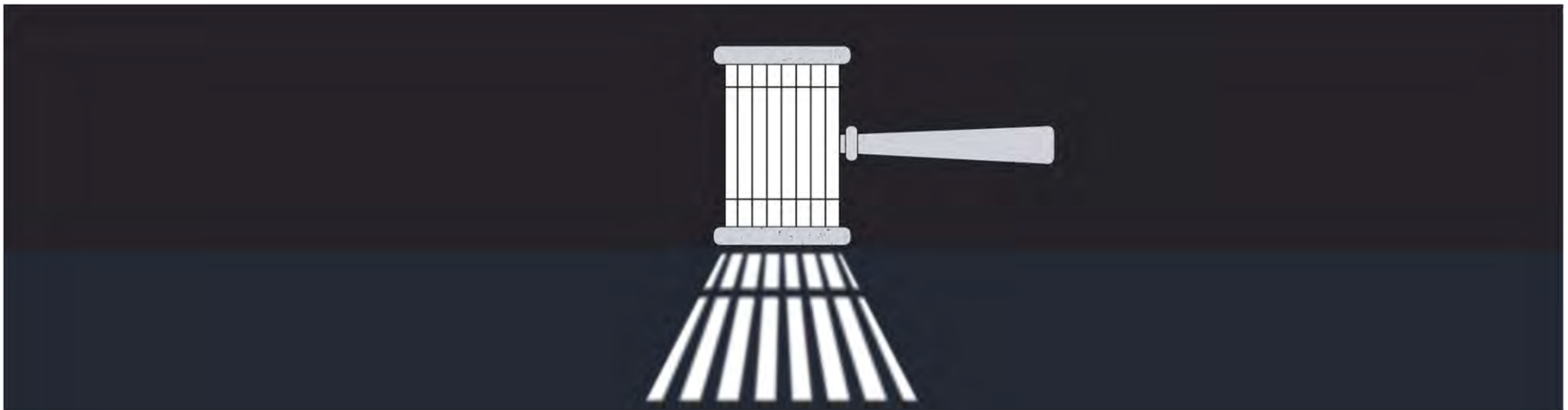


Excluding Immigration Cases (Fraud + Public Order only)



See *Freedom Denied* at 100; see also *id.* at 92 fig.14 (citing George E. Browne & Suzanne M. Strong, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018*, BUREAU OF JUST. STAT. at 2 tbl.1 (Mar. 2022), <https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf>).

Initial Appearance Hearing: Action Steps for Winning Release



ACTION STEP 1

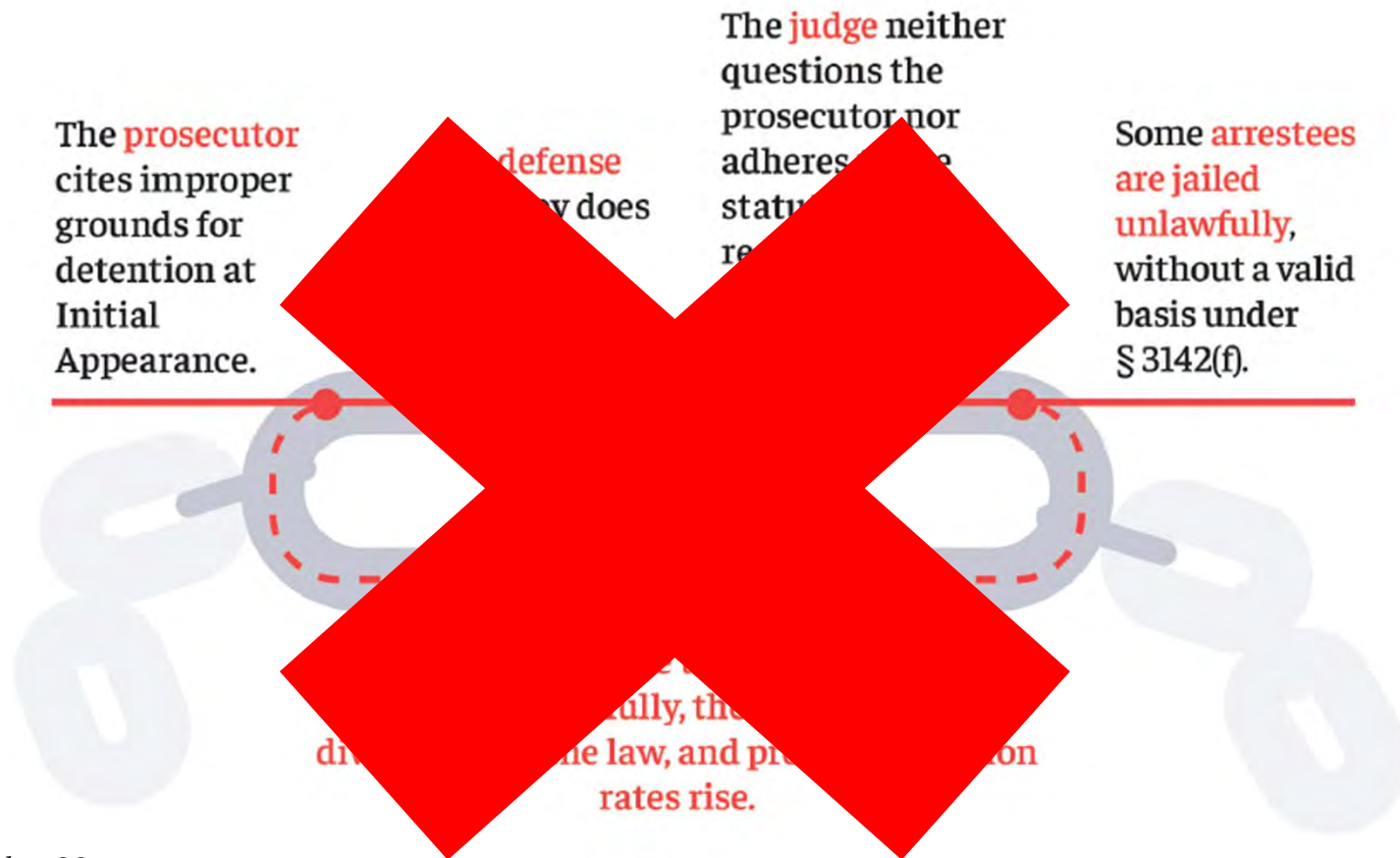
Initial Appearance in All Cases

1) Hold judges and government to the legal standard that applies at the Initial Appearance

- Ask govt what (f) factor authorizes a Detention Hearing—in every case.
- Explain that dangerousness and ordinary risk of flight are not legitimate bases for holding a Detention Hearing.
- Remind judge there's a legal standard the government must meet before the judge can hold a Detention Hearing.
- **Only options:**
 - Client is charged with drug, gun, COV, minor victim offense under (f)(1);
or
 - Proof of serious risk of flight/obstruction under (f)(2).
- *See* Handouts: Checklist & Flowchart

ACTION STEP 1

Breaks Problematic Feedback Loop at IA



Source: *Freedom Denied* at 29.

Action Steps for Winning Release and Avoiding Illegal Jailing in Non-(f)(1)s

FRAUD

MONEY LAUNDERING (no drug charge)

IMMIGRATION/ILLEGAL REENTRY

ACTION STEP 2

Initial Appearance in Non-(f)(1) Cases

2) If no (f)(1) factor: **OBJECT to DH as illegal & request immediate release**

- Object if Govt Claims Ordinary Risk of Flight
- Object if Govt Claims Danger to Community
- Types of cases = non(f)(1) cases
 - Fraud
 - Money laundering
 - Illegal reentry, etc

ACTION STEP 2A:

If Govt's Basis is Ordinary Risk of Flight

**“The govt is moving for
detention because the defendant is a
fugitive.”**



ACTION STEP 2A:

If Govt's Basis is Risk of Flight (ROF)

- Object: The government hasn't proven that there is “a **SERIOUS RISK** that [our client] will flee.”
- A serious risk of flight is “substantially narrower than [a risk of non-appearance] [A] case involves a ‘serious risk of flight,’ . . . if it involves a serious risk that the defendant intentionally will avoid court proceedings.”
 - *U.S. v. White*, 2021 WL 2155441, at *10, *7 (M.D. Tenn. May 27, 2021).

ACTION STEP 2A:

If Govt's Basis is Risk of Flight (ROF)

- Judge may need to hold a mini-hearing during the IA.
- Govt must present evidence to demonstrate “serious” risk of flight
 - 3d Cir: Client “may be detained *only if the record supports a finding* that he presents a serious risk of flight.” *Himler*, 797 F.2d at 160.
 - 2d Cir: The judge “must first determine by a *preponderance of the evidence*” that § 3142(f)(1) or (f)(2) is met before holding a Detention Hearing. *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988)
 - *See also United States v. Lopez-Chilel*, No. CR 22-20141, 2022 WL 1178503, at *1 (E.D. Mich. Apr. 20, 2022).
- Defense present evidence that client does not pose “serious” ROF
 - Has lived in community a long time. *See Friedman*, 837 F.2d at 49.
 - Good record of appearance in court, lack of bail forfeitures, etc.

See Freedom Denied at 109.

PUSH BACK
IF JUDGE SAYS
“SAVE IT FOR THE DETENTION HEARING”

There's a separate legal standard that applies at Initial Appearance.

§ 3142(f) is a gatekeeper for even holding a Detention Hearing.

The record must support your finding.

ACTION STEP 2A:

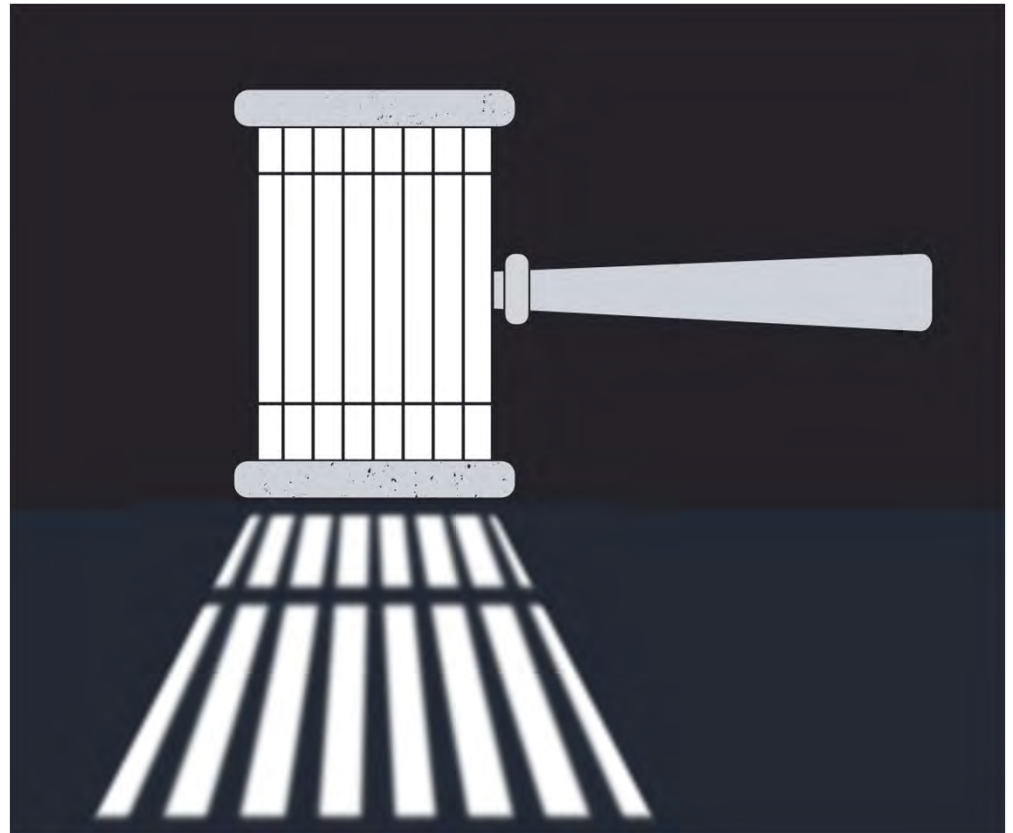
Support With *Freedom Denied*

1

Judges Must Follow the Correct Legal Standard at the Initial Appearance Hearing and Stop Jailing People Unlawfully.

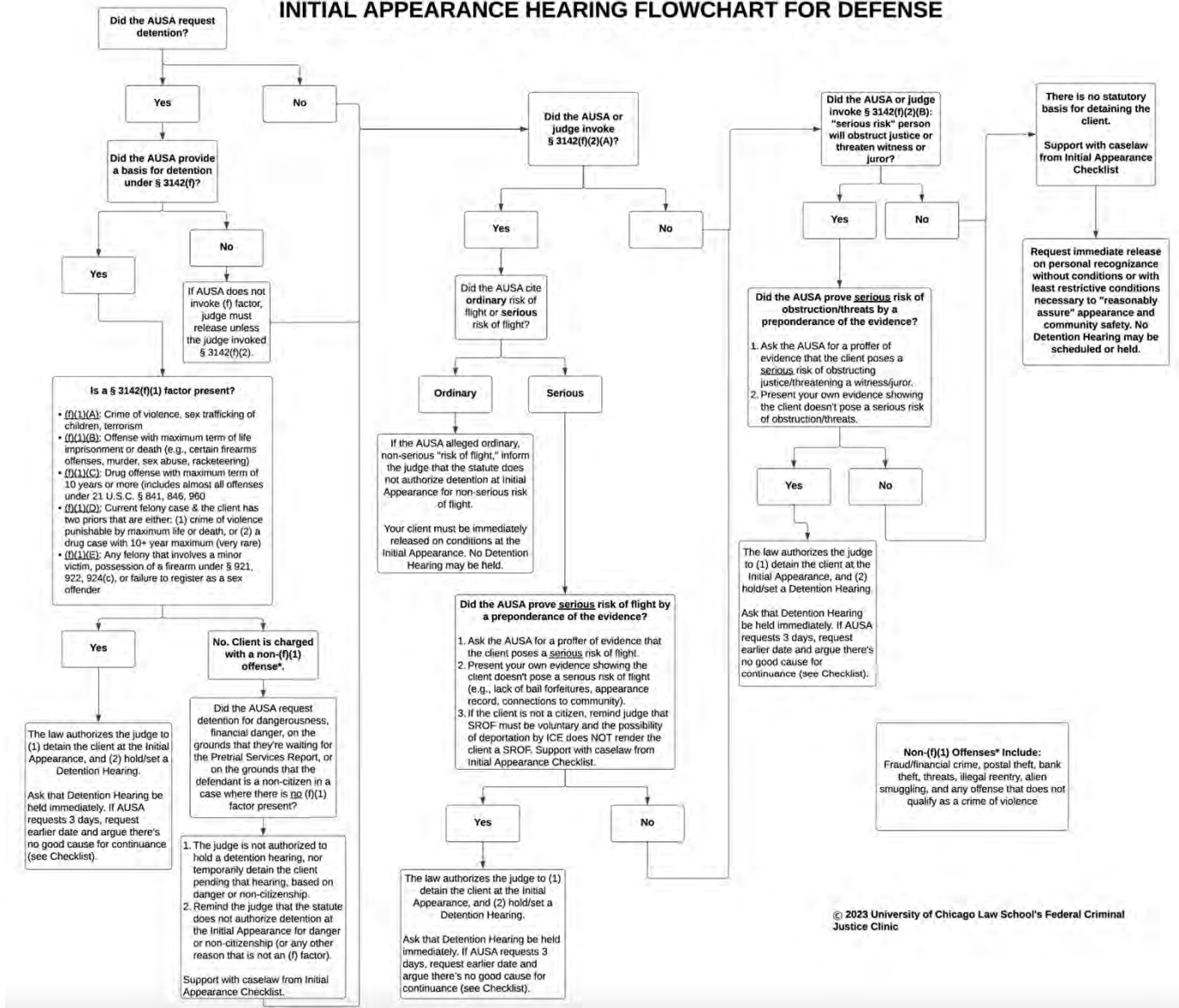
TAKEAWAYS	P.84
THE LAW	P.87
THE PRACTICE	P.93
THE SOLUTION	P.107

P.82



Flowchart for Initial Appearances (in handouts)

INITIAL APPEARANCE HEARING FLOWCHART FOR DEFENSE



ACTION STEP 2B:

If Govt's Basis is Danger/Financial Danger

- **FRAUD CASE—BRA does not authorize a judge to detain our client at Initial App as a “financial danger.”**
- Only legal basis for holding a DH in fraud case → “Serious risk” of flight or obstruction, (f)(2)
- Requires government to present EVIDENCE
- A judge cannot detain your client at Initial Appearance or hold a Detention Hearing on the ground that they pose a “financial danger.”

Limitations on Holding a Detention Hearing: ~~DANGER~~

Judge admits to holding a Detention Hearing in a fraud case on this impermissible basis:

“In fact, I did make that mistake, and [the defense] filed a motion after I detained someone in a fraud case based in part on dangerousness. They moved to reconsider, and ultimately the individual was released.”

Freedom Denied at 92.

Aside: If gov't invokes serious risk of flight at Initial Appearance...

If at IA the gov't's basis for holding a Detention Hearing is serious risk of flight, some courts hold that the judge is prohibited from considering dangerousness at the DH itself.

- *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (where “a serious risk of flight” was the basis for a detention hearing, the court found that “the statute does not authorize the detention of the defendant based on danger to the community. . .”).
- *United States v. Gibson*, 384 F. Supp. 3d 955, 960–64 (N.D. Ind. 2019) (following *Himler* and other cases over contrary district court case, *United States v. Holmes*, 438 F. Supp. 2d 1340 (S.D. Fla. 2005)).
- *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 965–69 (E.D. Wis. 2008) (finding similarly but relying on *United States v. Byrd*, 969 F.2d 106, 109–10 (5th Cir. 1992)).

ACTION STEP 3:

Initial Appearance in Fraud Cases Especially

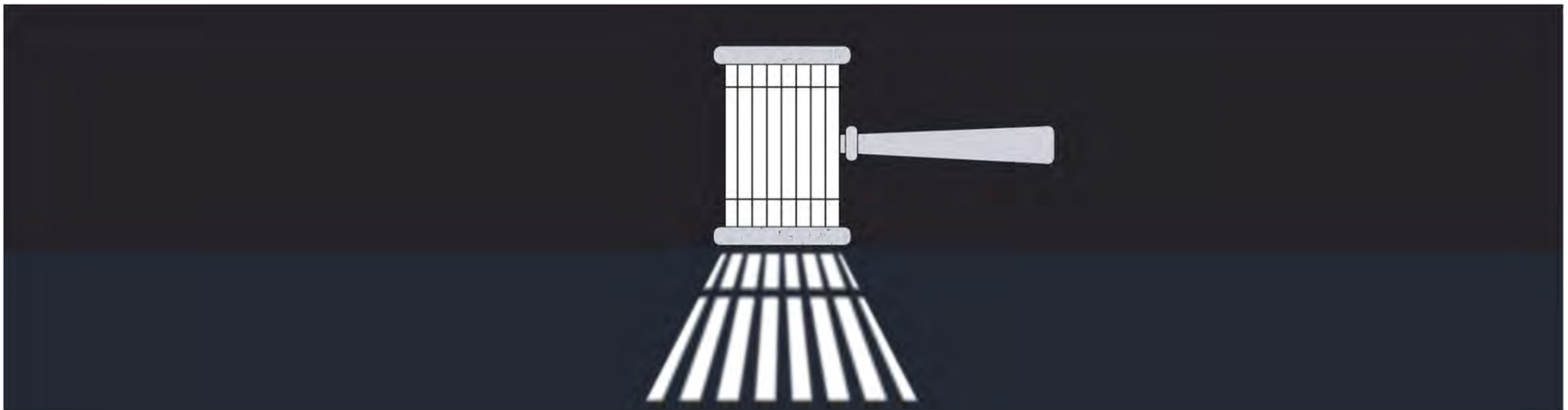
- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—OBJECT to detention hearing as illegal!
- 3) **File a written motion before Detention Hearing if judge's basis for holding that hearing is "risk of flight" and we think judge got it wrong.**
 - Only file in non-(f)(1) cases: fraud, money laundering, sympathetic immigration case with good facts
 - **CAUTION: DON'T FILE in an illegal reentry case with bad facts! You'll lose and risk creating bad law for fraud cases.**
 - Handouts: Template Motion For Immediate Release in a Case that Doesn't Qualify for Detention Under § 3142(f)(1)

ACTION STEP 4:

Initial Appearance in Fraud Cases Especially

- 1) Ask Gov't what (f) factor (Checklist & Flowchart)
- 2) If no (f)(1) factor—OBJECT to detention hearing as illegal!
- 3) File written motion if basis is “risk of flight”
- 4) **File motion to revoke with district court if judge's basis for detention is impermissible ground of danger or financial danger**
 - Handouts: Template Motion to Revoke (appeal to District Court)

Action Steps for Winning Release: Non-Citizens



Bond For Non-Citizen Clients

Defenders have been submitting to detention in non-citizen cases.

This must stop.

Bond For Non-Citizen Clients

- At Initial Appearance in immigration-related case, the government bears the burden of proving **serious risk of flight** to even get a Detention Hearing.
- Many clients have long-standing ties to the community.

Bond For Non-Citizen Clients

ICE detainer is NOT evidence of serious risk of flight because any flight must be voluntary.

- *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (“[A] risk of involuntary removal does not establish a serious risk that [the defendant] will flee.”).
- *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015) (“[T]he risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition.”).
- *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1135–36 (N.D. Iowa 2018).
- *United States v. Suastegui*, No. 3:18-MJ-00018, 2018 WL 3715765, at *4 (W.D. Va. Aug. 3, 2018).
- *United States v. Martinez-Patino*, 2011 U.S. Dist. LEXIS 26234 (N.D. Ill. Mar. 14, 2011).

Bond For Non-Citizen Clients

A judge cannot hold a Detention Hearing or deny bond to a removable client based on immigration status or the existence of an ICE detainer/hold

- *United States v. Sanchez-Rivas*, 752 F. App'x 601, 604 (10th Cir. 2018) (defendant “cannot be detained solely because he is a removable alien”).
- *United States v. Santos-Flores*, 794 F.3d 1088, 1091 (9th Cir. 2015).
- *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (mere presence of an ICE detainer does not override § 3142(g)).
- *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 968 (E.D. Wis. 2008) (“[I]t would be improper to consider only defendant’s immigration status, to the exclusion of the § 3142(g) factors, as the government suggests.”).
- And many more cases...

Bond for Non-Citizen Clients

**Don't argue ICE cannot detain client after release!
8 COAs have rejected this argument.**

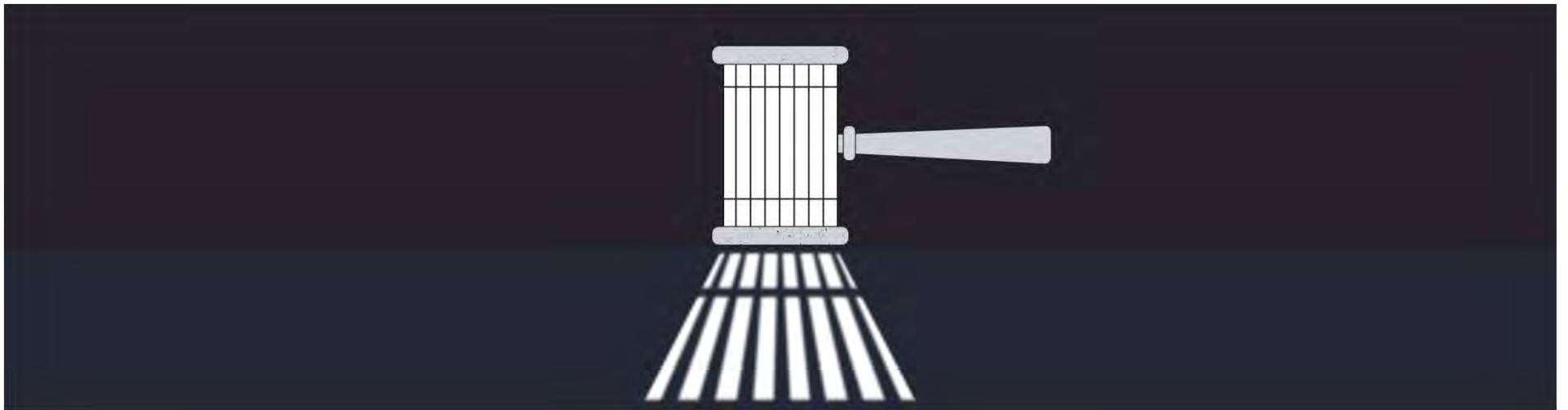
- *United States v. Vasquez-Benitez*, 919 F.3d 546, 554 (D.C. Cir. 2019) (holding district court erred by prohibiting ICE from taking custody of released defendant).
- *United States v. Lett*, 944 F.3d 467 (2d Cir. 2019).
- *United States v. Soriano Nunez*, 928 F.3d 240 (3d Cir. 2019).
- *United States v. Baltazar-Sebastian*, 990 F.3d 939 (5th Cir. 2021).
- *United States v. Veloz-Alonso*, 910 F.3d 266, 268–69 (6th Cir. 2018) (federal judge does not have the authority to order ICE not to jail or deport a person released on bond in a federal criminal case).
- *United States v. Pacheco-Poo*, 952 F.3d 950 (8th Cir. 2020).
- *United States v. Diaz-Hernandez*, 943 F.3d 1196 (9th Cir. 2019).
- *United States v. Barrera-Landa*, 964 F.3d 912, 918–919 (10th Cir. 2020) (cites *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) as consistent with this position).

Bond for Non-Citizen Clients

Tell judges: non-citizen clients don't pose a higher risk of flight or violation than citizens.

- **DOJ data shows undocumented clients have an even lower rate of non-appearance than U.S. citizens—they fail to appear .5% of the time and they're rearrested .2% of the time.**
 - DOJ, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018*, Table 9 at 11 (2022), <https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf>.
- **Compared to U.S. citizens: Undocumented clients are MORE likely to comply with conditions of release and LESS likely to have bond revoked.**
 - *Id.* at 11 (violations: 2% for undocumented vs. 22% for citizens; release revoked: 1% for undocumented vs. 12% for citizens).

Jailing of Non-Citizens: Data



Source: *Freedom Denied* at 105–06.

Figure 15: Prosecutors More Frequently Request Detention for Noncitizen Arrestees, Leading Judges to Regularly Detain Noncitizens on Improper Grounds.



Source: *Freedom Denied* at 106 fig.15.

Bond for Non-Citizen Clients: Interview Data

“[A] judge told us that prosecutors often fail to demonstrate any ‘level of analysis’ when requesting detention in cases involving noncitizens.

Instead, the judge characterized prosecutors’ thinking as:
‘there’s a detainer, we’re requesting detention.’”

Freedom Denied at 106.

ACTION STEP

We must fight for release for our non-citizen clients at both the Initial Appearance and the Detention Hearing.

We can't simply agree to detention out of a fear that our client will be detained by ICE and won't get credit for that time.

Handouts: Sample Motion for Release in Non-Citizen Cases (AFPD Andrew Grindrod)

AFPD Colleen Fitzharris' PowerPoint on fd.org

No, Really, Noncitizens Are Eligible for Pretrial Release, Too

Colleen Fitzharris

Assistant Federal Defender, W.D. Washington

Colleen_Fitzharris@fd.org

Bail Boot Camp

Houston, TX, January 26-28, 2023

<https://www.fd.org/criminal-defense-topics/essential-topics/bail-pretrial-release>

Bond for Non-Citizen Clients

9th Circuit: good law that enables clients to get credit for time spent in ICE custody.

Push other courts to follow this precedent.

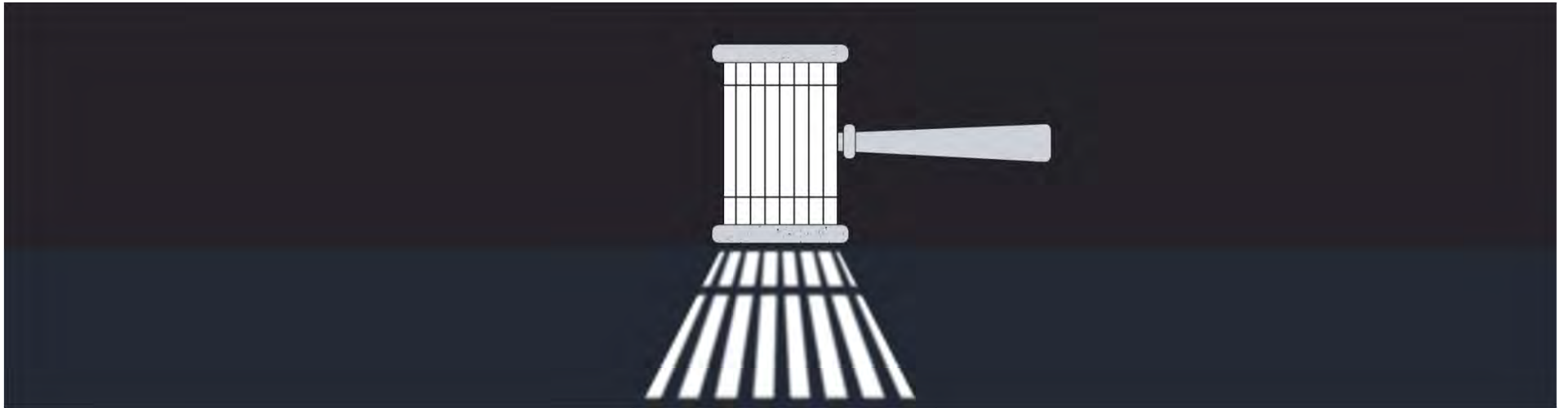
- *See Zavala v. Ives*, 785 F.3d 367, 380 (9th Cir. 2015) (“We hold that when immigration officials detain an alien pending potential prosecution, the alien is entitled under § 3585(b) to credit toward his criminal sentence. We also hold that an alien is entitled to credit for all time spent in ICE detention subsequent to his indictment or the filing of formal criminal charges against him.”).

Bond for Non-Citizen Clients

Benefits to fighting for release:

- Sometimes non-citizen clients are released on bond and aren't taken into ICE custody.
- Some non-citizens released on bond in the criminal case are then given a bond from ICE.
- Some non-citizens released on bond are deported and never have to face the criminal charge at all.
- **Handouts: Sample Motion for Release in Non-Citizen Cases**

Access-to-Counsel Crisis



Source: *Freedom Denied* at 116–45.

**In more than one-quarter of
federal courts:**

**An indigent individual can be jailed at
the Initial Appearance without a lawyer
by their side.**

Figure 6: There is a Nationwide Access-to-Counsel Crisis in the Federal System.



Source: *Freedom Denied* at 34 fig.6.

No Lawyer at Initial Appearance VIOLATES THE LAW

- Sometimes there's a federal defender in the courtroom in a stand-by capacity.
- **But the law demands active representation by a lawyer who can defend their client's rights under § 3142(f).**

“These widespread deprivations of counsel violate the law, increase an arrestee’s chances of being detained or incriminating themselves, and exacerbate existing racial disparities in the federal system.”

Freedom Denied at 128.

No Lawyer at Initial Appearance VIOLATES THE LAW

- **18 U.S.C. § 3006A(c)**: “A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance . . . through appeal.”
 - Mandates that a lawyer actively represent every single client, “not just passively standby in an advisory capacity.” *Freedom Denied* at 118.
 - Mandates representation from the start of the Initial Appearance.
- **Fed. R. Crim P. 44**: “A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from the initial appearance through appeal.”
- **Fed. R. Crim P. 5(d)(2)**: “The judge must allow the defendant reasonable opportunity to consult with counsel” at the Initial Appearance.
- **Sixth Amendment**: “The outcome of an Initial Appearance has the potential to significantly prejudice the rights of the accused—most prominently, the right to liberty. Courts recognize that the potential loss of one’s liberty is sufficiently significant to trigger the Sixth Amendment right to counsel.” *Id.* at 123; *see id.* at 122-25.

No Lawyer at Arraignment VIOLATES THE CONSTITUTION

- **The Sixth Amendment requires representation by counsel during any “critical stage” of a criminal case.**
 - *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Rothgery v. Gillespie County*, 554 U.S. 191, 211–12 (2008).
- **A federal arraignment is a “critical stage.”**
 - “Under federal law an arraignment is a sine qua non to the trial itself—the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried.” *Hamilton v. State of Alabama*, 368 U.S. 52, 54 n.4 (1961).
 - “Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.” *Frye*, 566 U.S. at 140 (citing generally *Hamilton*, 368 U.S. 52).

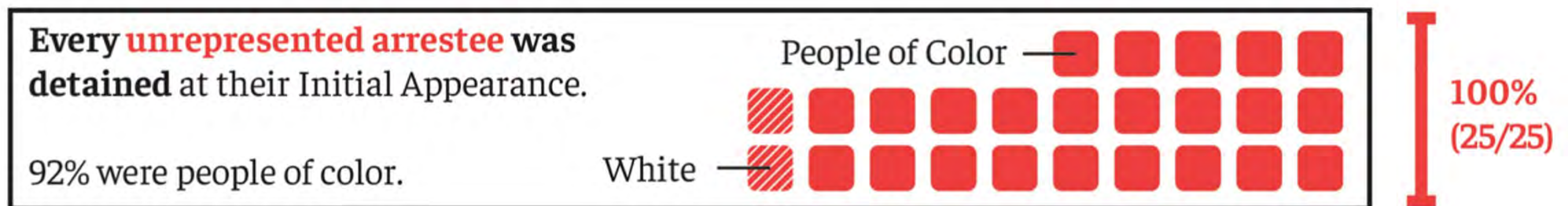
No Lawyer at Initial Appearance VIOLATES THE LAW

If there's no lawyer present, there's no one to prevent
illegal jailing.

Client needs a lawyer at the Initial Appearance to present
legal arguments about the § 3142(f) factors.

“Unrepresented defendants . . . are in no position at an initial bail hearing to present the best, most persuasive case on why they should be released pending trial.” *Booth v. Galveston County*, 2019 U.S. Dist. LEXIS 133937, *33 (S.D. Tex. Aug 7, 2019).

Figure 17: At the Initial Appearance, Arrestees Deprived of Lawyers Are Jailed at Far Higher Rates than Those With Lawyers.



Source: *Freedom Denied* at 113 fig.17.

New DOJ Pretrial Release Directive (2023): Access to Counsel

- “[P]rosecutors *must recognize* that ‘a defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding [including] initial appearance,’ except where ‘the defendant waives this right.’”
 - U.S. Dep’t of Just., Just. Manual § 9-6.110 (2023), <https://www.justice.gov/jm/jm-9-6000-release-and-detention-pending-judicial-proceedings>. (quoting Fed. R. Crim. P. 44(a) and citing 18 U.S.C. § 3006A).
- **Requires AUSAs to object to uncounseled Initial Appearances.**

FCJC Proposal to Judicial Conference

I. These Committees Should Act to Vindicate the Right to Counsel at the Initial Appearance Hearing.



Edwin F. Mandel Legal Aid Clinic
6020 South University Avenue | Chicago, Illinois 60637
PHONE 773-909-2011 | FAX 773-702-2063
E-MAIL alisonsiegler@uchicago.edu
www.law.uchicago.edu

Alison Siegler
Clinical Professor of Law
Founding Director, Federal Criminal Justice Clinic

December 12, 2022

To the Committee on Criminal Law and the Committee on Defender Services:

We write to alert the Judicial Conference's Committee on Criminal Law and Committee on Defender Services to a nationwide access-to-counsel crisis that these Committees are uniquely positioned to address. As we document in a new report about

ACTION STEP:

Ensure Every Single Client is Actively Represented at the Initial Appearance

- Use DOJ directive to tell judges that they're REQUIRED to appoint counsel!
- NO EXCEPTIONS: The law requires that EVERY single person be actively represented by counsel during the Initial Appearance, including:
 - In multi-defendant cases
 - Noncitizens
 - Removals/Rule 5s
- Judges are often at fault
 - Many Chief Defenders have worked with their courts to ensure representation for all arrestees at Initial Appearance.
 - Your office doesn't need to recreate the wheel.

ACTION STEP:
**Ensure Every Single Client is Actively Represented at
the Initial Appearance**

Multi-defendant cases:

- Duty AFPD can actively represent ALL individuals “for purposes of Initial Appearance only.”
- Happens in Chicago, San Diego, Wisconsin, and many more districts

ACTION STEP:

Ensure Every Single Client is Actively Represented at the Initial Appearance

Any ethical concerns about conflicts of interest must bend to the unequivocal statutory law requiring representation by counsel from the beginning of the Initial Appearance.

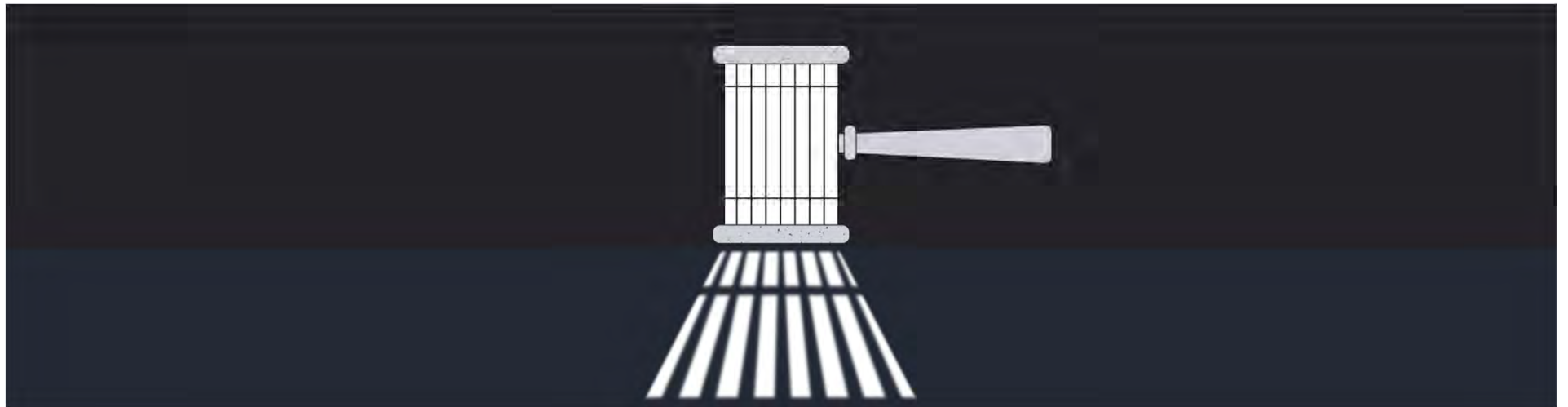
If there's a concern about conflicts of interest:

- Chief Defender could work with the court to bring in CJA lawyers in multi-defendant cases. See, e.g., D.MA.
- (Duty AFPD could even ask each client in a multi-defendant case to waive the conflict.)

BREAKOUT SESSION TODAY at 3:10 pm
to talk with Chief Defenders who've changed this
practice in their district

Ensuring Representation at Initial Appearance Hearings
Orchestra Ballroom

Action Steps for Winning Release Across Initial Appearance and Detention Hearing



Problem: Waiver of Detention Hearing

NATIONALLY

**The defense bar waives or submits to
detention in 40% of all cases!!!**

SOURCE FOR 40%: BUREAU OF JUST. STATS., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, FISCAL YEARS 2011–2018, at 2 & Table 1 (2022).

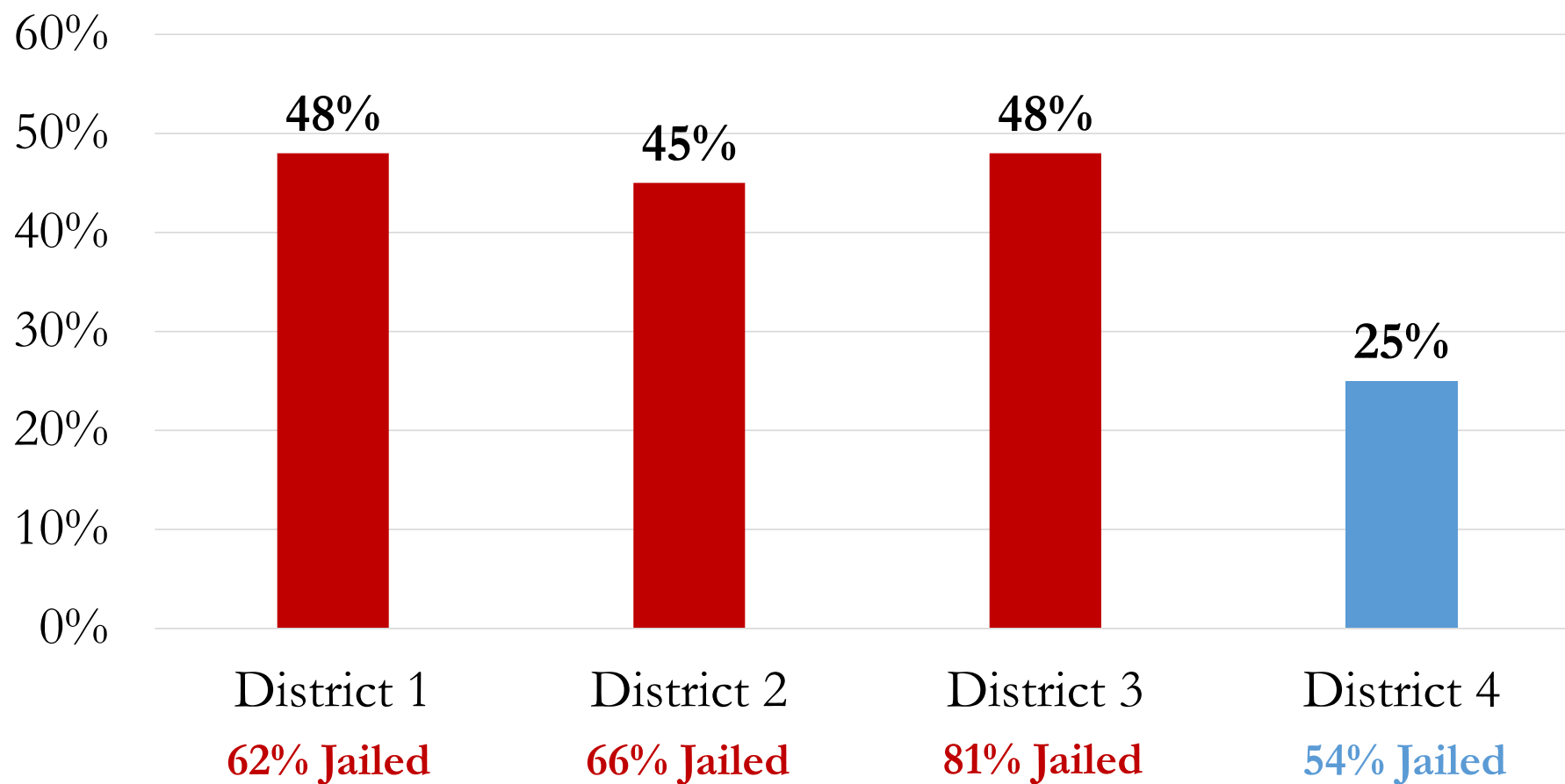
Problem: Waiver of Detention Hearing

Freedom Denied Study Findings

- **Defense waived detention in 42% of cases**
 - ~50% in some courts
- **Waiver rate higher in presumption cases**
 - **Presumption Cases: 55%**
 - **Non-Presumption Cases: 26%**

Source: *Freedom Denied* at 104, 163, 225.

Rate of Defense Waiver

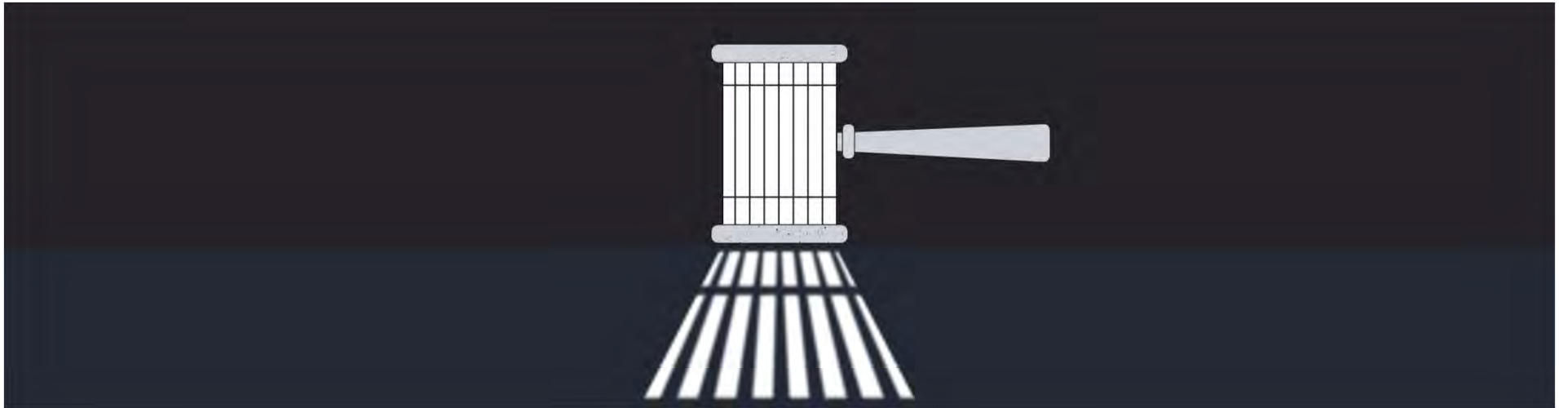


Source: *Freedom Denied* at 225.

ACTION STEP:

**DON'T WAIVE DETENTION
HEARINGS!**

Jailing for Poverty



Source: *Freedom Denied* at 172–91.

ACTION STEP:

Ensure Clients Are Not Jailed for Poverty

- **Clear prohibition:** “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.” § 3142(c)(2).
- **Supposed to be a bright-line rule**
 - Legislative history: “The purpose of [§ 3142(c)(2)] is to preclude the sub rosa use of money bond to detain dangerous defendants.” *The Comprehensive Crime Control Act of 1983*, S. REP. NO. 98-225, at 16 (1983).
- **But our study found that judges violate this law, which drives up detention rates and exacerbates racial disparities.**

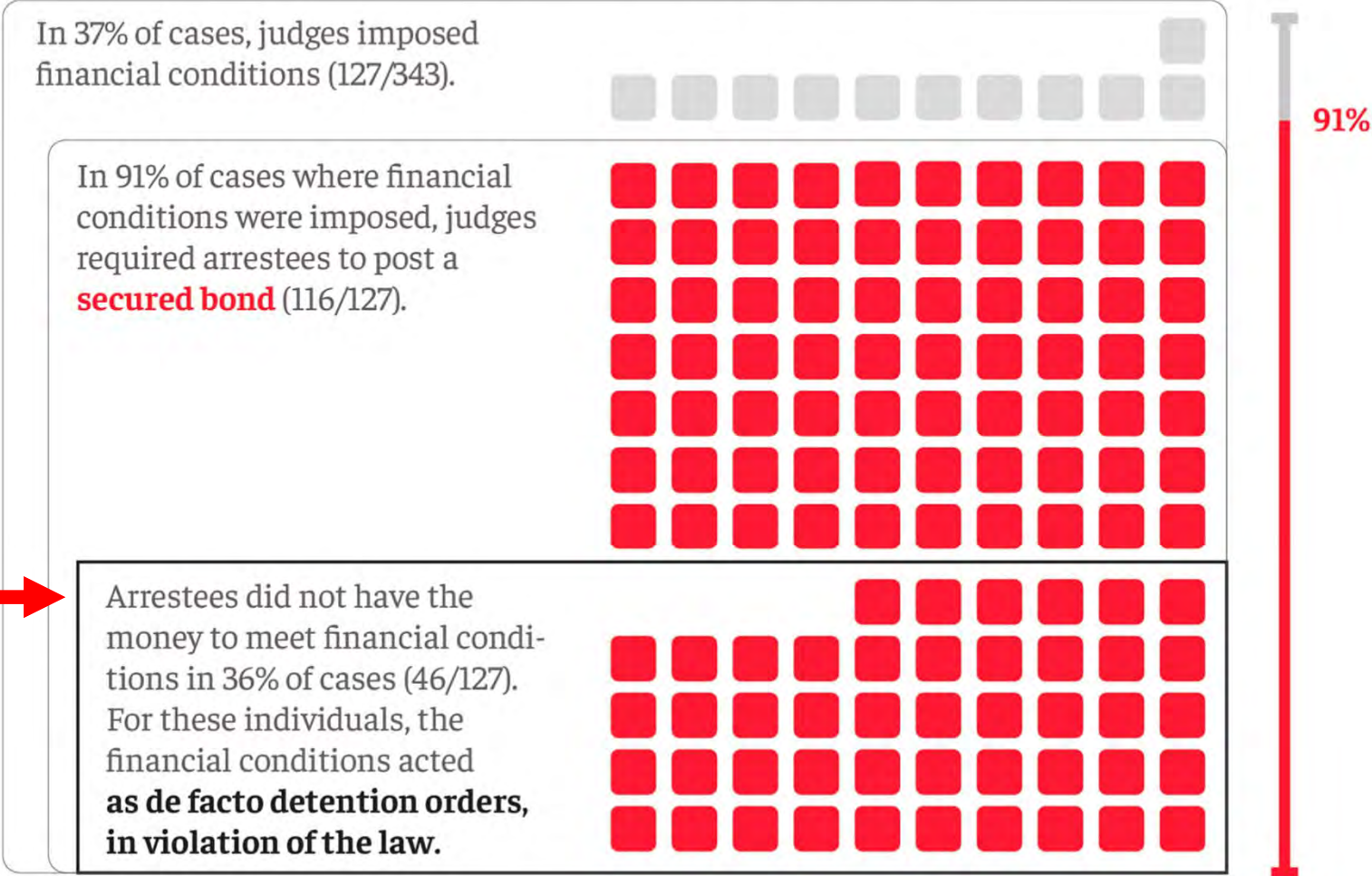
ACTION STEP:

Ensure Clients Are Not Jailed for Poverty

“Almost a quarter (24%) of defendants released pretrial were required to pay a financial bond to secure their release.”

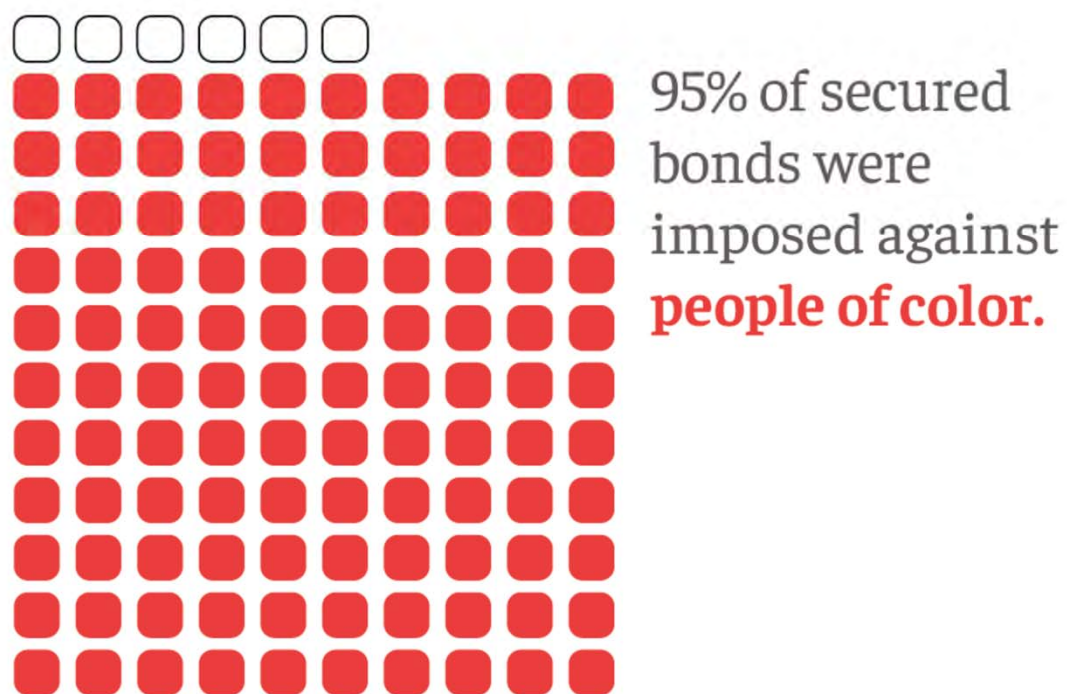
SOURCE: BUREAU OF JUST. STATS., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, FISCAL YEARS 2011–2018, at 6 & Table 4 (2022).

Figure 23: Judges Impose Burdensome Financial Requirements and Jail People for Poverty.



Source: *Freedom Denied* at 181 fig.23.

Figure 26: Excessive Financial Conditions of Release Have a Disproportionate Racial Impact.



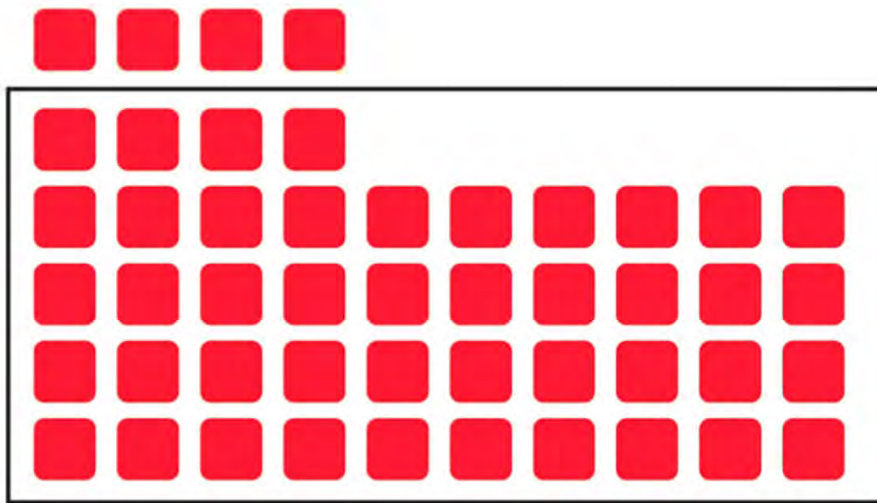
Source: *Freedom Denied* at 186 fig.26.

Eliminate Corporate Surety Bonds

Figure 24: The Use of Corporate Surety Bonds Results in Higher Rates of Pretrial Detention and Exacerbates Racial Disparities.

In one court, CSBs were imposed in **22%** of cases.

\$250,000!



In 92% of the cases where a CSB was imposed, the arrestee was **ultimately detained** pretrial.

All those on whom CSBs were imposed were **people of color**.

Source: *Freedom Denied* at 183 fig.24.

Nearly Everyone Subject to a CSB Remains in Jail

Judges' Comments

22 So you have expressed a concern that he should not be
23 released on this bond, which it's my experience nobody ever
24 meets this bond and they remain detained. But we will make it
25 a matter of record that this Defendant may not be released on
1 this tentative bond without further hearing.

During an interview, another judge confirmed that CSBs almost always result in detention, describing \$250,000 CSBs as “a bond they’re never going to make, obviously. Most people can’t make that bond.”

Agreeing to an Unmeetable Money Bond Does Not Help Your Client!!!

YOUR CLIENT WILL NOT GET A
BETTER BOP DESIGNATION

if the judge nominally issues a release order
and your client is ultimately detained on a
financial condition they can't meet!!!

ACTION STEP:

Oppose All Financial Conditions of Release Imposed on Indigent Clients

- **90% of people in the federal system are indigent.**
 - *Cardone Report* at xiv (2018).
- **If someone is too poor to pay for their release, the judge's order violates:**
 - The prohibition in § 3142(c)(2); and
 - The statutory requirement of “least restrictive” conditions in § 3142(c)(1)(B)—a financial condition that results in detention is never the “least restrictive” condition available.

ACTION STEP:

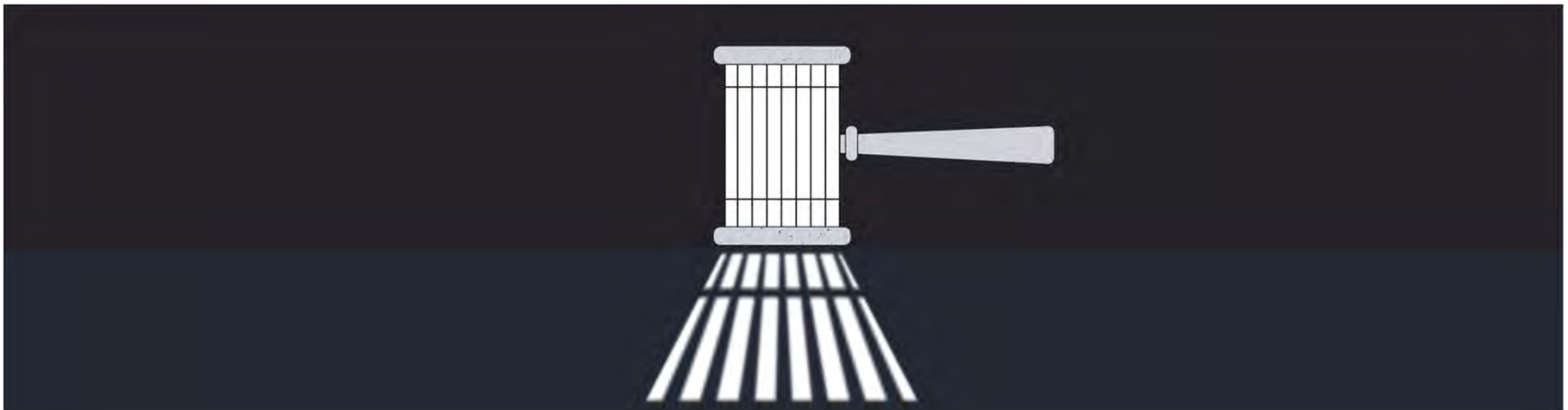
Ensure Clients Are Not Jailed For Poverty

Object to solvent surety

Object to property bonds

Both violate the spirit of § 3142(c)(2)

DETENTION HEARING: Action Steps for Winning Release



DH ACTION STEP 1:

Remind Judges of First Principles

Presumption of release on personal recognizance!!

- **BRA Text**: “**SHALL ORDER. . . RELEASE.**”
 - § 3142(b)-(c).
- **Legislative History**: BRA was supposed to authorize detention for a **small** category of people: highly dangerous or high risk of absconding.
 - “There is a **small** but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community It is with respect to this **limited group of offenders** that the courts must be given the power to deny release pending trial.” *The Comprehensive Crime Control Act of 1983*, S. REP. NO. 98-225, at 6–7 (1983).

DH ACTION STEP 1: Remind Judges of First Principles

- We don't have to *guarantee* appearance/safety of community.
 - **The statutory question is whether there are conditions of release that will “*reasonably assure*” appearance/safety.**
 - AFPD: “[I]t seems like it’s almost like you need this ironclad guarantee that the person’s going to make every court hearing or do everything Pretrial says, as opposed to what I think reasonable assurance means.”

DH ACTION STEP 1: Remind Judges of First Principles

- Gov't bears burden of proving danger by clear & convincing evidence; risk of flight by preponderance, at least. § 3142(f).
- Strong argument that higher clear & convincing evidence standard should also apply to flight.
 - See Siegler & Zunkel, *Champion* at 59 n.102.
 - See Jaden M. Lessnick, Comment, *Pretrial Detention by a Preponderance: The Constitutional and Interpretive Shortcomings of the Flight Risk Standard*, 89 U. Chi. L. Rev. 1245 (2022).

DH ACTION STEP 2:

Structure Argument Around § 3142(g) Factors

The law requires the judge to consider these factors in determining if our client poses a danger or flight risk that can't be mitigated by ANY conditions.

DH ACTION STEP 2: Structure Argument Around § 3142(g) Factors

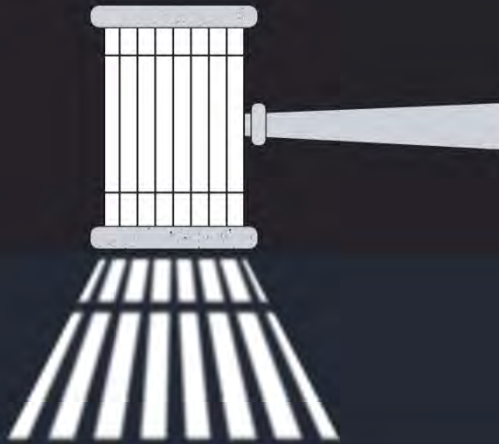
- Nature and circumstances of offense
- History & characteristics, including
 - Family ties
 - Employment ties
 - Length of time in the community
 - History of drug/alcohol abuse
 - Physical/mental condition
 - Criminal History
 - On parole, probation, supervision, bond
 - Record concerning appearance in court
- Weight of evidence: Least important factor

DH ACTION STEP 3: Conditions of Release

- The law requires judge to consider ALL conditions of release
 - And to impose “least restrictive” conditions under § 3142(c)(1)(B)
- Present facts to show there are conditions of release that will “reasonably assure” appearance/safety.
- Present a creative package of conditions tailored to our client
 - Third-party custodian
 - Maintain/get employment
 - Maintain/start education
 - Curfew
 - Refrain from excessive alcohol/all drugs
 - Undergo psych treatment
 - Restrictions on travel/living/EM/GPS

DETENTION HEARING:

Action Steps for Winning Release in Presumption Cases



Source: *Freedom Denied* at 148–169.

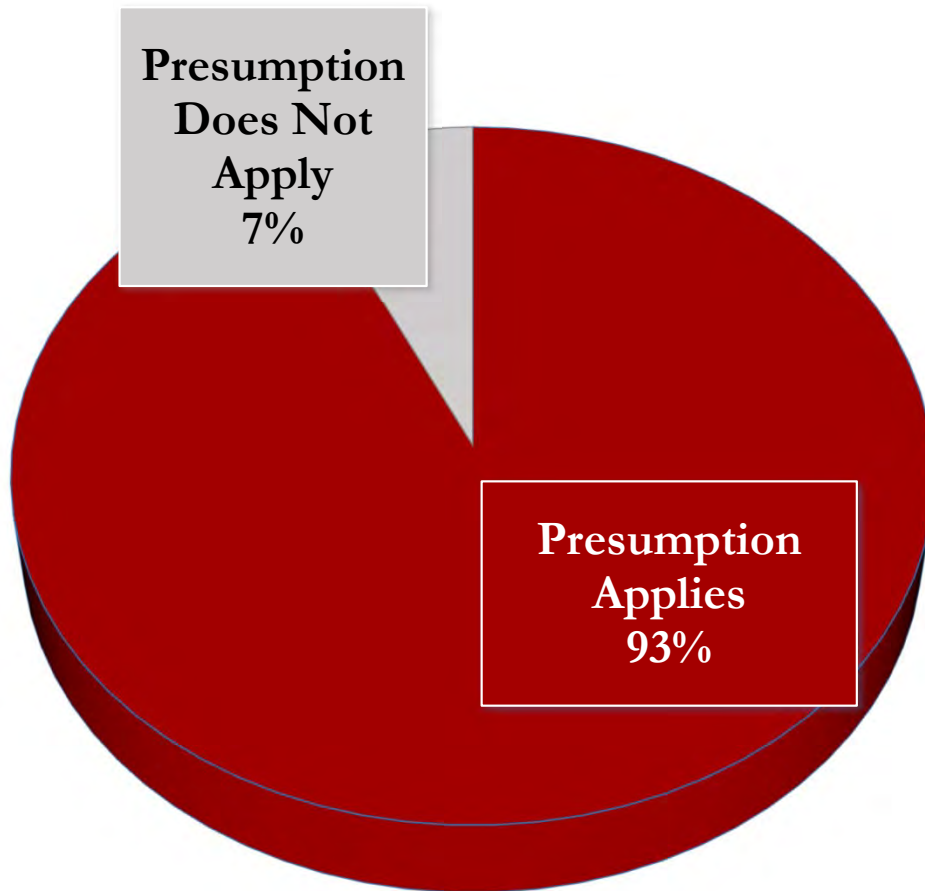
ACTION STEPS:

Detention Hearing & Presumption Cases

SOURCES IN HANDOUT MATERIALS

- Checklist & Flowchart for Defense Attorneys to take into court
- Template Motion for Pretrial Release in Presumption Case

Drug Cases Subject to the Presumption



93% of drug cases are presumption cases.

Freedom Denied at 38, 147 (citing Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. 52, 55 (2017), <https://www.uscourts.gov/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates>.)

AO Study: Presumption Over-Detains Low-Risk Individuals

“Rather than jailing the worst of the worst, the presumption over-incarcerates the lowest-risk offenders in the system, people who are stable, employed, educated, and have minimal to no criminal history.”

The Champion article at 50 (citing Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81(2) FED. PROBATION 52, 61 (2017)).

AO Study:

Presumption Over-Detains Low-Risk Individuals

- “[T]he Judicial Conference of the United States has expressed concern that the rise in presumption cases is ‘unnecessarily increasing the detention rates of low-risk defendants, particularly in drug trafficking cases.’”
 - *Freedom Denied* at 152 (quoting JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10–11 (2017), https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf [https://perma.cc/2GFW-LZUA]).
- “The Judicial Conference relied on a study finding that the presumption increased detention orders by 26% for people in the lowest Pretrial Risk Assessment (PTRA) category.”
 - *Freedom Denied* at 152 (citing Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 FED. PROB. 52, 57 (2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf [https://perma.cc/BL9D-D7LC]).

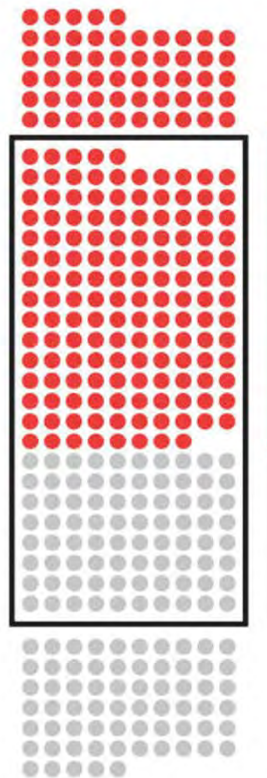
AO Study: Presumption Over-Detains Low-Risk Individuals

“The [Austin] study reveals that a sizeable segment of low-risk defendants falls into the category of drug traffickers subject to the presumption of detention. The study concluded that these defendants are detained at a high rate, even when their criminal histories and other applicable risk factors indicate that they pose a low risk of either reoffending or absconding while on pretrial release, and arguably should be released for pretrial supervision.”

Judicial Conference Recommendation Re: Presumptions of Detention During COVID, Enclosure 2, at 2 (Apr. 28, 2020), <https://perma.cc/R8UW-D6U7> (citing Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. 52, 57 (2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf [https://perma.cc/BL9D-D7LC]).

Figure 19: Arrestees Are Detained More Frequently in Presumption Cases Than in Non-Presumption Cases.

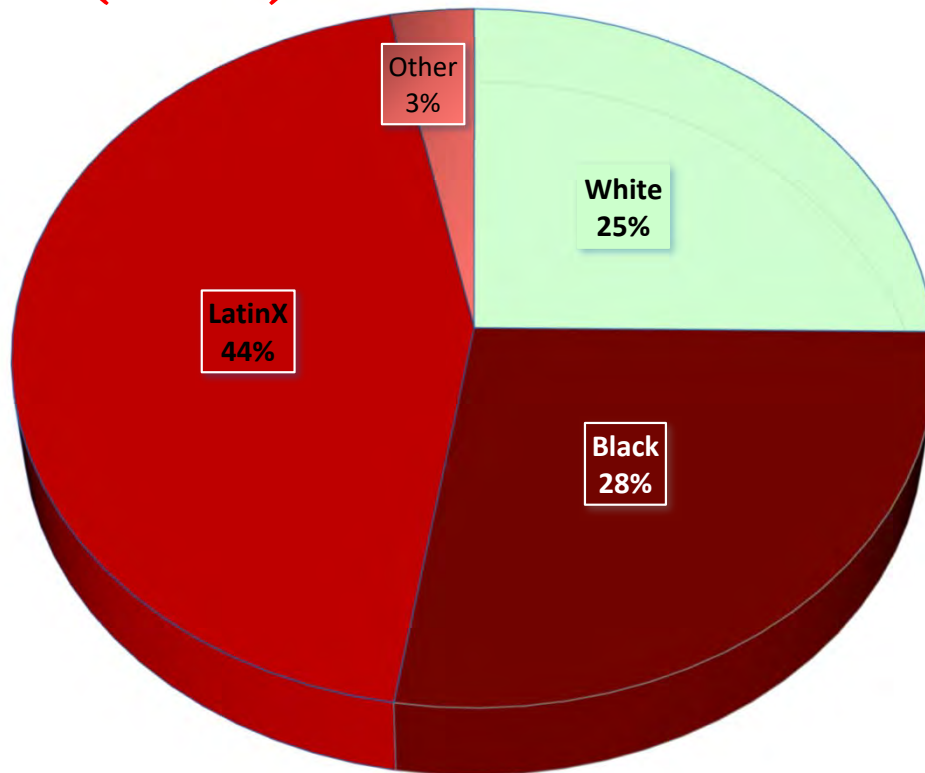
The **presumption of detention** applied in 58% of the cases we observed.



Within those **presumption cases**, arrestees faced a 72% detention rate.

In **non-presumption cases**, arrestees faced a 55% detention rate.

Presumption of Detention: Racial Disparities (2019)

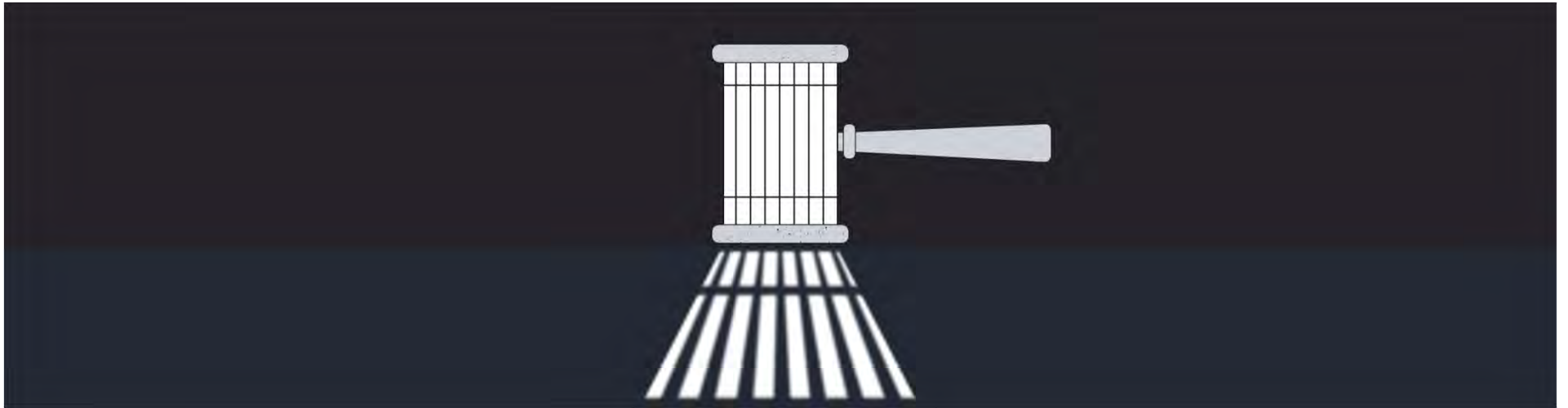


75% of those convicted of qualifying **drug** offenses were people of color.

(extrapolating from sentencing data)

Freedom Denied at 152 n.388 and accompanying text (citing U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 48 tbl.5, 110 tbl.D-2 (2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table05.pdf>).

Presumptions Data



Source: *Freedom Denied* at 158–167.



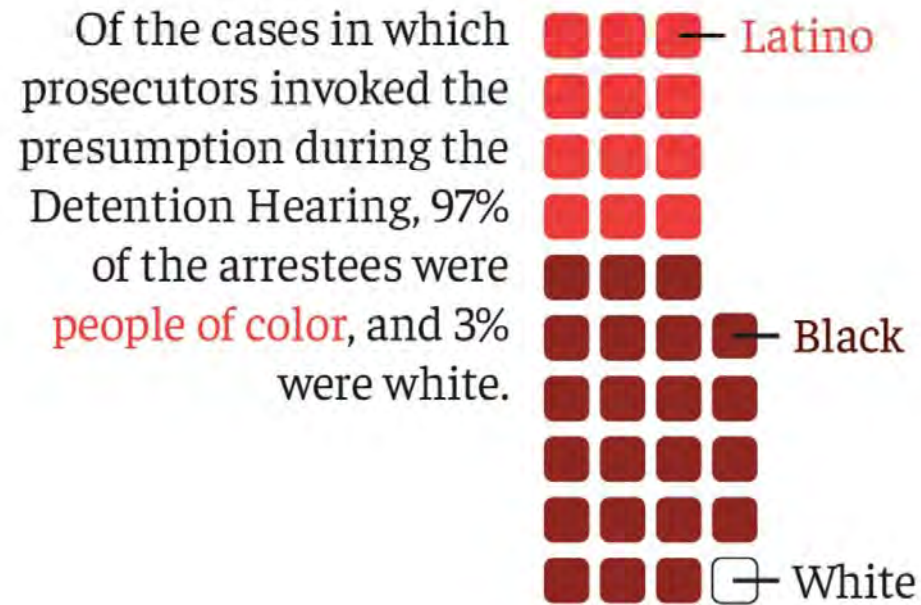
89%

Racial Disparities in presumption-of-detention cases

- In the cases where a presumption of detention applied, 89% of the arrestees were people of color.

Source: *Freedom Denied* at 41.

Figure 21: People of Color Receive Different Treatment When Facing a Presumption Charge.



Source: *Freedom Denied* at 166 fig.21.

Figure 22: The Presumption of Detention May Contribute to Racial Disparities in the Federal System.



Source: *Freedom Denied* at 167 fig.22.

**PRESUMPTION CASES:
CHANGE THE CULTURE OF
DETENTION**

ACTION STEPS:

Detention Hearing & Presumption Cases

SOURCES IN HANDOUT MATERIALS

- Checklist & Flowchart for Defense Attorneys to take into court
- Template Motion for Pretrial Release in Presumption Case

PRESUMPTION ACTION STEP 1

Prevent Judges From Misapplying Presumption

Presumption Applies at DH

- (A) Drugs
- (B) § 924(c) Gun
- (C) Terrorism
- (D) Kidnapping
- (E) Minor victim
- These are the only offenses in § 3142(e)(3)(A)-(E)

Presumption DOES NOT Apply

- Crime of Violence
- § 922(g) Gun
- Illegal Reentry
- Money Laundering
- Any offense not in § 3142(e)(3)(A)-(E)
- Uncharged conduct
 - *See United States v. Persico*, 376 F. App'x 155, 156 (2d Cir. 2010).

PRESUMPTION ACTION STEP 2

New DOJ Presumptions Directive (2023)

- **Presumption Cases**: “Prosecutors should not seek detention merely because the Bail Reform Act permits such an argument to be made or presumes that detention, based on the charges, is appropriate (as it does for many drug charges, *see* 18 U.S.C. § 3142(e)(3)).”
 - U.S. Dep’t of Just., Just. Manual § 9-6.100 (2023), <https://www.justice.gov/jm/jm-9-6000-release-and-detention-pending-judicial-proceedings>.
- **All Cases**: The new directive requires prosecutors to do a “case- and defendant-specific” analysis in deciding whether to seek detention. *Id.* “[A] weighing of all the facts and circumstances including, but not limited to what charges or violations a defendant presently faces, and the strength of the evidence in support of those charges or violations, is *required*.” *Id.* (emphasis added).

PRESUMPTION ACTION STEP 3

- Ensure judges are applying the right legal standard in presumption cases
- Case law lays out a two-step legal standard; insist judges follow
- *See Freedom Denied* at 151–57.

Two-Step Standard for Presumption Cases

STEP 1: Rebutting the Presumption

- Judge must make a finding about rebuttal.
- We have to remind judges how easy it is to rebut the presumption, and we need to argue that our evidence definitively rebuts it.

Step 1: BRA Presumption is Easy to Rebut

- **Defense just needs to produce “some evidence” related to the § 3142(g) factors.** *Jessup*, 757 F.2d 378, 384, 389 (1st Cir. 1985).
- **Evidence of the client’s family ties, employment history, or any “evidence of economic and social stability.”** *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986).
 - “evidence of [defendant’s] marital, family and employment status”: married/partner; minor children
 - “ties to and role in the community”
 - “clean criminal record”; minimal criminal history
 - Lack of drug history, lack of mental health history, and anything else in § 3142(g)
- **Ties to the community definitively rebut the presumption.**
 - *See United States v. Jackson*, 845 F.2d 1262, 1266 (5th Cir. 1988) (“Where the defendant has presented considerable evidence of his longstanding ties to the locality in which he faces trial . . . the presumption . . . has been rebutted.”).

Step 1: BRA Presumption is Easy to Rebut

Defense bears “a *light burden of production*” to rebut the presumption

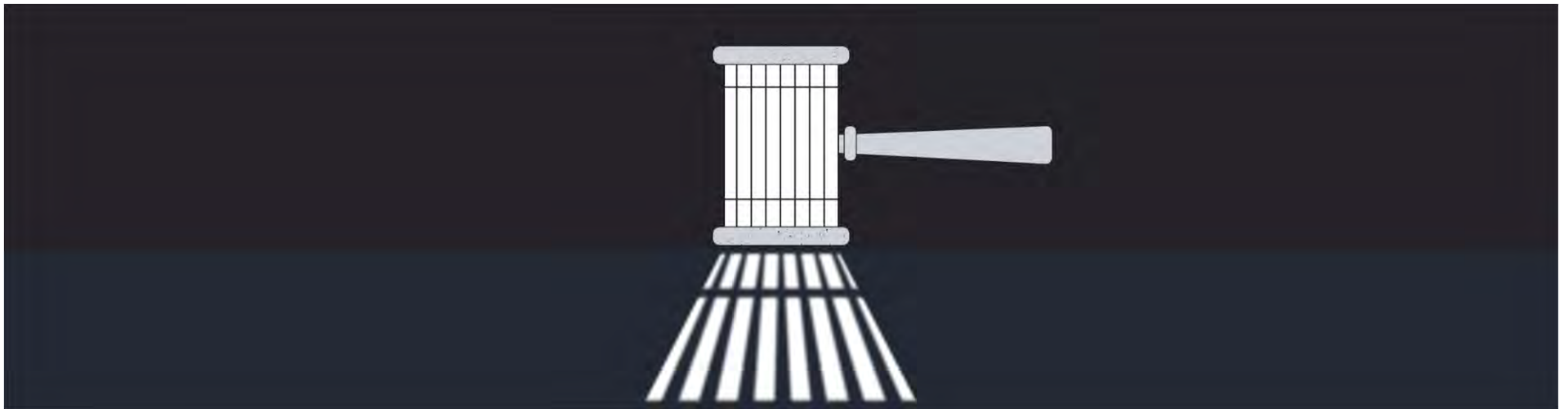
- *United States v. Wilks*, 15 F.4th 842, 846 (7th Cir. 2021) (emphasis added).
- *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (“The burden of production is not a heavy one to meet.”).
- *United States v. Jessup*, 757 F.2d 378, 380–84 (1st Cir. 1985) (to meet the burden of production required for rebuttal, the defendant need only produce “some evidence” under § 3142(g)).
- *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (same).
- *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (same).

Step 1: BRA Presumption is Easy to Rebut

The court should find the presumption rebutted in every case where there's a contested detention hearing and we present mitigating evidence!

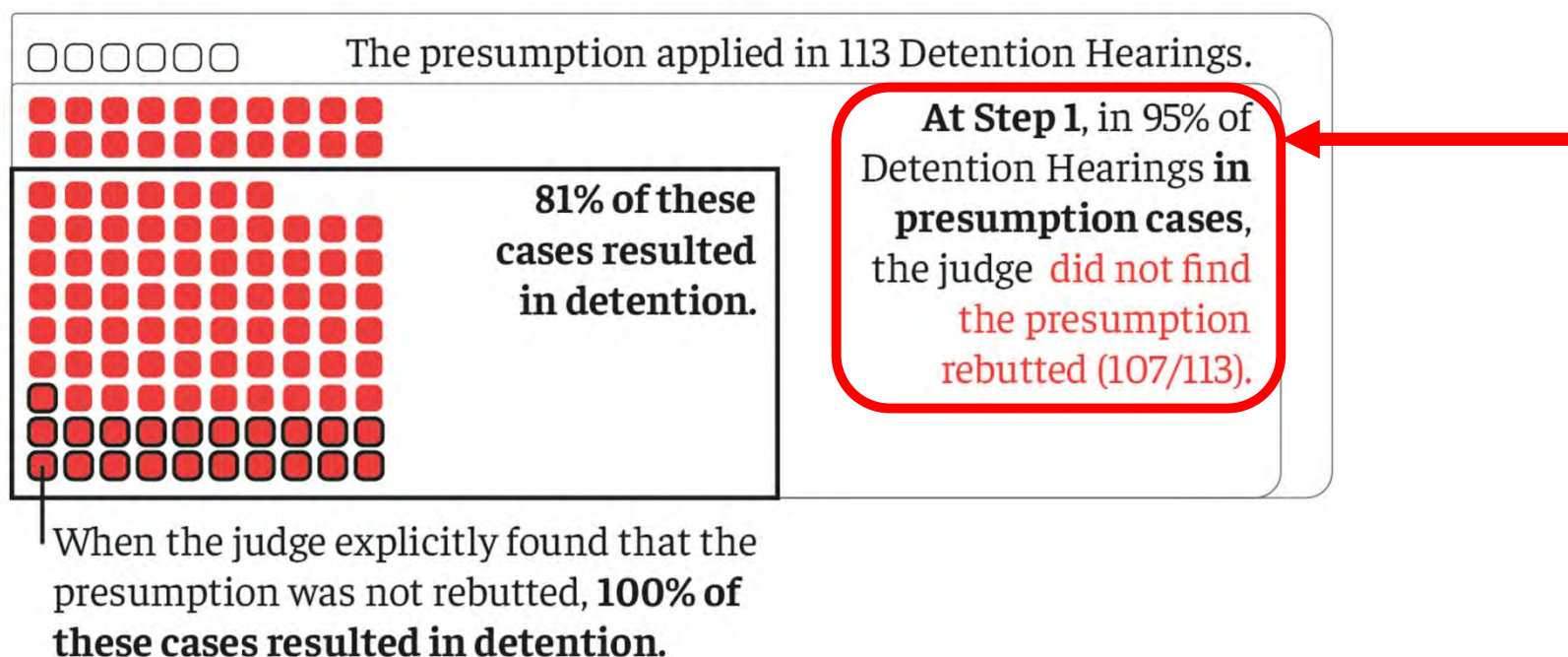
“Once defendants ‘[come] forward with some evidence that [they] will not flee or endanger the community if released,’ the presumption of flight risk and dangerousness is rebutted.” 50 GEO. L.J. ANN. REV. CRIM. PROC. at 404 (quoting *Dominguez*, 983 F.3d at 707)).

Data re Step 1: Rebutting the Presumption of Detention



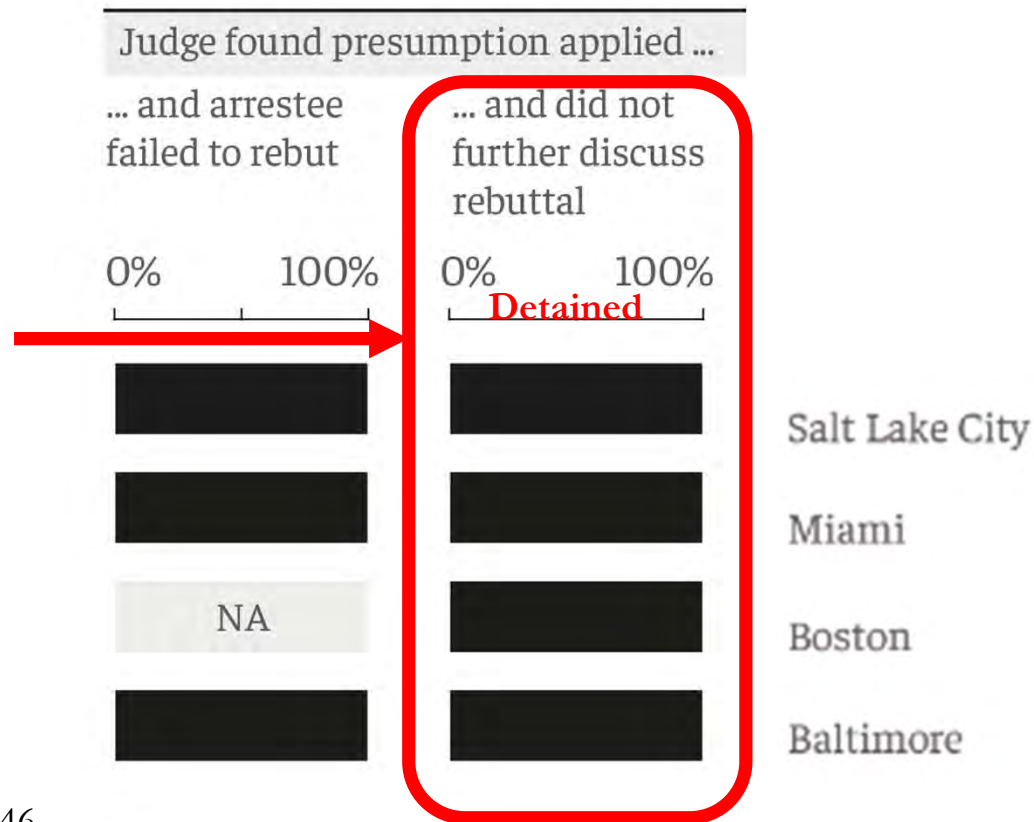
Source: *Freedom Denied* at 161–164.

Figure 20: Judges Are Not Following the Law in Presumption Cases.



Source: *Freedom Denied* at 162 fig.20; see also *id.* at 161 (“[I]n 95% of presumption cases that held a Detention Hearing in our study, judges either concluded that the arrestee had failed to rebut the presumption or did not mention whether the presumption was rebutted.”).

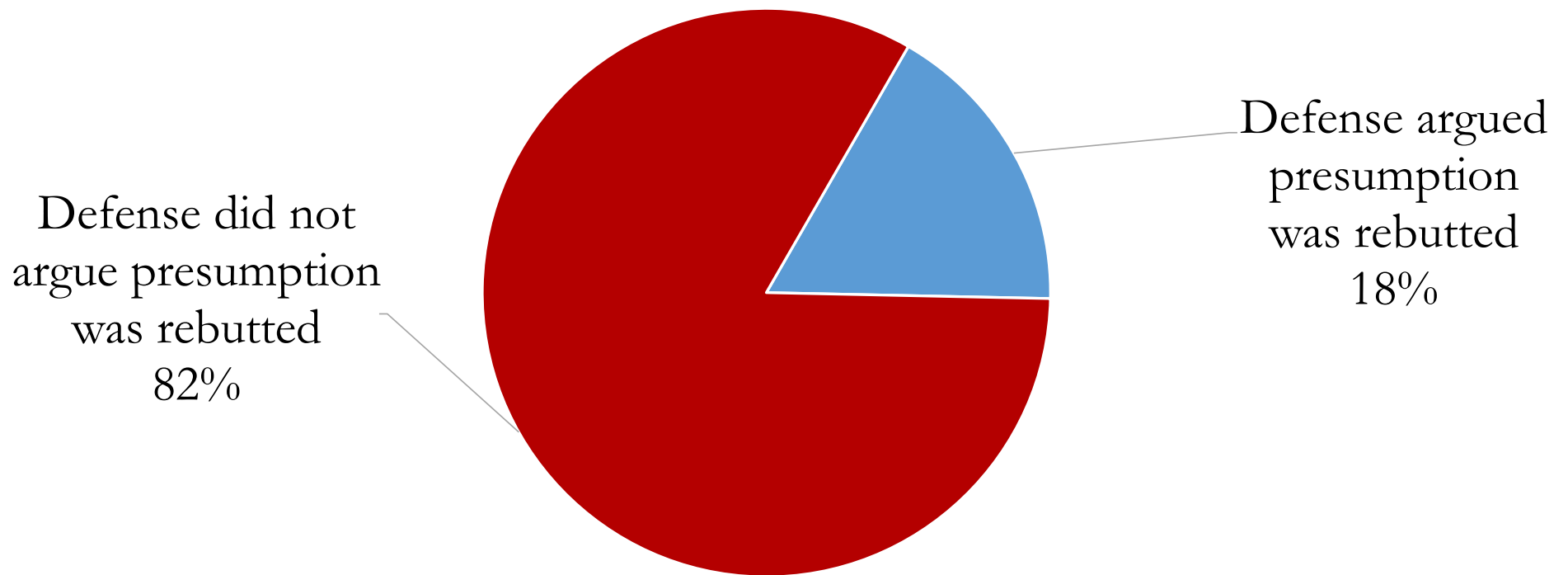
In every case where the judge found the presumption applied but did not make a rebuttal finding, the client was detained.



Source: *Freedom Denied* at 237 fig.46.

Defense Counsel Argued the Presumption Was Rebutted 18% of the Time

(Detention Hearing Data when Judge or Prosecutor Mentioned Presumption)



Source: *Freedom Denied* at 163.

Step 1: BRA Presumption is Easy to Rebut

ACTION STEPS in every presumption case!

- Defense must argue that the presumption is rebutted!
- Defense must tell judges that the law requires judge to make a finding about rebuttal; and
- Defense must present the law showing how easy it is to rebut the presumption.
- “Judges ultimately are required to make a finding about whether the presumption has been rebutted at every contested Detention Hearing, regardless of the defense presentation. Yet nearly every contested Detention Hearing in our sample lacked this finding.” *Freedom Denied* at 163; see also *id.* at 168.

Two-Step Standard for Presumption Cases

STEP 2: Post-Rebuttal Analysis

Regardless of whether we meet the low bar to rebut the presumption under Step 1, under Step 2 the judge must weigh all of the § 3142(g) factors along with the rebutted or unrebutted presumption.

Step 2: Post-Rebuttal Analysis

Once presumption is rebutted under Step 1, it carries little weight

- “[T]he presumption is just one factor among many.” *Jessup*, 757 F.2d at 384.
- It “does not disappear,” but must be weighed against all of our good evidence under § 3142(g).
- “[T]he burden of persuasion always rests with the government.”
 - *Wilks*, 15 F.4th at 846–47.
- During any Detention Hearing, there is a “heightened standard of proof under which the fact finder must ‘give the benefit of the doubt to the defendant.’”
 - *United States v. Munchel*, 991 F.3d 1273, 1289 (D.C. Cir. 2021).

Step 2: Post-Rebuttal Analysis

Once presumption is rebutted under Step 1, the judge can only lock our client up if the government has carried its ultimate burden of proof at Step 2.

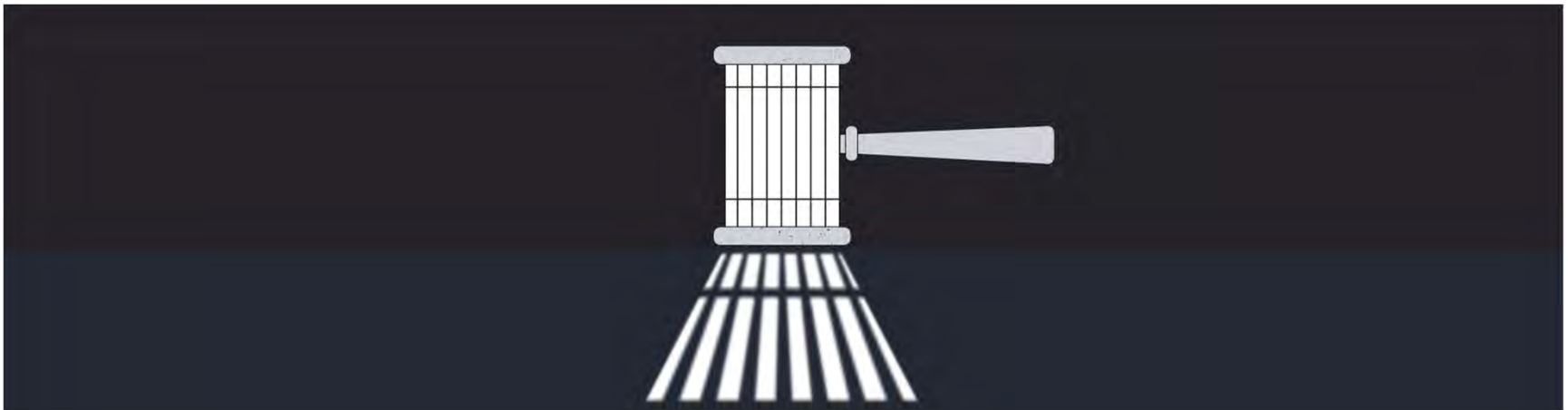
- “Even when a presumption of detention applies, the government continues to bear the ultimate burden of proving that no conditions of release will reasonably assure the defendant’s appearance and the safety of the community.” 50 GEO. L.J. ANN. REV. CRIM. PROC. at 404.
- “When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community... a court may disable the arrestee from executing that threat.” *Salerno*, 481 U.S. at 751.

Two Step Standard for Presumption Cases

Even if presumption is NOT rebutted at Step 1, that fact alone does not authorize detention!

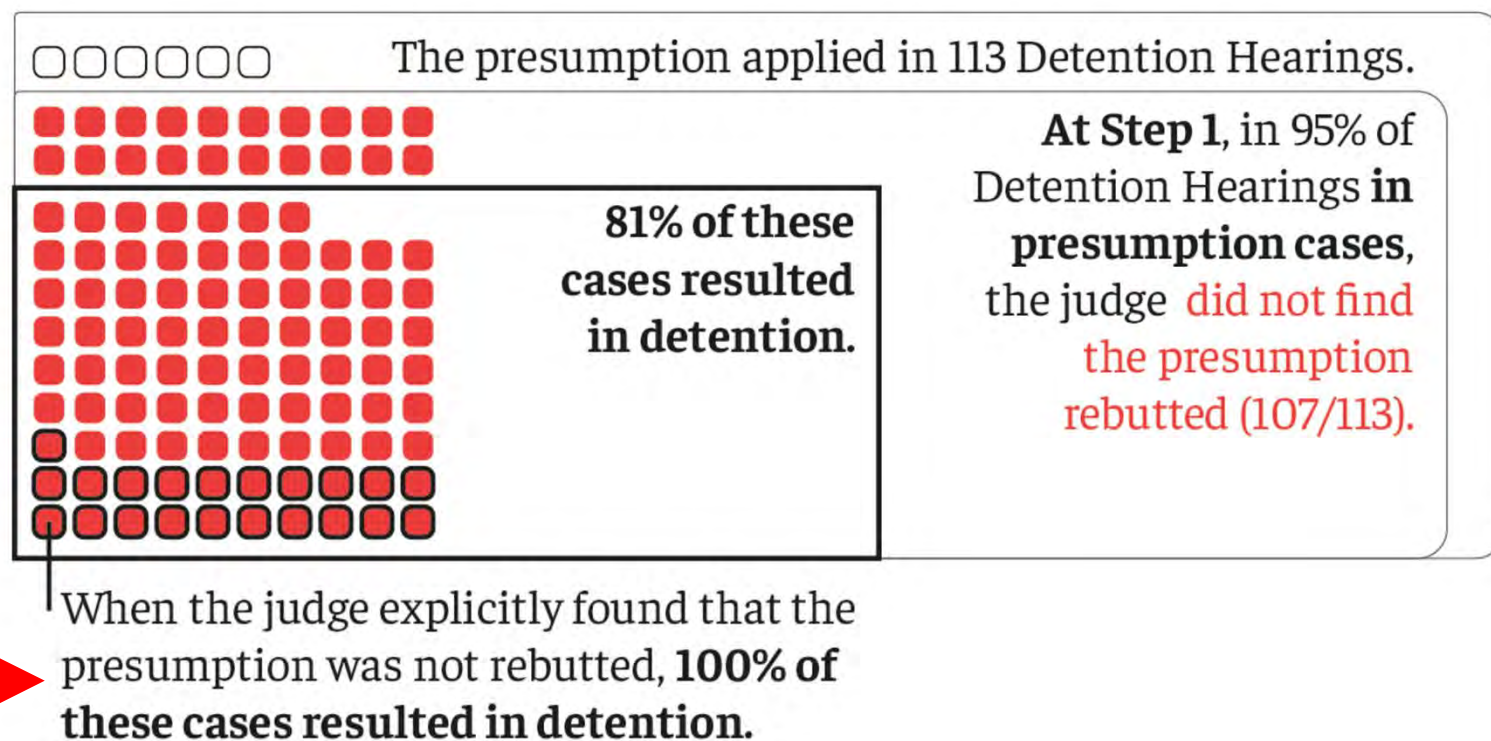
- Instead, the judge must follow the same Step 2 analysis, considering the unrebutted presumption alongside the § 3142(g) factors.
- “[A]n unrebutted presumption is not, by itself, an adequate reason to order detention. Rather, the presumption is considered together with the factors listed in § 3142(g).” *Wilks*, 15 F.4th at 847 (emphasis added) (citation omitted).

If judges were following the law at Step 2, a finding that the presumption was not rebutted would **NOT** guarantee detention.



See Freedom Denied at 161–62.

Figure 20: Judges Are Not Following the Law in Presumption Cases.



Source: *Freedom Denied* at 162 fig.20.

Step 2: Post-Rebuttal Analysis

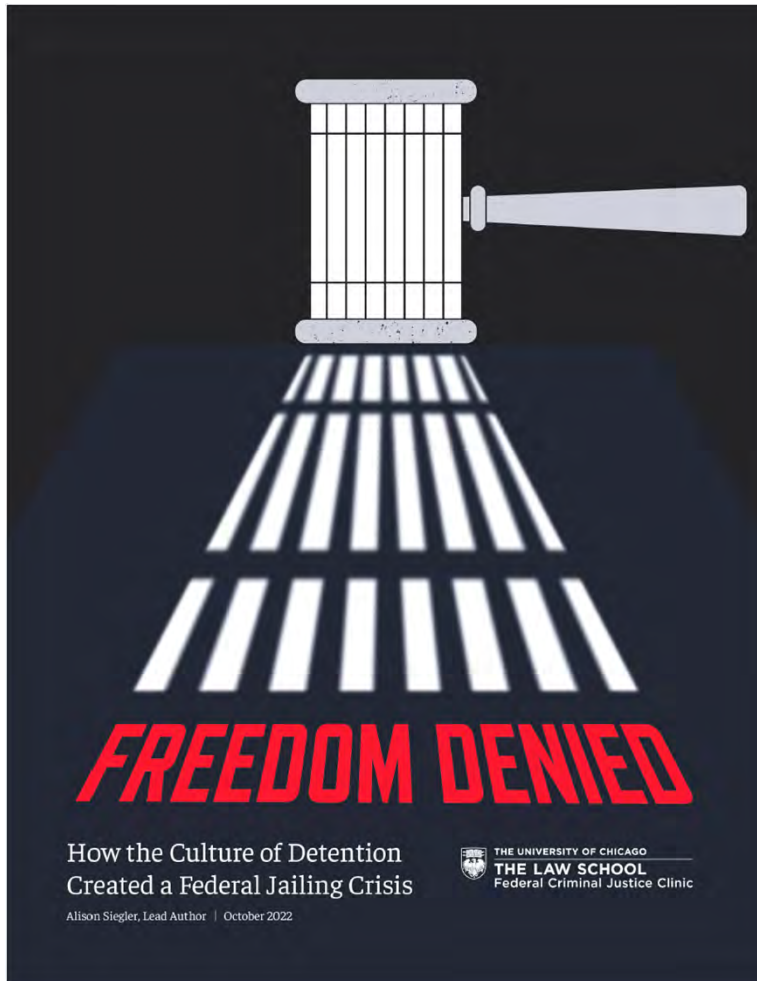
Freedom Denied Findings: Explanation of Figure 20

- “Our data also suggest that judges often disregard Step 2 of the legal test, where they are supposed to weigh the rebutted or unrebutted presumption along with all of the other pretrial release factors in reaching the ultimate release or detention determination.” *Freedom Denied* at 161–62.
- “[A]t every single Detention Hearing where a judge definitively found that the presumption had *not* been rebutted, the judge detained the arrestee [even though] . . . an unrebutted presumption does not mandate detention.” *Id.* at 162.

PRESUMPTION ACTION STEP 4: File Written Bond Motions Before DH

**Template: Defendant's Motion for Pretrial Release in
Presumption Case**

Judge: “What does [the presumption] mean? What do you need to provide to rebut it? I don’t think that’s litigated enough. I think that it needs to be brought to the court’s attention more often to know what standard applies.”



The Solution: At the Detention Hearing, Judges Must Adhere to the Low Standard for Rebutting the Presumption of Detention and Never Treat the Presumption as a Mandate for Detention.

Source: *Freedom Denied* at 168.

PRESUMPTION ACTION STEPS Summary

1. Ensure the presumption isn't applied to the wrong cases
 - Does not apply to COVs, § 922(g), illegal reentry, etc.
2. Push the government to agree to release per the new DOJ policy directive in presumption cases.
3. Ensure judges are applying the right legal standard:
 - Step 1: Determine whether defense has “rebutted” presumption; and
 - Step 2: Weigh all of the § 3142(g) factors along with the presumption.
4. File written bond motions before detention hearings.

AFPD Drew Grindrod's PowerPoint on fd.org

**DON'T TAKE NO FOR AN
ANSWER**

Litigating bond after the detention hearing



Andrew W. Grindrod, AFPD
January 2023

<https://www.fd.org/criminal-defense-topics/essential-topics/bail-pretrial-release>

Human Costs of Federal Pretrial Detention

- **Dangerous, overcrowded conditions**
 - *Freedom Denied* at 63: *A Judge's Decision to Jail Someone Pretrial has Damaging and Enduring Effects* (citing sources, testimony).
- **Physical and sexual violence**
 - *Freedom Denied* at 64 (citing sources).
 - *Sexual Victimization Reported by Adult Correctional Authorities, 2016–2018*, BUREAU OF JUST. STAT. at 1 (June 2021).
- **Medical neglect**
 - *Freedom Denied* at 63–64 (citing sources).
 - Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011–12*, U.S. BUREAU OF JUST. STAT. at 11 (Oct. 2016).

CULTURE OF DETENTION

We must fight against “the worn grooves of comforting routines and unthinking expectations, patterns of a social order that have been in place for so long that it looks like the natural order of things.”

-Isabel Wilkerson, *Caste*

CULTURE OF DETENTION

CHANGE IS POSSIBLE

CHANGING THE CULTURE

“I think you’re having a huge impact across the country, and it’s sort of chipping away at all this and winning [the judges] over.”

-Federal magistrate judge, *Freedom Denied* at 195

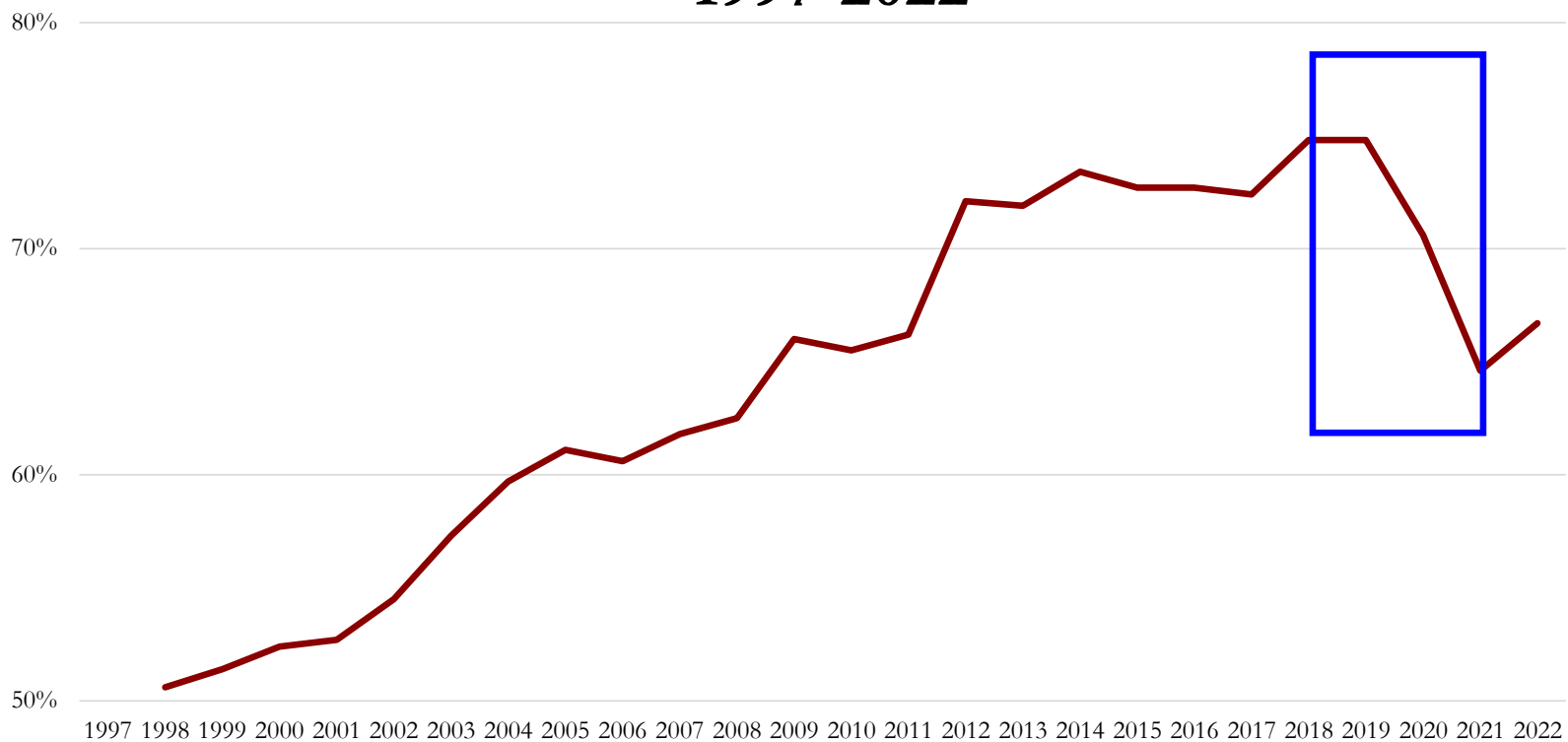
Detention rates are coming down, and much of that is attributable to you and your efforts. You have made a real difference in how the federal judiciary sees release and detention.

-Federal magistrate judge, *Id.* at 196

Judges and USAO realized that they’d been “doing things wrong. . . . It’s taken some time, but we haven’t had an issue with the government alleging danger or ordinary risk of flight at the Initial Appearance in several years.”

- Federal magistrate judge (Chicago)

Detention Rates: 1997-2022



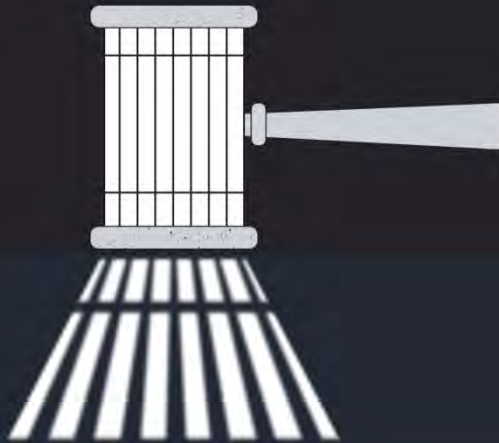
Source: AO Tables H-3, H-14

CHANGING THE CULTURE

Meeting of key stakeholders

- Participants:
 - Chief Defender, Magistrate Judges, U.S. Attorney's Office leadership, Chief Pretrial Services Officer
- At meeting:
 - Explain that new study shows we've been litigating bond wrong and attorneys in your office are going to start litigating differently.
 - Describe correct legal standard at Initial Appearance and the two-step standard for Detention Hearings in presumption cases.

Future Impact



Future Impact (2024-2026)

- If detention rate decreases by 2 percentage points/year from 2024-2026
 - 2022: 66.7%
 - 2024: 64.7% → 1,769 additional releases
 - 2025: 62.7% → 3,538 additional releases
 - 2026: 60.7% → 5,307 additional releases
- **10,614 more people total will be released**

Human Impact: Lives Saved

10,614 people released * 361 days
= 10,497 years of life saved

Economic Impact:
Taxpayer Dollars Saved in Jailing Costs

10,614 people released * \$31,073
= \$329 million saved in jailing costs

- “In 2021, it cost \$35,758 to put a single person in jail for a year; \$4,340 to supervise that same person on bond.”
- $35,758 - 4,340 = \$31,418$ taxpayer savings per person released on bond per year.
- Assuming each person is saved 361 days: $((31,418) * (361)) / 365 = \$31,073$ reduced cost per person per avg. jail time.

Human Impact: Fewer People Victimized in Jail

Releasing 10,614 people who would otherwise have been jailed federally will:

- **Prevent physical victimization of 2,547-3,714 people.**

(Freedom Denied n.131, citing Prison Policy Initiative)

- **Prevent sexual victimization of 126 people.**

(Freedom Denied n.131, citing Bureau of Justice Statistics)

Human + Economic Impact:
Lost Income Prevented

10,614 people released * (\$29,001)
= \$307 million saved in lost income

Defendants detained pretrial lose on average \$29,001 in income over a lifetime

Brookings Institute

“If you don’t like
something, change it.”
- Maya Angelou



TAKEAWAYS

1. Initial Appearance: If no valid 3142(f) factor is present, your client must be released. No detention. No detention hearing.
2. Non-Citizen Cases: At Initial Appearance and Detention Hearing, fight for release for all clients, including non-citizen clients.
3. Counsel at Initial Appearance: The law requires that every person be represented by counsel.
4. Never Consent to Detention or Waive Release.
5. Object to Financial Conditions that your client can't meet.
6. Detention Hearings and Presumption Cases: Always present evidence to rebut the presumption at Step 1 and hold government to its burden at Step 2.