THE UNITED STATES DEPARTMENT of JUSTICE

9-6.000 - RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

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).

As with all prosecutorial decisions, a determination as to whether to advocate for detention, or instead to advocate for or agree to a particular set of release conditions, should be case- and defendant-specific. *See* JM 9-27.110. There are many cases in which detention pending trial or a hearing is warranted to protect the public and/or to ensure that the defendant appears as required. Prosecutors should request a detention hearing and seek detention in such cases, as authorized by statute, *see* 18 U.S.C. §§ 3142(e), (f)(1)-(2), and do so vigorously, consistent with the Constitution, the Bail Reform Act, case law, and our obligation to the public. There also are cases in which detention is not warranted. 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)). Nor should prosecutors seek detention based solely on the fact that the alleged violation is of the conditions of post-conviction supervision. Rather, 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. In all cases, prosecutors should continue to be aware that, where applicable, victims have the right to be reasonably heard at any public proceeding involving release. *See* 18 U.S.C. § 3771(a)(4); Fed. R. Crim. P. 60(a)(3); *see also* Attorney General Guidelines for Victim and Witness Assistance.

[updated January 2023]

9-6.110 - CONTINUANCES PENDING DETENTION HEARINGS

The Bail Reform Act authorizes the continuance of detention hearings, during which the defendant shall be detained. S*ee* 18 U.S.C. § 3142(f). While prosecutors can and should invoke this provision in certain cases, they should do so only after a consideration of case- and defendant-specific facts and circumstances, including whether detention appears warranted and such a continuance is reasonably necessary. Prosecutors should endeavor, where practicable in light of all facts and circumstances, and consistent with district and judicial procedure and practice, to proceed to a detention hearing reasonably soon after a defendant's arrest, and where feasible and appropriate, be ready to proceed more quickly than the three days permitted in certain cases under the Bail Reform Act. In seeking to schedule a detention hearing, prosecutors 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." Fed. R. Crim. P. 44(a); *see also* 18 U.S.C. § 3006A.

[added January 2023]

9-6.200 - PRETRIAL DISCLOSURE OF WITNESS IDENTITY

Insuring the safety and cooperativeness of prospective witnesses, and safeguarding the judicial process from undue influence, are among the highest priorities of federal prosecutors. *See* the Victim and Witness Protection Act of 1982, P.L. 97-291, § 2, 96 Stat. 1248-9. The Attorney General Guidelines for Victim and Witness Assistance provide that prosecutors should keep in mind that the names, addresses, and phone numbers of victims and witnesses are private and should reveal such information to the defense only pursuant to Federal Rule of Procedure 16, any local rules, customs or court orders, or special prosecutorial need.

Therefore, it is the Department's position that pretrial disclosure of a witness' identity or statement should not be made if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other person, or lead to efforts to obstruct justice. Factors relevant to the possibility of witness intimidation or obstruction of justice include, but are not limited to, the types of charges pending against the defendant, any record or information about the propensity of the defendant or the defendant's confederates to engage in witness intimidation or obstruction of justice, and any threats directed by the defendant or others against the witness. In addition, pretrial disclosure of a witness' identity or statements should not ordinarily be made against the known wishes of any witness.

However, pretrial disclosure of the identity or statements of a government witness may often promote the prompt and just resolution of the case. Such disclosure may enhance the prospects that the defendant will plead guilty or lead to the initiation of plea negotiations; in the event the defendant goes to trial, such disclosure may expedite the conduct of the trial by eliminating the need for a continuance.

Accordingly, with respect to prosecutions in federal court, a prosecutor should give careful consideration, as to each prospective witness, whether absent any indication of potential adverse consequences of the kind mentioned above reason exists to disclose such witness' identity prior to trial. It should be borne in mind that a decision by the prosecutor to disclose pretrial the identity of potential government witnesses may be conditioned upon the defendant's making reciprocal disclosure as to the identity of the potential defense witnesses. Similarly, when appropriate in light of the facts and circumstances of the case, a prosecutor may determine to disclose only the identity, but not the current address or whereabouts of a witness.

Prosecutors should be aware that they have the option of applying for a protective order if discovery of the private information may create a risk of harm to the victim or witness and the prosecutor may seek a temporary restraining order under 18 U.S.C. § 1514 prohibiting harassment of a victim or witness.

In sum, whether or not to disclose the identity of a witness prior to trial is committed to the discretion of the federal prosecutor, and that discretion should be exercised on a case-by-case, and witness-by-witness basis. Considerations of witness safety and willingness to cooperate, and the integrity of the judicial process are paramount.

[updated November 2022]

‹ 9-5.000 - Issues Related To Discovery, Trials, And Other Proceedings up 9-7.000 - Electronic Surveillance ›