- Today's Topics
    - Appointment
    - Detention
    - Discovery

- Today's Goals
    - Specifying the Standard
        - A Word on Local Practice
    - Applying the Standard

- Appointment
    - Specifying the Standard
        - 18 U.S.C. § 3006A(a)—Criminal Justice Act
            - "Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan *shall include* ***counsel*** and ***investigative***, ***expert***, and ***other services necessary for adequate representation***."
        - 18 U.S.C. § 3006A(c)—duration and substitution of appointments
            - "A person for whom counsel is appointed *shall be represented* ***at every stage of the proceedings*** from his *initial appearance* before the United States magistrate judge or the court through *appeal*, including ancillary matters appropriate to the proceedings. . . . The United States magistrate judge or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings."
        - 18 U.S.C. § 3006A(e)—services other than counsel
            - "Counsel for a person who is financially unable to obtain ***investigative***, ***expert***, or ***other services necessary for adequate representation*** may request them in an *ex parte application*. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are ***necessary*** and that the person is ***financially unable to obtain them***, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services."

- Appointment
    - Applying the Standard
        - GUIDE TO JUDICIARY POLICY, Vol. 7, Pt. A, § 310.10.10
            - "In this connection, a person with retained counsel is financially unable to obtain the necessary services even if the person's resources are in excess of the amount needed to provide the person and the person's dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to the person's retained counsel, but are insufficient to pay for the necessary services."
        - *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993)
            - "To justify the authorization of investigative services under § 3006A(e)(1), a defendant must demonstrate with *specificity,* the reasons why such services are required. . . . The motion filed by Ferrell's counsel did not show with any specificity that investigative services at the government's expense were merited. No indication was made that *any* prospective witnesses or other evidence existed in Harris County likely to be relevant to Ferrell's defense. Moreover, no showing was made that defense counsel had ferreted out information through his own efforts which was likely to lead to the discovery of relevant evidence. Without such specificity, the district court could not adequately appraise Ferrell's need for investigative services."
        - *United States v. Hardin*, 437 F.3d 463 (5th Cir. 2006)
            - "It is undisputed that Hardin was indigent and that he moved properly under § 3006A(e)(1) for expert appointment. Thus, the district court should have granted the appointment after appropriate inquiry in an ex parte proceeding if Hardin demonstrated the expert was necessary for an adequate representation. District courts must 'grant the defendant the assistance of an independent expert under § 3006A when necessary to respond to the government's case against him, where the government's case rests heavily on a theory most competently addressed by expert testimony."

- Detention
    - Specifying the Standard
        - 18 U.S.C. § 3142(c)—release on conditions
            - "*If the judicial officer determines that the release described in subsection (b) of this section will not* ***reasonably assure the appearance of the person as required*** *or* ***will endanger the safety of any other person or the community***, such judicial officer shall order the pretrial release of the person . . . *subject to the least restrictive further condition, or combination of conditions*, that such judicial officer determines *will* ***reasonably assure the appearance of the person as required*** *and* ***the safety of any other person and the community***."
        - 18 U.S.C. 3142(e)(3)—rebuttable presumption
            - *"Subject to* ***rebuttal*** *by the person*, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed . . . ."
        - 18 U.S.C. § 3142(f)—detention hearing
            - "The hearing shall be held immediately upon the person's first appearance before the judicial officer *unless that person, or the attorney for the Government, seeks a continuance*. . . . The person shall be afforded an ***opportunity to testify***, ***to present witnesses***, ***to cross-examine witnesses who appear at the hearing***, and ***to present information by proffer or otherwise***. The *rules concerning admissibility of evidence in criminal trials do not apply* to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community *shall be supported by* ***clear and convincing evidence***."

- Detention
    - Applying the Standard
        - *United States v. Jackquet*, 987 F.2d 771 (5th Cir. 1993)
            - "The presumption only shifts the burden of producing rebutting evidence to the defendant; the burden of persuasion remains with the Government. . . . The mere production of evidence, however, does not completely rebut the presumption and, in making its ultimate determination, the court may still consider Congress's conclusion that drug offenders present a special risk of flight and dangerousness to society."
        - *United States v. Martinez-Hernandez*, Case No. 3:19-CR-346-K (N.D. Tex. Apr. 14, 2020), ECF No.77 (quoting *United States v. Clark*, ___ F. Supp.3d ___, 2020 WL 1446895 (D. Kan. Mar. 25, 2020))
            - "In *Clark*, the court enumerated four factors to be considered as a whole, but not necessarily equally, while making this determination: '(1) the original grounds for the defendant's pretrial detention; (2) the specificity of the defendant's stated COVID-19 concerns; (3) the extent to which the proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendant; and (4) the likelihood that the defendant's proposed release would increase COVID-19 risks to others.'"
        - *United States v. Fellela*, 2020 WL 1457877 (D. Conn. Mar. 20, 2020)
            - "He has shown he would not flee. Flight would be enormously more risky and complicated in light of the travel and commercial restrictions brought on by the COVID-19 virus. He has also shown that he is not a genuine risk to commit more of the kinds of crimes he has engaged in before. So far as I can tell from the presentence report, his crimes have depended on him being at large outside his house and in the community rather than subject to electronic lockdown at home. The current COVID-19 environment of restricted travel and commercial activities would make it that much more difficult for any attempted fraud activities to succeed."

- Discovery
    - Specifying the Standard
        - FED. R. CRIM. P. 16 advisory committee's note to 1975 amendment
            - "The rule is intended to prescribe the ***minimum amount*** of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases."
        - FED. R. CRIM. P. 16(a)(1)(A)
            - "Upon a defendant's request, the government must disclose to the defendant the ***substance*** of any ***relevant*** *oral statement made by the* ***defendant***, before or after arrest, ***in response to interrogation*** *by a person* ***the defendant knew was a government agent*** *if the government intends to use the statement at trial*."
        - FED. R. CRIM. P. 16(d)(2)—failure to comply
            - "If a party fails to comply with this rule, the court may:
                - (A) *order that party to* ***permit*** *the discovery or inspection*; specify its time, place, and manner; and prescribe other just terms and conditions;
                - (B) *grant a* ***continuance***;
                - (C) ***prohibit*** *that party from introducing the undisclosed evidence*; or
                - (D) enter any other order that is just under the circumstances."

- Discovery
    - Applying the Standard
        - *United States v. Sherwood*, 199 F. App'x 373 (5th Cir. 2006)
            - "First, he argues that the district court abused its discretion when it denied his pretrial motion for copies of the recordings. The district court denied this motion because it failed to comply with its 'Standing Discovery and Scheduling Order,' which required the parties to make discovery requests upon each other before filing motions. John had not demonstrated that he had served such a request on the Government. The district court's order did not prevent John from making a request on the Government and filing an appropriate motion if that request were denied. . . . Because John's motion failed to comply with the district court's discovery order and the Rules of Criminal Procedure, there was no abuse of discretion."
        - *United States v. Clark*, 385 F.3d 609 (5th Cir. 2004)
            - "The government argues that no Rule 16 violation occurred because Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure requires the government to disclose only the 'substance' of the defendant's oral statements that the government intends to use at trial and that it disclosed the substance by producing Agent Poff's interview summary. The government, however, ignores Rule 16(a)(1)(B)(ii), which additionally requires the disclosure of '*the portion of any written record* containing the substance' of such an oral statement. This rule imposes a more specific disclosure obligation than Rule 16(a)(1)(A), and Agent Poff's notes, by definition, constitute a portion of a written record containing the substance of Defendant's interview. Accordingly, the government violated Rule 16 by failing to turn over Agent Poff's rough notes upon Defendant's request."
        - *United States v. Garrett*, 238 F.3d 293 (5th Cir. 2000)
            - "[W]e have consistently held that a district court, when considering the imposition of sanctions for discovery violations, must carefully weigh several factors, and if it decides such a sanction is in order, it 'should impose the least severe sanction that will accomplish the desired result—prompt and full compliance with the court's discovery orders.' . . . [A] district court exercising its discretion and considering the imposition of sanctions for discovery violations should consider the following factors: 1) the reasons why disclosure was not made; 2) the amount of prejudice to the opposing party; 3) the feasibility of curing such prejudice with a continuance of the trial; and 4) any other relevant circumstances."