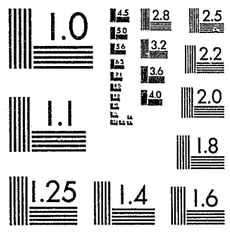

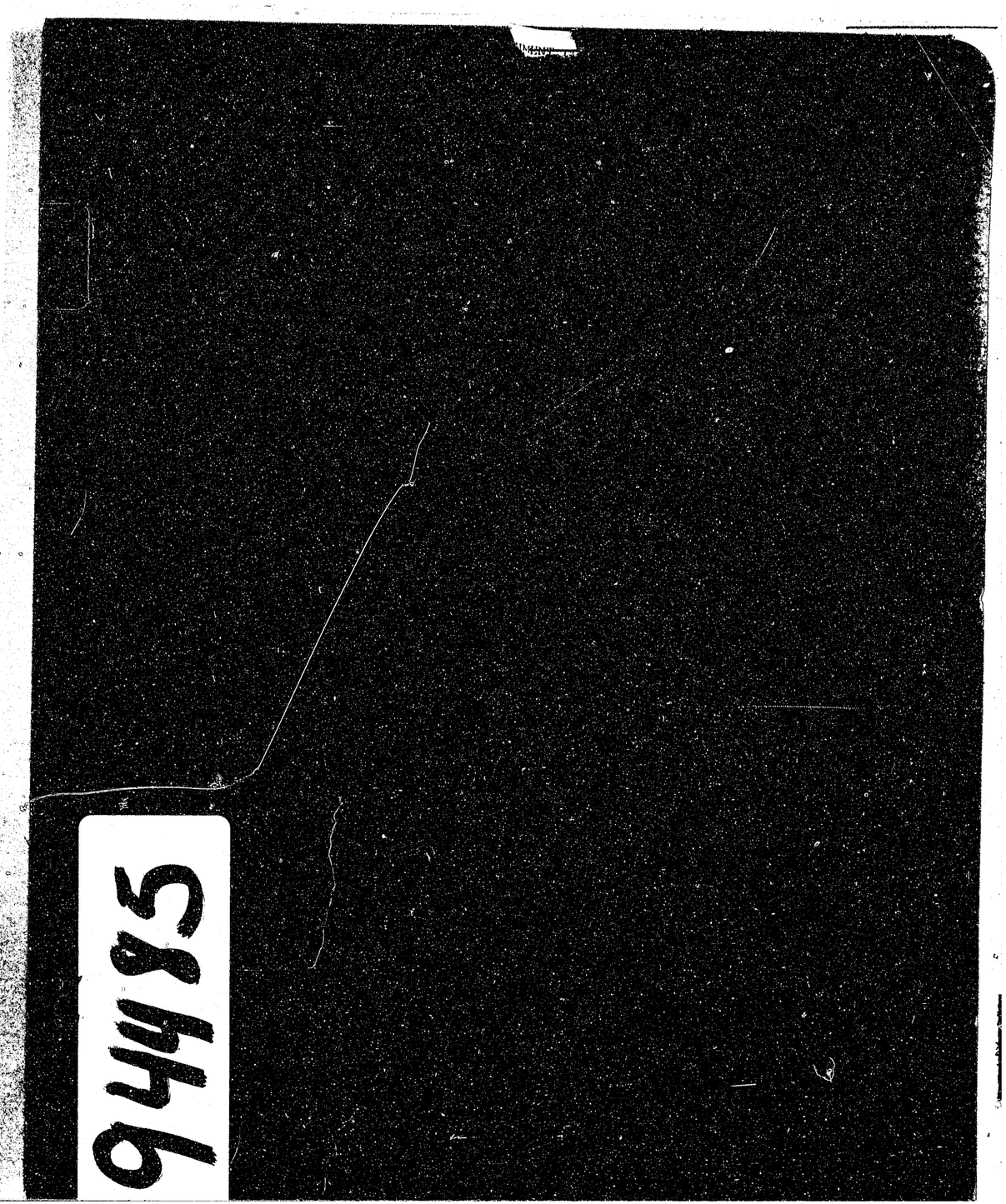

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Department of Justice

STATEMENT

OF

JAMES I. K. KNAPP
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND
THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

BAIL REFORM

ON

MAY 24, 1984

Mr. Chairman and Members of the Subcommittee, I would like to thank you for the opportunity to appear before you today to represent the views of the Department of Justice on amending the Bail Reform Act of 1966 and to comment on the bail reform bills before the Subcommittee, including H.R. 1098, H.R. 3005, and Title I of H.R. 2151.

In recent years, federal bail laws have come under increasing criticism and numerous efforts have been made to amend them. The President and the Chief Justice have both called for reform of our bail laws and the Attorney General's Task Force on Violent crime made several recommendations aimed at improving federal bail laws. In the last Congress, the Senate passed S. 2572, a bill which would have substantially revised the Bail Reform Act of 1966. In the present Congress, very similar legislation was passed by the Senate as Title I of S. 1762, the Administration's Comprehensive Crime Control Act of 1984, by a vote of 91-1. In addition, title I was considered so important that its provisions were also passed as a separate bill, S. 215, by a unanimous vote. These actions underscore the widely held, bipartisan view that there is an urgent need to provide the federal courts with the tools to make rational and appropriate decisions pertaining to the release of persons accused of crime on bail.

Mr. Chairman, two years go when then Deputy Associate Attorney General Jeffrey Harris represented the Department of Justice before your Subcommittee on this subject, he stated: "The Department of Justice shares the position held by many in the Congress, the judiciary, the law enforcement community, and

the public at large, that we must act to address the deficiencies of our bail laws." The Department firmly adheres to that position today.

Presently, federal release practices are governed by the Bail Reform Act of 1966. Prior to its enactment, the decision to release a defendant on bail was largely a matter within the discretion of the courts, and there was little statutory guidance to assist the courts in the exercise of this discretion. Furthermore, an over-dependence on cash bonds coupled with delays in bringing defendants to trial -- delays which have now been substantially reduced through implementation of the Speedy Trial Act of 1974 -- resulted in the lengthy pretrial incarceration of too many federal defendants, a disproportionate number of whom were poor. The Bail Reform Act, by providing a comprehensive set of criteria to be applied by the courts in making release determinations and encouraging the use of forms of conditional release tailored to the characteristics of individual defendants as alternatives to the use of cash bond, did much to achieve fairer and more rational bail decisions -- goals which the Department of Justice continues to support.

However, almost two decades of experience with the Bail Reform Act have demonstrated that, in some important respects, that Act does not permit the courts to make release decisions that strike the proper balance between the rights of defendants and the need to protect the integrity of our judicial processes and the safety of the public.

In my statement today, I will first discuss the reforms which the Department recommends to achieve necessary improvements in our bail laws. I will then discuss the bail reform bills before the Subcommittee in light of these recommendations.

DEPARTMENT OF JUSTICE RECOMMENDATIONS

1. Consideration of Dangerousness in Pretrial Release Decisions.

The most serious defect in the Bail Reform Act is that it does not permit the courts, except in capital cases,[1] to consider the danger the defendant may pose to the community if he is released. The sole issue that may be addressed is the likelihood that the defendant will appear for trial. Thus, the federal courts are without authority to impose conditions of release geared toward assuring community safety or to deny release to those defendants who pose an especially grave risk to community safety. If the court believes that a defendant poses a significant danger to others, it faces a dilemma. It can release the defendant prior to trial in spite of these fears, or it can manufacture a reason, such as risk of flight, to detain the defendant by imposing high money money bond. Too often the

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[1] Although the law is not settled, the Department, supported by case law, has taken the position that, for purposes of the bail laws, crimes for which Congress has established a possible death penalty remain "capital" offenses even though the death penalty is not constitutionally enforceable. See e.g., United States v. Kennedy, 618 F.2d 557 (9th Cir. 1980).

resolution of this dilemma causes the court to make an intellectually dishonest determination that the defendant may flee when the real problem is that he appears likely to engage in further criminal activity if released.

We believe that the law must be changed so that it recognizes that the danger a defendant may pose to others is as valid a consideration in the pretrial release determination as is the presently permitted consideration of the likelihood that the defendant will flee to avoid prosecution. It is, in our view, intolerable that the law denies judges the tools to make honest and appropriate decisions regarding dangerous defendants.

The concept of permitting an assessment of defendant dangerousness in the pretrial release decision has been widely supported, and is endorsed by such groups as the American Bar Association,[2] The National Conference of Commissioners on Uniform State Laws,[3] The National District Attorneys Association,[4] and the National Association of Pretrial Service Agencies.[5] Furthermore, the laws of several states recognize

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2 American Bar Association, Standards Relating to the Administration of Criminal Justice: Pretrial Release (1979), Standards 10-5.2, 10-5.8, and 10-5.9.

3 National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure 1974), Rule 341.

4 National District Attorneys Association, National Prosecution Standards: Pretrial Release (1977), Standard 10.8.

5 National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion 1978) Standard VII.

that dangerousness is an appropriate concern in bail determinations, as does the District of Columbia Code, passed by the Congress in 1970, which provides that the risk a defendant poses to community safety may be a factor in setting release conditions and may also, in certain circumstances, serve as the basis for denying release entirely.[6]

The broad support for giving judges the authority to weigh the defendant's dangerousness in bail decisions is a response to one overriding factor: people on pretrial release commit a large number of crimes. This disturbing fact has fact has been demonstrated by many studies over the past fifteen years. For example, in a recent study conducted by the Lazar Institute, "[a]pproximately one out of six defendants in the eight-site sample were rearrested during the pretrial period. Almost one-third of these persons were rearrested more than once, some as many as four times, before their original cases were settled."[7]

While statistics on rearrest rates, although they vary considerably, give some indication of the extent of the problem of pretrial criminality, it is probable that they do not fully reflect the seriousness of the problem of dealing with dangerous defendants under the Bail Reform Act, since we know that many crimes remain unsolved and never result in arrest, and thus

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6 23 D.C. Code 1321 and 1322.

7 Lazar Institute, Pretrial Release: A National Evaluation of Practices and Outcomes - Summary and Policy Analysis, (Washington, D.C., August 1981).

cannot be reflected in figures based on rearrest rates. Furthermore, statistics and studies cannot fully document the harm and expense to society caused by the crimes of persons on pretrial release simply because their clearly demonstrated dangerousness could not be taken into account. Two cases from the Eastern District of Michigan provide some illustration of the problem.

In November of 1982, George Gibbs was charged with the armed robbery of a credit union. Despite the violent nature of the offense, very strong evidence of his guilt, and the fact that Gibbs was a suspect in four other armed robberies, the magistrate, over the protests of the government, set a $25,000 bond with only a 10% deposit required, citing his inability under current law to consider evidence of the defendant's dangerousness in setting bail. Although a district judge changed the bond to a cash surety bond after an appeal by the government, the amount of the bond was not increased, and Gibbs was able to meet it almost immediately. Four days later, Gibbs participated in the holdup of a second bank in which a teller was struck and a local police officer was shot by Gibbs' partner.

The second Michigan case also involved a defendant charged with bank robbery. In 1979, Michael Dorris was convicted of the armed robbery of a Michigan bank. In 1982, within a few months after Dorris had been released on parole, the same bank was robbed at gunpoint again. Within hours, the FBI arrested Michael Dorris for this second robbery. Like George Gibbs, Michael Dorris was soon released on bail. At a subsequent meeting with

his parole officer, Dorris was informed that in light of his latest arrest, the officer would seek revocation of his parole. Dorris, who under a rational bail system clearly should have been held in custody in light of the seriousness of the offense charged and his status as a parolee, simply got up and left when the parole officer went to locate a marshal. Eventually Dorris resurfaced, but only after weeks of valuable FBI investigative effort had been wasted in trying to locate him.

In order to stop this revolving door through which an arrested defendant is quickly released to commit other crimes before he can be prosecuted for the offense for which he was arrested, two basic changes must be made in the federal bail laws. First, the issue of the risk that the defendant may pose to the community safety must be acknowledged as a legitimate concern -- on a par with the risk of flight -- which a court may consider in setting appropriate conditions of release. Second, the law must recognize that some defendants are so dangerous that no conditions of release will reasonably assure the safety of the community. The courts should be empowered to order these defendants detained pending trial.

As we mentioned when we testified before the Subcommittee two years ago on this same subject, we make no claim that pretrial detention will completely eliminate all crimes by persons in a pretrial release status, nor do we assert that preventive detention is appropriate for more than a small percentage of federal defendants. But that is not to diminish

the importance of permitting pretrial detention, for much of the dangerous and violent crime now plaguing the country is committed by career criminals, those who have absolutely no respect for the law or the rights of our citizens, and who repeatedly commit crimes with a not unwarranted confidence that the odds of their being arrested, much less sent to prison for their crimes, are very much in their favor. It is with respect to this group of defendants that the courts must be given the opportunity to consider the option of pretrial detention.

Moreover, as we discussed in our testimony in the last Congress, and as has been elaborated elsewhere, preventive detention in a limited class of cases is constitutional, and assessing the likelihood that future conduct will involve the committing of serious crimes is within a court's area of competence.[8] Indeed, courts routinely make such determinations today

8 See United States v. Edwards, 430 A.2d 321 (D.C. App. 1981) (en banc), cert. denied 455 U.S. 1022 (1982); De Veau v. United States, 454 A.2d 1308 (D.C. App. 1982), cert. denied, 103 S. Ct. 1781 (1983). Statement of Jeffrey Harris, United States Department of Justice, before the Committee on the Judiciary, Subcommittee on Courts, Civil Liberties and the Administration of Justice, United States House of Representatives, Concerning Bail Reform, February 25, 1982, pp. 7-8. (Hereafter cited as the 1982 Statement); See also, Senate Judiciary Committee Report on S. 1762, 98th Cong., 1st Sess. Report No. 98-225, pp. 7-9.

in deciding whether to grant bail pending appeal, as permitted under the Bail Reform Act, and in related contexts such as civil commitment proceedings.[9]

We recognize, nevertheless, that assessing the risk of future criminality is a difficult task. Consequently, our bail reform proposal which has passed the Senate provides that the judge or magistrate shall not order a person confined prior to trial due to dangerousness unless the government demonstrates by clear and convincing evidence at a hearing that no condition or combination of conditions other than detention will reasonably assure the safety of any other person or the community.

As we discussed in some detail before the Subcommittee in 1982, we recognize the gravity of pretrial detention and, as I have already indicated here, we think it is appropriate for only a small but identifiable group. Nonetheless, our continuing study of the problem and of the various proposals in both Houses of Congress over the past three and one half years have firmly convinced us that giving the courts the authority to deny release to defendants who pose a serious and demonstrable danger to the safety of others is not only sound policy, but would also represent a more honest way of addressing the problem of potential misconduct by persons seeking release. Despite the fact that the Bail Reform Act prohibits any consideration of

9 Congress has also in effect made determinations of dangerousness in defining certain crimes. For example, 18 U.S.C. 922(g) and (h) make it unlawful for persons under indictment to transport or receive firearms, an activity lawful as to most persons not under criminal charges.

defendant dangerousness, much less detention based on high probability of future criminality, it is widely believed that many courts do achieve the detention of particularly dangerous defendants by requiring the posting of high money bond, even if the defendants may pose little risk of flight.

That such instances of de facto detention of dangerous defendants would occur is hardly surprising. As noted earlier, current law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the community open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.

Providing statutory authority, in limited circumstances, to order the detention of especially dangerous defendants would, in our view, permit the courts to address the issue of pretrial criminality both effectively and honestly. Furthermore, we believe that this alternative would be fairer to defendants than the present practice. In the pretrial detention hearing, the government would be required to come forward with information

bearing squarely on the dangerousness of the defendant, and the defendant would be provided an opportunity to respond directly to this evidence.

2. Other Measures Addressing Bail Crime.

While the Department believes that pretrial detention of the most dangerous defendants is crucial to reducing the amount of crime by persons on pretrial release, there are other changes in the present laws which we think would also enhance our ability to deter and respond effectively to bail crime, and which should be included in any bail reform legislation.

First, we believe that whenever a defendant is ordered released, the court should be required to impose as a condition that he not commit another crime. This mandatory condition should be imposed in every case so as to stress to the defendant that the court expects him to be law-abiding.

Second, a violation of this condition, i.e., the commission of another crime while on bail, should result generally in the revocation of defendant's release. Once it is established that there is probable cause to believe a released defendant has committed another serious offense, the defendant has, through his own actions, established his dangerousness and his inability to abide by the conditions of his release, and he should, without any additional showing, be ordered detained, unless he can demonstrate that come combination of conditions can be imposed that will assure that he will not pose a danger to the community onto any person.

Third, a person convicted of a crime committed while on pretrial release should, in addition to the sentence for the new offense, be given an additional mandatory sentence to run consecutively to any other sentence of imprisonment. The length of the sentence should vary depending on whether the new offense was a felony or a misdemeanor. Such a sentencing provision is needed to deter further those who might abuse their release conditions by committing another crime.

Fourth, an effective bail reform bill should contain a provision allowing temporary detention, for a period of up to ten days, of a defendant who has been arrested for a crime and is already on a form of conditional release such as bail, probation, or parole. This would give the arresting authorities a reasonable opportunity to contact those authorities who originally released the defendant so that they may, if appropriate, pursue revocation proceedings in light of the defendant's subsequent arrest. A similar provision is now included in the release provisions of the D.C. Code, and in his testimony before this Subcommittee two years ago former United States Attorney Charles Ruff noted that this provision, which complements the D.C. Code pretrial detention statute, has been an extremely effective tool in dealing with recidivists.

3. Detention to Assure Appearance at Trial.

The problems with current federal bail laws are not confined to the area of defendant dangerousness. The goal of assuring appearance at trial -- the very purpose of the present statute --

is not being adequately met for certain defendants. While statistically the rate of failure to appear among federal defendants is quite low, the statistics alone do not tell the whole story, for the defects of our current bail laws show up most dramatically in cases involving the most serious offenders -- habitual and violent criminals and major drug traffickers. They contribute to a situation in which there are more federal drug fugitives (3021) than there are federal drug agents (2076). In short there is an identifiable minority of defendants as to whom no form of conditional release is adequate to assure their appearance. With respect to these persons the courts should be given express statutory authority to deny release without the need to impose a high bond to accomplish this result. While the Bail Reform Act contains no provision authorizing the court to detain outright a defendant who it finds is a significant flight risk, the implicit authority of the courts to deny pretrial release to defendants who are likely to flee to avoid prosecution has been recognized in case law.[10]

Despite this case law upholding the power to order detention of defendants who are severe flight risks, it has been our experience that many judges are reluctant to exercise this power because of the absence of specific authority in the federal bail statutes. Again, as has been the case with extremely dangerous defendants, there is instead a tendency to achieve detention

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[10] See, United State v. Abrahams, 575 F.2d 3 (1st Cir. 1978), and United States v. Meinster, 481 F. Supp. 1121 (S.D. Fla. 1979).

through the imposition of high money bonds. While we believe that, in some cases, money bond can be an effective mechanism for assuring appearance, it is also apparent that in cases where the only means of assuring appearance is through detention, prosecutors sometimes feel compelled to achieve this result by seeking, and some judges are willing to set, money bonds in amounts the defendant cannot realistically be expected to meet.

Specific statutory authority to detain defendants who pose a substantial flight risk is not only a more honest way of assuring their appearance than is the setting of a high money bond, it is more effective. Frequently, defendants engaged in extremely lucrative ventures -- in particular major narcotics traffickers -- are able to post what seems to be an astronomical sum and flee, forfeiting the money as a cost of doing business. For example, a bond of $1,000,000 was forfeited in the Southern District of Florida after a reputed head of a major marihuana smuggling operation failed to appear for trial on August 8, 1983. A large number of other defendants -- almost all involved in the drug trade -- have failed to appear after posting bonds in excess of half a million dollars.[11]

4. Inquiry into the Sources of Property Used to Post Bond

As just noted federal prosecutors are frequently faced with the problem of defendants who use the proceeds of their illegal activities to post bond in large amounts. For these persons,

[11] In Miami, for example, although the average money bond is $75,000 for drug defendants -- $500,000 for major traffickers -- 17% of these defendants never appear for trial.

forfeiting the bond and fleeing is but a cost of their operation. In fact, some organized crime and drug figures are even adopting the practice of setting aside a portion of their illegal proceeds for just this purpose. Clearly, such monies do not serve the intended function of assuring the defendant's appearance; rather the monies, if accepted by the courts, permit the defendant to avoid justice and become a fugitive. Thus, the source of the money or other property used to post bond is highly relevant in determining whether the bond will effectively assure the defendant's appearance.

Presently, there is some question whether the courts have full authority to inquire into the sources used to post bond and to deny bond if they are not satisfied that the source of the property is such that the bond will be effective in assuring the defendant's appearance.[12] We therefore recommend that the courts be given specific statutory authority to inquire into the source

[12] Rule 46(d) of the Federal Rules of Criminal Procedure permits the courts to require a surety, other than corporate sureties, to file an affidavit listing the property used to secure a bond, and it is likely that this provision authorizes a hearing into the source of property to secure a bond, at least with respect to non-corporate sureties. However, there is no express authority for the courts to make a similar inquiry where the bond is to be provided by a corporate surety. Nonetheless, at least two courts have conducted such an inquiry. See United States v. Melville, 309 F.Supp. 824 (S.D.N.Y. 1970), and United States v. DeMorchena, 330 F.Supp. 1223 (S.D. Cal. 1970).

of money or other property offered to fulfill financial conditions of release, and to refuse to accept the money or property if it appears that, because of its source, it will not reasonably assure the appearance of the defendant at trial.

5. Penalties for bail jumping should be more proportionate to the penalties for the offense charged.

Present law (18 U.S.C. 3150) makes bail jumping a separate offense but a violation of the section carries a maximum prison term of five years if the underlying offense is a felony and one year if the underlying offense is a misdemeanor. While these penalties may dissuade a defendant charged with a misdemeanor or a felony punishable by only a few years in prison from fleeing, they are not likely to deter a defendant charged with a major felony punishable by fifteen years or more in prison. Defendants facing such long terms may be tempted to go into hiding until the government's case becomes stale and witnesses are unavailable, and then surface to face only the five year penalty for bail jumping rather than the more severe penalty for the underlying offense. Consequently, we urge that the penalties for bail jumping should be be increased in cases where the underlying offense is a felony punishable by imprisonment for fifteen years or more so that they are more proportionate to the punishment for the offense[13] for which the defendant was on pretrial release.

[13] For example, in United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963), twelve defendants were convicted on drug charges and received sentences ranging from seven to forty years. One defendant, however, jumped bail before trial and by the time he was apprehended the original witnesses were unavailable. Instead of standing trial and facing a potential forty-year sentence, be received a three year sentence for bail jumping.

6. Post-conviction release.

Under present law (18 U.S.C. 3148) a person seeking release after conviction must be released on the least restrictive conditions necessary to assure appearance unless the court finds the person is likely to flee or pose a danger to the community. Only if such a risk of flight or dangerousness is found, or, in the case where release is sought pending appeal, the appeal is found to be frivolous or taken for delay, may the judge deny release. Although the Federal Rules provide that the defendant has the burden of establishing that he will not flee or pose a danger to the community,[14] they do not specify a particular standard. Moreover, under 18 U.S.C. 3148 the government has the burden of showing that the appeal is frivolous or taken for delay. The American Bar Association recently adopted a new standard relating to post-conviction release (Standard 21-2.5(a) and (b), adopted by the House of Delegates February 14, 1984), recommending that the defendant bear the burden by clear and convincing evidence of showing that his release would not create a substantial risk of flight or of danger to the public or the administration of justice. We agree.

Indeed, post-conviction release runs counter to the presumptive validity accorded the verdict establishing the defendant's guilt beyond a reasonable doubt. It also undermines the deterrent effect of the conviction and lessens the community's

[14] Rule 9(c), F.R.App.P.; Rule 46(c), F.R.Crim.P.

onfidence in the system of justice by allowing convicted criminals to remain free. The present standard for post-conviction release should be amended so that release on bail would not be lightly or frequently granted to convicted persons who are awaiting imposition or execution of sentence or who have been sentenced to a term of imprisonment and are awaiting appeal. Rather release should be permitted only in those cases in which the convicted person is able to provide convincing evidence that he will not flee or pose a danger to the community. Moreover, if the person is awaiting appeal, the defendant should be required to show that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal of conviction or an order for a new trial. A similar standard is now incorporated in the release provisions of the District of Columbia Code.[15]

7. Government appeal of release decisions.

The Bail Reform Act now specifically provides defendants with opportunities to move for reduction of bond, and to seek reconsideration and review of release decisions. However, the Act does not provide the government any analogous rights to appeal release decisions. Thus, the situation has arisen where, faced with what it believes to be an improper release determination, the government has been powerless to seek review of a hastily made decision which permits the defendant to flee the jurisdiction or to return to the community to commit further crimes.

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15 23 D.C. Code 1325.

While we have had some success in arguing that the government is not precluded, in certain cases, from seeking reconsideration of a release order, despite the lack of any specific statutory authority to do so,[16] we believe that as a matter of both sound policy and basic fairness, the government should be given clear authority to appeal release decisions.

DISCUSSION OF BILLS BEFORE THE SUBCOMMITTEE

I would now like to discuss the bail reform bills before the Subcommittee (H.R. 1098, Title I of H.R. 2151, H.R. 3005, Title I of S. 1762 and S. 215), in light of our recommended amendments to the bail laws. The latter two Senate-passed bills were largely drafted by the Administration and, in our judgment, would effectively accomplish all the objectives that we believe are necessary and proper in revising the bail statutes. H.R. 1098 and H.R. 2151 are very similar to these Senate-passed measures and either one would serve as an appropriate vehicle for enactment of the reforms I have discussed. They differ from the Senate bills as passed in only very minor ways. On the other

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16 In United States v. Zuccaro, 645 F.2d 104 (2d Cir. 1981), the authority of the government to request that a trial judge amend conditions of release that had been set by another judicial officer was found to be implicitly contemplated by the Bail Reform Act. Zuccaro, who had a long history of arrests for serious crimes, was charged with a hijacking involving the theft of $750,000. The day after his bail was set by a magistrate at $150,000, the government filed a motion with the District Court to increase the amount of bail. The District Court ordered an increase in the amount of bail to $350,000, and the defendant unsuccessfully appealed the validity of the order.

hand, our study of H.R. 3005 leads us to the conclusion that, while it contains many of the needed reforms, its omission of others -- principally of preventive detention for dangerous defendants -- makes it inadequate.

1. Consideration of Dangerousness and pretrial detention.

All the bills would allow the court to consider the dangerousness of the defendant in the pretrial release decision. However, H.R. 3005, alone of the bills, would not allow the detention of the defendant even if the judicial officer finds that no conditions of release will reasonably assure the safety of any other person or of the community.[17]

[17] H.R. 1098 and H.R. 2151 differ from one another slightly in that H.R. 2151 contains a provision that at the detention hearing there is a rebuttable presumption that no condition of release will assure the safety of another person and the community if the defendant has been convicted of a crime of violence while on pretrial release and less than five years have elapsed since his conviction or release from confinement for such an offense. We think the inclusion of such a presumption, which is also included in the Senate bills, is appropriate. Moreover, the Senate bills contain a further presumption that no conditions of release will assure the safety of the community and of any other person if the defendant has been convicted, while on pretrial release, of an offense for which the authorized punishment is life imprisonment, or of an offense involving certain types of narcotics trafficking punishable by imprisonment for ten years or more. The Senate bills contain additional presumptions that no conditions of release will assure the safety of the community or the appearance of the defendant if the offense for which the defendant is presently charged is one of the ten-year narcotics trafficking felonies or is using a firearm in the course of a crime in violation of 18 U.S.C. 924(c).

In our view the additional presumptions in the Senate bills are important and should be included. The burden should be on the defendant who has already been found guilty of a serious crime while on pretrial release to show that there are some conditions of release that give assurance he will not once again engage in criminal activity. Also, persons charged with the most serious drug trafficking offenses are often engaged in an ongoing course of criminal activity and usually have significant contacts with foreign countries and the economic means to flee. Hence, the burden should be on them to show they will not commit further crimes and will appear for trial.

H.R. 3005 provides that a defendant must be released unless no conditions of release will reasonably assure his appearance no matter how much of a danger to another person or to the community he poses. It provides that preventive detention for dangerousness may be imposed only in one circumstance -- after the defendant has been released and violates a condition of the release. At that point, provided the court makes a finding that the defendant has violated a condition of release designed to assure the safety of another person or of the community, and after considering other options, the court can order the defendant detained. In effect, the defendant, no matter how bad his prior criminal record, is given the chance to commit one more crime before the safety of the community may be assured through his pretrial detention.[18]

[18] We recognize that the provisions in H.R. 3005 permitting preventive detention only where an already-released defendant has demonstrated his danger to the community through specific post-release actions such as the commission of a crime, reflect the position of the American Bar Association's Standards for Criminal Justice in Standard 10-5.9. While this remains the official position of the ABA, it should be noted that the Association's Criminal Justice Section in its February, 1983 Report to the House of Delegates recommended that this Standard be changed to reflect additional criteria for determining dangerousness which, if found to exist, would allow pretrial detention. This recommendation is presently under study within the ABA.

In addition to giving this unjustified "one bite of the apple," H.R. 3005 includes certain procedural requirements that would make pretrial detention very difficult even after the violation of a release condition. It provides first that the court must consider advancing the trial date as an alternative to detention to assure the community's safety. Such a manipulation of already crowded criminal dockets is, we submit, generally unworkable. It would often be unrealistic to expect extremely busy federal prosecutors to be able adequately to prepare for, and secure the attendance of witnesses at, a difficult trial well in advance of its expected starting date, even if the courts were willing to let their dockets be so altered. Moreover, the necessity of going to trial on unexpectedly short notice could mean that critical evidence -- for example laboratory reports -- and key witnesses would be unavailable, thus decreasing the chances of convicting the very defendants who pose the greatest threat to society.

In addition, H.R. 3005 provides that if the government seeks a pretrial detention order based on a violation of a release condition because the defendant has committed another crime, the government must prove the new offense in strict accordance with the rules of evidence. This requirement, which is in direct conflict with current law,[19] would not only create difficult problems for the government, particularly on short notice, but

[19] 18 U.S.C. 3146(f) provides that information or evidence offered at bail hearings or bail modification hearings need not conform to the rules of evidence.

would also afford the defendant a totally unjustified form of discovery concerning the strengths and weaknesses of the government's evidence of the crime committed while on pretrial release.

In short, we believe that the sharply limited conditions under which preventive detention procedures could be invoked in H.R. 3005 fall far short of the essential changes in current bail laws that must be made. The provisions in H.R. 3005 would have done nothing to prevent release in the two Michigan cases which I mentioned earlier and would not have helped in a recent Philadelphia case where traditional organized crime organization were indicted on federal racketeering charges. Despite the fact that several top figures in the local criminal organization had been murdered in gangland style during the preceding year, all nine defendants were released on bail. Within two months, the principal defendant was murdered by an explosion of dynamite that had been placed on his front porch. Several months later, after the trial of the remaining defendants had begun, another one was shot to death. Their pretrial detention -- which would have been permitted under the Senate passed bills as well as H.R. 2151 and H.R. 1098, but not under H.R. 3005 -- would have prevented this violence.

2. Other measures addressing bail crime.

All the bills contain a provision that the judicial officer impose as a condition of release the requirement that the defendant not commit a crime. Only the Senate-passed bills and H.R. 2151, however, provide that, for persons who commit a felony

while on pretrial release, a presumption arises that no combination of release conditions will assure that they will not pose a danger to the safety of any other person or of the community. H.R. 1098 omits this presumption and such a presumption is also not included in H.R. 3005. As I mentioned earlier, once there is probable cause to believe that the defendant has committed a felony while on pretrial release, he should bear the burden of proving that there are conditions short of detention that will prevent him from committing further offenses.

The Senate-passed bills and H.R. 2151 and H.R. 1098 contain mandatory penalty provisions for a crime committed while on pretrial release, which we favor. H.R. 3005 contains no comparable provision.

Similarly, the Senate passed bills and H.R. 2151 and H.R. 1098 contain provisions allowing the temporary detention of persons already on some form of conditional release such as bail, parole, or probation, and who have been charged with an offense, in order to allow the authorities to notify the officials in the jurisdiction that released the person. H.R. 3005 does not contain this important provision.

3. Detention to assure appearance at trial.

All the bills specifically provide for this much needed reform.

4. Inquiry into the source of the property used to post bail.

All the bills would specifically allow the court to make this inquiry and to decline to accept the designation for forfeiture or posting as collateral of property that, because of its source, will not reasonably assure the defendant's presence.

5. Penalties for bail jumping.

The Senate-passed bills and H.R. 1098 and H.R. 2151 would make the penalties for bail jumping more proportionate to the penalty for the underlying offense by a revised section 3146 of title 18. H.R. 3005 makes no change in the law in this area and thus would leave intact the present inadequate provisions of 18 U.S.C. 3150 which, as discussed, may not deter bail jumping in cases where the defendant faces a long period of incarceration.

6. Post conviction release.

All the bills would alter present law by placing the burden on a convicted defendant who is awaiting sentencing or appeal to show by clear and convincing evidence that he will not flee or pose a danger to any person or the community if he is to be placed in a release status. The Senate-passed bills and H.R. 2151 and H.R. 1098 would also impose on a defendant pending appeal the burden of showing that the appeal was not for purposes of delay and raises a substantial question likely to result in a reversal or a new trial. H.R. 3005 would continue to place this burden on the government.

7. Government appeal of release decisions.

All the bills adequately allow for government appeals of release decisions, first from the magistrate to the district court judge, and then to a court of appeals.

CONCLUSION

I have presented to the Subcommittee today our recommendations for improving federal bail laws, a field in which reform is critically needed. Two of the bills before the Subcommittee, H.R. 1098 and Title I of H.R. 2151, contain all of the needed reforms and, with minor exceptions, are identical to the two bills the Senate has already passed. The final bill, H.R. 3005, while taking several steps in the right direction, does not adequately provide for pretrial detention, the most urgently needed reform in this area.

To be sure, pretrial detention was once a controversial issue. However, the fact that S. 215 passed unanimously in the Senate, and that its provisions were part of a much larger bill that passed 91-1 after thorough discussion and debate, indicates that preventive detention is not a partisan issue or a position favored only by those of any one political philosophy. Accordingly, we think that the time has come to recognize in our laws that judges may order detained prior to trial the small but identifiable group of particularly dangerous defendants who threaten the safety of society and the integrity of the judicial

system. In short, we strongly urge the Subcommittee to approve legislation like Title I of S. 1762, Title I of H.R. 2151 or H.R. 1098.

Mr. Chairman, that concludes my prepared remarks and I would be happy to try to answer any questions from the Subcommittee at this point.

DOJ-1984-05

*U.S. GOVERNMENT PRINTING OFFICE : 1984 0-421-593/10957

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