Western New England Law Review

Volume 18 *18 (1996)*
Issue 2

Article 4

1-1-1996

CRIMINAL PROCEDURE—UNITED STATES v. EVANS: DISTRICT OF ARREST OR DISTRICT OF PROSECUTION?—DETERMINING THE PROPER TRIBUNAL FOR REVIEW OF PRETRIAL BAIL DECISIONS IN THE MULTI-DISTRICT CONTEXT

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CRIMINAL PROCEDURE—*UNITED STATES V. EVANS*: DISTRICT OF ARREST OR DISTRICT OF PROSECUTION?—DETERMINING THE PROPER TRIBUNAL FOR REVIEW OF PRETRIAL BAIL DECISIONS IN THE MULTI-DISTRICT CONTEXT

> American criminal procedure has its defects, though its essentials have behind them the vindication of long history. But all systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism.[1]

INTRODUCTION

In *United States v. Evans*,[2] the defendant, John Byrnes Evans, was arrested in Arizona on a warrant issued upon the return of an indictment arising out of violations of federal law alleged to have occurred in West Virginia.[3] He was brought before the federal magistrate judge in Arizona,[4] and ordered detained without bail pending trial.[5] Evans sought review of his detention in the United States District Court for the District of Arizona pursuant to the Bail Reform Act of 1984.[6] Section 3145(b) of the Bail Reform Act authorizes review of the magistrate judge's detention order in federal district court, but fails to specify which district court has the authority to review the order.[7] The government argued that only the district court in the charging district possesses that authority.[8] A divided panel of the United States Court of Appeals for the

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1. Rosenberg v. United States, 346 U.S. 273, 310 (1953) (Frankfurter, J., dissenting).

2. 62 F.3d 1233 (9th Cir. 1995).

3. *Id.* at 1234.

4. *Id.* Evans was brought before the magistrate judge in Arizona pursuant to Federal Rule of Criminal Procedure 40(a). *Id.* See *infra* note 35 for the pertinent text of Rule 40(a).

5. *Evans*, 62 F.3d at 1234-35.

6. *Id.* at 1235. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, §§ 202-210, 98 Stat. 1976-87 (1984) (codified as amended at 18 U.S.C. §§ 3141-3150 (1994)).

7. See *infra* note 60 for the pertinent text of § 3145(b).

8. *Evans*, 62 F.3d at 1235.

Ninth Circuit agreed.[9] The dissent, however, agreed with Evans in concluding that the district court in the district of his arrest was the proper tribunal to review the magistrate judge's order of detention.[10]

This Note focuses upon the proper interpretation of sections 3145(a) and (b) of the Bail Reform Act of 1984[11] by analyzing the decision of the Ninth Circuit in *United States v. Evans*. Part I provides a brief history of the concept of bail and examines the Bail Reform Act of 1984 as well as the procedural complexities involved in federal criminal proceedings in both the single- and multi-district contexts. Part I also introduces the concept of venue embodied within the United States Constitution. Part II of this Note discusses the facts of the principal case, *Evans*, and traces it through disposition at the district court level to the decision of the United States Court of Appeals for the Ninth Circuit. Against the backdrop of the controlling authorities, Part III analyzes the holding of *Evans*, with a critique of the majority, concurring, and dissenting opinions. This Part of the Note concludes that the majority correctly determined that the district of prosecution is the proper district to review the detention order issued by the magistrate judge in the district of arrest. Finally, Part IV addresses how the conflict arising in *Evans* is properly resolved through this conclusion.

I. BACKGROUND

A. *The History of Bail*

The statutory history of bail began with the passage of the Judiciary Act of 1789.[12] In this Act, Congress provided a right to bail for defendants accused of non-capital crimes in federal courts.[13]

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9. *Id.* at 1237.

10. *Id.* at 1239-40 (Noonan, J., dissenting).

11. Subsection (b) of § 3145 authorizes review of an order of detention upon request by the defendant, while subsection (a) authorizes review of a release order upon a motion by either the government or the defendant. See *infra* notes 59 and 60 for the pertinent text of subsections (a) and (b).

12. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (current version at 18 U.S.C. §§ 3141-3150 (1994)).

13. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 4 (1951) ("From the passage of the Judiciary Act of 1789 . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail."); United States v. Melendez-Carrion, 790 F.2d 984, 997 (2d Cir. 1986) ("First Judiciary Act . . . provided a right to bail in all cases except capital offenses . . . ."). *See also* JoAnn M. Arkfeld, Comment, *The Federal Bail Reform Act of 1984: Effect of the Dangerousness Determination on Pretrial Detention*, 19 PAC. L.J. 1435, 1436 (1988) ("Since 1789, Congress has provided a right to bail in noncapital criminal cases . . . ."); Heidi J. Herman, Note, United States v. Salerno*: The*

However, courts were required to detain defendants who were viewed as risks of flight, likely to tamper with witnesses or jurors, or charged with capital crimes.[14] The 1789 Act remained substantially unchanged until the implementation of the Bail Reform Act of 1966.[15]

In the 1966 Act, Congress attempted to address public dissatisfaction with the practice of courts detaining indigent defendants by imposing artificially high bail requirements.[16] The 1966 Act required courts to either release defendants on their own recognizance or grant defendants conditional release pending trial, unless the judicial officer determined that release would not adequately assure the appearance of the defendant.[17] A shortcoming of the 1966 Act was that it did not allow the judicial officer to consider the future dangerousness of a defendant in making the determination of whether to grant pretrial release.[18] The Act failed to address the

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Bail Reform Act is Here to Stay, 38 DEPAUL L. REV. 165, 166 (1989) ("The Judiciary Act guaranteed all persons accused of non-capital crimes the right to be released on bail.").

14. The rationale behind the first two exceptions to the admission of a defendant to bail was that "there will not be a fair trial if the accused is not present or if the jurors and witnesses have been threatened or bribed." Herman, *supra* note 13, at 167 n.20. In capital crimes, defendants were denied bail because they were considered to be extreme risks of flight. *Id.* A defendant "released on bail with the knowledge that if he appears in court, he will face the possibility of a death sentence or life imprisonment, may reevaluate his options before entering the court room." *Id.* *See Stack*, 342 U.S. at 4; *Melendez-Carrion*, 790 F.2d at 1002; United States v. Abrahams, 575 F.2d 3, 5 (1st Cir.), *cert. denied*, 439 U.S. 821 (1978); United States v. Edwards, 430 A.2d 1321, 1326 n.6 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

15. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3141-3151 (1982) (repealed 1984)).

16. Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1093 (1993); Arkfeld, *supra* note 13, at 1436. Additionally, this concern was addressed in the passage of the 1984 Bail Reform Act. *See, e.g.*, United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985) (One of "[t]he major differences between the [1966] Bail Reform Act and the 1984 Act . . . [is] the prohibition against using inordinately high financial conditions to detain defendants.").

17. Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3141-3151 (1982) (repealed 1984)). The 1966 Act provided in pertinent part:

> Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required.

18 U.S.C. § 3146 (1982) (repealed 1984).

18. *See* Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3145-3151 (1982) (repealed 1984)). *See also Orta*, 760 F.2d at 890.

growing concern for crimes being committed by dangerous individuals awaiting trial.[19] This increasing problem was one of the major impetuses behind the Bail Reform Act of 1984.[20]

The 1984 Act "mark[ed] a significant departure" from the fundamental philosophy that the concept of bail exists solely to assure the appearance of the defendant for trial.[21] It focused upon a concern for community safety and the need for preventive detention[22] by requiring the judicial officer to consider the dangerousness of the defendant in making bail determinations.[23]

The Bail Reform Act specifically governs the process of deter-

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19. *See* Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3141-3151 (1982) (repealed 1984)). *See also* Harwin, *supra* note 16, at 1093; Arkfeld, *supra* note 13, at 1437.

20. Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, §§ 202-210, 98 Stat. 1976-87 (1984) (codified as amended at 18 U.S.C. §§ 3141-3150 (1994)). *See, e.g.*, *Orta*, 760 F.2d at 890 (the Bail Reform Act of 1984 was "a legislative response to growing public concern over increased crime and the perceived connection between crime and defendants released on bail"); United States v. Williams, 753 F.2d 329, 332 (4th Cir. 1985) (1984 revision of the Bail Reform Act responded to the "'alarming problem' of crimes committed by persons on release"). The Senate Report stated that the revisions to the 1966 Act incorporated into the 1984 Act "reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. REP. No. 225, 98th Cong., 1st Sess. 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The Bail Reform Act of 1984 also revised the 1966 Act in order to address such other problems as:

> (a) the need to consider community safety in setting nonfinancial pretrial conditions of release, (b) the need to expand the list of statutory release conditions, (c) the need to permit the pretrial detention of defendants as to whom no conditions of release will assure their appearance at trial or assure the safety of the community or of other persons, (d) the need for a more appropriate basis for deciding on post-conviction release, (e) the need to permit temporary detention of persons who are arrested while they are on a form of conditional release . . . , and (f) the need to provide procedures for revocation of release for violation of the conditions of release.

Id. For a thorough discussion of the legislative history of the Bail Reform Acts of 1966 and 1984, see Harwin, *supra* note 16, at 1092-96; Arkfeld, *supra* note 13, at 1439-48.

21. S. REP. No. 225, *supra* note 20, at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3185-86.

22. In contrast, the primary focus of the 1966 Act was on the release of defendants before trial. Arkfeld, *supra* note 13, at 1441. *See, e.g.*, *Williams*, 753 F.2d at 332 ("Previously, under the Bail Reform Act of 1966, the exclusive consideration in setting bail was whether the defendant would appear at trial.") (footnote omitted).

The term "preventive detention" refers to "pretrial incarceration of a defendant if release would pose a danger to the community or if the defendant would be likely to commit crime if released pending trial." Arkfeld, *supra* note 13, at 1441 n.60.

23. *See* 18 U.S.C. § 3142(b) (1994). *E.g.*, *Williams*, 753 F.2d at 332 (In the 1984 revision to the Bail Reform Act, "federal courts have been accorded the power to weigh the risk to the community posed by a defendant's release pending trial.").

mining whether defendants accused of federal crimes should be detained or released. The procedures to be followed in reaching the bail determination stage, however, are prescribed by the Federal Rules of Criminal Procedure.

B. *Procedural Complexities*

A common situation in criminal cases involving violations of federal law arises where a defendant is arrested in one district, but the alleged violations—and subsequent indictment—occur in another district, giving rise to a multi-district proceeding.[24] This type of proceeding raises an interesting question for the judiciary: Which is the proper district court to review a federal magistrate judge's detention or release order—the district court in the district of arrest or the district court in the charging district? This issue does not surface in a single-district proceeding because the alleged offenses have occurred in the same district as the arrest.[25] In a multi-district proceeding, however, the procedure is somewhat different, and determining which district court has the authority to review the magistrate's order is slightly more complex.

1. Single-District Proceeding Under Rules 5 and 5.1 of the Federal Rules of Criminal Procedure

Rules 5 and 5.1 of the Federal Rules of Criminal Procedure set out the requirements and procedure to follow in the situation where a defendant is arrested in the same district where the alleged offenses occurred.[26] Rule 5 requires an "initial appearance" of the defendant "without unnecessary delay before the nearest available federal magistrate judge."[27] At the initial appearance, the magistrate judge must inform the defendant of the complaint against him and of his general rights.[28] Additionally, the magistrate judge is re-

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24. See *infra* notes 85-91 and accompanying text for a discussion of the factual situation which gives rise to the multi-district proceeding as in *United States v. Evans*.

25. It is clear that in the single-district proceeding the entire process—from the moment of indictment to final disposition of the case—takes place in a single district. No other district has any interest in the matter.

26. FED. R. CRIM. P. 5, 5.1. For a thorough discussion of the requirements and procedures under Rules 5 and 5.1, see generally David J. Charies, *Preliminary Hearings*, 81 GEO. L.J. 1094 (1993).

27. FED. R. CRIM. P. 5(a). The "initial appearance" is "[t]he first court appearance for a defendant charged with a federal offense." JOHN L. WEINBERG, FEDERAL BAIL AND DETENTION HANDBOOK § 3.01, at 3-1 (1992).

28. FED. R. CRIM. P. 5(c). The defendant's general rights include, *inter alia*, the right to counsel or to request assignment of counsel, and the right to remain silent. *Id.*

quired to "detain or conditionally release the defendant as provided by statute."[29] The magistrate judge must also, under Rule 5, inform the defendant that he is entitled to a "preliminary examination."[30] In the event that the defendant is arrested without a warrant, the magistrate judge must make a finding of probable cause in compliance with Federal Rule 4(a).[31]

Federal Rule 5.1 addresses the "preliminary examination" referred to in Rule 5. Rule 5.1 expands upon the Rule 5 probable cause requirement.[32] Under Rule 5.1, if the magistrate judge finds that "there is probable cause to believe that an offense has been committed and that the defendant committed it," the magistrate judge must "hold the defendant to answer in district court."[33] However, if no probable cause is found, the magistrate judge must dismiss the complaint and release the defendant.[34]

2. Multi-District Proceeding Under Rule 40 of the Federal Rules of Criminal Procedure

The starting point in a multi-district proceeding is set forth in Rule 40 of the Federal Rules of Criminal Procedure. In the multi-district situation, Rule 40(a) requires the defendant to be taken

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Rule 5(c) also addresses the time frame in which a defendant must receive a preliminary examination. *Id.*

29. *Id.*

30. *Id.* The defendant has the right to waive the preliminary examination. If the defendant waives the preliminary examination, the magistrate judge must hold the defendant to answer in federal district court. If the defendant does not waive the preliminary examination, the magistrate judge is required to schedule one. *Id.*

The initial appearance and preliminary examination constitute two separate proceedings. The preliminary examination can be held at the same time as the initial appearance, but "in practice this ordinarily does not occur." FED. R. CRIM. P. 5 advisory committee's note. "Usually counsel need time to prepare for the preliminary examination and as a consequence a separate date is typically set for the preliminary examination." *Id.*

31. FED. R. CRIM. P. 5(a). *See also* FED. R. CRIM. P. 5.1. Rule 4(a) states that "[i]f it appears from the complaint . . . that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it." FED. R. CRIM. P. 4(a).

32. FED. R. CRIM. P. 5.1(a). *See* Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (holding that the Fourth Amendment requires "a timely judicial determination of probable cause as a prerequisite to detention").

33. FED. R. CRIM. P. 5.1(a).

34. FED. R. CRIM. P. 5.1(b). Preliminary examination is unnecessary in two situations. The first is where the defendant has been indicted or an information has been filed in federal district court. FED. R. CRIM. P. 5(c). The second is where the defendant elects to waive the preliminary examination. *Id.*

"without unnecessary delay before the nearest available federal magistrate judge," which is the magistrate judge in the district of arrest.[35] The preliminary proceedings under Rule 40 are required to be conducted in accordance with Rules 5 and 5.1.[36] Consequently, the defendant is entitled to an "initial appearance" as well as a "preliminary examination" before the magistrate judge in the district of arrest.[37] However, Rule 40(a) allows the defendant to elect to have the preliminary examination conducted in the charging district.[38] Additionally, Rule 40(a) provides that if the defendant is held to answer for the offense committed, the defendant must answer in the district in which prosecution is pending.[39]

Rule 40(b) requires the magistrate judge to inform the defendant of the provisions of Rule 20 of the Federal Rules of Criminal Procedure.[40] Rule 20 grants the defendant the right to waive trial

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35. FED. R. CRIM. P. 40(a). Rule 40(a) provides:

> If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person must be taken without unnecessary delay before the nearest available federal magistrate judge. . . . If held to answer, the defendant must be held to answer in the district court in which the prosecution is pending—provided that a warrant is issued in that district . . . .

Id. E.g., Parman v. United States, 399 F.2d 559 (D.C. Cir.) (holding that one arrested in a district distant from that of the commission of the offense must be presented before a magistrate in the district of arrest), *cert. denied*, 393 U.S. 858 (1968).

36. FED. R. CRIM. P. 40(a). See *supra* notes 26-34 and accompanying text for a discussion of the requirements and procedures under Rules 5 and 5.1. In analyzing the language of, and purposes behind, Rule 40(a), it is important to be aware of the relevance of Federal Rules 5 and 5.1. Cases that have addressed Rules 5 and 5.1 have determined that custody and control of the defendant must be relinquished, without unnecessary delay after arrest, to the magistrate judge whose function is to advise the defendant of his rights and to conduct a hearing as soon as possible to determine whether there is sufficient probable cause to warrant further detention. *See, e.g.*, Ricks v. United States, 334 F.2d 964, 969 (D.C. Cir. 1964). The Notes of the Advisory Committee on Rules for the 1979 amendment to Rule 40 state that "[u]nder rule 5.1 dealing with the preliminary examination, the defendant is to be held to answer *only* upon showing of probable cause that an offense has been committed and that the defendant committed it." FED. R. CRIM. P. 40 advisory committee's note (emphasis added). The rule that the defendant must be taken before the nearest available magistrate judge is invoked for the protection of a defendant who may be prejudiced by a delay. *See generally* United States v. Bandy, 421 F.2d 646 (8th Cir. 1970); United States v. Asher, 367 F. Supp. 895 (E.D. Tenn. 1973).

37. *See* FED. R. CRIM. P. 5, 5.1.

38. FED. R. CRIM. P. 40(a).

39. *Id. E.g.*, United States v. Perkins, 433 F.2d 1182, 1186 (D.C. Cir. 1970) ("Rule 40 specifies the procedures governing transfer of an arrestee from the district of his arrest to another district wherein the trial is properly to be held."). *See also* FED. R. CRIM. P. 40 advisory committee's note.

40. FED. R. CRIM. P. 40(b). Rule 40(b) provides: "In addition to the statements required by Rule 5, the federal magistrate judge shall inform the defendant of the provisions of Rule 20." *Id. See also* FED. R. CRIM. P. 20.

in the district of prosecution and allow the district of arrest to hear the case.[41] The waiver, however, is subject to approval by the United States attorney for each district.[42]

Federal Rule 40(c) requires documentation generated by the preliminary examination and any bail collected to be transmitted to the district court in the district of prosecution.[43] The transmission is to be made upon determination of detention or discharge of the defendant pursuant to the Bail Reform Act.[44]

Although the Federal Rules of Criminal Procedure provide the general procedure to follow in single- and multi-district proceedings, they provide no guidance in initiating a hearing to determine whether pretrial detention of the defendant is appropriate.[45] Moreover, the Rules render no insight into what occurs at the detention hearing, or what happens in the event any of the parties contest the findings of the magistrate judge.[46] The Bail Reform Act of 1984 addresses these concerns.

3. The Bail Reform Act of 1984[47]

Section 3141 of the Bail Reform Act authorizes the judicial officer, before whom the defendant is brought, to order such person released or detained.[48] Section 3142 of the Act requires a determi-

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41. FED. R. CRIM. P. 20. Rule 20(a) provides in pertinent part:

> A defendant arrested . . . in a district other than that in which an indictment or information is pending . . . may state in writing a wish . . . to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, . . . subject to the approval of the United States attorney for each district.

Id.

42. *Id.*

43. FED. R. CRIM. P. 40(c).

44. *Id.*

45. *See generally* FED. R. CRIM. P. 5, 5.1, 40.

46. *See generally* FED. R. CRIM. P. 5, 5.1, 40.

47. Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, §§ 202-210, 98 Stat. 1976 (1984) (codified as amended at 18 U.S.C. §§ 3141-3151 (1994)).

48. 18 U.S.C. § 3141(a) (1994). Any judicial officer who is authorized to order the arrest of a person under 18 U.S.C. § 3041 (1994) may conduct the hearing to determine whether the defendant should be detained or released. § 3141. "[T]hese 'judicial officers' can include Justices or judges of the United States, magistrates, and other court-appointed officials, and a variety of state court judges." Michael Edmund O'Neill, *A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations*, 99 YALE L.J. 885, 889 n.39 (1990). Magistrate judges are empowered by the Federal Magistrates Act to "issue orders pursuant to section 3142 [of the Bail Reform Act] . . . concerning release or detention" of defendants prior to trial. 28 U.S.C. § 636(a)(2) (1994). *See* Harwin, *supra* note 16, at 1096 n.36; O'Neill, *supra*, at 889. Thus, the mag-

nation of release or detention of the defendant pending trial.[49] Under section 3142, the magistrate judge must conduct a detention hearing upon motion of the prosecution or, in certain circumstances, upon motion of the magistrate judge herself.[50] The detention hearing is to be held "immediately upon the person's first appearance before the judicial officer" unless a continuance is sought by either the defendant or the government.[51]

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istrate judge often makes the initial bail decision. Harwin, *supra* note 16, at 1096; O'Neill, *supra*, at 889.

49. 18 U.S.C. § 3142 (1994).

50. § 3142(f)(1), (2). Section 3142(f) provides:

> 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;
>
> (B) an offense for which the maximum sentence is life imprisonment or death;
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> (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed [in certain Acts] . . . ; or
>
> (D) any felony if such person has been convicted of two or more offenses . . . ; 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 . . . justice, or threaten, injure, or intimidate . . . a prospective witness or juror.

§ 3142(f).

51. § 3142(f). "In practice, the defendant makes an 'initial appearance' before the magistrate" judge. Harwin, *supra* note 16, at 1096-97; O'Neill, *supra* note 48, at 889. The "initial appearance" is governed by Federal Rule of Criminal Procedure 5. At this appearance, the government can move for a detention hearing pursuant to § 3142(f)(1). Harwin, *supra* note 16, at 1097. The Bail Reform Act authorizes the magistrate judge to conduct a detention hearing at the defendant's initial appearance. O'Neill, *supra* note 48, at 889. With this in mind, there are basically five dispositions at which the courts can arrive regarding detention or release:

> 1. Order "temporary detention." If the case is one that qualifies for temporary detention under the statute, the court *must* so order. See § 3142(d) . . . .
>
> 2. Conduct a "detention hearing" immediately. See § 3142(e) and (f) . . . .
>
> 3. Continue the case three to five days upon a motion for detention hearing, while defendant remains in custody. See § 3142(f) . . . .
>
> 4. Order defendant's release on his personal recognizance bond or an unsecured appearance bond. See § 3142(b) . . . .
>
> 5. Set other conditions for release. See § 3142(c) . . . .

WEINBERG, *supra* note 27, § 3.03 at 3-2. "As a routine matter . . . magistrates grant short continuances, thereby giving the parties time to prepare for the actual detention hearing." O'Neill, *supra* note 48, at 889 (footnotes omitted). As a result, the detention hearing is normally conducted at the "preliminary examination" proceeding before the magistrate judge, which is governed by Federal Rule 5.1.

Section 3142 of the Act also sets out the details of the "release or detention" requirement.[52] Subsections (b) and (c) provide two possibilities for the defendant's release: (1) on personal recognizance or unsecured appearance bond,[53] or (2) on certain conditions if deemed necessary by the judicial officer.[54] Under subsection 3142(e), the magistrate judge must detain the defendant if there are no conditions that will reasonably assure the appearance of the defendant or protect the safety of the community.[55]

Subsection 3142(g) of the Bail Reform Act guides the magistrate judge in determining whether to release or detain a defendant by specifying the factors to be considered at the detention hear-

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52. 18 U.S.C. § 3142 (1994).

53. § 3142(b). Section 3142(b) provides in pertinent part:

> The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a . . . crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

Id. Release on "personal recognizance" means:

> Pre-trial release based on the person's own promise that he will show up for trial (no bond required). A species of bail in which the defendant acknowledges personally without sureties his obligation to appear in court at the next hearing or trial date of his case. It is used in place of a bail bond when the judge or magistrate is satisfied that the defendant will appear without the need of a surety bond or other form of security.

BLACK'S LAW DICTIONARY 1290 (6th ed. 1990). An "unsecured appearance bond" is "[a] bail bond for which the defendant is fully liable upon failure to appear in court when ordered to do so or upon breach of a material condition of release, but which is not secured by any deposit or lien upon property." *Id.* at 140.

54. § 3142(c). If the magistrate judge determines that release of the defendant under subsection (b) will not reasonably assure the appearance of the defendant or will pose a threat to the safety of other people or the community, the magistrate judge may order release of the defendant subject to certain conditions. § 3142(c)(1). The first uniform condition is that "the person not commit a Federal, State, or local crime during the period of release." § 3142(c)(1)(A). Furthermore, numerous other conditions, or combinations of conditions, may be employed by the magistrate judge to reasonably assure the appearance of the defendant and the safety of the community. § 3142(c)(1)(B). For instance, the magistrate judge may impose the conditions that the defendant: remain in the custody of a designated person; maintain employment or actively seek employment; maintain an education; avoid contact with the alleged victim of the crime; comply with a curfew; and so on. *See* § 3142(c)(1)(B)(i)-(xiv). The list of conditions provided in § 3142(c) that the magistrate judge may impose on the defendant is not exhaustive. Any combination of conditions may be set by the magistrate judge, so long as the conditions are determined to "reasonably assure the appearance of the person as required and the safety of any other person and the community." § 3142(c)(1)(B).

55. § 3142(e).

ing.[56] The magistrate judge utilizes a balance of those factors to determine whether release of the defendant will assure the defendant's appearance and protect the community.[57]

After the detention hearing is conducted, and an order issued, the result is often disputed by either the government or the defendant.[58] In such a circumstance, section 3145 of the Bail Reform Act allows for review of the release[59] or detention order.[60] A motion for review must be filed with the "court having original jurisdiction over the offense"—the United States federal district court.[61] Sec-

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56. § 3142(g). The factors that the magistrate judge may consider in making the determination of detention or release include:

(1) the nature and circumstances of the offense charged . . . ;
(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 . . . ; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Id.

57. *Id.* If the information obtained reveals that there will be no reasonable assurance of the appearance of the defendant or of the safety of others or the community, the defendant shall be ordered detained under subsection (e). § 3142(e).

58. *See* United States v. Evans, 62 F.3d 1233, 1234-35 (9th Cir. 1995). See *infra* notes 85-91 and accompanying text for the facts of *Evans*. In *Evans*, the defendant disputed the detention order issued by the magistrate judge and sought review pursuant to § 3145(b) of the Bail Reform Act. *Evans*, 62 F.3d at 1235. See *infra* note 60 for the pertinent text of § 3145(b). If the government had disputed a release order, review would have presumably been brought pursuant to § 3145(a). See *infra* note 59 for the pertinent text of § 3145(a).

59. § 3145(a). Section 3145(a) provides:

If a person is ordered released by a magistrate . . . —

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

Id.

60. § 3145(b). Section 3145(b) states: "If a person is ordered detained by a magistrate, . . . the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly." *Id.*

61. § 3145(a), (b). *See* WEINBERG, *supra* note 27, § 9.02(a) at 9-2 (The language of section 3145 referring to "the court having original jurisdiction" must "certainly mean[ ] review by a district judge.").

tion 3145 mandates that the motion for review "shall be determined promptly."[62]

Although section 3145 of the Bail Reform Act does not specify the standard of review to be followed by the district court, the United States courts of appeals that have addressed the issue have uniformly determined that the district court judge should conduct de novo review.[63] The decision to conduct de novo review, however, is at the district court's discretion.[64] Furthermore, exactly what is involved in de novo detention or release order review is not specified by the courts of appeals.[65] There are almost as many variations on the de novo standard as there are courts that have decided the issue.[66]

Section 3145 also allows either party to appeal from the district court's determination of detention or release, or from the district court's decision to deny revocation or amendment of an existing order.[67] The section allows appeal to be brought before the appropriate United States court of appeals pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3731.[68]

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62. § 3145.

63. WEINBERG, *supra* note 27, § 9.02(c) at 9-4. *See also* O'Neill, *supra* note 48, at 891 n.60; Bruce D. Pringle, *Bail and Detention in Federal Criminal Proceedings*, 22 COLO. LAW. 913, 922 (1993); Sally Baumler, Note, *Appellate Review Under the Bail Reform Act*, 1992 U. ILL. L. REV. 483, 503.

"De novo review involves no deference to the lower court. The [reviewing] court redetermines the issue as though being presented with it for the first time." Baumler, *supra*, at 503 n.213.

64. O'Neill, *supra* note 48, at 891 n.56. *See, e.g.*, United States v. Delker, 757 F.2d 1390, 1394-95 (3d Cir. 1985) (district court could determine whether to conduct de novo review).

65. O'Neill, *supra* note 48, at 891 n.60.

66. *See* United States v. Torres, 929 F.2d 291, 292 (7th Cir. 1991) (district judge may review transcript of magistrate hearing; in the alternative, district judge can "start from scratch," but must follow same procedure as magistrate); United States v. Koenig, 912 F.2d 1190, 1193 (9th Cir. 1990) (district judge should review evidence that was before magistrate judge and make independent determination whether magistrate's findings are correct; district judge may hold additional evidentiary hearings); United States v. Maull, 773 F.2d 1479, 1481-82 (8th Cir. 1985) (de novo review with all possible options available to the magistrate); United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985) (district judge acts de novo, and review could be an independent determination, or based on evidence presented to magistrate judge and additional evidence obtained by district judge); United States v. Leon, 766 F.2d 77, 80 (2d Cir. 1985) (district court should reach "own independent conclusion"); *Delker*, 757 F.2d at 1394 (standard of review is de novo and within discretion of district judge whether to conduct own evidentiary hearing).

67. 18 U.S.C. § 3145(c) (1994).

68. § 3145(c). Section 3145(c) provides: "An appeal from a release or detention

C. *Constitutional Requirements of Venue: Article III, Section 2, Clause 3 and the Sixth Amendment*

In a multi-district proceeding, the issue of where the defendant can constitutionally be prosecuted is pertinent in ascertaining which district court has "original jurisdiction over the offense" for purposes of pretrial bail decision review.[69] In federal criminal prosecutions, proper venue lies solely in the "district in which the offense was committed."[70] This rule derives from the constitutional guarantee of trial "in the State where the said Crimes shall have been committed" under Article III, Section 2, Clause 3,[71] and the Sixth Amendment right to "an impartial jury of the State and district wherein the crime shall have been committed."[72] One of the justifications behind the constitutional guarantees of venue in the state or

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order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title." *Id.*

Section 1291 of title 28 and § 3731 of title 18 of the United States Code provide that an appeal from a decision of a district court shall lie to the court of appeals and that the court of appeals shall have jurisdiction. *See* 28 U.S.C. § 1291 (1994); 18 U.S.C. § 3731 (1994).

69. *See* 18 U.S.C. § 3145(a), (b) (1994).

70. FED. R. CRIM. P. 18. Rule 18 provides:

> Except as otherwise permitted . . . , the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Id.

71. U.S. CONST. art. III, § 2, cl. 3. *See, e.g.*, Hanson v. United States, 285 F.2d 27, 28 (9th Cir. 1960) ("The Constitution of the United States grants an accused the right to a trial within the state and federal district in which his offense was committed.").

72. U.S. CONST. amend. VI. Strictly speaking, the requirement provided in Article III, Section 2, Clause 3 is a venue requirement while the requirement set out in the Sixth Amendment to the Constitution is considered a "vicinage" requirement. The Sixth Amendment is commonly called the "vicinage" requirement because it "specifies the geographic area from which jurors in criminal proceedings must be drawn" and "does not, as is often mistakenly assumed, establish the venue in which the proceedings themselves must take place." Wm. Henry Jernigan, Jr., Note, *The Sixth Amendment and the Right to a Trial by a Jury of the Vicinage*, 31 WASH. & LEE L. REV. 399, 399-400 (1974); Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 729 n.2 (1985). *See* Zicarelli v. Dietz, 633 F.2d 312, 314 n.2 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); United States v. Countryside Farms, Inc., 1977-2 Trade Cas. (CCH) ¶ 61,629 (D. Utah Jan. 28, 1977). However, the distinction has been referred to as "unimportant." *Id.* at 72,604. *See* 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 301, at 190 (2d ed. 1982). "In practice, the sixth amendment has consistently been interpreted as guaranteeing trial in the district where the crime was committed." Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 90 n.3 (1983). *See, e.g.*, Johnston v. United States, 351 U.S. 215, 220 (1956); Salinger v. Loisel, 265 U.S. 224, 232-33 (1924).

district where the crime was committed was to "facilitat[e] factfinding by holding trial near where the relevant evidence could be found."[73] In addition, the venue provisions avoid prejudice to an accused's case that might result from facing trial in a district where it would be difficult to obtain witnesses in preparation for trial.[74] Because the right to trial where the crime was committed is a right guaranteed by the Constitution, only the defendant may waive the right and move for a change of venue.[75]

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73. Note, *supra* note 72, at 107-08. *See* Travis v. United States, 364 U.S. 631, 640 (1961) (Harlan, J., dissenting) ("basic policy" of venue best served by trial where the "witnesses and relevant circumstances surrounding the contested issues" will be found); United States v. DiJames, 731 F.2d 758, 762 (11th Cir. 1984) (One of the policy reasons for the venue provisions is that the jurors "know the local conditions surrounding the criminal acts," thus they are able to "draw the most accurate inferences from the evidence presented at trial."); United States v. Nadolny, 601 F.2d 940, 943 (7th Cir. 1979) ("Venue traditionally has been based on notions of fair, fast and efficient administration of trials. When venue is laid in the proper district—the one in which the crime was committed—witnesses are more readily available, and the operative facts and situs of the incident are closer at hand."), *overruled by* U.S. v. Fredrick, 835 F.2d 1211 (7th Cir. 1987).

The constitutional venue provisions arose out of the common law, which required criminal prosecutions to be sought in the county where the crime was committed. *See* Note, *supra* note 72, at 105; 1 J. BISHOP, NEW CRIMINAL PROCEDURE § 49 (2d ed. 1913). The purpose behind this common-law rule was:

> [So] that the circumstances of [the] crime may be more clearly examined, and that the knowledge which the jurors thereby receive of [the] general character [of the defendant], and of the credibility of the witnesses, might assist them in pronouncing, with a greater degree of certainty, upon [the defendant's] innocence or guilt.

16 PARL. HIST. ENG. 490 (1769). In essence, the common-law justification for venue was that it provided "[b]etter factfinding." Note, *supra* note 72, at 106. Federal constitutional venue provisions were promulgated with the same emphasis in mind. *Id.* at 107. For a thorough treatment of the history behind the federal constitutional venue provisions, see Kafker, *supra* note 72, at 741-50; Note, *supra* note 72, at 105-08.

74. *DiJames*, 731 F.2d at 762. The court in *DiJames* also articulated a third policy reason behind the venue provisions: "[S]ince most crimes usually take place in the district where the defendant resides, the venue provisions try to reduce the difficulties to the defendant that would be caused by a trial at a distance from his home and friends." *Id. But cf.* Note, *supra* note 72, at 107 n.89 ("[T]he desire to spare the accused the rigors of trial far from home is no longer a compelling justification. . . . [T]he district-of-the-crime test will not even serve this policy goal in many cases, since people today are far more likely to commit crimes outside their district of residence than they once were.").

75. Donna A. Balaguer, *Venue*, 30 AM. CRIM. L. REV. 1259, 1260 (1993). *See, e.g.*, *DiJames*, 731 F.2d at 761 ("[a] defendant cannot be forced to accept a change of venue against his will"); United States v. Abbott Lab., 505 F.2d 565, 572 (4th Cir. 1974) (change of venue cannot be ordered against defendant's will), *cert. denied*, 420 U.S. 990 (1975); Delaney v. United States, 199 F.2d 107, 116 (1st Cir. 1952) (a defendant "is not obliged to forgo his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed"). *But cf.* Kafker, *supra* note 72, at 746 (suggesting that the Sixth Amendment right to venue is not an absolute right of the

Federal statutes that define crimes often contain provisions that indicate where the proper venue for prosecution lies.[76] In the absence of a provision by Congress specifying the proper venue, courts look to where the crime was "committed" as required by the Constitution.[77] This involves, at a basic level, an analysis of the nature of the alleged offense and the location of the acts constituting the offense to determine where the prosecution should be sought.[78]

The concept of venue is separate and distinct from the concept of jurisdiction.[79] However, courts occasionally "speak in terms of jurisdiction when they mean venue," which can cause confusion.[80] "Jurisdiction" refers to the inherent power of a court to decide a case,[81] whereas "venue" specifies the particular geographic area in which a court with jurisdiction may hear and determine a case.[82] As such, venue may be waived by the defendant, but jurisdiction may not.[83]

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defendant); United States v. Stratton, 649 F.2d 1066, 1077 (5th Cir. 1981) (rejecting the district court's judicial convenience exception to the defendant's right to venue, but leaving open the possibility that the defendant's right to venue is not absolute).

76. Balaguer, *supra* note 75, at 1263. Although Congress can provide venue provisions in federal statutes, it "has no authority to establish in a criminal statute venue which would not be permitted under the Constitution." *Id.* at 1261.

77. *Id.* at 1263. *See, e.g.*, Johnston v. United States, 351 U.S. 215, 220 (1956) ("place [of the crime] is determined by the acts of the accused that violate a statute"); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1188 (2d Cir.) ("When a crime consists of a single noncontinuing act, it is 'committed' in the district where the act is performed."), *cert. denied sub nom.* Lavery v. United States, 493 U.S. 933 (1989).

78. Travis v. United States, 364 U.S. 631, 635 (1961); United States v. Anderson, 328 U.S. 699, 703 (1946); United States v. Kibler, 667 F.2d 452, 454 (4th Cir.), *cert. denied*, 456 U.S. 961 (1982); United States v. Tedesco, 635 F.2d 902, 905 (1st Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); United States v. O'Donnell, 510 F.2d 1190, 1192-93 (6th Cir.), *cert. denied*, 421 U.S. 1001 (1975).

Some courts have adopted a more elaborate test to ascertain where the offense was committed, called the "substantial contacts rule." *Beech-Nut Nutrition*, 871 F.2d at 1188-89; United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985). The "substantial contacts rule" examines "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact finding." *Beech-Nut Nutrition*, 871 F.2d at 1188-89. *See also Reed*, 773 F.2d at 481.

79. United States v. Roberts, 618 F.2d 530, 537 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981).

80. *Id.*

81. BLACK'S LAW DICTIONARY 853, 1557 (6th ed. 1990). *See* Hagans v. Lavine, 415 U.S. 528, 538 (1974) (jurisdiction is the authority conferred by Congress to decide a case); *Roberts*, 618 F.2d at 537 ("subject matter jurisdiction . . . refers to the types of cases a court is authorized to hear").

82. BLACK'S LAW DICTIONARY 1557 (6th ed. 1990).

83. *E.g.*, *Roberts*, 618 F.2d at 537 (Subject matter jurisdiction is not transferable. On the other hand, "[a] criminal defendant has a constitutional right to be tried in the

II. *UNITED STATES V. EVANS*[84]

A. *Case Facts*

In March of 1994, the United States District Court for the Northern District of West Virginia issued a warrant for the arrest of John Byrnes Evans upon the return of an indictment charging Evans with numerous violations of federal law.[85] Evans was arrested in Arizona, his state of residence, and brought before a federal magistrate judge in the United States District Court for the District of Arizona pursuant to Rule 40 of the Federal Rules of Criminal Procedure.[86]

At Evans's "initial appearance"[87] before the Arizona federal magistrate judge, the government moved for a pretrial detention hearing.[88] The magistrate judge held an evidentiary hearing and continued the matter to allow time for the United States attorney for the District of West Virginia to respond to Evans's proposed bond.[89] In a subsequent hearing, the magistrate judge determined that Evans should not be released on bond and ordered him detained pending trial.[90] Evans sought review of the magistrate judge's order in the United States District Court for the District of Arizona pursuant to 18 U.S.C. § 3145(b).[91]

B. *Disposition of the United States District Court for the District of Arizona*

On Evans's motion for review, the government moved to have the appeal dismissed, arguing that the Arizona district court did not have jurisdiction to review the detention order under section 3145

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jurisdiction where the crime was committed. This 'constitutional venue' right . . . can be waived."). *See also* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939) (discussing the differences between jurisdiction and venue in a civil context).

84. 62 F.3d 1233 (9th Cir. 1995).

85. *Id.* at 1234. The violations that Evans was charged with included: "conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846, conspiracy to launder money in violation of 18 U.S.C. § 1956, and travel to promote marijuana business in violation of 18 U.S.C. § 1952(a)(3)." *Id.*

86. *Id.* See *supra* note 35 for the text of Rule 40(a).

87. See *supra* notes 26-34 and 36 and accompanying text discussing the "initial appearance" and Federal Rule 5, and how they relate to Federal Rule 40.

88. *Evans*, 62 F.3d at 1234. The motion for a pretrial detention hearing was presumably brought pursuant to 18 U.S.C. § 3142(f). See *supra* note 50 for the text of § 3142(f).

89. *Evans*, 62 F.3d at 1234.

90. *Id.* at 1234-35.

91. *Id.* at 1235. See *supra* note 60 for the text of § 3145(b).

of the Bail Reform Act.[92] The government asserted that jurisdiction remained solely with the West Virginia district court, which issued the warrant, as "the court having original jurisdiction over the offense" under section 3145.[93]

After conducting an evidentiary hearing, the Arizona district court determined that it had jurisdiction to review the detention order, and ordered Evans released on a $100,000 bond.[94] The government appealed the release order to the United States Court of Appeals for the Ninth Circuit.[95] In addition, the government requested an emergency stay of the district court's release order.[96] The Ninth Circuit stayed the release order pending resolution of the matter.[97]

C. *Decision of the United States Court of Appeals for the Ninth Circuit*

1. Judge Hug's Majority Opinion

A divided panel of the United States Court of Appeals for the Ninth Circuit vacated the Arizona district court's order of release.[98] The Ninth Circuit accepted the government's argument that the proper district court to review the magistrate judge's detention order was the district court in the district of prosecution.[99] Judge Hug began the court's opinion by discussing the general procedure to follow when an arrest is made in one district for a federal offense alleged to have occurred in another district.[100]

The opinion then addressed the defendant's assertion that section 3145 of the Bail Reform Act affords the district court in the district of arrest jurisdiction to review the detention order.[101] Evans argued that 18 U.S.C. § 3231 grants all federal district courts "original jurisdiction" over federal offenses.[102] The majority ac-

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92. *Evans*, 62 F.3d at 1235.
93. *Id.*
94. *Id.*
95. *Id.* The government appealed pursuant to 18 U.S.C. § 3145(c). See *supra* note 68 for the text of § 3145(c).
96. *Evans*, 62 F.3d at 1235.
97. *Id.*
98. *Id.* at 1238.
99. *Id.* at 1237.
100. *Id.* at 1235. See *supra* notes 35-68 and accompanying text for a discussion of the general procedure for the issuance of the detention or release order in the multi-district context and review.
101. *Evans*, 62 F.3d at 1235-37.
102. *Id.* at 1235-36. Section 3231 of title 18 of the United States Code reads: "The

knowledged that this section confers a "broad grant of jurisdiction."[103] However, Judge Hug interpreted section 3231 as merely providing that "the federal courts, not the state courts, have jurisdiction over federal law offenses."[104] The judge determined that the phrase "the court having original jurisdiction over the offense," as used in section 3145, has a much narrower meaning when construed in light of the constitutional restrictions on where a defendant can be tried.[105]

The majority pointed out that Article III, Section 2, Clause 3 and the Sixth Amendment to the Constitution establish that, unless prosecution is "originally" brought in a district permitted by these provisions and the governing statute, the prosecution is subject to dismissal by the defendant.[106] Thus, according to the majority, this matter is really one of venue, rather than jurisdiction, because the constitutional right to venue can be waived by the defendant.[107] However, the matter can be thought of as jurisdictional in that the constitutional standard is required until the defendant waives the right.[108]

The Ninth Circuit majority then analyzed the meaning of the phrase "the court having original jurisdiction over the offense" contained in sections 3145(a) and (b) of the Bail Reform Act in light of the constitutional, statutory and rule provisions.[109] The majority focused on the use of the word "the" in the phrase and determined

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district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231 (1994).

103. *Evans*, 62 F.3d at 1236.

104. *Id.*

105. *Id.* *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. See *supra* notes 71 and 72 and accompanying text for the pertinent language of both constitutional provisions, respectively.

106. *Evans*, 62 F.3d at 1236.

107. *Id.* See *supra* notes 79-83 and accompanying text discussing the distinction between venue and jurisdiction.

108. *Evans*, 62 F.3d at 1236. Judge Hug stated that: "In a sense, this can be thought of as jurisdictional, in that the constitutional requirement as to the place of trial must be upheld unless it is waived by the defendant. However, it is more correctly designated as a venue requirement because it can be waived." *Id.* Some early cases construed this matter as an issue of subject matter jurisdiction rather than venue. *See, e.g.*, United States v. Lombardo, 241 U.S. 73, 75-76 (1916) (addressing the issue of whether the Court had "jurisdiction of the subject-matter" as a right guaranteed by the Sixth Amendment); Meltzer v. United States, 188 F.2d 913, 915 (9th Cir. 1951) (holding that a defendant can constitutionally be tried only in the district with "[j]urisdiction of the subject matter").

109. *Evans*, 62 F.3d at 1236. Specifically, the provisions utilized by the majority in the analysis included: Article III, Section 2, Clause 3 and the Sixth Amendment to

that it refers to a particular district court having original jurisdiction over the offense.[110] On a plain reading of the statute, the court reasoned that Congress would not have used the word "the" if it meant "any" court with original jurisdiction.[111] The majority concluded that "[b]ecause a prosecution must originally be brought in a district required by the constitutional and statutory provisions or face dismissal, absent a waiver by the defendant, the phrase is most reasonably interpreted as designating the district in which the prosecution is pending," not, as the defendant contended, the district of arrest.[112]

Finally, the court urged that it would be "a strange and unwieldy construction" to view the statute as permitting review in any district court.[113] The majority asserted that Rule 40 of the Federal Rules of Criminal Procedure and section 3145 of the Bail Reform Act contemplate review in the district where prosecution is pending to avoid any delay by an intermediate determination of bail status in the district of arrest.[114] The majority stated that the district of prosecution is "where the bail status of the defendant ultimately will be determined during the course of [the] trial."[115]

The court found support for its position in Rule 40(c) of the Federal Rules of Criminal Procedure.[116] Rule 40(c) provides that "all papers in the proceeding before the magistrate judge and any bail taken is to be transmitted to the clerk of the district court in which the prosecution is pending."[117] The majority concluded that it would be unusual to require the papers and bail to be transmitted to the district where prosecution is pending if the district of arrest is to review the magistrate judge's order.[118]

2. Chief Judge Wallace's Concurring Opinion[119]

Chief Judge Wallace began his concurrence by noting that this

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the Constitution; 18 U.S.C. §§ 3145 and 3231; and Rule 40 of the Federal Rules of Criminal Procedure.

110. *Evans*, 62 F.3d at 1236.
111. *Id.*
112. *Id.* at 1236-37.
113. *Id.* at 1237.
114. *Id. See* FED. R. CRIM. P. 40; 18 U.S.C. § 3145 (1994).
115. *Evans*, 62 F.3d at 1237.
116. *Id. See* FED. R. CRIM. P. 40(c).
117. *Evans*, 62 F.3d at 1237.
118. *Id.*
119. *Id.* at 1238 (Wallace, C.J., concurring).

issue was one of first impression.[120] Like the majority, the concurrence acknowledged that section 3145 was more specific than the broad grant of jurisdiction under section 3231.[121] The concurrence also recognized that the use of the word "the" in the statute was important in determining the issue.[122]

Chief Judge Wallace relied on Rule 40 for guidance in determining which court was "the" appropriate tribunal to review the magistrate judge's order.[123] The concurrence noted that Rule 40(a) requires a defendant, who is arrested in a district other than that in which the alleged offense was committed, to be brought before the nearest available magistrate judge.[124] Additionally, upon conclusion of the preliminary proceedings, Rule 40(c) requires the papers and bail pertaining to the defendant to be transferred to "the district court in which the prosecution is pending."[125] Thus, according to the concurrence, Rule 40 reveals that "the magistrate judge's role is limited, and that the district court where the prosecution is pending should take over the case as soon as possible."[126]

Moreover, the concurrence noted that Rule 40(a) grants the defendant the right to elect to have preliminary proceedings conducted in the district where the prosecution is pending.[127] Chief Judge Wallace urged that this fact further illustrates the limited nature of the magistrate's role.[128] The right of election, the concurrence asserted, reveals that the purpose for holding the preliminary examination before the nearest magistrate judge is to ensure prompt review of a defendant's detention.[129]

The concurrence utilized section 3142(g) of the Bail Reform Act to bolster the position that the proper district to review the magistrate judge's order is the district of prosecution.[130] Section 3142(g) requires that in determining detention or release, the mag-

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120. *Id.*

121. *Id.*

122. *Id.* Chief Judge Wallace concluded that "[t]he word 'the' is important. Failure to pay attention to it would allow any district court in the country to review the order of a magistrate judge with respect to a bail hearing. That, I suggest, makes no sense." *Id.*

123. *Id.*

124. *Id.* See *supra* note 35 for the pertinent text of Rule 40(a).

125. *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring).

126. *Id.*

127. *Id. See* FED. R. CRIM. P. 40(a).

128. *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring).

129. *Id.*

130. *Id. See* 18 U.S.C. § 3142(g) (1994).

istrate judge must have a certain level of familiarity with the case.[131] The concurrence reasoned that the district in which the prosecution is pending is the proper district to review the magistrate judge's order because it will have the requisite familiarity with the matter.[132]

Finally, Chief Judge Wallace noted that the district court in the district of arrest could review the order of the magistrate judge, but only in a very limited situation.[133] In a circumstance where the defendant has waived trial in the district of prosecution, and where the waiver is approved by the United States attorney for both districts, review would be appropriate in the district of arrest.[134]

3. Judge Noonan's Dissenting Opinion[135]

In dissent, Judge Noonan first noted that section 3145 identifies a court that is "distinctly different" from the court identified by Federal Rule 40.[136] The dissent stated that the language "the court having original jurisdiction" as used in section 3145 could mean any district court of the United States under section 3231.[137] However, the Sixth Amendment to the Constitution limits the commencement of prosecution to "the district wherein the crime shall have been committed."[138] Thus, according to the dissent, section 3145 refers to a specific district court with jurisdiction over the defendant, but the challenge is determining which court that is.[139]

The dissent determined that the court with jurisdiction over the

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131. *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring). See *supra* note 56 for the pertinent text of 18 U.S.C. § 3142(g).

132. *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring). The concurring opinion cited to two cases—without discussion or elaboration—in support of its conclusion. *Id.* at 1239. The two cases are United States v. Gebro, 948 F.2d 1118 (9th Cir. 1991) and United States v. Acheson, 672 F. Supp. 577 (D.N.H. 1987). See *infra* notes 154-56 and 267-72 and accompanying text for the facts and holdings of each case, respectively.

133. *Evans*, 62 F.3d at 1239 (Wallace, C.J., concurring).

134. *Id.* Chief Judge Wallace noted that the waiver could be effectuated by Rule 20 of the Federal Rules of Criminal Procedure. *Id.* See *supra* notes 41-42 and accompanying text for a discussion of Rule 20. *See also* United States v. French, 787 F.2d 1381, 1384-85 (9th Cir. 1986) (discussing Rule 20 and the prerequisites to transfer); United States v. Gallagher, 183 F.2d 342, 345-46 (3d Cir. 1950), *cert. denied*, 340 U.S. 913 (1951).

135. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting).

136. *Id.* The dissent pointed out that § 3145 refers to "the court having original jurisdiction over the offense" while Rule 40 refers to "the district court in which prosecution is pending." 18 U.S.C. § 3145 (1994); FED. R. CRIM. P. 40. See *supra* notes 35 and 59-60 for the pertinent text of Rule 40 and § 3145, respectively.

137. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). See *supra* note 102 for the text of § 3231.

138. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). *See* U.S. CONST. amend. VI.

139. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting).

defendant is the district court in the district of arrest.[140] Judge Noonan noted that Rule 40 does not address the issue because subsection (c) merely provides that the papers and bail will "go *eventually* to 'the clerk of the district court in which the prosecution is pending.'"[141]

Moreover, the dissent urged that the factors of section 3142(g)—applied in considering whether release of the defendant on bail is appropriate—favor review in the district of arrest.[142] The dissent determined that:

> The great majority of these factors such as the person's "character, family ties, employment, financial condition, length of residence, community ties" are best determined by the court in which the person is apprehended if the person happens, as is the case here, to be a resident of the district in which apprehended.[143]

Additionally, the dissent concluded that permitting review in the district court to which the magistrate is attached assures the promptness that is required by the United States Constitution and mandated by section 3145.[144] The dissent argued that since the magistrate is housed, in most districts, in the same courthouse where the district court sits, access to the district court becomes physically facilitated and immediate.[145]

Of particular importance to the dissent in its analysis was the nature of the relation between magistrate judges and Article III judges.[146] The dissent asserted that "[t]he normal system of appellate review is territorial," thus, the ordinary procedure is that "[o]ne goes from a magistrate to the district court which has appointed the magistrate and then to the appellate court of the circuit in which the magistrate and district court exist."[147] The dissent claimed that it was unlikely that Congress, in providing for review in section 3145, intended to abandon this normal "territorial hierarchy" in the manner suggested by the majority.[148]

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140. *Id.*

141. *Id.* (emphasis added). *See* FED. R. CRIM. P. 40(c).

142. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). *See* 18 U.S.C. § 3142(g) (1994). For the pertinent text of § 3142(g), see *supra* note 56.

143. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting).

144. *Id.*

145. *Id.* at 1239-40.

146. *Id.* at 1240.

147. *Id.*

148. *Id.*

The dissent cited to the Supreme Court decision in *United States v. Raddatz*[149] to emphasize that an analysis of the nature of the relationship between magistrate judges and Article III judges is critical.[150] The dissent considered *Raddatz* important because in that opinion "the Supreme Court declared: 'the entire process takes place under the district court's total control and jurisdiction.'"[151]

The dissent also cited *United States v. Gebro*,[152] which quoted the language in *Raddatz* as "relevant to the relationship between the district court and a magistrate judge ordering release on bail."[153] In *Gebro*, the defendant appealed the decision of a district court judge to review "sua sponte"[154] the magistrate judge's release order.[155] The United States Court of Appeals for the Ninth Circuit held that the district court had the authority to review the magis-

149. 447 U.S. 667 (1980).

150. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting) (citing *Raddatz*, 447 U.S. at 681). In *Raddatz*, the defendant appeared before a federal magistrate judge on a motion to suppress evidence. 447 U.S. at 669. The magistrate recommended to deny the motion and the defendant filed objections. *Id.* at 672. The district court accepted the magistrate's recommendation, denied the defendant's motion to suppress, and sentenced the defendant. *Id.* The United States Court of Appeals for the Seventh Circuit reversed the district court's decision, finding that the defendant had been deprived of due process because the district court failed to hear the controverted testimony. *Id.* The Supreme Court reversed, holding that "the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing," and, thus, the district court in *Raddatz* did not deprive the defendant of due process by failing to hear the controverted testimony. *Id.* at 681.

151. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting) (quoting *Raddatz*, 447 U.S. at 681).

152. 948 F.2d 1118 (9th Cir. 1991).

153. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting) (citing *Gebro*, 948 F.2d at 1120).

154. "Sua sponte" means "[o]f his . . . own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

155. *Gebro*, 948 F.2d at 1120. The defendant in *Gebro* was charged with aiding and abetting an armed bank robbery. *Id.* at 1119. The procedure challenged by the defendant in *Gebro* was actually the second "bite at the apple" for the Government. The defendant was originally charged and arrested for aiding and abetting a bank robbery, ordered detained by a magistrate judge, and ultimately convicted and sentenced. *Id.* However, the conviction was reversed and remanded by the court of appeals due to improper jury instructions. *Id.*

Because of a violation of the Speedy Trial Act, the district court dismissed the original indictment and a new one was filed. *Id.* at 1119 n.2. The defendant was brought before a magistrate judge and the government moved for pretrial detention. *Id.* at 1119. The magistrate judge denied the motion for pretrial detention, and ordered the defendant released on $25,000 bail. *Id.* At a trial setting hearing, the United States district court judge indicated that he thought that the defendant was a flight risk, and ordered a detention hearing. *Id.* At that detention hearing, the district court vacated the magistrate judge's release order and ordered the defendant detained. *Id.* at 1119-20.

trate judge's order, stating that "'the entire process takes place under the district court's total control and jurisdiction.'"[156]

The dissent in *Evans* recognized that *Gebro* was distinguishable from the principal case.[157] However, the dissent contended that *Gebro* was the closest precedent, "incorporat[ing] the traditional understanding of the relationship of the magistrate judge to the district court that appointed the magistrate judge."[158] The phrase "total control," the dissent argued, "suggests, even if it does not absolutely require, the proximity of the magistrate judge to the district court which is exercising control."[159] Thus, the dissent concluded that requiring a district court thousands of miles away to exercise "total control" over a magistrate judge who orders detention or release creates a strange and unusual result.[160] This result is an improper increase in the magistrate judge's independence.[161] In short, the dissent in *Evans* concluded that the defendant properly sought review of the magistrate judge's detention order in the district of arrest.[162]

III. ANALYSIS

At issue in *United States v. Evans* is a determination of the proper interpretation of section 3145 of the Bail Reform Act of 1984.[163] The legislative history of this statute provides no guidance

156. *Id.* at 1120 (quoting United States v. Raddatz, 447 U.S. 667, 681 (1980)).

157. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting) ("At issue in *Gebro* was not our question, so *Gebro* may be distinguished.").

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1239-40.

163. *See id.* at 1235. The United States Court of Appeals for the Eleventh Circuit recently had occasion to address precisely the same issue faced by the United States Court of Appeals for the Ninth Circuit in *Evans*, on essentially the same facts, in United States v. Torres, 86 F.3d 1029 (11th Cir. 1996). In a very brief one-page opinion, a majority of the Court of Appeals for the Eleventh Circuit determined that the plain language of 18 U.S.C. § 3145 dictates that, in a multi-district proceeding, the court with original jurisdiction over the offense is the district court in the prosecuting district. *Id.* at 1031. The *Torres* majority relied exclusively on the Ninth Circuit's majority opinion in *Evans* as the basis for its conclusion. *Id.* Judge Barkett dissented from the *Torres* majority opinion, finding Judge Noonan's dissent in *Evans* the more persuasive approach. *Id.* (Barkett, J., dissenting). Neither the majority nor the dissent in *Torres* added any independent discussion, elaboration, or analysis to the issue raised under § 3145. Instead, the majority and dissent adopted in full the reasoning of their respective Ninth Circuit counterparts.

in determining this issue.[164] In fact, courts that have addressed various issues arising out of multi-district proceedings have determined that in drafting section 3145, "[i]t does not appear that Congress gave any consideration to the problems that multi-district proceedings would generate."[165] The Senate Report prepared in connection with the Bail Reform Act "seems only to contemplate proceedings within a single district."[166] Consequently, guidance must be derived from other sources. The sources adopted in this Note for determining the proper interpretation of section 3145 include: a plain language analysis, the United States Constitution, Rules 5 and 40 of the Federal Rules of Criminal Procedure, selected sections within the Bail Reform Act of 1984, as well as case law. This section of the Note will discuss and analyze these sources and attempt to reconcile them with section 3145 of the Bail Reform Act of 1984. In doing so, this Note concludes that the phrase "the court having original jurisdiction over the offense" refers to the district court in the district of prosecution.

A. *Plain Language of Section 3145 of the Bail Reform Act of 1984*

The *Evans* majority determined that the best starting point in ascertaining which district court is authorized to review the findings of the magistrate judge under section 3145 of the Bail Reform Act, especially in light of the absence of legislative intent, is an analysis of the statutory language itself.[167] Section 3145 states that either

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164. *See* S. REP. No. 225, *supra* note 20, at 29-30, *reprinted in* 1984 U.S.C.C.A.N. at 3212-13.

165. United States v. Dominguez, 783 F.2d 702, 704 n.3 (7th Cir. 1986). *See generally* S. REP. No. 225, *supra* note 20, *reprinted in* 1984 U.S.C.C.A.N. 3182.

166. *Dominguez*, 783 F.2d at 704 n.3. *See also* United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986) ("There is no indication that Congress . . . considered the context of an arrest in a district other than the district of prosecution."); United States v. Velasco, 879 F. Supp. 377, 378 (S.D.N.Y. 1995) (citing *Dominguez*, 783 F.2d at 704 n.3); United States v. Acheson, 672 F. Supp. 577, 579 (D.N.H. 1987) (citing *Dominguez*, 783 F.2d at 704 n.3.) ("As at least one court has aptly pointed out, it does not appear that Congress in adopting the Bail Reform Act, gave any consideration to the problems that multi-district proceedings would generate.").

167. United States v. Evans, 62 F.3d 1233, 1236-38 (9th Cir. 1995). For a comprehensive examination of the various theories behind statutory interpretation and construction, see generally Robert J. Araujo, S.J., *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401

the government or the defendant may seek review in "*the* court having original jurisdiction over the offense."[168] The *Evans* court initially focused on the use of the word "the" in the statute.[169] Under 18 U.S.C. § 3231, federal district courts of the United States have original jurisdiction over federal offenses.[170] In isolation, it may appear as though section 3231 extends original jurisdiction to all district courts of the United States.[171] The *Evans* court, however, determined that the language of section 3145 limits the choice to one particular federal district court—"the" court with original jurisdiction over the offense.[172] The statute does not refer to "any" federal court or "all" federal courts, but limits review to "the" court with original jurisdiction. If Congress had intended for any or all federal district courts to have the authority to review the magistrate judge's orders, it may well have used that broad language in the text of section 3145. In the absence of that language, it is apparent that Congress intended to restrict the courts from which to choose to a single court.

(1994); Antonin Scalia, *The Rule of Laws as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992). *See also* Susan G. Fentin, Note, *Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255, 285-90 (1995); Jane Ellen Warner, Note, *The Household Waste Exclusion Clarification; 42 U.S.C. Section 6921(i): Did Congress Intend to Exclude Municipal Solid Waste Ash from Regulation as Hazardous Waste Under Subtitle C?*, 16 W. NEW ENG. L. REV. 149, 167-75 (1994).

168. 18 U.S.C. § 3145(a), (b) (1994) (emphasis added).

169. *Evans*, 62 F.3d at 1236.

170. § 3231. See *supra* note 102 for the text of § 3231. Section 3231 has been considered a broad grant of jurisdiction. *See Evans*, 62 F.3d at 1236; United States v. Koloboski, 732 F.2d 1328, 1329-30 (7th Cir. 1984); Williams v. United States, 582 F.2d 1039, 1040 (6th Cir.), *cert. denied*, 439 U.S. 988 (1978); United States v. Wiseman, 445 F.2d 792, 797 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); United States v. Sasscer, 558 F. Supp. 33, 36 (D. Md. 1982); United States v. Jackson, 374 F. Supp. 168, 173 (N.D. Ill. 1974), *aff'd in part and rev'd in part*, 508 F.2d 1001 (7th Cir. 1975).

171. This was precisely the defendant's argument in *Evans*. The defendant maintained that § 3231 grants all district courts "original jurisdiction" over federal offenses, thus, any district court has the authority to review the magistrate judge's detention order. *Evans*, 62 F.3d at 1235-36. However, as the majority in *Evans* clarified, § 3231 merely designates that federal courts, rather than state courts, have jurisdiction over federal offenses. *Id.* at 1236. The court stated that § 3231 does not specify exactly which court is "the court having original jurisdiction over the offense" as used in § 3145. *Id.* See *supra* notes 59 and 60 for the text of 18 U.S.C. §§ 3145(a) and (b) (1994), respectively. Section 3145 possesses a narrower meaning than the "broad grant of original jurisdiction" conveyed in § 3231. *Evans*, 62 F.3d at 1236.

172. *Evans*, 62 F.3d at 1236. *See* § 3145(a), (b). There is no dispute among the *Evans* court that the language of § 3145 of the Bail Reform Act refers to a single federal district court. The dispute centers around which district court that is. *See generally Evans*, 62 F.3d at 1233-40.

Having determined that there is but one district court which is authorized to review the magistrate judge's detention or release order, the majority in *Evans* asserted that the next step is to discern which court that is.[173] Because review is limited by the word "the" to a single district court, it follows that there is only one district court with "original jurisdiction over the offense" for the purposes of detention or release decision review. In the multi-district context, however, there are two federal district courts with an arguable interest in the determination of the defendant's detention or release—the district court in the district of arrest and the district court in the charging district. The majority in *Evans* concluded that an analysis of the term "original jurisdiction" of section 3145 in light of the constitutional restrictions on where a trial can be held helps in determining which court is the proper district court for review.[174]

B. *Constitutional Guarantee of Venue: Determining Where the Case can "Originally" be Brought*

Article III, Section 2, Clause 3 of the Constitution and the Sixth Amendment require the prosecution of federal crimes in the district where the crimes were committed unless waived by the defendant.[175] The defendant can seek a dismissal of the prosecution unless it is brought in that district.[176] Since waiver can be effectuated, this is technically a matter of venue rather than jurisdiction.[177] However, until the defendant waives the right, the court that possesses "original jurisdiction over the offense" is the court in the "district wherein the crime shall have been committed."[178]

The dissent in *Evans* placed little emphasis on the effect of these constitutional provisions.[179] The dissent conceded that the broad grant of jurisdiction of section 3231 is limited by the Sixth

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173. *Evans*, 62 F.3d at 1236.

174. *Id.*

175. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. See *supra* notes 71 and 72 and accompanying text for the pertinent language of Article III, Section 2, Clause 3 and the Sixth Amendment, and for a discussion of the distinction between the two provisions.

176. *Evans*, 62 F.3d at 1236.

177. See *supra* notes 79-83 and accompanying text discussing the distinction between the concepts of venue and jurisdiction.

178. *See* U.S. CONST. amend. VI.

179. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). Judge Noonan never actually mentioned Article III, Section 2, Clause 3 of the Constitution in his dissent, although he did make reference to the Sixth Amendment. *Id.*

Amendment to prosecution in the district where the crime was committed.[180] However, the dissent suggested that this did not aid in answering the question, but really constituted the question itself.[181] Judge Noonan maintained that the Sixth Amendment only helps in determining that section 3231 does not grant all district courts jurisdiction to hear the case.[182]

Emphasizing that the constitutional requirement was not "jurisdictional," the dissent concluded that it was more properly characterized as a venue requirement, which can be waived by the defendant.[183] Thus, although the Sixth Amendment requires trial in the district where the offense was committed, the "usual rules governing venue and jurisdiction" render the Sixth Amendment "requirement" ambiguous for the purpose of determining which district court has the authority to review under section 3145.[184]

One of the "usual rules" referred to by the dissent is doubtlessly Rule 20 of the Federal Rules of Criminal Procedure.[185] Rule 20 accords the defendant the right to waive trial in the district of prosecution and allow the district of arrest to hear the case.[186] However, a defendant seeking to transfer under this provision does not receive an "automatic" transfer.[187] The transfer is subject to the approval of the prosecuting attorneys for both the arresting and charging districts.[188] Consequently, it is apparent that the district court in the district of arrest is without the authority to hear and try the case absent consent by the government attorneys for both

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180. *Id.*

181. *Id.*

182. *Id.* Thus, the dissent argued that the Sixth Amendment does not answer the question of which district court has authority to review the magistrate judge's orders. *Id.* The dissent urged that the Sixth Amendment merely provides that no district court could be chosen at random to hear the review of a magistrate judge's detention order.

183. *Id.* See *supra* notes 79-83 and accompanying text discussing the distinction between jurisdiction and venue.

184. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). *See* U.S. CONST. amend VI ("right to . . . trial[ ] by an impartial jury of the State and district wherein the crime shall have been committed").

185. FED. R. CRIM. P. 20.

186. FED. R. CRIM. P. 20(a). The Notes of the Advisory Committee on Rules state that "[t]his rule would accord to a defendant . . . an opportunity to secure disposition of the case in the district where the arrest takes place, thereby relieving him of whatever hardship may be involved in a removal to the place where the prosecution is pending." FED. R. CRIM. P. 20 advisory committee's note.

187. FED. R. CRIM. P. 20(a).

188. *Id.* See *supra* note 41 for the pertinent language of Federal Rule 20(a). The requirement of approval by both United States attorneys is intended to control the danger of forum shopping by the defendant. FED. R. CRIM. P. 20 advisory committee's note.

districts.[189]

In contrast to the dissent, the majority in *Evans* placed its emphasis on the constitutional requirement that prosecution could be "originally" brought only in the federal district court of the district where the crime was alleged to have been committed.[190] Because the Constitution mandates that the defendant shall be accorded trial in the district where the crime was committed—i.e., the district of prosecution—the district court in that district is the only tribunal with true "original" jurisdiction over the offense.[191] The term "original jurisdiction" refers to the "[j]urisdiction of [a] court to take cognizance of a cause *at its inception*, try it, and pass judgment upon the law and facts."[192] The district court in the charging district is the only court with the ability to take cognizance of the case at its inception.[193] Accordingly, the district court in the charging district is the only court with "original jurisdiction."[194]

It is evident that this rationale is proper when analyzed under the notion that there is a single district court with "original jurisdiction over the offense."[195] Additionally, although the district of arrest may obtain jurisdiction over the defendant, it may do so only in a circumstance where the defendant has waived his right to be tried in accordance with the Constitution.[196] This does not constitute "original jurisdiction" as that term is used in the review provision of the Bail Reform Act.[197] Thus, under the language of section 3145, "the court having original jurisdiction," in the context of a multi-district proceeding, refers to the district court in the district where the crime was committed.

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189. FED. R. CRIM. P. 20(a).

190. United States v. Evans, 62 F.3d 1233, 1236 (9th Cir. 1995).

191. *See* discussion *supra* part I.C.

192. BLACK'S LAW DICTIONARY 1099 (6th ed. 1990) (emphasis added).

193. The district court in the district of arrest can take cognizance of the case only in the event of an approved waiver. This is not cognizance at its "inception."

194. *See* United States v. Spilotro, 786 F.2d 808, 813 (8th Cir. 1986) (Addressing section 3146(e) of the Bail Reform Act of 1966 (repealed 1984): "[T]he magistrate . . . of the court which has original jurisdiction over the offense charged [the district court in the charging district] has the authority to amend conditions of release previously set in another district by another magistrate."); United States v. James, 674 F.2d 886, 890 (11th Cir. 1982) (district judge in the charging district "had authority as the court with original jurisdiction over the case to amend the conditions of appellants' release"); United States v. Zuccaro, 645 F.2d 104, 105 (2d Cir.) (per curiam) (referring to district court in the charging district as the court with original jurisdiction over the offense), *cert. denied*, 454 U.S. 823 (1981).

195. *See* discussion *supra* part III.A.

196. *See* discussion *supra* part I.C. *See also* FED. R. CRIM. P. 20.

197. *See* 18 U.S.C. § 3145(a), (b) (1994).

C. *Rule 40 of the Federal Rules of Criminal Procedure*

Federal Rule 40 is the procedural starting point in a multi-district case such as *Evans*. In addition, an examination of the language of the Rule itself provides some insight into determining which court is authorized to review the magistrate judge's order under section 3145.[198] Rule 40 provides further support for the conclusion that the district court in the prosecuting district is the proper tribunal for review.

1. Rule 40(a)

To ensure that there will be no "unnecessary delay," Rule 40(a) requires a defendant to be brought before the nearest available magistrate judge for a pretrial determination of bail.[199] However, the defendant can waive this requirement.[200] Rule 40(a) grants the defendant the right to "elect[ ] to have the preliminary examination conducted in the district in which the prosecution is pending."[201] This right of election supports the conclusion that the district court in the charging district is the only properly authorized tribunal to review the magistrate judge's orders in two ways. First, it shows that the role of the magistrate judge, before whom the defendant first appears in the district of arrest, is a limited one. The defendant is able to circumvent the magistrate judge in the district of arrest to have the detention hearing conducted in the charging district if he so chooses.[202] That the role of the magistrate judge in the district of arrest is limited in such a manner lends support to the conclusion that the charging district should take over as soon as possible.[203] More importantly, the right of election indicates that

198. The majority and concurrence in *Evans* consulted Rule 40 in helping to ascertain the proper interpretation of § 3145 of the Bail Reform Act. *See* United States v. Evans, 62 F.3d 1233, 1235-39 (9th Cir. 1995).

199. FED. R. CRIM. P. 40(a). See *supra* note 36 discussing the purpose behind the "no unnecessary delay" requirement of Rule 40(a), and the relation of Rule 40(a) to Rules 5 and 5.1.

200. FED. R. CRIM. P. 40(a).

201. *Id.* The Advisory Committee's Note to the 1979 amendment of Rule 40(a) states: "A defendant might wish to elect that alternative when, for example, the law in that district is that the complainant and other material witnesses may be required to appear at the preliminary examination and give testimony." FED. R. CRIM. P. 40(a) advisory committee's note.

202. See the election right provision of FED. R. CRIM. P. 40(a).

203. If the charging district should take over as soon as possible, the inference is that the charging district should also be the district to review the orders of the magistrate. *See* United States v. Evans, 62 F.3d 1233, 1238 (9th Cir. 1995) (Wallace, C.J., concurring).

the Federal Rules favor prompt review of detention orders over prompt determinations of detention or release.[204] If the defendant elects to have the detention hearing conducted in the district of prosecution, it is clear that more of a delay will ensue than if the defendant had not exercised the right. From these conclusions flows the inference that review is appropriate only in the charging district. This inference is further bolstered by analyzing the peculiar results that follow if the district court in the district of arrest is authorized to review the magistrate judge's determination of detention or release.

In a multi-district case, the defendant must appear before the nearest magistrate judge in the district of arrest for the "preliminary proceedings."[205] Under Rule 40(a), the defendant is entitled to elect to have the detention hearing conducted in the charging district.[206] A defendant who chooses to exercise that right must then be transferred to the charging district for the detention hearing.[207] In the event the orders issued by the magistrate judge are disputed by either the government or the defendant, sections 3145(a) and (b) of the Bail Reform Act allow either party to file a motion for review.[208] Requiring the motion for review to be filed with the district court in the district of arrest would compel a transfer of the defendant back to the arresting district.[209] This result is untenable for two reasons. First, it contravenes the mandate of section 3145 of the Bail Reform Act that motions for review "shall be deter-

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204. The concurrence in *Evans* determined that the defendant's "right of election indicates that the fundamental purpose of having the preliminary examination conducted by the nearest available magistrate judge is to *ensure that the defendant is not prevented from obtaining prompt review of his detention*." *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring) (emphasis added). This language illustrates a dual purpose behind the requirement of the appearance of the defendant before the nearest available magistrate judge. The first purpose is to protect the defendant from prejudicial delay. *See supra* note 36. The second is to ensure the defendant prompt review of his detention. *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring). *See* 18 U.S.C. § 3145(a), (b) (1994) ("The motion [for revocation or amendment of the conditions of the detention order] shall be determined promptly.").

205. FED. R. CRIM. P. 40(a). *See also* FED. R. CRIM. P. 5.

206. FED. R. CRIM. P. 40(a).

207. *Id.*

208. 18 U.S.C. § 3145(a), (b) (1994).

209. See discussion *supra* part III.A reaching the conclusion that there is one—and only one—district court with the authority to review the magistrate judge's orders. *Either* the district court in the arresting district *or* the district court in the charging district has the authority to review, but not both. Consequently, there cannot be a flexible determination, on a case by case basis, of the proper district court for review depending on where the defendant chooses to have the detention hearing conducted.

mined promptly."[210] Second, Federal Rule 40(a) requires the defendant to ultimately answer for the alleged offenses in the charging district.[211] This would necessitate a *third* transfer of the defendant—from the district of arrest back to the charging district for trial.

In order to avoid multiple transfers of the defendant and undue delay of this kind in the review of detention, the district court in the charging district must be the proper tribunal to review the orders of the magistrate judge. Adherence to this conclusion avoids this problematic scenario and leads to consistency in pretrial procedure.[212]

2. Rule 40(c)

Federal Rule 40(c) also strongly supports the position that the proper court to review the magistrate judge's order is the district court in which prosecution is pending. Rule 40(c) provides that after the detention hearing is conducted and a determination of detention or release is reached, "the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which prosecution is pending."[213] It would be illogical to require the papers and bail to be forwarded to the district in which prosecution is pending if review was to be conducted in the district of arrest.[214] Thus, Rule 40(c) illustrates the proper contemplation of review in the district of prosecution in a multi-district proceeding.

The dissent in *Evans*, however, disregarded the inconsistencies that would seemingly arise in concluding that the proper district court to review is the district of arrest.[215] The dissent urged that

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210. § 3145(a), (b).

211. FED. R. CRIM. P. 40(a).

212. To illustrate the ensuing consistency in procedure, if the defendant decides not to exercise the election right under Rule 40(a), the pretrial bail determination occurs promptly in the arresting district. FED. R. CRIM. P. 40(a). The review then takes place in the charging district, where the trial is required to be conducted under Rule 40(a). *Id.* On the other hand, if the defendant chooses to exercise the right of election, substantially the same procedure results. The defendant receives the prompt appearance before the magistrate judge in the arresting district. The only change is that the detention hearing is conducted in the charging district, the same district where the review and trial are to be conducted. This procedure averts any unwarranted delay and avoids subjecting the defendant to as many as three transfers between the arresting district and charging district.

213. FED. R. CRIM. P. 40(c). The full text of Rule 40(c) states: "If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending." FED. R. CRIM. P. 40(c).

214. *See* United States v. Evans, 62 F.3d 1233, 1237 (9th Cir. 1995).

215. *Id.* at 1239 (Noonan, J., dissenting).

Rule 40(c) does not necessarily specify that the papers and bail must go to the district court in which prosecution is pending for review.[216] Rather, the papers and bail merely need to "eventually" reach the charging district.[217] The dissent concluded that once the issue of detention or release is resolved—either by the magistrate judge or by the district court on review—the papers are to be transferred at that point.[218]

The dissent's reasoning, however, fails to fully consider the implications of this interpretation of Rule 40(c). In light of the plain language of section 3145 of the Bail Reform Act,[219] the principles underlying the applicable constitutional provisions,[220] and the election right provision contained within Rule 40(a),[221] a reasonable interpretation of the language is that the papers and bail are to be sent immediately following the magistrate judge's determination of detention or release.[222] The conclusion of immediate transfer logically flows from an adherence to the notion of procedural consistency. As previously illustrated, any other interpretation leads to inconsistent and anomalous results—an outcome surely not intended by Congress.

An alternative approach to undermining the dissent's reasoning with regard to Rule 40(c) is to construe the requirement of the transfer of the papers and bail as a limitation on the role of the magistrate judge in the arresting district.[223] The dissent reasoned that Rule 40(c) is ambiguous because it does not specify exactly at what point the papers and bail are to be transferred.[224] However,

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216. *Id.*

217. *Id.*

218. *Id.* The dissent stated that Rule 40(c) fails to address the issue because the "Rule does not determine whether the district court which has appointed the magistrate shall first have reviewed the decision." *Id.*

219. *See* discussion *supra* part III.A.

220. *See* discussion *supra* part III.B.

221. *See* discussion *supra* part III.C.1.

222. The papers and bail should be sent immediately as opposed to "eventually" as suggested by the dissent in *Evans*. *See Evans*, 62 F.3d at 1239 (Noonan, J., dissenting).

223. The approach adopted by the dissent in *Evans* expands the role of the arresting district by requiring the detention hearing as well as review to be conducted in the arresting district. *Id.* The approach endorsed by the majority and concurrence, however, effectively limits the role of the arresting district to, at most, the pretrial determination of detention or release by the magistrate judge. *Id.* at 1236-39.

224. *Id.* at 1239 (Noonan, J., dissenting). *See supra* notes 215-18 and accompanying text. The ambiguous language, as contended by the dissent, consists of the first part of Rule 40(c) which states: "If a defendant is held or discharged . . . ." FED. R. CRIM. P. 40(c).

an analysis of other subdivisions within Rule 40 reveals that the language is not as unclear as the dissent asserts.[225]

For example, subdivision (a) of Rule 40 addresses the appearance of the defendant before the *magistrate judge*.[226] Subdivision (b) addresses the required statement to the defendant by the *magistrate judge* regarding the provisions of Federal Rule 20.[227] These observations are noteworthy because the subdivisions only address activities concerning the magistrate judge, not the district court judge who conducts review.[228] Moreover, Rule 40 makes no reference at all to review of the magistrate judge's pretrial bail determination.[229] Therefore, it seems that Rule 40(c) is not ambiguous, but, rather, quite clear that its application is limited to the detention or discharge of the defendant by the magistrate judge. The conclusion of the dissent in *Evans* improperly broadens the scope of the Rule 40(c) transfer of papers and bail to apply to detention or release decisions by the magistrate judge *and* by the district court judge in the district of arrest. Nothing in the language of the Rule suggests such a construction. The foregoing analysis clarifies that the magistrate judge's role in the proceedings is a limited one, and that pursuant to Rule 40(c) the prosecuting district should take over as soon as possible.

D. *"Requisite Familiarity" Requirement of Section 3142(g) of the Bail Reform Act of 1984*

Section 3142(g) of the Bail Reform Act of 1984 was employed by both the concurrence[230] and dissent[231] in *Evans* to support each opinion's determination of the appropriate interpretation of section 3145.[232] This subsection of the Note analyzes how each opinion ap-

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225. *See generally* FED. R. CRIM. P. 40.

226. FED. R. CRIM. P. 40(a).

227. FED. R. CRIM. P. 40(b).

228. All of the subdivisions of Rule 40 address the procedures to be followed by the magistrate judge in the district of arrest in a multi-district case. *See generally* FED. R. CRIM. P. 40. None of the subdivisions indicate contemplation of application or relation to the district judge who conducts review at the district court level.

229. Review of pretrial bail determinations is specifically provided for in § 3145 of the Bail Reform Act. 18 U.S.C. § 3145 (1994). Rule 40 does not address detention or release of the defendant—it is merely concerned with the pretrial criminal procedure in the multi-district context. *See generally* FED. R. CRIM. P. 40.

230. United States v. Evans, 62 F.3d 1233, 1238 (9th Cir. 1995) (Wallace, C.J., concurring).

231. *Id.* at 1239 (Noonan, J., dissenting).

232. *See* 18 U.S.C. § 3142(g) (1994). Section 3142(g) requires the magistrate

proached section 3142(g), how other courts have interpreted the provision, and how to resolve the interpretive problem.

Section 3142(g) of the Bail Reform Act of 1984 presents the factors to be considered by the judicial officer in reaching a determination of whether to release a defendant on bail.[233] Some of the factors sweep rather broadly[234] while others require a more personal, knowledgeable assessment of the defendant.[235] Section 3142(g)(3) mandates that the judicial officer shall take into account the available information concerning personal factors including: the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, and community ties.[236] Sections 3142(g)(1) and (2) require the judicial officer to consider the nature and circumstances of the offense and the weight of the evidence against the person.[237] Because review of a magistrate judge's orders by the district court is de novo, consideration of these factors arises again on review under section 3145.[238]

The factors required to be considered by the judicial officer generate two approaches to the determination of the appropriate tribunal for review. Under the first approach, the focus centers on the judicial officer's familiarity with the nature and circumstances of the offense as required by section 3142(g)(1),[239] and the weight of the evidence against the person under subsection (g)(2).[240] Proponents of this approach conclude that the proper district court to review the pretrial bail decision is the district court in the charging district because that district is best able to review with the proper knowledge and background mandated by section 3142(g).[241]

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judge to take into consideration many factors concerning the defendant and the alleged crime. See *supra* note 56 for the pertinent text of § 3142(g).

233. § 3142(g).

234. *See* § 3142(g)(1), (2).

235. *See* § 3142(g)(3)(A).

236. *Id.*

237. § 3142(g)(1), (2).

238. "[T]he district court judge may begin anew and simply follow the procedures set out in [the Bail Reform] Act [§] 3142." Pringle, *supra* note 63, at 922. *See generally* United States v. Torres, 929 F.2d 291 (7th Cir. 1991). See also *supra* notes 63-66 and accompanying text discussing the district court's de novo standard of review.

239. *See* § 3142(g)(1).

240. *See* § 3142(g)(2).

241. The approach that the district court in the district of prosecution is the proper tribunal to review the determination of bail is the approach adopted by the concurring opinion in *Evans*. United States v. Evans, 62 F.3d 1233, 1238 (9th Cir. 1995) (Wallace, C.J., concurring). This approach receives support from both the Second and Seventh Circuits. *See* United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir.

The second approach focuses on the judicial officer's familiarity with the history and personal characteristics of the defendant pursuant to section 3142(g)(3).[242] Advocates of this approach conclude that the pretrial bail decision of the magistrate judge is properly reviewed by the district court in the district of arrest.[243] The basis for this conclusion is that when a defendant is arrested in the district in which he resides, that district possesses the requisite familiarity under section 3142(g).[244]

1. Requisite Familiarity in the District of Prosecution

Two federal courts of appeals decisions that have addressed the issue of which court has the requisite familiarity with a particular defendant and the defendant's case are *United States v. Dominguez*[245]

1986) (holding that the evidence necessary to make the determination of whether to release or detain the defendant will be located primarily in the district where prosecution is pending); United States v. Dominguez, 783 F.2d 702, 704-05 (7th Cir. 1986) (holding that the most informed decisions concerning release or detention will be made by the prosecutors and courts in the district where prosecution is pending). *See also* United States v. Velasco, 879 F. Supp. 377, 378 (S.D.N.Y. 1995) (holding that the most informed decisions concerning bail or release will be made in the district where prosecution is pending); United States v. Jones, 804 F. Supp. 1081, 1090 (S.D. Ind. 1992) (holding that the Bail Reform Act "recognizes a 'local' interest in the originating jurisdiction which may be different than the interests of the jurisdiction in which the arrest occurs").

242. *See* § 3142(g)(3).

243. The approach that the arresting district is the proper district to review is the approach adopted by the dissent in *Evans*. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). Several district courts lend support to this approach. *See, e.g.*, United States v. Johnson, 858 F. Supp. 119, 122 (N.D. Ind. 1994); United States v. Acheson, 672 F. Supp. 577, 579 (D.N.H. 1987).

244. *See Evans*, 62 F.3d at 1239 (Noonan, J., dissenting); *Johnson*, 858 F. Supp. at 122 (holding that a magistrate judge in the charging district has no authority to review an order denying detention issued by another magistrate judge in the arresting district); *Acheson*, 672 F. Supp. at 579 (stating that "[i]t is difficult to ascertain how . . . personal history and ties to the community can be developed unless by hearing before the judicial officer in the community in which the defendant has resided," which is where the defendant was arrested, but holding that the district court in the district of arrest had no authority to set aside an ex parte order issued by a magistrate in the district of prosecution).

245. 783 F.2d 702 (7th Cir. 1986). In *Dominguez*, the defendants were indicted in the Northern District of Indiana on drug-trafficking charges and were arrested in Florida where they appeared before a federal magistrate judge. *Id.* at 703. The magistrate judge set the defendants' bond at one million dollars. *Id.* After removal proceedings in Florida, the defendants were transported to Indiana. *Id.* At the defendants' first appearance in Indiana, the government moved for a pretrial hearing pursuant to 18 U.S.C. § 3142(e). *Id.* See *supra* note 50 and accompanying text discussing § 3142(f). At the hearing, the defendants were ordered detained. *Dominguez*, 783 F.2d at 703.

The defendants filed motions for revocation of the magistrate judge's detention order with the district judge in Indiana and the district judge revoked the order. *Id.*

and *United States v. Melendez-Carrion*.[246] In *Dominguez*, the United States Court of Appeals for the Seventh Circuit held that, in a removal proceeding, a detention hearing should not be conducted in the arresting district.[247] A detention hearing in the arresting district would place the bail decision in the hands of persons much less concerned about the ultimate outcome of the proceedings.[248] The court of appeals concluded that the district of arrest is less likely to possess the requisite knowledge of the defendant and of the charges against him to make an informed decision regarding detention or release.[249]

However, the district judge then conducted a de novo hearing on a motion by the defendants to modify the Florida bond, at which the district judge ordered the defendants detained. *Id.*

The defendants appealed to the United States Court of Appeals for the Seventh Circuit. *Id.* They argued that the district court judge did not have the authority to detain them because the government had waived its right to pretrial detention by not raising it at the defendants' first appearance before the magistrate judge in Florida. *Id.* at 704. The court of appeals rejected the defendants' claim and held that the motion for detention in the charging district was timely. *Id.* at 705.

246. 790 F.2d 984 (2d Cir. 1986). The case is a consolidation of the appeals of eight individuals. The defendants were indicted in the district of Connecticut. *Id.* at 988. Seven of the defendants were arrested in Puerto Rico and the eighth was arrested in Dallas, Texas. *Id.* The defendants were brought before the federal magistrate judge in their respective arresting districts, but the cases were removed to the charging district before a detention hearing was conducted. *Id.* at 989. Consequently, the detention hearings were conducted before the federal magistrate judge in Connecticut. *Id.*

The magistrate judge ordered six of the eight defendants detained and the remaining two released on bail. *Id.* at 990. The government sought review of the two release orders in the United States District Court for the District of Connecticut, and the district court judge reversed the release orders and ordered the remaining two defendants detained. *Id.*

On appeal, the defendants raised procedural challenges to the detention and removal proceedings, arguing that a removal proceeding may not precede the detention hearing. *Id.* The United States Court of Appeals for the Second Circuit found that the removal proceedings could precede the detention hearing, relying on *Dominguez*. *Id.* *See Dominguez*, 783 F.2d at 704-05.

247. *Dominguez*, 783 F.2d at 704.

248. *Id.*

249. *Id.* The court also recognized that if prosecutors in the arresting district were required to seek detention at the first appearance of defendants, they would often rely on "automatic" requests for continuances to obtain the relevant information from the charging district, which would possibly result in unnecessarily extended detention. *Id.* The court conceded that there is support in the legislative history of the Bail Reform Act that "automatic" continuances are available to the government to help facilitate preparation for detention hearings, but that they should not be used in a "wholesale fashion" by courts or prosecutors. *Id.* at 704-05. *See* S. REP. NO. 225, *supra* note 20, at 21-22, *reprinted in* 1984 U.S.C.C.A.N. at 3204-05. The court noted, however, that "[i]t does not appear that Congress gave any consideration to the problems that multi-district proceedings would generate," and that "[t]he [Senate] Report seems only to contemplate proceedings within a single district." *Dominguez*, 783 F.2d at 704 n.3.

The court supported its position by analyzing section 3142(g) of the Bail Reform Act.[250] The court stated that in light of sections 3142(g)(1) and (2), the best assessment of the nature of the charged offense and weight of evidence against the defendant "will most assuredly be available" in the district of prosecution.[251]

In a similar situation to *Dominguez*, the United States Court of Appeals for the Second Circuit, in *Melendez-Carrion*, stated that it was very unlikely that Congress would have intended detention hearings to occur in districts "scattered across the country in which those accused . . . might happen to be arrested."[252] Furthermore, the court concluded that the "decision whether to seek detention and the evidence necessary to support a finding of dangerousness and risk of flight sufficient to justify detention will normally be located primarily in the district of prosecution."[253]

However, the Second Circuit recognized that there may be circumstances in which pertinent evidence may also be located in the arresting district.[254] The court noted that if the defendant is a resident of the district of arrest, he can be afforded protection from inaccessibility to evidence that may be beneficial or relevant to the defendant's case.[255] If the evidence of certain personal factors that a defendant may wish to present can be reasonably obtained only in the district of arrest, the court suggested that the defendant should be given the opportunity to present such evidence.[256] Presumably, the locally available evidence—concerning the defendant's "roots" in the community or other factors—would be presented to the magistrate judge in a preliminary hearing.[257] This hearing, however,

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250. *Dominguez*, 783 F.2d at 705.

251. *Id.* at 705. The court concluded that in light of the factors to be considered under § 3142(g)(1) and (2), "the most informed decisions will almost always be made in the charging district by prosecutors that have supervised the investigations and by courts that will supervise the remaining proceedings." *Id.* The court further stated that "[i]t makes no sense to mandate in multi-district situations that . . . procedures be conducted in the district court with the lesser interest in the defendant and less complete knowledge of his case." *Id.*

Dominguez also went on to address the defendants' substantive challenges to the district judge's determination of dangerousness under 18 U.S.C. § 3142(e). Those issues are not raised in *United States v. Evans* and are beyond the scope of this Note.

252. United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* See *infra* notes 276-91 and accompanying text for a thorough discussion of the Second Circuit's approach in *Melendez-Carrion* concerning the defendant's opportunity to present evidence.

257. *Melendez-Carrion*, 790 F.2d at 990.

would not constitute a "detention hearing" in the district of arrest.[258] The record of that proceeding would then be transferred to the district of prosecution for the actual detention hearing.[259]

In light of these two appellate decisions, it is evident that the district court in the charging district is the proper tribunal to review the detention or release order issued by the magistrate judge in the district of arrest. The district of prosecution will arguably have more familiarity with the nature and circumstances of the offense charged.[260] In a situation where evidence of the personal characteristics of the defendant is important, the prosecuting district will also have access to that evidence. Under the de novo standard of review, the considerations of section 3142(g) in determining detention or release again become controlling for the district court judge.

2. Requisite Familiarity in the District of Arrest

The dissent in *Evans* argued that, in certain circumstances, the district court in the district of arrest will have the requisite familiarity with the defendant to make the determination of whether to release the defendant back into the community.[261] The dissent asserted that the factors to be considered on review under section 3142(g) "are best determined by the court in which the person is apprehended *if* the person happens . . . to be a resident of the district in which apprehended."[262]

This argument is unpersuasive for several reasons. First, the dissent's conclusion only contemplates which district court is appropriate for review if the defendant resides in the arresting district. The next logical question, which the dissent's approach fails to consider, is: Which district court is appropriate for review if the defendant *does not* reside in the arresting district? The dissent's approach, in effect, addresses only half of the question.

Moreover, the conclusion reached by the dissent is illogical in a situation where the defendant does not reside in, or have any ties to, the arresting district. There is no rational reason to require the

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258. *Id.*

259. *Id.*

260. *See* United States v. Evans, 62 F.3d 1233, 1238 (9th Cir. 1995) (Wallace, C.J., concurring); United States v. Dominguez, 783 F.2d 702, 704-05 (7th Cir. 1986); *Melendez-Carrion*, 790 F.2d at 990. *See also* United States v. Velasco, 879 F. Supp. 377, 378 (S.D.N.Y. 1995); United States v. Jones, 804 F. Supp. 1081, 1090 (S.D. Ind. 1992).

261. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting). *See* 18 U.S.C. § 3142(g)(3)(A) (1994). See also *supra* note 56 for the pertinent text of § 3142(g).

262. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting) (emphasis added).

filing of a motion for review in the arresting district in a situation where the defendant has no ties to that district. Nevertheless, the dissent's approach concludes that the tribunal authorized to hear the motion for review under section 3145 of the Bail Reform Act is the district court in the district of arrest.[263]

The dissent in *Evans* also asserted that "Congress may well have supposed that [the scenario in which the defendant is arrested in the district of residence] was the more common one and that therefore the district of arrest should be the district to determine bail."[264] It is possible that Congress "may well have" contemplated that the scenario in which the defendant is arrested in the district where he resides is the more common scenario. However, Congress has provided no guidance on this point.[265] Additionally, at least one commentator has stated that "people today are far more likely to commit crimes outside their district of residence than they once were."[266] It is equally as possible that people are more commonly arrested outside of their district of residence than within. Thus, Congress may well have contemplated that the more common scenario is one in which the defendant is arrested in a district in which he does not reside. In any event, it seems that the *Evans* dissent has tailored, indeed manufactured, congressional intent to fit its conclusion, rather than tailor its conclusion to fit congressional intent.

The dissent's view appears at first blush to receive some support from *United States v. Acheson*.[267] In *Acheson*, the district court judge in the district of arrest held that he did not have jurisdiction to set aside an ex parte order of detention issued by the

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263. *Id.* at 1239-40. *See* § 3145(a), (b). See *supra* notes 59 and 60 for the pertinent text of § 3145(a) and (b), respectively.

264. *Evans*, 62 F.3d at 1239 (Noonan, J., dissenting).

265. *See generally* S. REP. NO. 225, *supra* note 20, *reprinted in* 1984 U.S.C.C.A.N. 3182.

266. Note, *supra* note 72, at 107 n.89 (discussing the erosion of certain policy justifications behind the concept of venue).

267. 672 F. Supp. 577 (D.N.H. 1987). In *Acheson*, the defendant was indicted by the grand jury in the District of Nevada and arrested in New Hampshire, his state of residence. *Id.* at 578. The defendant was brought before a federal magistrate judge in New Hampshire and the government moved for a pretrial detention hearing. *Id.* The magistrate judge admitted the defendant to bail and the government sought review of the release order in the United States District Court for the District of Nevada. *Id.* at 577-78. The district court judge in Nevada issued an ex parte order staying the order by the New Hampshire magistrate judge admitting the defendant to bail. *Id.* at 577. The defendant appealed that decision to the United States District Court for the District of New Hampshire. *Id.* at 580.

district court judge in the district of prosecution.[268] In dicta, however, the judge noted that the personal history of the defendant is best evaluated in a hearing before the magistrate judge in the community in which the defendant resides.[269]

The dicta in *Acheson* supports the approach that the requisite familiarity of the defendant under 3142(g) lies with the district of arrest.[270] However, the actual decision of the district court illustrates that this approach holds little weight. The district judge in *Acheson* recognized that review was properly sought in the district court in the charging district because only that district court had "original jurisdiction over the offense."[271] Accordingly, the district court judge in *Acheson* held that the district court in the arresting district had no authority to set aside the charging district's ex parte order of detention.[272]

The dissent in *Evans* specifically based its conclusion on the fact that the personal factors of section 3142(g)(3) are best considered by the arresting district.[273] This conclusion, however, receives little valuable support and leads to inconsistencies in federal criminal pretrial procedure.

3. Reconciliation of the Competing Views

Under section 3142(g) of the Bail Reform Act, the factors considered in determining whether to release or detain a defendant encompass a full range of inquiry—from general knowledge of the defendant and the surrounding circumstances to intricate personal details.[274] In essence, section 3142(g) involves a balancing test in

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268. *Id.*

269. *Id.* at 579. The judge recognized this as such "at least in cases where, as here, such residence has been continuous for a period of approximately three and one-half years." *Id.*

270. *Id.*

271. *Id.* (quoting United States v. Spilotro, 786 F.2d 808, 815 (8th Cir. 1986)). In *Spilotro*, the court held that, in a multi-district proceeding, sua sponte review of an out-of-district magistrate judge's conditions of release was appropriate. The court stated:

> We . . . hold that § 3146(e) [now repealed] granted the court with original jurisdiction over the offense charged the authority to amend sua sponte and at any time the conditions of release. To hold otherwise would sharply restrict the discretion of the trial court to determine pretrial matters. In addition, requiring a remand of the case to the releasing judicial officer in order to amend conditions of release would waste limited judicial resources.

Spilotro, 786 F.2d at 815.

272. *Acheson*, 672 F. Supp. at 580.

273. United States v. Evans, 62 F.3d 1233, 1239 (9th Cir. 1995). *See* 18 U.S.C. § 3142(g)(3) (1994).

274. § 3142(g). See *supra* note 56 for the pertinent text of § 3142(g).

which the key is to weigh the various factors to determine whether the defendant is a risk of flight or a danger to the community.[275] The outcome of the determination depends on the evidence and information adduced before the magistrate judge at the detention hearing or the district judge on review. The challenge faced here is to determine which district is best able to gain access to and evaluate that evidence and information.

The approach set out by the Second Circuit in *Melendez-Carrion* elucidates the proper procedural solution.[276] Under the Second Circuit's approach, it is reasonable to conclude that review in a multi-district proceeding is properly sought only in the district court in the charging district pursuant to section 3145.[277] The charging district is the district which issues the indictment and warrant, and the prosecutors who have conducted the appropriate investigations are located there.[278] Therefore, on review, the district of prosecution is normally the district best able to make the determination of whether the defendant is a danger to the community or a risk of flight.[279]

However, situations may arise in which the defendant wishes to introduce evidence of personal factors to counter the government's evidence favoring detention.[280] This evidence may only be available in the district of arrest, when that coincides with the defendant's place of residence. In such a situation, the *Melendez-Carrion* court has stated:

> Where practical, consideration should be given to affording the defendant, arrested in his district of residence, an opportunity in that district promptly to present locally available evidence pertinent to the issue of pretrial release so that a transcript of such evidence can be prepared and furnished to the judicial officer

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275. § 3142(g).

276. United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986). See *supra* notes 246 and 252-59 and accompanying text for the facts and holding of *Melendez-Carrion*.

277. *Melendez-Carrion*, 790 F.2d at 990.

278. *Id.*

279. *Id.* *See* 18 U.S.C. § 3142(f) (1994), which provides that a detention hearing shall be held to "reasonably assure the appearance of [a] person as required and the safety of any other person and the community." See *supra* note 50 for the pertinent text of § 3142(f).

280. These situations arise when the government introduces evidence showing that the defendant is a danger to the community or a risk of flight and should be detained. § 3142(f). *See also* § 3142(g). The defendant may have access to rebutting evidence to show that the factors of § 3142(g) weigh in his favor. See *supra* note 56 for the pertinent text of § 3142(g).

making the detention decision in the district of prosecution.[281]

This approach, as set out in *Melendez-Carrion*, is consistent with the Federal Rules of Criminal Procedure and the Bail Reform Act of 1984. The Federal Rules require the defendant to be brought in an "initial appearance" before the nearest federal magistrate judge.[282] Under the Bail Reform Act, a detention hearing is to be held upon the defendant's "first appearance" before the judicial officer.[283] Although these two requirements appear to be equivalent, the United States Court of Appeals for the Seventh Circuit, in *Dominguez*, held that they should not be interpreted as such.[284] The court suggested that the term "initial appearance" under the Federal Rules refers to the first appearance of the defendant before a judicial officer, whether in the arresting district or the charging district.[285] However, the term "first appearance" under the Bail Reform Act refers to "the first appearance before *any* judicial officer."[286] Thus, the defendant could have "as many 'first appearances' as judicial officers his bail determination came before."[287]

In the procedure suggested by the court in *Melendez-Carrion*, the defendant is afforded the "initial appearance" required under the Federal Rules of Criminal Procedure in the district of arrest.[288] Then, the detention hearing is properly conducted at the "first appearance" before the judicial officer in the charging district.[289] Under the *Dominguez* gloss, this type of procedure is consistent with both the Federal Rules and the Bail Reform Act of 1984.

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281. *Melendez-Carrion*, 790 F.2d at 990. *See also* United States v. Dominguez, 783 F.2d 702, 705 (7th Cir. 1986) ("In some cases, . . . circumstances may make it appropriate to request detention in the arresting district.").

282. FED. R. CRIM. P. 5. See *supra* notes 27-31 and accompanying text discussing Federal Rule 5.

283. 18 U.S.C. § 3142(f).

284. *Dominguez*, 783 F.2d at 704 ("Although it is semantically tempting to equate the expressions 'initial appearance' and 'first appearance', [sic] we do not believe that such an interpretation is consistent with the policies behind pretrial detention or with the requirements for its employment under the Bail Reform Act.").

285. *Id.*

286. *Id.* at 705 (emphasis added). *Accord* United States v. Maull, 773 F.2d 1479, 1482-83 & n.2 (8th Cir. 1985) (en banc).

287. *Dominguez*, 783 F.2d at 705.

288. United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986). The "initial appearance" constitutes the first appearance before the magistrate judge for the purpose of informing the defendant of certain rights and requirements—under Rule 5(c)—and for allowing the defendant "to present locally available evidence." *Id.* See *supra* notes 27-31 and accompanying text discussing Federal Rule 5.

289. *Melendez-Carrion*, 790 F.2d at 990.

Although *Melendez-Carrion* involved removal of the defendant from the district of arrest before the detention hearing was conducted, distinguishing it from the situation in *Evans*,[290] the underlying principles of the Second Circuit's reasoning can nevertheless be applied in the *Evans* context. The purpose of the suggested initial proceeding in the district of arrest under the guidance of *Melendez-Carrion* is to assure the defendant access to vital evidence only available in the district of arrest, when that coincides with the defendant's district of residence.[291] In the situation where a detention hearing has occurred in the district of arrest prior to removal, as in *Evans*, the defendant's concern—as well as the dissent's concern in *Evans*—should be alleviated.[292] When removal is effectuated, or when review of the detention order is sought in the charging district, a record of any pertinent evidence adduced before the magistrate judge in the arresting district can be provided to the charging district.

The procedure outlined in *Melendez-Carrion* conforms with the de novo standard of review as well. Although true de novo review would require the district court to reassess the case completely anew,[293] most cases that have addressed the issue of the proper standard of review allow the district courts a certain amount of discretion in the de novo assessment.[294] For example, in *United States v. Fortna*,[295] the United States Court of Appeals for the Fifth Circuit held that when the district court acts on a motion to amend or revoke a magistrate judge's detention order, the court acts de novo.[296] However, the Fifth Circuit added that the district court could base its determination on evidence presented to the magistrate judge supported by additional evidence adduced before the district court.[297] Thus, under this standard, the district court has at its disposal the record of the magistrate's findings—subject to in-

290. *Id.* at 989; United States v. Evans, 62 F.3d 1233, 1234-35 (9th Cir. 1995). In *Evans*, the issue involved determining the proper tribunal for *review* of a magistrate judge's detention order. *Id.* In *Melendez-Carrion*, the issue involved determining the proper tribunal for the *original* determination of detention or release rather than review. *Melendez-Carrion*, 790 F.2d at 984.

291. *Melendez-Carrion*, 790 F.2d at 990.

292. *Evans*, 62 F.3d at 1234-35.

293. *See* Baumler, *supra* note 63, at 503 n.213.

294. See *supra* note 66 for the cases that have addressed the de novo standard of review.

295. 769 F.2d 243 (5th Cir. 1985).

296. *Id.* at 249. In addition, the court made it clear that the de novo standard applies as well when the government challenges a release order. *Id.*

297. *Id.* at 249-50.

dependent consideration—and any additional evidence presented before it.[298]

De novo review of this type in a multi-district proceeding would doubtlessly solve the concerns that are addressed by the court in *Melendez-Carrion*, as well as the concerns addressed by the dissent in *Evans*. The district court in the charging district is the best forum for review because the de novo review standard allows for a more complete overall presentation of the pertinent evidence.

E. *Relation of Magistrate Judges to Article III Judges*

In *Evans*, the dissent concluded that the special relationship between the magistrate judge and the district court judge requires the detention hearing and review to be conducted in one district as a single package.[299] In support of this position, the dissent cited to the Supreme Court's decision in *United States v. Raddatz*.[300]

In *Raddatz*, the Supreme Court stated that "Congress made clear [in the 1976 amendments to the Federal Magistrates Act] that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court."[301] Then, after authorization, "the entire process takes place under the district court's total control and jurisdiction."[302] The dissent in *Evans* asserted that *Raddatz* stands for the proposition that the proper procedure for review is for the appeal to go from the magistrate judge to the district court judge in the district where the magistrate sits.[303]

The United States Court of Appeals for the Ninth Circuit cited the *Raddatz* language in *United States v. Gebro* as pertinent to the close relationship between the district court and the magistrate judge ordering release on bail.[304] Although the relevant facts of *Gebro* are distinguishable from those of *Evans*, and the issues

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298. *Id.* at 250.

299. United States v. Evans, 62 F.3d 1233, 1240 (9th Cir. 1995) (Noonan, J., dissenting).

300. *Id.* (citing United States v. Raddatz, 447 U.S. 667 (1980)). See *supra* notes 150-51 and accompanying text for the facts and holding of *Raddatz*.

301. *Raddatz*, 447 U.S. at 681.

302. *Id.* The dissent in *Evans* argued that "[t]he phrase 'total control' [used in *Raddatz*] suggests, even if it does not absolutely require, the proximity of the magistrate judge to the district court which is exercising control." *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting).

303. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting).

304. United States v. Gebro, 948 F.2d 1118, 1120 (9th Cir. 1991). See *supra* notes 154-56 and accompanying text for the facts and holding of *Gebro*.

raised in the cases are different,[305] the *Evans* dissent considered *Gebro* the "closest precedent" for the Ninth Circuit.[306]

The *Gebro* court also relied on an Eighth Circuit court of appeals case, *United States v. Maull*.[307] In *Maull*, the Eighth Circuit, in a situation similar to that in *Gebro*, held that the district court did not exceed its authority by conducting sua sponte a detention hearing and ordering the defendant detained.[308] The court held that "[w]e . . . cannot conclude that the government's failure to request detention before the magistrate, or for that matter at all, constrains the district court judge."[309] The court in *Maull* determined that the role of the magistrate judge is a limited one, and that there is a certain territorial hierarchy to proceedings involving a magistrate judge and the Article III court.[310]

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305. The facts of *Gebro* and *Evans* differ in that the defendant in *Gebro* was arrested in the district of prosecution, thus involving a single district proceeding. *Gebro*, 948 F.2d at 1119-20. The facts of *Gebro* gave rise to an issue of whether the district court judge could review sua sponte the magistrate judge's order. *Id.* at 1120. Conversely, the defendant in *Evans* was arrested in a non-charging district, giving rise to an issue of the proper procedure to follow in a multi-district proceeding. *Evans*, 62 F.3d at 1234-35.

306. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting).

307. 773 F.2d 1479 (8th Cir. 1985) (en banc). In *Maull*, the defendant was indicted and arrested in the Eastern District of Missouri. *Id.* at 1481. A federal magistrate judge set the defendant's bond at one million dollars. *Id.* Neither the government nor the magistrate judge moved for pretrial detention. United States v. Maull, 768 F.2d 211, 212 (8th Cir. 1985). The defendant sought review of the conditions of the bond in the United States District Court for the Eastern District of Missouri. *Maull*, 773 F.2d at 1481. The district court judge held sua sponte a detention hearing and ordered the defendant detained. *Id.*

The defendant then appealed to the United States Court of Appeals for the Eighth Circuit. *Id.* On appeal, the defendant argued that the district court "exceeded the scope of its authority because the Bail Reform Act of 1984 does not confer jurisdiction on the district court to go beyond review of the conditions of a bail bond to consider whether pretrial detention is appropriate." *Id.* The appellate court held that the district court had no authority to conduct a detention hearing and reversed and remanded the district court's order. *Id.* On remand, the district court ordered the defendant released on a $500,000 appearance bond secured by $250,000 cash or surety. *Maull*, 768 F.2d at 211.

The defendant again appealed to the Eighth Circuit for an amendment of the conditions of release. *Id.* The court of appeals remanded the district court's order with directions. *Id.* at 212. The Eighth Circuit later granted a rehearing en banc and affirmed the district court's original order of detention of the defendant. United States v. Maull, 771 F.2d 506 (8th Cir. 1985) (en banc).

308. *Maull*, 773 F.2d at 1481.

309. *Id.* at 1486.

310. *See id.* The Eighth Circuit stated:

> Congressional intent to limit the scope of magistrate authority is reinforced by the charge of 18 U.S.C. § 3142(f), which gives the judicial officer upon his own motion the authority to call a detention hearing where there is a serious risk

Under the auspices of *Raddatz* and its progeny, the dissent in *Evans* argued that the magistrate judge and Article III courts have a hierarchical relationship.[311] The dissent asserted that this relationship lends support to the conclusion that the proper court to review the magistrate judge's order of detention or release is the district court in the arresting district.[312]

Raddatz, *Gebro*, and *Maull* support the proposition that the magistrate judge's role is limited by the district court which appoints the magistrate—but only in the *single*-district case.[313] There is nothing to suggest that this "territorial hierarchy" approach is supported by any of these cases in the *multi*-district context. The *Evans* dissent indicated this by acknowledging that *Gebro* was the "closest precedent" to the principal case.[314] It is manifest that in a single-district situation the district court in the arresting district will have "control" over the magistrate judge.[315] But in the multi-dis-

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that the defendant will flee. The power to decide must finally reside in the Article III court.

Id.

311. United States v. Evans, 62 F.3d 1233, 1240 (9th Cir. 1995) (Noonan, J., dissenting).

312. *Id.* In *Evans*, the dissent argued that the logical steps in "territorial appellate review" start at the level of the federal magistrate judge in the district of arrest. *Id.* Review then proceeds to the district court judge in the district in which the magistrate sits, and then to the appellate court of the circuit in which the magistrate judge and district court are assembled. *Id.* The dissent asserted that this is the "normal system of appellate review," and that this view is consistent with the holdings in *Raddatz* and *Gebro*. *Id.* *See* United States v. Raddatz, 447 U.S. 667, 681 (1980); United States v. Gebro, 948 F.2d 1118, 1120 (9th Cir. 1991).

313. *Raddatz*, 447 U.S. at 681; *Gebro*, 948 F.2d at 1120; *Maull*, 773 F.2d at 1486. Under the 1976 amendments to the Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1994), "Congress expanded the role of magistrates under the discretion and direction of district court judges." Raymond P. Bolanos, Note, *Magistrates and Felony Voir Dire: A Threat to Fundamental Fairness?*, 40 HASTINGS L.J. 827, 840 (1989). *See* H.R. REP. No. 1609, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6162. *See also* J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1032 (1985) ("Congress expressly granted magistrates the power, upon designation by the district court . . . , to conduct 'any or all proceedings in a jury or nonjury civil matter' as well as criminal misdemeanor trials."); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1510 (1995) ("A magistrate judge is a judicial officer of the district court. The district judges appoint magistrate judges within the district . . . .").

314. *Evans*, 62 F.3d at 1240 (Noonan, J., dissenting). The dissent acknowledged that *Gebro* was the "closest precedent" because it is substantially factually different and addresses separate issues than does *Evans*. See *supra* note 305 and accompanying text discussing the distinctions between the two cases.

315. *Raddatz*, 447 U.S. at 681 ("entire process takes place under district court's total control and jurisdiction").

trict situation, this element of control is not as evident. In *United States v. Zuccaro*,[316] the United States Court of Appeals for the Second Circuit, in a single district bail amendment situation, held that the district court had the authority to amend a bail order issued by the magistrate judge.[317] The court partially based its decision on the desire to avoid the anomalous results that would arise in a multi-district situation under Rule 40 of the Federal Rules of Criminal Procedure.[318] The court stated that when the defendant is removed to the charging district pursuant to Rule 40, "it would not make sense to insist that the government's only recourse in seeking additional conditions of bail is to apply to the judicial officer who originally set the conditions."[319] The court further stated that "the category of judicial officers authorized to set the initial conditions of bail covers a broad range of officials . . . . Congress would not likely have accorded these officers authority to set conditions of release immune from revision by a district judge."[320] This approach was adopted by the United States Court of Appeals for the Eleventh[321] and Eighth Circuits,[322] both involving actual multi-district situations. This line of cases illustrates the limited role of the arresting district magistrate judge in the multi-district setting. Additionally, the cases show that the district court in the charging district has control over the magistrate judge, similar to the control assumed by the district court in the arresting district.

Under the "territorial hierarchy" notion suggested by the dissent in *Evans*, one would expect that in all cases the district court would take over the proceedings conducted by the magistrate judge in the same district. However, it is quite clear that this is not so in the multi-district context for several reasons. First, in the multi-district context, the court with original jurisdiction over the offense is the district court in the charging district.[323] Under the language of

316. 645 F.2d 104 (2d Cir.) (per curiam), *cert. denied*, 454 U.S. 823 (1981). *Zuccaro* involved a magistrate judge and a district judge in the same district. The defendant was arrested and brought before a federal magistrate judge who released the defendant on bond. *Id.* at 105. The next day the government filed a motion with the district court to increase the bond, and the district court did so. *Id.* The defendant appealed, arguing that under 18 U.S.C. § 3146(e) (repealed 1984) the district court could not amend the bail. *Id.* *See* 18 U.S.C. § 3146(e) (1982) (repealed 1984).

317. *Zuccaro*, 645 F.2d at 105-06.

318. *Id.* at 106.

319. *Id.*

320. *Id.*

321. United States v. James, 674 F.2d 886, 889-90 (11th Cir. 1982).

322. United States v. Spilotro, 786 F.2d 808, 813-14 (8th Cir. 1986).

323. *See* discussion *supra* part III.B. *See also Spilotro*, 786 F.2d at 813 ("the mag-

section 3145 of the Bail Reform Act, that is the proper district for review.[324] Second, under Rule 40(a) of the Federal Rules of Criminal Procedure, the charging district must take over the case if the defendant is required to stand trial.[325] Finally, venue properly lies solely in the district in which the crime was committed.[326] These principles disrupt the "territorial hierarchy" notion and indicate that in a multi-district proceeding the "control" over the magistrate judge remains generally with the district court in the charging district.

Finally, the de novo review standard accorded to the district courts in review of the magistrate judge supports the conclusion that a departure from "territorial hierarchy" would not be problematic. In fact, the development in the case law of the many different intricacies within the de novo standard suggests that this divergence is preferred.[327] Because the district courts need not be deferential to the magistrate judge, there is no justification for adherence to the rigid notion of "territorial hierarchy."

IV. RESOLUTION OF THE INTERPRETIVE CONFLICT

To resolve the conflict arising in *Evans* over the proper interpretation of section 3145 of the Bail Reform Act, there must be an accommodation between the views. Legislative intent in the drafting of section 3145 of the Bail Reform Act of 1984 is lacking—it seems that Congress never even gave consideration to the problems that may arise in the multi-district context.[328] Congress left it to the judiciary to determine which is "the court having original jurisdiction over the offense" as it is worded in section 3145.[329] The ap-

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istrate . . . of the court which has original jurisdiction over the offense charged [the district court in the charging district] has the authority to amend conditions of release previously set in another district by another magistrate"); *James*, 674 F.2d at 890 (district judge in charging district "had authority as the court with original jurisdiction over the case to amend the conditions of appellants' release"); *Zuccaro*, 645 F.2d at 105 (referring to district court in the charging district as the court with original jurisdiction over the offense).

324. 18 U.S.C. § 3145(a), (b) (1994) (government or defendant may file with the court having original jurisdiction over the offense a motion for revocation of the order or amendment of the conditions).

325. FED. R. CRIM. P. 40(a).

326. *See* discussion *supra* part I.C.

327. See *supra* notes 63-66 and accompanying text discussing the de novo standard of review and its variations.

328. See *supra* notes 164-66 and accompanying text discussing the lack of consideration by Congress of the problems arising in the multi-district situation.

329. *See generally* 18 U.S.C. § 3145 (1994).

proach best able to integrate the applicable provisions of the Bail Reform Act of 1984, the Federal Rules of Criminal Procedure, and the United States Constitution into a consistent model for multi-district proceedings is the approach suggested by the majority and concurrence in *Evans*.[330] Under that approach, the proper tribunal to review a magistrate judge's orders in the multi-district context is the district court in the charging district.

The best way to analyze the conclusions of the majority and concurring opinions in *Evans* is to view them in contemplation of the major concerns involved in the underlying issue, as best reflected in *Melendez-Carrion*.[331] The court in *Melendez-Carrion* concluded that the district of prosecution was normally the best district in which to assess the defendant for the purpose of determining detention or release.[332] But the court argued that it is important to give the defendant the opportunity to "present locally available evidence pertinent to the issue of pretrial release."[333]

Following this rationale, the *Evans*-type situation is analogous to the *Melendez-Carrion*-type situation.[334] The Second Circuit determined that a defendant in a *Melendez-Carrion*-type situation can be protected by being afforded an initial proceeding in which to obtain evidence that may only be reasonably obtainable in the dis-

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330. There are many concerns involved in coming to a conclusion regarding the proper interpretation of § 3145. They include: (1) compliance with the prompt appearance requirements of Federal Rules of Criminal Procedure 40 and 5, *see* FED. R. CRIM. P. 40 and 5; (2) concern for providing the defendant prompt review, *see* FED. R. CRIM. P. 40(a); United States v. Evans, 62 F.3d 1233, 1238 (9th Cir. 1995) (Wallace, C.J., concurring); (3) concern for providing the defendant access to the decisive information and evidence, *see* United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986); (4) determining the proper court to handle a personal, knowledgeable assessment of the defendant, *see* 18 U.S.C. § 3142(g) (1994); *Evans*, 62 F.3d at 1238 (Wallace, C.J., concurring); *Melendez-Carrion*, 790 F.2d at 990; United States v. Dominguez, 783 F.2d 702, 704-05 (7th Cir. 1986); United States v. Velasco, 879 F. Supp. 377, 378 (S.D.N.Y. 1995); United States v. Johnson, 858 F. Supp. 119, 122 (N.D. Ind. 1994); United States v. Jones, 804 F. Supp. 1081, 1090 (S.D. Ind. 1992); United States v. Acheson, 672 F. Supp. 577, 579 (D.N.H. 1987); (5) compliance with constitutional rights, *see* U.S. CONST. art III, § 2, cl. 3; U.S. CONST. amend. VI; and (6) consistency among statutory sections, Federal Rules, and the Constitution.

331. *Melendez-Carrion*, 790 F.2d at 990. See *supra* notes 276-92 and accompanying text discussing *Melendez-Carrion*.

332. *Melendez-Carrion*, 790 F.2d at 990.

333. *Id.*

334. Recall that *Evans* involved a determination of the proper court to review the order of the magistrate. *See Evans*, 62 F.3d at 1234. In *Melendez-Carrion*, the situation involved a question of whether removal proceedings should precede the detention hearing. *See Melendez-Carrion*, 790 F.2d at 990. The cases are analogous, however, in that both involve the underlying concern of determining which court is best able to assess the defendant under § 3142 of the Bail Reform Act.

trict of arrest.[335] Although *Melendez-Carrion* is distinguishable from *Evans* in that it would afford protection in a removal proceeding rather than a review proceeding, the underlying purpose—to give the defendant the opportunity to obtain critical evidence or information in the district of residence—applies equally in the *Evans* context.

Thus, the concern in interpreting section 3145 to afford the defendant protection from inaccessibility to local evidence in the *Evans*-type situation is allayed.[336] The defendant in *Evans* had already been given the opportunity to present the local evidence because the detention hearing actually took place in the district of arrest.[337] That is analogous to affording the defendant in a *Melendez-Carrion*-type situation an opportunity to present the local evidence in a proceeding prior to removal.

Moreover, this approach promotes consistency between the Bail Reform Act of 1984 and the underlying purposes of the constitutional guarantee of trial in the district wherein the crime is alleged to have been committed.[338] The hallmark of the constitutional venue provisions is the facilitation of factfinding.[339] Authorizing de novo review in the district court in the charging district advances this objective.

CONCLUSION

The arguments supporting the "district of prosecution" perspective have a strong foundation in the case law and are bolstered by viewing them in light of various sections of the Bail Reform Act of 1984. Moreover, this view reads consistently with Rule 40 of the Federal Rules of Criminal Procedure and the United States Constitution. In view of this persuasive support, it is most reasonable to interpret section 3145 of the Bail Reform Act of 1984 as requiring review of the magistrate judge's order of detention or release in the district court in which prosecution is pending.

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335. *Melendez-Carrion*, 790 F.2d at 990. This initial proceeding to which the *Melendez-Carrion* court refers is not a detention hearing. It is a proceeding designed to give the defendant an opportunity to present the local evidence to the magistrate judge in the local district. *See id.* The purpose of the local proceeding is "so that a transcript of such evidence can be prepared and furnished to the [magistrate judge] making the detention decision in the district of prosecution." *Id.*

336. *See Evans*, 62 F.3d at 1239 (Noonan, J., dissenting).

337. *Id.* at 1234-35.

338. *See* discussion *supra* part I.C.

339. Note, *supra* note 72, at 107-08. *See supra* note 73.

A plain reading of section 3145 in light of the influence of Article III, Section 2, Clause 3 and the Sixth Amendment to the United States Constitution supports this interpretation. In the phrase "*the* court having original jurisdiction over the offense," the word "the" is important in limiting the court with "original jurisdiction" to a particular court.[340] And an analysis of Article III, Section 2, Clause 3 and the Sixth Amendment to the Constitution reveals that a defendant is afforded a constitutional right to be tried in the district where the crimes are alleged to have been committed.[341]

Rule 40 of the Federal Rules of Criminal Procedure also factors into the inquiry. Absent a waiver, the defendant will be required, under Rule 40(a), to stand trial in the prosecuting district.[342] Moreover, under Rule 40(c), papers generated in the pretrial detention proceedings and any bail collected in the district of arrest are required to be transferred to the charging district upon a determination of detention or release, properly contemplating removal to that district.[343]

Finally, the factors that the magistrate judge must consider in making the determination of detention or release are best reassessed on review by the district court in the district of prosecution.[344] The charging district will normally have the requisite familiarity with the nature and circumstances of the offense charged.[345] Any concerns regarding inaccessibility to local evidence are alleviated by the flexibility of the de novo review standard.

Because the functions and objectives of the Bail Reform Act overlap with other important authorities, primarily the United States Constitution and the Federal Rules of Criminal Procedure, development of consistency among these authorities is crucial. The reasons for the development of consistency are threefold: (1) to protect the rights of the accused; (2) to preserve the safety of the community; and (3) to promote the expediency of the criminal process. By concluding that the authority to review a federal magistrate judge's order, pursuant to section 3145 of the Bail Reform

340. *See* 18 U.S.C. § 3145 (1994) (emphasis added).

341. *See* U.S. CONST. art. III, § 2, cl. 3 ("Trial shall be held in the State where the . . . Crimes shall have been committed"); U.S. CONST. amend VI ("right to . . . trial[ ] by an impartial jury of the State and district wherein the crime shall have been committed").

342. FED. R. CRIM. P. 40(a).

343. FED. R. CRIM. P. 40(c).

344. *See* 18 U.S.C. § 3142(g) (1994).

345. § 3142(g)(1).

Act, lies solely with the charging district, the *Evans* court formulated a logical and consistent model of criminal pretrial procedure—indeed, an apropos solution to the question of the proper interpretation of section 3145. As the framework of this Note demonstrates, adherence to the notion of criminal pretrial consistency among the relevant authorities in fact ultimately dictates such a conclusion.

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