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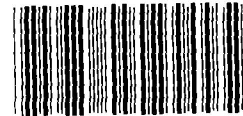
Report to the Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives

October 1987

CRIMINAL BAIL

How Bail Reform Is Working in Selected District Courts



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October 23, 1987

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the
Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

As you requested, this report provides information on the impact of the implementation of the Bail Reform Act of 1984 in selected district courts. We performed our work in four courts—northern Indiana, Arizona, southern Florida, and eastern New York. Specifically, the report provides information on detention rates, reasons for detention, failure-to-appear, and crime on bail rates under the new law and the previous law, the Bail Reform Act of 1966. The report also discusses court and justice officials' views about the new law and the use of a special provision of the new law intended to aid in the detention of certain types of defendants.

As arranged with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this report. At that time, we will send the report to the Attorney General, the Chief Justice of the United States, the Chief Judge of each district court we visited, the Director, Administrative Office of the United States Courts, and other interested parties.

Sincerely yours,

Arnold P. Jones
Senior Associate Director

Executive Summary

Purpose

The Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, requested that GAO examine the impact of the implementation of the Bail Reform Act of 1984 in selected district courts. This law replaced the Bail Reform Act of 1966. Specifically, the Chairman asked GAO to

- compare the extent that defendants were detained prior to trial under the old and new bail laws and the reasons they were detained;
- determine the extent of use of a provision of the new law intended to aid in the detention of certain types of defendants;
- compare for the old and new bail laws, the extent that defendants released before trial failed to appear for a scheduled judicial proceeding or were arrested for committing a new crime: and
- identify any problems court officials have encountered in implementing the new law.

GAO conducted this review in four judicial districts—northern Indiana, Arizona, southern Florida, and eastern New York.

Background

In the federal criminal justice system, one of the first decisions a judicial officer (i.e., a federal judge or magistrate) makes after a defendant comes into federal custody is whether the defendant will be released or detained before trial. To decide, the judicial officer will conduct a bail hearing to obtain information about the defendant.

Currently, the judicial officer can elect to release the defendant contingent on financial or nonfinancial conditions, detain the defendant temporarily, or can deny bail and order the defendant detained during the pretrial period. In the latter case, the judicial officer must hold a separate detention hearing to determine whether detention is warranted or whether any release condition(s) will ensure the person's appearance and the safety of the community. If a defendant does not comply with the nonfinancial conditions imposed by the judicial officers or fails to pay the financial bail, he or she can be detained without holding a detention hearing.

The Bail Reform Act of 1984 greatly expanded the extent to which judicial officers can consider dangerousness in the bail setting process. Under the Bail Reform Act of 1966, a defendant could only be denied bail and detained for dangerousness if the person was charged with an offense punishable by death (i.e., capital offense). The new law specifies

a wider range of defendants that can be detained as dangerous and provides specific criteria for identifying who is dangerous. By so doing, the new law intended to eliminate the use of sub rosa detention which refers to the setting of an extremely high money bail as an indirect method of detaining a defendant considered dangerous.

The new law contains a provision which may be applied to certain defendants who the law defines as flight or danger risks. The provision—known as the "rebuttable presumption"—shifts the burden to the defendant to show that he/she is not a flight and/or danger risk. However, the prosecutor must persuade the court that the defendant is a flight or danger risk.

Results in Brief

The reasons that defendants are detained before trial under the new law have changed significantly from those under the old law, with nearly half of the defendants now being detained without bail because they are considered a flight and/or danger risk. Overall, the extent defendants were detained increased under the new law. The new law leaves open to interpretation whether money bail can be set at an amount the defendant is unable to pay and, in two of the four districts, there was an increase in the percent of defendants detained for not paying their money bail. The "rebuttable presumption" provision in the new law has been used in varying degrees by prosecutors. The new law does not require that pretrial detention be sought against every defendant who meets the criteria, and GAO found that detention was requested for less than half of those who were qualified. Generally, the court officials GAO interviewed believe the new bail law is an improvement over the old law.

The percentages of defendants released on bail who failed to appear for subsequent judicial proceedings or were arrested for committing a new crime are low under the old and new bail laws.

GAO's Analysis

GAO's analysis of criminal cases in the four districts showed that overall, a greater percentage of defendants were detained during their pretrial period under the new law than under the old, 31 versus 26 percent. (See p. 18.) GAO's analysis of criminal cases also showed that the reasons defendants were detained under the new law changed significantly from those under the old. All of the defendants detained in the four districts under the old law were detained because they did not pay the money bail set by the courts, compared to 51 percent detained for this reason

under the new law. The remaining 49 percent were denied bail and detained because they were considered to be a flight and/or danger risk. (See pp. 21 to 23.) In two of the four districts, when money bail was used as a release condition under the new law, the extent that defendants were detained because they did not pay their bail increased. (See pp. 25-26.)

The new law leaves open to interpretation whether money bail can be set at an amount the defendant is unable to pay. GAO found the four districts were evenly split on their interpretation and implementation of this provision. (see pp. 24-25.)

Use of Special Provision

Use of the rebuttable presumption provision varied from district to district. From its analysis of court records, GAO found that most of the defendants who qualified for the rebuttable presumption had been indicted for a drug offense for which the maximum term of imprisonment is 10 years or more. (See pp. 30-31.) The new law does not require federal prosecutors to, nor did they seek pretrial detention of all defendants who met the rebuttable presumption criteria. Pretrial detention was sought for 39 percent who were qualified, and prosecutors were successful in obtaining the detention of 61 percent of them. (See pp. 31 to 33.)

Extent Defendants Failed to Appear and Committed New Crimes

The percentage of defendants released on bail who failed to appear for judicial proceedings was 2.1 and 1.8 percent under the old and new laws, respectively. The percentage of released defendants who were arrested for committing new crimes was 1.8 and 0.8 percent under the old and new laws, respectively. (See pp. 37 to 41.)

Court Officials' Views

The predominant feeling of court officials in the four districts was that the new bail law is an improvement over the old law and that it is more direct and honest because the law allows the judicial system to label a defendant as dangerous when that is what he or she is thought to be. (See p. 33.) However, a common concern expressed by about half of these officials was the length of time involved in attending detention hearings. (See p. 34.)

Recommendations

GAO is not making any recommendations. The purpose of this report is to present information on the impact of the new bail law.

Agency Comments

GAO did not obtain official agency comments on this report. However, GAO discussed the report with Department of Justice and judicial branch officials who generally agreed with the facts GAO obtained.

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Introduction

In the federal criminal justice system, one of the first decisions a judicial officer (i.e., a federal judge or magistrate) makes after a defendant comes into federal custody is whether the defendant will be released or detained before trial. This is referred to as the bail setting process. Before October 1984, bail in the federal system was governed by the Bail Reform Act of 1966 (Public Law 89-465, June 22, 1966). With the enactment of the Comprehensive Crime Control Act of 1984 (Public Law 98-473, Oct. 12, 1984), a new bail law went into effect—the Bail Reform Act of 1984. This report—prepared at the request of the Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee—addresses the implementation of the Bail Reform Act of 1984 in selected district courts.

The Bail Process

To set bail the judicial officer conducts a bail hearing. At the hearing, the prosecutor and the defense attorney each make a recommendation to the judicial officer regarding bail. These recommendations are based on information on the defendant's background and criminal history, the offense the defendant is charged with, the circumstances surrounding the arrest, and any other relevant information. In addition, probation or pretrial service officers, who work for the courts, are required to provide the judicial officers with background information on the defendant and to recommend appropriate release conditions. Currently, the judicial officer can select one of four courses of action. He/she can

- release the defendant (1) on his/her personal recognizance or (2) upon execution of an unsecured appearance bond (i.e., a bond whereby the defendant promises to pay a specified amount of money if he/she fails to appear for a judicial proceeding). These options are referred to as nonfinancial bail because the defendant does not pay money to be released.
- make the defendant's release contingent upon (1) the payment of a financial bond or cash and/or (2) compliance with one or more nonfinancial release conditions (e.g., remain in custody of a third person, abide by restrictions on travel). If the defendant does not comply with these conditions, he/she is incarcerated during the pretrial period.
- order the defendant temporarily detained (up to 10 days) so that appropriate officials can be notified if it is determined that the defendant, when arrested, was on probation or parole as a result of a prior conviction, is not a citizen of the United States or has not been lawfully admitted for permanent residence, or was already released on bail before trial or pending sentencing or appeal for another criminal charge, and the

defendant may flee or pose a danger to any other person or the community.

- deny bail and order that the defendant be incarcerated during the pretrial period. If the prosecutor or the judicial officer believes that the defendant should be denied bail and detained, the judicial officer must hold a separate detention hearing to determine whether detention is warranted or whether any release condition (nonfinancial or financial) or combination of conditions will assure the appearance of the person as well as the safety of any other person and the community.

The initial bail decision may be changed. The attorney for the defendant or the government may request that the original decision be reviewed, or the attorneys may present new information in seeking a different bail decision. In either event, the original release condition(s) may be made more or less stringent, or they may remain the same. Also, if the defendant fails to comply with a release condition or commits a crime while on release, the court may revoke the defendant's bail and order the defendant detained.

Comparison of Old and New Bail Laws

Under the Bail Reform Act of 1966, the primary purpose of bail was to assure the appearance of the defendant at judicial proceedings. To do this, a judicial officer could set financial and/or nonfinancial release conditions. The old law permitted a judicial officer to set money bail at an amount which would assure the defendant's appearance, whether the defendant could pay it or not. The dangerousness of defendants and the threat they posed to others while released on bail could only be considered by judicial officers if the defendant was charged with an offense punishable by death (i.e., a capital offense). In the case of a capital offender, the judicial officer could order the defendant detained without bail if he/she determined that no other condition(s) (financial or nonfinancial) would assure that the person would not pose a danger.

Under the 1966 bail law, if the defendant was not charged with a capital offense and a judicial officer believed a defendant to be dangerous, the judicial officer faced a dilemma. The judicial officer could set conditions resulting in the defendant's release on bail despite fears of the danger posed by the defendant's release, or the officer could set an extremely high money bail which the defendant could not pay and justify it by making the defendant appear to be a risk to flee. Setting an extremely high money bail as an indirect method of keeping a dangerous defendant incarcerated or detained during the pretrial period is referred to as sub rosa detention.

The Bail Reform Act of 1984 greatly expanded the extent to which judicial officers can consider dangerousness in the bail setting process. In selecting nonfinancial conditions of release, the judicial officer is to give equal consideration to the flight and the danger risk the defendant presents. Under the old law only the flight risk could be considered when deciding whether to release a defendant on his/her own recognizance or on an unsecured bond.

Furthermore, pretrial detention can now be obtained for a much larger segment of defendants than only those charged with capital offenses. In addition to capital offenders, detention can now be sought for defendants charged with (1) a crime of violence;[1] (2) an offense for which the maximum sentence is life imprisonment or death; (3) a drug offense which has a maximum term of imprisonment of 10 years or more; and (4) any felony (an offense with a term of imprisonment of more than 1 year) if the defendant has two or more previous convictions for a capital offense, an offense for which the maximum sentence is life imprisonment, a crime of violence, or a 10-year drug offense. Defendants can also be detained if judicial officers or prosecutors believe they are serious flight risks or if there is a serious risk that they will obstruct or attempt to obstruct justice through injury, threat, or intimidation of a prospective witness or juror. By specifying who is eligible for pretrial detention and by expanding eligibility to a wider range of defendants, Congress' intent, according to the legislative history (Senate Report No. 98-225, 98th Cong., 1st Sess., pp. 9-16), was to make pretrial detention more forthright and honest and to eliminate the use of sub rosa detention.

The new law also contains a provision that may be applied to certain defendants, such as those charged with a serious drug offense or with using a firearm, that no release conditions set by the court will be adequate to reasonably assure the appearance of the person as required or the safety of the community. Commonly referred to as the "rebuttable presumption," 18 U.S.C. Section 3142(e) shifts the burden of the production of evidence from the federal prosecutor to the defendant and is intended as an aid to the government in seeking the detention of those defendants who are considered a danger and/or a flight risk. The prosecutor, however, retains the burden of persuading the court that the defendant is a flight or danger risk.

[1] A crime of violence is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any felony 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. Section 3156).

Supreme Court Upholds Constitutionality of Dangerousness as Basis for Pretrial Detention

On May 26, 1987, the United States Supreme Court ruled that the provision of the new bail law that authorizes judicial officers to order pretrial detention of defendants considered to be a danger to another person or to the community at large (18 U.S.C. Section 3142(e)) is constitutional.[2] This provision of the law had been found unconstitutional by the Court of Appeals for the Second Circuit.[3] In the Second Circuit's Melendez-Carrion decision, a majority of the court agreed that pretrial detention on the grounds of dangerousness, where such detention lasted more than 8 months, was unconstitutional. In the Second Circuit's Salerno decision, a majority of the court agreed that the due process clause prohibits pretrial detention on the grounds of danger to the community without regard to the duration of the detention. All other Courts of Appeals that had considered the validity of the pretrial detention provision had found it constitutional.[4] The Supreme Court reversed the decision of the Court of Appeals for the Second Circuit in a case involving Anthony Salerno, the alleged head of the Genovese crime group in New York, who has been held in pretrial detention since March 21, 1986, pending trial on racketeering and other charges. The Supreme Court, in a 6-to-3 ruling, rejected arguments that preventive detention violated the due process clause of the Fifth Amendment and the excessive bail clause of the Eighth Amendment. In its Salerno decision, the Supreme Court did not address the issue of the duration of the defendant's pretrial detention.

Objectives, Scope, and Methodology

By letter dated November 7, 1985, the Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, requested that we examine the impact of the implementation of the Bail Reform Act of 1984 in selected district courts. As agreed with the Chairman's office, our objectives were to (1) compare the extent that defendants were detained pending trial under the old and new bail laws and the reasons they were detained, (2) determine the frequency of use of a provision of the new law intended to aid in the detention of certain types of defendants, (3) identify any problems court officials have encountered in implementing the new law, and (4) compare for the old and new bail laws, the extent that defendants released before trial failed to appear for a scheduled judicial proceeding or were arrested for committing a new crime.

[2] United States v. Salerno, 107 S. Ct. 2095 (1987).

[3] United States v. Melendez-Carrion, 790 F.2d 984 (2nd Cir. 1986). United States v. Salerno, 794 F.2d 64 (2nd Cir. 1986).

[4] For example, United States v. Portes, 786 F.2d 758 (7th Cir. 1985). United States v. Delker, 757 F.2d 1390 (3rd Cir. 1985).

There are limits to the conclusions that can be drawn from a study which relies on comparing two samples drawn from cases commenced at two different points in time, two years apart. Although we attempted to control for as many of these factors as possible in order to construct equivalent groups, we recognize that the two groups may differ in unanticipated ways due to variations over time in the mix of defendant characteristics, case variables, and particularly, systems variables. The latter would include, for example, changes in prosecution policies, court practices, and major law enforcement efforts, changes in district idiosyncracies, and historical effects which may have introduced an unknown bias into our sample.

As agreed with the requester's office, we conducted our review in four judicial districts—northern Indiana, Arizona, southern Florida, and eastern New York. We chose districts for our study with caseloads ranging from small to large. We selected Arizona, southern Florida, and eastern New York because our review of statistics from the Administrative Office of the United States Courts[5] indicated that the rates of criminal defendants committing a new crime while on bail and failure to appear for judicial proceedings were high compared to other judicial districts. Also, when we began the assignment, Senate Judiciary Committee staff suggested that the southern district of Florida be included in our review. We selected northern Indiana because of its small caseload. We reviewed criminal cases and interviewed judiciary and Department of Justice officials in the four districts.

We did not review the implementation of all of the provisions of the new law. For example, as agreed with the Chairman's office, we did not examine the use of the postconviction detention provisions of the new law. We did not analyze why detention requests were denied. Similarly, we did not analyze the amount of time that defendants were detained under the new law or the impact of the law on plea agreements because many of the new law's cases we reviewed had not been completed when we reviewed them in August/September 1986. We plan to examine these issues in the future.

[5] To make the selection we used the only data available, the Administrative Office's Pretrial Services Data System. As reported in our previous report Federal District Courts' Implementation of the 1982 Pretrial Services Act (GAO/GGD-85-84, Sept. 26, 1985), Administrative Office officials only considered the data on the original 10 demonstration districts to be reliable; the data from the other 83 districts were considered questionable.

Examination of Criminal Cases

We examined in each district a random sample[6] of cases involving criminal defendants charged with a felony whose cases were commenced between January and June 1984 under the Bail Reform Act of 1966. We also looked at a second sample of criminal felony defendants whose cases were commenced between January and June 1986 under the new law. We believed 6 months would be a sufficient period of time to review under both the old and new bail laws. We selected January to June 1986 as the period to review under the new law because we believed that, by this time, the new law should have been implemented by all of the courts. We selected January to June 1984 as the period to review under the old law so that we could compare information from the same time of year. Our sample cases were randomly selected from listings of criminal filings obtained from the Statistical Analysis and Reports Division (SARD) of the Administrative Office of the United States Courts.

Because the Chairman was specifically interested in defendants who were held under pretrial detention, committed new crimes while released on bail, or failed to appear for at least one scheduled judicial proceeding, we attempted to manually identify <u>all</u> defendants in these three categories in the four courts during the January through June 1984 and 1986 time periods. However, we did not analyze all pretrial detention cases in the eastern district of New York because of the large volume of defendants in that category (185). Instead, we increased the size of our basic random sample for the period of January through June 1986 for the district. To identify individuals who failed to appear and committed new crimes while on bail, we reviewed court records and other documents including presentence investigation reports. We could not locate court documents for all defendants whose cases were commenced during the two time periods. Therefore, our rates of failure to appear and crime on bail are projections based on those defendants for whom we could obtain information.

To identify defendants detained under the new law's detention provisions, we asked U.S. attorneys' offices to record data on all defendants for whom they sought pretrial detention during the first 6 months of 1986. This methodology allowed us to make a detailed examination of detention cases within the four districts for the time period we reviewed. It also allowed us to obtain statistics for the four courts

[6]Our sample was drawn from a universe of defendants, not district court cases. Some court cases have multiple defendants. However, when we refer to a case in this report, it represents a defendant. Because of the small number of criminal cases in northern Indiana in 1984, we used the total number of cases (the universe) rather than a random sample of cases. Thus, the analyses reported for this district are actual rather than estimated values

reviewed on pretrial detention, crime while out on bail, failure to appear, the use of money bail, and the use of the rebuttable presumption.

We analyzed the criminal case files of 639 defendants—605 from the random sample and 34 manually selected—whose cases were commenced under the old bail law and we projected the results to an adjusted universe of 2,086 defendants in the four districts. Similarly, we analyzed 747 defendants—613 from the random sample and 134 manually selected—whose bail was set under the new bail law and projected the results to an adjusted universe of 2,200 defendants in the four districts. In most instances, numbers and percentages are rounded up or down to the nearest whole number. Details on the number of cases we reviewed, and the statistical significance and confidence intervals (calculated at the 95 percent level) for the statistical projections in this report are presented in appendixes I, II, and III.

For each case reviewed, we examined the docket sheet (a chronological record of events that occur in the case), the court clerk's file, the presentence investigation report by the Probation Office (if one had been prepared and could be located), or information from the pretrial services officers if a presentence investigation report was not available. In a substantial number of 1986 sample cases in eastern New York, the official court records did not provide us with specific information about the outcome of the initial bail hearing. In those instances, we used information from personal records maintained by the head of the pretrial services unit of the Probation Office.

The data we extracted from these sources enabled us to compile information about (1) the defendant's criminal history, demographic information, and the offense he/she was charged with; (2) the outcome of the bail hearing, including the type and amount of bail set; (3) the outcome of detention hearings, the basis for seeking detention, and whether the rebuttable presumption was used; (4) the outcome of reviews and appeals of release conditions and detention orders; (5) the types of nonfinancial conditions set by the court; (6) any misconduct committed by the defendant while released on bail; and (7) the final disposition of the criminal proceeding against the defendant. We could not obtain sentencing information for 307 of 1,386 sample cases we reviewed (22 percent) because our review of case files was made before the judicial officers had made final decisions on the cases.

Information From U.S. Attorneys

To get an indication about how the new bail law was being implemented in districts other than the four we visited, we analyzed the information that was recorded in six U.S. attorneys' offices on all motions to detain defendants considered to be flight and/or danger risks between January and June 1986. The six U.S. attorneys' offices were in central California, Massachusetts, eastern Michigan, eastern and western Missouri, and southern Texas. This information included the basis for the motion, the party requesting the hearing, whether the rebuttable presumption provision was invoked, and the result of the hearing. Since in some districts this information was not always complete, the data on the use of the rebuttable presumption were not available for our analyses, which appear in appendix IV.

Officials' Views on the New Bail Law

To obtain the views of judicial officials regarding problems in implementing the new law we interviewed at least three judicial officers and representatives from prosecutors', defenders', probation, or pretrial services offices in each district. We interviewed in each of the four districts the following people:

- in northern Indiana all three magistrates, the U.S. Attorney and the Chief of the Criminal Division of the U.S. attorney's office, and the Chief Probation Officer;
- in Arizona three of four full-time magistrates, the Chief of the Criminal Division of the U.S. attorney's office, the Chief and Deputy Chief Probation Officer, and the Federal Public Defender and one of his assistants;
- in southern Florida all five full-time magistrates, the U.S. Attorney and the Chief of the Criminal Division of the U.S. attorney's office, the Chief Probation Officer, the Chief Pretrial Services Officer, and the Federal Public Defender and six of his assistants; and
- in eastern New York the Chief Judge, three of four full-time magistrates, five assistant U.S. attorneys, the Chief and Deputy Chief Probation Officer, the Probation Officer in charge of the Pretrial Services Unit, and the Federal Public Defender and two of his assistants.

Our audit was conducted from December 1985 to April 1987 in accordance with generally accepted government auditing standards. The views of directly responsible officials were sought during the course of our work and are incorporated in the report where appropriate. In accordance with the Chairman's wishes, we did not request that the Attorney General, the Judicial Conference of the United States, or the Director of the Administrative Office of the United States Courts review

and comment officially on a draft of this report. We did, however, discuss the results of our work with judicial officials at the courts we reviewed and officials of the Justice Department who agreed with the facts we obtained.

New Law Is Being Used to Detain Defendants

From our analysis of criminal cases in the four districts, the provisions of the new law are being used to detain defendants. We estimate that 31 percent of defendants remained detained during their pretrial period under the Bail Reform Act of 1984 compared to 26 percent under the old bail law.[1] Under the old law, according to court documents, all 537 of the defendants that were detained were detained because they did not pay the financial bail set by the court. Under the new law, however, according to court documents, 349 of the 678 detained defendants (51 percent) were detained because they failed to pay the bail set by the court. The court documents also indicate the other 329 defendants (49 percent) were detained because they were considered to be flight and/or danger risks.

Under the new law, the use of financial or money bail as a condition of release declined by 18 percent when compared to the old law. In addition, in three of the four districts reviewed, the number of defendants detained for failure to pay money bail decreased significantly. In northern Indiana and eastern New York, almost no defendants were detained because they did not pay their money bail. In Arizona, detention for failure to pay money bail decreased under the new law from 100 to 34 percent and in southern Florida from 100 percent to 84 percent.

We found that one of four full-time magistrates in eastern New York was not holding detention hearings for certain types of defendants who were detained because they were considered to be flight risks. The law requires that detention hearings be held for these defendants. After we brought this situation to the attention of the Chief Judge, he instructed his magistrates to hold detention hearings as required by the law.

We also found that not all of the defendants who the new law presumes are danger or flight risks because of the crimes they are charged with or their criminal history (rebuttable presumption) were detained. The new law does not require that detention be sought for these defendants. Of the 1,923 defendants for whom we could make a determination, we estimate that 1,112 met the rebuttable presumption criteria. The government sought to detain 406 or 39 percent of these defendants and was successful in obtaining the detention of 249 defendants (61 percent). For the remaining 157 defendants (39 percent), judicial officers set release conditions.

[1] Unless stated otherwise, all numbers, analyses, and percentages are projections to the adjusted universe.

Our discussions with court officials revealed that overall they believe the new bail law to be an improvement over the old law. The most common concern expressed by these officials was the length of time involved in attending pretrial detention hearings.

More Defendants Detained Under New Law

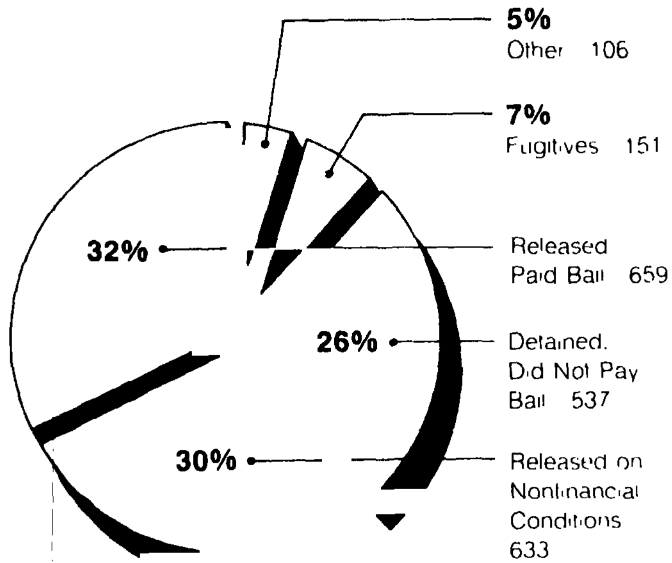
Our analysis of criminal cases in the four districts showed that overall, a greater percentage of defendants remained incarcerated during their pretrial period[2] under the new law than under the old law. Under the old law, we estimate that 537 of 2,086 defendants (26 percent) were detained during their pretrial period. Under the new law, we estimate that 678 of 2,200 defendants (31 percent) were detained.

Most of the criminal defendants included in our study who were not detained pending trial were released on bail under financial and/or nonfinancial conditions (62 and 58 percent under the old and new bail laws, respectively). The remaining cases consisted of defendants who were fugitives and never appeared for an initial judicial proceeding (7 percent and 6 percent), or who were not considered for bail for various reasons, such as they were already incarcerated for another offense (5 percent and 5 percent).

Figure 2.1 shows the overall results of our analysis of criminal cases in the four districts. Table 2.1 depicts the results on a district by district basis and illustrates that pretrial detention increased in three districts (Arizona, southern Florida, and eastern New York) and decreased in northern Indiana.

[2]For the purposes of this review, we defined the pretrial period as the time between the date the defendant came into federal custody until either the date the defendant's trial began or the date a judicial officer accepted the defendant's guilty plea

Figure 2.1: Analysis of Criminal Defendants Under the Old and New Bail Laws



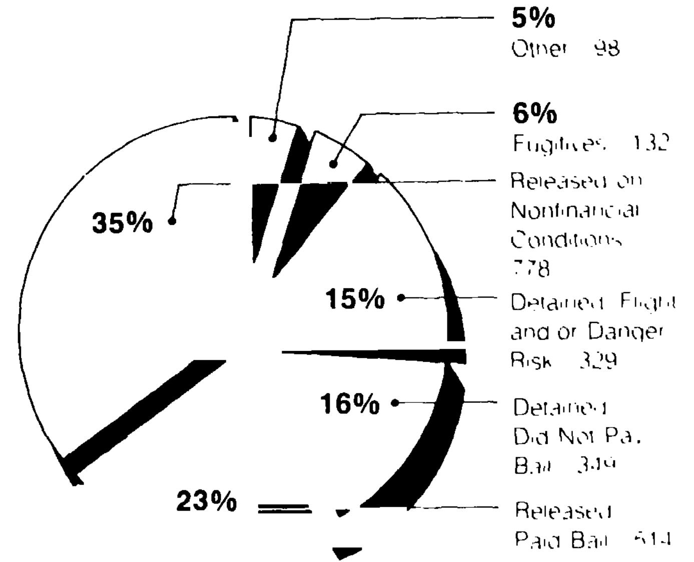


Table 2.1: Estimated Pretrial Status of Criminal Defendants Under Old and New Bail Laws by District

District	Old law		New law	
	Number	(Percent)	Number	(Percent)
Northern Indiana				
Released-paid bail	30[a]	(35)	11	(9)
Released-nonfinancial	33[a]	(38)	87	(67)
Detained-did not pay bail	14[a]	(16)	0	(0)
Detained-flight/danger	0[a]	(0)	4	(3)
Other	6[a]	(7)	14	(11)
Fugitives	3[a]	(4)	13	(10)
Eastern New York				
Released-paid bail	54	(14)	94	(18)
Released-nonfinancial	202	(51)	218	(42)
Detained-did not pay bail	129	(32)	3	(1)
Detained flight/danger	0	(0)	185	(36)
Other	8	(2)	5	(1)
Fugitives	5	(1)	12	(2)
Arizona				
Released-paid bail	152	(34)	87	(19)
Released-nonfinancial	129	(29)	202	(44)
Detained-did not pay bail	56	(13)	43	(10)
Detained-flight/danger	0	(0)	84	(18)
Other	50	(11)	21	(5)
Fugitives	58	(13)	20	(4)
Southern Florida				
Released-paid bail	423	(37)	322	(29)
Released-nonfinancial	269	(23)	271	(25)
Detained-did not pay bail	338	(29)	303	(28)
Detained-flight/danger	0	(0)	56	(5)
Other	42	(4)	58	(5)
Fugitives	85	(7)	87	(8)

[a]These are actual numbers

Old Bail Law: Failure to Pay Financial Bail Was Sole Reason Stated for Detaining Defendants

Under both the old and new bail laws, criminal defendants could be detained before trial if

- the judicial officer denied bail and ordered them detained because they were considered likely to flee, a danger to a person(s) or the community, or both a flight and danger risk; or
- the defendant failed to pay the financial bail or failed to comply with the nonfinancial release conditions imposed by judicial officers.

We identified no defendants in our sample of cases commenced in the four districts between January and June 1984 who were denied bail and detained according to court documents because they were considered to be a flight and/or danger risk. All 537 defendants in the four districts who were incarcerated during their pretrial period under the old bail law were detained because they did not pay the financial bail that was set by the court as a condition of release.

Under the old bail law, a judicial officer could impose pretrial detention under the flight and/or danger section of the law (18 U.S.C. Section 3148) only if the defendant was charged with an offense punishable by death.[3] There were five defendants in the four districts who were eligible for pretrial detention because they were charged with offenses under title 18 of the U.S. Code that carried a maximum penalty of death. However, pretrial detention was not ordered.[4]

Twelve of the 14 magistrates we interviewed in the four districts had experience setting bail under both the old and new bail laws. All 12 told us they rarely used the flight/danger detention provisions of the old bail law. They said they used money bail to keep noncapital offense defendants incarcerated. If, in the view of the judicial officer, a defendant was a flight risk, the old bail law permitted financial bail to be set at an amount to assure the defendant's appearance. If the defendant was thought to be a danger, the judicial officers said they would set money bail at an extremely high level which they thought the defendant could not pay (i.e., sub rosa detention).

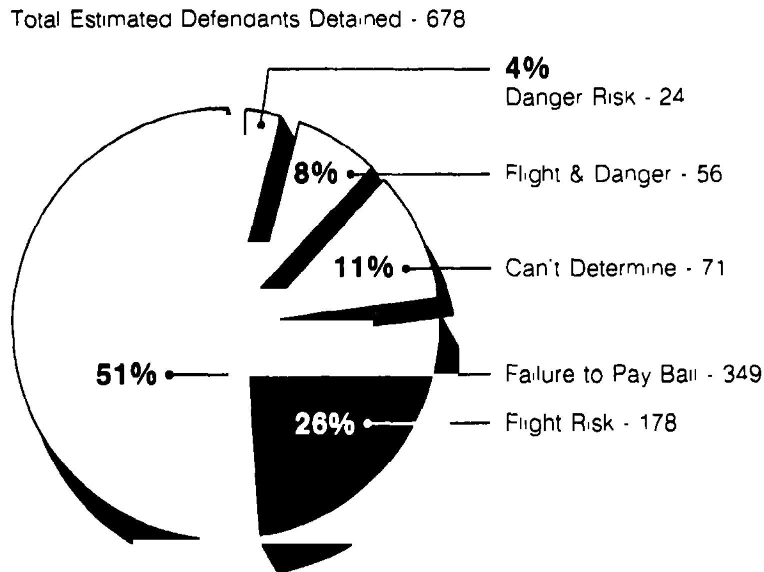
[3]The old bail law also authorized detention of defendants including those already convicted of an offense and awaiting sentencing, a sentence review, or the outcome of an appeal. Since that provision did not relate to the pretrial period, we were not concerned with it for the purpose of this study.

[4]The capital offenses we used were: causing the death of an aircraft crew member; assassination or kidnapping of the president or vice president; murder or hostage taking during a bank robbery; espionage, first degree murder and conspiracy to murder; first degree murder of government officials, a member of Congress, or foreign officials; rape; treason; death resulting from wrecking a train, explosives violations, and mailing articles that result in death.

New Bail Law: Smaller Proportion of Defendants Detained Due to Failure to Pay Financial Bail

Our analyses of criminal cases commenced between January and June 1986 in the four districts showed that the reasons defendants were detained under the new law changed significantly from those of the old law. Under the new law, of the 678 defendants that were detained in the four courts, 349 (51 percent) were detained because they did not pay the financial bail set by the courts compared to the 100 percent detained for this reason under the old law. The remaining 329 defendants (49 percent) were denied bail and detained because they were considered to be a flight and/or danger risk. Figure 2.2 shows the reasons for detention for all of the defendants in the four courts we visited.

Figure 2.2: Reasons for Detention Under New Bail Law



Six additional districts (central California, Massachusetts, eastern Michigan, eastern and western Missouri, and southern Texas) provided us with statistics on the extent that defendants were detained between January through June 1986 because they were considered to be flight and/or danger risks. The rates ranged from 3 to 23 percent. Appendix IV shows a breakdown by district.

The increased use of pretrial detention for flight and/or danger risk under the new law is not surprising. Compared to the old bail law, the

Bail Reform Act of 1984 significantly expanded the range of defendants eligible for pretrial detention as a flight and/or danger risk. Under the new law, the prosecutor can seek pretrial detention of defendants who are charged with

- a crime of violence;
- an offense for which the maximum sentence is life imprisonment or death;
- violation of certain federal drug laws for which the maximum term of imprisonment is 10 years or more; or
- any felony, providing the defendant has two or more prior convictions for the above mentioned crimes.

In addition, either the prosecutor or the judicial officer may seek pretrial detention of defendants believed to be a serious flight risk; a serious risk to obstruct or attempt to obstruct justice; or a risk to threaten, injure, or intimidate a prospective witness or juror or attempt to do so. When the judicial officer or prosecutor seeks to detain a defendant for any of these reasons, a separate pretrial detention hearing must be held.

In each district we visited, failure to pay financial bail decreased as a reason for pretrial detention under the new bail law. As table 2.2 shows there was a significant decrease in three of the four districts (northern Indiana, from 100 percent to 0 percent; Arizona, from 100 percent to 34 percent; and eastern New York, from 100 percent to 2 percent). However, in southern Florida, failure to pay financial bail was the reason for detaining 84 percent of all detained defendants under the new law, a decrease of 16 percent compared to the old law. In each of the districts, under the new law defendants were detained because they were considered dangerous, flight risks, or both danger and flight risks.

Table 2.2: Reasons for Detention Under Old and New Bail Laws by District

	Old law		New law	
District	**Failure to pay bail**	**Flight danger, or both**	**Failure to pay bail**	**Flight danger, or both[b]**
Northern Indiana				
Number	14[a]	0[a]	0[a]	4[a]
Percent	100	0	0	100
Arizona				
Number	56	0	43	84[a]
Percent	100	0	34	66
Southern Florida				
Number	338	0	303	56[a]
Percent	100	0	84	16
Eastern New York				
Number	129	0	3	185
Percent	100	0	2	98
Total				
Number	537	0	349	329
Percent	100	0	51	49

[a]These figures are actual numbers

[b]This column includes defendants who were detained because they were a flight and/or danger risk as well as those for whom we could not determine what the specific reason was flight, danger or flight and danger

Restrictions on the Use of Financial Bail

While the Bail Reform Act of 1984 was intended to eliminate the use of high financial bail as an indirect means of detaining dangerous defendants (sub rosa detention), the use of financial bail was retained for flight risk defendants. Financial or money bail is discussed in subsection 3142 (c) of the new bail law. There is some statutory ambiguity in that the law provides the following:

- The judicial officer may not impose a financial condition that results in the pretrial detention of the person.
- Financial bail can be used as the least restrictive condition or one of a combination of conditions to assure the appearance of the person as required.

A literal reading of the first provision would indicate that judicial officers cannot impose financial bail that a defendant could not pay. However, five court decisions have not supported this view and concluded that financial bail does not have to be set at an amount that the

defendant can pay.[5] Four of the court cases (all except United States v. Szott) specifically cited the legislative history contained in the Senate Judiciary Committee's report on the act. The report states[6]

> "In addition, section 3142(c) provides that a judicial officer may not impose a financial condition of release that results in the pretrial detention of the defendant. The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. However, its application does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance. Thus, for example, if a judicial officer determines that a $50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond, the judicial officer may reconsider the amount of the bond. If he still concludes that the initial amount is reasonable and necessary then it would appear that there is no available condition of release that will assure the defendant's appearance."

In northern Indiana and eastern New York, the six magistrates we interviewed said money bail must be set at an amount the defendant is capable of paying. The eight magistrates we interviewed in southern Florida and Arizona have a different view of how money bail should be set. They set bail at an amount they believe will assure the defendant's appearance, regardless of whether they believe the defendant can pay it.

Use of Money Bail Decreased in All Districts but Extent That Defendants Paid Bail Varied

As shown in table 2.3, the percentage of cases in which financial bail was set as a release condition under the new bail law decreased by 18 percent when compared to the old law—from 65 percent to 53 percent. As table 2.4 shows, the extent that defendants did not pay their bail under the new law decreased significantly in northern Indiana (from 32 to 0 percent) and in eastern New York (from 70 to 3 percent). However, in Arizona and southern Florida the extent that financial bail was not paid increased under the new law from 27 to 33 percent and 44 to 48 percent, respectively. These results mirror the magistrates' different interpretations of how money bail is to be set under the new law.

[5] United States v. Szott, 768 F.2d 159 (7th Cir. 1985) United States v. Wong-Alvarez, 779 F.2d 583 (11th Cir. 1985) United States v. Gotay, 609 F. Supp. 156 (S.D.N.Y. 1985) United States v. Westbrook, 780 F.2d 1185 (5th Cir. 1986) United States v. Jessup, 757 F.2d 378 (1st Cir. 1985)

[6] Senate Report No. 98-225, 98th Cong., 1st Sess. p. 16.

Table 2.3: Estimated Cases in Which Financial Bail Was Set Under the Old and New Bail Laws

District	Old law		New law	
	Number	(Percent)	Number	(Percent)
Northern Indiana	44[a]	(57)	11	(11)
Arizona	208	(62)	130	(39)
Southern Florida	761	(74)	625	(70)
Eastern New York	183	(48)	97	(31)
Combined districts	1 196	(65)	863	(53)

[a]This is an actual number

Table 2.4: Estimated Cases in Which Financial Bail Was Set but Not Paid Under the Old and New Bail Laws

District	Old law			New law		
		Bail not paid			Bail not paid	
	Bail set	Number	(Percent)	Bail set	Number	(Percent)
Northern Indiana	44[a]	14[a]	(32)	11	0	(0)
Eastern New York	183	129	(70)	97	3	(3)
Arizona	208	56	(27)	130	43	(33)
Southern Florida	761	338	(44)	625	303	(48)

[a]These are actual numbers

Three Options for Dealing With a Flight-Risk Defendant

The new bail law provides a judicial officer with three options for dealing with a defendant considered a flight risk. The officer can (1) set nonfinancial bail (i.e., personal recognizance or unsecured bond), (2) set a financial bail at an amount that he/she believes will assure the defendant's appearance, or (3) deny bail and order pretrial detention after concluding that no amount of financial bail and combination of nonfinancial conditions will assure the defendant's appearance. Under the last approach, a detention hearing must be held before ordering pretrial detention. If financial bail is set as a condition of release and the defendant does not pay the bail, he/she will be detained and a detention hearing is not required. The defendant can, however, request a review of the bail amount or appeal the bail decision. Other than this judicial review of bail set in individual cases, there are no standards for assessing the appropriateness of the amount of bail set. If nonfinancial bail is used, defendants are almost always released before trial.

The legislative history of the act indicates that some members of Congress were concerned about the possible misuse of financial bail to detain defendants in lieu of holding detention hearings. Some consideration was given to deleting financial bail as an option in the bail setting

process but Congress kept it. According to the Senate Judiciary Committee, it was considered to be an effective deterrent to flight for certain defendants and was retained for that reason.

No Evidence of Use of Sub Rosa Detention for Southern Florida and Arizona Defendants

The large percentage of defendants in southern Florida who were detained for not paying their financial bail (84 percent of all detentions) and, to a lesser extent, in Arizona (34 percent of all detentions) raises the question of whether the judicial officers were using high financial bail as an indirect method of detaining dangerous defendants (sub rosa detention). The act permits financial bail to be set at an amount appropriate to assure appearance. However, setting bail as an indirect means of detaining dangerous defendants would be contrary to the intent of the act. The heads of the public defender units in southern Florida and Arizona told us that they did not believe that sub rosa detention was being used in their districts under the new law. The only way to discern the reason for the judicial officer's bail decision is by looking at court records and talking to the judicial officer who set bail. In looking at the court records and talking to the judicial officers, we found no evidence to indicate that judicial officers in southern Florida or Arizona used sub rosa detention to detain dangerous defendants.

We asked the Chief Magistrate and two other magistrates for the southern district of Florida if sub rosa detention was still being used under the new law to detain dangerous defendants. The Chief Magistrate said that in southern Florida, judicial officers do not set high financial bail to detain dangerous defendants because the defendants could pay the bail and be released. The Chief Magistrate said in his opinion, all of the defendants detained for failure to pay financial bail were considered to be flight risks. He explained that these cases frequently involve defendants who deal in large quantities of drugs and who have large sums of money at their disposal. Because of the financial resources available to these defendants, southern Florida's judicial officers set the bail amounts for them at high levels to ensure their appearance. The defendants normally decline to pay the bail amount and remain detained because if they paid the bail the court is permitted to investigate the source of the funds.[7] If the money was found to be derived from illegal sources, the government can, for most cases, confiscate the funds under civil forfeiture provisions (21 U.S.C. Section 881(a)(6) or 31 U.S.C. Sections 5316 and 5317).

[7] The authority to investigate the source of funds is derived from the decision in United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966).

The two other magistrates agreed with the Chief Magistrate's opinion. They explained further that government prosecutors could have requested pretrial detention for almost all the defendants in this group who are aliens charged with drug offenses. They said it seems that the prosecutors only seek detention of defendants involved in the worst cases (this agrees with what the prosecutors told us) so it will not appear that the government is overusing the pretrial detention provision of the new law. They said that for the remaining defendants, the prosecutors request high money bail because they are flight risks. The net effect is the same—defendants remain incarcerated during their pretrial period because they are flight risks.

Because of the possibility that judges were setting high money bail to detain dangerous defendants, we attempted to determine if any of the 303 defendants in southern Florida that we estimate were detained because they did not pay their money bail could have been detained on the basis of being danger risks. Section 3142 (e) of the new bail law defines a dangerous defendant as part of the rebuttable presumption provision. According to this section of the law, a dangerous defendant is one who qualifies for pretrial detention (i.e., is charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, a 10-year drug offense, or any felony if there are two or more previous convictions for any of the first three crimes), and the judicial officer finds that the defendant has a previous conviction for one of the four qualifying crimes, that the crime was committed while the defendant was on bail, and no more than 5 years have elapsed since conviction or release from prison.[8]

From our review of court records for defendants in southern Florida, 6 of the 303 who were detained for not paying their money bail appeared to meet the rebuttable presumption definition of dangerous. However, all six were illegal aliens and the court officials said financial bail was set in amounts they deemed adequate to assure the defendants' appearance. We have no basis to question these decisions.

In Arizona, 43 defendants were detained for not paying their money bail. Twenty-nine of the 43 could be considered flight risks because they were aliens (26 were illegal aliens). The remaining 14 defendants were charged with a variety of offenses from drugs to assault. None of the 43

[8]The other part of the rebuttable presumption provision in the new law defines a defendant as both a danger and flight risk. Since the purpose of our analysis was to determine if any of the 303 defendants could be considered dangerous, we excluded this part of the rebuttable presumption provision because it can be used to identify defendants who are either a flight or danger risk.

defendants appeared to meet the definition of a dangerous defendant as defined in the rebuttable presumption provision.

Detention Hearings Not Held for All Defendants in Eastern New York

In our review of cases in eastern New York, we estimate that of 185 defendants who were detained as flight and/or danger risks, 48 (26 percent) were detained without detention hearings. One magistrate was considering these defendants (foreign nationals arrested at the airport carrying drugs into the United States—commonly referred to as "mules"—with no apparent ties to this country) as flight risks and was detaining them without holding detention hearings.

The Bail Reform Act of 1984 requires that a separate pretrial detention hearing be held before detaining a defendant as a flight or danger risk. The purpose of the hearing is for the court to determine whether any release conditions will reasonably assure the defendant's appearance and/or the safety of any other person and the community before denying bail and ordering pretrial detention.

According to prosecutors and public defenders we interviewed, in these particular cases, the prosecutor requests pretrial detention at the defendant's initial appearance before the magistrate because the defendant is considered a flight risk. The defense attorney—usually a public defender—will routinely request the 5-day delay authorized by the law to prepare for the hearing. The magistrate would ask the defense attorney to explain what additional information he/she plans on developing during the delay which could possibly result in the defendant's release.

The magistrate advised us that in his opinion, for these types of cases, there are no new facts the defense attorney could develop that would result in a different outcome for these defendants. He believed that reconvening all parties—magistrate, probation/pretrial services officer, prosecutor, defense attorney, defendant, U.S. marshal, and court room deputy—for a detention hearing 5 days later, which will not change the outcome of the case, is a waste of time and money. The magistrate would deny the defense attorney's motion for a delay. He would also instruct the attorney to notify the court in the event that any new information comes to light which may permit bail to be set and, at that point, a hearing would be scheduled. By authorizing a hearing at a future time, the magistrate believed he was not infringing on the defendant's due process rights.

Notwithstanding the explanation provided by the magistrate, the law does not authorize detaining defendants in this manner without holding detention hearings. We notified the Chief Judge of eastern New York of this situation. He ordered all magistrates in his district to follow the letter of the law scrupulously and provide detention hearings for all defendants who were to be detained because they were considered flight and/or danger risks. He advised us, however, that, as a practical matter, the magistrate was trying to conserve the court's limited resources and achieve a more efficient and effective operation. He also speculated that almost none of these defendants would ever be released on bail if a detention hearing was held—an opinion that was shared by other court officials. The Chief Judge suggested that possibly the law should be revised to allow discretion in the handling of certain defendants such as these.

Use of Rebuttable Presumption Varies From District to District

When the government moves for pretrial detention of a defendant, the prosecutor can benefit from a provision in the new law which presumes that certain types of defendants are flight and/or danger risks and shifts the burden to the defendant to produce evidence to show otherwise—the rebuttable presumption. A prosecutor can invoke the rebuttable presumption in seeking pretrial detention only if the judicial officer finds there is probable cause to believe that the defendant

- committed a drug offense for which the maximum term of imprisonment is 10 years or more;
- used or possessed a firearm while committing a federal offense 18 U.S.C. Section 924(c); or
- committed a crime of violence, an offense for which the maximum sentence is life imprisonment or death, a serious drug offense, or any felony, if the defendant has a prior criminal record of two or more convictions for any of the first three offenses; and the defendant has a prior conviction for one of these crimes, the crime was committed while the defendant was on release pending trial, and the defendant was convicted or was released from incarceration for the crime within the past 5 years.

From our analysis of court records, we found that most of the defendants who qualified for the rebuttable presumption had been indicted for a drug offense for which the maximum term of imprisonment is 10 years or more. This is not surprising since we estimate that 49 percent of all defendants in the four districts were charged with drug violations

between January and June 1986. In three of the four districts, drug violations were the single largest type of offense defendants were charged with: 41 percent in Arizona, 51 percent in southern Florida, and 58 percent in eastern New York.

The other two ways of qualifying for the rebuttable presumption appear to be of limited use because (1) very few defendants are charged with using or possessing a firearm under 18 U.S.C. Section 924(c) (we estimate that nine defendants were charged under this statute) and (2) the third way requires the defendant to meet several criteria before qualifying. The results of our analysis are shown in table 2.5.

Table 2.5: Estimated Use of Rebuttable Presumption In Selected Districts

		Qualified for rebuttable presumption					
District	**Universe**	**Drugs**	**Firearms**	**Other**	**Total**	**Not qualified for rebuttable presumption**	**Cannot determine**
Northern Indiana							
Number	129	16	0	1	17	97	15
Percent	100	12	0	1	13	75	12
Arizona							
Number	457	181	9	29	219	206	32
Percent	100	40	2	6	48	45	7
Southern Florida							
Number	1 097	550	0	20	570	386	141
Percent	100	50	0	2	52	35	13
Eastern New York							
Number	517	291	0	15	306	122	89
Percent	100	56	0	3	59	24	17
Total							
Number	2.200	1.038	9	65	1 112	811	277
Percent	100	47	0	3	50	37	13

The new law authorizes but does not require the government or judicial officers to move for pretrial detention against defendants who meet the criteria for a rebuttable presumption. The legislative history (Senate Report No. 98-225, p. 19) merely states that, for such defendants, a strong probability arises that no form of conditional release will be adequate. The Department of Justice recommends against detaining all defendants who meet the criteria. Justice's policy is that motions for pretrial detention not be predicated simply on the applicability of one of the rebuttable presumptions or simply on the existence of a charge in the indictment for which pretrial detention is authorized. Such motions should be predicated only on the basis of concrete evidence indicating a

danger to the safety of an individual or the community or indicating a risk of flight.[9]

We found that federal prosecutors did not seek pretrial detention of all defendants who met the rebuttable presumption criteria. Of the 1,923 defendants for whom we could make a determination, we estimate that 1,112 defendants qualified under the rebuttable presumption of the new bail law. Excluding the 71 defendants who never came into custody because they were fugitives or who did not have a bond hearing, the government sought pretrial detention for 406 for the defendants (39 percent) who were qualified, and did not for the remaining 635 (61 percent). A district by district breakdown of these statistics is depicted in table 2.6.

Table 2.6: Estimated Use of Pretrial Detention on Defendants Qualified for Rebuttable Presumption

District	Total qualified not in fugitive status	Pretrial detention sought	Pretrial detention not sought	Defendants detained
Northern Indiana				
Number	13	0	13	0[a]
Percent	100	0	100	
Arizona				
Number	210	89	121	29[a]
Percent	100	42	58	
Southern Florida				
Number	529	69	460	46[a]
Percent	100	13	87	
Eastern New York				
Number	289	248	41	174
Percent	100	86	14	
Total				
Number	1,041	406	635	249
Percent	100	39	61	

[a]These are actual numbers

As table 2.6 shows, the fact that a defendant qualified under a rebuttable presumption does not mean that the government will move for pretrial detention. This is most evident in the southern district of Florida where pretrial detention was only sought for 69 of 529 eligible defendants (13 percent) who were in federal custody. Court officials in that district said that if they sought pretrial detention for everyone who qualified, they would have to hold detention hearings 7 days a week to keep up with the workload.

[9]Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress. (Dec. 1984) p. 25.

When prosecutors in the four districts sought pretrial detention of defendants who qualified for the rebuttable presumption, they were successful 61 percent of the time. Of the 406 defendants for whom the government sought pretrial detention, we were able to determine that in 249 (61 percent) of the cases the defendants were detained. In the remaining 157 cases (39 percent), the judicial officers set release conditions for the defendants.

Court Officials' Views of the New Bail Law

The predominant feeling of court officials in the four districts was that the new bail law is an improvement over the old law All 12 magistrates we interviewed in the four districts who set bail under both the old and new bail laws told us they thought that the pretrial detention provision of the new law made the bail process more forthright and honest, especially when confronted with dangerous defendants. The primary improvement cited by judicial officers was that the new law allows the judicial system to label a defendant as dangerous when that is what he or she is thought to be. A dangerous defendant can now be detained because he or she is dangerous.

Representatives from the U.S. attorneys' offices in all four districts also believe the new law is more direct and honest because the law defines who can be detained and gives specific criteria for identifying who is dangerous. Assistant U.S. attorneys told us that they consider a variety of factors when deciding whether to seek pretrial detention. Often, these factors reflect specific conditions which exist in the district or the predominant type of crime committed in the district. No standards exist for prosecutors to use in deciding when to seek pretrial detention. The prosecutors we interviewed in the four districts each cited different criteria that they used.

In northern Indiana, according to the U.S. Attorney, the general policy is to avoid frivolous requests and to motion for pretrial detention only in cases involving relatively serious situations. He said that they follow this policy to maintain credibility with the court.

In Arizona, the government will seek pretrial detention of defendants involved in violent crimes, especially crimes which are viewed with concern by the citizens of the community. On the other hand, the government hesitates to seek detention of juveniles because that jurisdiction lacks adequate space to house juvenile defendants.

Among the factors considered by prosecutors in southern Florida when deciding to seek detention are whether the defendant is a career criminal or has threatened witnesses or judicial officers; whether the defendant has bank accounts outside the United States; to what extent the defendant has community ties; and for drug cases, whether the quantity of drugs exceeds 50 kilograms (1 kilogram is equal to 2.2 pounds).

In the eastern district of New York, prosecutors consider the defendant's citizenship, the seriousness of the charges, whether narcotics are involved, prior arrest record, and the defendant's roots in the community and family ties. One prosecutor said he always seeks detention in narcotics cases involving more than 2 kilograms of drugs if the defendant is an alien with no roots in the community.

A Justice headquarters official told us that they may need to provide more detailed guidance to prosecutors on when to seek pretrial detention. He said Justice was currently studying this issue.

Representatives from two of the three public defender organizations believed that when the government seeks pretrial detention of a defendant it generally achieves the desired result, especially when the rebuttable presumption is used. Consequently, these public defenders believed they spend considerable time preparing for detention hearings in which they have little chance of gaining their clients' release on bail. Our review showed that the government is not always successful in achieving pretrial detention of a defendant when they seek it. We found that the government sought pretrial detention in about 24 percent (529 of 2,200) of all felony cases commenced between January and June 1986.[16] Pretrial detention was granted for 329 of the 529 defendants, or 62 percent of those instances in which it was sought.

One concern in the pretrial detention process which was voiced by about half of the officials was the time and effort required for detention hearings. The concern was over the time needed to attend the hearings. The length of time that pretrial detention hearings lasted varied considerably. In northern Indiana, Arizona, and southern Florida, the officials estimated that hearings ranged from 30 minutes to 2 hours. In contrast, public defenders and prosecutors in eastern New York said that the hearings usually lasted 10 minutes or less. They attributed this to the

[16] The 529 includes all defendants for whom the government sought pretrial detention, whether they met the criteria for a rebuttable presumption or not.

predictable, routine nature that pretrial hearings have come to follow in their district.

Rates of Failure to Appear and Crime on Bail During the Pretrial Period Are Low Before and After the New Bail Law

No comprehensive, reliable statistics exist on the extent to which federal defendants released on bail fail to appear for scheduled judicial proceedings or are arrested for committing additional crimes while on bail. The data that is available, however, indicates that failure to appear and crime on bail is confined to a relatively small group of defendants. For example, data on 38,687 defendants released on bail in 10 judicial districts between July 1975 through June 1983 showed that (1) 2.7 percent of the defendants failed to make at least one court appearance and (2) 4.7 percent[1] of the defendants were charged with at least one felony or misdemeanor.[2] When the Senate Judiciary Committee was considering passage of the bail reform legislation, it cited studies which had reported the rate of crime on bail as somewhere between 7 to 20 percent. These studies, however, included defendants from local jurisdictions as well as federal defendants from the District of Columbia.[3]

From our analysis of criminal cases in the four districts reviewed, we estimate that during the pretrial period defendants released on bail failed to appear for scheduled judicial proceedings in a small percentage of cases—2.1 percent under the old bail law and 1.8 percent under the new bail law.[4] A substantial portion of these defendants who failed to appear—24 of 55, or 44 percent—were still fugitives at the time we reviewed their court records. Of the 31 defendants who came back into federal custody, we could determine in 30 cases whether the defendants were prosecuted for failing to appear—4 were charged and 26 were not.

Our analysis of criminal cases shows that an even smaller percentage of released defendants were arrested for committing a new offense (misdemeanor or felony) while on bail during their pretrial period—1.8 percent under the old bail law and 0.8 percent under the new law. We also found that the types of crimes defendants released on bail were rearrested for were often of a less serious nature (56 percent misdemeanors

[1]These percentages were cited in hearings before the House Judiciary Committee, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, July 27, 1983. The data are from the Administrative Office's Pretrial Services Data System and reported by the 10 demonstration districts Administrative Office officials consider the data to be reliable

[2]A felony is an offense which carries a penalty of a term of imprisonment of more than 1 year. A misdemeanor is a less serious offense than a felony and carries a term of imprisonment of 1 year or less.

[3]These percentages were cited in Senate Report No. 97-317, 97th Cong., 2nd Sess., and Senate Report No. 98-147, 98th Cong., 1st Sess.

[4]Unless otherwise stated, all numbers, analyses, and percentages are projections to the adjusted universe

and 44 percent felonies) than the crimes for which the defendants were originally charged.

Our percentages of defendants who failed to appear or who committed crime on bail may be somewhat understated for three reasons. First, judicial proceedings had not been completed on 307 of the 1,386 defendants (22 percent) at the time we reviewed the court records. Some percentage of these defendants could have committed a misconduct subsequent to our review. Secondly, we limited our study to defendants who were originally charged with felonies; defendants charged with misdemeanors and petty offenses were excluded. And lastly, we measured crime on bail and failure-to-appear rates for the pretrial period only—the time between the date the defendant came into federal custody until either the defendant's trial began or the date a judicial officer accepted the defendant's guilty plea.

We cannot attribute the changes in the rates of failure to appear and crime on bail under the old and new bail laws to the implementation of the new law. The new law could be a contributing factor. However, other factors which we did not address in our study, such as the operation of the Organized Crime Drug Enforcement Task Force and changes in the staffing levels of the law enforcement agencies and U.S. attorneys offices may also have influenced the rates because of their impact on the types of cases and defendants that are prosecuted. Similarly, the extent to which defendant supervision and treatment programs were available in a given district could have influenced the rates of failure to appear and crime on bail.

Comparison of Failure-To-Appear Rates in Four Selected Districts

The incidence of failure to appear in the four districts we examined was 2.1 percent under the old bail law and 1.8 percent under the new bail law. Two of the four districts had higher failure-to-appear rates under the new bail law during the two 6-month periods we examined. A district by district comparison is shown in table 3.1.

Table 3.1: Comparison of Estimated Failure-To-Appear Rates Under the Old and New Bail Laws

	Figures in percent	
District	**Old law**	**New law**
Northern Indiana[a]	0	1.5
Arizona	3.8	1.6
Southern Florida	2.2	2.1
Eastern New York	0.3	1.3

[a]These are actual percentages

Disposition of Failure to Appear Cases in Four Judicial Districts

From our review of court records we identified a total of 55 defendants[b] in the four districts who were released on bail and failed to appear for at least one scheduled court proceeding during their pretrial period—28 under the old bail law and 27 under the new bail law. At the time we reviewed their case files, 44 percent of the defendants (24 of 55) were fugitives and not in federal custody. These defendants were fugitives from the time they failed to appear until we reviewed their files. Of the remaining 31 defendants, 21 came back into federal custody after being arrested and 10 returned on their own volition, as depicted in table 3.2.

Table 3.2: Disposition of Defendants Who Failed to Appear

	Number of defendants	
Custody status	**Old law**	**New law**
Returned on own volition	8	2
Returned by bondsman	0	0
Returned after arrest	11	10
Remains a fugitive	9	15
Total	**28**	**27**

Of the 31 defendants who came back into federal custody after failing to appear, we were able to determine what action the government took for 30 of the defendants. Our examination of court records for these 30 defendants showed that 26 defendants were not charged for failure to appear and 4 were charged. Of the four who were charged with failure to appear, two had been found guilty. The penalty imposed for both defendants was incarceration for 24 months.[c] These sentences were made consecutive with the sentences they received for the original crime

[b]The results presented in this section are based on the actual number of defendants and are not projected numbers

[c]One defendant was on bail under the old law and the maximum sentence he could have received was not more than 5 years. The other defendant, released under the new law, could have been imprisoned for not more than 10 years

for which they had been released on bail. Table 3.3 shows the disposition of the failure to appear cases we reviewed under the old and new bail laws.

Table 3.3: Prosecution of Defendants Who Failed to Appear

	Number of defendants	
Disposition	**Old law**	**New law**
Not charged	15	11
Charged, guilty	1	1
Charged, acquitted	1	0
Charged, dismissed	1	0
Cannot determine	1	0
Fugitives	9	15
Total	**28**	**27**

Comparison of Crime on Bail Rates in Four Selected Districts

We estimate the overall rate with which defendants were rearrested for committing a new crime while released on bail in the four selected districts was 1.8 percent under the old bail law and 0.8 percent under the new bail law. We used rearrests as a measure of crime on bail. While rearrests do not reflect all crimes that are committed by released defendants, it is commonly used as an indicator of the amount of crime on bail.

Two of the four districts had lower rearrest rates for crime on bail under the new law than they did under the old law, and two districts had higher rearrest rates under the new law. A district-by-district comparison of the rates of crime on bail for the two 6-month periods we examined are shown in table 3.4.

Table 3.4: Comparison of Estimated Crime on Bail Rates Under the Old and New Bail Laws

	Figures in percent	
District	**Old law**	**New law**
Northern Indiana[a]	0	0 8
Arizona	1 9	0 8
Southern Florida	2.4	0 8
Eastern New York	0 6	1 0

[a]These are actual percentages.

Types of Offenses Committed by Defendants Released on Bail and Disposition of the Cases

We identified 37 defendants who, while released on bail, were arrested for at least one crime during their pretrial period.[7] All 37 defendants were released on bail for charges involving felony offenses. The offenses they were arrested for while on bail, however, were often of a less serious nature: 20 were misdemeanors and 16 were felonies. In one instance, we could not determine the type of crime for which the defendant was rearrested. The single offense defendants were most frequently arrested for while on bail was the illegal operation of a motor vehicle, such as driving with a suspended license or driving while intoxicated. Table 3.5 shows the types of offenses committed by defendants while released on bail. If a defendant was arrested for a misdemeanor and a felony, we recorded the felony offense.

Table 3.5: Types of New Crimes Defendants Arrested for While Released on Bail

	Old law		New law[a]	
Offense	**Misdemeanors**	**Felonies**	**Misdemeanors**	**Felonies**
Illegal operation of motor vehicle	8	0	3	0
Use, sale, or possession of drugs	4	2	0	1
Assault	1	1	1	0
Forgery	0	0	0	3
Firearms	0	1	0	1
Murder or attempted murder	0	2	0	0
Miscellaneous	2	3	1	2
Total	**15**	**9**	**5**	**7**

[a]In one instance we could not determine the specific crime the defendant was arrested for while on bail

In 81 percent of the cases (30 of 37) involving defendants who were rearrested for committing crime on bail, the prosecution of the new offense was still pending or we could not determine the outcome of the government's case against the defendant. For the remaining seven cases, five defendants were convicted and two defendants were not convicted.

[7]The results presented in this section are based on the actual number of defendants and are not projected numbers.

Universe and Sample Sizes

District	SARD universe[a]	Adjusted universe[b]	Random sample	Manual sample	Total sample
January 1, 1984 - June 30, 1984					
Northern Indiana	86	86	86	0	86
Arizona	450	445	175	11	186
Southern Florida	1,169	1,157	191	23	214
Eastern New York	419	398	153	0	153
Total	**2,124**	**2,086**	**605**	**34**	**639**
January 1, 1986 - June 30, 1986					
Northern Indiana	145	129	89	3	92
Arizona	474	457	154	65	219
Southern Florida	1,190	1,097	190	59	249
Eastern New York	565	517	180	7	187
Total	**2,374**	**2,200**	**613**	**134**	**747**

[a]Universe obtained from the Statistical Analysis and Reports Division (SARD) of the Administrative Office of the United States Courts

[b]The SARD universe included cases which were not felonies or were commenced outside the selected 6-month periods The adjusted universe reflects the smaller universe after the cases which did not meet our criteria were dropped

Statistical Significance of Samples From the Old and New Bail Laws

Statistical sampling enables us to draw conclusions about the universe of interest on the basis of information in a sample of that universe. The results from a statistical sample are always subject to some uncertainty or sampling error because only a portion of the universe has been selected for analysis. By analyzing a random, stratified sample of defendants whose bail was set under the old bail law and a second sample of defendants whose bail was set under the new bail law, we were able to make comparisons between the groups in the four selected districts.

Comparisons were made for the use of money bail, the failure to pay money bail, the use of pretrial detention, the failure-to-appear rate, the crime on bail rate, and the combined rate of pretrial detention due to money bail and formal detention.

We then made the appropriate statistical tests to determine the confidence level, that is, the degree of assurance, that observed differences in the groups in the four selected districts are statistically significant and not due to sampling error. For example, in our comparison of the use of money bail under the old and new bail laws, a significance level of 99.9 percent was calculated for Arizona, while a significance level of only 70 percent was calculated for southern Florida. This means that the probability that the differences observed actually exist in 999 out of 1,000 cases for Arizona, but only exist in 700 out of 1,000 for southern Florida.

The results of these comparisons are shown in table II.1 for each district and the districts combined.

Table II.1: Statistical Significance of Selected Comparisons Between Samples From the Old and New Bail Laws

Use of money bail	Percentage level of statistical significance
Northern Indiana	99 9
Arizona	99 9
Southern Florida	70 0
Eastern New York	99 9
Combined Districts	99 9
Failure to pay money bail	
Northern Indiana	99.5
Arizona	60 0
Southern Florida	30 0
Eastern New York	99 9
Combined Districts	99 9
Use of pretrial detention	
Northern Indiana	100 0
Arizona	100.0
Southern Florida	100.0
Eastern New York	100 0
Combined Districts	100 0
Failure-to-appear rate	
Northern Indiana	100 0
Arizona	99 5
Southern Florida	89.5
Eastern New York	99.5
Combined Districts	45.0
Crime on bail rate	
Northern Indiana	100 0
Arizona	97 5
Southern Florida	99 9
Eastern New York	82 0
Combined Districts	97.5
Pretrial detention, formal detention, and money bail	
Northhern Indiana	99 5
Arizona	99 9
Southern Florida	50 0
Eastern New York	70 0
Combined Districts	90 0

Confidence Limits for the Rate of Crime on Bail and the Rate That Defendants Fail to Appear at 95 Percent Confidence Level

We conducted the appropriate tests to determine the range associated with certain projections. The range is the upper and lower limits between which the actual value may be found. For the projections in this appendix, the chances are 95 in 100 that the actual value would be between the ranges shown.

Our particular sample of defendants is only one of a large number of samples of equal size and design which could have been selected. Each of these samples would produce a different value for most characteristics being estimated. An estimate's sampling error measures the variability among the estimates obtained for all the possible samples. Sampling error thus is a measure of the precision or reliability with which an estimate from a particular sample approximates the results of a complete census. From the sample estimate, together with an estimate of its sampling error, interval estimates can be constructed with prescribed confidence that the interval includes the average result of all possible samples.

Table III.1: Confidence Limits for the Rate of Crime on Bail and the Rate That Defendants Fail to Appear at 95 Percent Confidence Level

			Percentage		
Category by district	**Adjusted universe**	**Cases reviewed[a]**	**Observed rate**	**Upper confidence limit**	**Lower confidence limit**
Rate of failure to appear-old law					
Northern Indiana	86	86	0 00	[c]	[c]
Arizona	445	315	3 81	5 13	2 82
Southern Florida	1 157	675	2.22	3 06	1 61
Eastern New York	398	330	0 30	0 67	0 14
Combined Districts	2 086	1 406	2 10	2 88	1 33
Rate of crime on bail-old law					
Northern Indiana	86	86	0 00[c]	[c]	
Arizona	445	315	1 90	2 91	1 24
Southern Florida	1 157	675	2 37	3.23	1.73
Eastern New York	398	330	0 61	1 06	0 34
Combined Districts	2 086	1.406	1.84	2 57	1 10
Rate of failure to appear-new law					
Northern Indiana	129	129	1 55	[c]	[c]
Arizona	457	365	1 64	2 34	1 15
Southern Florida	1.097	655	2 14	2 96	1 54
Eastern New York	517	395	1 27	1 92	0 83
Combined Districts	2 200	1 544	1 80	2 46	1 13
Rate of crime on bail-new law					
Northern Indiana	129	129	0 78[c]	[c]	
Arizona	457	365	0 82	1 35	0 50
Southern Florida	1 097	655	0.76	1.32	0 44
Eastern New York	517	395	1 01	1 62	0 63
Combined Districts	2.200	1.544	0 83	1 28	0 39

[a] This is the number of defendants for whom we located court records and were able to check for evidence of failure to appear and crime on bail Our projected rates are based on the number of cases reviewed

[c] Universe examined therefore there is no sampling error

Use of Pretrial Detention and the Rebuttable Presumption in Six Other Districts

In order to have a broader base of information about the use of pretrial detention of flight and/or danger risk defendants and the rebuttable presumption of the new bail law, we asked U.S. attorneys' offices in six additional districts to compile data on the use of these provisions during the 6-month period from January to June 1986. The six districts are central California, Massachusetts, eastern Michigan, eastern and western Missouri, and southern Texas. We believed these districts would be diverse enough in the types of cases they handled to provide an indication of how the new bail law was being implemented.

Detention Due to Flight And/Or Danger Risk

According to the data provided by the U.S. attorneys' offices, pretrial detention rates due to flight and/or danger risk varied substantially among the six districts: ranging from 3 percent in southern Texas to 23 percent in central California. In the six districts, the government requested pretrial detention of 523 defendants: 404 (77 percent) were ordered detained and 119 (23 percent) were not detained. A district-by-district comparison of pretrial detention rates is shown in table IV.1.

Table IV.1: Pretrial Detention in Six Additional Districts

		Total defendants where detention sought		Total defendants detained[a]	
District	Universe	Number	(Percent)	Number	(Percent)
Central California	813	256	(31)	191	(23)
Massachusetts	395	79	(20)	63	(16)
Eastern Michigan	523	87	(17)	73	(14)
Western Missouri	362	27	(7)	21	(6)
Eastern Missouri	268	18	(7)	14	(5)
Southern Texas	1 347	56	(4)	42	(3)
Combined Total	**3,708**	**523**	**(14)**	**(404)**	**(11)**

[a]The detentions do not include defendants who were detained because they failed to pay their money bail. The U.S. attorneys' offices did not collect information for these types of detentions

Use of Rebuttable Presumption

Only four of the six districts provided us data on the frequency that the rebuttable presumption was used in seeking pretrial detention. In the four districts reporting rebuttable presumption information, the government requested pretrial detention of 374 defendants. The rebuttable presumption provision was used in 167 of the 374 cases (45 percent) and was not used in the other 207 cases (55 percent). Regardless of whether the rebuttable presumption was used, approximately 75 percent of the defendants were detained and 25 percent were not. A district

by district analysis of the use of the rebuttable presumption in the four districts is shown in table IV.2.

Table IV.2: Use of Rebuttable Presumption in Four Additional Districts

	Rebuttable presumption used			Rebuttable presumption not used		
District	Detained	Not detained	Total	Detained	Not detained	Total
Central California[a]						
Number	93	32	125	89	28	117
Percent	74	26	100	76	24	100
Eastern Michigan						
Number	26	4	30	47	10	57
Percent	87	13	100	82	18	100
Eastern Missouri						
Number	8	1	9	6	3	9
Percent	89	11	100	67	33	100
Western Missouri						
Number	1	2	3	20	4	24
Percent	33	67	100	83	17	100
Total						
Number	128	39	167	162	45	207
Percent	77	23	100	78	22	100

[a]The data from the U S attorney s office did not indicate if a rebuttable presumption was used in cases involving 14 defendants As a result, the number of defendants for central California in this table is 14 less than the data in table IV 1

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