National Symposium on Pretrial Justice
May 31, 2011

Remarks by Chief Judge Eric Washington

Good afternoon. My name is Eric Washington, and I am the Chief Judge of the District of Columbia Court of Appeals. I am honored to have been asked to comment briefly on why I believe this symposium is so timely and important. I have to begin by congratulating the justice department and pji for convening this symposium. I took an oath upon becoming a judge, promising to support and defend the constitution. That oath also commands me to administer justice without respect to persons. That means, rich or poor, black or white, it is my obligation to ensure that all who come before the court are treated fairly and equally. Furthering the fair administration of justice is a mission about which I am passionate, and the subject of this gathering goes to the core of that mission. I am fortunate to preside in a jurisdiction that has implemented progressive pretrial reform, having for the most part eliminated the use of financial bail as a means of preventive detention. Unfortunately, jurisdictions like ours are in the minority.

The history of DC: The bail act and its administration have followed a precarious path. The District's unique status, its proximity to congress, and its visibility in the nation's capital placed it in the vanguard of the bail reform movement. Congressional committees, bar association committees, area law schools, and the US Justice Department have all significantly influenced the development of our pretrial release system.

Prior to the early 1960s the concept of pretrial release was grounded on the theory that financial bonds were the best way to ensure the return of criminal defendants to the courthouse for trial. In most jurisdictions the use of money bonds is still the most common practice. It was not until 1961, when the Manhattan Bail Project began to test community ties as an alternative to financial bond that our court began to address the very obvious inequities of the traditional bail system, liberty being determined by economic status. The success of the New York project ultimately prompted congress to pass the federal bail reform act of 1966, providing for a presumption of release on non-financial conditions and requiring judges to consider family ties, employment, and length of residence in the community when shaping their release orders. The Federal Bail Reform Act, however, did not authorize the courts to consider danger to the community as a factor to be considered in pretrial release conditions.

As a result, it was not atypical for a judge who was faced with a dangerous felon seeking pretrial release, to merely set a bail sum too high for the defendant to meet, despite the presumption of release that was embodied in the Bail Reform Act. This was done under the pretext that the defendant posed a flight risk, although the reality was that it was simply a way for the courts to protect the community from what the judge believed to be a dangerous felon. Recognizing this hypocrisy, local court reform leaders here in dc convinced congress, in 1970, to include as part of the DC Court Reform and Criminal Procedure Act, the DC Bail Reform Act. It followed the Federal Bail Act in most respects, but included a provision that allowed prosecutors to petition the court to detain certain defendants pretrial by using careful, restrictive detention categories. The net result is that

only the truly hard-core dangerous defendant can be held. Even then, trial is expedited, and the detention period strictly limited.

As a result of our current practice, the number of individuals unnecessarily detained, particularly, non-violent and low risk persons, has been significantly reduced. As you will hear more about during this symposium in dc, at least as of 2008, 80% of all defendants were released without a money bond. Fifteen percent are preventively detained based upon a showing by clear and convincing evidence, that no condition or combination of conditions will reasonably assure the appearance of the defendant as required, and the safety of any other person and the community. The remaining 5% were required to post a financial bond however, none of those bonds required commercial intervention because our Bail Act prohibits a bond being set that the defendant can not afford to pay. This means that fully 85% 0f the persons arrested annually in the District of Columbia are released pretrial back into the community with or without supervision and that has been accomplished without sacrificing the safety of our communities. Agency data released by the pretrial justice institute shows 88% of released defendants make all court appearances, and 88% complete the pretrial release period without any new arrests. Thus, lower income defendants are able to continue to work, maintain their homes, support their families, and help prepare their defense while awaiting their day in court, which is only fair since every defendant is presumed innocent until proven guilty.

What is being done here in the District, can be done in jurisdictions nationwide. Cash-based bail systems institutionalize economic discrimination against the poor.

Persons who can afford their freedom are able to work, meet with their counsel and actively participate in the preparation of their defense.

Most defendants don't have resources like former international monetary fund (IMF) leader, Dominique Strauss-Kahn. Had he been poor, the likelihood is that the bail set for him would have acted to preventatively detain him in prison awaiting trial for his alleged rape of that hotel worker in New York. Instead, because of his wealth, he is living in an upscale apartment in New York under house arrest where he will be allowed to leave his home for court, doctor's visits, and religious services. And where he also enjoys unlimited access to his attorneys, and may have up to four visitors at a time, in addition to members of his family.

These issues must be addressed and that is why this symposium, this conversation, is incredibly important. Let's agree right now that the conversation will not end for us with this symposium, but that we will keep the conversation going even after we depart. Thank you.