

COUNCIL OF THE DISTRICT OF COLUMBIA

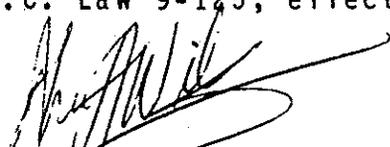
NOTICE

D.C. LAW 9-125

"Bail Reform Amendment Act of 1992".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P. L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 9-360 on first and second readings, February 4, 1992, and March 3, 1992, respectively. Following the signature of the Mayor on March 20, 1992, this legislation was assigned Act No. 9-170, published in the April 3, 1992, edition of the D.C. Register, (Vol. 39 page 2134) and transmitted to Congress on March 24, 1992 for a 60-day review, in accordance with Section 602(c)(2) of the Act.

The Council of the District of Columbia hereby gives notice that the 60-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 9-125, effective July 3, 1992.


JOHN A. WILSON
Chairman of the Council

Dates Counted During the 60-day Congressional Review Period:

March 24,25,26,27,30,31
April 1,2,3,6,7,8,9,10,28,29,30
May 1,4,5,6,7,8,11,12,13,14,15,18,19,20,21,26,27,28,29
June 1,2,3,4,5,8,9,10,11,12,15,16,17,18,19,22,23,24,25,26,
29,30
July 1,2

AN ACT

Codification

D. C. ACT 9-170

District of Columbia Code

(1993 Supplement)

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA .

MARCH 20, 1992

To amend sections 23-1321, 23-1322, 23-1323(c) and (d), 23-1324(a) and 23-1325(a) of the District of Columbia Code to change pretrial and detention procedures in the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Ball Reform Amendment Act of 1992".

Sec. 2. Section 23-1321 of the District of Columbia Code is amended to read as follows:

Section
23-1321

"§ 23-1321. Release prior to trial.

"(a) Upon the appearance before a judicial officer of a person charged with an offense, other than murder in the first degree or assault with intent to kill while armed, which shall be treated in accordance with the provisions of § 23-1325, the judicial officer shall issue an order that, pending trial, the person be:

"(1) Released on personal recognizance or upon execution of an unsecured appearance bond under subsection (b) of this section;

"(2) Released on a condition or combination of conditions under subsection (c) of this section;

"(3) Temporarily detained to permit revocation of conditional release under § 23-1322; or

"(4) Detained under § 23-1322(b).

"(b) 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 local, state, or federal crime during the period of release, unless the judicial officer determines that the release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

"(c)(1) 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, the judicial officer shall order the pretrial release of the person subject to the:

"(A) Condition that the person not commit a local, state, or federal crime during the period of release; and

"(B) Least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure

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the appearance of the person as required and the safety of any other person and the community, which may include the condition or combination of conditions that the person during the period of release shall:

- "(i) Remain in the custody of a designated person or organization that agrees to assume supervision and to report any violation of a condition of release to the court, if the designated person or organization is able to reasonably assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;
- "(ii) Maintain employment, or, if unemployed, actively seek employment;
- "(iii) Maintain or commence an educational program;
- "(iv) Abide by specified restrictions on personal associations, place of abode, or travel;
- "(v) Avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
- "(vi) Report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- "(vii) Comply with a specified curfew;
- "(viii) Refrain from possessing a firearm, destructive device, or other dangerous weapon;
- "(ix) Refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner. The terms "narcotic drug" and "controlled substance" shall have the same meaning as in section 102 of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981, (D.C. Law 4-29; D.C. Code § 33-501);
- "(x) Undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, if available, and remain in a specified institution if required for that purpose;
- "(xi) Return to custody for specified hours following release for employment, schooling, or other limited purposes;
- "(xii) Execute an agreement to forfeit upon failing to appear as required, the designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court the indicia of ownership of the property, or a percentage of the money as the judicial officer may specify;
- "(xiii) Execute a bail bond with solvent sureties in whatever amount is reasonably necessary to assure the appearance of the person as required; or
- "(xiv) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

"(2) In considering the conditions of release described in paragraph (1)(B)(xii) or (xiii) of this subsection, the judicial officer may upon his own motion, or shall upon the motion of the government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation or the use as collateral of property that, because of its source, will not reasonably assure the appearance of the person as required.

"(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection that results in the pretrial detention of the person.

"(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition that requires that the person return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is released on another condition or conditions, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer may review the conditions.

"(5) The judicial officer may at any time amend the order to impose additional or different conditions of release."

Sec. 3. Section 23-1322 of the District of Columbia Code is amended to read as follows:

Section
23-1322

"§ 23-1322. Detention prior to trial.

"(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense:

"(1) Was at the time the offense was committed, on:

"(A) Release pending trial for a felony under local, state, or federal law;

"(B) Release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under local, state, or federal law; or

"(C) Probation or parole for an offense under local, state, or federal law; and

"(2) May flee or pose a danger to any other person or the community. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial.

"(b)(1) The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community, upon oral motion of the attorney for the government, in a case that involves:

"(A) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331;

"(B) An offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Code § 22-722); and

"(C) A serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror."

"(2) If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.

"(c) There shall be a rebuttable presumption that no conditions or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by a substantial probability that the person:

"(1) Committed a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, while armed with or having readily available a pistol, firearm, or imitation firearm;

"(2) Has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding;

"(3) Committed a dangerous crime or a crime of violence, as these terms are defined in § 23-1331, and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense; or

"(4) Committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense.

"(d)(1) 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. Except for good cause, a continuance on motion of the person shall not exceed 5 days, and a continuance on motion of the attorney for the government shall not exceed 3 days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the government or sua sponte, may order that, while in custody, a person who appears to be an addict receive a medical examination to determine whether the person is an addict, as defined in § 23-1331.

"(2) At the hearing, the person has the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.

"(3) The person shall be afforded an opportunity to testify. Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings under §§ 23-1327, 23-1328 and 23-1329, in perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

"(4) The person shall be afforded an opportunity 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.

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"(5) The person shall be detained pending completion of the hearing.

"(6) The hearing may be reopened at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community.

"(7) When a person has been released pursuant to this section and it subsequently appears that the person may be subject to pretrial detention, the attorney for the government may initiate a pretrial detention hearing by ex parte written motion. Upon such motion, the judicial officer may issue a warrant for the arrest of the person and if the person is outside the District of Columbia, the person shall be brought before a judicial officer in the district where the person is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section.

"(e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concerning:

"(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime as these terms are defined in § 23-1331, or involves obstruction of justice as defined in section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Code § 22-722).

"(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 pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law; and

"(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

"(f) In a release order issued under § 1321(b) or (c), the judicial officer shall:

"(1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) Advise the person of:

"(A) The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

"(B) The consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

"(C) The provisions of section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December

1, 1982 (D.C. Law 4-164; D.C. Code § 22-722), relating to threats, force, or intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations and retaliating against a witness, victim, or an informant.

"(g) In a detention order issued under subsection (b) of this section, the judicial officer shall:

"(1) Include written findings of fact and a written statement of the reasons for the detention;

"(2) Direct that the person be committed to the custody of the Attorney General of the United States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

"(3) Direct that the person be afforded reasonable opportunity for private consultation with counsel; and

"(4) Direct that, on order of a judicial officer or on request of an attorney for the government, the person in charge of the corrections facility in which the person is confined deliver the person to the United States Marshal or other appropriate person for the purpose of an appearance in connection with a court proceeding.

"(h) The case of the person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, the person shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration of 100 days. However, the person may be detained for an additional period not to exceed 20 days from the date of the expiration of the 100-day period on the basis of a petition submitted by the attorney for the government and approved by the judicial officer. The additional period of detention may be granted only on the basis of good cause shown and shall be granted only for the additional time required to prepare for the expedited trial of the person. For the purposes of determining the maximum period of detention under this section, the period shall not exceed 120 days. The period shall:

"(1) Begin on the date defendant is first detained after arrest;

and

"(2) Include the days detained pending a detention hearing and the days in confinement on temporary detention under subsection (a) of this section whether or not continuous with full pretrial detention. The defendant shall be treated in accordance with § 23-1321(a) unless the trial is in progress, has been delayed by the timely filing of motions excluding motions for continuance, or has been delayed at the request of the defendant.

"(i) Nothing in this section shall be construed as modifying or limiting the presumption of innocence."

Sec. 4. Section 23-1323 of the District of Columbia Code is amended as follows:

Section
23-1323

(a) Subsection (c) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "subsection (c) of section 23-1322" and inserting the phrase "§ 23-1322(d)" in its place; and

(2) Paragraph (2)(B) is amended by striking the phrase "subsection (b) of section 23-1321" and inserting the phrase "§ 23-1322(e)" in its place.

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(b) Subsection (d) is amended by striking the phrase "subsection (d) of section 23-1322" and inserting the phrase "§ 23-1322(h)" in its place.

Sec. 5. Section 23-1324(a) of the District of Columbia Code is amended by striking the phrase "section 23-1321(d) or section 23-1321(e)" and inserting the phrase "§ 23-1321(c)(4)" in its place.

Section
23-1324

Sec. 6. Section 23-1325 of the District of Columbia Code is amended as follows:

Section
23-1325

(a) By striking the phrase "23-1325. Release in first degree murder cases or after conviction." and inserting the phrase "Release in first degree murder and assault with intent to kill while armed cases or after conviction." in its place.

(b) Subsection (a) is amended by adding the phrase "or assault with intent to kill while armed" after the word "degree".

Sec. 7. Section 23-1329 of the District of Columbia Code is amended as follows:

Section
23-1329

(a) Subsection (b) is amended as follows:

(1) By striking the phrase "subsection (b) of section 23-1321" and inserting the phrase "§ 23-1322(e)" in its place; and

(2) By striking the phrase "subsections (c) and (d) of section 23-1322" and inserting the phrase "§ 23-1322(d) and (h)" in its place.

(b) Subsection (d) is amended by striking the phrase "subsection (c)(2) of section 23-1322" and inserting the phrase "§ 23-1322(d)(7) in its place.

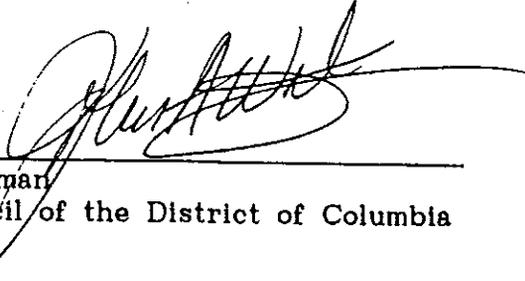
Sec. 8. The table of contents for subchapter II of chapter 13 of title 23 of the District of Columbia Code is amended as follows:

(a) By striking the phrase "23-1321. Release in other than first degree murder cases prior to trial." and inserting the phrase "23-1321. Release prior to trial." in its place; and

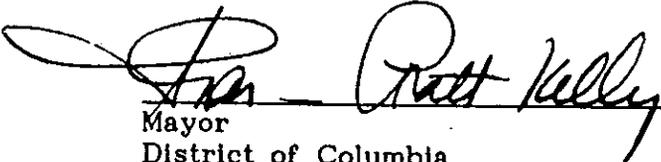
(b) By striking the phrase "23-1325. Release in first degree murder cases or after conviction." and inserting the phrase "23-1325. Release in first degree murder and assault with intent to kill while armed cases or after conviction." in its place.

Sec. 9. This act shall take effect after a 60-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(2) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(2),

and publication in either the District of Columbia Register, the District of Columbia Statutes-at-Large, or the District of Columbia Municipal Regulations.



Chairman
Council of the District of Columbia



Mayor
District of Columbia

APPROVED: March 20, 1992



COUNCIL OF THE DISTRICT OF COLUMBIA
Council Period Nine

RECORD OF OFFICIAL COUNCIL VOTE

DOCKET NO: Bill 9-360

Item on Consent Calendar

ACTION & DATE: Adopted First Reading, 2-4-92

VOICE VOTE: Approved
Recorded vote on request

Absent: all present

ROLL CALL VOTE. — RESULT _____

COUNCIL MEMBER	AYE	NAY	N.V.	A.B.	COUNCIL MEMBER	AYE	NAY	N.V.	A.B.	COUNCIL MEMBER	AYE	NAY	N.V.	A.B.
CHMN. WILSON					JARVIS					ROLARK				
BRAZIL					LIGHTFOOT					SMITH, JR.				
CRAWFORD					MASON					THOMAS, SR.				
CROPP					NATHANSON									
EVANS					RAY									

X — Indicates Vote A.B. — Absent N.V. — Present, not voting

CERTIFICATION RECORD

Deyle (me)
Secretary to the Council

March 6, 1992
Date

Item on Consent Calendar

ACTION & DATE: Adopted Final Reading, 3-3-92

VOICE VOTE: Approved
Recorded vote on request

Absent: all present

ROLL CALL VOTE. — RESULT _____

COUNCIL MEMBER	AYE	NAY	N.V.	A.B.	COUNCIL MEMBER	AYE	NAY	N.V.	A.B.	COUNCIL MEMBER	AYE	NAY	N.V.	A.B.
CHMN. WILSON					JARVIS					ROLARK				
BRAZIL					LIGHTFOOT					SMITH, JR.				
CRAWFORD					MASON					THOMAS, SR.				
CROPP					NATHANSON									
EVANS					RAY									

X — Indicates Vote A.B. — Absent N.V. — Present, not voting

CERTIFICATION RECORD

Deyle (me)
Secretary to the Council

March 6, 1992
Date

Item on Consent Calendar

ACTION & DATE: _____

VOICE VOTE: _____
Recorded vote on request

Absent: _____

ROLL CALL VOTE. — RESULT _____

COUNCIL MEMBER	AYE	NAY	N.V.	A.B.	COUNCIL MEMBER	AYE	NAY	N.V.	A.B.	COUNCIL MEMBER	AYE	NAY	N.V.	A.B.
CHMN. WILSON					JARVIS					ROLARK				
BRAZIL					LIGHTFOOT					SMITH, JR.				
CRAWFORD					MASON					THOMAS, SR.				
CROPP					NATHANSON									
EVANS					RAY									

X — Indicates Vote A.B. — Absent N.V. — Present, not voting

CERTIFICATION RECORD

Secretary to the Council

Date



SUPERIOR COURT LIBRARY

**LEGISLATIVE HISTORY
COLLECTION**

Legislation #

Short Title

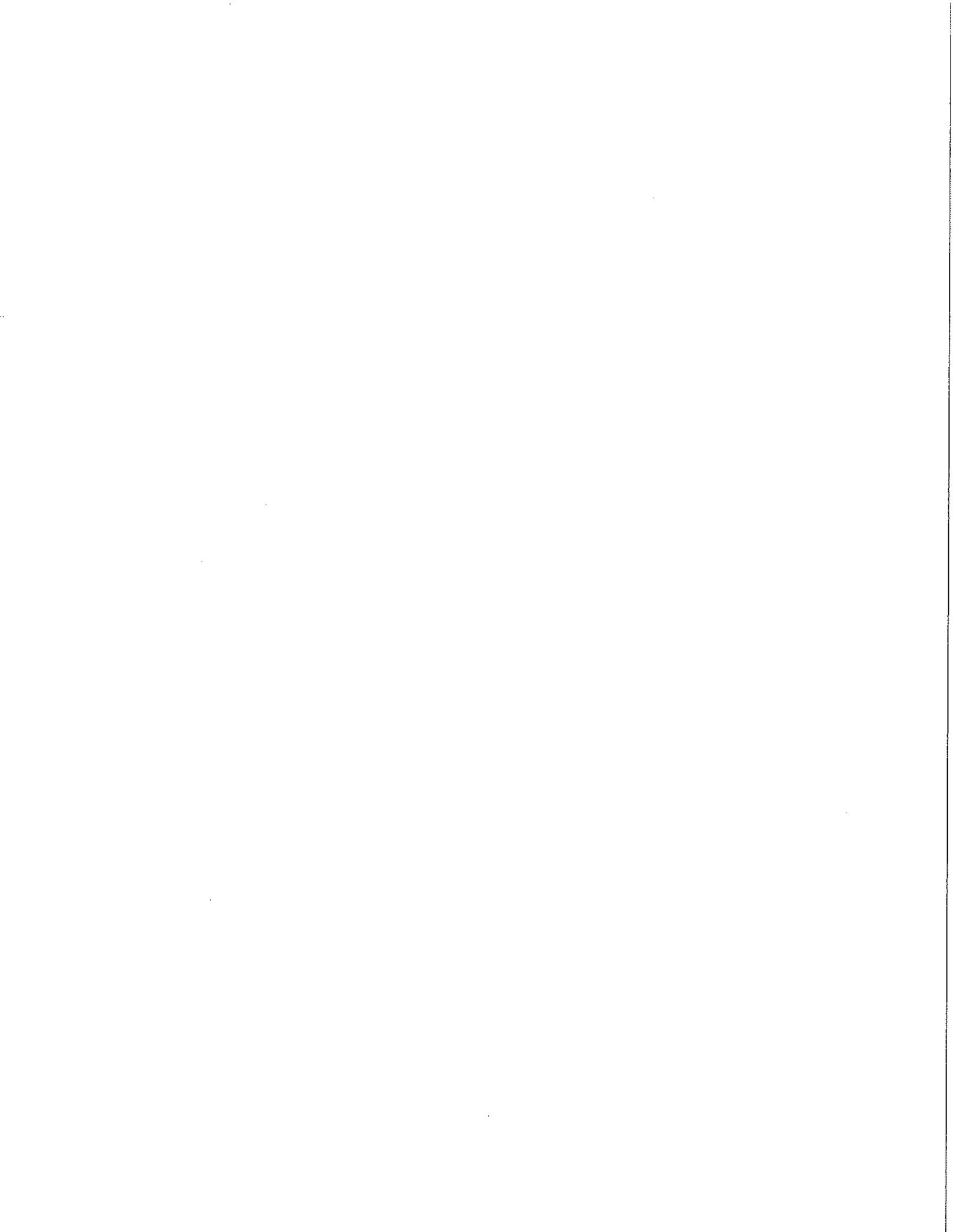
Act # 9-170

Bill 9-360

Bail Reform Amendment Act of 1991

Law #

L 9-125 copy 4



DC LAW 9-125 Feb 9-170
Council of the District of Columbia
Report

RECEIVED

1350 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

'92 JAN 30 P1:48

TO: All Councilmembers
FROM: Wilhelmina J. Rolark, Chairperson
Committee on the Judiciary
DATE: January 23, 1992
SUBJECT: Bill 9-360, the "Bail Reform Amendment Act of 1991"

Wilhelmina J. Rolark

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SUMMARY OF RECOMMENDATIONS

The Committee on the Judiciary, to which was referred Bill 9-360, the "Bail Reform Amendment Act of 1991", having considered the same, reports favorably and recommends that the legislation pass.

LEGISLATIVE HISTORY

November 6, 1991	Bill 9-360, "Bail Reform Amendment of 1991" introduced by Chairman Wilson and Councilmember Brazil.
November 6, 1991	Bill 9-360, "Bill Reform Amendment of 1991" referred to the Committee on the Judiciary.
December 19, 1991	Public Hearing on Bill 9-360.
January 23, 1992	Mark-up and discussion on Bill 9-360

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I. BACKGROUND AND NEED

The Bail Reform Act of 1966 was the first comprehensive statute to govern release practices in the federal courts and the District of Columbia. Prior to its enactment, the decision to release a defendant on bail was primarily a matter within the discretion of the courts, and there was little statutory guidance to assist the courts in the exercise of that decision. This system relied primarily on financial conditions to ensure an accused's presence at trial. It was recognized that an overdependence on cash bonds, coupled with delays in bringing defendants to trial, resulted in lengthy pretrial detention of too many defendants, a disproportionate number of whom were poor. To cure this infirmity, Congress enacted the Bail Reform Act of 1966 which applied to the federal courts and the courts of the District of Columbia.

The Bail Reform Act established a comprehensive set of criteria to be applied by the courts in making release determination and encouraging the use of forms of conditional release tailored to the individual defendants as alternatives to the use of cash bonds. The aim of the Act was to strike the proper balance between the rights of defendants, presumed to be innocent, and the need to protect the integrity of the judicial process and the safety of the public. The statutory presumption was, therefore, in favor of release.

The Bail Reform Act was amended as applied to the District of Columbia in 1970 as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970. The 1970 Act, which took effect on February 1, 1971, introduced significant changes to the District's bail laws, including the following major reforms; (1) a provision to allow the court to consider the safety of the community in setting non-financial conditions of release; (2) a provision which authorized additional penalties for committing an offense while on pretrial release; (3) a provision which provided for revocation of release and prosecution for contempt for violating conditions of release; and most importantly, (4) two provisions which authorized pretrial detention without bail for certain persons charged with non-capital offenses.

The next significant changes to the District's bail laws were made in 1982 by the Council of the District of Columbia which, pursuant to the Home Rule Charter, was granted authority to legislate in the criminal law area. D.C. Law 4-152¹, "District of Columbia Bail Reform Amendment Act of 1982", was enacted as one part of an overall criminal law reform effort in the District. D.C. Law 4-152 was introduced in response to increasing concern expressed at public hearings¹ regarding the issue of pretrial release and detention. That law made three substantive changes to then existing statutory provisions on pretrial release and detention. First, it expanded the time period within which a defendant must be brought to trial from sixty days to ninety days for

¹ As part of the criminal law reform effort, the Committee on the Judiciary held eight public hearings in 1980. The hearings focused on a proposal developed by the D.C. Law Revision Commission to revise the District's basic criminal code. At the conclusion of the hearings, the Committee earmarked bail procedure as an area for legislative action.

good cause shown. Second, the law increased the maximum time that a person rearrested while on probation or parole may be detained for five "calendar" days to five "business" days, thus excluding weekend and legal holidays from the computation of the five day period. Finally, D.C. Law 4-152 revised D.C. Code section 23-1325 to permit detention in first degree murder cases.

In 1989, the District's bail laws were again amended, this time through emergency legislation. Citing the record number of assaults and homicides committed with firearms in the District in 1988, the Council enacted the "Law Enforcement Emergency Amendment Act of 1989" (D.C. Act 8-10) and corresponding permanent legislation (D.C. Law 8-120, the "Law Enforcement Amendment Act of 1989"). This amendment, created "rebuttable presumptions" in favor of detention in cases of (1) first degree murder; (2) dangerous crimes; crimes of violence; (4) obstruction of justice (e.g., threatening witnesses); and (5) felony drug crimes, where the judge finds that there is a "substantial probability" that the crime was committed.

Bill 9-360, as introduced, would expand the categories of crimes that would be subject to pretrial detention and would lower the eligibility threshold for detention from "substantial probability" to "probable cause". Proponents of the bill argue that the legislation is necessitated by the current epidemic of violent crimes committed with firearms, and by the fact that the existing bail law is too limited to cover the most violent offenders, particularly violent youth offenders. This position was principally argued by the United States Attorney at the Committee's December 19th hearing (See attachment 7). According to United States Attorney Jay Stevens, the purported need to reform the bail law is that "too many armed violent offenders are not even eligible for pretrial detention under the current law"², and "judges are prevented from detaining until trial many of the most dangerous defendants who are charged with shootings, armed robberies, and other armed assaults."³ This premise is, however, not supported by the facts.

First, under D.C. Code section 23-1321 judges are required to consider the safety of the community in every case. It states, in pertinent part, "any person charged with an offense, other than murder in the first degree, shall at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance... unless the officer determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required or the safety of any other person or the community." (emphasis added). If such a determination is made, the judicial officer is then to "impose the first of the following conditions of release which will reasonably assure... the safety of any other person or the community". (emphasis added).

² Letter dated October 30, 1991, from Jay Stevens to John Carver, Director, Pretrial Services Agency.

³ Letter dated September 16, 1991 from Jay Stevens to Mayor Kelly.

Second, an analysis of actual court records reveals that the United States Attorney rarely requests either temporary holds (for violation of release conditions and parole and probation violations) or pretrial detention where he could under existing law. Instead, in the majority of those cases, the United States Attorney requested a money bond. (See attachment 6, Pretrial Services Agency statement, October 3, 1991, pp. 8-9). For example, of the 4667 felony cases received by the Superior Court during the first six months of 1990, 1358 or 39% met the current statutory guidelines for a detention hearing under D.C. Code section 23-1322. Only 231 cases (17%) were held under any provision of the detention statute, and in 835 cases money bonds were set. Since it is the U.S. Attorney's responsibility to request a preventive detention hearing, it is fair to conclude that in those 1358 eligible cases, the U.S. Attorney chose to opt for a money bond.

The highly publicized case involving Raymond Bigelow, who was arrested for the January 1 murder of a teenager, is illustrative of the U.S. Attorney's failure to use existing law. Mr. Bigelow was released pending a September 7, 1991 murder charge of assault with intent to commit murder. The U.S. Attorney could have requested the preventive detention of Mr. Bigelow as early as September 25, 1991 but failed to do so. On that date, Mr. Bigelow was found to have violated the conditions of his release and could have been detained under the current law. However, the government did not request detention and Mr. Bigelow was released again. On December 12, 1991, Mr. Bigelow was again found to have violated the conditions of his release and therefore was eligible for detention. Instead, he was sentenced to 15 days in jail for contempt and was released after serving the sentence.

On the other side of the issue was the Public Defender for the District of Columbia, who argued that the proposed bill goes too far and substantially changes the bail laws in favor of detention (See attachment 5). Taking a neutral position was the Director of Pretrial Services who presented in his testimony evidence of the use of the existing detention statute based on actual court records. The debate concerning whether the current law is too limited or too broad necessarily reflects a public policy view balancing the rights of the accused against the safety of the community. The proposed legislation addresses these competing concerns.

II. PURPOSE AND EFFECT

The purpose of Bill 9-360 as amended is to reform the existing bail laws of the District of Columbia to permit the pretrial detention of the most violent and dangerous criminal offenders (including persons with juveniles records) and, consequently, provide an additional measure of community safety. This bill defines the types of crimes which will make a person eligible for pretrial detention, and sets forth the procedure for doing so. Under such a procedure the United States Attorney has the opportunity to request a hearing, based on the defendant's statutory eligibility and to present evidence of a defendant's "dangerousness". The defendant has the right to challenge the basis for the requested detention. Finally, a detention order can be signed only after specific (and appealable) judicial findings are made. The intended effect is to make bail procedures more accountable to community safety concerns, while preserving the time-honored principle of presumption of innocence.

III. SECTION-BY-SECTION ANALYSIS

Section 1

States the short title of the Act.

Section 2

This section reenacts section 23-1321 of the D.C. Code. Paragraph 23-1321 (a) sets forth conditions for release prior to trial, except where the charge is first degree murder or assault with intent to kill while armed, in which case pretrial release would be governed by D.C. Code §23-1325.

Paragraph (c)(B)(xii) removes the 10% cap on appearance bond deposits. Judicial officers are thus left with the discretion to determine an appropriate deposit. Ten percent deposits are already posing financial problems and impacting some defendants' ability to obtain pretrial release. Removing the deposit cap may exacerbate the situation.

Paragraph (c)(B)(xiv)(3) prohibits the judicial officer from imposing a financial bond that results in pretrial detention. This paragraph mirrors a corresponding provision in the federal bail law. The intent is to eliminate "sub rosa" preventive detention (i.e., detention accomplished by setting money bonds beyond the supposed financial means of the defendant) and to replace it with a more honest and open process.

Section 3

This section reenacts section 23-1322 of the D.C. Code. The bill as introduced recommended an expansion of the temporary detention period from 3 days to 10 days for a person charged with a dangerous or violent crime while released on bond and from 5 to 10 days for a person charged with another offense while on probation or parole for determining whether the appropriate court, probation, parole or local authorities wish to take custody of the person. Based on the testimony in the record, the Committee concluded that this change was not warranted because the attorney for the government did not proffer adequate testimony to show that more time is needed to notify the requisite authorities of an offender's violation of release conditions. Thus the 5 day period under current law is retained in the Committee Print for persons who are charged with committing another offense while on probation or parole, and increase from 3 to 5 days the hold period for persons charged with a crime of violence or dangerous crime while released on bond.

Paragraph 23-1322(b)(1) eliminates the requirement of a "pattern of behavior consisting of past and present conduct" and permits detention on the basis of a single arrest, even if the defendant had no prior record. Since the term "dangerous crime" in the District includes all felony drug offenses, this means that a first offender charged with a drug offense is subject to detention on the basis of a single arrest. This provision is broader than the comparable federal provision, primarily because it allows detention in all drug felony cases regardless of the quantity of drugs distributed. It should be noted that Congress excluded small scale dealers from the federal detention statute.

Additionally, paragraph 23-1322 (b)(1) eliminates the requirement that a person be detained pretrial for a "crime of violence" if the person has been convicted of a "crime of violence" within the 10 years immediately preceding the alleged crime of violence for which he is presently being charged. Thus, here also a first offense would be sufficient to subject the offender to pretrial detention.

Paragraph 1322 (c) carries over the rebuttable presumption against pretrial release that exists in current law. Bill 9-360, as introduced, recommended lowering the burden of proof from "substantial probability" to "probable cause". The Committee decided against this change because it would be too great an erosion of constitutional safeguards. The "probable cause" standard is too low and thus, would lead to detention in many cases where there is no threat to the safety of the community.

Paragraph 1322(d)(1) changes the standards for continuing a detention hearing once the government has requested detention. It provides for mandatory temporary detention during a continuance, but does not require the government to offer any justification at all for a continuance of up to 3 days. In addition, no limit is placed on the length of a government continuance if good cause is shown. Current D.C. Code subsection 23-1322(c)(3) requires the government to show good cause for any continuance of the hearing, and limits government continuances to three days. Moreover, the current law permits, but does not require, detention pending a hearing.

Paragraph 1322(d)(6) omits language in current D.C. law (D.C. Code subsection 23-1322(d)(2)(B)) requiring that preventive detention cease whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention. Instead, this paragraph requires a judicial officer to make a preliminary finding that "information exists that was not known to the movant at the time of the hearing and that has material bearing on the issue" of dangerousness. Presumably, a defendant could remain in detention even if the government no longer has a viable prosecution.

Paragraph 1322(d)(7) maintains current law (D.C. Code §23-1322 (c)(2)) that a judge may issue an arrest warrant for a defendant who has been released if the government decides to seek detention. The proposed bill would have made detention mandatory in this circumstance. It would not matter that the person who had already been released is fully complying with all release conditions. The Committee felt that such a change was not justified in the record.

Paragraph 1322(h) significantly increases the amount of time a person can be detained before trial. Under current law, such detention is not to exceed 60 days, with an allowable extension of up to 30 additional days for good cause shown. This paragraph, however, extends the time by which the detainee must be brought to trial from 60 days to 100 days, with an extension of up to 20 days. The period is measured from the date of the arrest. The Committee added a requirement that indictment occur before the expiration of 90 days so that the defendant can have the remaining 10 days to prepare for trial. At the hearing it was reported that current practice is that the U.S. Attorney frequently waits until the 59th day (under present 60 day detention

period) to indict, necessarily resulting in the defendant requesting a continuance in order to prepare for trial. During the continuance the defendant remains detained, and therefore pretrial detention is lengthened. The Committee felt that by requiring the indictment by the 90th day, the defendant would be afforded the opportunity for discovery and perhaps lessen the need to request a continuance and prolong pretrial detention.

The Committee also eliminated all references to holding non-United States citizens pending determination by Immigration and Naturalization Service (INS) of whether the individual should be detained or deported. The Committee felt that immigration should be left in the federal domain where it properly belongs.

Section 4

this section amends D.C. Code §23-1323 with technical amendments.

Section 5

this section amends D.C. Code §23-1324 with technical amendments.

Section 6

This section adds "assault with intent to kill while armed" to D.C. Code §23-1325 so that this offense can be treated the same as first degree murder for purposes of determining whether or not pretrial release should be granted.

Section 7

States the standard effective date of the act.

IV. SUMMARY OF PUBLIC HEARING

On December 19, 1991, the Committee on Judiciary held a public hearing to receive comments on Bill 9-360, the "Bail Reform Amendment Act of 1991".

The following persons submitted oral and/or written testimony to the Committee and responded to questions:

Panel I

John Payton, Corporation
Counsel
Jay Stephens, Esq.

Angela Jordan-Davis, Director
John Carver, Director

Office of the Corporation Counsel
U.S. Attorney for the District of
Columbia
Public Defender Service
Pre-Trial Services Agency

Calvin W. Rolark, Publisher

Washington Informer Newspaper

Panel II

Kemi Morten, Executive Director	Unfoldment, Inc.
Jerome Jordan	
Waverly Yates, Executive Director	Bonbond, Inc.

Panel III

Gerald P. Monks, Executive Director	Professional Bail Agents of U.S.
Jerry Watson, Esq.	Bail Industry
John Floyd	Professional Bail Association

Lawrence Hebner, President	D.C. Superior Court Trial Lawyers' Association
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Panel IV

Deborah Carlow	Council of Hispanic Agencies
Mauricio Alarcon	Citizen
Eduardo Perdomo	Citizen

Panel V

Pedro Aviles, Chairman	D.C. Latino Civil Rights Task Force
Juan Milanes, Esq.	Washington Lawyers Committee for Civil Rights Under law
Deborah Sanders, Esq.	
Elan Nguyen	

Panel VI

Marc Granowitter, Sr. Research Assistant	National Association of Latino Elected & Appointed Officials
Cesar Collantes	League of United Latin American Citizens (LULAC)
Linda Mar, President	Kentucky Avenue Neighborhood Watch Association
Donald Sullivan, Executive Director	National Conference of Christians & Jews (NCCJ)
Shaun Moore	American Civil Liberties Union of the National Capital Area (ACLU)

Barbara Murphy	Advisory Neighborhood Commission 6A07
Diana Offen, Commissioner	Advisory Neighborhood Commission,
Sally Byington	Public Safety Committee, Capitol
Linda Barnes	Hill Restoration Society
Rob Adams, Co-Chairman	Advisory Neighborhood Commission-6C
Larry Broun	Citizen
Timothy J. Lynes, Secretary	Kentucky Avenue Neighborhood Watch Association

The following is a summary of the salient points presented orally and in writing at the hearing.

The first panel was composed of representatives from the Office of the Corporation Counsel, U.S. Attorney for the District of Columbia, Public Defender Service and Pretrial Services Agency.

John Payton, Corporation Counsel of the District of Columbia, testified on behalf of the Executive Branch and voiced support for Bill 9-360. The Corporation Counsel noted that the principle change that the enactment of Bill 9-360 would effect would be to make any person charged with a "dangerous crime" or a "crime of violence" eligible for consideration for pretrial detention.

The Executive recommended four substantive changes. First, the deletion of the provisions relating to detention of non-U.S. citizens pending determination of immigration status by the INS.

Secondly, Mr. Payton suggested there should be added to the class of cases in which the attorney for the government may request a detention hearing under D.C. Code section 23-1322 (b), cases that involve a serious risk that the person will flee and cases that involve a serious risk that the person will obstruct or attempt to obstruct justice.

Third, there should be added the class of cases to which the rebuttable presumption applies be expanded to include cases involving the commission of a dangerous crime or a crime of violence while the person was on release pending trial for a District of Columbia, state or federal offense.

Additionally, Mr. Payton recommended conforming amendments relating to the detention of a person charged with a crime who is determined to be an addict, and to D.C. Code section 23-1324, relating to appeal from conditions of release.

Finally, Mr. Payton suggested that provisions in Bill 9-374, the "Criminal and Juvenile Justice Reform Act of 1991", be included within the "Bail Reform Amendment Act of 1991". The suggested amendment would create a new section allowing for a judicial officer to take into account the individual's juvenile law enforcement and case records in determining pretrial release.

Jay Stephens, United States Attorney for the District of Columbia, supported this legislative initiative. Mr. Stephens' position was that the law simply does not allow young armed offenders to be detained unless they are charged with first degree murder. Additionally, Attorney Stephens pointed out that the bill will help to protect the citizens of this community from armed violence. It will provide greater security to witnesses who testify at trial, and it will create a greater sense of community confidence that participation in the criminal justice system makes a difference, he noted.

Angela Jordan Davis, Director, Public Defender Service voiced strong opposition to the bill. Ms. Davis noted that the proposed D.C. Bail Reform Act is broader than the current federal statute primarily because it allows detention in all felony drug cases, regardless of the quantity of drugs distributed. Ms. Davis commented on the authority of the courts and the U.S. Attorney to hold non-U.S. citizens under the bill as proposed which, in her opinion vastly exceeds the legal authority of the INS to take action based upon an arrest. Additionally, she pointed out that the proposed legislation does not include the requirement of a pattern of behavior consisting of past and present conduct by the accused and permits detention on the basis of a single arrest, even if the defendant has an otherwise spotless record.

Ms. Davis noted that the proposed bill would require the detention of a person with two or more convictions for a dangerous or violent crime, or for obstruction of justice if the person is charged with any felony, no matter how minor the offense is, and no matter how old the convictions are. Another substantive change, noted Ms. Davis, is the creation in the proposed bill of a rebuttable presumption that no combination of conditions will assure the safety of the community once a judge has probable cause to believe that a person has committed an enumerated offense.

Ms. Davis pointed out that the bill will significantly expand the amount of time a person can be detained before trial from 90 days to 120 days. In conclusion, as an alternative to bail reform, Ms. Davis made the following six recommendations:

- 1) obtain accurate information about the effectiveness of preventive detention;
- 2) improve pretrial services and supervision;
- 3) improve the juvenile justice system;
- 4) increase court resources;
- 5) increase street patrols and community policing; and
- 6) increase drug treatment services.

John A. Carver, III, Esq., Director, D.C. Pretrial Services Agency, stated that the bill expands the category of defendants subject to pretrial detention, and bases the procedural burdens on the prosecutor to secure detention by creating rebuttable presumptions and lowering the standard of proof on requisite judicial findings. Mr. Carver made two proposed changes, one would be to modify D.C. Code §23-1322 so that persons charged with a dangerous crime and persons charged with a crime of violence (as defined in D.C. Code §23-1331) could be treated equally with respect to eligibility for a pretrial detention hearing.

The second recommendation, the elimination of money bond, in Mr. Carver's opinion is required because the money bail system is a system that has outlived its usefulness. There is no empirical evidence supporting the notion that the money bail system of release operates more effectively than carefully monitored non-financial conditions of release.

Dr. Calvin W. Rolark, Publisher, Washington Informer, submitted a written statement for the record. He stated that the current statistics released from the D.C. Office of Criminal Justice Plans & Analysis 1991 Report revealed that juveniles are entering the criminal justice system at an alarming rate. Particularly, he noted that the majority of juveniles arrested in 1990 were ages 15 and 16, which accounts for 43% of the total juvenile arrests, and those over the age of 16 accounted for 30 percent of all juvenile arrests. Furthermore, juveniles age 14 accounted for 21 percent of arrests, those aged 10 to 12 accounted for five percent of arrests and those under 10 accounted for two percent of arrests. These startling figures reveal a generation of young black men that are being lost. We need programs that mainly focus on youth development activities that are recreational, educational, employment related and foster positive self-esteem. The community cannot afford to lose these youth.

The second panel was comprised of representatives from two community organizations, Unfoldment, Inc. and Bonabond, Inc. These organizations discussed a dire need to have programs within the community which provide rehabilitative services to persons who enter the criminal justice system.

Kemi Morten, Executive Director of Unfoldment, Inc., voiced opposition to the enactment of this legislation. Ms. Morten expressed concern that in enacting the bill, the Committee carefully consider the distinction between the violent and non-violent offenders. Ms. Morten further noted that the courts and prosecutors already have the power to hold without bail those who are a danger to our community. She concluded that this bill goes too far.

Mr. Jerome Jordan, Assistant Director, Unfoldment Substance Abuse Treatment Program (USATP), voiced opposition to the bill and advocated the need to increase services for persons with substance abuse problems.

Mr. Waverly Yates, Executive Director of Bonabond, Inc., opposed the bill. He stressed the need to more frequently utilize third party custody programs.

The third panel was comprise of representatives from the Bail Industry.

Gerald P. Monks, Executive Director, Professional Bail Agents of the United States, noted that punishment is key in establishing bail and acknowledged the need for accountability and responsibility.

Jerry W. Watson, Attorney, stated that the group of persons this bill is targeted to protect represents only a very small percentage of those who are going to suffer. He cited a 1991 federal study by the Bureau of Justice Statistics, which reported that on money bonded defendants the appearance rate was up and the recidivism rate was down.

John Floyd, Professional Bail Association, stated that the proposed bill is over broad and will have a substantial fiscal impact on the District of Columbia. He, therefore, suggested a system like Maryland where each time a defendant posts bond, one percent of the bond goes into coffers of the state, thus it becomes a revenue enhancer.

Lawrence Hebner, President, D.C. Superior Court Trial Lawyers Association, opposed the enactment of the bill. He believes that the bill would detain far more citizens than anticipated by the U.S. Attorney. Mr. Hebner urged the Council to look at existing mechanisms that allow the U.S. Attorney to request preventive detention.

Deborah Carlow, Citizen, voiced opposition to the enactment of the bill. Her main contention was that the bill lacked sensitivity to members of the international community and most importantly, would have an adverse impact on the Hispanic population in Washington, D.C.

Mauricio Alacon, Citizen, expressed opposition to the bill, particularly the provisions which addressed deportation. Ms. Alacon noted that such provisions would clearly legalize discrimination in the District of Columbia court system and would likely increase the lack of trust Latinos feel toward the police and the judicial system.

Edwardo Perdomo, President of the Latino American Festival and Chairman of the Hispanic American Contractors Association, voiced opposition to the enactment of the proposed legislation. Mr. Perdomo pointed out that the bill contains language and provisions which are clearly unfair, discriminatory, unconstitutional and would amount to a flagrant violation of one's civil rights.

Pedro Aviles, Chairman, D.C. Latino Civil Rights Task Force and Executive Director of the Central American Refugee Center, noted that the District's Latino community is extremely concerned about the present levels of violence and the crime affecting the safety and well being of the citizens of the District. He added that the provisions in the bill addressing deportation are discriminatory and violate the spirit of the Latino Blueprint for Action, a step backwards in the efforts to improve the quality of life of the Latino and immigrant community.

Juan E. Milanes, Esquire, Washington Lawyers's Committee of Civil Rights Under Law, opposed the bill. Mr. Milanes noted that, at a minimum, section 23-1322 violates the Equal Protection Clause of the United States Constitution because it targets a particular class of persons without so much as a rational basis. In fact, Mr. Milanes pointed out, the section does not merit a "strict scrutiny" analysis because of the lack of a compelling state interest furthered by the least discriminatory means available.

Deborah Sanders, Esq., Director, Asylum and Refugee Rights Law Project of the Washington Lawyers' Committee for Civil Rights Under Law, noted that her organization and other organizations have made a study of the proposed "Bail Reform Amendment Act of 1991", which reveal that under the U.S. Constitution, the bill illegally requires detention based on a person's ability to prove his or her immigration status without regard to the criminal offense with which he or she are charged.

Elan Nguyen, John Gardner Fellow, Asylum and Refugee Rights Law Project, Washington Lawyer's Committee for Civil Rights Under Law, urged the Council to respect the passionate hope for freedom for refugee groups and within that context, to reject the bill.

Marc Granowitler, Senior Research Associate, D.C. Office of the National Association of Latino Elected and Appointed Officials, purported that the bill would most likely affect individuals who do not look or sound like they are U.S. citizens or who lack Anglo surnames. For these reasons, if this legislation were enacted, Latinos as a group would suffer disproportionately, and it would certainly punish some individuals who are living in or visiting this country.

Cesar A. Collantes, Special Assistant and Edward Pena, Jr., LULAC, both view Bill 9-360 as unconstitutional and as a violation of civil rights laws. Mr. Collantes noted that the issues presented by this bill will not adversely impact on the Latino population, alone but would have a devastating impact on the international community, as a whole.

Martha V. Wyatt, Executive Director and Karin M. Yancy, Immigration Specialist, Hispanic Committee of Virginia, submitted a written statement urging the Council to reject the bill because it is likely to have a profoundly harmful effect on permanent residents, refugees and any kind of immigrants living in this area.

Clare Cherkasky, Director, Immigration, Hogar Hispano Catholic Diocese of Arlington, Inc., stated that the legal provisions currently in force in the District of Columbia are adequate to protect the security of the city's population. She argued that the provisions relating to deportation are discriminatory and are merely an attempt to scapegoat an already disenfranchised population.

Dr. Nguyen Dinh Thang, Executive Director, Boat People S.O.S., submitted a written statement which voiced strong opposition to the bill because it would place an unfair burden on Vietnamese Americans and invite discriminatory actions against a community already sensitive to arbitrary government inquiry.

Albert Mokhiber, President, American-Arab Anti-Discrimination Committee, submitted written comments which reflect his dissatisfaction with the bill. Mr. Mokhiber pointed out that under the proposed bill, the person arrested bears the burden of proving that he or she is a citizen or permanent resident of the United States. Very few, if any, citizens and permanent residents of the United States carry with them evidence of their citizenship or permanent resident status.

Tran Van Kien, President, Executive Committee, National Congress of Vietnamese in America, submitted written comments voicing strong opposition to the bill. It's passage would betray the promise of refuge--legal and political-- that the Vietnamese received upon entering the United States, noted Mr. Kien.

Kathleen M. Sullivan, Washington Representative, American Council for Nationalities Service, urged the Judiciary Committee to take the public's

collective comments into account and remove any provision requiring pretrial detention of aliens because there is no rationale basis to assume that every alien who lacks permanent resident status is more likely than any other person to be harmful to the public or to abscond.

Wayne Matelski and Christine Herrell, Attorney, Arent Fox Kinter Plotkin & Kahn, expressed opposition to the enactment of the legislation. Particularly, the bill violates the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment of the U.S. Constitution. Additionally, it conflicts with the Fifth Amendment right against self testimony and invalidly places the burden of proof on the defendant.

Carol Wolchok, Attorney Consultant to the American Bar Association of Immigration Issues, noted that a city which enjoys the rich diversity of the District of Columbia ought not enact legislation that discriminates against persons on the basis of presumed citizenship or immigration.

Le Van Ba, President, League of Vietnamese Associations in Washington Metropolitan Area, voiced strong opposition to the proposed Bail Reform Amendment Act. Particularly, he noted that it would impact on thousands of newly arrived Vietnamese refugees in the D.C. metropolitan area who do not yet have their "green cards". Additionally, very few Vietnamese American citizens carry their naturalization certificates or passports with them at all times. It is unreasonable to require them to do so.

Donald F. Sullivan, the National Conference of Christians and Jews, Inc (NCCJ), opposed the enactment of the bill. He observed that at a time when this community faces the most serious kinds of social and economic problems, it would be a major error for the District of Columbia City Council to pass legislation which would justify discriminatory treatment, dividing us at a time when we need to be working together.

Shaun Moore, American Civil Liberties Union of the National Capital Area (ACLU), opposed the bill noting that it is a serious and unnecessary intrusion on liberty, will do nothing to stop criminal activity, and will be a costly measure of little real value. As drafted, the legislation would allow bondless detention for the those charged with a dangerous or violent crime while armed even though the accused has no history of criminal or dangerous behavior. Secondly, the legislation would allow bondless detention for those charged with violent or dangerous crimes while armed based only on a finding of probable cause. This standard is the lowest in criminal law.

Barbara Murphy, Advisory Neighborhood Commission 6A07 testified in support of the legislation. She contended that this bill would give us the peace of mind that we all deserve. She pleaded with the Committee not to make the system that is supposed to protect us more of a mockery than is now believed to be.

Linda Barnes, President, Capitol Hill Association of Merchants and Professionals (CHAMPS), testified in support of the bill. She noted that the amendments in the bill are necessary because, regrettably, we are in a war, which will be lost if firm guidance is not established now. She discussed the change in moral and the frequent reliance on guns to settle simple disputes.

Denis Zegar, Advisor Neighborhood Commissioner 6B06, expressed support for enactment of the bill. In particular, he supports the provision that eliminates the distinction between dangerous crimes and crimes of violence. He pointed out that government has the obligation to guarantee its citizenry a reasonably safe environment in which malicious and wanton disregard of life and property are considered deplorable and undesirable.

Sally Byington, Chairperson, Public Safety Committee, Capitol Hill Restoration Society, supported the enactment of the bill. Ms. Byington noted that members of her organization are concerned that pretrial detention not be more widely used than necessary because the principle that an accused is presumed innocent until proven guilty is important. However, she concluded that Bill 9-360 is sufficiently limited in its scope and contains adequate safeguards against misuse.

Robert Adams, Commissioner, Advisory Neighborhood Commission 6C, reported that the members of his ANC voted not to support the bill. Mr. Adams stated that locking up young people with hardened criminals does not teach the youth about the disadvantages of criminal lifestyle -- it teaches them the tricks of a criminal lifestyle. He further stated that the preventive detention laws, such as D.C. Code section 1322, already exist and are underused.

Laurence I. Broun, Member, Advisory Neighborhood Commission 6A, Public Safety Committee, spoke in favor of the bill and urged the Council to enact it. He reported that residents of ANC 6A are frustrated and fed up with crime because fully one-third of the people who live in his neighborhood will not leave their houses at night.

Timothy J. Lynes, Secretary, Kentucky Avenue Neighborhood Block Association, testified in support of Bill 9-360. Mr. Lynes contended that violent crime and recidivism represent some of the most serious problems which our city faces today. The perpetrators of violent crimes present a clear and present danger to the safety of our community. The residents of our block, young and old alike, should be free to walk from their homes to supermarket without fear. Passage of the Bail Reform Act will hopefully help this to occur.

Linda A. Mar, President, Asian Pacific American Bar Association of the Greater Washington, D.C. Area, urged the Committee to reject the provisions which would detain non U.S. citizens.

Diana Offen, Commissioner, Advisory Neighborhood Commission 6A09, voiced support for the passage of the bill. Ms. Offen noted that our city is slowly dying as a viable community and it is time that we take positive action.

EXECUTIVE COMMENTS

The Executive supports Bill 9-360. Executive Comments were presented by Jonh Payton, Corporation Counsel for the District of Columbia (see attachment 3).

VI. FISCAL IMPACT STATEMENT

Bill 9-360, the "Bail Reform Amendment Act of 1992" will have a significant fiscal impact on the current and next five fiscal years. The Executive estimates the annual cost of this legislation to be \$5.2 million if calculated for a 100 day detention; and \$6.9 million if calculated at a 120 day detention. The Committee disagrees. We believe the fiscal impact will be significantly higher. Assuming a detention rate similar to that in U.S. District Court (70%), Bill 9-360 would cost \$30.5 million annually, and \$150 million over 5 years.

Under Bill 9-360 as amended, approximately 75% of all felony cases filed will be eligible for pretrial detention. The Committee can not estimate the two most significant variables which will affect fiscal impact: the number of times the United States Attorney will request pretrial detention, and the number of times the courts will grant that request. We therefore estimate the fiscal cost on an annual basis to be between a range of \$43 million and \$4.4 million.

The Pretrial Services Agency completed a survey of cases for January 1, 1990 to June 30, 1990 to determine the number of cases eligible for detention. They found:

TOTAL CASES FILED	4,667	100.0%
DANGEROUS OR VIOLENT(NO DRUGS)	1,329	28.5%
DANGEROUS (DRUG FELONIES)	2,180	46.7%
ALL OTHER FELONIES	1,158	24.8%

The Committee annualized these figures for the full 8,558 felony filings in calendar year 1990 as follows:

TOTAL CASES FILED	8,558	100.0%
DANGEROUS OR VIOLENT(NO DRUGS)	2,429	28.5%
DANGEROUS (DRUG FELONIES)	3,997	46.7%
ALL OTHER FELONIES	2,138	24.8%

Under Bill 9-360, all dangerous or violent crimes are eligible for pretrial detention. Thus, 6,426 cases (2,429 + 3,997) or 75.2% of felony cases (28.5% + 46.7%) are eligible for pretrial detention. Under Bill 9-360, a person may be held for up to 100 days, with an additional 20 days for good cause shown.

In his letter to the Committee Chair, Chief Judge Fred Ugast stated:

"The expansion from sixty (plus thirty) days in the existing statute to the 100 (plus 20) days in Bill 9-360, will relieve the pressure to some extent in the short run; but we would expect, with our current capacity, to run up against the new time constraints fairly quickly, and at that point I have serious concerns about our ability to dispose of all of these cases within the statutory period without additional resources."

Congress, not the Council must approve additional judges to the Superior Court. This process along with the appointment process can be time consuming. As the Court believes it will run up against time constraints, the Committee is using the 120 day detention period.

Continuing with the fiscal impact, multiplying 120 days by 6,426 cases yields a total of 771,120 possible days of incarceration in pretrial detention. From this figure we deduct the pretrial detention time actually spent in calendar year 1990. This includes 80 pretrial detention cases at 90 days per case under the current law, $80 \times 90 \text{ days} = 7,200 \text{ days}$ (source: Pretrial Services Agency). We must also deduct the time persons who committed dangerous or violent crimes were held before being released on bond, 1,210 persons at an average of 39 days: $1,210 \times 39 \text{ days} = 47,190 \text{ days}$ (source: Department of Corrections). Both of these figures are already included in the maximum number and must be removed to avoid duplication.

Finally, Bill 9-360 increases the 3 day detention for persons charged while on bond pending trial to 5 days. In 1990, there were 133 such holds. An additional 2 days per case would be 266 days. Taken together, there would be a possible 716,996 days of pretrial detention in calendar year 1990.

	6,426 CASES X 120 DAYS	771,120 DAYS
LESS		
	PRETRIAL DETENTION 80 X 90 DAYS	(7,200) DAYS
	HELD BEFORE BOND 1,210 X 39 DAYS	(47,190) DAYS
		<u>716,730 DAYS</u>
PLUS		
	2 DAY INCREASE FOR 3 DAY HOLD 133 X 2 =266	<u>266 DAYS</u>
		716,996 DAYS
	TOTAL POSSIBLE PREVENTIVE DETENTION DAYS	
	PER MANDAY COST OF INCARCERATION (AS PER DEPT. CORR.	60.90
	MAXIMUM ANNUAL FISCAL IMPACT	<u>\$43,665,056</u>

This \$43.7 million cost is the top end of the scale. As stated above, the Committee cannot estimate the behavior of the United States Attorney or the Judges of the Superior Court as to how many preventive detention cases

will be approved. For example, the United States Attorney is successful in obtaining preventive detention in 70% of all felony cases in the United States District Court. Yet in the Superior Court, the U.S. Attorney obtained preventive detention in only 80 cases in calendar year 1990, one percent of cases filed. The Committee however, believes that the number of approved preventive detention cases must increase significantly.

In a letter to the Committee, Chief Judge Fred Ugast stated that over a six month period in 1991, the U.S. Attorney requested preventive detention in 48 of 379 cases where the defendant was charged with a crime of violence while armed, approximately 12.7%. Of course, in many of these cases, the defendant may not have been eligible for preventive detention under current law (i.e. first offenders). However, we would expect that under the amended statute, the U.S. Attorney would request preventive detention in most of these cases. If the offenders in the remaining 331 cases were preventively detained, the cost to the District would be approximately \$2.4 million, \$4.8 million annualized. (These figures would be reduced by \$786,000 and \$1.6 million respectively if you assume all were held on money bond for the average 39 days.) Of course, these are only the violent while armed cases.

We must also consider the remainder of the violent crimes and dangerous crimes (non-drug), another approximately 1,600 cases. Bill 9-360 removes consideration of prior convictions in violent crimes and "past and present conduct" from consideration in dangerous crimes for eligibility for pretrial detention. These changes should make it easier for the U.S. Attorney to make a case for preventive detention.

Much of the fiscal impact of Bill 9-360 will depend on what policies the U.S. Attorney sets for seeking detention in drug distribution cases, currently included in the definition of "dangerous crime", approximately half of all felony filings in the Superior Court (3,997 filings in 1990). The Committee Print does not include within the rebuttable presumption drug cases with a maximum term of 10 years or more as included in federal law and recommended by the Corporation Counsel. Under District law, all Schedule I, Schedule II, and Schedule III controlled substances which are narcotic or abusive drugs carry a maximum sentence of 30 years. Inclusion of these crimes within the rebuttable presumption would come close to mandating that all persons charged with drug distribution, half the cases in the Superior Court, be preventively detained. Hopefully, the U.S. Attorney will show some restraint when developing policy in this area.

Finally, Bill 9-360 tracks the federal bail statute in specifically stating that "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." Currently, the U.S. Attorney is using money bonds in lieu of pretrial detention. He will no longer have this option and thus must request detention hearings to hold persons in most cases.

Following is a schedule of possible impact on the corrections system based on what percentage of cases the U.S. Attorney obtains pretrial detention.

716,996 x 100% = 716,996 (1,964) x 60.90 = \$43,665,056
716,996 x 90% = 645,296 (1,768) x 60.90 = \$39,298,526
716,996 x 80% = 573,597 (1,571) x 60.90 = \$34,932,057

716,996 x 70% = 501,897 (1,375) x 60.90 + \$30,565,527
U.S. District Court Detention Level

716,996 x 60% = 430,198 (1,179) x 60.90 = \$26,199,058
716,996 x 50% = 358,498 (982) x 60.90 = \$21,832,528
716,996 x 40% = 286,798 (786) x 60.90 = \$17,466,056
716,996 x 30% = 215,098 (589) x 60.90 = \$13,099,468
716,996 x 25% = 179,249 (654) x 60.90 = \$10,916,264
716,996 x 20% = 143,399 (393) x 60.90 = \$8,732,999
716,996 x 15% = 107,549 (295) x 60.90 = \$6,549,734
716,996 x 10% = 71,700 (196) x 60.90 = \$4,366,530

(numbers in parentheses represent increase in pretrial population)

An additional cost will be the cost of adding new judges to the system. It will cost \$311,000 and 5 continuing full time positions for each new judge.

The cost of \$60.90 per day is an average cost, not an actual cost. As a result, it is possible to reduce the possible cost of this legislation by several different methods. However, each such method brings with it other considerations. For example, we could place more persons in facilities without court ordered caps, or ask the courts to amend current population caps as recently suggested by the Attorney General and the Supreme Court. Such a move would of course aggravate our current prison overcrowding situation with the attendant problems.

Another option would be to increase the use of contract jail space from other states. The current cost of these contracts runs from \$45 to \$55 per manday. The Department of Corrections had begun phasing down this program because of a reduction in our Lorton population and problems in some county institutions. Problems revolved around the acts of prejudice perpetrated on D.C. prisoners (i.e. Klan activities, threats of castration, failure to provide medical services, etc.). However, with the return of prisoners from federal institutions, some contracts have been continued. Enlarging this program may revisit the same problems previously experienced.

Finally, we should remember that under our Prison Overcrowding Emergency Powers Act, we reduce the sentences of sentenced prisoners by up to 180 days to create space for new prisoners. Releasing a sentenced prisoner for a pretrial detainee would be a wash with no additional cost.

Funding for this legislation will be paid through general appropriations.

VII. IMPACT ON EXISTING LAW

Generally, Bill 9-360 would amend the District's existing bail laws by making it more difficult for persons arrested for certain crimes to obtain release prior to trial. The bill would expand the pool of those eligible for pretrial detention in several significant ways. First, it removes the requirement under current law that there be evidence of past or present criminal conduct to predict the defendant's dangerousness to the community. A first offense, if "dangerous" or "violent" (as defined in D.C. Code, section 23-1331), would be sufficient to detain a person. Second, in the case of "crimes of violence", this measure eliminates the requirement that a person have a record of adult convictions, effectively including juveniles (i.e., juvenile adjudications) within the bill's coverage. Third, the bill permits the judicial officer to automatically consider (i.e., no evidentiary finding is required) for pretrial detention a person who has committed the crime of "assault with intent to kill while armed", in addition to persons who commit first degree murder.

Finally, Bill 9-360 eliminates judicial discretion to detain a person who meets the statutory requirements for detention by changing the statutory language from "may" to "shall". The overall impact is to tilt bail law in favor of detention for certain crimes (e.g., murder I, assault with intent to kill while armed, violent, and dangerous) and under certain conditions (e.g., violation of probation).

VIII. COMMITTEE ACTION

On Thursday, January 23, 1992, the Committee on the Judiciary met in an additional meeting to mark-up and discuss an Amendment in the Nature of a Substitute to Bill 9-360, the "Bail Reform Amendment Act of 1992". Council Chairman Wilson indicated that the cost of the legislation, based on information from the U.S. Attorney, would be approximately \$4.2 million. Committee staff indicated that Mr. Wilson's projected cost approximates the Committee's estimate of the additional cost for violent crimes while armed cases only (see page 18, first paragraph). However, because the legislation applies to additional categories of cases other than violent crimes while armed, the original cost range of \$4.4 million to \$43 million was accurate. Chairman Wilson indicated he was willing to budget \$4.2 million for this legislation. Councilmember Ray asked that language be included in the Committee Report indicating that funding for this legislation will be paid through general appropriations.

Following a discussion of the substantive changes to Bill 9-360, Chairperson Rolark moved the bill. Subsequently, Chairperson Rolark moved an Amendment in the Nature of a Substitute to Bill 9-360, and the corresponding Committee Report, with leave to staff to make technical and conforming changes. The vote was as follows:

	<u>Amendment in Nature of a Substitute to Bill 9-360</u>	<u>Report on Bill 9-360</u>
Chairperson Rolark	Aye	Aye
Councilmember Crawford	Aye	Aye
Councilmember Mason	Aye	Aye
Councilmember Nathanson	Aye	Aye
Councilmember Ray	Aye	Aye

IX. ATTACHMENTS

1. Bill 9-360, the "Bail Reform Amendment Act of 1991"
2. Committee Print of 9-360
3. Executive Branch Testimony
4. Executive Branch Fiscal Impact Statement
5. Public Defender Service Testimony
6. Pretrial Services Testimony
7. United States Attorney Testimony

Council of the District of Columbia

Memorandum

1350 Pennsylvania Avenue, N.W. Washington, D.C. 20004

To: Members of the Council
From: Phyllis Jones, Secretary to the Council
Date: November 6, 1991
Subject: Referral of Proposed Legislation

Notice is given that the attached proposed legislation has been introduced in the Office of the Secretary on November 6, 1991. Copies are available in Room 28, Legislative Services Division.

TITLE: Bail Reform Amendment Act of 1991, Bill 9-360

INTRODUCED BY: Chairman Wilson and Councilmember Brazil

The Chairman is referring this proposed legislation to the Committee on the Judiciary.

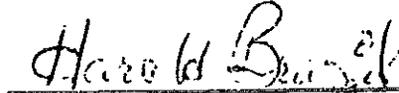
cc: General Counsel
Legislative Counsel
Legislative Services Division

RECEIVED



Chairman John A. Wilson

02
03



Councilmember Harold Brazil

04
05

A BILL

06

07

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

08

09

Chairman John A. Wilson and Councilmember Harold Brazil introduced the following bill, which was referred to the Committee on _____.

10
11

To amend sections 23-1321 and 23-1322 of of the District of Columbia Code to change pretrial release and detention procedures in the District of Columbia.

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13
14

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA,

15

That this act may be cited as the "Bail Reform Amendment Act of 1991".

16

Sec. 2. Section 23-1321 of title 23 of the District of Columbia Code is amended to read as follows:

17
18

"Sec. 23-1321. Release prior to trial.

19

"(a) Upon the appearance before a judicial officer of a person charged with an offense, other than murder in the first degree, which

20
21

shall be treated in accordance with the provisions of D.C. Code §23-1325, 01
the judicial officer shall issue an order that, pending trial, the person 02
be: 03

"(1) Released on personal recognizance or upon execution of 04
an unsecured appearance bond under subsection (b) of this section; 05

"(2) Released on a condition or combination of conditions under 06
subsection (c) of this section; 07

"(3) Temporarily detained to permit revocation of conditional 08
release, deportation, or exclusion under section 23-1322; or 09

"(4) Detained under section 23-1322(b). 10

"(b) The judicial officer shall order the pretrial release of the person 11
on personal recognizance, or upon execution of an unsecured appearance 12
bond in an amount specified by the court, subject to the condition that 13
the person not commit a local, state or federal crime during the period 14
of release, unless the judicial officer determines that the release will not 15
reasonably assure the appearance of the person as required or will 16
endanger the safety of any other person or the community. 17

"(c)(1) If the judicial officer determines that the release described 18
in subsection (b) of this section will not reasonably assure the appearance 19
of the person as required or will endanger the safety of any other person 20
or the community, the judicial officer shall order the pretrial release of 21
the person: 22

"(A) Subject to the condition that the person not commit 23
a local, state or federal crime during the period of release; and 24

"(B) Subject to the least restrictive further condition, 25
or combination of conditions, that the judicial officer determines will 26
reasonably assure the appearance of the person as required and the safety 27

of any other person and the community, which may include the condition 01
or combination of conditions that the person during the period of release 02
shall: 03

"(i) Remain in the custody of a designated person 04
or organization that agrees to assume supervision and to report any 05
violation of a release condition to the court, if the designated person or 06
organization is able reasonably to assure the judicial officer that the 07
person will appear as required and will not pose a danger to the safety 08
of any other person or the community; 09

"(ii) Maintain employment, or, if unemployed, 10
actively seek employment; 11

"(iii) Maintain or commence an educational program; 12

"(iv) Abide by specified restrictions on personal 13
associations, place of abode, or travel; 14

"(v) Avoid all contact with an alleged victim of the 15
crime and with a potential witness who may testify concerning the offense; 16

"(vi) Report on a regular basis to a designated law 17
enforcement agency, pretrial services agency, or other agency; 18

"(vii) Comply with a specified curfew; 19

"(viii) Refrain from possessing a firearm, destructive 20
device, or other dangerous weapon; 21

"(ix) Refrain from excessive use of alcohol, or any 22
use of a narcotic drug or other controlled substance. The terms "narcotic 23
drug" and "controlled substance" shall have the same meaning as in section 24
102 of the District of Columbia Uniform Controlled Substance Act of 1981, 25
effective August 5, 1981 (D.C. Law 4-29; D.C. Code §33-501), without a 26
prescription by a licensed medical practitioner; 27

"(x) Undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(xi) Return to custody for specified hours following release for employment, schooling or other limited purposes;

"(xii) Execute an agreement to forfeit upon failing to appear as required the designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court the indicia of ownership of the property or the percentage of the money as the judicial officer may specify;

"(xiii) Execute a bail bond with solvent sureties in whatever amount is reasonably necessary to assure the appearance of the person as required; or

"(xiv) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

"(2) In considering the conditions of release described in subsections (c)(1)(B)(xii) or (c)(1)(B)(xiii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

"(3) No financial condition may be imposed to assure the safety of any other person or the community.

"(4) A person for whom conditions of release are imposed and
who, after 24 hours from the time of the release hearing, continues to
be detained as a result of inability to meet the conditions of release, shall
upon application be entitled to have the conditions reviewed by the judicial
officer who imposed them. Unless the conditions of release are amended
and the person is thereupon released, on another condition or conditions,
the judicial officer shall set forth in writing the reasons for requiring the
conditions imposed. A person who is ordered released on a condition that
requires that the person return to custody after specified hours shall,
upon application, be entitled to a review by the judicial officer who
imposed the condition. Unless the requirement is removed and the person
is thereupon released on another condition or conditions, the judicial
officer shall set forth in writing the reasons for continuing the
requirement. In the event that the judicial officer who imposed conditions
of release is not available, any other judicial officer may review the
conditions.

"(5) The judicial officer may at any time amend the order to
impose additional or different conditions of release."

Sec. 3. Section 23-1322 of the District of Columbia Code is amended
to read as follows:

"Sec. 23-1322. Detention prior to trial.

"(a) The judicial officer shall order the detention of any person
charged with an offense for a period of not more than 10 days, excluding
Saturdays, Sundays, and holidays, and direct the attorney for the
Government to notify the appropriate court, probation or parole official,
or local or state law enforcement official, or the appropriate official of the

Immigration and Naturalization Service, if the judicial officer determines 01
that: 02

"(1) The person charged with an offense: 03

"(A) Was at the time the offense was committed on: 04

"(i) Release pending trial for a felony under local, 05
state, or federal law; 06

"(ii) Release pending imposition or execution of 07
sentence, appeal of sentence or conviction, or completion of sentence, for 08
any offense under local, state, or federal law; or 09

"(iii) Probation or parole for any offense under local, 10
state, or federal law; or 11

"(B) Is not a citizen of the United States or lawfully 12
admitted for permanent residence, as defined in section 101(a)(20) of the 13
Immigration and Nationality Act (8 U.S.C. § 1101(a)(3) (1989)); and 14

"(2) The person may flee or pose a danger to any other person 15
or the community. If the official fails or declines to take the person into 16
custody during that period, the person shall be treated in accordance with 17
the other provisions of this section, notwithstanding the applicability of 18
other provisions of law governing release pending trial or deportation or 19
exclusion proceedings. If temporary detention is sought under paragraph 20
(1)(B) of this subsection, the person has the burden of proving to the 21
court that person's United States citizenship or lawful admission for 22
permanent residence. 23

"(b) The judicial officer shall hold a hearing to determine whether 24
any condition or combination of conditions set forth in section 23-1321(c) 25
will reasonably assure the appearance of the person as required or the 26

safety of any other person or the community, upon oral motion of the attorney for the government, in a case that involves:

"(1) A crime of violence, or a dangerous crime, as defined in section 23-1331;

"(2) An offense under D.C. Code §22-722; or

"(3) Any felony if the person has been convicted of 2 or more offenses, described in paragraphs (1) and (2) of this subsection, or 2 or more state or federal offenses that would have been offenses described in paragraphs (1) and (2) of this subsection if a circumstance giving rise to federal jurisdiction had existed. If, after a hearing pursuant to the provisions of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, or the safety of any other person or the community, the judicial officer shall order that the person be detained before trial.

"(c) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the safety of any other person or the community if the judicial officer finds that there is probable cause to believe that a person has:

"(1) Committed a dangerous crime, as defined in section 23-1331, while armed with or having readily available a pistol, firearm, or imitation firearm;

"(2) Committed a violent crime, as defined in section 23-1331, while armed with or having readily available a pistol, firearm, or imitation firearm;

"(3) Threatened, injured, intimidated, or attempted to threaten, injure or intimidate a law enforcement officer, an officer of the

court, or a prospective witness or juror in any criminal investigation or
judicial proceeding; or

"(4) The person has committed an offense described in
subsection (b)(1) or (b)(2) of this section; and

"(5) Has been convicted of an offense that is described in
subsection (b)(1) or (b)(2) of this section, or of a state or federal offense
that would have been an offense described in subsection (b)(1) or (b)(2)
of this section if a circumstance giving rise to the jurisdiction had existed;
and

"(6) The offense described in paragraph (5) of this subsection
was committed while the person was on release pending trial for a local,
state or federal offense.

"(d)(1) 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. Except for good cause, a
continuance on motion of the person shall not exceed 5 days, and a
continuance on motion of the attorney for the government shall not exceed
3 days. During a continuance, the person shall be detained, and the
judicial officer, on motion of the attorney for the government or sua
sponte, may order that, while in custody, a person who appears to be a
narcotics addict receive a medical examination to determine whether the
person is an addict.

"(2) At the hearing, the person has the right to be represented
by counsel and, if financially unable to obtain adequate representation,
to have counsel appointed.

"(3) The person shall be afforded an opportunity to testify.
Testimony of the person given during the hearing shall not be admissible

on the issue of guilt in any other judicial proceeding, but the testimony 01
shall be admissible in proceedings under D.C. Code, §§23-1327, 23-1328 02
and 23-1329, in perjury proceedings, and for the purposes of impeachment 03
in any subsequent proceedings. 04

"(4) The person shall be afforded an opportunity to present 05
witnesses, to cross-examine witnesses who appear at the hearing, and to 06
present information by proffer or otherwise. The rules concerning 07
admissibility of evidence in criminal trials do not apply to the presentation 08
and consideration of information at the hearing. 09

"(5) The person shall be detained pending completion of the 10
hearing. 11

"(6) The hearing may be reopened at any time before trial if 12
the judicial officer finds that information exists that was not known to the 13
movant at the time of the hearing and that has a material bearing on the 14
issue whether there are conditions of release that will reasonably assure 15
the appearance of the person as required or the safety of any other person 16
or the community. 17

"(7) Whenever a person has been released pursuant to this 18
section and it subsequently appears that the person may be subject to 19
pretrial detention, the attorney for the government may initiate a pretrial 20
detention hearing by ex parte written motion. Upon such motion, the 21
judicial officer shall issue a warrant for the arrest of the person and if 22
the person is outside the District of Columbia, the person shall be brought 23
before a judicial officer in the district where the person is arrested and 24
shall then be transferred to the District of Columbia for proceedings in 25
accordance with this section. 26

"(e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community, take into account the available information concerning:

"(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime, or involves obstruction of justice;

"(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 pending trial, sentencing, appeal or completion of sentence for an offense under local, state, or federal law; and

"(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

"(f) In a release order issued under sections 1321(b) or (c), the judicial officer shall:

"(1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) Advise the person of:

"(A) The penalties for violating a condition of release, 01
including the penalties for committing an offense while on pretrial release; 02

"(B) The consequences of violating a condition of release, 03
including the immediate issuance of a warrant for the person's arrest; and 04

"(C) D.C. Code §22-722 (relating to threats, force or 05
intimidation of witnesses, jurors, and officers of the court, obstruction 06
of criminal investigations and retaliating against a witness, victim, or an 07
informant). 08

"(g) In a detention order issued under subsection (b) of this 09
section, the judicial officer shall: 10

"(1) Include written findings of fact and a written statement 11
of the reasons for the detention; 12

"(2) Direct that the person be committed to the custody of the 13
Attorney General for confinement in a corrections facility separate, to the 14
extent practicable, from persons awaiting or serving sentences or being 15
held in custody pending appeal; 16

"(3) Direct that the person be afforded reasonable opportunity 17
for private consultation with counsel; and 18

"(4) Direct that, on order of a judicial officer or on request 19
of an attorney for the government, the person in charge of the corrections 20
facility in which the person is confined deliver the person to a United 21
States marshal or other appropriate person for the purpose of an 22
appearance in connection with a court proceeding. 23

"The judicial officer may, by subsequent order, permit the temporary 24
release of the person, in the custody of a United States marshal or other 25
appropriate person, to the extent that the judicial officer determines the 26

release to be necessary for preparation of the person's defense or for
another compelling reason. 01
02

"(h) The case of the person detained pursuant to subsection (b) 03
of this section shall be placed on an expedited calendar and, consistent 04
with the sound administration of justice, shall have trial of the case 05
commence before the expiration of 100 days. However, the person may 06
be detained for an additional period not to exceed 20 days from the date 07
of the expiration of the 100-day period on the basis of a petition submitted 08
by the attorney for the government and approved by the judicial officer. 09
The additional period of detention may be granted only on the basis of 10
good cause shown and shall be granted only for the additional time 11
required to prepare for the expedited trial of the person. For the 12
purposes of determining the maximum period of detention under this 13
section, the period shall not exceed 120 days. The period shall: 14

(1) Begin on the date the defendant is first detained after 15
arrest; and 16

(2) Include the days detained pending a detention hearing 17
and the days in confinement on temporary detention under section 18
(a) whether or not continuous with full pretrial detention. The defendant 19
shall be treated in accordance with section 1321(a) unless the trial is in 20
progress, has been delayed by the timely filing of motions (excluding 21
motions for continuance), or has been delayed at the request of the 22
defendant. 23

"(i) Nothing in this section shall be construed as modifying or 24
limiting the presumption of innocence." 25

Sec. 4. This act shall take effect after a 60-day period of 26
Congressional review following approval by the Mayor (or in the event of 27

veto by the Mayor, action by the Council of the District of Columbia to 01
override the veto) as provided in section 602(c)(2) of the District of 02
Columbia Self-Government and Governmental Reorganization Act, approved 03
December 24, 1973 (87 Stat. 813; D.C. Code §1-233(c)(2)), and publication 04
in either the District of Columbia Register, the District of Columbia 05
Statutes-at-Large, or the District of Columbia Municipal Regulations. 06

4/BBAIL 01
Committee Print 02
Committee on the Judiciary 03
Amendment in the Nature of a Substitute 04
January 23, 1992 05

A BILL 06

_____ 07

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA 08

_____ 09

To amend sections 23-1321, 23-1322, 23-1323(c) and (d), 23-1324(a) and 10
23-1325(a) of the District of Columbia Code to change pretrial and 11
detention procedures in the District of Columbia. 12

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, 13

That this act may be cited as the "Bail Reform Amendment Act of 1992". 14

Sec. 2. Section 23-1321 of the District of Columbia Code is amended 15

to read as follows: 16

"§ 23-1321. Release prior to trial. 17

"(a) Upon the appearance before a judicial officer of a person 18

charged with an offense, other than murder in the first degree or assault 19

with intent to kill while armed, which shall be treated in accordance with 20

the provisions of § 23-1325, the judicial officer shall issue an order that, 21

pending trial, the person be: 22

"(1) Released on personal recognizance or upon execution of 23

an unsecured appearance bond under subsection (b) of this section; 24

"(2) Released on a condition or combination of conditions under subsection (c) of this section; 01 02

"(3) Temporarily detained to permit revocation of conditional release under § 23-1322; or 03 04

"(4) Detained under § 23-1322(b). 05

"(b) 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 local, state or federal crime during the period of release, unless the judicial officer determines that the release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community. 06 07 08 09 10 11 12

"(c)(1) 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, the judicial officer shall order the pretrial release of the person subject to the: 13 14 15 16 17

"(A) Condition that the person not commit a local, state or federal crime during the period of release; and 18 19

"(B) Least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition or combination of conditions that the person during the period of release shall: 20 21 22 23 24

"(i) Remain in the custody of a designated person or organization that agrees to assume supervision and to report any violation of a condition of release to the court, if the designated person 25 26 27

or organization is able to reasonably assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

"(ii) Maintain employment, or, if unemployed, actively seek employment;

"(iii) Maintain or commence an educational program;

"(iv) Abide by specified restrictions on personal associations, place of abode, or travel;

"(v) Avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

"(vi) Report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

"(vii) Comply with a specified curfew;

"(viii) Refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(ix) Refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner. The terms "narcotic drug" and "controlled substance" shall have the same meaning as in section 102 of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981, (D.C. Law 4-29; D.C. Code § 33-501);

"(x) Undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, if available, and remain in a specified institution if required for that purpose;

"(xi) Return to custody for specified hours following release for employment, schooling or other limited purposes;

"(xii) Execute an agreement to forfeit upon failing 01
to appear as required, the designated property, including money, as is 02
reasonably necessary to assure the appearance of the person as required, 03
and post with the court the indicia of ownership of the property, or a 04
percentage of the money as the judicial officer may specify; 05

"(xiii) Execute a bail bond with solvent sureties in 06
whatever amount is reasonably necessary to assure the appearance of the 07
person as required; or 08

"(xiv) Satisfy any other condition that is reasonably 09
necessary to assure the appearance of the person as required and to 10
assure the safety of any other person and the community. 11

"(2) In considering the conditions of release described in 12
paragraph (1)(B)(xii) or (xiii) of this subsection, the judicial officer may 13
upon his own motion, or shall upon the motion of the government, conduct 14
an inquiry into the source of the property to be designated for potential 15
forfeiture or offered as collateral to secure a bond, and shall decline to 16
accept the designation or the use as collateral of property that, because 17
of its source, will not reasonably assure the appearance of the person as 18
required. 19

"(3) A judicial officer may not impose a financial condition 20
under paragraph (1)(B)(xii) or (xiii) of this subsection that results in 21
the pretrial detention of the person. 22

"(4) A person for whom conditions of release are imposed and 23
who, after 24 hours from the time of the release hearing, continues to 24
be detained as a result of inability to meet the conditions of release, shall 25
upon application be entitled to have the conditions reviewed by the judicial 26
officer who imposed them. Unless the conditions of release are amended 27

and the person is thereupon released, on another condition or conditions, 01
the judicial officer shall set forth in writing the reasons for requiring the 02
conditions imposed. A person who is ordered released on a condition that 03
requires that the person return to custody after specified hours shall, 04
upon application, be entitled to a review by the judicial officer who 05
imposed the condition. Unless the requirement is removed and the person 06
is released on another condition or conditions, the judicial officer shall 07
set forth in writing the reasons for continuing the requirement. In the 08
event that the judicial officer who imposed the conditions of release is not 09
available, any other judicial officer may review the conditions. 10

"(5) The judicial officer may at any time amend the order to 11
impose additional or different conditions of release." 12

Sec. 3. Section 23-1322 of the District of Columbia Code is amended 13
to read as follows: 14

"§ 23-1322. Detention prior to trial. 15

"(a) The judicial officer shall order the detention of a person 16
charged with an offense for a period of not more than 5 days, excluding 17
Saturdays, Sundays, and holidays, and direct the attorney for the 18
government to notify the appropriate court, probation or parole official, 19
or local or state law enforcement official, if the judicial officer determines 20
that the person charged with an offense: 21

"(1) Was at the time the offense was committed, on: 22

"(A) Release pending trial for a felony under local, state, 23
or federal law; 24

"(B) Release pending imposition or execution of sentence, 25
appeal of sentence or conviction, or completion of sentence, for any 26
offense under local, state, or federal law; or 27

"(C) Probation or parole for an offense under local, state, or federal law; or

"(2) May flee or pose a danger to any other person or the community. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial.

"(b) The judicial officer shall hold a hearing to determine whether any other condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required or the safety of any other person or the community, upon oral motion of the attorney for the government, in a case that involves:

"(1) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331; or

"(2) An offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Code § 22-722).

If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, or the safety of any other person or the community, the judicial officer shall order that the person be detained before trial.

"(c) There shall be a rebuttable presumption that no conditions or combination of conditions of release will reasonably assure the safety of any other person or the community if the judicial officer finds by a substantial probability that the person:

"(1) Committed a dangerous crime or a crime of violence, as 01
these crimes are defined in § 23-1331, while armed with or having readily 02
available a pistol, firearm or imitation firearm; 03

"(2) Has threatened, injured, intimidated or attempted to 04
threaten, injure or intimidate a law enforcement officer, an officer of the 05
court, or a prospective witness or juror in any criminal investigation or 06
judicial proceeding; 07

"(3) Committed a dangerous crime or a crime of violence, as 08
these terms are defined in § 23-1331, and has previously been convicted 09
of a dangerous crime or a crime of violence which was committed while on 10
release pending trial for a local, state or federal offense. 11

"(4) Committed a dangerous crime or a crime of violence while 12
on release pending trial for a local, state or federal offense. 13

"(d)(1) The hearing shall be held immediately upon the person's first 14
appearance before the judicial officer unless that person, or the attorney 15
for the government, seeks a continuance. Except for good cause, a 16
continuance on motion of the person shall not exceed 5 days, and a 17
continuance on motion of the attorney for the government shall not exceed 18
3 days. During a continuance, the person shall be detained, and the 19
judicial officer, on motion of the attorney for the government or sua 20
sponte, may order that, while in custody, a person who appears to be 21
an addict receive a medical examination to determine whether the person 22
is an addict, as defined in § 23-1331. 23

"(2) At the hearing, the person has the right to be represented 24
by counsel and, if financially unable to obtain adequate representation, 25
to have counsel appointed. 26

"(3) The person shall be afforded an opportunity to testify. 01
Testimony of the person given during the hearing shall not be admissible 02
on the issue of guilt in any other judicial proceeding, but the testimony 03
shall be admissible in proceedings under §§ 23-1327, 23-1328 and 23-1329, 04
in perjury proceedings, and for the purpose of impeachment in any 05
subsequent proceedings. 06

"(4) The person shall be afforded an opportunity to present 07
witnesses, to cross-examine witnesses who appear at the hearing, and to 08
present information by proffer or otherwise. The rules concerning 09
admissibility of evidence in criminal trials do not apply to the presentation 10
and consideration of information at the hearing. 11

"(5) The person shall be detained pending completion of the 12
hearing. 13

"(6) The hearing may be reopened at any time before trial if 14
the judicial officer finds that information exists that was not known to the 15
movant at the time of the hearing and that has a material bearing on the 16
issue of whether there are conditions of release that will reasonably assure 17
the appearance of the person as required or the safety of any other person 18
or the community. 19

"(7) When a person has been released pursuant to this section 20
and it subsequently appears that the person may be subject to pretrial 21
detention, the attorney for the government may initiate a pretrial detention 22
hearing by ex parte written motion. Upon such motion, the judicial officer 23
may issue a warrant for the arrest of the person and if the person is 24
outside the District of Columbia, the person shall be brought before a 25
judicial officer in the district where the person is arrested and shall then 26

be transferred to the District of Columbia for proceedings in accordance 01
with this section. 02

"(e) The judicial officer shall, in determining whether there are 03
conditions of release that will reasonably assure the appearance of the 04
person as required or the safety of any other person or the community, 05
take into account information available concerning: 06

"(1) The nature and circumstances of the offense charged, 07
including whether the offense is a crime of violence or dangerous crime 08
as these terms are defined in § 23-1331, or involves obstruction of justice 09
as defined in section 502 of the District of Columbia Theft and White Collar 10
Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. 11
Code § 22-722). 12

"(2) The weight of the evidence against the person; 13

"(3) The history and characteristics of the person, including: 14

"(A) The person's character, physical and mental 15
condition, family ties, employment, financial resources, length of residence 16
in the community, community ties, past conduct, history relating to drug 17
or alcohol abuse, criminal history, and record concerning appearance at 18
court proceedings; and 19

"(B) Whether, at the time of the current offense or arrest, 20
the person was on probation, on parole, or on other release pending trial, 21
sentencing, appeal or completion of sentence for an offense under local, 22
state or federal law; and 23

"(4) The nature and seriousness of the danger to any person 24
or the community that would be posed by the person's release. 25

"(f) In a release order issued under § 1321(b) or (c), the judicial 26
officer shall: 27

"(1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) Advise the person of:

"(A) The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

"(B) The consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

"(C) The provisions of section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Code § 22-722), relating to threats, force or intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations and retaliating against a witness, victim, or an informant.

"(g) In a detention order issued under subsection (b) of this section, the judicial officer shall:

"(1) Include written findings of fact and a written statement of the reasons for the detention;

"(2) Direct that the person be committed to the custody of the Attorney General of the United States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

"(3) Direct that the person be afforded reasonable opportunity for private consultation with counsel; and

"(4) Direct that, on order of a judicial officer or on request of an attorney for the government, the person in charge of the corrections facility in which the person is confined deliver the person to the United

States Marshal or other appropriate person for the purpose of an appearance in connection with a court proceeding.

"(h) The case of the person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration of 100 days. However, the person may be detained for an additional period not to exceed 20 days from the date of the expiration of the 100-day period on the basis of a petition submitted by the attorney for the government and approved by the judicial officer. The additional period of detention may be granted only on the basis of good cause shown and shall be granted only for the additional time required to prepare for the expedited trial of the person. For the purposes of determining the maximum period of detention under this section, the period shall not exceed 120 days. The period shall:

"(1) Begin on the date defendant is first detained after arrest; and

"(2) Include the days detained pending a detention hearing and the days in confinement on temporary detention under subsection (a) of this section whether or not continuous with full pretrial detention. The defendant shall be treated in accordance with § 23-1321(a) unless the trial is in progress, has been delayed by the timely filing of motions excluding motions for continuance, or has been delayed at the request of the defendant.

"(1) Nothing in this section shall be construed as modifying or limiting the presumption of innocence."

Sec. 4. Section 23-1323 of the District of Columbia Code is amended 01
as follows: 02

(a) Subsection (c) is amended as follows: 03

(1) Paragraph (1) is amended by striking the phrase 04
"subsection (c) of section 23-1322" and inserting the phrase "§ 23-1322(d)" 05
in its place; and 06

(2) Paragraph (2)(B) is amended by striking the phrase 07
"subsection (b) of section 23-1321" and inserting the phrase "§ 23-1322(e)" 08
in its place. 09

(b) Subsection (d) is amended by striking the phrase "subsection 10
(d) of section 23-1322" and inserting the phrase "§ 23-1322(h)" in its 11
place. 12

Sec. 5. Section 23-1324(a) of the District of Columbia Code is 13
amended by striking the phrase "section 23-1321(d) or section 23-1321(e)" 14
and inserting the phrase "§ 23-1321(c)(4)" in its place. 15

Sec. 6. Section 23-1325 of the District of Columbia Code is amended 16
as follows: 17

(a) By striking the phrase "23-1325. Release in first degree murder 18
cases or after conviction." and inserting the phrase "Release in first 19
degree murder and assault with intent to kill while armed cases or after 20
conviction." in its place. 21

(b) Subsection (a) is amended by adding the phrase "or assault 22
with intent to kill while armed" after the word "degree". 23

Sec. 7. Section 23-1329 of the District of Columbia Code is amended 24
as follows: 25

(a) Subsection (b) is amended as follows: 26

(1) By striking the phrase "subsection (b) of section 23-1321" 01
and inserting the phrase "§ 23-1322(e)" in its place; and 02

(2) By striking the phrase "subsections (c) and (d) of section 03
23-1322" and inserting the phrase "§ 23-1322(d) and (h)" in its place. 04

(b) Subsection (d) is amended by striking the phrase "subsection 05
(c)(2) of section 23-1322" and inserting the phrase "§ 23-1322(d)(7) in 06
its place. 07

Sec. 8. The table of contents for subchapter II of chapter 13 of title 08
23 of the District of Columbia Code is amended as follows: 09

(a) By striking the phrase "23-1321. Release in other than first 10
degree murder cases prior to trial." and inserting the phrase "23-1321. 11
Release prior to trial." in its place; and 12

(b) By striking the phrase "23-1325. Release in first degree murder 13
cases or after conviction." and inserting the phrase "23-1325. Release 14
in first degree murder and assault with intent to kill while armed cases 15
or after conviction." in its place. 16

Sec. 9. This act shall take effect after a 60-day period of 17
Congressional review following approval by the Mayor (or in the event of 18
veto by the Mayor, action by the Council of the District of Columbia to 19
override the veto) as provided in section 602(c)(2) of the District of 20
Columbia Self-Government and Governmental Reorganization Act, approved 21
December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(2), and 22
publication in either the District of Columbia Register, the District of 23
Columbia Statutes-at-Large, or the District of Columbia Municipal 24
Regulations. 25

TESTIMONY OF JOHN PAYTON
CORPORATION COUNSEL
AT A PUBLIC HEARING ON
BILL 9-360
BEFORE THE COMMITTEE ON THE JUDICIARY
COUNCIL OF THE DISTRICT OF COLUMBIA
THURSDAY, DECEMBER 19, 1991

GOOD AFTERNOON, CHAIRPERSON ROLARK AND MEMBERS OF THE COMMITTEE. I AM JOHN PAYTON, CORPORATION COUNSEL. I AM APPEARING ON BEHALF OF THE MAYOR TO TESTIFY IN SUPPORT OF BILL 9-360, "THE BAIL REFORM AMENDMENT ACT OF 1991."

BILL 9-360 WOULD AMEND D.C. CODE SECTIONS 23-1321 AND 23-1322, GOVERNING PRETRIAL RELEASE AND DETENTION IN CRIMINAL CASES, TO MAKE THESE SECTIONS MORE CLOSELY RESEMBLE THE FEDERAL BAIL PROVISIONS SET FORTH AT 18 U.S.C. § 3142. UNDER THE DISTRICT'S CURRENT LAW, D.C. CODE § 23-1322, A PERSON CHARGED WITH A "DANGEROUS CRIME" WILL BE DETAINED PRIOR TO TRIAL ONLY IF THE GOVERNMENT DEMONSTRATES THAT, BECAUSE OF THE PERSON'S "PATTERN OF BEHAVIOR CONSISTING OF HIS PAST AND PRESENT CONDUCT," THERE IS "NO CONDITION OR COMBINATION OF CONDITIONS WHICH WILL REASONABLY ASSURE THE SAFETY OF THE COMMUNITY." AND A PERSON CHARGED WITH A "CRIME OF VIOLENCE," OTHER THAN MURDER IN THE FIRST DEGREE, WILL BE DETAINED PRIOR TO TRIAL ONLY IF THE GOVERNMENT DEMONSTRATES THAT (1) THE PERSON HAS BEEN CONVICTED OF A CRIME OF VIOLENCE IN THE LAST 10 YEARS, OR (2) "THE CRIME OF VIOLENCE WAS ALLEGEDLY COMMITTED WHILE THE PERSON WAS, WITH RESPECT TO ANOTHER CRIME OF VIOLENCE, ON BAIL OR OTHER RELEASE OR ON PROBATION, PAROLE, OR

MANDATORY RELEASE PENDING COMPLETION OF A SENTENCE," AND (3) THAT NO CONDITION OR COMBINATION OF CONDITIONS OF RELEASE WILL REASONABLY ASSURE THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY. IN ADDITION, A PERSON CHARGED WITH ANY OFFENSE IS ELIGIBLE FOR PRETRIAL DETENTION UNDER SECTION 32-1322(a)(3) IF THE PERSON OBSTRUCTS JUSTICE BY THREATENING, INJURING, OR INTIMIDATING ANY PROSPECTIVE WITNESS OR JUROR, OR ATTEMPTS TO DO ANY OF THESE THINGS.

THE EFFECT OF THESE PROVISIONS IS THAT MANY PERSONS CHARGED WITH DANGEROUS CRIMES OR CRIMES OF VIOLENCE ARE NOT EVEN ELIGIBLE FOR CONSIDERATION FOR PRETRIAL DETENTION BECAUSE THEY HAVE NO PAST ADULT CRIMINAL HISTORY. THE PRINCIPAL CHANGE THAT THE ENACTMENT OF BILL 9-360 WOULD EFFECT WOULD BE TO MAKE ANY PERSON CHARGED WITH A DANGEROUS CRIME OR A CRIME OF VIOLENCE ELIGIBLE FOR CONSIDERATION FOR PRETRIAL DETENTION. WHILE ENLARGING THE CLASS OF PERSONS WHO MAY BE DETAINED PRIOR TO TRIAL, THE BILL RETAINS THE PROCEDURAL SAFEGUARDS SET FORTH IN THE DISTRICT'S PRESENT LAW AND IN THE FEDERAL BAIL LAW. THESE INCLUDE THE RIGHT TO A PROMPT DETENTION HEARING, TO BE REPRESENTED BY COUNSEL AT THE HEARING, TO TESTIFY AND PRESENT WITNESSES, TO PROFFER OTHER EVIDENCE, AND TO CROSS-EXAMINE WITNESSES AGAINST THE PERSON. IF PRETRIAL DETENTION IS ORDERED, THE JUDICIAL OFFICER MUST MAKE WRITTEN FINDINGS OF FACT WITH REGARD TO STATUTORILY DEFINED DETENTION FACTORS AND SUPPORT HIS CONCLUSIONS WITH CLEAR AND CONVINCING EVIDENCE. FURTHER, A PERSON ORDERED DETAINED IS

ENTITLED TO BE HOUSED IN A FACILITY SEPARATE, TO THE EXTENT PRACTICABLE, FROM PERSONS AWAITING OR SERVING SENTENCES OR BEING HELD IN CUSTODY PENDING APPEAL, TO EXPEDITED APPELLATE REVIEW OF THE DETENTION ORDER, AND TO AN EXPEDITED TRIAL ON THE MERITS OF THE CRIMINAL CHARGE. (SEE UNITED STATES V. SALERNO, 481 U.S. 739, 742-743, 747 (1987) (UPHOLDING THE CONSTITUTIONALITY OF 18 U.S.C. § 3142 IN PART BECAUSE OF THESE PROCEDURAL SAFEGUARDS).)

WE RECOMMEND THAT TECHNICAL CHANGES BE MADE TO BILL 9-360 SO THAT THE BILL'S STRUCTURE MORE FULLY COMPORTS WITH THE TRADITIONAL STRUCTURE OF ENACTED TITLES OF THE D.C. CODE. WE WILL COMMUNICATE WITH THE COMMITTEE'S STAFF REGARDING THESE CHANGES.

IN ADDITION, WE RECOMMEND THE FOLLOWING SUBSTANTIVE CHANGES:

1. WE RECOMMEND DELETION OF THE PROVISIONS RELATING TO A JUDICIAL OFFICER'S PUTTING A 10-DAY HOLD ON AN ARRESTED PERSON FOR THE PURPOSE OF DETERMINING WHETHER THE PERSON IS ILLEGALLY IN THE UNITED STATES AND THEREFORE SHOULD BE TURNED OVER TO THE IMMIGRATION AND NATURALIZATION SERVICE FOR DEPORTATION. THESE PROVISIONS ARE EXTRANEOUS TO THE CENTRAL PURPOSE OF THE BILL. IMMIGRATION LAWS ARE FEDERAL LAWS ENFORCED BY FEDERAL AUTHORITIES. STATE PRETRIAL DETENTION AND BAIL LAWS HAVE NOT BEEN USED TO PERFORM IMMIGRATION ENFORCEMENT FUNCTIONS. FOR EXAMPLE, THERE ARE NO SUCH PROVISIONS IN THE EXISTING LAWS OF THE

DISTRICT, MARYLAND, OR VIRGINIA.

2. THERE SHOULD BE ADDED TO THE CLASS OF CASES IN WHICH THE ATTORNEY FOR THE GOVERNMENT MAY REQUEST A DETENTION HEARING UNDER D.C. CODE SECTION 23-1322(b) CASES THAT INVOLVE A SERIOUS RISK THAT THE PERSON WILL FLEE AND CASES THAT INVOLVE A SERIOUS RISK THAT THE PERSON WILL OBSTRUCT OR ATTEMPT TO OBSTRUCT JUSTICE. COMPARABLE PROVISIONS ARE CONTAINED IN 18 U.S.C. § 3142(f).

3. THERE SHOULD BE ADDED TO THE CLASS OF CASES IN WHICH THERE WOULD BE A REBUTTABLE PRESUMPTION THAT NO CONDITION OR COMBINATION OF CONDITIONS WILL REASONABLY ASSURE THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY CASES INVOLVING THE COMMISSION OF AN OFFENSE UNDER THE DISTRICT OF COLUMBIA UNIFORM CONTROLLED SUBSTANCES ACT OF 1981 FOR WHICH THE MAXIMUM TERM OF IMPRISONMENT IS 10 YEARS OR MORE, AND CASES INVOLVING THE COMMISSION OF A DANGEROUS CRIME OR A CRIME OF VIOLENCE WHILE THE PERSON WAS ON RELEASE PENDING TRIAL FOR A DISTRICT OF COLUMBIA, STATE, OR FEDERAL OFFENSE. COMPARABLE PROVISIONS ARE CONTAINED IN 18 U.S.C. § 3142(e).

4. THERE SHOULD BE ADDED CONFORMING AMENDMENTS TO D.C. CODE SECTION 23-1323, RELATING TO THE DETENTION OF PERSON CHARGED WITH A CRIME WHO IS DETERMINED TO BE AN ADDICT, AND TO D.C. CODE SECTION 23-1324, RELATING TO APPEAL FROM CONDITIONS OF RELEASE.

IN ADDITION, I WOULD LIKE TO DIRECT THE COMMITTEE'S ATTENTION TO THE MAYOR'S BILL 9-374, THE "CRIMINAL AND JUVENILE JUSTICE REFORM ACT OF 1991," WHICH WAS INTRODUCED ON NOVEMBER 27, 1991, AND REFERRED TO THIS COMMITTEE FOR CONSIDERATION. BILL 9-374 WOULD, INTER ALIA, ADD A NEW SECTION 1333 TO CHAPTER 13 OF TITLE 23 OF THE D.C. CODE PROVIDING THAT "A JUDICIAL OFFICER SHALL, IN DETERMINING WHETHER THERE ARE CONDITIONS OF RELEASE THAT WILL REASONABLY ASSURE THE APPEARANCE OF THE PERSON AS REQUIRED, AND THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY, TAKE INTO ACCOUNT THE PERSON'S JUVENILE LAW ENFORCEMENT AND CASE RECORDS." THIS PROVISION WOULD STRENGTHEN THE APPLICATION OF THE DISTRICT'S BAIL LAW. WE URGE THE COUNCIL TO ENACT IT.

THANK YOU FOR THIS OPPORTUNITY TO PRESENT THE VIEWS OF THE MAYOR ON THIS IMPORTANT PIECE OF LEGISLATION. I WILL BE PLEASED TO RESPOND TO ANY QUESTIONS YOU MAY HAVE.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE



DIRECTOR OF
INTERGOVERNMENTAL RELATIONS
1350 PENNSYLVANIA AVE., N.W. - RM. 1
WASHINGTON, D.C. 20004

January 22, 1992

RECEIVED
JAN 22 1992
WILHELMINA J. ROLARK
COUNCILMEMBER, WARD 8

The Honorable Wilhelmina J. Rolark
Chairperson
Committee on the Judiciary
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Councilmember Rolark:

This is to provide the Committee on the Judiciary with the requested fiscal impact statement on Bill 9-360, the "Bail Reform Amendment Act of 1991".

Under the provisions of Bill 9-360, any person charged with a dangerous or violent offense while armed, or charged with obstruction of justice, poses a danger to the community and could be detained until trial for a period not to exceed 100 days (with a 20 day extension for good cause shown). Assuming that persons in these charge categories would be placed in pretrial detention, the Department of Corrections has estimated that a daily average of 234 additional persons would be held in pretrial status if this bill was enacted. The Department has estimated that this would cost an additional \$5 million in its operating expenditures per year. (See enclosed charts)

If the Committee requires further information, please do not hesitate to contact me.

Sincerely,

Cynthia A. Brock-Smith
Cynthia Brock-Smith
Director

Enclosures

Bail Reform Amendment Act of 1991
 Estimated Increase in Pretrial Population
 and Fiscal Impact
 D.C. Department of Corrections
 Office of Planning, Analysis and Data Resource Management

Projected Increase in Pretrial Population for 100 Day Detention

	1988	1989	1990	Three Year Average
--	------	------	------	-----------------------

Average Length of Detention Until Bond Release for Crimes Covered in Bail Reform Amendment Act	42 days	34 days	39 days	38 days
Net Increase in Detention for Persons Held Under Bail Reform Amendment Act for 100 Days	58 days	66 days	61 days	62 days
Total Number of Residents Released on Bond Per Year Who Would be Held in Pretrial Detention ¹	1,271	1,646	1,210	1,376
Total Number of Additional Mandays under Bail Reform Act	73,718	108,636	73,810	85,388
Average Daily Increase in Pretrial Population				234 persons

Estimated Annual Fiscal Impact

Total Number of Additional Mandays Per Year:	85,388
Per Manday Cost of Incarceration :	\$ 60.90
Estimated Annual Fiscal Impact	\$5,200,129

¹ These figures reflect the numbers released on bond charged with the offenses included in this legislation (ie. dangerous crimes, violent crimes and obstruction of justice).

Bail Reform Amendment Act of 1991
 Estimated Increase in Pretrial Population
 and Fiscal Impact
 D.C. Department of Corrections
 Office of Planning, Analysis and Data Resource Management

Projected Increase in Pretrial Population for 120 Day Detention

	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>Three Year Average</u>
Average Length of Detention Until Bond Release for Crimes Covered in Bail Reform Amendment Act	42 days	34 days	39 days	38 days
Net Increase in Detention for Persons Held under Bail Reform Amendment Act for 120 Days	78 days	86 days	81 days	82 days
Total Number of Residents Released on Bond Per Year Who Would be Held in Pretrial Detention ¹	1,271	1,646	1,210	1,376
Total Number of Additional Mandays under Bail Reform Act	99,138	141,556	98,010	112,901
Average Daily Increase in Pretrial Population				309 persons

Estimated Annual Fiscal Impact

Total Number of Additional Mandays Per Year:	112,901
Per Manday Cost of Incarceration :	\$ 60.90
Estimated Annual Fiscal Impact	\$6,875,671

¹ These figures reflect the numbers released on bond charged with the offenses included in this legislation (ie. dangerous crimes, violent crimes and obstruction of justice).

COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
ON THE
"BAIL REFORM AMENDMENT ACT OF 1991"

PRESENTED BEFORE THE DISTRICT OF COLUMBIA CITY COUNCIL
COMMITTEE ON THE JUDICIARY
THE HONORABLE WILHELMINA J. ROLARK, CHAIRPERSON

PRESENTED BY
ANGELA JORDAN DAVIS, DIRECTOR
DECEMBER 19, 1991

Prepared with the assistance of:
David A. Reiser
Special Litigation Counsel
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Thank you for the opportunity to address the Committee about this legislation. It raises issues of great importance, not only to those who work in the District of Columbia court system, but also to everyone in our community who views a full and fair trial by jury as the appropriate way to determine a person's guilt or innocence of criminal charges. We believe that this bill will expand the use of preventive detention, not merely to close a "loophole" in the existing law, but to apply to the vast majority of felony prosecutions. In so doing, it will replace jury trials with premature determinations of guilt by a lower standard of proof and based on unreliable hearsay evidence.

Preventive detention has irreparable consequences. A defendant who is held without bond will lose his job as well as his liberty. He will communicate with his family by infrequent telephone calls and visits across a plexiglass barrier. He will be unable to help with the investigation of the charges against him, and his ability to consult with counsel will be impaired. Can anyone promise that mistakes will not be made? Can anyone assure that these terrible consequences will not fall upon the innocent as well as the guilty? Can anyone undo the harm caused by preventive detention after the charges are dismissed? The answer to all of these questions is no. There are already countless examples of young men held without bond on supposedly overwhelming evidence who were acquitted or released when the charges were dropped. The newspapers do not write stories about these miscarriages of justice, but they are real. Are we willing to multiply these injustices? Can't we try instead measures to increase public safety which do not risk turning innocent citizens into victims of our fears?

We wholeheartedly support proposals to put more police officers on the streets. Police officers who regularly patrol a community can do more to prevent crime than any bail legislation. We urge the Council to increase funding for drug treatment; we can prevent thousands of crimes by making sure that drug treatment is available right away to people who need it. There are many drug addicts who will resolve to seek treatment, but who return to their addiction during the weeks or months it can take to enter a treatment program. We support many of the proposals to create new programs for "at risk" youth. We also support proposals to improve the services of agencies which provide supervision over defendants released pending trial, such as house arrest and Intensive Third Party Custody programs. These measures have the potential to reduce the crime and violence which afflict our city without harming the innocent.

The history of increasingly tougher bail laws in the District of Columbia is a clear illustration that preventive detention has not proven itself to be an effective means of reducing crime. Preventive detention was introduced in 1970 as a supposed solution to the District's crime problem, which critics then blamed on the bail law. Later studies showed that the statistics on which that charge was based were misleading, as misleading as the statistics used to support this bill. In 1982 the law was amended, again because of concerns about rising crime rates. Yet crime rates continued to climb. In 1989 the Council was agreed to expand preventive detention again. Yet crime, especially violent crime, continued unabated. The vast majority of persons charged with First Degree Murder are held without bond, yet the District of Columbia has the highest murder rate in the country. Clearly, preventive detention does not prevent or deter crime. The current rate of incarceration in the District of Columbia is 1,125 inmates per 100,000 population, nearly three times the national average, which is itself the highest in the world. The District seemingly has

the highest rate of incarceration in the world. Yet the crime rate in this city is among the highest. More of our young men in prison is not the answer to our crime problem.

The federal bail statute, which is the model for many of the provisions of this bill, was supposed to allow the detention of a "small but identifiable" group of very serious criminals. S.Rep. 98.225, 8th Congress, 1st Session at 3. Instead, it has resulted in the detention of an astounding 70% of defendants in the United States District Court here. The percentages are even higher in other districts. If we follow this model, we will detain people accused of being unarmed accomplices, first offenders charged with non-violent crimes, and people who present no risk to the community.

The United States Attorney supports this bill, supposedly so that persons charged with armed offenses can be held in jail. He has promoted this bill as if its sole effect would be to fill a gap in the District's present bail statute. Attention has focused on "triggermen" with histories of serious crime but without any adult criminal convictions. A two word amendment to the current statute would fill any gap in the current statute's application to these cases. But the bill goes much further. It includes many additional provisions which are unjustified, unfair, and are likely to result in even more preventive detention of the innocent. Rather than a solution tailored to fit a problem, it is a prosecutorial "wish list" of provisions which would make it easier to detain more people charged with less serious offenses for a longer period of time on less evidence. It would permit preventive detention for any felony, in certain circumstances. The U.S. Attorney has not explained why this vast expansion of preventive detention is necessary. He has not explained why people should be held longer before they have any hearing, or why the length of preventive detention should double. Nor has he explained why important procedural safeguards, including safeguards included in the federal bail statute, are omitted. The Council is being asked to do much more than the press coverage of this proposal would suggest or that the public has been asked to support.

Current D. C. Law

At present, the United States Attorney for the District of Columbia can move for preventive detention under four different statutes, three applicable in Superior Court, and one in the United States District Court. D.C. Code § 23-1325(a) authorizes detention without bond to protect the community or to prevent flight in first degree murder cases. D.C. Code § 23-1322, the statute the United States Attorney proposes to amend, authorizes detention in three classes of cases:

- "a person charged with a dangerous crime, as defined in section 23-1331(3), if the Government certifies by motion that based upon such person's pattern of behavior consisting of his past and present conduct, and on the other factors set out in section 23-1321(b), there is no condition or combination of conditions which will reasonably assure the safety of the community;" § 23-1322(a)(1).

- "a person charged with a crime of violence, as defined in section 23-1331(4), if (i) the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is

presently charged; (ii) the crime of violence was allegedly committed while the person was, with respect to another crime of violence, on bail or other release or on probation, parole, or mandatory release pending completion of a sentence;" § 23-1322(a)(2).

- "a person charged with any offense if such person, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror."

In addition, the United States Attorney may seek preventive detention in any criminal case if a defendant violates a condition of release, D. C. Code § 23-1329(b). Release orders in the Superior Court typically include many conditions designed to protect the safety of the community, such as orders to stay away from witnesses or areas of the city, curfews, orders for drug testing or treatment. Current law requires judges to consider community safety in setting conditions of release. D. C. Code § 23-1321(a).

Statistics available from the D. C. Pretrial Services Agency show that, in practice, the United States Attorney often does not seek detention in cases in which it is already authorized by statute. Instead, the government will request a money bond, intending to assure the defendant's incarceration before trial without having to satisfy the burden of proof at a detention hearing. The result of this practice is that defendants who are able to post bond are often released without any other conditions to protect the community. Those who cannot post the bonds are detained without any procedural safeguards. The real problem may be an unwillingness to devote the resources to proving the facts required for detention, rather than a lack of detention authority.

The common element of the District's current preventive detention law, is that it is "preventive and forward looking." As our Court of Appeals said in United States v. Edwards, 430 A.2d 1321, 1332 (1981)(en banc), it "seeks to curtail reasonably predictable conduct, not to punish for prior acts." The law therefore relies on a pattern of conduct or prior convictions which allow a judge to predict that no combination of conditions of release can protect the community rather than a single unproven allegation. The focus, however, must be on future dangerousness, not on past guilt.

If the United States Attorney were omniscient and incapable of error, it might be reasonable to conclude, in some cases, that a single criminal charge would justify a prediction of future dangerousness. The United States Attorney claims that "[s]ome 20 percent of [defendants charged with shootings, armed robberies or other armed assaults] commit yet another violent crime while awaiting trial. This statistic does not appear to comport with statistics compiled by the D. C. Pretrial Services Agency, but even if it did, it would mean that a statute allowing detention in all of these cases would detain 80% unnecessarily. Many of these cases will result in dismissals or acquittals. The District's current law requires more than a single, unproven allegation, because the chances of a mistaken arrest and prosecution are high enough, and the consequences of wrongful preventive detention are so severe.

The United States Attorney does not say how many of his "20 percent" were eligible for detention under current law, but were released on money bonds requested

by the government. Nor does he say how many of this 20% are first offenders, as opposed to persons with prior juvenile records or a pattern of dangerous conduct. If, as seems likely, the group of people likely to commit crimes while on release have a pattern of dangerous or criminal conduct, whether or not it includes adult criminal convictions, then there is no need for a statute which would allow detention based on a single arrest.

The best illustration of the United States Attorney's understatement of existing detention authority is his claim that defendants charged with armed robberies are ineligible for detention under current law if they do not have adult criminal convictions for crimes of violence. In fact, a section of the District's law -- Sec. 23-1322(a)(1) -- already allows the detention of persons charged with armed robbery, whether or not the defendant has a previous adult criminal record, if the government can show a pattern of behavior which would indicate dangerousness. A "pattern of behavior consisting of his past and present conduct" may consist of prior adult convictions, prior juvenile adjudications, or even conduct which has never been formally charged at all. See Edwards, 430 A.2d at 1340 (discussing requirement of notice of specific instances of uncharged criminal conduct). The law permits detention of persons charged with "dangerous crimes," which are defined as:

(A) taking or attempting to take property from another by force or threat of force [i.e., robbery], (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein [i.e., burglary], (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year. D.C. Code § 23-1331(3).

If the objective of bail reform is, as the United States Attorney asserts in his recent Post editorial, to allow the detention of "a 17 year-old triggerman with a string of juvenile offenses or a 20 year old gunman without a prior record of adult violent crime," Stephens, "No Bail for Triggermen," Post, Oct. 1, 1991 A21, then the solution is to amend the statute to allow detention of those who commit violent as well as dangerous crimes under Section 1322(a)(1). Crimes of violence are defined as:

murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion, or blackmail accompanied by threats of violence, arson, assault with the intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

D.C. Code § 23-1331(4). An amendment to Section 1322 to include persons charged with crimes of violence whose "pattern of behavior consisting of his past and present conduct," would therefore meet the United States Attorney's concerns. Indeed, such a modification of the statute would go even further than the United States Attorney seems to propose in his op-ed piece, since it would apply to offenses committed without firearms and would not be limited to "triggermen."

Henry James, the young man charged with the drive-by shooting on I-295, is a case in point. The two word amendment, allowing for detention based upon a "pattern of conduct" in violent as well as dangerous crimes, would have permitted preventive detention before Mr. James' arrest for this shooting. Current D.C. law allows the prosecutor to ask for detention based upon a "pattern of conduct," whether or not there has been an adult criminal conviction. Juvenile offenses, even uncharged criminal conduct, can be used to prove that the defendant's pattern of behavior shows he is a danger to the community. Consequently, the United States Attorney's Office already has the power to ask for detention in cases in which it possesses information about prior conduct. Based upon the information supplied to the Court at Mr. James' detention hearing, as well as information which came to light during a recent murder trial in which Mr. James appeared as a government witness, there would have been ample foundation for detention with this simple amendment of the current statute.

Data assembled by the District of Columbia Pretrial Services Agency (DCPSA) indicate that the rate of arrests for violent crimes while on pretrial release is much lower than claimed. A study by DCPSA of felony cases processed over the six months from January to July of 1990 shows that 95% of those who were arrested for a dangerous or violent non-drug offense and who did not qualify for detention under current law -- the group that would be most affected by the United States Attorney's proposal -- were not rearrested for a dangerous or violent offense. 91% of this group were not rearrested for a drug offense. Despite these figures, the United States Attorney's proposal would add more than 2000 cases to the group eligible for detention, without even counting the number of persons who would be made eligible because of minor or old felony conviction records. On an annual basis, the proposed modifications of the statute would make preventive detention available in an additional 4000 to 5000 cases, primarily of people who do not remotely fit the description of teenage "triggermen."

In deciding whether there is a need for an expansion of preventive detention in the District of Columbia, it is also useful to consider the federal preventive detention law, which is also available to the United States Attorney in many cases. The federal statute permits the prosecutor to request detention "in a case that involves --"

- (A) a crime of violence;
- (B) an offense for which the maximum sentence is life imprisonment or death;
- (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in [various drug offense statutes];
- (D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph is a circumstance giving

rise to Federal jurisdiction had existed, or a combination of such offenses

18 U.S.C. § 3142(f)(1). See 18 U.S.C. § 3156(a)(4) (defining "crime of violence"). This statute gives the United States Attorney the ability to seek detention in a wide array of cases, including drug and weapons offenses. This federal authority, in addition to the power which exists under the D.C. Code, already gives the United States Attorney the ability to seek detention of persons accused of violent crimes who pose a danger to the community. The proposed D.C. Bail Reform Act is broader than the federal statute, primarily because it allows detention in all felony drug cases, regardless of the quantity of drugs distributed. Congress excluded small scale dealers from the detention provisions of the federal statute. Under the proposed change to D.C. law, however, a first offender accused of selling a single \$10 rock could be preventively detained.

We strongly believe that preventive detention is an evil which should be abandoned in favor of speedy trials and better pretrial supervision. If it is a necessary evil, it should be confined to those few cases in which it has truly been shown to be necessary. Each time someone is detained who would not commit an offense on release, that person, his family, and the community is robbed of something precious and irreplaceable. Although the newspapers often sensationalize reports of crimes committed by people on pretrial release, they do not report the daily ordeal of young men ripped from their homes and families for crimes they did not commit. Nevertheless, if the legislators of this city are persuaded that preventive detention should be an option in our city in the kinds of cases described by the United States Attorney, we suggest that this can be accomplished without the far-reaching and unconstitutional provisions of this bill. The United States Attorney's proposal capitalizes on understandable fear in the community to promote legislation which poses a broad and unrelated threat to our community's civil liberties. Although promoted as a narrowly tailored response to a perceived loophole in the present detention law, the United States Attorney's proposal is in reality a revolutionary measure which would make detention the norm in the District of Columbia, rather than "the carefully limited exception," as our Constitution requires. United States v. Salerno, 107 S. Ct. 2095, 2105 (1987).

Analysis of the Proposed Legislation

The proposed Bail Reform Act changes standards and procedures at three stages of the criminal process: initial appearance (presentment), the detention hearing, and the trial. At each stage, the bill does away with important safeguards and makes it more likely that people who are innocent of any crime and who present no danger to the community will be imprisoned.

A. Initial Appearance

Each day commissioners of the Superior Court review over a hundred new "lockup" cases to set conditions of release. At most, a few minutes are devoted to a review of the defendant's history and community ties, and the allegations against him. Although the prosecution may have prepared an arrest warrant long in advance, and the defendant may have turned himself in, the defense has no advance notice of the charges, and is not given an opportunity to contest the facts set forth by the government in an affidavit. It is at this stage, and in this high pressure, high speed

environment, that the initial decision to "hold" a defendant pending a detention hearing is made. The proposed bill changes both the procedures and the substantive standards for making these decisions in ways that are simply unfair to the defense, and have nothing to do with the public rationale for changing the law.

1. Substantive Changes.

1322(a)(1)(B): Current law already allows temporary detention (a five day "hold") for persons on probation, parole, or pretrial release. This paragraph adds authority to detain anyone who "[i]s not a citizen of the United States or lawfully admitted for permanent residence," to be held without bond pending a determination by the Immigration and Naturalization Service (INS) of whether the person should be excluded or deported. This "hold" authority vastly exceeds the legal authority of the INS to take action based upon an arrest, and presents a tremendous potential for discriminatory enforcement.

There are many people lawfully present in the United States who are neither citizens nor permanent residents. Tourists, students, and legal residents who are awaiting resolution of political asylum claims are common in the District of Columbia. Should any one of these persons get arrested, for any offense, the prosecution may request a "hold" for up to ten days not counting holidays and weekends, even though the INS would not have any power to take action against the person on the basis of an arrest alone.

1322(b)(1): This paragraph does away with the requirement of a "pattern of behavior consisting of his past and present conduct," and permits detention on the basis of a single arrest, even if the defendant has an otherwise spotless record. Since "dangerous crimes" in the District of Columbia include all felony drug offenses, this means that a first offender charged with a drug offense is subject to detention without bond pending trial. There have been enough scandals involving police vice and narcotics units to inspire caution before allowing preventive detention on the basis of a single arrest. Recently, a federal judge dismissed a prosecution brought after police officers "destroyed evidence in the case and later lied about it in court." Thompson, "Police Faulted in Dismissal of Drug Case," Washington Post, Dec. 1, 1991 D1, 7. Unlike mandatory minimum sentences imposed after conviction, this provision would result in the incarceration of people whose cases are dismissed, who are acquitted after trial, who are convicted of lesser offenses, or who are exempt from mandatory sentencing because of drug addiction.

1322(b)(2): This paragraph permits detention based upon a charge of obstruction of justice. Current law authorizes detention of a person "charged with any offense" if the person tries to intimidate or threaten a witness or juror in the pending case. This provision would extend detention authority to persons who have never been charged with any other offense.

1322(b)(3): This paragraph authorizes the detention of a person with two or more convictions for a dangerous or violent crime, or for obstruction of justice if the person is charged with any felony, no matter how minor the new offense is, and no matter how old the convictions are. A fifty year old charged with passing a bad check or felony destruction of property could be detained without bond based upon convictions for two drug offenses when he was eighteen. By contrast, current D.C. law requires either that the person be on probation, parole or pretrial release for the

past offense, D.C. Code § 23-1322(a)(2), or that the conviction be within ten years of the new arrest. Current law is limited to crimes of violence, but could be extended to include new arrests for dangerous crimes without extending to "any felony."

The leaders of this city cannot rely on "prosecutorial discretion" to prevent the abuse of this detention power. Not long ago in this city a young woman was found asleep inside a "crack house" in the same room with a quantity of crack cocaine. There was no evidence that she had been observed selling drugs, or participating in a drug business in any way other than that of a customer. The young woman lived with her parents, both of whom were successful, employed, longtime residents of the District who were willing to assume responsibility for her. She was nine months pregnant. She was arrested, charged with possession of cocaine with the intent to distribute, and detained without bond in the United States District Court at the request of a representative of this United States Attorney. She gave birth to her child in the locked ward of D.C. General Hospital. Eventually, the Chief Judge of the United States District Court reversed the magistrate's detention order and she was released to her parents. The case was dismissed. This case is just one example of why we cannot rely upon the discretion of the prosecutor to only request detention in appropriate cases.

2. Procedural Changes.

1322(a): This paragraph provides for the temporary detention of a person on probation, parole, pretrial release, or who is not a citizen or permanent resident for "not more than ten days, excluding Saturdays, Sundays and holidays," to determine whether the probation, parole, court, or immigration authorities wish to take custody of the defendant. Current law permits detention "for a period not to exceed five days (excluding Saturdays, Sundays, and legal holidays)," D.C. Code § 23-1322(e), or three days for persons on pretrial release. D.C. Code § 23-1322(f). There is no reason to extend the time for making what amounts to a telephone call to the authorities to notify them of the defendant's arrest to permit detention for as long as two full weeks. There is simply no reason to believe, after twenty years with the existing statute, that compliance with the five day (excluding weekends and holidays) time limit is impractical. To our knowledge, no justification has been offered for this change.

1322(d)(1): The statute also drastically changes the standards for continuing a detention hearing once the government has requested detention. It provides for mandatory temporary detention "[d]uring a continuance," but does not require the government to offer any justification at all for a continuance of up to three days. In addition, the proposal places no limit whatsoever on the length of a government continuance if good cause is shown. Current law requires the government to show good cause for any continuance of the hearing, D.C. Code § 23-1322(c)(3), and limits government continuances to three calendar days. The current law permits, but does not require, detention pending a hearing. *Id.* In many cases there is no reason why detention hearings could not take place immediately, as they do in juvenile court. Again, there has been no explanation for eliminating the "good cause" requirement.

B. Detention Hearings.

Under current law, judges are required to hold special hearings to determine whether the government has proven the need for detention by clear and convincing evidence. These hearings are more extensive than ordinary preliminary hearings because they have different consequences. Hearsay is admissible in many cases, but is not always sufficient to satisfy the defendant's due process right to confront witnesses. See Lynch v. United States, 557 A.2d 580, 582 n.6 (D.C. 1989) (en banc).

1. Substantive Changes.

1322(c): This subsection creates a rebuttable presumption that no combination of conditions will assure the safety of the community once a judge has found probable cause to believe that a person has committed an enumerated offense. This provision radically changes the burden of proof from "clear and convincing evidence" to mere "probable cause," by requiring detention "unless he demonstrates that he does not pose a threat to the safety of the community or another person." The rebuttable presumptions fatally undermine one of the essential safeguards against erroneous detention in the District's original detention law and in the federal statute considered by the United States Supreme Court. See United States v. Edwards, 430 A.2d at 1339; United States v. Salerno, 107 S.Ct. 1197, 2104 (1987). The Supreme Court and our Court of Appeals approved detention based upon separate findings of probable cause or substantial probability to believe that a person committed the charged offense and clear and convincing evidence of dangerousness. There is a vast difference between making a finding of substantial probability to believe a person committed an offense in addition to clear and convincing evidence of dangerousness, and using a probable cause finding as a substitute for clear and convincing evidence of dangerousness. By shifting the burden of proof to the defense based upon a probable cause finding, the statute crosses constitutional bounds. See Lynch, 588 A.2d at 582 n.5 (reserving issue of impermissible "bootstrapping" of probable cause). The proposed legislation also changes the standard from "substantial probability" as required in the existing rebuttable presumption provisions, to probable cause, further diminishing the protection of the innocent against wrongful detention. See Edwards, 430 A2d at 1339 (discussing substantial probability standard).

The proposal threatens to reduce detention hearings to empty formalities. By contrast, in United States v. Salerno, the case in which the Supreme Court ruled on the constitutionality of preventive detention, the government presented overwhelming evidence of guilt, including recordings of wiretapped conversations. The government did not rely upon presumptions in Salerno, and the Supreme Court did not consider the constitutionality of this aspect of the federal law. 107 S.Ct. at 2100 n.3.

In addition, the proposal is not limited, as the United States Attorney's op-ed piece implies, to "triggermen." It includes people who possess, but neither display nor fire a weapon; it includes people who possess imitation firearms; and it presumably includes people charged with aiding and abetting such offenses who do not actually possess a weapon at all. It also includes people charged with threatening, intimidating, or injuring police officers (or attempting to do so). The statute thereby creates a presumption in favor of detaining people charged with assault on a police officer, even though many of these people are themselves the victims of assaults by officers who are charged in order to protect the officers.

2. Procedural Changes.

1322(d)(6): Current law requires that preventive detention cease "whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention." D.C. Code § 23-1322(d)(2)(B). This may include the suppression of evidence, Edwards, 430 A.2d at 1333, as well as evidence that undermines the government's proof of dangerousness. The proposed statute, however, omits this language and requires a judicial officer to make a preliminary finding "that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue" of dangerousness. It is possible that under the proposed statute, a defendant could remain in detention even if the government no longer has a viable prosecution. This change cannot be justified.

1322(d)(7): Current law permits, but does not require, a judge to issue an arrest warrant for a defendant who has been released if the government decides to seek detention. D.C. Code § 23-1322(c)(2). The proposed statute, however, substitutes "shall," for "may," requiring the arrest of a person who has already been released and may be living in full compliance with all release conditions. Judges should have discretion to issue a judicial summons rather than an arrest warrant in such cases.

C. Trial

Although the statute does not cover the trial process itself, it will have a substantial impact on the fairness of criminal trials in the District of Columbia. As more people are detained on less evidence, it will become more difficult to locate defense witnesses and to prepare for trial. Defense lawyers and investigators searching for witnesses known by nickname or a vague description might succeed if aided by the client, but are unlikely to succeed without help. There have been many recent cases in which witnesses the police overlooked or rejected have provided vital exculpatory testimony for the defense. Incarceration is a devastating handicap for the defense, and it is most harmful to those who are innocent but unable to mount an effective defense because of their imprisonment.

The bill does significantly increase the amount of time a person can be detained before trial. When our Court of Appeals upheld Section 1322 in 1981 it did so with the understanding that the detention authorized "is closely circumscribed so as not to go beyond the need to protect the safety of the community pending the detainee's trial. Such detention is not to exceed 60 days, by which time the detainee must be brought to trial or bail must be set." Edwards, 430 A.2d at 1333. In 1982, at the United States Attorney's request, the Council amended the law to allow an extension of up to 30 days for good cause shown. This was done, supposedly, to allow enough time to investigate and prepare even complicated homicide cases for trial.

Today, although there has been an increase in the number of prosecutions for violent crimes, there has also been a significant increase in the size of the United States Attorney's staff. Senior prosecutors with low case loads handle the most serious felonies. Yet the United States Attorney proposes doubling the length of detention to 100 days, with an extension of up to twenty days. Moreover, this period is measured from the date of the detention order, rather than the date of arrest. Since in some cases an arrest may precede a defendant's initial appearance by several days, this provision significantly increases the length of incarceration before trial.

When it passed the federal Bail Reform Act, Congress relied on the federal speedy trial act's requirement that a detained defendant must be tried within ninety days, except for good cause, or be released. 18 U.S.C. §§ 3164(c), 3161(h). See S. Rep. 98-225, 98th Cong. 1st Sess. 22 n.63 (1983) (explaining federal bail reform). This provision governs even the most complex multi-defendant conspiracy case. Yet the "speedy trial" provision of the proposed bill gives the prosecution even more time.

In addition, the proposed statute significantly increases the overall length of detention without including provisions to ensure that the defense has an adequate opportunity to prepare for trial. The United States Attorney refuses, despite the plain language of Criminal Rule 16, to provide discovery as a matter of right before indictment. Since the only statutory limitation on the length of time to indict allows the government 9 months to seek an indictment, there is nothing to guarantee that a defendant will have an adequate opportunity to obtain discovery, prepare for trial, and file pretrial motions before the 120 days expire. The government may, by delaying discovery, force the defense to request a continuance of trial. Under the proposed statute, unlike the current law, this would have the effect of extending the length of preventive detention.

Defendants should not be forced to choose between fair trials and extended preventive detention. The United States Attorney has offered no explanation for most of these changes. They do not relate to the narrow purpose advocated in his public communications. Nor can they be defended as necessary to protect the safety of our community.

Our Recommendations

We know that the fear in our community is real, and we do not suggest that it is enough to look for long-term solutions to poverty and hopelessness. Unlike most prosecutors, we spend many hours with clients, witnesses, and families in their homes throughout the District at all hours. We know from experience that many of these families include victims as well as suspects, and that it is impossible to build walls which will isolate all of the "bad" or "dangerous" people from everyone else. As Senator Ervin wrote of the original Justice Department proposal for preventive detention: "[p]reventive detention legislation is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem." "Foreword: Preventive Detention -- A Step Backward for Criminal Justice," 6 Harv. C.R. -C.L. L. Rev. 291 (1971).

The problem is complex, and so is the solution. The United States Attorney's objective is to enact a preventive detention law modeled after, although even more repressive than, the federal preventive detention law. This objective has nothing to do with local conditions, nor is it prompted by the specific concern raised in the United States Attorney's Post submission. Our leadership owes it to the community to resist imitation of the federal model. We therefore propose six steps towards both long and short term solutions to the problem of violent crime:

• Obtain Accurate Information about the Effectiveness of Preventive Detention.
In 1970 the Justice Department promoted preventive detention on the basis of data supposedly showing that the crime problem was due to the District's liberal bail law. Later and more careful studies traced the problem to national trends in crime and

demographs, Roth & Wice, "Pretrial Release and Misconduct in the District of Columbia," 3 (1980). See Ewing, "Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass," 34 Buff. L. Rev. 173, 181-196 (1985). The D. C. Pretrial Services Agency and other agencies have computer capabilities undreamt of in 1970 or even in 1982. It is possible to determine with precision who is being arrested for what kinds of offenses, what kinds of release conditions are requested and imposed, and how often people who are released are rearrested for what kinds of offenses. Decisionmakers should gather all of this information from a reliable source like our Pretrial Services Agency, rather than relying on undocumented assertions by the United States Attorney. In addition, our leadership should consider what happens to those charges; it is obviously a mistake to detain someone for a crime he did not commit. How high a percentage of arrests for violent crimes results in acquittals or dismissals? How many rearrests result in acquittals or dismissals? Before undertaking a drastic revision of the District's bail law in imitation of the federal statute, a careful study should be conducted.

• Improve Pretrial Services and Supervision. The D.C. Pretrial Services Agency already offers a number of respected programs for supervision of arrestees. Some of these are models for programs around the country. It is cheaper and better for the community to help arrestees stay off drugs, find jobs or training programs, and obtain counseling help if they need it than it is to incarcerate them. Not only that, but incarceration before trial tends to be a self-fulfilling prophecy of incarceration after trial. Studies have repeatedly shown that conviction rates are higher for people who are incarcerated, and that sentences are harsher. It is better, especially in this time of fiscal crisis, to spend money helping someone to acquire skills and attitudes that will lead them towards a productive and law abiding life, than it is to spend thousands of dollars to house them at Lorton with little hope that they will emerge better rather than worse.

• Improve the Juvenile Justice System. Few children enter the juvenile justice system for the first time charged with violent crimes. The number of young people charged with serious offenses is evidence of the failure of our juvenile justice system to carry out its mission of providing care and rehabilitation to children in its custody. This is not because the system is "too soft." Many other cities with serious crime problems have successful juvenile justice systems which reduce teenage crime. Our system, however, has been nothing more than a warehouse which teaches youngsters imprisonment as a way of life.

In 1986 the city agreed to improve the services it offers to children in its custody. It is cheaper to spend money on services for a substance abusing family than it is to spend money to incarcerate a youngster from such a family at Oak Hill and then at Lorton. We must begin now to break the cycles of abuse and neglect which contribute to the violence in our streets. We must ask why so many young men are so filled with anger that slight quarrels lead to shooting and death, and we must intervene effectively to reduce that anger.

• Increase Court Resources. Studies have consistently shown that the rate of rearrests of persons released pending trial varies with the length of time the case is pending. Although the United States Attorney's Office has increased its staff, there are still not enough judges, experienced public defenders, or qualified private counsel to try serious cases quickly. Speedier trials in all cases is a better solution than detention, particularly since D. C. Pretrial Services Agency data shows that the

rearrest rate is almost the same across all categories of defendants. Speedy trials cannot happen without more resources for the court and the defense, nor can they happen without faster discovery by the United States Attorney's Office. But these changes can be accomplished, resulting in the swifter exoneration of the innocent and the swifter punishment of the guilty. This is a better goal to strive for than a system which imprisons as many people as possible until proven innocent.

· Increase Street Patrols and Community Policing. Police officers who are familiar with and are accepted within neighborhoods have a much better chance of preventing crime than officers who have less community involvement. An increased police presence in high crime areas will have a stronger deterrent effect than increasing penalties or changing bail standards. To do more than just push crime from one area to another, we need to increase the number of officers assigned to street patrols.

· Increase Drug Treatment Services. Too many crimes are committed over drugs, either by addicts desperate to obtain them, or by dealers desperate to sell them. By making drug treatment more accessible, we can remove the pressure for addicts to steal to support their habits and dry up the markets the dealers need. It is inexplicable why addicts seeking treatment must wait for weeks or months.

These changes will cost money, but so will putting people in jail without a trial. Programs designed to reduce crime pay for themselves by reducing losses due to injury and theft. Incarceration, in the long run, just produces more people without jobs, futures, or a stake in our society. It is time to invest in the future.

Prepared Remarks of
John A. Carver, III, Esq.
Director, D.C. Pretrial Services Agency
On Bill 9-360, "Bail Reform Amendment Act of 1991"

Before the
Committee on the Judiciary
Council of the District of Columbia
December 19, 1991

Madam Chairperson, members of the Committee on the Judiciary, it is a pleasure to appear before you today and offer comments on Bill 9-360, the "Bail Reform Amendment Act of 1991." This is a matter of great public interest. The Committee takes up this issue at a time when our city is being torn apart by an epidemic of violence -- an epidemic so tragic and often so random in its devastation that it seems hopelessly out of control. Bail reform is just one of a number of public policy initiatives that have been spawned by these desperate times.

As we open this policy discussion, I suspect there is much on which we all agree. I don't think many would take issue with the notion that public safety is a legitimate concern of the bail system, although the idea was quite controversial when first enacted into law in 1971. We could all live with a system in which truly dangerous and truly guilty defendants are held, quickly tried, and sentenced. By the same token, I think most would agree that for those defendants who can safely be supervised in the community, this alternative is preferable to locking them up prior to trial. It belabors the obvious to state that all of us want a system that carefully and honestly assesses the risks that may be posed by the pretrial release of someone charged with a criminal offense.

"Bail" has been defined as "the mechanism in which the defendant's right to freedom prior to trial is squared with society's interest and the smooth administration of justice".¹ This bill proposes to change the way in which these competing values are reconciled. Briefly stated, the bill expands the category of defendants subject to a pretrial detention, and eases the procedural burdens on the prosecutor to secure detention by creating "rebuttable

¹ Thomas, W., *Bail Reform in America*, Berkeley: University of California Press. (1976).

presumptions" and lowering the standard of proof on requisite judicial findings. I am sure that the advocates in our adversary system, representing the defense bar and the prosecution, will have a great deal to say about the procedural issues raised by this bill.

As Director of the Pretrial Services Agency, I am not here as an advocate for either the defense or the prosecution side of this issue. If I am an advocate for anything, it is for a process of pretrial release decision-making that faithfully carries out societal goals, as expressed through the legislative process, in the area of pretrial release and detention. I am an advocate for a fair, open, and honest process that reconciles the sometimes-conflicting goals of a defendant's right to freedom before conviction, and society's right to enjoy peace and tranquility, free from violent crime. Ultimately, it is the judges who must strike the balance in individual cases. It is the statutory role of the Pretrial Services Agency to assist judges by providing background information on arrestees, and supervising court-ordered conditions of pretrial release.

In our capacity as neutral providers of information to judges, we collect a great deal of data on how the system actually works. Given our high degree of automation, and our ability to track cases, release decisions, rearrest rates, and dispositions, I believe we are in a position to assist the Committee as it examines current practices and assesses the potential impact of changes to those practices.

I have followed with great interest the call for "bail reform." Much of the public outcry stems from highly publicized cases involving truly heinous acts. Knowing something about how the bail system is supposed to work, I have asked myself if these cases really are examples of the need for bail reform, as Mr. Stephens frequently asserts. I have also taken a systematic look at release and detention practices in Superior Court, and the changing trends over the past several years.

From these analyses, I have concluded that some modifications to our release and detention laws may be in order. But I have found little to persuade me, either from the individual cases frequently cited or from the aggregate data, that wholesale changes to our pretrial release and detention system are justified at this time. It seems to me that the real problem is not that the current law is inadequate, but that many provisions of the current law are simply not being used. I have detailed some of these areas in my comments on Mr. Stephens' earlier proposal, prepared at the request of the City Administrator, which I am submitting for the record with this statement.

Specifically, I have proposed two changes. First, I would modify D.C. Code §23-1322 so that persons charged with a "dangerous crime" and persons charged with a "crime of violence" (as defined in D.C. Code §23-1331) could be treated equally with respect to eligibility for a pretrial detention hearing. Second, I would eliminate financial conditions of release altogether.

In my opinion, many if not most of the concerns expressed by the sponsors of this bill could be addressed with a small modification to the existing law. Our current detention statute maintains a distinction between "dangerous crimes" and "crimes of violence".² I am not aware of the reason for this distinction. However, it does have practical consequences in that situations arise where the current charge coupled with past conduct are not statutorily sufficient to permit the U.S. Attorney to request a hearing. This could be remedied along the following lines (shading representing new language):

§ 23-1322. Detention Prior to trial

(a) Subject to the provisions of this section, a judicial officer may order pretrial detention of --

(1) a person charged with a dangerous crime ~~or a crime of violence~~, as defined in section 23-1331...

(2) a person charged with a crime of violence ~~or a dangerous crime~~, as defined in 23-1331...

With this technical modification, the U.S. Attorney would be free to request a detention hearing in many cases similar to the examples cited in support of Bill 9-360. For example, "drive-by shooters" are generally charged with a "crime of violence." As currently written, only in the instance of defendants charged with a "dangerous crime" can the "past and prior conduct" (such as a juvenile record) be the basis for a detention hearing request. My proposed change would eliminate this anomalous result.

The second proposal is sure to provoke controversy, but in my view offers the best hope for a truly honest system for determining who really belongs in jail, and who can be safely released, given the existence of effective supervision options. I would make the following change (strike out indicating deleted language):

² D.C. Code §23-1331

§ 23-1321. Release in other than first degree murder cases prior to trial.

No financial condition may be imposed ~~to assure the safety of any other person or the community.~~

Such a change would force the system to confront head-on the issue of public safety in every case. It would eliminate once and for all the truly "antiquated" parts of our bail law -- the use of money bail to accomplish "sub rosa" preventive detention.

I believe this change is the only way to achieve true bail reform. The money bail system is a system that has outlived its usefulness. There is no empirical evidence supporting the notion that the money bail system of release (assuming it actually results in a release, which it frequently does not!) operates more effectively than carefully monitored non-financial conditions of release.

In my view, the only explanation for our continued use of this option is expediency. Setting a bond in tough cases is quick and easy. It does not require a hearing. There are no time limits in which the case must come to trial, as there are for defendants detained under §23-1322. And if the defendant (or his friends) somehow come up with the cash to bail him out, this is not an action or a decision taken by any actors in the system, or for that matter, even known to the system.

The real problem with the money bail system of release/detention is that it reduces the court's role to that of a gambler -- gambling that a given amount will either facilitate release or ensure detention. The public is entitled to have these issues determined openly and honestly -- and not on a "roll of the dice."

While I do not believe that this body should legislate based on anecdotes, I would like to address one case that has been put forth as an example of why we need a major overhaul of our detention statute. I believe the case is a better example of why we need to enact the modifications I have proposed.

On November 7, 1991, in a story in the Washington Times reporting on the press conference that unveiled the bill before the Committee today, Mr. Stephens cited the case of a defendant by the name of Tarik Coefield, who committed a murder while on release for another murder. This example, according to the story in the Times, underscored the need for bail reform.

I looked into this case and learned that there was a little more to it than

was reported in the newspaper. When Mr. Coefield was arrested and charged with Second Degree Murder on February 28, 1989, he already had a pending gun charge. The Pretrial Services Agency recommended a "three day hold" so that the judge in the first case could review release conditions in light of the subsequent arrest for murder. A three day hold was ordered. At the end of the three days, under existing law, Mr. Coefield could have been detained based on these facts. However, at the hearing, the original release remained unchanged, and a high bond (\$25,000) was set on the Murder II charge. Two days later, the bond was posted, and Mr. Coefield was released. Less than a month later, Mr. Coefield was back in the "lockup", this time charged with First Degree Murder. At this point, Mr. Coefield was clearly eligible for detention under three separate sections of our current law. Keep in mind also that current law states that "no financial condition may be imposed to assure the safety of any other person or the community." So what happened on the Murder I case? A \$100,000 bond was set. This time, Mr. Coefield was unable to come up with the cash, and remained in jail until he was convicted and sentenced. Clearly, these crimes are shocking. I agree with Mr. Stephens's published remarks that something is wrong here. But there is no assurance that the result would have been any different had this bill been the law, since the money bond option would remain.

There should have been a hearing on both occasions to address the community safety issues posed by Mr. Coefield's prior arrest on a gun charge, and two subsequent arrests on murder charges. Yet in both instances, money bonds were set. In the first instance the result (most likely unintended) was the unsupervised release of Mr. Coefield. In the second instance, the result was detention, but that outcome was by no means certain, given Mr. Coefield's demonstrated capacity to come up with a substantial sum of money just a month before.

As I said previously, while individual anecdotes may be instructive, they should not, in my opinion, be the basis for legislative reform. I would like to turn now to data representing overall trends in our pretrial release and detention process.

The experience with defendants charged with homicides might be useful to the Committee. As many of you will recall, the detention statute was amended in 1982, and §23-1325 was added to permit detention without bond in cases of defendants charged with First Degree Murder. In 1989, emergency legislation was enacted creating a "rebuttable presumption" that no conditions of release will assure community safety when the judicial officer finds "there

is a substantial probability that the person has committed murder... while armed..." Since this bill expands the use of rebuttable presumptions, and lowers the standard from "substantial probability" to "probable cause", the experience with this earlier enactment may be helpful to the Committee.

Since the changes proposed in Bill 9-360 will affect all homicide cases, the Committee may be interested in case outcomes. The Pretrial Services Agency recently conducted an analysis of homicide case dispositions over the last five years for the Office of Criminal Justice Plans and Analysis. Looking only at 1990 homicide cases (as of June 30, 1991), and excluding cases still pending, 60% were dismissed by the U.S. Attorney's Office, and another 5% were found not guilty. Looking only at the cases detained, 49% were still pending as of June 30, 1991, but of those closed, 61% were closed without a finding of guilty -- most by dismissals. The Committee may want to look closely at this data when considering relaxing the standards necessary for pretrial detention.

I would like to turn now to the broader category of cases -- those felony defendants charged with "dangerous crimes" or "crimes of violence." Again, since all of these defendants would be subject to pretrial detention under Bill 9-360, the Committee may find it helpful to examine case outcomes and rearrest rates. The following data comes from an analysis of all felony charges filed during the first six months of 1990 -- a total of 4667 cases. Among the cases that had reached final disposition as of June 30, 1991, 35% of these felonies were dismissed with no disposition of guilt. Another 27% were convicted of something (often a lesser-included offense) and sentenced to probation.

Looking at a sub-sample of these 4667 felony cases -- those who would qualify for detention under this bill based on charge alone -- 37% were dismissed and another 31% were sentenced to probation. Finally, looking at a different sub-sample -- those qualifying for a detention hearing under current law, 25% of the cases were dismissed, and another 20% sentenced to probation.

Finally, I would like to turn to the question of rearrests while on pretrial release. It is this problem, or the public perception of this problem, that seems to be driving the call for "bail reform." Of course, no system, short of locking up all defendants until their case is over, can ever totally eliminate the problem of rearrests.

Again, using the data sample of the 4667 felony cases, the overall rate

of subsequent arrest was 22%. However, when one takes a closer look at the problem on people's minds -- the rate of repeat violent arrests -- a somewhat different picture emerges. Of those felony defendants charged with a "dangerous crime" or a "crime of violence", 95% were not rearrested on a subsequent "dangerous" or "violent" offense.

In closing, I appreciate the opportunity to appear before the Committee on the Judiciary and share my perspective on this important issue. I hope the information I have supplied will be helpful as you consider ways in which to make our criminal justice system more effective. I look forward to working with Committee in the days ahead, and will be happy to provide any additional information the Committee may desire.

Comments on Proposed Amendments to Bail Laws
Submitted by:
John A. Carver, III
Director, D.C. Pretrial Services Agency
October 3, 1991

The United States Attorney has offered for the Mayor's consideration a proposal to amend the bail laws of the District of Columbia. At the request of City Administrator John P. Bond, III, I have reviewed both the suggested changes as well as the reasons offered in support of these changes contained in the letter from Mr. Stephens to Mayor Dixon, dated September 16, 1991.

Summary

First, the premise for the proposal -- that "under current law judges are prevented from detaining until trial many of the most dangerous defendants" -- is not supported by the facts.

- In thousands of cases eligible for pretrial detention now, the U.S. Attorney requests money bonds.
- Money bonds cannot assure community safety. The current over-reliance on money bonds permits many "dangerous" defendants to purchase their freedom, without any further restrictions on their pretrial behavior.
- While most defendants in all categories return to court and are not rearrested, rearrest rates for defendants eligible for pretrial detention, but free on money bonds, are higher than average.
- In cases representing the highest statistical likelihood of dangerousness -- defendants charged with a "dangerous" offense or a "crime of violence" and already on probation or parole for another offense (all of whom are eligible for a "five day hold") -- holds are rarely used. Money bond has become the norm in just the last four years.

Second, I would like to point out that despite the assertion that this proposal is "modeled after the existing Federal Bail Reform Act," there are several key differences.

- The proposed law expands the category of defendants eligible for detention from that permitted in the federal "model".
- The proposal omits an important provision of the federal law which prohibits judges from imposing a financial condition (money bond) that results in the defendant's detention.

- Careful consideration should be given to the actual experience of the Federal bail act before embracing it as a "model" for the District of Columbia.

Finally, I would like to offer a few suggestions of my own, which I feel would better address the concerns we all share for release/detention procedures that take into account not only the defendant's rights, but also the public's.

- Many of the concerns expressed by Mr. Stephens could be addressed with a technical amendment to the existing law, which would eliminate the procedural distinctions between "dangerous" crimes and "crimes of violence."
- The use of money bonds should be finally and unequivocally abolished. This would ensure that the existing law would be used the way the D.C. Council intended for it to be used. It would also guarantee a much more honest procedure for dealing with the important issue of public safety.

Discussion and Commentary

I. The premise for this proposal is not supported by the facts.

In his transmittal letter to Mayor Dixon, Mr. Stephens writes: "Under current law, judges are prevented from detaining until trial many of the most dangerous defendants who are charged with shootings, armed robberies, and other armed assaults." He goes on to quote several provisions of Section 1321, including the provision that "no financial condition may be imposed to assure the safety of any other person or the community." "The effect of this law," concludes Mr. Stephens, "is to prohibit judges from considering a defendant's dangerousness to the community when determining what bond should be set for defendants charged with violent crimes. Under Section 1321, the court can only consider whether a defendant is likely to flee, when setting a money bond."

There is considerable public misunderstanding about these sections of the law. No doubt some of this confusion stems from semantic differences about the meaning of the word "bond". This colloquial term is used to describe everything from "surety bond" (involving a bondsman), "cash bond" (a monetary deposit with the Court), "personal bond" (personal recognizance or supervised release) and even "unsecured bond," (personal recognizance with financial liability for failure to appear.)

There is a popular belief, reflected often in newspaper and television accounts, that except in limited circumstances, judges cannot consider community safety. This is simply not true. Under existing law, judges are required to consider the safety of the community in every case. D.C. Code §23-1321 states that any person (except those charged with Murder I) "shall, at his appearance before a judicial officer, be ordered released pending trial on his

personal recognizance... unless the officer determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required or the safety of any other person or the community." (emphasis supplied) "If such a determination is made, the judicial officer is then to "impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or the safety of any other person or the community." (emphasis supplied)

Later on in section 1321, as Mr. Stephens correctly notes, is the provision that "no financial condition may be imposed to assure the safety of any other person or the community." There is considerable history behind this language, but essentially it boils down to a simple, common sense proposition. Financial conditions of release should not be used to assure community safety because they cannot assure community safety. Why? Because there is no way of knowing with any certainty the outcome of a particular financial bond. Low bonds may result in lengthy detention if the defendant has no money. Conversely, high bonds can be posted. Once the defendant has satisfied the financial condition of his release (by paying a sum of money) there are generally no further restrictions on his pretrial behavior, such as drug testing, curfew, or placement in a halfway house.

A powerful impetus for enacting both the D.C. detention statute in 1970, and the federal statute in 1984 was precisely the dual realization that community safety should be an explicit consideration in pretrial release decisions, and that money bonds cannot further this goal. The federal act is even more explicit, stating that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person."¹ (Interestingly, this important provision was omitted from Mr. Stephens' proposed changes.)

The legislative intent of both statutes is well documented. If the defendant is believed to be dangerous, either restrictive conditions of release are to be imposed to reduce the threat, or a detention hearing is to be convened for the purpose of examining the prosecutor's belief that a defendant's release would pose unacceptable risks. There is abundant legislative history underscoring Congress' intention to eliminate "sub rosa" preventive detention (i.e. detention accomplished by setting money bonds beyond the supposed financial means of the defendant) and to replace it with a more open and honest process. Under such a procedure, (and assuming the defendant falls within the statutory guidelines regarding current charge and prior behavior), the prosecutor has the opportunity to request a hearing to present evidence of a defendant's "dangerousness". The defendant has the right to challenge the basis for the requested detention. Finally, a detention order can be signed only after specific (and appealable) judicial findings are made. This procedure was viewed by many proponents as vastly preferable (both for the defendant and for the community) over the traditional and largely discredited practice of setting a monetary bond after a perfunctory glance at the police report.

¹ 18 USC 3142(c)

Essentially, Mr. Stephens is suggesting that the current D.C. detention statute is too limited in scope, and that the categories under which the U.S. Attorney's Office may request a detention hearing should be broadened. Whether the current law is "too limited" or "too expansive" is a subjective question. The answer necessarily reflects a public policy view on how the defendant's and the community's rights should be reconciled. Perhaps a better series of questions -- questions that are subject to empirical analysis -- could be asked. To what extent does the U.S. Attorney's Office use the current law? In how many instances where the defendant clearly falls within the existing guidelines for a pretrial detention hearing does the U.S. Attorney request such a hearing? Stated another way, in how many instances are the "tools" currently available simply disregarded in favor of requesting a money bond? And finally, among the cases in which the defendant could have been held for a detention hearing, but was instead held on a money bond -- how many eventually purchased their freedom from a bondsman and were rearrested?

The short answer to these questions is that except for Murder I cases, or an occasional "high-profile" case, the U.S. Attorney rarely requests either temporary holds or pretrial detention. In most cases where the prosecutor could ask for a detention hearing under existing law, a money bond is requested and granted. Too many of these defendants buy their way out of jail and are eventually back in the "lock up" charged with another offense.

The support for these statements is relatively easy to obtain, given the policies and data collection capabilities of the Pretrial Services Agency. The Agency interviews every arrestee charged with a criminal offense in the District of Columbia, operating in both the D.C. Superior and U.S. District Courts. Part of the Agency's risk assessment process is to notify the Court (and the attorneys) as to which defendants fall within the statutory guidelines for either a temporary hold (if the defendant is on probation, parole, or pretrial release) or pretrial detention. In every case in which the defendant qualifies for a detention hearing or hold, the Agency recommends that such a hearing be held (noting in the written report the citation to the applicable section of the D.C. Code) to determine if the underlying circumstances are such as to justify detention. If the prosecutor chooses not to ask for a hold, the Agency then supplies the court with a recommendation for restrictive release conditions designed to minimize any potential threat to community safety.

All of this information, including the actual release decision, is recorded in the Agency's computer system. Thus, the Agency is in a position to document through statistical analysis that which anyone may freely observe on any day in "arraignment" court -- namely, that the existing pretrial detention provisions are rarely invoked (except in the case of defendants charged with First Degree Murder) and that money bonds have become the norm, at least for the (arguably) "dangerous" defendants.

Before proceeding to the statistics on how the detention statute is currently being

administered by the U.S. Attorney's Office, a little historical background might be helpful.

The pretrial detention law took effect on February 1, 1971. Far from being "antiquated" (as described by Mr. Stephens in an opinion piece in the Washington Post on October 1), the law was a revolutionary departure from all existing bail laws. It was the first comprehensive statute in the nation that explicitly permitted judges to consider community safety at the defendant's first appearance, and set forth detailed procedures for holding without bond certain defendants for whom no conditions of release could adequately assure community safety. It was hailed at the time as one of the cornerstones of President Nixon's crime fighting program for the District of Columbia. Many states eventually adopted laws patterned after our law. Indeed, the Federal Bail Reform Act of 1984, (cited by Mr. Stephens as the "model" for his proposal) was itself modeled after the D.C. Statute, albeit with several important modifications. Finally, at the request of U.S. Attorney, amendments to the detention law have been enacted on two occasions -- first in 1982, and then again in 1989.

Throughout the District's twenty year experience with this law, the U.S. Attorney has never used the law in anywhere near the number of cases for which it was available. In an early study of the law, the virtual non-use of the statute was documented: "The law was invoked with respect to only 20 of a total of more than 6,000 felony defendants who entered the D.C. Criminal Justice System."² Four years later, another major study reported that: "Despite the great controversy this [preventive detention] provision initially stirred, it has been used infrequently; in fact, following a brief four-month period in which it was formally used approximately 20 times and caused 10 defendants to be preventively detained, the provision was virtually not invoked for the next four years."³ The study went on to state that the use of high money bond to detain defendants had been cited as the reason for the infrequent use of the D.C. Code's pretrial detention statute. In 1981, when the D.C. Council considered then-U.S. Attorney Charles Ruff's proposals to amend the statute, David A. Clarke, Chairperson of the Committee on the Judiciary, wrote: "[T]he pretrial detention statute, which authorizes the court to detain dangerous individuals prior to trial, has been used infrequently. Specifically, detention under this statute has been requested by the United States Attorney's Office in 78 cases since 1976. Twelve of the requests were made

² Nan C. Bases & William F. McDonald, *Preventive Detention in the District of Columbia: The First Ten Months*, Georgetown Institute of Criminal Law and Procedure and Vera Institute of Justice, p. 69, (1972)

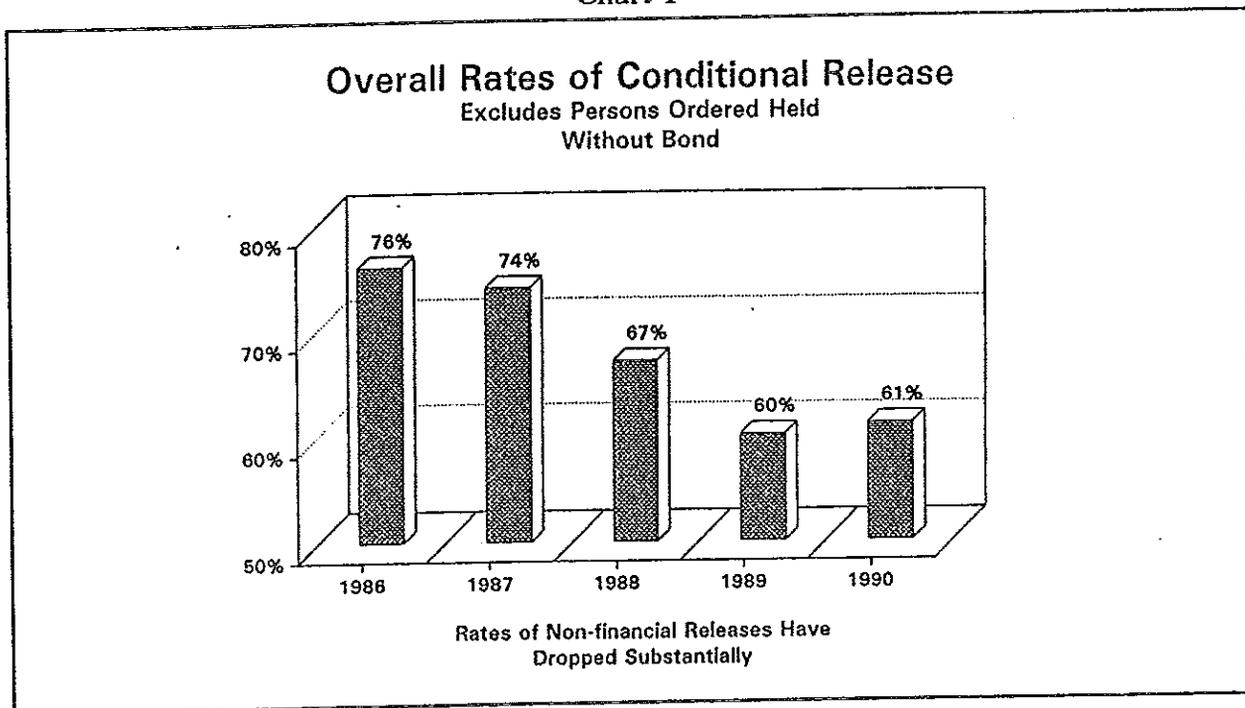
³ Jeffrey A. Roth and Paul B. Wice, *Pretrial Release and Misconduct in the District of Columbia*, Institute for Law and Social Research, March 20, 1978.

during 1980 of which 10 were granted."⁴

Following amendments to the statute enacted in 1982, and after a number of Constitutional questions were resolved in United States v. Edwards⁵ the detention statute was, for a time, used more frequently than ever before. During this time period in the mid-eighties, rates of supervised release were at an all-time high, and rates of monetary bond were relatively low. It appeared that at long last, the pretrial release and detention system was beginning to operate in the manner envisioned by the proponents of bail reform.

The past five years has seen a steady decline in the use of non-financial release alternatives. Chart 1 depicts the drop in release rates from 76% in 1986 to 61% in 1990.

Chart 1



⁴ Memorandum to members of the Council of the District of Columbia from David A. Clarke, dated July 22, 1981,, on Bill No. 4-127, the "District of Columbia Bail Amendment Act of 1981"

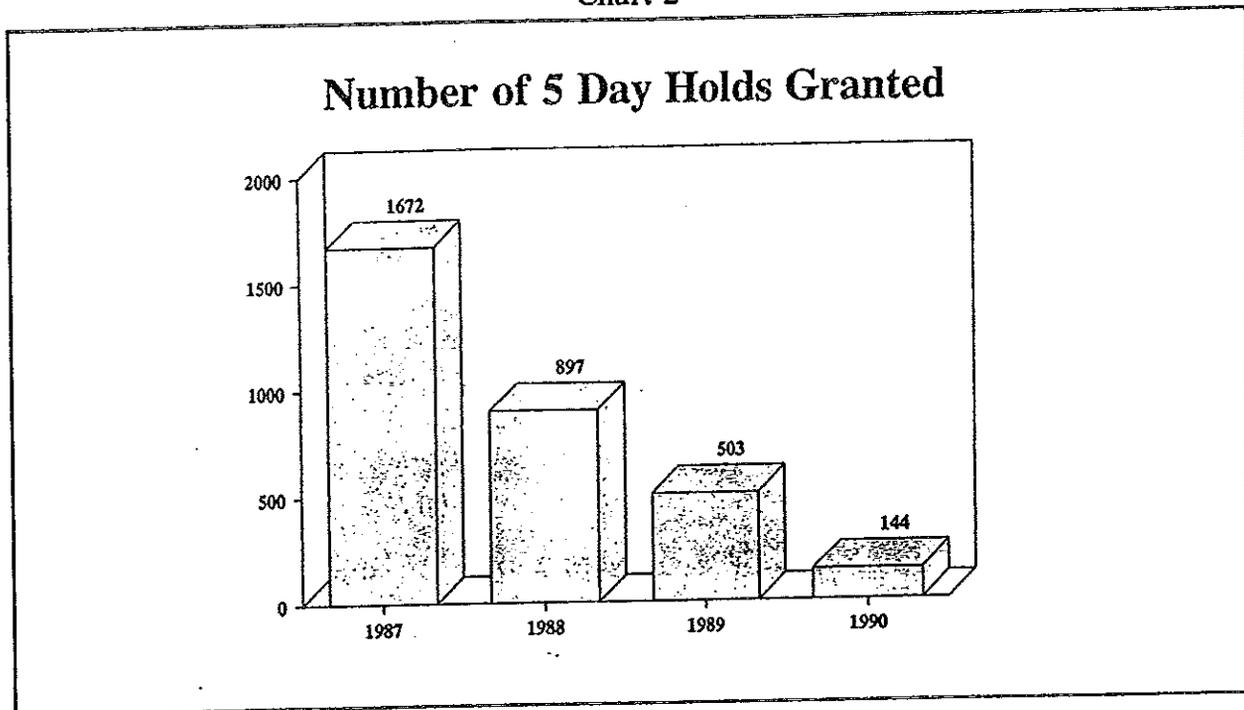
⁵ United States v. Edwards, App. D.C., 432 A.2d 1321 (1981), cert. denied, 455 U.S. 1022 (1982)

The drop in release rates might lead one to suspect that the decline resulted from an increase in the use of pretrial detention. This is not the case. The detention statute has also fallen into disuse. The differences observed from 1986 through 1990 are almost entirely explained by the increase in the use of money bonds. This change is clearly seen in the use of the "five day hold" provision of the detention statute⁶ for individuals rearrested while on probation or parole for another offense. The five day time period is designed to give the supervising authority an opportunity to decide whether to revoke probation and parole, and take the individual into custody.

⁶ D.C. Code 23-1323(e) "The judicial officer may detain for a period not to exceed five days (excluding Saturdays, Sundays, and legal holidays) a person who comes before him for a bail determination charged with any offense, if it appears that such person is presently on probation, parole, or mandatory release pending completion of sentence for any offense... and that such person may flee or pose a danger to any other person or the community if released. During the five day period, the United States attorney... shall notify the appropriate... probation or parole officials."

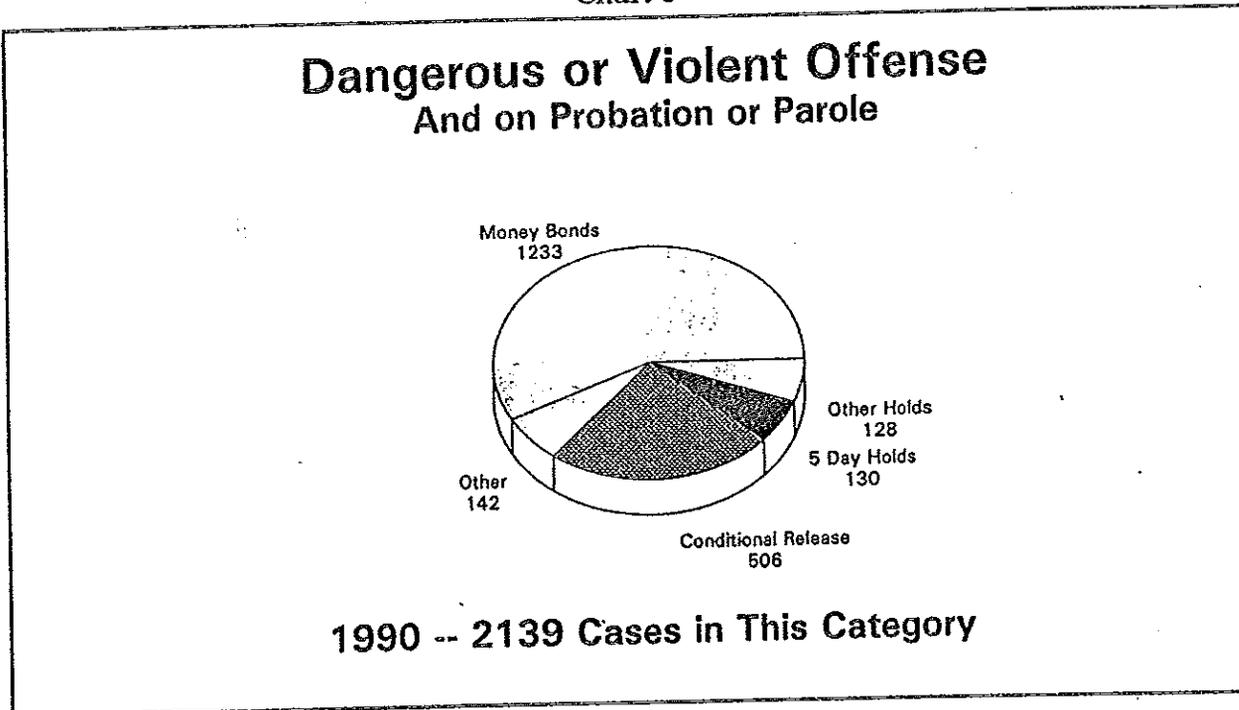
As Chart 2 illustrates, the use of five day holds was routine in 1986, when 1672 five day holds were granted. Following a steady decline, last year only 144 five day holds were granted.

Chart 2



While the five day hold provision applies to defendants rearrested on any charge, a closer look was taken at the subset of individuals charged with a "dangerous crime" or a "crime of violence" as defined in D.C. Code 23-1331, and on probation or parole. Clearly, parolees rearrested on a violent felony would have to be included among "the city's most dangerous defendants" for whom Mr. Stephens asserts the need for new bail laws. For 1990, the Agency identified 2,139 cases in this category. Every single one of these 2,139 cases is eligible for detention under current laws! Moreover, the fact that they were eligible for a five day hold was noted in writing in each of the reports submitted by the Agency summarizing the defendant's prior criminal history. (Copies of these reports go to the judicial officer, defense attorney, and the Assistant U.S. Attorney handling the case.) What happened to these cases? As Chart 3 graphically illustrates, more than half of them (1233) had money bonds set. This practice is in stark contrast to the practice of four years ago, when five day holds for parolees and probationers charged with serious felonies were routinely requested and ordered.

Chart 3



The foregoing relates only to the question of whether a defendant on probation or parole will be held temporarily to determine if release will be revoked. Many defendants are eligible for outright detention based on current charge and prior record. Here again, most of the defendants eligible for a detention hearing have bonds set.

The Agency examined a sample of all felony cases coming into the Superior Court during the first six months of 1990, a total of 4667 cases. Of these cases, 1358, or 39% met the current statutory guidelines for a detention hearing under D.C. Code 23-1322. Only 231 cases (17%) were held under any provision of the detention statute. In almost two out of every three cases eligible for a detention hearing, (835 cases) money bonds were set. This is not to suggest that the defendants in all of these cases should have been detained. (That would have been the focus of the detention hearing, had one been held.) However, these statistics suggest that the real problem is not that the current law is too limited, rather that the current law is simply being ignored.

- II. Mr. Stephens' proposal differs in key points from the Federal Bail Reform Act of 1984.

The Federal Bail Reform Act of 1984 was itself modeled after the D.C. detention statute. Without going into all the intricacies, the federal act expanded the categories of eligible defendants and enacted procedural changes regarding "rebuttable presumptions" of dangerousness or flight which shifted much of the evidentiary burden from the prosecution to the defense.

Looking first at the category of defendants eligible for detention under Mr. Stephens' proposal, it is clear that the suggested law broadens the category of "detainable" defendants beyond that permitted by the federal statute. It further appears that it more than triples the number of defendants eligible for a detention hearing from that which is currently authorized.

Utilizing the sample of 4667 felony cases filed in Superior Court during the first six months of 1990, 1358 cases were eligible for a detention hearing under current law. Under Mr. Stephens' proposal, it appears that at least 3,491 cases (61% of the total) would be eligible for a detention hearing. Even more are no doubt within the proposed guidelines since the number in one of the proposed categories has not been calculated from this data.⁷

The proposal omits an important provision of the federal law which prohibits judges from imposing a financial condition (money bond) that results in the defendant's detention. There is a great deal of legislative history spanning more than a decade regarding the use of money bonds as a "de facto" or "sub rosa" means of achieving preventive detention without the necessity of holding a hearing. Indeed, the use of bond set beyond the defendant's ability to post it has been and continues to be the primary means of detaining large numbers of individuals, not only in the District of Columbia, but throughout the United States. The inequities inherent in this practice have led such groups as the American Bar Association to call for the abolition of compensated sureties. (Kentucky did just that in 1976, making it a crime to write a bail bond for profit, establishing instead a state-wide system of pretrial services.) Other groups, such as the National Association of Pretrial Services Agencies, and the Mid-Atlantic Pretrial Services Association have called for the complete elimination of all forms of money bond.

Congress itself, in passing the 1984 Bail Act, gave serious consideration to the idea of eliminating money bonds. In one of the reports of the Committee on the Judiciary considering bills that eventually led to passage of the Bail Reform Act, this concern was spelled out clearly:

⁷ On page 8 of the proposal, one of the "detainable" categories includes "any felony if the person has been convicted of two or more offenses, described in subparagraphs (1) [crime violence or dangerous crime] and (2) [obstruction of justice] of this paragraph." The number of defendants in this category has not been calculated.

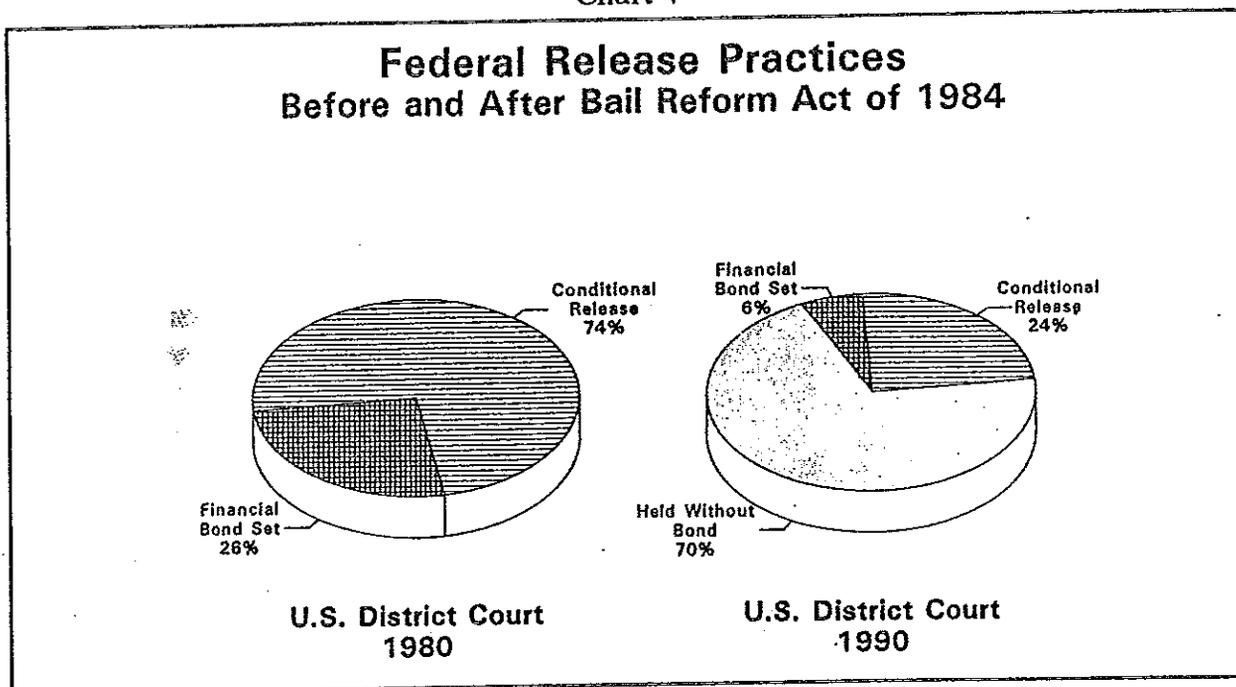
It is the intent of the Committee that the pretrial detention provisions of section 3502 replace any existing practice of detaining dangerous defendants through the imposition of excessively high money bond. Because of concern that the opportunity to use financial conditions of release to achieve pretrial detention would provide a means of circumventing the procedural safeguards and standard of proof requirement of a pretrial detention provision, the Committee was urged to do away with money bond entirely. Indeed, section 3502 of this bill as introduced did not provide for imposition of financial conditions of release. While the retention of money bond does create the potential for such abuse, the Committee concluded, after consideration of arguments for continuing to provide discretion to impose financial conditions of release, that the abolition of money bond at this time would promote unnecessary controversy. Instead, the bill assures the goal of precluding detention through use of high money bond by stating explicitly that "[the] judge may not impose a financial condition that results in the detention of the person."⁸

This key provision of the federal bail act is not found in Mr. Stephens' proposal. There are no procedural safeguards to prevent the mis-use of money bonds to detain defendants without a hearing. Equally important, to the extent that the "system" continues to rely on money bail to detain dangerous defendants, there is nothing to prevent the release of defendants who perhaps should be detained. Conducting inquiries into the source of money offered to post bail (proposed on page 5) is, in my view, completely unworkable in a high-volume urban court.

Before embracing the federal act as a "model" for the District of Columbia, careful consideration should be given to the actual experience in the federal system. In the U.S. District Court for the District of Columbia, there has been a dramatic change in release practices with the new law. Chart 4 compares release practices before and after the act came into effect.

⁸ Report of the Committee on the Judiciary, United States Senate, to accompany S.1630, Senate Report No. 97-307, 97th Congress, 1st Sess. 1155 (1981). (footnotes omitted)

Chart 4



As the Chart shows, detention rates have risen dramatically. Since the proposal for Superior Court is even broader than the existing federal law, a comparable increase in detention rates could have very significant fiscal consequences for the City. Furthermore, there is no evidence that detaining large numbers of arrestees is necessary to protect community safety, provided sufficient resources exist to supervise the release of defendants pending trial. Close supervision is effective in keeping rearrest rates low, even for "high risk" defendants. The Intensive Supervision Program operated by the Agency in conjunction with the D.C. Department of Corrections consistently demonstrates that only 2% of program participants are rearrested.⁹

Another reason for carefully examining the implementation of the proposed "model" is to determine the extent to which the intention of the lawmakers has been carried out. A GAO study of selected federal districts raises questions in this regard.¹⁰ Briefly, the study found that detention rates went up, that failure-to-appear rates were very low under the old and the new law (around 2%), and the rearrest rates were also very low (1.8% under the

⁹ See Prepared Remarks of John A. Carver, before the Council of the District of Columbia, Committee on the Judiciary, March 11, 1991.

¹⁰ *Criminal Bail: How Bail Reform is Working in Selected District Courts*, GAO/GGD-88-6, United States General Accounting Office, October, 1987.

old law, and 0.8% under the new law.) Finally, in direct opposition to the plain language of the law ("the judicial officer may not impose a financial condition that results in... detention..."), fully half of the detained defendants were detained because they could not afford the bail. In two districts, the percentage was even higher.

Finally, before embracing this "model," we would all be well advised to re-read the Supreme Court case upholding the constitutionality of the pretrial detention provisions of the Bail Reform Act of 1984. In the opinion for the Court, Chief Justice Rehnquist upheld the constitutionality partly on the basis of the extensive procedural protections contained in the law. "In our society," wrote Chief Justice Rehnquist, "liberty is the norm, and detention prior to trial is the carefully limited exception."¹¹ In the federal court today, detention has become the norm, and pretrial liberty the exception.

III. Some changes to our release/detention laws may be in order.

In my opinion, much of Mr. Stephens' concerns could be addressed with a small modification to the existing law. Our current detention statute maintains a distinction between "dangerous crimes" and "crimes of violence".¹² I am not aware of the reason for this distinction. However, it does have practical consequences in that situations arise where the current charge coupled with past conduct are not statutorily sufficient to permit the U.S. Attorney to request a hearing. This could be remedied along the following lines (shading representing new language):

§ 23-1322. Detention Prior to trial

(a) Subject to the provisions of this section, a judicial officer may order pretrial detention of --

(1) a person charged with a dangerous crime ~~or a crime of violence~~, as defined in section 23-1331...

(2) a person charged with a crime of violence ~~or a dangerous crime~~, as defined in 23-1331...

With this technical modification, the U.S. Attorney would be free to request a detention hearing in cases similar to the examples cited in support of his proposal.

The second proposal is sure to provoke controversy, but in my view offers the best hope for a truly honest system for determining who really belongs in jail, and who can be

¹¹ United States v. Salerno, 107 S. Ct. 2095 (1987)

¹² D.C. Code 23-1331

safely released, given the existence of effective supervision options. I would make the following change (strike out indicating deleted language):

§ 23-1321. Release in other than first degree murder cases prior to trial.

No financial condition may be imposed ~~to assure the safety of any other person or the community.~~

Such a change would force the system to confront head-on the issue of public safety in every case. It would eliminate once and for all the truly "antiquated" parts of our bail law -- the use of money bail to accomplish "sub rosa" preventive detention.

I believe this change is the only way to achieve true bail reform. If the federal bail reform act is a model for anything, it serves as a reminder that the clearly-expressed intentions of the legislative branch continue to be undermined by the existence of money bail.

The money bail system is a system that has outlived its usefulness. After numerous criminal justice studies, there is no empirical evidence that the money bail system of release (assuming it actually results in a release, which it frequently does not!) operates more effectively than carefully monitored non-financial conditions of release.

In my view, the only explanation for our continued use of this option is expediency. Setting a bond in tough cases is quick and easy. It does not require a hearing. There are no time limits in which the case must come to trial, as there are for defendants detained under §23-1322. And if the defendant (or his friends) somehow come up with the cash to bail him out, that "release decision" is not one taken by any actors in the system, or for that matter, even known to the system.

The real problem with the money bail system of release/detention is that it reduces the court's role to that of a gambler -- gambling that a given amount will either facilitate release or ensure detention. The public is entitled to have these issues determined openly and honestly -- and not on a "roll of the dice."

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STATEMENT

OF

JAY B. STEPHENS
UNITED STATES ATTORNEY
FOR THE DISTRICT OF COLUMBIA

BEFORE

THE

DISTRICT OF COLUMBIA CITY COUNCIL

CONCERNING

THE BAIL REFORM ACT OF 1991

ON

DECEMBER 19, 1991

I appreciate the opportunity to present the views of the United States Attorney's Office on the proposed District of Columbia "Bail Reform Act of 1991" introduced by Chairman Wilson and Councilmember Brazil.

The senseless cold-blooded murder of Patricia Lexie as she drove home with her husband on Interstate 295 last month is one chilling example of the need to reform the District's bail law. At the time of the shooting, the accused killer, Henry James, was free on \$1,000 bond for a charge of assault with intent to kill. Under the current bail law, the judge was powerless to detain James on his earlier armed assault charge, because James had no prior adult violent crime convictions.

The case of Tarik Coefield provides another shocking example of the violence to which we subject our citizens when dangerous offenders are not detained prior to trial. Coefield was charged with second-degree murder, but because he had no prior adult record he was ineligible for pretrial detention under current law and was released on \$50,000 bond. One month later he shot and killed Marcus Herring, a witness to the first murder, after Herring refused to accept a bribe not to testify. This February Coefield was convicted for both the first murder and the murder of Mr. Herring.

Based on our experience in prosecuting thousands of criminal cases each year in the Superior Court of the District of Columbia, we submit that reform of the District of Columbia bail law is necessary to protect the people who live, work and visit in our

Nation's Capital is a tide of armed violence that has swept this city. Under the current statute, judges are prevented from detaining until trial many of the most dangerous armed offenders who terrorize this community. For example, neither an eighteen year old with a lengthy juvenile record of violent crime, charged with critically wounding a group of teenagers outside of their high school in a drive-by shooting, nor a first time offender, who is arrested for robbing a crowded convenience store at gunpoint, is eligible for pretrial detention under the current bail law.

As a result, although our office moves to detain 97% of the armed violent offenders who are eligible under the current statute, most violent offenders are ineligible for pretrial detention and must be released back into the community within hours after their arrest. Some twenty percent of defendants charged with violent crimes commit additional violent crimes prior to their trial. Others are killed in apparent retaliatory acts of "street justice." Still others are never brought to justice because they successfully intimidate potential witnesses against them.

Our citizens rightly cannot understand why someone charged with a drive-by shooting is back on their block within hours of being arrested. As a result of the current bail system's revolving door, which routinely allows triggermen to reenter the community within hours after their arrest, our citizens are exposed to additional violence. Often intimidated witnesses refuse to testify against these violent offenders. It is simply intolerable that witnesses are forced to choose between bringing armed offenders to

justice and protecting their v. and their families.

Enactment of the legislation proposed by Chairman Wilson and Councilmember Brazil, which includes a speedy trial provision requiring that all detained defendants be tried within one hundred and twenty days, will instill confidence in our citizenry that the criminal justice system can bring about a swift and just resolution of cases. At the same time, the legislation will shield those who participate in the system of justice, such as witnesses and jurors, from threats and intimidation. The time for action is now. Every day that the enactment of this critical piece of legislation is postponed is a day that jeopardizes the safety of innocent citizens such as Patricia Lexie and Marcus Herring. We urge that this legislation be enacted on an emergency basis.

Critics of Chairman Wilson's legislation point out that, in an effort to ensure the community's safety, judges may currently impose conditions of release, such as requiring that the defendant remain in the custody of a third party or adhere to a curfew. What these critics fail to mention, however, is that, all too often, this effort is made in vain. Experience teaches that the imposition of such conditions has proven ineffective in protecting our citizens from additional violence. The case of Leonard Cole, the sixteen year old charged as an adult in the Dunbar High School shooting, provides a dramatic example of the failure of release conditions to protect our community. Cole was slain in broad daylight just five days after a D.C. Superior Court judge was forced to release him into the community. Although the judge had

imposed a "stay away" order, requiring Cole to avoid the Dunbar-High area, Cole was shot and killed while traveling in a car with two young women only a few blocks from the site of the original shooting, jeopardizing the safety of all those around him.

Similar problems occur when judges release a violent defendant into the custody of a third person. In the context of armed violent crime, the custodian simply cannot monitor a defendant's every move, in order to shield the community from additional violence. Indeed, fifteen percent of defendants released into the custody of a third party commit another crime while on release. The fact is, conditions of release, when imposed, are inadequately monitored and enforced. In order to shield effectively our citizens from armed violent offenders, judges simply must be given the authority to detain pretrial those who pose a demonstrated risk to this community.

Under current law, defendants charged with violent crimes other than first degree murder can be considered for pretrial detention only if they 1) have been convicted as an adult of another violent crime within the last ten years; or 2) are on parole or probation for an adult violent crime conviction; or 3) are on release pending trial as an adult for another violent crime. A defendant charged with a violent crime is ineligible for pretrial detention unless he has an adult history of committing violent crimes. Ironically, while the current pretrial detention statute allows the courts to detain a third-time pickpocket or a two-time burglar, it does not allow the courts to detain some of this city's

most violent armed offenders. In addition, in determining whether a defendant charged with a violent offense qualifies for pretrial detention, the law recognizes only prior adult convictions -- juvenile records are disregarded in the pretrial release decision. This is especially disturbing since the majority of armed violent offenses today are committed by defendants under twenty-two years of age who do not have a prior adult conviction for a crime of violence.

This year the U.S. Attorney's Office will prosecute nearly 1,200 violent armed offenses. While much public attention has focused on the number of homicides committed in the District, shootings that do not result in death out-pace homicides by three-to-one. Most of these crimes are committed by offenders under the age of 22, and increasingly, the triggermen are juveniles. Yet, many of these defendants, who obviously pose great danger to the citizens of this community, are released back onto the streets within hours of their arrest, free to terrorize their neighborhoods and intimidate witnesses. The law simply does not allow these young armed offenders to be detained unless they are charged with First Degree Murder. While the law permits detention of a defendant charged with first degree murder, it precludes detention if the shooting victim is in the hospital sustained by a life support system. Clearly, whether a triggerman poses a danger to the community should not depend on the fortuity of whether his victim lives or dies.

The reforms embodied in the Wilson-Brazil bill will

substantially enhance the safety of this community by keeping armed violent offenders off the street. The legislation is modeled closely after the Federal Bail Reform Act, which has been upheld as constitutional by the Supreme Court. The proposal affords defendants full due process and provides an extensive judicial procedure for determining whether eligible defendants should in fact be detained pretrial. These procedural safeguards, identical to those found in the federal statute, previously have been sustained by the courts.

The legislative history of the federal statute demonstrates that Congress, in drafting the federal statute, took painstaking efforts to avoid what it perceived as the shortcomings in the District of Columbia local statute, enacted some fifteen years earlier. The result was a comprehensive, effective and constitutional statute which has been working effectively in federal court since 1984. The federal law recognizes that the courts can detain pretrial defendants who constitute a danger to the community. Moreover, defendants charged with firearm offenses and drug trafficking crimes are presumed to pose a danger to the safety of the community.

The proposed legislation recognizes what common sense tells each of us -- that those who use firearms on the streets of Washington pose a very real danger to this community. A defendant charged with a drive-by shooting should be considered a danger to the community by the court based on the nature of the charges against him, and not on whether he has an adult violent crime

record.

The Wilson-Brazil bill takes an important step toward reducing violent crime in Washington and providing greater safety for law abiding citizens. In sum, the bill will help to protect the citizens of this community from armed violence. It will provide greater security to witnesses who testify at trial. It will create a greater sense of community confidence that participation in the criminal justice system makes a difference. And it will hold accountable those who use armed violence to terrorize the citizens of this community. The time to enact this critical piece of legislation is now.

Thank you for the opportunity to share with you these views on the proposed bail reform legislation. I would be pleased to respond to any questions you might have.

