AN EXAMINATION OF THE "EXCEPTIONAL REASONS" JURISPRUDENCE OF THE MANDATORY DETENTION ACT: TITLE 18 U.S.C. §§ 3143, 3145(c)

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INTRODUCTION

Recently, the issue of the availability of bail for defendants convicted of serious crimes has attracted international attention. The eyes of the world focused on the case of two Los Angeles police officers, Sergeant Stacey C. Koon and Officer Laurence M. Powell, who were convicted of violating the civil rights of Rodney King.[1] The earlier acquittal of Koon, Powell, and two fellow officers on all criminal charges in a 1992 California State proceeding led to several days of deadly rioting in Los Angeles.[2] In the federal action, Koon and Powell were convicted of criminal civil rights violations for assaulting King, and they moved for bail pending appeal of their sentences.[3]

Federal statutory law provides a mechanism by which a defendant may obtain release from custody pending sentencing or appeal.[4] The statute, however, mandates detention pending the sentencing or appeal of defendants convicted of certain serious crimes.[5] Therefore, at first blush, it would appear that this statute mandates the detention of all defendants convicted of these serious crimes. Courts, however, have interpreted a related statutory provision to allow the release of a defendant convicted of a serious crime if certain conditions are met and there are

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1. *See* Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1; *see also* Henry Weinstein, *Koon, Powell Win 11th-Hour Prison Reprieve*, L.A. TIMES, Sept. 28, 1993, at A1.

2. *See, e.g.*, Jane Gross, *Smell of Fear in Los Angeles*, N.Y. TIMES, May 1, 1992, at A1 (describing the post-acquittal violence).

3. United States v. Koon, 6 F.3d 561 (9th Cir. 1993) (Rymer, J., concurring).

4. 18 U.S.C. § 3143 (Supp. V 1994).

5. *Id.* § 3143(a)(2), (b)(2).

"exceptional reasons" why such person's detention would not be appropriate.[6]

Following their sentence of thirty months imprisonment, both defendants moved the district court for bail pending appeal of their convictions.[7] Because of the nature of their convictions, the mandatory detention provisions of 18 U.S.C. § 3143 required both men to be held pending appeal unless they could demonstrate that exceptional reasons justified their release.[8] On August 4, 1993, U.S. District Judge John G. Davies found that no exceptional reasons existed justifying the release of Koon and Powell.[9] Both defendants petitioned the Ninth Circuit for review of the district court's denial of bail. The Ninth Circuit affirmed the district court's decision and both officers petitioned for a rehearing en banc before the Ninth Circuit on the exceptional reasons issue.[10]

The Ninth Circuit denied Koon and Powell's request for a rehearing en banc, but one concurring and two dissenting opinions were filed with the denial.[11] These opinions directly addressed the exceptional reasons proffered by the officers. Judge Davies was influenced by Circuit Judge Stephen Reinhardt's "eloquent and persuasive" dissenting opinion.[12] Subsequently, Judge Davies, in a "highly unusual" action, reversed his earlier decision denying bail pending appeal.[13] He granted both Koon and Powell reprieve from prison until October 12, 1993, so they could be released while filing appeals on the exceptional reasons issue with the United States Supreme Court.

Koon and Powell both filed appeals with the United States Supreme Court. The Court rejected both motions "in a terse, one sentence order" without asking the "government lawyers to submit a written brief on the bail issue and without hearing [oral] arguments."[14] The Court had never previously addressed the exceptional reasons exception to mandatory detention.

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6. *See infra* notes 38-48 and accompanying text (discussing 18 U.S.C. § 3145(c)).

7. *Koon*, 6 F.3d at 565 (Reinhardt, J., dissenting).

8. 18 U.S.C. § 3145(c).

9. *See* United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993).

10. *Koon*, 6 F.3d at 562.

11. *Id.*

12. Weinstein, *supra* note 1, at A1.

13. *Id.* at A18.

14. Jim Newton, *Supreme Court Rejects Powell Bail Motion*, L.A. TIMES, Oct. 5, 1993, at A1.

This Article considers the exceptional reasons provision of 18 U.S.C. § 3145(c) as applied to the mandatory detention requirements contained in 18 U.S.C. § 3143 of the Bail Reform Act of 1984. Part I describes the history and application of the mandatory detention provision. Part II examines the origins and judicial application of the exceptional reasons exception. Part III explores whether the exceptional reasons exception should be limited to the government's exclusive use. In sum, this Article will provide the reader with a fundamental understanding of a new and unsettled issue.

I. THE MANDATORY DETENTION PROVISIONS

A. The History of the Mandatory Detention Provisions

The Federal Rules of Criminal Procedure[15] condition eligibility for release pending sentence or appeal on meeting the criteria set forth in the Bail Reform Act of 1984 (the "1984 Act").[16] The 1984 Act, as originally drafted, required that under certain circumstances detention rather than bail was appropriate for a defendant awaiting sentencing or an appeal.[17] "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest."[18]

By passing the 1984 Act, "Congress hoped to 'give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others

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15. *See* FED. R. CRIM. P. 46(c).

16. Pub. L. No. 98-473, tit. II, ch. I, § 203(a), 98 Stat. 1976 (codified at 18 U.S.C. §§ 3141-3156 (1984)). The 1984 Act "dramatically changed the bail system." 135 CONG. REC. S7,511 (daily ed. June 23, 1989) (statement of Sen. Simon). It also represented "the National Legislature's considered response to numerous perceived deficiencies in the federal bail process." United States v. Salerno, 481 U.S. 739, 742 (1987). *See also* United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985) ("As early as 1970, Congress enacted a much more stringent rule for bail pending appeal under its authority as the legislative body for the District of Columbia, D.C. CODE ANN. § 23-1325(c), the precursor of the Bail Reform Act of 1984."). Congress responded to "the alarming problem of crimes committed" by defendants released on bail by formulating the 1984 Act "as the solution to [the] bail crisis in the federal courts." *Salerno*, 481 U.S. at 742 (quoting S. REP. NO. 225, at 3 (1983)).

17. *See* 18 U.S.C. § 3142(f) (1984). The certain circumstances include conviction for a crime of violence, an offense for which the maximum sentence was life imprisonment or death, a serious drug offense, or a certain repeat offense crime. *Id.* § 3142(f)(1)(A)-(D).

18. *Salerno*, 481 U.S. at 750.

if released.'"[19] The 1984 Act's original provisions left the finding of "danger to the community if released" to the discretion of the district court judge presiding over the defendant's case.[20] This improved the previous bail standard, which permitted release merely upon showing that the defendant was not likely to flee pending sentencing or during appeal. Nonetheless, after six years of observing the 1984 Act in effect, many members of Congress regarded the discretion given to judges in making bail decisions as a "loophole"[21] that had to be closed or tightened "considerably, allowing release only under very narrow circumstances."[22]

Due to the surge of violent and drug related crimes during the 1980s, by decade's end numerous members of Congress concluded that the 1984 Act did not go far enough in detaining dangerous criminals who awaited sentencing or appeal. Thus, in 1990, Senator Paul Simon, responding to the concerns of his fellow members of Congress, introduced the Mandatory Detention for Offenders Convicted of Serious Crimes Act (the "Simon Act")[23] as a floor amendment to the Crime Control Act of 1990 (the "1990 Act"). The Simon Act revised section 3143 of the 1984 Act to provide mandatory detention for "convicted drug traffickers or violent criminals who are awaiting sentencing or appeal."[24] The basic structure and general application of the 1984 Act otherwise remained intact.

As revised, the statute removed all judicial discretion to grant bail for defendants convicted of certain crimes. In introducing his act, Senator Simon stated:

> There is simply no reason that an individual convicted of a violent crime or serious drug trafficking offense should be back on the street. . . .
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> . . . .
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> . . . My bill prevents these defendants from reentering the community where they pose a danger and can commit

19. *Id.* at 742 (quoting S. REP. NO. 225, at 3 (1983)).

20. *See* 18 U.S.C. § 3142(d) (1984) (amended 1990).

21. 135 CONG. REC. S7,511 (daily ed. June 23, 1989) (statement of Sen. Simon).

22. 136 CONG. REC. H638 (daily ed. Mar. 6, 1990) (statement of Rep. Glickman).

23. Pub. L. No. 101-647, tit. IX, 104 Stat. 4826 (1990) (codified at 18 U.S.C. §§ 3141, 3143, 3145).

24. 135 CONG. REC. S15,201 (daily ed. Nov. 7, 1989) (statement of Sen. Simon).

> further offenses and is especially important in protecting the victims of these serious crimes.[25]

He justified mandatory detention on the grounds that, "[u]nlike the pretrial detention setting in which the presumption of innocence creates a need for flexibility in setting bail, there is little need for judicial discretion to release those who have been found guilty."[26]

B. Application of the Mandatory Detention Provisions

The 1990 Act distinguishes between two categories of crimes in order to determine the eligibility of a defendant for release from detention.[27] The first category applies to defendants convicted of crimes *not* specifically listed in section 3142(f)(1)(A), (B), and (C), and permits release when the trial judge finds certain conditions satisfied.[28] The second category mandates detention for defendants convicted of crimes listed in section 3142(f)(1)(A), (B), and (C).[29] Congress determined which categories of offenses required mandatory detention by incorporating by reference the pre-trial release provision of the 1984 Act. This provision identified the types of crimes in which "a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person

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25. 135 CONG. REC. S7,511 (daily ed. June 23, 1989) (statement of Sen. Simon).

26. 135 CONG. REC. S15,202 (daily ed. Nov. 7, 1989) (statement of Sen. Simon). *See also* United States v. Austin, 614 F. Supp. 1208, 1212 n.13 (D.N.M. 1985) ("Bail pending appeal has always been thought of differently than bail pending trial. Until conviction, a defendant is presumed innocent." (citing U.S. CONST., amend. V)).

27. United States v. DiSomma, 951 F.2d 494, 496 (2d Cir. 1991).

28. *See* 18 U.S.C. § 3143(a)(1), (b)(1).

29. Section 3142(f)(1)(A) lists crimes of violence, which section 3156(a)(4) defines as:

> (A) an offense that has [as] an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or
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> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 3156(a)(4). Section 3142(f)(1)(B) lists an offense for which the maximum sentence is life imprisonment or death. Section 3142(f)(1)(C) lists an offense for which a maximum term is imprisonment of ten years or more prescribed in the Controlled Substances Act, 21 U.S.C. § 801, the Controlled Substances Import and Export Act, 21 U.S.C. § 951, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901.

and the community."[30] The 1990 Act employs the words "shall be detained" and apparently leaves no discretion to a judge to make a bail determination.[31] Thus, given this statutory language, it appears that in passing the 1990 Act Congress required mandatory detention for defendants convicted of certain specific crimes.

II. THE "EXCEPTIONAL REASONS" EXCEPTION TO MANDATORY DETENTION

A. Origins of the "Exceptional Reasons" Provision

Prior to the passage of the Simon Act, the Justice Department expressed to Senator Simon certain reservations about the mandatory detention provisions of the 1990 Act. In a letter to Senator Simon, an official in the Legislative and Intergovernmental Affairs Division of the Justice Department suggested that in certain limited circumstances the judicial officer should retain discretion to release defendants convicted of crimes meriting mandatory detention under the then pending 1990 Act.[32] It is highly likely that this letter prompted Senator Simon to include the exceptional reasons provision in his amendment to the 1984 Act, which permitted release of criminals subject to mandatory detention when "it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."[33] The exceptional reasons provision was intended to "provide an avenue for exceptional discretionary relief"[34] and to "mitigate the harshness of [the 1990 Act's] blanket prohibition on release pending appeal."[35]

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30. United States v. Koon, 6 F.3d 561, 566 (9th Cir. 1993) (Reinhardt, J., dissenting) (quoting 18 U.S.C. § 3142(e)).

31. *See* 18 U.S.C. § 3143(a)(1), (b)(1).

32. *See* United States v. DiSomma, 769 F. Supp. 575, 577 (S.D.N.Y. 1991) (citing Letter from Assistant Attorney General Carol T. Crawford to Honorable Paul Simon (July 26, 1989) [hereinafter Letter]).

33. 18 U.S.C. § 3145(c).

34. United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1991) (per curiam).

35. United States v. Koon, 6 F.3d 561, 567 (Reinhardt, J., dissenting). A similar avenue of relief exists in international extradition treaty cases. For an extensive discussion of "special circumstances" that merit release in such cases, see *In re* Extradition of Nacif-Borge, 829 F. Supp. 1210, 1213 (D. Nev. 1993).

The exceptional reasons provision may have been borrowed from a District of Columbia court reform statute previously enacted by Congress. The legislative history of the D.C. statute reads in part that "[o]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or *even permit it in the absence of exceptional circumstances.*"[36] But this legislative history and the Justice Department letter are the only pieces of legislative history addressing exceptional reasons. Courts have found the exceptional reasons standard troublesome to apply because of the provision's sparse legislative history.

B. Judicial Application of the "Exceptional Reasons" Provision

The exceptional reasons provision states:

> [a] person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.[37]

This provision applies whenever a defendant faces mandatory detention pending sentencing or an appeal, and is not an issue unless the defendant in question is subject to mandatory detention under the 1990 Act.

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36. United States v. Austin, 614 F. Supp. 1208, 1218-19 n.68 (D.N.M. 1985) (alteration in original) (brackets in original) (quoting H.R. 907, 91st Cong., 2d Sess. 168-87 (1970)); D.C. CODE ANN. § 23-1325(c) (1981). The district court judge stated in *Austin*:

> The plain language of the provision requiring a substantial question likely to result in reversal would seem to harmonize with the legislative mandate that bail pending appeal only be granted in exceptional circumstances. The exceptional circumstances would include where the defendant is not a flight risk, not dangerous, and it is fairly certain that his conviction will be reversed. In my view, the current interpretation of the federal provision does not find its strength in the legislative history of the D.C. provision.

Austin, 614 F. Supp. at 1219 n.68 (citation omitted); *see also* Ibn-Tamas v. United States, 368 A.2d 520, 521 (D.C. Cir. 1977) ("In other words, once a jury has found a defendant guilty, detention rather than release is the normal rule prescribed by statute for Superior Court judges to follow, unless they can find that the exceptional circumstances defined therein have been shown by 'clear and convincing evidence.'").

37. 18 U.S.C. § 3145(c).

From the outset, a hurdle in the application of the exceptional reasons provision involved the ability of federal district court judges to render bail decisions regarding exceptional reasons. The exceptional reasons provision is contained in a section specifically concerning appeals, whereas the mandatory detention provisions of the 1990 Act are applicable at both the district and appellate levels.[38] The reasons why the drafters structured the exceptional reasons provision in this manner are unknown.

Despite the inclusion of exceptional reasons in an appeals section, statutory law, the legislative history, and case law support district court consideration of exceptional reasons. First, the provision fails to distinguish between motions for release at the district or appellate levels. Section 3143(c) states only that the official responsible for determining whether exceptional reasons exist is the "judicial officer." The 1984 Act defines judicial officer as:

> unless otherwise indicated, any person or court authorized pursuant to section 3041 of [18 U.S.C. § 3041], or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia.[39]

Second, the 1984 Act also states:

> [a] judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under this chapter [18 U.S.C. §§ 3141 et seq.].[40]

Read together, sections 3156(1) and 3141 enable a district court to entertain motions for bail from mandatory detention under the

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38. *Compare* 18 U.S.C. § 3145 ("Review and appeal of a release or detention order") *with* 18 U.S.C. § 3142 ("Release or detention of a defendant pending trial") *and* 18 U.S.C. § 3143 ("Release or detention of a defendant pending sentence or appeal").

39. 18 U.S.C. § 3156(a)(1).

40. 18 U.S.C. § 3141(b) (brackets in original). "The mandatory language in § 3141 makes it clear . . . that a district court must act on an application for release pending appeal when made." United States v. Hart, 779 F.2d 575, 576 (10th Cir. 1985).

exceptional reasons provision. Also, changes made to the provision during its drafting further support the principle that a district court may address bail motions raising exceptional reasons.[41] In addition, the United States district court that hears the criminal trial makes determinations regarding bail when sentencing or an appeal is pending.[42] Only then does the court of appeals review the district court's decision.[43] This arrangement "contemplates that the district court is in a better position to evaluate, in the first instance, the propriety of granting bail."[44]

Third, case law supports a district court's application of the exceptional reasons provision. To date over thirty reported cases have ruled on the exceptional reasons issue. Each uniformly holds that district courts may address the exceptional reasons issue. For example, the Fifth Circuit stated:

> Section 3143(a)(2) and (b)(2) use the term "judicial officer" when referring to the individuals initially ordering such mandatory detention. Furthermore, at least two district courts have applied section 3145(c) in the first instance. We see no reason why Congress would have limited this means of relief to reviewing courts. Thus we conclude that the "exceptional reasons" language of [section] 3145[(c)] may be applied by the judicial officer initially ordering such mandatory detention, despite its inclusion in a section generally covering appeals.[45]

A district court in the Second Circuit also observed that:

> [s]ince [section] 3145(c) requires a showing of exceptional reasons separate from the showing required by

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41. During the drafting of section 3145(c), the section's original text stated that the exceptional reasons issue could be addressed "by a court of appeals or a judge thereof." 136 Cong. Rec. S6,491 (daily ed. May 17, 1990) (Section 1152—Mandatory Detention). The current language of section 3145(c) replaced the previous text with "by the judicial officer" (as defined in section 3156(a)(1) and employed in section 3141(b)).

42. *See* FED. R. APP. P. 9(a), (b).

43. *Id.*

44. United States v. Affleck, 765 F.2d 944, 954 (10th Cir. 1985) (en banc).

45. United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1991) (citing United States v. DiSomma, 951 F.2d 494 (2d Cir. 1991), and United States v. Bailey, 759 F. Supp. 685 (D. Colo.), *aff'd*, 940 F.2d 1539 (10th Cir. 1991)); *accord* United States v. Herrera-Soto, 961 F.2d 645, 646 (7th Cir. 1992).

> [section] 3143(a) and (b) and an appellate court generally cannot review matters of fact, there could be no record for a reviewing court's consideration. Thus, it seems, a district court is itself impelled to determine the appeal, since, as a factual matter, a showing of exceptional reasons is the exclusive province of the lower court.[46]

Appellate courts have also accorded district courts great latitude in deciding what constitutes exceptional reasons. For example, the First Circuit maintained that "[g]iven the absence of any explanation in the 1990 Act or its legislative history as to the scope of this provision, it is apparent that a district court has wide discretion in determining what sort of reasons might be sufficiently 'exceptional' so as to render detention inappropriate."[47]

C. Standards for Determining Whether "Exceptional Reasons" Exist

Since the enactment of the exceptional reasons provision, courts have adopted various standards of exceptional reasons. The genesis of any inquiry concerning these standards is the letter written by the Department of Justice in 1989 to Senator Simon, which stated:

> While confinement will be the proper result in the vast majority of cases of persons convicted for crimes of violence and serious drug offenses, there may be rare instances in which release, under appropriate conditions, would be proper. *For example, suppose a situation in which the convicted defendant does not pose either a danger to the community if released or a risk of flight, and in which the appeal raises a substantial question of law* (e.g. an elderly man convicted under 18 U.S.C. [§] 1111 of the mercy killing of his spouse, who has lived in the community all his life without prior incident, and who is challenging the applicability of the federal murder statute to mercy killings, a question of first impression in

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46. United States v. Bloomer, 791 F. Supp. 100, 102 n.1 (D. Vt. 1992).

47. United States v. McCabe, No. 90-1483, 1991 U.S. App. LEXIS 20448, at *6 (1st Cir. May 8, 1991).

> the circuit). *In such a case, release pending appeal or sentence might be a suitable disposition, and detention an unduly harsh remedy. The same might be true of even a convicted drug dealer who, because of wounds incurred during his capture, was temporarily incapacitated and thus not likely to commit further crimes or to flee, and whose appeal raised a novel and difficult search or seizure question on which the conviction will stand or fall.*[48]

The Department of Justice's letter initially recites the provisions of the 1990 Act as the standard for exceptional reasons, specifically those applicable to defendants on appeal who are subject to mandatory detention.[49] Through the letter's two examples, the Department of Justice grafts standards of novelty and undue harshness onto this statutory foundation. The undue hardship standard is demonstrated by the old man who is detained for the murder of his wife after her mercy killing. The Justice Department suggests that detaining the elderly man would be unduly harsh because the possibility exists that mercy killing is not covered under the murder statute and his circumstances are sympathetic. Although undue hardship constitutes a basis for finding exceptional reasons in this example, the man's challenge to the legality of the statute also provides a foundation on which the undue hardship finding rests. When applying the undue hardship standard alone, the threshold for showing exceptional reasons appears to be quite low: on appeal, one need only challenge the applicability of a statute to one's actions.[50]

Similarly, the threshold for demonstrating exceptional reasons when applying the novel question standard alone also appears to be quite low. To solely put forth a novel question merely reiterates the "likelihood of reversal" and "substantial question of law or fact" tests, contained in the 1990 Act.[51] If exceptional reasons are to have any meaning beyond the 1990 Act's tests, the letter's standards should be read together. The facts of both examples evidence that elements of both standards exist in each example, even though the letter identifies one

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48. Letter, *supra* note 32 (emphasis added) (brackets in original).

49. *Id.*

50. *Id.*

51. *See* 18 U.S.C. § 3143(a)(2), (b)(1) (Supp. V 1994).

standard in the first example and the other standard in the second example.[52] While the letter's novelty and undue harshness standards support an exceptional reasons finding, it fails to explicitly limit the standards governing an exceptional reasons finding. Therefore, this implies that other standards may exist. Courts considering the exceptional reasons provision have read the letter to expand the standards of exceptional reasons.

1. The *DiSomma* Standard

The first case to apply the exceptional reasons provision was *United States v. DiSomma*.[53] In finding exceptional reasons which merited DiSomma's release pending appeal, the court considered the Department of Justice's examples and found elements of both examples in DiSomma's case, namely "a situation in which the convicted defendant does not pose either a danger to the community if released or a risk of flight, and in which the appeal raises a substantial question of law . . . . DiSomma's appeal will raise an issue on which his only conviction will stand or fall."[54]

Though the court referred to the examples contained in the Department of Justice's letter, it also expanded the standards of exceptional circumstances beyond those examples through a plain reading of the statute.[55] Particularly, the court ruled that the legal novelty of a question on appeal is not a prerequisite to a finding of exceptional reasons.[56] The court stated:

> the language of [section] 3145(c) does not suggest that a person convicted of a crime of violence is required to raise a novel issue in a motion for acquittal or on appeal. . . . Section 3145(c) says only that there must be "exceptional

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52. *See* United States v. Koon, 6 F.3d 561, 567 (9th Cir. 1993) (Reinhardt, J., dissenting) ("Both of the cases in the letter involve a person for whom detention would be 'unduly harsh' given the accompanying circumstances and the extent to which the defendant had already suffered.") (citing United States v. DiSomma, 769 F. Supp. 575 (S.D.N.Y.), *aff'd*, 951 F.2d 494 (2d Cir. 1991)).

53. United States v. DiSomma, 769 F. Supp. 575 (S.D.N.Y.), *aff'd*, 951 F.2d 494 (2d Cir. 1991). *DiSomma* is only one of two reported cases to find the existence of "exceptional reasons." *See also* United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1991).

54. *DiSomma*, 769 F. Supp. at 577.

55. *Id.*

56. *Id.* (quoting Letter, *supra* note 32).

> reasons." A motion for acquittal or an appeal that raises a novel issue may be one such reason, but nothing in the language of [section] 3145(c) suggests that it would be the only such reason.[57]

On appeal, the Second Circuit affirmed the district court's finding of exceptional reasons and agreed that the standards of exceptional reasons are not restricted by the examples in the Department of Justice's letter.[58] The court also explicitly sanctioned the district court's position regarding the legal novelty of a question on appeal:

> While one example involves a legal question said to be "novel," the other involves merely a question of first impression in one circuit. We therefore do not take the examples to impose a requirement of absolute legal novelty. We do think that an unusual legal or factual question can be sufficient . . . . On the other hand, a merely substantial question may be sufficient, in the presence of one or more remarkable and uncommon factors, to support a finding of exceptional reasons for the inappropriateness of detention. As in many things, a case by case evaluation is essential, and it is not our intention to foreclose district judges from the full exercise of discretion in these matters. That discretion certainly is not limited by examples contained in the Justice Department letter. It is constrained only by the language of the statute: "exceptional reasons."[59]

2. The *Hill* Standard

Nearly every case decided after *DiSomma* that considers exceptional reasons has cited *DiSomma* for the proposition that each case be decided on its own facts and that legal novelty is not a requirement for a finding of exceptional reasons.[60] Of these

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57. *Id.*

58. *See* Letter, *supra* note 32.

59. *DiSomma*, 951 F.2d at 497.

60. *See, e.g.*, United States v. Koon, 6 F.3d 561, 562 (9th Cir. 1993) (Rymer, J., concurring); United States v. Herrera-Soto, 961 F.2d 645, 647 (7th Cir. 1992) (per curiam); United States v. Weiner, No. 92-1708, 1992 U.S. App. LEXIS 28794, at *4 (1st Cir. July

cases, only *United States v. Hill* found the existence of exceptional reasons.[61] In *Hill*, the district court added an objective factor to the exceptional reasons standard similar to other likelihood-of-reversal tests contained in the 1990 Act.[62] The *Hill* court explained that "[t]his Court thinks that the greater the likelihood of reversal on appeal, the greater the chance an 'exceptional reason' exists under Section 3145(c)."[63]

Although correlating "likelihood of reversal" with "exceptional reasons" is appealing, the *Hill* standard does not comport with the statutory framework. The exceptional reasons provision initially refers a judge to the 1990 Act.[64] Once the judge determines that the defendant meets the tests contained therein, the judge then makes the exceptional reasons determination. As part of such determination, *Hill* requires a judge to refer to the 1990 Act and measure the likelihood of reversal on appeal.[65] In the case of a defendant seeking release pending appeal, *Hill* requires the judge to make the identical determination regarding likelihood of reversal made prior to arriving at the exceptional reasons provision in the first instance.[66] In this regard, *Hill* is redundant.

For a defendant awaiting sentencing, *Hill* directs a judge to a section of the 1990 Act not mentioned in the exceptional reasons provision.[67] Contrary to the express direction of the exceptional reasons provision, the *Hill* standard subjects a defendant awaiting sentencing to the same standards that are applied to a defendant whose appeal is pending. The exceptional reasons provision explicitly refers both classes of defendants to different parts of the 1990 Act, which in turn applies different standards to each class of defendants.[68] The standards applied to a defendant awaiting sentence are less rigorous than those applicable to a defendant pending appeal. By requiring both classes of defendants to demonstrate the likelihood of reversal on appeal as a standard for

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31, 1992).

61. United States v. Hill, 827 F. Supp. 1354 (W.D. Tenn. 1993).

62. *Id.* at 1358; *see also* 18 U.S.C. § 3143(a)(2), (b)(1).

63. *Hill*, 827 F. Supp. at 1358.

64. *See* 18 U.S.C. § 3143(a)(1), (b)(1).

65. *Hill*, 827 F. Supp. at 1358.

66. *Id.*

67. *Id.* at 1356.

68. *See* 18 U.S.C. § 3145(c).

exceptional reasons, *Hill* disposes of this distinction and is plainly at odds with the exceptional reasons provision.

3. *United States v. Koon*—the Rymer Approach

Judge Rymer and Judge Reinhardt's respective concurring and dissenting opinions filed with the Ninth Circuit's denial of an en banc hearing in the Koon and Powell appeals addressed the standards governing exceptional reasons. In his concurrence, Judge Rymer asserted that "[t]hough it's true that the boundaries of 'exceptional reasons' are undefined, 'exceptional' necessarily means more than what the typical nonviolent offender must show to merit bail pending appeal—and in turn, what the violent offender must show as a prerequisite to release under the 'exceptional reasons' exception to mandatory detention."[69] This standard, however, added nothing to the *DiSomma* standard. By requiring the defendant subject to mandatory detention to demonstrate something more than what a defendant not subject to such detention would have to show, Judge Rymer merely restated the words of the exceptional reasons provision: that is, the defendant must meet either set of criteria set forth in the 1990 Act and then show something more—"exceptional reasons."

Judge Rymer's exceptional reasons approach is also incompatible with the *Hill* standard. Under the *Hill* standard, the likelihood of reversal on appeal determines whether exceptional reasons exist.[70] Thus, in certain cases all defendants, regardless of whether they are subject to mandatory detention under the 1990 Act, theoretically may advance similar or the same reasons why their convictions are likely to be reversed on appeal. Because two classes of crimes exist under the 1990 Act, the *Hill* and Rymer standards are not incompatible in appeals concerning the legal facets of the underlying crimes. The difference in crimes necessarily means that the violent defendant will always have to show more on appeal than the non-violent defendant. Rather, the two standards clash in cases that implicate other legal concerns such as erroneous jury instructions, inadmissible evidence or a procedural irregularity—matters that are not elements of the underlying crimes. Because *all* defendants are capable of making these same showings on appeal,

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69. United States v. Koon, 6 F.3d 561, 564 (9th Cir. 1993) (Rymer, J., concurring).

70. *See supra* note 66 and accompanying text.

under the *Hill* standard a defendant subject to mandatory detention raising such an appeal would be unable to demonstrate "more than what the typical non-violent offender must show to merit bail pending appeal."[71]

4. *United States v. Koon*—the Reinhardt Approach

Judge Reinhardt advanced an even less persuasive standard for exceptional reasons. He maintains:

> Congress clearly did not intend to require detention for *everyone* convicted of a crime of violence. Otherwise, it would not have included the exception in section 3145(c). . . .
>
> . . . Read in light of this general intent of the Act, the "exceptional reasons" exception appears to apply where there is no chance that the defendants will pose any danger to the community if released.[72]

Such a finding is already required under both sets of criteria for release set forth in the 1990 Act; the very criteria that must be fulfilled *prior* to considering exceptional reasons.[73]

This standard disregards the fact that the exceptional reason provision requires a finding of something more than what is called for in the 1990 Act. If all a defendant must show is that he does not pose a danger to the community, the exceptional reasons provision is rendered meaningless because a judge would never reach the point of having to make an exceptional reasons determination. Instead, the judge could stop the inquiry during the consideration of the 1990 Act's criteria, specifically at the point in both lines of analysis where the judge assesses the defendant's danger to the community. To carry the inquiry further would be redundant because the judge would simply undertake the same inquiry again under the exceptional reasons determination. Judge Reinhardt's standard of exceptional reasons is in fact no standard at all, but rather merely a means of reading exceptional reasons out of the equation altogether.

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71. *Koon*, 6 F.3d at 564 (Rymer, J., concurring).

72. *Id.* at 565-66 (Reinhardt, J., dissenting).

73. *See, e.g.*, 18 U.S.C. § 3145(c) (interpreted by courts to require that the defendant meet the conditions set forth in 18 U.S.C. § 3143(a)(1) or (b)(1)).

In light of the inherent deficiencies of the *Hill*, Rymer, and Reinhardt standards, the most satisfactory standard governing exceptional reasons is set forth in the two *DiSomma* opinions. This simple standard allows for a wide array of possible exceptional reasons.[74] While the *DiSomma* standard is simple and broad, given the degree of discretion that district court judges possess in finding exceptional reasons, this standard is difficult to satisfy.

D. Examples of "Exceptional Reasons"

Despite the judicial discretion afforded courts under the *DiSomma* standard, only the *DiSomma* and *Hill* courts have actually found that exceptional reasons exist under this standard. Because neither the statute nor its legislative history defined exceptional (the word is not even used in the Department of Justice's letter), the *DiSomma* district court resorted to the dictionary to discern the meaning of exceptional reasons. The dictionary meaning given for "exceptional" was "being out of the ordinary," "uncommon," or "rare."[75] Though the dictionary's definition added little to the substantive interpretation of exceptional reasons, the *DiSomma* court found that DiSomma's situation was suitably "out of the ordinary" and "rare" to merit release. The Second Circuit's summation of the "exceptional nature" of DiSomma's situation stated: "[w]e are confronted here with a most unusual factual and legal situation . . . . The element of the crime called into question on appeal is the element of the bail statute that bars release."[76]

Additionally, the *DiSomma* court noted:

> [T]he violence that is the necessary element of the conspiracy to commit robbery conviction—the existence of which is the substantial question raised on appeal—is the same violence that prevents release on conditions. . . .

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74. Since *DiSomma*, every court addressing the exceptional reasons issue has employed the *DiSomma* standard, and in twenty-nine of the thirty reported cases the courts have declined to find exceptional reasons. The one case finding exceptional reasons was *United States v. Hill*, 827 F. Supp. 1354 (W.D. Tenn. 1993).

75. United States v. DiSomma, 769 F. Supp. 575, 576 (S.D.N.Y.), *aff'd*, 951 F.2d 494 (2d Cir. 1991) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 791 (3d ed. 1986)).

76. *DiSomma*, 951 F.2d at 497-98.

> . . . .
> . . . Because this is so, DiSomma will have been confined unjustly if he prevails on appeal. . . .
> . . . We consequently hold that where a defendant mounts a direct and substantial challenge on appeal to the factual underpinnings of the element of violence upon which his sole conviction stands or falls, in the absence of risk of flight or danger to the community, it is well within the district judge's discretion to find that exceptional reasons allow release of the defendant pending appeal.[77]

Though the Second Circuit refused to restrict the standard for exceptional reasons to the two standards set forth in the Department of Justice's letter, it nevertheless squarely rested its decision in the case on a combination of the letter's two standards.[78] The facts in the case were similar to those of the first example in the letter. While DiSomma presented no novel question of law, his challenge of the factual (not legal) underpinnings of his conviction provided the grounds upon which his appeal would be determined (i.e., on appeal the violence for which DiSomma was convicted, which mandated his detention, would be shown to have been erroneously found because he was not at the place where he was purported to have committed the violence for which he was charged and consequently detained).

In *Hill* the defendant was in an identical situation to DiSomma. Hill was subject to mandatory detention for a crime involving drugs arising under the Controlled Substances Act. The court stated "[s]ubstitute 'Controlled Substances Act' violation for 'violence' and we see that the same 'exceptional reason' exists in the instant case as in *DiSomma*—the element of the crime called into question on appeal is the element of the bail statute that bars release."[79] The court held that "[t]his is not to say that every case where sufficiency of evidence is challenged would amount to 'exceptional reasons' under 18 U.S.C. § 3145(c)."[80] Like *Hill*, courts considering the exceptional reasons provision have consistently rejected claims of exceptional reasons that merely

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77. *Id.* (citation omitted).
78. *Id.* at 497.
79. *Hill*, 827 F. Supp. at 1358 (citations omitted).
80. *Id.*

raise a substantial question on appeal or some fact—based reason for release. Courts have demanded something truly "exceptional" but fail to explain what that something may be.

A substantial question on appeal by itself has never been found to constitute an exceptional reason because, under the 1990 Act, the finding of a substantial question is a prerequisite to consideration of exceptional reasons.[81] *DiSomma* and *Hill* relied on the existence of a substantial question in making their exceptional reasons findings,[82] but as stated previously, both courts found that something more "exceptional" existed over and above the mere existence of a substantial question.[83]

In *United States v. Herrera-Soto*, the defendant maintained that an erroneous jury instruction constituted a substantial question on appeal and therefore justified a finding of exceptional reasons.[84] The court disagreed, stating:

> A substantial question of law sufficient to satisfy the criteria for release required of any convicted person, in a remarkable or unique factual context, may render detention pending appeal inappropriate. . . .
>
> . . . There is nothing out of the ordinary about the circumstances of this case that causes this appellate issue, although arguably meritorious, to transform Herrera-Soto's circumstances into exceptional reasons meriting release pending appeal.[85]

The *Herrera-Soto* court acknowledged the fact that circumstances, such as those in *DiSomma*, may constitute exceptional reasons, but concluded that a mere challenge to a jury instruction did not present such circumstances.[86]

In *United States v. Weiner*, the court maintained: "[e]ven if defendant's evidentiary challenge were to be deemed a 'substantial' one, we see nothing in the relatively ordinary

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81. *See* 18 U.S.C. § 3145(c) (referring to 18 U.S.C. § 3731).

82. *See Hill*, 827 F. Supp. at 1358; *DiSomma*, 951 F.2d at 497.

83. *Id.*; *see supra* notes 53-68 and accompanying text.

84. United States v. Herrera-Soto, 961 F.2d 645, 646 (7th Cir. 1992) (per curiam).

85. *Id.* at 647.

86. *See id.*

circumstances here that would call for such a result [i.e. a finding of exceptional reasons]."[87]

In addition, the *Weiner* court stated:

> Defendant would read into this exception the requirement that, whenever one who has been convicted of a "crime of violence" (and who is not a risk of flight or danger) has raised a "substantial question" as to the sufficiency of the evidence, release must be ordered. Yet such a rule—which presumably would also apply to those convicted of offenses described in 3142(f)(1)(B) & (C)—finds no support in the statutory language, and would seem at odds with Congress' purpose in enacting the mandatory-detention provision.[88]

Driving home the point that a substantial question does not constitute exceptional reasons, the court in *United States v. McAllister* determined that a substantial question and exceptional reasons were two different lines of inquiry.[89] "In the absence of 'exceptional reasons,' there will thus be no discretion to release McAllister pending an appeal no matter how 'substantial' the appellate issues may be."[90]

Courts have uniformly rejected suggested exceptional reasons that are purely fact-based but involve no legal question. Examples of proffered exceptional reasons that involve purely fact-based reasons include the following: defendant "should be allowed to continue serving the community as a musician . . . because he and his audiences should not suffer the hiatus in his performances" and "the good feeling the band created;"[91] defendant "maintains that his close relationship with his step-daughter, his stabilizing influence on his wife and support of his family, his aid to an unrelated family of which the father is separated on account of illness, [defendant's] medical condition (Bell's palsy), and his position as mechanical engineer for the

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87. United States v. Weiner, No. 92-1708, 1992 U.S. App. LEXIS 28794, at *9 (1st Cir. July 31, 1992).

88. *Id.* at *8.

89. United States v. McAllister, 974 F.2d 291, 292 (2d Cir. 1992).

90. *Id.* (citations omitted).

91. United States v. deLay, No. CR 90-10-FR, 1992 U.S. Dist. LEXIS 3474, at *3-*4 (D. Or. Mar. 19, 1992), *aff'd*, No. 92-30090, 1993 U.S. App. LEXIS 4911 (9th Cir. Mar. 10, 1993).

West Rutland water distribution system;"[92] defendant's "daughter's difficult pregnancy;"[93] defendant "has a history of mental and emotional problems . . . [and] was unaware . . . that he could be detained following the jury verdict . . . his place of business, along with his equipment and materials were left unattended . . . he was unable to properly say good-bye to his children and prepare them for the separation;"[94] and the "inadequacies in the general means of transportation of prisoners from places of holding court to places of detention."[95] "[C]ompliance with pretrial supervision and gainful employment up until the date of sentencing" also were not acceptable fact-based exceptional reasons.[96]

In each of these cases, courts refused to find that purely fact-based exceptional reasons warranted the defendant's release. Unlike *DiSomma*, these cases suggest that exceptional reasons involve something legally exceptional (i.e., involving a substantial question on appeal) that might implicate factual peculiarities, but factual reasons alone are insufficient for a finding of exceptional reasons.

The exceptional reasons proffered in the Koon and Powell appeals included both a substantial question on appeal and a variety of fact-based reasons. Powell's appeal to the Ninth Circuit advanced the following exceptional reasons:

> [T]heir offense was "highly situational" and their release poses no danger to the community; there are unusual and weighty issues on appeal; they had been acquitted in state court; the victim's conduct contributed to the offense; a lengthy sentence and detention will adversely affect police morale; Koon is involved in civil litigation; there will be difficulty in assuring safety while incarcerated; and the sentence is relatively short in comparison to the relatively long process for appeal.[97]

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92. United States v. Bloomer, 791 F. Supp. 100, 102 (D. Vt. 1992).

93. United States v. Taliaferro, 779 F. Supp. 836, 838 (E.D. Va.), *aff'd*, 993 F.2d 1541 (4th Cir. 1992), *cert. denied*, 114 S. Ct. 261 (1993).

94. United States v. Dempsey, No. 91-098, 1991 U.S. Dist. LEXIS 16876, at *5-*6 (E.D. La. Nov. 19, 1991).

95. United States v. Mostrom, 11 F.3d 93, 95 (8th Cir. 1993).

96. *Id.*

97. United States v. Koon, 6 F.3d 561, 563 (9th Cir. 1993) (Rymer, J., concurring).

Given the dismissive treatment courts uniformly accord to such offers of exceptional reasons, it is not surprising that Judge Rymer, alluding to *DiSomma*, maintained:

> [t]he record suggests nothing clearly "out of the ordinary," "uncommon" or "rare" about Koon and Powell which sets them apart from any one else convicted of a crime of violence, or of violating a suspect's constitutional rights.
>
> . . . .
>
> None of these reasons is exceptional; each is an ordinary corollary of being a law enforcement officer convicted of violating another's civil rights.[98]

Judge Rymer continued:

> The most arguably "exceptional reason" proffered by Koon and Powell, is that they may have served a substantial part of their relatively short sentence before the appeal is resolved. While the length of sentence compared with the length of appeal may well be "exceptional" in a particular case, there is no basis for finding any unusual delay in processing the Koon and Powell appeals.[99]

Like others before him, Judge Rymer found nothing exceptional in the mere substantial question and purely fact-based reasons for release that Powell offered.

Judge Reinhardt, in dissent, proposed a definition of exceptional reasons that runs counter to the holdings of all previous cases. He stated:

> In short, the exception must apply where detention would not serve any rational goal of the mandatory detention law.
>
> The two hypothetical cases in Assistant Attorney General Crawford's letter indicate that other factors, besides total lack of dangerousness, may establish "exceptional reasons." . . . Significant changes in life

98. *Id.* (citation omitted).

99. *Id.*

> circumstances leaving the defendant without the opportunity to commit the same crimes in the future might be [one such factor]. Exceptional reasons might also exist when the defendant's culpability is significantly less than that of the typical offender contemplated by Congress in creating its categories of dangerous offenders, or when the defendant's immediate incarceration would cause him undue or unusual hardship. The exception may also apply when it is fairly clear that we will be compelled to reverse the defendant's conviction. There appear to be a number of possible reasons that might under appropriate circumstances qualify as exceptional. The general principle, however, seems to be that exceptional reasons exist in unusual cases where application of the statute would be "unduly harsh."[100]

Contrary to all the reported case law, Judge Reinhardt appeared willing to find exceptional reasons in cases involving merely fact-based reasons and also in cases involving only a substantial question on appeal. Judge Reinhardt's willingness to find exceptional reasons upon the mere showing of a substantial question compromised the function of the exceptional reasons provision because a substantial question is a predicate finding to the exceptional reasons analysis.

A final example of exceptional reasons is the release of a defendant for the purpose of cooperating with the government in an ongoing investigation or as a trial witness as illustrated by *United States v. Douglas*.[101] In *Douglas* the defendant entered a guilty plea and "[a] concomitant agreement to cooperate with the government and testify at the trial" against his co-defendants.[102] He maintained that his cooperation constituted exceptional reasons because he "'demonstrated an extraordinary effort to accept responsibility for his actions and to take efforts to correct his wrongdoing'"[103] and that, without release, his

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100. *Id.* at 567-68 (Reinhardt, J., dissenting).

101. United States v. Douglas, 824 F. Supp. 98 (N.D. Tex. 1993).

102. *Id.* at 99.

103. *Id.* at 100 (quoting the defendant's brief).

cooperation would possibly subject him to retaliation from his co-defendants.[104]

The court declined to find defendant's situation "exceptional" and stated that "such circumstances would exist in virtually any case where one defendant enters into a plea agreement requiring him to testify against his co-defendants."[105] "[A]lthough any attempts at rehabilitation are certainly admirable, they are not exceptional, or at least sufficiently exceptional, to justify release pending the imposition of sentence."[106] This holding is justified on the grounds that a defendant providing the government with evidence does not necessarily have to be released. The same cannot be said for defendants needed to assist the government in investigations.

A defendant's cooperation in an ongoing government investigation inevitably requires the defendant's release from custody. In investigation cases, the government and not the defendant moves for release invoking the exceptional reasons provision.[107] When the government moves for the release of a defendant, the motion is generally unopposed. The only appellate decision involving both a government and defendant motion for release upheld a district court's denial of release without mentioning what the district court refused to recognize as constituting exceptional reasons.[108] Nevertheless, court orders granting release in investigation situations do exist. One release order determined:

> [T]he defendant is in a unique position to furnish valuable assistance to the government with respect to the investigation of persons suspected of dealing narcotics in this District and the defendant has offered to furnish such assistance to the government. The Court finds that the above stated facts constitute "exceptional reasons"

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104. *Id.* at 99.

105. *Id.*

106. *Id.* at 100.

107. *See* United States v. Murphy, No. 92-00194 (S.D. Ala. Dec. 2, 1992) (Order granting bail pending appeal).

108. *See* United States v. Schuermann, No. 92-3339, 1992 U.S. App. LEXIS 30110, at *1 (10th Cir. Nov. 5, 1992). "Both the government and appellant contended there were exceptional reasons for appellant's release under 18 U.S.C. § 3145(c). The district court considered the circumstances recited by the parties and determined those circumstances did not present an exceptional reason for defendant's release." *Id.* at *1-*2.

> why defendant's detention would be inappropriate pursuant to 18 U.S.C. § 3145(c).[109]

This court's willingness to find exceptional reasons when the government moved for release under the exceptional reasons provision, contrasted with the rare instances of release on motion by defendants, suggests that the provision may have been intended for the government's exclusive use.[110]

E. Appellate Review of "Exceptional Reasons" Cases

Appeals of exceptional reasons determinations are made pursuant to Rule 9(c) of the Federal Rules of Appellate Procedure.[111] This rule refers an appellate court to the 1990 Act, and the exceptional reasons provision by implication, for criteria to review district court exceptional reasons determinations.

In keeping with *DiSomma,* holding that district court judges may rely on a broad standard of what constitutes exceptional reasons, appellate courts accord a great deal of deference to district court findings under the *DiSomma* standard. The Tenth Circuit has stated:

> "Appellate review of detention or release orders is plenary as to mixed questions of law and fact and independent, with due deference to the district court's purely factual findings." Whether the particular circumstances of a case present an exceptional reason for release is a mixed question of law and fact.[112]

Likewise, the First Circuit has stated: "Our ability to . . . conduct an 'independent review . . . [is] tempered by deference to the district court's firsthand judgment of the situation.'"[113] Nevertheless,

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109. *See Murphy*, No. 92-00194, at 2 (S.D. Ala. Dec. 2, 1992).

110. *See infra* part III for a more complete discussion of this concept.

111. FED. R. APP. P. 9(c).

112. United States v. Schuermann, No. 92-3339, 1992 U.S. App. LEXIS 30110, at *2 (10th Cir. Nov. 5, 1992) (citation omitted) (quoting United States v. Stricklin, 932 F.2d 1353, 1355 (10th Cir. 1991)).

113. United States v. McCabe, No. 90-1483, 1991 U.S. App. LEXIS 20448, at *5 (1st Cir. May 8, 1991) (quoting United States v. Bayko, 774 F.2d 516, 520 (1st Cir. 1985)).

> if, after careful assessment of the trial judge's reasoning, together with such papers, affidavits, and portions of the record as the parties present, the court of appeals independently reaches a conclusion different from that of the trial judge the court of appeals has the power to amend or reverse a detention or release decision.[114]

Three courts of appeals have reversed district court exceptional reasons determinations: *United States v. McCabe*,[115] *United States v. Herrera-Soto*,[116] and *United States v. McAllister*.[117] The Seventh Circuit reversed in *Herrera-Soto* on the grounds that, in relying on *DiSomma*, the district court found "'exceptional reason[s]' . . . because the 'defendant's conviction rest[ed] on the introduction of evidence forming the basis of defendant's appellate issues.'"[118] The court maintained that the district court employed an overly expansive interpretation of *DiSomma*.[119] Given *DiSomma's* broad standard, this reversal would be surprising but for the fact that the defendant's claim of exceptional reasons was grounded on a mere substantial question on appeal. As mentioned previously, a substantial question on appeal alone has never constituted an exceptional reason.[120]

The reversal in *McCabe* rested on the First Circuit's determination that the district court had apparently failed to consider either the 1990 Act or exceptional reasons in denying bail.[121] Finally, in *McAllister*, the Second Circuit reversed because the district court judge, in denying bail, had confused the 1990 Act's two sets of criteria for release from mandatory detention.[122] The confusion arose from the judge's perception that the wording of the Act made eligibility for bail in the pre-sentence period more difficult to attain than in the appeal setting.[123]

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114. United States v. Strong, 775 F.2d 504, 505 (3d. Cir. 1985) (quoting United States v. Delker, 757 F.2d 1390, 1400 (3rd Cir. 1985)).

115. United States v. McCabe, No. 90-1483, 1991 U.S. App. LEXIS 20448 (1st Cir. May 8, 1991).

116. United States v. Herrera-Soto, 961 F.2d 645 (7th Cir. 1992).

117. United States v. McAllister, 974 F.2d 291 (2d Cir. 1992).

118. *Herrera-Soto*, 961 F.2d at 646 (quoting Detention Order, Feb. 10, 1992, at 3).

119. *Id.*

120. *See supra* notes 79-100 and accompanying text.

121. *McCabe*, No. 90-1483, 1991 U.S. App. LEXIS 20448, at *2-*5.

122. *McAllister*, 974 F.2d at 292-93.

123. *Id.*

Besides *McCabe, Herrera-Soto,* and *McAllister*, no other court has reversed a district court's finding of exceptional reasons. This may be attributed to the general reluctance of an appellate court to disturb the factual findings of a district court. Exceptional reasons determinations are mixed questions of law and fact. No court has found exceptional reasons when only fact-based exceptional reasons are offered. Because of this, appellate courts have unanimously upheld district courts' rulings in these cases. The three cases above involve primarily legal questions, specifically the misapplication of law. Because of the legal aspects of these cases, the appellate courts justified their reversals on the legal questions presented.

III. "EXCEPTIONAL REASONS"—THE GOVERNMENT'S EXCLUSIVE USE?

The mandatory detention statute and the government's need for the cooperation of criminal defendants outside of detention are incompatible.[124] The conflicting interests raised by the 1990 Act's mandatory detention provisions may have prompted the Department of Justice's letter to Senator Simon, which suggested that "there may be rare instances in which release, under appropriate conditions, would be proper."[125] Although the letter does not explicitly restrict release to motion by the government and indeed the examples given in the letter imply the opposite, the letter indicates that release should be rare and "under appropriate conditions."[126] Both of these criteria suggest release of the defendant on motion by the government under conditions of governmental custody, since, in a criminal case, the government prosecutes the defendant thereby subjecting him to mandatory detention. It is therefore counterintuitive that the Department of Justice would then propose an avenue by which defendants could then secure their release following conviction.

The current application of the exceptional reasons provision potentially affords defendants a chance for release that the Simon Act purportedly removed. Therefore, by restricting the invocation

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124. For example, the government often needs the cooperation of defendants convicted of drug offenses that fall within 18 U.S.C. § 3142(f)(1)(C) for on-going drug investigations. *See* United States v. Murphy, No. 92-00194 (S.D. Ala. Dec. 2, 1992).

125. Letter, *supra* note 32.

126. *Id.*

of the statute to the rare and compelling instances in which the government requires the defendant's release for a trial or investigation, the purposes and operation of the 1990 Act's mandatory detention provisions would be better served. The problem with the theory that restricts the use of the exceptional reasons provision to the exclusive use of the government, however, is the theory's incompatibility with the two examples given in the Department of Justice's letter.

On the other hand, the restriction of exceptional reasons to exclusive governmental use is supported by remarks made in both chambers of Congress. Senator Simon maintained:

> [T]he Justice Department has recommended that in certain limited circumstances the judicial officer should retain discretion. First, in the pre-sentencing setting, if the attorney for the government will recommend a sentence of no incarceration or if the judicial officer finds that there is a substantial likelihood the defendant's motion for new trial or acquittal will be granted and the defendant is not likely to flee or pose a danger to the community, the judicial officer may release the defendant. Second, in the appeals setting, if the attorney for the government files a motion indicating that there are exceptional circumstances which warrant release and the defendant is not likely to flee or pose a danger to the community, the judicial officer may order release.[127]

Representative Glickman made similar remarks in the House.[128] Both statements buttress the notion of restricting the exceptional reasons provision to the government's exclusive use. The intent expressed when these remarks were made could apply today.[129]

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127. 135 CONG. REC. S15,202 (daily ed. Nov. 7, 1989) (statement of Sen. Simon).

128. 136 CONG. REC. H638 (daily ed. Mar. 6, 1990) (statement of Rep. Glickman). "In the appeals setting, the convicted criminal could only be released if the attorney for the government files a motion indicating that there are exceptional circumstances which warrant release and the defendant is not likely to flee or pose a danger to the community." *Id.*

129. Senator Simon's remarks were made in November of 1989, and Representative Glickman's in March of 1990. 135 CONG. REC. S15,202 (daily ed. Nov. 7, 1989); 136 CONG. REC. H638 (daily ed. Mar. 6, 1990). The Justice Department letter was sent in July of 1989, and § 3145(c) was enacted into law in October of 1990. Letter, *supra* note 32; Pub.

The appeals test mentioned by both Senator Simon and Representative Glickman is a verbatim restatement of the test set forth in the Department of Justice's letter. The test is also the current test for release under the 1990 Act for defendants subject to mandatory detention pending sentencing. When the exceptional reasons provision became law, however, a more rigorous standard was incorporated governing defendants subject to mandatory detention pending appeal. Even though the phrase "government files a motion indicating that there are 'exceptional circumstances'" was omitted from the text of the exceptional reasons provision, given the "art" of statutory construction and courts' use of legislative history, it is possible that a court could find that the provision was intended for government use only.[130]

CONCLUSION

The exceptional reasons provision as applied to the mandatory requirements of the 1990 Act remains in the early stages of judicial evolution. In response to a lack of statutory or legislative history sufficiently defining the term "exceptional reasons," courts have developed a definition. *DiSomma*, *Hill*, and *Koon* have all established various standards which define exceptional reasons.

Courts have encountered difficulty in applying the exceptional reasons provision because the purpose of the mandatory detention requirement and exceptional reasons provision

> can be viewed as the balance between two conflicting interests. On the one hand, a person who has been convicted should not be forced to undergo punishment if it is later determined that his conviction is invalid. On the other, a person who is validly convicted ought to begin serving his sentence without delay. These two interests are not perfectly compatible given the inherent delay of the appeal process. In absence of a statute, the Court, ad hoc or by rule, may arrive at the balance. That is not the case where Congress has weighed conflicting

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L. No. 101-647, 104 Stat. 4827(1990) (codified at 18 U.S.C. § 3145(c).

130. *Compare* 18 U.S.C. § 3145(c) *with* 135 CONG. REC. S15,202 (daily ed. Nov. 7, 1989) (statement of Sen. Simon) *and* 136 CONG. REC. H638 (daily ed. Mar. 6, 1990) (statement of Rep. Glickman).

> policy considerations and enacted a controlling statute.[131]

Congress weighed the conflicting policy considerations, passed a controlling statute, but failed to provide any legislative guidance on the issues of mandatory detention and exceptional reasons. Thus, the courts have been left the task of giving meaning to the exceptional reasons provision.

131. United States v. Austin, 614 F. Supp. 1208, 1212 (D.N.M. 1985) (footnotes omitted).