PRETRIAL RELEASE AND DETENTION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA
OF THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
SECOND SESSION
ON
H.R. 7747

AN ACT TO AMEND TITLE 23 OF THE DISTRICT OF COLUMBIA CODE WITH RESPECT TO THE RELEASE OR DETENTION PRIOR TO TRIAL OF PERSONS CHARGED WITH CERTAIN VIOLENT OR DANGEROUS CRIMES, AND FOR OTHER PURPOSES.

JANUARY 31 AND FEBRUARY 6, 1978

the use of the Committee on Governmental Affairs

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TESTIMONY OF
CHIEF JUDGE HAROLD H. GREENE
BEFORE THE SENATE SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA
ON D.C. BAIL REFORM LAW
JANUARY 31, 1978

I appreciate this opportunity to appear before this Committee to testify on H.R. 7747, which would amend the pretrial detention provisions of the D.C. Bail Reform Act. I likewise testified before the House committee which considered this legislation, and the present bill incorporates some of the suggestions I made at that time.

I want to reiterate now what I stated then: that I fully share the public concern and dismay about crimes committed by repeaters, particularly those who are on some form of conditional release, be it bail, probation, or parole. The rights of citizens to be safe in their homes and their streets is obviously of paramount importance to an organized, civilized society, and it deserves the highest attention of both law enforcement and the judicial system. For that reason I support portions of the bill before this Committee. Yet it must also be recognized that both practical and constitutional considerations may dictate other, more complex steps toward the achievement of the objective of greater community safety in the context of bail.

It may be instructive to remember that, when the current preventive detention provisions were enacted in 1970, they were widely hailed by

their proponents as the definitive answer to the crime problem in the District of Columbia. The then Chief of Police Jerry Wilson frequently suggested during the course of the debate that enactment of the preventive detention statute would, in effect, break the back of violent criminal activity in the District of Columbia by bringing about the incarceration of the 300 to 400 individuals who, he believed, were responsible for most street crime. Others agreed with this position, even while assuring the Congress that the use of preventive detention, and hence the denial of the right to bail, would always be limited to the most dangerous criminal recidivists--individuals who could not reasonably be dealt with in any other way.

Although, happily, the crime rate has declinced since 1970, this does not appear to be due primarily to the preventive detention legislation. The fact is that the law has been but rarely used. In 1977, for example, a great many defendants might conceivably huve been regarded as eligible for preventive detention under the broad provisions of section 1322(a)(1) of title 23 of the D.C. Code. The Bail Agency actually recommended preventive detention hearings in 322 cases during the first nine months of that year pursuant to section 1322, and the U.S. Attorney requested preventive detention hearings in only 29 cases during all of 1977.

Law enforcement officials argue, first, that the failure to utilize the current law more frequently is due in large part to its

administrative complexity, and second, that the authority to invoke preventive detention must be significantly expanded if criminal recidivism is to be contained.

Let me deal first with the procedural, administrative aspects of the proposed changes.

1. H.R. 7747 as passed by the House of Representatives would amend section 1322(e) of title 23 to provide a 10-day holding period, rather than the present 5-day period, to enable the appropriate authorities to make an initial decision as to whether probation or parole should be revoked in the case of a rearrest. I support this amendment. The five-day limitation is probably too short in view of the substantial logistical task of assembling the evidence necessary for a revocation hearing and the necessarily limited resources of the prosecution, probation, and parole authorities.

2. Likewise, H.R. 7747 would increase to 90 days the period during which the trials of any detained defendants must be commenced. I am in agreement with the U.S. Attorney that the present 60-day limit is unrealistic. Evidence must be gathered; investigations must be conducted; witnesses must be presented to a grand jury; the grand jury must deliberate, decide, and return indictments; motions may be filed by one side or the other; defense counsel as well as the trial prosecutor

must have an opportunity fully to prepare their cases; and the court's calendar must be such that the matter may be heard within a time certain. It is unlikely that all of these processes can be accomplished in the majority of cases with just and fair results within the sixty-day time frame. Indeed, the federal Speedy Trial Act (18 U.S.C. 3161) will only by 1979 require trials within 60 days after ind ctment--rather than after arrest--and achievement of even that objective is likely in practice to depend upon the appropriation of considerable amounts of public funds for both courts and prosecutorial agencies.

Criminal cases are now being tried in Superior Court as expeditiously as in the more efficient urban courts in the United States. In 1977, it took an average of 12 to 15 weeks after indictment to bring the average felony defendant to trial. Yet in spite of the exceptional record, it is unlikely that the 60-day time limit could be observed in a great number of cases even here, if only because the grand jury ordinarily takes more than 60 days to consider indictments. For these reasons, I favor the proposed amendment to extend the statutory period to 90 days.

These extensions of the proposed time limits should overcome some of the prosecutorial complaints about the administrative unworkability of the present law.

3. The various House bills which ultimately culminated in the passage of H.R. 7747 would have provided for the detention of persons

"charged" with certain serious or violent offenses, and they would have eliminated the requirement that no one may be held in preventive unless a "judicial officer . . . finds . . . that . . . there is a substantial probability that the person committed the offense." Law enforcement agencies strongly supported these proposed amendments, but they were not incoprorated in the bill finally passed by the House. I would caution the Committee against any attempt to revive these concepts.

There is no reason to doubt the good faith or, indeed, the good judgment of most members of the Metropolitan Police Department. Still, it would be a fundamental departure from constitutional principles to grant the power to any or all of them to bring about the incarceration of a citizen for weeks or months without the protection of a meaningful hearing before a judicial officer. Our system is based on checks and balances. Police officers arrest; judicial officers decide whether the arrested person is to be detained. To depart from that division of authority would not only grant to police officers both law enforcement and judicial powers, but it would also effectively discard the presumption of innocence which is a cornerstone of our legal system. That presumption of innocence, as Chief Justice Vinson so eloquently stated in Stack v. Boyle, 342 U.S. 1 (1951), is more than a rule of evidence, it is central to Anglo-American law. Under that system of law, police

officers (or, indeed, prosecutors) do not decide on punishment--and incarceration, by whatever name or in whatever cause, is punishment insofar as the detained individual is concerned. Moreover, statistics show that well over one-half of all arrests result either in dismissal, acquittal, or a decision by the U.S. Attorney that the case does not merit prosecution. These figures indicate that under proposals which would provide for detention pending trial upon a charge alone--without a judicial hearing and determination of probability that the defendant committed the offense--a large number of defendants would be punished, that is incarcerated, without subsequently being convicted of any crime.

4. I have problems with two other procedural aspects of the proposed legislation. The bill would amend section 23-1322(c) to provide that pretrial detention proceedings may be initiated by a judge or other judicial officer, while under present law such proceedings may be "triggered" only by an application of the prosecutor. In my view it is inappropriate to inject judicial officers into the process as advocates of pretrial detention. Such a role, it seems to me, not only threatens judicial impartiality, but it removes from the prosecutor the authority and responsibility for identifying and seeking pretrial detention that is rightfully his alone. Under our system of legal procedure, it is the prosecutor who is most familiar with such factors as the precise circumstances surrounding a crime, the defendant's

criminal record, and other facts which would indicate the need for initiating a preventive detention proceeding, either to assure the defendant's presence at trial or to protect the community. This is especially the case at the early point in the judicial proceedings when the preventive detention decision will be made. It is also the prosecutor who knows best the posture of his witnesses, and he alone is in a position to determine whether they should or should not testify in early proceedings, or only at a later time, at the trial. Indeed, the judge is not likely even to know the names of the witnesses and the nature of their evidence, and he would have no way of finding out without a significant intrusion and participation in the investigatory process.

To make the judicial officer responsible, in whole or in part, for initiating a preventive detention hearing, would change the role of the judge from that of an impartial individual--who decides on the basis of the facts presented by both the prosecution and the defense as to whether or not preventive detention is appropriate--to that of an advocate of preventive detention. Just as I believe it to be inappropriate to allow preventive detention to be based simply on an arrest or a charge, without any judicial determination of probable cause--because this would change the role of police and prosecutors to that of judges--so it seems to me, and for the same reason,

inappropriate to ask the judicial officer to initiate preventive detention proceedings, for that would change his role from that of a judge to that of a prosecutor.

H.R. 7747 would also amend the current legislation to provide for revocation of conditional release for offenders arrested while on bail, probation, parole, or other mandatory release pending completion of any sentence. As you know, under the decision in United States v. Peters which I authored, and which was endorsed unanimously by the Board of Judges of the Superior Court, the court may hold an individual on probation or parole who is arrested for certain serious offenses until a determination can be made whether probation or parole ought to be revoked. The proposed legislation would, in effect, both codify and expand the Peters procedure. Under an amendment to section 1322(e), if a probationer or a parolee is rearrested for any offense he could be held for 10 days to determine whether the appropriate authorities wish to seek revocation of probation or parole. If revocation were not to be sought in this manner, there would be a requirement that the judge hold a pretrial detention hearing anyway.

While I fully support the codification of the Peters procedure for probationers and parolees who are charged with serious new offenses, I question whether revocation and hence detention should automatically be considered where the original offense, the subsequent charge, or

both, are relatively minor ones. I do not believe that it is either desirable or practical to proceed automatically with an immediate revocation of probation or parole solely upon an arrest for a minor misdemeanor.

Beyond that, I have serious reservations about a requirement that the judge hold a pretrial detention hearing in all rearrest cases, even when the appropriate Federal or State authorities have deliberately declined to revoke pending a conviction on the new charge. Again, the various supervising authorities are in the best position to assess whether a defendant in this status truly represents a danger to the community. If these authorities decline to seek revocation there would appear to be no reason to require that a preventive detention hearing be held on the court's own initiative. At a minimum, rather than requiring a mandatory detention hearing in such cases, I suggest that such a hearing should be held only if the prosecutor affirmatively requests it, and if the crime for which the defendant is rearrested is a dangerous or violent crime as defined in sections 1322(a) and 1331 of the bill.

5. Let me turn now to the proposals to expand the categories of cases subject to preventive detention. Under H.R. 7747 these would appear to fall into two general categories. First, the bill would remove the general presumption in favor of pretrial release in cases

involving murder in the first degree, forcible rape, and armed robbery; second, it would provide for preventive detention with respect to any defendant who, while on bail for a felony, is subsequently rearrested for any other offense.

The law currently perpetuates the ancient practice of allowing bail in all non-capital cases. While there may be some doubt about the constitutionality of a legislative determination that individuals charged with any non-capital crimes will not at all be entitled to bail, the provisions referring to murder and forcible rape would appear to be appropriate and valid. Inclusion of these offenses in the preventive detention sections of the Act would not represent a radical departure. But for the abolition of capital punishment in the District, some of these, at least, might well have been capital cases. Moreover, the statute now authorizes detention of a person charged with certain dangerous crimes if, based on his pattern of behavior, the government certifies that no condition will reasonably assure the safety of the community. It would not seem to be unreasonable legislatively to presume that with respect to persons charged with murder or forcible rape, there are no conditions of release which would reasonably assure the safety of the community (provided, of course, that the prosecution would still have to show and the judge would still have to find that danger to the community actually existed in the particular case).

Somewhat different considerations may be said to apply to the offense of armed robbery. Heinous as it is, it has not traditionally been a capital offense, but is in the category of what is commonly referred to as "street crimes." Moreover, at least under District of Columbia law, the offense of armed robbery encompasses many different factual circumstances. For example, armed robbery charges are frequently brought not only against the primary perpetrator of an armed robbery--the individual who actually uses or holds the weapon--but also against accomplices who may not have even been directly on the scene. The Committee may well want to consider whether there is justification for holding without bail, in advance of any determination of guilt or innocence, an individual who not even allegedly carried a weapon, who has no background of previous criminality, and whose participation in the offense may have consisted in his presence at a pocketbook snatch (which is defined as robbery under District of Columbia law). The question of the need for expanding preventive detention to that kind of case should also be viewed against the background of the fact that persons charged with armed robbery are already subject to detention under present law (section 1322(a)(2)) if they have a prior history of violent crime.

6. The bill would also permit the pretrial detention of a defendant on bail for a felony who is subsequently arrested for any

other offense. An individual who has previously been convicted of a crime and as part of the sentence is released on probation or parole is in a substantially different position in terms of the presumption of innocence than an individual who has merely been charged with an offense, albeit more than once. Probation or parole may validly be revoked for conduct falling far short of the commission of a crime and, as noted, the Superior Court took action under the Peters decision to deal promptly with such cases. However, there are obvious legal problems with jailing an individual who is on bail pending trial (for an offense with respect to which he is presumed to be innocent) on account of an arrest for another offense (of which he is under law likewise presumed to be innocent.

To be sure, section 1322(a)(2) of the present law provides for the pretrial detention of a person charged with a crime of violence if that crime was allegedly committed while the defendant was on bail with respect to another crime of violence. But H.R. 7747 would vastly broaden that provision, by expanding the concept of the original charge from a "crime of violence" to any "felony offense," and by expanding the rearrest charge from a "crime of violence" to "any offense," however minor. If there are constitutional problems with denying bail to one charged with an offense allegedly committed while on bail, they would obviously be magnified by this amendment.

Beyond that, however, the practicalities of the District's available detention facilities should also be considered. Overcrowding of the D.C. Jail was to have been cured by the construction of the new Jail. The new facility was designed to hold 960 persons; the old jail--which Chief Judge William Bryant held to be substandard--was to have been abandoned altogether. Yet both facilities now have a combined population of 1,402 prisoners. The detention of only 135 additional persons would completely fill up both the old and the new jails to capacity. If the provision in H.R. 7747 which calls for the pretrial detention of individuals charged with "any offense" while on bail for "any felony" is enacted and implemented, it may well be that overcrowding at the jails--which the U.S. District Court has indicated it will not permit--could be avoided only by releasing from these facilities individuals who are presently there and who may well be more dangerous than the category of persons encompassed in the amendment. Thus, it would seem that, at a minimum, this amendment should be narrowed.

Additionally, I believe that there are steps which can be taken which may be reasonably effective without raising constitutional or overcrowding problems. Let me suggest just two such measures. First, an individual on bail who is rearrested on a new charge might be placed in a 24-hour residential third-party custody program, or he might be supervised under a program patterned after the so-called home detention procedure (which I ordered into effect for juveniles in the case of In re Savoy) under which each probation officer

has responsibility for providing intensive supervision to no more than five offenders. Any absence from the place of supervision might call for the issuance of a bench warrant for violation of the conditions of release. Second, persons rearrested while on bail might be tried on an expedited basis, either on the original charge or the new charge. I would be glad to cooperate with the U.S. Attorney in any proposals he might wish to make for special, accelerated calendars for selected groups of defendants.

Finally, I believe that it may be appropriate to suggest that one area which is most urgently and immediately in need of congressional support is that of providing better and more stringent supervision of persons on conditional release, especially those on pretrial release. Theoretically such supervision is currently provided by the D.C. Bail Agency, various private third party custody organizations, the Narcotics Treatment Administration, and other similar groups. The fact is, however, that effective and meaningful supervision, for those defendants who need it, is largely non-existent because the funds allotted to the supervising agencies are simply inadequate. Effective supervision requires enough personnel to permit close, and in some instances almost continuous, contact with the defendant. In many cases effective supervision may also require the availability of specialized services such as drug treatment. While such efforts might be expensive, they may be expected to be less costly, both in financial and in constitutional terms, than

either massive jail detentions or continued criminality by persons on release without significant supervision.

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