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

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PREPARED STATEMENT OF WILLIAM F. McDONALD,* PROFESSOR, GEORGETOWN UNIVERSITY

Mr. Chairman and members of the Subcommittee, greetings, I am Professor William McDonald of Georgetown University. Before addressing the subject at hand I would like to state for the record that the views and opinions that I express here today are my own and do not necessarily represent those of Georgetown University. I am here as a private citizen and not on behalf of any organized group.

My connection with this proposed amendment is that I was involved in a study of the preventive detention law in the District of Columbia during the first ten months of its operation. (Additional copies of that study are available.) That study was completed in March 1972. Our major conclusion then seems to continue to have validity today. We found that the law has been a failure as a means of protecting the citizenry against crimes committed by persons on pre-trial release.

This failure is entirely due to the simple fact that the law was used so sparingly. We estimated that the U.S. Attorney sought preventive detention in only 1.4% of all those cases eligible under the law.** We have not done a follow-up study but judging from what I read in the newspapers and what I hear during my trips to the courthouse, the preventive detention law continues to be used rarely and when it is invoked it is done so exclusively in cases that qualify under the five-day hold provision. It should be

* The views and opinions expressed herein are those of the author and do not necessarily represent those of Georgetown University or organizations supporting the research upon which this testimony is based.

** This is not to imply that we felt the law would have been a success if it had been used more often. We did not address that point in our study.

noted, of course, that this latter group of cases constitutes a small proportion (16%) of all those defendants who are eligible under the law.

Thus, it appears that there are some threshold questions before this Committee: (1) Why wasn't the law put to greater use? (2) Why was there an almost exclusive attention to cases eligible under the five-day hold provision? (3) Will the proposed amendment or some alternative amendments result in a greater use of the law?

I do not believe I can answer these questions satisfactorily for you but I would like to pass along my observations. With regard to why the law was not used more often, there seems to be two interrelated reasons. First, there is the problem of getting a case to trial within sixty days. This problem should not be minimized in a large urban court system. But, on the other hand, it should be recognized for what it is. Ultimately it comes down to a question of management, the allocation of resources and the setting of priorities. It is not a question of whether all cases can get to trial within 60 days but whether provisions can be made so that a selected subgroup of all cases can get to trial. Furthermore, it must be remembered that we are not discussing some prosecutor's office and court system out in the hinterland that is low on talent, finances, and physical resources. We are discussing a court system that underwent a major reorganization just a few years ago and is now about to move into a brand new, multi-million dollar physical plant. It is a prosecutor's office that attacts applications from

outstanding lawyers from the best law schools and has the assistance of an on-line computerized system that allows for multiple cross-checking of files that was impossible to do by hand just a few years ago. What is more there is a bail agency which can be used to identify cases that are eligible for inclusion in this select subgroup.

Experience in other jurisdictions has shown that it is possible for prosecutors' offices to drastically increase the processing time of selected subgroups of their workload. An LEAA-funded evaluation of the career criminal unit in Bronx County, New York found that the career criminal cases were being disposed in a median time of 97 days compared to a median time of 400 days for other bureaus with the prosecutor's office.* Even more impressive and more directly relevant to the reasonableness of a 60-day time period in the present preventive detention law, is the experience of the District Attorney of New Orleans, La. His office reports an average time from arrest to conviction (not just to trial) of 53 days. What is more, he does this with very little recourse to plea bargaining.**

It seems to me that this is the proper perspective to bring to the question of why the law was not used more often

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* D. McGillis, An Exemplary Project: Major Offense Bureau, Bronx County District Attorney's Office, New York (Washington, D. C.: U.S.G.P.O., 1977), p. 5.

** Harry Connick, 1975 Annual Report of New Orleans District Attorney (monograph on file with District Attorney's office), p. 2.

before and whether the law should be changed to extend the detention period from 60 to 90 days. Unless it could be shown that reasonable efforts were made to develop a system of priority treatment of these cases and that such efforts were clearly not consistent with the sound administration of justice, then I would be reluctant to support the extension to 90 days. To do so would be a concession to bureaucratic inertia. Up until now the issues in the debate over preventive detention have revolved around the classic trade-off between freedom and security. But, today the amendments which are before this Committee have changed the nature of the debate. The question now seems to be whether we should further reduce freedom to accommodate the criminal justice bureaucracy. I refer here not just to the expansion from 60 to 90 days but also the expansion of the 5-day hold to 10 days. In a free society any reduction in liberty is to be resisted and carefully scrutinized even when the proposed reduction is on behalf of greater security -- which at least is a noble motive. But, a concession on behalf of bureaucracy has no place at all.

The Committee should consider ways of increasing the efficient administration of justice in the District of Columbia by recommending relevant legislation. One change that should be considered is the elimination of unnecessary redundancy in the criminal process. I refer to the fact that in the District of Columbia felony cases go through both a preliminary

hearing and a grand jury hearing yet both proceedings are to make the same determination, namely, whether probable cause exists. Why go through the added time and expense when there is virtually no additional due process benefits for the defendant and a considerable addition to the court's workload?

Returning to the reasons why the preventive detention law was used so infrequently, I would like to discuss an additional explanation besides the problem of getting to trial in 60 days. As the preventive detention law now stands, it still permits the old hypocrisy of high money bail to achieve sub rosa preventive detention of dangerous defendants. In our study of the cases where preventive detention was invoked during the first ten months of the law we asked the U.S. Attorney and the judges in those cases what they would have done if there were no preventive detention provision. In all seven cases where the government successfully sought preventive detention, the assistant U.S. Attorney told us that he would have requested high money bail. In five of the seven cases the judicial officers indicated that they would have set money bail. When we examined a sample of cases that were eligible for preventive detention but not proceeded against we found that 35 (52%) of the 67 eligibles in the sample had money bail set and that 21 (or 31%) of 67 eligibles remained continuously detained pre-trial in lieu of money bond. Since that time I have heard it said in the courthouse that the reason preventive detention

is not used more often is that the simple expedient of money bail is still available. Why should the prosecutor to to the bother of a lengthy preventive detention hearing, when he can achieve his goal much easier by requesting high money bond? As long as the judges continue to go along with this system why should the prosecutor invoke preventive detention and add to his workload for no additional benefit? As for the judges, why shouldn't they go along with the prosecutor's request for money bail. Under the existing law it is not their responsibility to invoke preventive detention. Even with your proposed amendment that would allow the judge to initiate preventive detention sua sponte, it is unlikely that the easy resort to money bail will be affected. Judges are not likely to move for preventive detention on their own initiative very often. They too feel the pressure to move the docket as efficiently as possible but more importantly they are likely to see this as a prosecutorial function.

The Committee will recall that a primary motive behind the Bail Reform Act of 1966 was to eliminate the hypocrisy of high money bail being used to achieve sub rosa preventive detention. But that law appeared to some people to throw the baby out with the bath water. So the preventive detention law was passed to allow judges to consider dangerousness. Today, 12 years after the Bail Reform Act we find that sub rosa preventive detention has not been eliminated and lawful preventive detention is rarely used. It seems to me that if

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the Committee does not eliminate or, at least, restrict the use of money bail as an alternative to lawful preventive detention that bail reform in the District of Columbia will continue to fail to achieve its goals. The need for this reform will be even greater if you decline to extend the period of detention from 60 to 90 days.

In keeping with the Committee's request that introductory statements be kept brief I will end my formal remarks at this time and try to answer specific questions from the Committee.

About the Author

Dr. McDonald's is Associate Professor of Sociology and Research Director of the Institute of Criminal Law and Procedure at Georgetown University where he teaches Criminology; Sociology of Criminal Justice; and Methods of Social Research. He is co-author of the study entitled "Preventive Detention in the District of Columbia: The First Ten Months." He is also a co-director of an evaluation of a pre-trial release project in Philadelphia, Pennsylvania. He is the editor of the book, Criminal Justice and the Victim, and author of various studies relating to the administration of justice. He received a Doctor of Criminology in 1970 from the University of California, Berkeley; a Masters of Education in 1965 from Boston College; and a Bachelor of Arts in 1964 from the University of Notre Dame.

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