FOCUS ON THE 1984 BAIL REFORM ACT: PRETRIAL DETENTION PERMITTED

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INTRODUCTION

For many years there has been public concern about the rising crime rate and the need to detain dangerous criminals with a propensity toward repeated criminal activity. Although many detention proposals had been presented, it was not until October, 1984 that the change occurred which allows pretrial detention without bond in federal courts nationwide.

The pretrial detention provisions of the Comprehensive Crime Control Act of 1984[1] allows federal courts, for the first time, to detain a defendant in a noncapital case without bond pending trial. Adoption of the Bail Reform Act of 1984,[2] which was signed into law by President Reagan on October 12, 1984, marked a significant departure from the Bail Reform Act of 1966,[3] which, as its sole purpose, focused on the appearance of the defendant at judicial proceedings. Until now, the traditional objective of bail[4] or other pretrial release options was to assure appearance at trial. The 1984 Act explicitly provides for pretrial preventive detention to insure community safety. Thus, it incorporates the defendant's dangerousness to the community as a paramount public concern and expressly provides for detention based on the dangerousness factor. Federal courts nationwide may now detain a defendant in a noncapital case, without bond, pending trial, if the court finds 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."[5]

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1. Act of Oct. 12, 1984, Pub. L. No. 98-473, U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837.
2. *Id.* at 1976 (to be codified at 18 U.S.C. §§ 3141-3150).
3. 18 U.S.C. §§ 3141-3151 (1982). With the enactment of the 1984 Act, the bail provisions contained in section 3141 through 3151 were repealed and in lieu thereof the new sections 3141-3150 have been inserted.
4. BLACK'S LAW DICTIONARY 177 (4th ed. 1979) defines bail as:

> Bail, *v.* To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the judgment of the court. . . .
> Bail, *n.* The surety or sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated. Those persons who become sureties for the appearance of the defendant in court.

The term bond, *id.* at 224, is defined as:

> Bond, A certificate or evidence of a debt. A written obligation.

Throughout the Bail Reform Act of 1984, the term "pretrial release" is used instead of the term "bail." Thus, a distinction is drawn between money bond or "bail" in one instance, and "conditional release" in the other. In this article the terms bail and bond will be used interchangeably.

5. Bail Reform Act of 1984 § 3142(e).

When a "dangerous person"[6] is accused of a crime, federal prosecutors are now equipped with the tools to assure, not only that the defendant will appear at trial, but also that victims, witnesses and society as a whole will not be subjected to continued criminal activity on the part of the offender. It is hoped that the new Bail Reform Act will eliminate the widespread practice in many jurisdictions of detaining defendants by setting high money bail, thus incarcerating accused individuals because of an inability to post bonds. Moreover, because the new law has built-in procedural safeguards, judges will no longer have to resort to justifying high money bonds as necessary to insure the defendant's appearance in court. Instead, a defendant against whom pretrial detention is sought can expect that the system now affords a certain amount of consistency which, in the long run, promotes the orderly and honest administration of justice.

This article will examine the new Bail Reform Act of 1984, focusing on the Act's pretrial detention provisions. The writer will discuss the procedures required to initiate a pretrial detention hearing and the defendant's rights at such a hearing. The author will evaluate the new law as it relates to prosecutors, defendants and the society. It is the author's firm belief that these changes are long overdue; for although a criminal defendant has an interest in remaining free prior to trial, that interest is often outweighed by society's interest in community protection.

I. BACKGROUND

The eighth amendment of the United States Constitution provides that "[e]xcessive bail shall not be required . . . ."[7] There is no requirement, however, that bail be made available in all cases;[8] but if bail is set, it may not be excessive or higher than required to assure the defendant's appearance at trial.[9] In capital cases, bail may be denied altogether since the theory is that a person facing death will have little incentive to appear for trial to defend against the charges.[10]

The question of "excessiveness" of the amount of bail was addressed by the Supreme Court in *Stack v. Boyle*.[11] The Court held that bail set at $50,000 was excessive because it was "set at a figure higher than an amount reasonably calculated to fulfill [its] purpose"; that is, of assuring appearance at trial.[12] In

6. *Id.* This subsection creates two rebuttable presumptions respecting dangerousness. First, if the defendant is charged with a crime of violence, a capital offense or a drug violation with a minimum ten year penalty, and he was convicted of or released from a sentence he was serving for such a crime within the last five years, and the offense on which he was convicted was committed while on pretrial release, it is presumed that no condition or combination of conditions will reasonably assure the safety of any other person or the community. The same rebuttable presumption arises if there is probable cause to believe that the defendant committed a ten year drug felony or any felony in which a firearm was used or possessed.

7. U.S. CONST., amend. VIII.

8. Carlson v. Landon, 342 U.S. 524, 545-46 (1952).

9. Stack v. Boyle, 342 U.S. 1, 4 (1951) (purpose of bail is to assure the defendant's appearance at trial).

10. Pretrial release in capital cases was governed by 18 U.S.C. § 3148 (1966) and judicial interpretation did not limit capital crimes to those punishable by death. United States v. Kennedy, 618 F.2d 557 (9th Cir. 1980) held that the special conditions relating to capital cases derive from the particularly dangerous nature of the offense—not the nature of the penalty.

11. 342 U.S. 1 (1951).

12. *Id.* at 5.

Stack, the defendants were arrested for violating an act prohibiting communist activities. Since this was a noncapital offense, the defendants claimed a statutorily protected right to bail. The Court held that the excessive bail prohibition was intended to protect the pretrial liberty interests of defendants not yet proven guilty.

A few months later, the Court elaborated on the *Stack* rationale and resolved a case in which the defendants were detained without bail. In *Carlson v. Landon*,[13] Congress had authorized detention of alien communists without bail. The Supreme Court upheld the denial of bail holding that Congress could legislate, consistent with the eighth amendment, that certain classes of offenses—in that instance, illegal immigration—were nonbailable. The Court held that Congress has the power to regulate the immigration and expulsion of aliens and to decide "the classes of cases in which bail shall be allowed in this country."[14]

Where capital offenses are concerned, and in post-conviction situations, dangerousness has always been a consideration in release decisions. More specifically, section 3148 (1966 Statute),[15] provided that a person who was charged with a capital offense, or who had been convicted of an offense and was either awaiting sentence or had an appeal pending, could be denied release if it was believed that either no condition of release could reasonably assure against danger or flight, or if the appeal was frivolous or taken for delay. The prosecution bore the burden of establishing dangerousness,[16] a finding which involved the consideration of many factors and the exercise of judicial discretion.[17] For example, dangerousness has been deemed to include: an imminent threat of unlawful conduct,[18] ongoing narcotics trafficking,[19] propensity toward physical violence,[20] and threats of harm to witnesses and victims.[21] In essence, courts have denied bail in capital cases where the anticipated danger so jeopardized the public that the only way to protect the public was to keep the defendant in jail.

In noncapital cases, bail had traditionally been granted to the accused who had not yet been tried so that he could remain free until appearance for

13. 342 U.S. 542 (1952).
14. *Id.* at 545.
15. 18 U.S.C. § 3148 (1966). Release in capital cases or after conviction

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of conditions of release or orders of detention shall not be affected.

16. Leary v. United States, 431 F.2d 85 (5th Cir. 1970); White v. United States, 412 F.2d 145 (D.C. Cir. 1968).
17. United States v. Baca, 444 F.2d 1292 (10th Cir. 1971), *cert. denied*, 404 U.S. 979 (1971).
18. Leary v. United States, 431 F.2d 85 (5th Cir. 1970).
19. United States v. Hawkins, 617 F.2d 59 (5th Cir. 1980); United States v. Miranda, 442 F.2d 786 (S.D. Fla. 1977); United States v. Rabena, 339 F. Supp. 1140 (E.D. Pa. 1972).
20. United States v. Ursini, 276 F. Supp. 993 (D. Conn. 1967); United States v. Allen, 343 F. Supp. 549 (E.D. Pa. 1972).
21. United States v. Brown, 399 F. Supp. 631 (W.D. Okla. 1975); United States v. Campbell, 314 F. Supp. 157 (D. Mass. 1970).

trial. Statutory bail guarantees, in noncapital cases, encouraged pretrial freedom whenever possible. Indeed, the Bail Reform Act of 1966 was designed to "revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges."[22] Basically, the purpose of bail was to allow an accused who had not been tried to remain free, and to insure that he would appear for trial and sentencing.

Historically, a defendant accused of a crime could be released upon the posting of a money bond, which was forfeited to the court if the accused failed to appear as required. Generally, a money bond took four forms: fully secured bail (the defendant posted the full amount with the court); privately secured bail (a percentage was posted by a bondsman or surety who charged the defendant a fee); a percentage bail (posted by the defendant and returned if he appeared); or unsecured bail (the defendant was liable for the full amount but posted no money initially). In each instance, failure to appear resulted in forfeiture of the bail amount.[23]

Courts began factoring in the dangerousness element in noncapital cases when the issue of threats against witnesses arose. Thus, in *United States v. Gilbert*,[24] the court held that "courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial."[25] In *Gilbert*, the court denied bail altogether because there was evidence of threats toward witnesses. The defendant, however, had the right to a hearing in order to refute the charges against him. Similarly, danger to the general public was considered in *United States v. Wind*,[26] a case which expanded the federal bail law by permitting dangerousness to the community to be considered at a pretrial bail hearing.

Because of concern about a defendant's potential danger to future witnesses and to the general public, about three-fifths of the states have some provision in their pretrial release laws to ensure community safety.[27] In 1970, just four years after Congress passed the Bail Reform Act of 1966, which favored pretrial release, Congress passed the District of Columbia Criminal Procedures Act which provided for pretrial detention of dangerous criminals.[28]

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22. Because the Bail Reform Act of 1966 applied to federal crimes, it covered all crimes within the District of Columbia—common law crimes and crimes of violence such as rape, robbery and burglary. The District Court of Columbia handles a higher volume of violent crimes than other federal jurisdictions because the jurisdiction includes what would elsewhere be deemed "local crimes." Following a literal interpretation of the 1966 Act, the dangerousness of the defendant was not to be considered in noncapital cases and before conviction.

Accordingly, the District of Columbia Court Reform and Criminal Procedure Act of 1970 was enacted to regulate detention of dangerous individuals prior to trial. D.C. CODE ANN. § 23-1321-1332 (1970).

23. Of course a defendant could be released on other conditions not requiring money, like third party custody, restrictions on travel or personal recognizance. *See, e.g.*, Bail Reform Act of 1984 § 3142.

24. 425 F.2d 490 (D.C. Cir. 1969).

25. *Id.* at 491-92. *See also* Blunt v. United States, 322 A.2d 579 (1974).

26. 527 F.2d 672 (6th Cir. 1975).

27. *Typology of State Laws Which Permit Consideration of Danger in the Pretrial Release Decision*, Pretrial Services Resource Center, Washington, D.C., 1982, *as reported in* REPORT TO THE NATION ON CRIME AND JUSTICE, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 59 (NCJ-87068 Oct. 1983).

28. D.C. CODE ANN. § 23-1321-1332.

But it was not until 1980, that the section of the District of Columbia act allowing pretrial detention was challenged directly for the sole purpose of protecting community safety. In *United States v. Edwards*,[29] an accused rapist was denied release because of the risks he posed to the community. The District of Columbia Court of Appeals, in an exhaustive opinion, upheld the constitutionality of the District of Columbia pretrial detention statute against both due process and eighth amendment challenges.

Until now, the danger criterion had no application to pretrial release in noncapital cases which were governed by section 3146. The Bail Reform Act of 1966 did not permit a judge to consider, in noncapital cases, the suspect's dangerousness to the community. Because of this limitation, many judges routinely set high money bonds which greatly exceeded the ability of defendants to pay. Thus, even when a defendant was accused of an offense, for which provisions for bail were prescribed, the defendant could still be detained simply because the financial conditions of release were exorbitantly high.[30] The Attorney General's Task Force on Violent Crime recognized this situation as a "widespread practice" employed by judges to assure appearance.[31] Judges who felt that they were being forced to turn dangerous criminals loose because they were not permitted to consider that very element of dangerousness, resorted to rationalization in order to circumvent a law deemed by them to be unreasonable. Thus, the average judge, no matter how sure he was that the defendant would appear for trial, effectively denied bail by setting unreasonably high financial requirements to those dangerous criminals. This custom had received the general public sanction.[32] As former Judge Timothy Murphy stated:

> An unreasonable law has the ultimate effect of forcing those who administer it to ignore it, calloused of the consequences, or else to make extreme rationalization in circumventing it; this applies to judges. You cannot expect judges to follow the letter of a law that requires them to turn many dangerous criminals loose day after day.[33]

Ironically, while favoring pretrial release, the Bail Reform Act of 1966 put courts in the position of regularly setting bail beyond a defendant's financial capabilities thereby denying such relief. One of the objectives in enacting the District of Columbia statute was to "eliminate from the bail system the hypocrisy of locking up defendants, without fixed standards, through the device of requiring a high money bond."[34]

The Bail Reform Act of 1984 is modeled after the District of Columbia

29. 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). The Bail Reform Act of 1984 is modeled on the 1970 pretrial detention statute enacted by Congress for the District of Columbia. Because the District's statute was passed by Congress, signed by the President, and served as the model for the federal statute, the *Edwards* opinion will be particularly helpful in analyzing and supporting the constitutionality of 18 U.S.C. § 3142.

30. The test is not the financial status of the defendant, but whether the amount is reasonably calculated to assure his presence as required. United States v. Wright, 483 F.2d 1068, 1070 (4th Cir. 1973).

31. Attorney General's Task Force on Violent Crime, Final Report, 51 (Aug. 17, 1981).

32. *See* S. REP. NO. 147, 98th Cong., 1st Sess. 20-21 (1983).

33. *Bail Reform Act of 1966: Hearings Before the Subcomm. on Constitutional Rights*, 91st Cong., 1st Sess. 220-221 (1969) (testimony of Hon. Timothy Murphy, Judge of the D.C. Court of General Sessions).

34. H.R. REP. NO. 907, 91 Cong., 2d Sess. 82 (1970).

statute upheld in *Edwards*.[35] The new bail provisions for pretrial detention of dangerous individuals is an express departure from the nearly two hundred-year-old presumption of release in noncapital cases. For the first time since the signing of the Constitution, federal courts may detain a defendant without bail in noncapital cases prior to an adjudication of guilt.

II. HIGHLIGHTS OF THE 1984 BAIL REFORM ACT

While the basic philosophy of the Bail Reform Act of 1966 favored pretrial release in noncapital cases, the new law takes a different approach and incorporates several substantive changes. Most significantly, danger to the community and protection of society are factors to be considered in release determinations, whereas, they were expressly forbidden under the 1966 Act. In the past, courts, in essence, abused their authority by setting extremely high bonds rather than unwillingly releasing defendants who posed danger to the community. Thus, although not statutorily permissible, intentional imposition of stringent financial conditions of release were routinely used to indirectly detain dangerous defendants. This practice proved at times to be wholly ineffective in cases of dangerous defendants with sufficient financial resources.[36] While the rationale articulated for detention was to assure the defendant's appearance at trial, the underlying concern of the judicial officer has been the need to detain dangerous individuals. While the public may not have protested such judicial action, the denial of bail for the reasons articulated, by setting high money bonds, has certainly cast doubt on the fairness of release decisions and the administration of justice in general. Moreover, the defendants were detained for "dangerousness" while that issue was neither articulated nor litigated. Thus, such defendants could not refute the "real reason" for detention. This situation points out the obvious unfairness of the bail system for the poor who do not have the financial resources to post high money bonds in order to secure pretrial release.

With the enactment of the 1984 Bail Reform Act, the judicial officer can now consider danger to the community or to particular individuals in setting pretrial release conditions. It is now statutorily permissible to detain defendants charged with serious crimes[37] and for whom the question of appearance at trial is not in issue, for the safety of the community and/or the safety of specific individuals. The heart of the new Act, section 3142, sets forth the procedure to be followed to detain persons without bail.

35. 430 A.2d 1321 (D.C. Cir. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

36. The new act permits the rejection of bail money if its source is illegal income. Bail Reform Act of 1984 § 3142(g)(4). In particularly lucrative criminal activities such as narcotics trafficking, the setting of a high money bond is no deterrent to flight. Recognizing this fact, Congress allowed the court to inquire "into the source of property to be designated for potential forfeiture or offered as collateral to secure a bond." *Id.* Now a court may reject collateral that "because of its source, will not reasonably assure the appearance of the person as required." *Id.* See United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966).

37. As defined in the Bail Reform Act of 1984, § 3142(f) includes crimes involving physical force or violence, crimes punishable by life imprisonment or death, ten year drug felonies or any other felony where the person has already been convicted twice for a crime of violence, a crime punishable by life imprisonment or a ten year drug felony.

A. *Changes from Prior Law*

When a defendant is brought before a judicial officer, by whom the issue of pretrial release is to be considered, four options are available.[38] First, the defendant may be released on his own recognizance[39] or by execution of an unsecured appearance bond.[40] If the defendant is not an appropriate candidate for such release, he may be released subject to one or more of the specified release conditions which are contained in section 3142(c).[41] Both of these options are similar to prior law.[42]

If the defendant is already on a form of conditional release like probation,

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38. Bail Reform Act of 1984 § 3141(a).
39. This generally is called an O.R. bond.
40. Bail Reform Act of 1984 § 3142(b).
41. Bail Reform Act of 1984 § 3142(c) provides:

(c) RELEASE ON CONDITIONS—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(2) subject to the least restrictive further condition, or combination of conditions, that he 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 that the person—

(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to 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;

(B) maintain employment, or, if unemployed, actively seek employment;

(C) maintain or commence an educational program;

(D) abide by specified restrictions on his personal associations, place of abode, or travel;

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

(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(G) comply with a specified curfew;

(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

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

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

(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(N) 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.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

42. 18 U.S.C. § 3146(a) (1982).

parole, or pretrial release from other charges, or is subject to deportation at the time of the arrest, the third alternative, which is new, allows temporary detention for up to ten days, not counting Saturdays, Sundays, and holidays.[43] In order to utilize the third alternative, the judicial officer must direct the government attorney to notify the appropriate authorities who have an interest in the detainee, such as the Immigration and Naturalization Service, parole or probation officers. If, during the ten day time period, the interested official fails or declines to take custody of the detainee, the judicial officer will proceed according to the other provisions of section 3142. The court then will consider what release conditions are necessary to assure appearance at trial, just as with any other defendant.

Finally, the fourth option, which is also new, allows the court to enter an order of detention after a hearing if the defendant has a significant felony conviction record,[44] or if it appears that there is a substantial risk that the individual will flee, or will obstruct justice. The Act creates two rebuttable presumptions[45] which, if satisfied, establish that no form of conditional release will be adequate. The first occurs when the individual has been convicted of a crime of violence,[46] a capital offense, or a ten year drug felony while on pretrial release; and his conviction or release from conviction occurred within the last five years. In such situations the presumption is that "no condition or combination of conditions will reasonably assure the safety of any other person and the community."[47] The second rebuttable presumption arises if the defendant is presently facing charges involving the use or possession of a firearm or a drug felony punishable by ten years or more.[48]

This new statute has created a unique opportunity for prosecutors to prove dangerousness by producing the court records which establish, by clear and convincing evidence, that a prior crime was committed while on pretrial release. If the crime charged is a ten year drug felony or if it involved the use or possession of a firearm, the prosecutor need only establish probable cause that the defendant committed the offense. Thus, unless the defendant overcomes the burden of the presumption, the detention order may be issued because there is a presumption that the defendant will flee or present a danger to the community.

B. *Initiating the Detention Hearing*

The question posed during a pretrial detention hearing is whether any

43. Bail Reform Act of 1984 § 3142(d).

44. The term "felony" means an offense punishable by a maximum term of imprisonment of more than one year. 18 U.S.C. § 3156(a)(3).

45. *Cf.*, Hunt v. Roth, 648 F.2d 1148, 1164 (8th Cir. 1981) where the Nebraska legislature enacted an irrebutable presumption of dangerousness for anyone charged in a sex offense involving force. The eighth circuit held the provision to be unconstitutional because, in assuming that all sex offenders were dangerous or would flee, the law left no room for judicial discretion.

46. The term "crime of violence" means: (a) an offense that has as one of its elements the use, attempted use, or threatened use of a physical force against the person or property of another; or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. § 3156(a)(4).

47. Bail Reform Act of 1984 § 3142(e).

48. 21 U.S.C. §§ 801-969 (1970). For definition of such felonies, see 18 U.S.C. § 924(c), 21 U.S.C. §§ 801-969 (1970).

form of conditional release will reasonably assure the appearance of the defendant and the safety of the community or any other individual. The government must move for a hearing if the person is charged with a crime of violence, a capital offense, a ten year drug felony, or if the person has a history of criminality.[49] However, either the judicial officer or the government can move for a detention hearing when there is a serious risk that the person will flee or obstruct justice.[50]

The hearing must be held at the time of the defendant's initial appearance before a judicial officer.[51] In essence, the detention hearing is basically a bail hearing.

C. *Factors to be Considered*

The factors involved in determining dangerousness will vary from case to case. If the situation is not one of the two discussed above, dependent upon rebuttable presumptions, the court can consider many factors in deciding dangerousness. These factors, outlined in section 3142(g), include:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or whether it involves a narcotic drug;
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person including—
> (A) his character, physical and mental condition, family ties, employment, financial resources, the 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, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local 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 . . . .[52]

The statute has expanded the factors to include community safety, which was impermissible under the prior act. For example, consideration of whether the crime(s) involved drugs or violence reflects on the defendant's criminal propensity and therefore is relevant to the community's interest in safety.

D. *Nature of Current Offense*

If the current offense is a crime of violence, a capital offense, or a ten year drug felony, the judicial officer, in denying pretrial release, must be satisfied by clear and convincing evidence of specific instances of conduct by the defendant. For example, evidence detailing injury to other persons or the type of drugs involved or the possession of a gun can all be used to establish that the defendant should not be released. Injury to others caused by the defendant in committing the instant offense is a major consideration as are threats against victims and witnesses. Legislative history makes clear that Congress intended

49. Bail Reform Act of 1984 § 3142(f).
50. *Id.*
51. *Id.* Either party can move for a continuance. The government can only seek continuance for up to three days and the defendant is allowed ten days. The defendant is confined during any continuance as well as during the detention hearing.
52. Bail Reform Act of 1984 § 3142(g).

injury to include physical as well as non-physical harm such as corrupting a union.[53] Also, the risk that a defendant will, if released, continue to traffic in drugs has been held to be a danger to the safety of individuals and the community.[54] With the alarming rise in drug trafficking throughout every level of society, it is clear that Congress intended to reach the narcotics offender charged with a serious drug crime and remove him from society pending trial.[55] Considering the seriousness of the drug problem in this country, it is a good policy to remove the offenders in an effort to protect the community.

E. *Prior Criminal History*

A defendant's criminal history has been perhaps the factor most utilized in the past to deny pre-trial release.[56] Since the focus is now on "the safety of any other person and of the community,"[57] the criminal record may take on new significance.

Previously, only convictions were to be considered.[58] The 1984 Act allows the "criminal history" to be considered; and, according to the legislative history, a judge should not "ignore a lengthy record of prior arrests."[59] Thus, a defendant may now have considered against him arrests which may not have resulted in convictions or in which charges were later dismissed. And, the defendant may not use the pre-trial detention hearing as a forum to attack any prior convictions.[60]

F. *Standard of Proof*

The defendant's criminal history is an effective barometer to demonstrate to the judicial officer the dangerousness of the defendant. Because of the defendant's high stake in the outcome of the hearing, a finding of dangerousness must be supported by clear and convincing evidence.[61]

The detainee has no right to have his bail determined by a reasonable doubt standard. A person can be arrested on probable cause, but the pretrial detention statute requires the court to find by clear and convincing evidence that there is no condition or combination of conditions that will reasonably assure the safety of any person or the community. The reasonable doubt standard has no application in the pretrial detention arena.[62] The judicial officer must decide two issues: Whether there is probable cause to believe that the

53. S. REP. NO. 147, 98th Cong., 1st Sess. 39 (1983); United States v. Provenzano, 605 F.2d 85, 96 (3d Cir. 1979).

54. United States v. Hawkins, 617 F.2d 59 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980).

55. S. REP. NO. 147, 98th Cong., 1st Sess. 39 (1983).

56. A defendant's "record of convictions" was one of the factors to be considered in determining whether release in noncapital cases prior to trial would "reasonably assure appearance of the person as required." 18 U.S.C. § 3146(b) (1982).

57. Bail Reform Act of 1984 § 3142(c).

58. Hawkins, 617 F.2d 59 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980).

59. S. REP. NO. 147, 98th Cong., 1st Sess. 49, n.142 (1983).

60. *Id.*

61. Bail Reform Act of 1984 § 3142(f).

62. Bell v. Wolfish, 441 U.S. 520 (1979). A person can be restrained on less than a reasonable doubt standard. For example, for a violation of parole, Morrissey v. Brewer, 408 U.S. 471 (1972); or probation, Gagnon v. Scarpelli, 411 U.S. 778 (1973), probable cause is all that is necessary for detention.

defendant committed the crime and whether there is clear and convincing evidence that defendant should be detained.

G. *Detention Order*

If the judicial officer decides to order the defendant confined, the detention order must contain written findings of fact and a written statement of reasons for the detention.[63] The defendant can appeal a detention order after it has been entered; the government, too, has a new right to appeal a release order. The defendant remains in detention while the appeal is being processed.[64]

III. DEFENDANT'S RIGHTS

In general, a defendant against whom detention is sought under this new Act can expect the system of justice to be operating in an honest manner. As discussed previously, courts should no longer set exorbitant money bonds beyond the defendant's financial reach as a means of securing pretrial detention. Although precluded from such action by section 3142(c), there is always the potential for abuse if a judge attempts to thwart the safeguards and procedural requirements established by the new Act.

Thus, although a judge could still set an amount of bond beyond the financial means of the defendant, he must support this action by setting forth reasons in the detention order so that the defendant can appeal the court's findings pursuant to section 3145.[65] In this manner, a defendant is put on notice that his detention is based upon the finding that the amount of bond set was reasonable and that the requirement of posting bond was the only way to secure his appearance at trial.

In general, the defendant confronted with the prospect of detention will be afforded notice that the government is going to present evidence and seek pretrial detention.[66] Notice provides the opportunity for the defendant to marshal evidence in his defense.[67] Of course, the defendant has the right to be represented by counsel and, if financial circumstances warrant, counsel will be appointed at the government's expense.[68] In addition, the defendant is allowed to testify, to present information on his behalf, to cross-examine the government's witnesses and to present witnesses.[69] As was the case under prior law on bail hearings, the presentation and consideration of evidence does not have to conform to the Federal Rules of Evidence.[70] Therefore, a defendant can present evidence by proffer or otherwise; hearsay is admissible.

Just as the defendant can present evidence without respect to traditional evidentiary constraints, so, too, the government may sustain its burden by hearsay or proffer. Because the statute allows the defendant to call "witnesses

63. Bail Reform Act of 1984 § 3142(i).

64. This new provision allowing the government to appeal is incorporated into an amendment to 18 U.S.C. § 3731.

65. In fact, Congress has explicitly stated that "[t]he judge may not impose a financial condition that results in the detention of the person." Bail Reform Act of 1984 § 3142(c).

66. Bail Reform Act of 1984 § 3142(f).

67. Wolff v. McDonnell, 418 U.S. 539, 564 (1974).

68. Bail Reform Act of 1984 § 3142(f).

69. *Id.*

70. *Cf.* Bail Reform Act of 1966 § 3146(f) and Bail Reform Act of 1984 § 3142(f).

on his own behalf,"[71] government witnesses need not be divulged or subjected to defense subpoena.[72] Therefore, the defendant has no right to learn the identity of government witnesses and to call them in an effort to achieve discovery. A defendant's right to subpoena witnesses on his behalf is not unconditional and does not extend to adverse witnesses.

As noted above, the bail hearing is not the forum which allows a defendant to discover the government's case.[73] Thus, a defendant is not entitled to the witness list, scientific tests and other information usually provided during the discovery phase of litigation and governed by Rule 16 of the Federal Rules of Criminal Procedure. Discovery rights do not inure to the benefit of the defendant until an indictment has been filed.[74]

IV. PERSPECTIVES

Most people would agree that "dangerous" individuals should be incarcerated pending trial. Disagreement is evident, however, when a definition of "dangerous" is attempted.

The evidence necessary to demonstrate dangerousness varies on a case by case basis. Section 3142(g) identifies the particular factors which the court must consider in assessing dangerousness. Many of these are factors which traditionally have been considered in setting bail: the nature and circumstance(s) of the offense; the weight of evidence against the defendant; the defendant's family circumstances; the defendant's employment responsibilities; the length of the defendant's residence in a particular community; the defendant's criminal history; the defendant's physical and mental condition; and the defendant's track record of appearances at court proceedings. The new statute has expanded the category of factors to include consideration of issues relating to community safety, which previously could not have been considered in setting bail.

The additional factors take into consideration whether the offense with which the defendant is charged is a violent or drug-related crime, whether the defendant is presently on some form of conditional release, and the seriousness of the danger to the community posed by the defendant's release. These factors allow a court to draw a fair inference regarding the potential dangerousness of the defendant.

The concept is not an simple one, for its calls into play predictions about future conduct based on past behavior. Many studies have been done which focus on recidivist rates in various jurisdictions. The results range from a low of 7% to a high of 70%.[75] These figures represent the percentage of criminals who were placed on some form of conditional release and who committed an additional crime while released.

Determining dangerousness by evaluating relevant aspects of the defendant's past record is not a novel burden for the courts. The prior bail reform

71. Bail Reform Act of 1984 § 3142(f).

72. A defendant must make a preliminary proffer showing how a witness' testimony will negate probable cause before the court will order service or process. United States v. Edwards, 430 A.2d at 1338.

73. *Id.*

74. *See, e.g.*, Bost v. United States, 542 F.2d 893, 897 (4th Cir. 1976).

75. *See discussion* S. REP. No. 147, 98th Cong., 1st Sess. 22-30 (1983).

act allowed judges to question a defendant's potential for future violence when setting bail in a capital case.[76] The same law required courts to predict the potential for flight in all instances of pretrial release.[77] Thus, courts have been in the position of predicting defendants' future tendencies for some time. Making such predictions in the interest of public safety is a logical step in the evolution of the law. Recidivism, that is, repeated criminal activity by a defendant, is as relevant as other considerations in this delicate balancing process.

Furthermore, along with the higher incident of crime in our society today comes the higher incidence of unsolved and unreported crimes. It is fair to conclude, that some of those persons on pretrial release commit crimes without being detected or apprehended. The rate of unsolved crimes, alone, could have a significant impact on the recidivism percentages.

Courts must weigh the potential for future violence. The most appropriate and sound method is through a careful examination of past conduct and certain classes of offenses. The prior criminal record of a defendant is a good indicator that he may be a likely candidate to commit further crimes while free on bail. Particularly where the atrocity of the offense is great, the concerns for detention surpass the interests in release.

A. *The Government's Perspective*

It is evident that this new statute, in allowing judges and magistrates to consider danger to the community, will result in increased detention of dangerous individuals. Where no condition of release will assure the safety of individuals or the community, the government can move the court for a detention order. For the first time, federal prosecutors can now realistically promote the safety of the community through pretrial detention of dangerous offenders.

Perhaps the most unique aspects of this act are the two rebuttable presumptions respecting dangerousness. If the defendant is charged with a ten year drug felony, a violent or capital offense, there is a rebuttable presumption that no conditions of release will assure community safety if the defendant has committed another offense while on pretrial release and not more than five years has elapsed since the previous conviction or release from prison.

The second rebuttable presumption arises when the defendant has charges pending pertaining to a serious drug offense (felony) or the use or possession of a firearm during a felony. In these situations there is a presumption that the defendant will flee or present a danger to the community. Thus, the defendant must bear the burden of demonstrating to the court that he is a good release candidate.

Studies show that persons with the above characteristics have a higher than average rate for repetitive criminal conduct. The average person would conclude that an individual who uses a firearm while committing a felony is a "dangerous" individual. And in the area of increasingly widespread narcotics violations, the statutory provisions are timely. For example, major drug pushers engaged in an extremely lucrative "business" are not likely to cease their

76. Bail Reform Act of 1966, 18 U.S.C. § 3148.
77. *Id.* § 3146.

operations pending trial. Many drug pushers continue to traffic in narcotics, often to raise funds necessary for their legal defense. Communities recognize the serious risk to safety posed by narcotics traffickers because of the potential for violence, use of guns and other weapons. Also, in light of the high volume of international travel and large amounts of money associated with drug trafficking, as well as other subsidiary criminal activity, such conduct poses a particularly high risk to community safety. Because of the great public concern over drug trafficking, prosecutors can now aggressively seek detention when appropriate, and may urge the court to reject "drug money" as collateral.

B. *The Defendant's Perspective*

Although the Bail Reform Act of 1984 provides substantial assistance to law enforcement, from a defendant's standpoint, the new act provides a detailed account of the reasons for denying pretrial release to those defendants for which pretrial detention is permitted, and codifies procedural protections for them. If a defendant does not fit within the class of defendants for which the act permits pretrial detention, the detention provisions will not be triggered.

At the outset, the defendant is put on notice that the government is seeking detention, for which a hearing must be held immediately. The defendant has a right to legal representation, the right to testify, the right to present witnesses and other evidence, and to cross-examine the government's witnesses.

For the first time, bail hearings may directly focus on the issue of dangerousness. As pointed out earlier, this question can now be litigated forthrightly by the parties rather than ignored or obscured. Past practices show that high money bonds were used indirectly to detain dangerous individuals. Thus, a defendant could not defend and argue on his behalf for release. The prior system operated to the defendant's disadvantage often by presenting an inaccurate justification for detention of the dangerous.

In general, once a defendant's dangerousness has been litigated and established by clear and convincing evidence, the government may seek a detention order. If the order is entered, the new act expands the appeal rights by allowing the defendant to appeal any release condition; prior law only allowed an appeal of detention orders.

It is worth emphasizing that, without a detention hearing, a person may no longer be detained by the imposition of a high money bond, or other financial condition of release, which he is unable to meet. Although defendants are understandably displeased when pretrial detention is imposed, at least the system avoids the hypocrisy of the prior practices and affords him his day in court. Whereas, in the past the defendant could have been detained, ostensibly "to assure his appearance at trial," if the judge was acting based on a concern for community safety and dangerousness, the defendant was never afforded an opportunity to refute the reason. He now has that opportunity.

As expected with any legal shift which aids prosecutors, the defense bar will undoubtedly be outraged by the new law. Since in certain cases a defendant will face a rebuttable presumption that he poses a danger to society if released, the burden is shifted to the defendant to prove to the court's satisfaction that he is not a danger.

The government's reduced burden of proof will present a target for defendants to challenge the new law. Our system has always maintained that the government bears the burden of proof in criminal matters, and defense practitioners will aim their arguments at this presumption.

Moreover, defendants can be expected to claim that the eighth amendment's proscription against "excessive bail" guarantees a right to bail, that pretrial detention is really punishment for past conduct without an adjudication of guilt and that the pretrial detention statute deprives them of procedural due process. The *Edwards* court rejected the claim of a constitutional right to bail, finding that the excessive bail clause was not intended to restrict the class of offenses for which the legislature could preclude bail.[78] *Edwards* also concluded that pretrial detention is prospective and forward looking, designed to curtail future conduct and therefore not a punishment for prior criminal activity.[79] The *Edwards* court found it significant that pretrial detention is not intended to promote retribution and deterrence, the traditional aims of punishment.[80]

A variety of due process arguments are anticipated with regard to the new law, including claims that a defendant has rights to proof of dangerousness beyond a reasonable doubt, discovery and prior notice of all evidence the government will use, and confrontation of all witnesses. Undoubtedly courts will struggle with these important procedural issues on a case-by-case basis.

C. *Society's Perspective*

Society wants to be protected against criminal conduct. It is known that some people who are released pending trial will commit additional crimes. Those who witness crimes are often traumatized and reluctant to report their observations. Often, this translates into a reluctance on the part of witnesses to testify. Moreover, victims of crime are the individuals most directly affected by the actions of criminals. The first concern expressed by many victims as well as witnesses is whether the offender will be removed from society while the trial is pending.

When it is agreed that an individual defendant is a danger, few would argue for release. When an individual uses a firearm during the commission of a federal felony, it is unlikely that society will want him released, with the opportunity to prey upon society again. If an individual is engaged in extensive, ongoing drug trafficking, the risk is high that he is engaged in additional criminal activity which compliments the pending offenses. Such criminals often have organized crime connections. They handle large sums of money and have ties outside of the United States. Drug traffickers pose a significant risk of continuous pretrial criminal activity. Because of the extremely lucrative nature of the criminal activity, it is likely that continued drug trafficking will occur if release is granted. There is little dispute that extensive narcotics trafficking, and its subsidiary criminal activities, is a threat and danger to community safety.

Thus, the benefits to society of the Bail Reform Act of 1984 are substantial. Congress intended to reach such ongoing narcotics activities when it in-

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78. United States v. Edwards, 430 A.2d at 1330-1331.
79. *Id.* at 1332.
80. *Id.* at 1332-33.

cluded the rebuttable presumption of dangerousness, based upon probable cause to believe that the defendant had committed a drug violation carrying a penalty of ten years or more. Since drug trafficking permeates all levels of society, public interest in community protection is now afforded legitimate statutory recognition.

CONCLUSION

The Bail Reform Act of 1984 has beneficial aspects for all interested in the criminal justice system. Law enforcement is aided, society is protected and the defendant now has a fair opportunity to litigate the critical issue of dangerousness.

Predictions about future conduct always involve some margin of inaccuracy. However, an established component of our pretrial release system, preventing flight, relies on such predictions. If, indeed, there is no condition or combination of conditions that will reasonably assure the safety of victims, witnesses and the general community, the threat to that safety should not be permitted. Even the most vigorous proponents of a right to bail agree that the right is not absolute. All agree that the right should not extend to defendants who pose a risk of flight. The determination of who poses such a risk is based on predictions. In the same vein, it is also accepted that capital defendants may justifiably be denied bail. If the government is justified in preventing flight, the same level of concern is evident in protecting the community from danger.

Pretrial detention clearly has a substantial relationship to preventing injury to the public and is long overdue. In appropriate circumstances, the defendant's interest in remaining free is outweighed by society's interest in protection.