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SECTIONS

THE DISTRICT OF COLUMBIA BAR

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D.C. Bar President-Elect
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D.C. Bar Executive Director

Carol Ann Cunningham
Sections Manager

TO: Board of Governors
Section Chairpersons
(Designated to Receive Public Statements)

FROM: Carol Ann Cunningham CAC

DATE: February 12, 1992

SUBJECT: EMERGENCY PUBLIC STATEMENT regarding Comments on D.C. City Council Bill 9-360, The Bail Reform Amendment Act of 1991, by the Section on Criminal Law and Individual Rights

<u>48-hour expedited consideration requested on behalf of the Criminal Law and Individual Rights Section</u>

Enclosed please find for your immediate review a one-page summary of a public statement prepared by the Criminal Law and Individual Rights Section. Copies of the full text will be provided upon request. If you wish to have this matter placed on the next Board of Governors' agenda on March 10, please call me by 5:00 p.m. on Friday, February 14. I can be reached at (202) 331-4364.

Please note that according to the Guidelines regarding public statements (pp. 39-52) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc w/enclosures:
James Robertson, Esq.
Jamie S. Gorelick, Esq.
Linda E. Perle, Esq.
James D. Berry, Jr., Esq.
Eileen Sobeck, Esq.
Susan L. Moss, Esq.
Katherine A. Mazzaferri, Esq.

SUMMARY OF COMMENTS OF THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR REGARDING D.C. COUNCIL BILL 9-360, THE "BAIL REFORM AMENDMENT ACT OF 1991"

The Section on Criminal Law and Individual Rights of the District of Columbia Bar fully concurs in the Comments on the Bail Reform Amendment Act of 1991 submitted to the D.C. Council by the Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar, which are attached. In addition, the Section on Criminal Law and Individual Rights makes the following comments on those provisions of the Bill affecting the time for indicting and trying preventively detained defendants.

1. Indefinite Detention. As drafted, Section 3(h)(2) of the Bill permits indefinite detention of preventively detained defendants if "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" (emphasis added). Under current law, if trial does not take place within the maximum 60 or 90 day period of detention, the preventively detained defendant instead must be treated under D.C. Code § 23-1321(a), and conditions of release (which may include a surety bond) must be set. It is not clear what was intended by the language, "delayed by the timely filing of motions," because in Superior Court motions are customarily heard on the day of trial. Typically, the filing of motions does not delay the trial date. As drafted, the Bill would permit the government to extend detention indefinitely by filing its own motion.

2. Time for Indictment. An even more serious problem results from the interplay between the time limit for indictment and the language permitting continued detention if the defense requests a continuance. The Bill, although elsewhere imitative of federal law, takes a sharp departure for return of an indictment. The Bill sets a time limit of 90 days for indictment. This is only ten days from the 100 day period which is deemed to be the outer limit of detention. Ten days is rarely sufficient time to complete defense trial preparation; indeed, in most cases it would be professionally irresponsible to try a case ten days after an indictment. The amendment virtually assures that the defense will be forced to seek a continuance in order to provide adequate representation.

For the reasons set forth above, the Section on Criminal Law and Individual Rights urges the Council to amend the Bill to modify the conditions under which preventive detention may be extended and to shorten the period in which a preventively detained defendant must be indicted.

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BEFORE THE
COUNCIL OF THE DISTRICT
OF COLUMBIA

COMMENTS OF THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR REGARDING D.C. COUNCIL BILL 9-360, THE "BAIL REFORM AMENDMENT ACT OF 1991"

Blair G. Brown, Co-chair
Grace M. Lopes, Co-chair
Laurie B. Davis
Charles M. Rust-Tierney
Ellen M. Barry
Rhonda R. Winston
Clifford T. Keenan*

Steering Committee of the
Section On Criminal Law And
Individual Rights Of The
District Of Columbia Bar

February 7, 1992

* Abstains from the decision making process

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STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Criminal Law And Individual Rights Of The District Of Columbia Bar and not those of the D.C. Bar or of its Board of Governors."

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COMMENTS OF THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR REGARDING D.C. COUNCIL BILL 9-360, THE "BAIL REFORM AMENDMENT ACT OF 1991"

The Section on Criminal Law and Individual Rights of the District of Columbia Bar fully concurs in the Comments on the Bail Reform Amendment Act of 1991 submitted to the D.C. Council by the Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar.[1] In addition, the Section on Criminal Law and Individual Rights makes the following comments on those provisions of the Bill affecting the time for indicting and trying preventively detained defendants. For the reasons set forth below, the Section on Criminal Law and Individual Rights urges the Council to amend the Bill to modify the conditions under which preventive detention may be extended and to shorten the period in which a preventively detained defendant must be indicted.

Indefinite Detention

When the District of Columbia Court of Appeals upheld the District's original preventive detention statute, it relied upon the fact that detention "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." United States v. Edwards, 430 A.2d 1321, 1333 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982). The proposed Bail Reform Amendment Act of 1991 removes this essential safeguard.

The Bill actually permits detention to continue for an indefinite period. Under current law, if trial does not take place within the maximum 60 or 90 day period, the preventively detained defendant instead must be treated under D.C. Code § 23-1321(a), and conditions of release (which may include a surety bond) must be set. Under the Bill, however, "the defendant shall be treated in accordance with Section 23-1321(a) of the District of Columbia Code 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" (emphasis added). In contrast, the Bill places no limit on the length of detention under these circumstances. It is not clear what was intended by the language, "delayed by the timely filing of motions," because in Superior Court motions are customarily heard on the day of trial. Typically, the filing of motions does not delay the trial date. As drafted, the Bill would permit the

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[1] Those Comments are attached.

will suffer the most from this system are the innocent, who must choose to endure erroneous detention or to take a risk that inadequate trial preparation will lead to a wrongful conviction.

None of the proponents of this legislation have offered any explanation for giving the prosecution such an unfair advantage in trial preparation. The written statements of the United States Attorney and the Corporation Counsel gloss over this radical change in the law. The Section by Section Analysis of the bill recognizes the problem with delayed defense trial preparation, but misstates current law. The Committee Report notes that under current law "the defendant remains detained, and therefore pretrial detention is lengthened," if the defense requests a continuance because of government delay in obtaining an indictment. That is not so. The Court must set conditions of release under Section 1321 if detention lasts beyond the 90 day maximum. The government therefore has no incentive to drag its feet. The combination of unlimited detention if the defense requests a continuance and the 90 day indictment limit produces a system which is likely to result in detention for substantially longer than the 120 days the statute envisions as the maximum period of detention. Without acknowledgement, the bill erodes one of the principal safeguards against detention exceeding constitutional limits.

The Section on Criminal Law and Individual Rights of the District of Columbia Bar recommends, if this Bill is enacted in any form, that it remain faithful to federal standards by adopting a thirty day time limit on indictment. This will leave the government free to prepare its case after an indictment is returned, but permit the defense to have a fair opportunity for discovery and the preparation of motions. The proposed 90 day time limit does not "lessen the need to request a continuance and prolong pretrial detention;" to the contrary, it virtually assures that this will be the result.

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SUMMARY OF COMMENTS ON D.C. CITY COUNCIL BILL 9-360, THE "BAIL REFORM AMENDMENT ACT OF 1991"

The Section on Courts, Lawyers and the Administration of Justice shares with other members of our community the concern over the tide of violence which is sweeping our city. The Section strongly endorses measures to intervene with at risk youths and their families, and to deter crime through community policing and other similar measures. The Section opposes amendments to the current bail law of the District of Columbia, such as the proposed "Bail Reform Amendment of 1991," which reduce the procedural safeguards against detaining innocent persons, because such measures jeopardize the liberty of citizens without adding to the safety of the community. The specific aspects of the Bail Reform Amendment Act which are of greatest concern to the Section are discussed below.

1. Although the measure has been justified to the public as a way of detaining "triggermen" with histories of violence, but no adult convictions, the scope of the detention provisions in the bill is much broader. For example, the bill authorizes detention on the basis of a single "dangerous" crime. The statutory definition of "dangerous" offenses includes all felony drug crimes. This tremendously expands the scope of preventive detention. Congress envisioned detaining a "small but identifiable group of particularly dangers defendants." S. Rep. 98-225 at 6, when it passed the federal detention statute in 1984, but the current rate of detention in the United States District Court is 70%, including defendants in many relatively small scale drug cases. This suggests that prosecutorial discretion cannot be relied upon to narrow overbroad statutory detention authority. Instead of the "carefully limited exception," United States v. Salerno, 107 S. Ct. 2095, 2105 (1987), the proposed bill could make detention without bond the rule. An amendment to the current law tailored to persons accused of violent crimes whose "pattern of behavior" demonstrates that release would endanger the community would address the concerns raised in the news media without diluting constitutional safeguards. Such an amendment has been proposed by John A. Carver, Director of the D.C. Pretrial Service Agency.

2. The use of "rebuttable presumptions" to shift the burden to the defense to produce evidence why someone should not be detained has the practical effect of reducing the government's burden of proof from "clear and convincing evidence" to something less. When a detention request is based upon a single unproven charge instead of a pattern of conduct or a prior criminal record, the burden of producing clear and convincing evidence must rest with the government.

3. The proposed bill extends the length of detention authorized, at the same time that it reduces the evidentiary requirements for detention. Moreover, instead of the absolute time limit under the current statute, the proposed bill permits continued detention for an indefinite period if the trial is delayed at the request of the defense, presumably even if the reason for the continuance is the government's failure to disclose information in discovery. The result is that more people will be detained on less evidence for a longer period before a jury has the opportunity to determine guilt or innocence. The proponents of this bill have not explained why an extension of time is justified.

4. The bill contains many provisions wholly unrelated to the rationale communicated to the public. For example, the bill would make detention pending a hearing mandatory if the government requests it, even if the judge is convinced that release would not endanger the public. The bill also would permit the government to delay detention hearings without giving any reason for up to three days, and to delay them for an indeterminate period on a showing of "good cause." This means that people who should and will be released after a hearing may imprisoned for extended periods before the hearing is held.