No. 86-87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Public Defender Service is an agency of the District of Columbia established to represent indigent persons charged with crimes in the United States District Court and the Superior Court for the District of Columbia. 1 D.C. Code § 2701 *et seq.* (1981). As counsel for a large proportion of those accused of serious crimes in the Superior Court, the Public Defender Service has acquired considerable experience with the practical operation of

the preventive detention statute, 23 D.C. Code § 1322 (1981), which provided the blueprint for the federal law now under consideration by this Court, and with the devastating effect of preventive detention upon the rights of the accused.

Preventive detention is new to the federal system, but it has been authorized by statute in the District of Columbia since 1970. 84 Stat. 644, Pub. L. 91-358. In considering the bail reform legislation which resulted in 18 U.S.C. § 3142(e), Congress relied heavily upon testimony and data drawn from the District's experience, and upon the reasoning of the District of Columbia Court of Appeals upholding the preventive detention law. *Edwards v. United States*, 430 A.2d 1321 (D.C. 1981) (*en banc*), *cert. denied*, 455 U.S. 1022 (1982). Our experience is therefore directly relevant to the factual and legal premise of Section 3142(e).[1]

SUMMARY OF THE ARGUMENT

We agree with the court below, and with the Respondent, that preventive detention is contrary to fundamental constitutional principles regardless of the procedures adopted to make detention decisions in particular cases. Our brief, however, will address a second aspect of the facial validity of Section 3142(e): whether the statute is capable of being interpreted and applied so as to provide sufficient protection against the wrongful pretrial detention of innocent and nondangerous persons to satisfy the due process clause of the Fifth Amendment.?[2] Section 3142(e) provides even less protection against erro-

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[1] The parties have consented to the filing of this Brief. Letters of consent have been filed with the Clerk. Supreme Court Rule 36.2.

[2] This Court need not reach the procedural issue, which was not squarely considered below. *See Schall v. Martin*, 467 U.S. 253, 274 n.24 (1984) (court below intimated that it would reach same result on procedural grounds).

neous and prolonged incarceration before trial than its model, 23 D.C. Code § 1322. We believe the lesson to be drawn from the District of Columbia's experiment with preventive detention is that the government's "regulatory" power to detain persons accused of crime solely because they are believed to be dangerous, may be exercised, if at all, only with the most scrupulous regard for the liberty interests of the accused. This brief outlines the minimal procedural safeguards our experience shows are necessary to ensure that these determinations are fair and accurate.

The principles which must guide this Court's analysis of the procedural mechanism Section 3142 creates are straightforward and not in dispute. The issue is "whether the procedural protections embodied in the pretrial detention provisions provide 'sufficient protection against erroneous and unnecessary deprivations of liberty.'" Brief for the United States (Pet. Br.) at 35, *quoting Schall v. Martin*, 467 U.S. 253, 274 (1984). There are two types of error which must be avoided: the detention of persons innocent of the crime of which they have been accused, regardless of their supposed dangerousness, and the detention of nondangerous persons, regardless of their guilt. Section 3142 fails to provide essential safeguards against these errors, although the government has no legitimate interest—"regulatory" or otherwise—in imprisoning the innocent and nondangerous.

Perhaps the most significant shortcoming of the federal law is that the factual showing of guilt the government must make to justify pretrial detention is no greater than the showing required to support an arrest. This flaw results from congressional reliance on *Edwards*, which applied Fourth Amendment principles rather than this Court's extensive procedural due process jurisprudence. This Court's due process decisions make clear that the standard of proof required to support the deprivation of the liberty interest at stake here is clear and convincing

evidence, not the minimal showing of probable cause which suffices under the Fourth Amendment. Even if this alone were insufficient to doom Section 3142(e) under the due process clause, the statute also omits other important safeguards crucial to the protection of the fundamental liberty interest at stake here. The defendant is denied notice of the specific allegations relied on to prove dangerousness and the right to confront adverse witnesses. *See Black v. Romano*, 471 U.S. 606, 612 (1985) (procedural safeguards in probation revocation hearing). Moreover, in contrast to the District of Columbia statute, Section 3142(e), read in conjunction with the federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, does not adequately limit the duration of the confinement and loss of liberty to which a federal defendant is exposed.

ARGUMENT

SECTION 3142 VIOLATES DUE PROCESS BECAUSE IT PROVIDES INADEQUATE SAFEGUARDS AGAINST ERRONEOUS DETENTIONS

The Bail Reform Act of 1984 was, as Congress recognized, a "significant departure" from American tradition. "Comprehensive Crime Control Act of 1983," S. Rep. 98-225, 98th Cong., 1st Sess. 3 (1983). As this Court explained in *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted):

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured after centuries of struggle, would lose its meaning.

Until the enactment of the District of Columbia preventive detention statute in 1970, the suspected dangerous-

ness of a person accused of a crime was not a legitimate [3] consideration in the setting of pretrial release conditions.[4]

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[3] The Bail Reform Act of 1984 was intended, in part, to remedy the covert practice of detaining those suspected of dangerousness by setting money bonds in an amount higher than required to assure the defendant's appearance at trial. S.Rep. 98-225 at 5, 11. Because the Act retains the use of money bonds, however, the Bail Reform Act allows this practice to continue, so that "dangerous" persons may still be detained without resort to the statutory preventive detention procedures, and in cases where the showing required by the statute cannot be made.

[4] This case does not present the broader question, whether a court may take dangerousness into account in setting release conditions. Consequently, this Court could strike down Section 3142(e) without invalidating alternative bills proposed in Congress which would allow dangerousness to play a part in the release decision without authorizing preventive detention. *E.g.*, House Rep. 98-1121 60 (1984) (additional views of Rep. Kastenmeier, explaining proposed substitute). *See* ABA Standards, *Pretrial Release*, 10-5.9 (b)(ii)(A), (B) (2d ed. 1980) (the ABA in 1985 revised its Standards to endorse limited preventive detention following a more extensive hearing than is permitted under 18 U.S.C. § 3142); Hearings before House Subcommittee on Crime House Judiciary Committee, 97th Cong., 1st Sess. 66-70 (1982) (testimony of Judge Sylvia Bacon, D.C. Superior Court) (ABA "does not favor the use of preventive detention based solely upon a defendant's past conduct as upon a general prediction of future dangerousness" although it does favor consideration of dangerousness); Hearings before Senate Judiciary Committee, 97th Cong., 1st Sess. 11889-90 (1983) (same); Hearings before Senate Judiciary Committee, 96th Cong., 1st Sess. 10328 (1979) (testimony of Prof. Dershowitz), 10340 (testimony of Bruce Beaudin, then director of D.C. Pretrial Services Agency); 10912 (letter Prof. William Greenhalgh to Sen. Kennedy stating ABA position); Hearings before Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 97th Cong., 1st & 2d Sess. 84, 95 (1983) (testimony of Judge Tjoflat); 129 (testimony of Prof. George, stating ABA position). Nor does this case require the Court to address the constitutionality of statutes which permit detention of a defendant who has violated a specific condition of release, such as an instruction not to violate any law. *See, e.g.*, ABA Standards, *Pretrial Release*, 10-5.4(b)(i) (revised 1985).

The presumption of innocence carried with it a presumption of freedom from the loss of liberty and stigma associated with a criminal conviction. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that the presumption of innocence does not limit the conditions of confinement which may be imposed upon pretrial detainees. *Wolfish* does not address the question presented here: whether the government may curtail the fundamental liberty interest of a presumptively innocent person accused of a crime on the grounds of future dangerousness? *See Wolfish*, 441 U.S. at 534 n.15.

The government asks the Court to write the whole issue of innocence out of its analysis of preventive detention by asserting an expansive "regulatory" power to imprison for suspected future dangerousness alone. Pet. Br. at 11. But if a person innocent of wrongdoing could be imprisoned solely because of likely future misconduct, all of the constitutional protections now available to criminal defendants would be surplusage;[5] rarely would the government seek to prove guilt beyond a reasonable doubt

[5] This is especially true because of the breadth of the term "safety of the community." For example, this Court has held that a non-violent petty theft is "dangerous" conduct for purposes of involuntary commitment of an insanity acquittee to a mental hospital. *Jones v. United States*, 463 U.S. 354, 365 n.14 (1983). Imprisonment of the dangerous would eviscerate not only the procedural safeguards in the Bill of Rights, but the principle of legality which constrains the exercise of the state's ultimate coercive power. An individual would have no way to be sure his or her future conduct would not be deemed dangerous. Nor would a judge have a sufficient basis for deciding which persons are dangerous and which are not. *See Connally v. General Construction Co.*, 269 U.S. 385, 395 (1926); *Winters v. New York*, 333 U.S. 507 (1948). Fair notice and the control of arbitrariness are the two fundamental objectives of the void-for-vagueness doctrine. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Whether imprisonment can be based solely on "dangerousness" is a different question than whether this factor can play a part in sentencing the convicted, for example, as a "dangerous special offender" under 18 U.S.C. § 3575. *See Schall v. Martin*, 467 U.S. at 278 n.30.

when it could incapacitate a citizen by establishing a risk of future harm to the community in a civil regulatory proceeding. Our constitutional heritage does not support the government's radical claim of such sweeping police power. *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), reflect at best the ease with which such an all-encompassing regulatory power may be abused.[6] Indeed, Congress has not authorized regulatory detention based only on predicted criminality. Congress believed, however, that there exists a "small but identifiable" segment of the population whose members are both guilty of past criminal conduct and likely to be dangerous. S. Rep. 98-225 at 6-7.

We agree with the Court of Appeals below, that the imprisonment of this "small but identifiable" segment before trial violates our fundamental law because the government cannot show a compelling interest in detention which overcomes the citizen's fundamental interest in "[l]iberty from bodily restraint" *Greenholtz v. Nebraska Inmates*, 442 U.S. 1, 18 (Powell, J., concurring in part

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[6] New evidence has shown that the fears which inspired the decision to detain Japanese-Americans were exaggerated. *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986), *cert. granted on other grounds*, —— U.S. —— (Nov. 17, 1986). The same is true of the evidence supporting the preventive detention legislation at issue here. As Senator Ervin wrote, "Preventive detention legislation is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem." "Foreword: Preventive Detention—A Step Backward for Criminal Justice," 6 Harv. C.R.-C.L. L.Rev. 291 (1971). Just as subsequent evidence has undermined the premise of the order for the detention of Japanese-Americans during World War II, studies have shown that the "alarming problem" of crime committed by persons on pretrial release was not, as Congress apparently thought in 1970, due to the liberal release provisions of the 1966 Bail Reform Act. Rather, it reflected national trends in crime and demography. Roth & Wice, "Pretrial Release and Misconduct in the District of Columbia," ["INSLAW Study"] 3 (1980).

and dissenting in part). But even if the long tradition described in *Stack v. Boyle* does not absolutely bar preventive detention, it does warrant this Court in scrutinizing the Bail Reform Act with scrupulous care.[7] Judged by any standard, Section 3142 deprives pretrial detainees of their liberty without due process of law.

A. The Framework

For over a decade, this Court has consistently followed the analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

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[7] The government argues, and we agree, that this Court generally owes a large measure of respect to decisions by the legislative branch. Pet. Br. at 15. This restraint must be balanced in this case, however, by a vigilance for the rights of citizens who lack a meaningful voice in the legislative process. A higher level of scrutiny is also appropriate here because the legal basis for Section 3142(e) is a court decision which this Court has not reviewed. *See* S. Rep. 98-225 at 8 (discussing significance of *Edwards*). Since *Edwards*, we submit, was wrongly decided on several important points, the entire statute is based upon a faulty judicial premise rather than independent congressional judgment. Finally, Congress relied upon two empirical studies concerning pretrial recidivism to support its view that this small group of dangerous criminal defendants was also "identifiable." S. Rep. 98-225 at 6 nn.14, 15. These studies prove the opposite. They show, as do other studies, that predictions of dangerousness are extremely unreliable, and that any rule for detaining dangerous persons before trial will necessarily entrap many other nondangerous and presumptively innocent persons. Ewing, *"Schall v. Martin*; Preventive Detention and Dangerousness Through The Looking Glass," 34 Buff. L. Rev. 173, 181-196 (1985) (surveying studies); Note, Preventive Detention: An Empirical Analysis 6 Harv. C.R.-C.L. L. Rev. 298, 314 (1971).

> substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The government agrees that *Mathews'* due process analysis is appropriate. Pet. Br. at 35-36. Congress, however, relied on the District of Columbia Court of Appeals decision in *Edwards*, which, in turn derived its procedural standard from *Gerstein v. Pugh*, 420 U.S. 103 (1975), rather than from this Court's due process decisions.

In *Gerstein*, this Court held that before a person accused of a crime may be detained pending further judicial proceedings, a neutral and detached magistrate must find probable cause to believe that he or she committed the offense charged. The only issue decided in *Gerstein* was what the Fourth Amendment required in order to continue the warrantless seizure of a person past the initial appearances before a magistrate. *Gerstein*, 420 U.S. at 125 n.27. *Gerstein* does not purport to decide what protections the Due Process Clause requires before an individual may be deprived of liberty on the basis of an asserted government interest in preventing dangerousness.[8]

The *Gerstein* standard is the same "practical, common sense decision" *Illinois v. Gates*, 462 U.S. at 238,[9] which

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[8] *See United States v. Edwards*, 430 A.2d at 1336-37. Judge Ferren made this point in his dissent, *id.* at 1353-54. In *DeVeau v. United States*, 454 A.2d 1308, 1315 (D.C. 1982), a panel of the same court relied on *Edwards* for the proposition that "if a process is adequate for Fourth Amendment purposes, there is no reason why it should not be adequate for Fifth Amendment purposes."

[9] This Court's recent decisions in *Illinois v. Gates*, 462 U.S. 213 (1983) and *Massachusetts v. Upton*, 466 U.S. 727 (1984) reduce the government's burden in showing probable cause to support an arrest or search warrant and cast additional doubt on the ade-

governs issuance of arrest warrants, and determines whether a person may be held for trial. This Court need not decide whether *Gerstein's* Fourth Amendment holding also satisfies the requirements of the Due Process Clause to justify pretrial detention on the basis of risk of flight.

Detention under Section 3142 is a different matter entirely. The government asserts the authority to detain not by necessary implication from its power to bring an individual to trial, but under a general "regulatory" power to detain.[10] By definition, the constitutional issue here does not arise when an individual is unlikely to appear and may be detained for that reason. Therefore, the government's weighty interest in obtaining a determination of guilt or innocence cannot be used to justify detention under Section 3142. *Gerstein* cannot supply the measure of the process which is due; yet *Gerstein* is the only process which Section 3142 provides to protect against detention of an innocent person.

Schall v. Martin, 467 U.S. 253 (1984) applied the *Mathews v. Eldridge* calculus to a New York statute authorizing the brief detention of juveniles charged with acts of delinquency rather than relying exclusively on Fourth Amendment standards derived from *Gerstein*. *Schall* did not place this Court's imprimatur on preventive detention in every form;[11] indeed, *Schall* itself illus-

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quacy of a *Gerstein* proffer to satisfy the requirements of due process in a preventive detention hearing.

[10] Since the United States does not have a general "police power," any "regulatory" detention must be related to some specific power or function of the federal government. *See Greenwood v. United States*, 350 U.S. 366 (1956); *United States v. Perry*, 788 F.2d 100, 109-11 (3d Cir. 1986). This distinction also differentiates preventive detention of the supposedly dangerous from the detention of those who pose specific threats to evidence or witnesses, *see Carbo v. United States*, 82 S.Ct. 662 (1962) (Douglas, Cir. J.) or mentally incompetent defendants pending trial. *Greenwood, supra.*

[11] In *Schall* itself, the Court said, "[i]t may be, of course, that in some circumstances detention of a juvenile would not pass constitu-

trates why the minimal safeguards available under Section 3142 cannot satisfy the due process clause. The liberty interest of the juvenile respondents in *Schall* was slight in comparison to the interests of the adult criminal defendants detained under Section 3142. Unlike a juvenile, an adult is not "always in some form of custody." *Schall v. Martin*, 467 U.S. at 265 Detention is not limited, as it was under the statute at issue in *Schall*, to a maximum of seventeen days. 467 U.S. at 270. Nor, in the case of adults, can the state's *parens patriae* interest add weight to the government's side of the scales as it did in *Schall*. 467 U.S. at 271.

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tional muster." 467 U.S. at 273. In contrast to the broad support of preventive detention for juveniles noted in *Schall*, only four states and the District of Columbia permit preventive detention of adults solely on the basis of predicted future behavior. *See* Ariz. Const. art. II, § 22(3); Ariz. Rev. Stat. Ann. § 13-3961B (Supp. 1985); Cal. Const. art. I, § 12(b); D.C. Code § 1322; Code of Va. § 19.2-120(2); Wisc. Stat. Ann. § 969.035(2), (6). Two states permit preventive detention of adults based upon future dangerousness only when the defendant has previous charges or convictions. *See* Colo. Const. art. II, § 19(b); Fla. Const. art. 1 § 14; Fla. Stat. Ann. § 907.041(4). Ten other states authorize pretrial detention when the defendant is accused of committing or previously has been convicted of certain serious (non-capital) offenses. *See* Ga. Code Ann. § 17-6-1(b)(1)-(2) (Supp. 1986); Haw. Rev. Stat. § 804-3(b) (Supp. 1984); Ill. Rev. Stat. ch. 38 para. 110-4(a); Mich. Const. art. I, § 15; Neb. Const. art. 1, § 9; Nev. Rev. Stat. §§ 178.484 *et seq.*; N.M. Const. art. II, § 13; Ore. Const. art. I, § 14; Ore. Rev. Stat. § 135.240(2); R.I. Const. art. 1, § 9; R.I. Gen. Laws § 12-13-1.1; Tex. Const. art. I, § 11a. Certainly, "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether the practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Schall*, 467 U.S. at 268, *quoting*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The absence of a comparable consensus in support of preventive detention of adults argues against its validity.

As the Court recognized in *Schall*, the proper analysis is that set out in *Mathews v. Eldridge*. When the *Mathews* test is applied to the preventive detention of adults authorized under Section 3142, the balance of interests necessarily is different from that struck by the Court in *Schall*. Accordingly, we turn now to a discussion of those interests.

B. The Interest of the Accused

The foremost interest of a person accused of a crime is in retaining his freedom of movement before trial. For the innocent, especially, but for every person accused of a crime, the time before trial is a period of intense emotional strain, when the support of family and friends is badly needed. Imprisonment cuts the accused person off from all that makes his life meaningful, and places him in an often frightening and demeaning environment.[12] For a person who has never been in prison before, pretrial detention may be the first step in the "hardening" process which produces career criminals.[13] "Lengthy exposure to these conditions 'has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult.'" *Barker v. Wingo*, 407 U.S. 514, 520 n.12 (1972).

A pretrial detainee is likely to lose his job and livelihood, which will adversely influence his future in two distinct ways. First, it will make him a worse candidate for probation if convicted, because he no longer has a source of income or as stable a base in the community as he did before he was arrested. The loss of employ-

[12] *Bell v. Wolfish* upheld prison regulations restricting visits and receipt of publications, and allowed double bunking and body cavity searches.

[13] A person with no prior criminal record may well be detained if charged with a drug or weapons offense resulting in a presumption under 18 U.S.C. § 3142(e) that no conditions of release will assure the safety of the community.

ment may impair an accused person's ability to prepare a defense, since the loss of income limits his or her ability to hire an attorney and to pay the necessary costs of investigation, expert witnesses, laboratory analysis, and the like. Pretrial imprisonment may also have a more direct effect on the ability to prepare a defense. *See Barker v. Wingo*, 407 U.S. at 533, & n.35. A client who is imprisoned is unable to assist counsel in gathering evidence and identifying potential witnesses. Not infrequently, clients will know of witnesses by sight or nickname. Without a client's assistance, these witnesses—who are essential to the presentation of the defense—cannot be located. The dramatic effects of pretrial incarceration on both conviction rates and sentencing has been documented in numerous studies, which demonstrate that the loss of liberty before trial is strongly correlated to the loss of liberty after trial.[14]

In addition to his loss of physical liberty, and concomitant isolation from family, friends, work, and his counsel, the accused person who is detained under Section 3142 suffers a devastating loss of reputation as well. This Court has recognized that the stigma of a label such as "mentally ill" is a factor to be considered in weighing the individual's liberty interest. *In re Winship*, 397 U.S. 358, 363 (1969) (state must prove juvenile's guilt beyond a reasonable doubt "both because of the possi-

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[14] Wald, "Pretrial Detention and Ultimate Freedom: A Statistical Study" 39 N.Y.U. L. Rev. 631 (1964). U.S. Dept. of Justice, Bureau of Justice Statistics, Pretrial Release and Misconduct 5 (1985). Attorney General's Committee on Poverty and The Administration of Criminal Justice "Poverty and The Administration of Federal Criminal Justice," *reprinted in part* in "Hearings before Subcommittee on Constitutional Rights, Senate Judiciary Committee, 88th Cong., 2d Sess. 218-220 (1964); Rankin, "The Effect of Pretrial Detention," 39 N.Y.U. L. Rev. 641 (1964); Ares, Rankin & Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole," 38 N.Y.U. L. Rev. 67 (1963).

bility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction"); *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Vitek v. Jones*, 445 U.S. 480, 488 (1980). To be labeled a member of the "small but identifiable group of particularly dangerous defendants" is stigmatizing to a degree completely independent of any loss of reputation from the criminal charge itself.[15] The accused therefore has a greater interest in avoiding preventive detention than he does in being free from pretrial detention of comparable length to prevent flight.[16]

The individual's liberty interest in avoiding detention increases with the duration of pretrial incarceration. Under Section 3142, detention lasts far longer than the maximum of seventeen days possible under the statute this Court considered in *Schall*.[17] The "costs" of an erroneous

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[15] There is certainly reason to believe that this labelling process will also have an independent adverse effect on the defendant in sentencing, if he is convicted.

[16] *Vitek v. Jones* illustrates why *Gerstein* cannot provide the standard of proof in a preventive detention case. In *Vitek*, the Court held that additional process was required before a convicted prisoner could be transferred from a state prison to a state mental hospital. *Vitek* upheld a District Court injunction requiring a pre-transfer hearing, with notice, an opportunity to prepare, an independent decisionmaker, counsel, a right to confront and cross-examine witnesses except for good cause, a right to present witnesses, and written findings. 445 U.S. at 494-95. Thus, even if an accused person were detained under *Gerstein* in lieu of bond, additional process would be due before that person could be "transferred" to preventive detention. *Cf.* ABA Standards, *Pretrial Release*, 10-5.4(b)(i)(B) (additional procedures required for detention of person already held because of risk of flight).

[17] The Administrative Office of the Courts has collected statistics which reflect the total number of detention hearings in reporting districts (10,209 as of October, 1986), and the number of persons detained (7,841). These data reflect only 63 of 92 judicial districts. No separate statistics are kept on the average length of detention

determination are commensurately greater. Congress rejected proposals to adopt a specific time limit for detention under Section 3142,[18] comparable to those enacted in the District of Columbia and other states allowing detention on the basis of predicted dangerousness.[19]

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of those detained under Section 3142(e). Telephone conversation with Mr. Guy Willets, Chief, Pretrial Services Branch, Dec. 4, 1986.

Cases such as *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) and *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), reflect the fact that prosecutions resulting in preventive detention are often complex and unlikely to be resolved without significant exclusions of time under the Speedy Trial Act. 18 U.S.C. § 3161(h). *See United States v. Colombo*, 777 F.2d 96, 100-101 (2d Cir. 1985). Although Congress recognized that under the Speedy Trial Act in theory cases come to trial within ninety days after arrest, *see* Sen. Rep. No. 98-225 at 22 n.63, excludable time may prolong pretrial detention for a year or more.

[18] As Senator Mitchell, the former United States Attorney for Maine, noted, the District of Columbia Court of Appeals in *Edwards* viewed 'the sixty day time limit as an integral part of the circumstances in which preventive detention does not contravene constitutional guarantees." 130 Cong. Rec. S938 (Feb. 3, 1984) (remarks of Sen. Mitchell). In the absence of such a provision, "we run the risk of having many Americans in jail who have not been convicted of anything, who are not in fact guilty of anything, and without any standard limit on their detention." *Id.* at S939.

Senator Mitchell was speaking in support of an amendment to the Bail Reform Act co-sponsored by Sen. Arlen Specter to add a sixty day time limit to the Act. *Id.* at S924. The amendment was defeated. *Id.* at S945.

[19] The original statute passed in 1970 required the United States Attorney to bring preventive detention cases to trial within sixty days. 23 D.C. Code § 1322(d)(2)(A). The Council of the District of Columbia amended the statute in 1982 to permit an extension of up to thirty days. 23 D.C. Code § 1322(d)(4) [Supp. 1986], D.C. Law 4-152.

Most of the states which permit preventive detention based upon future dangerousness place specific time limitations on detention. *See* Colo. Const. art. II, § 19(c)(2) (90 days); D.C. Code § 1322(d)(2)(A) (60 days); Fla. Stat. Ann. 907.041(4)(i) (90 days); Wisc.

Whether or not the length of detention authorized under the Speedy Trial Act alone is sufficient to violate the strictures of the Due Process Clause, *see United States v. Melendez-Carrion*, 790 F.2d 984, 1007 (2d Cir. 1986) (Feinberg, C.J., concurring), the length of detention authorized under Section 3142 heightens the need for procedural protections.

C. The Risk of Error and the Value of Additional Procedures

The second factor to be considered under *Mathews* is the risk of an erroneous deprivation of the private interest. There are two types of errors which must be minimized if Section 3142 is to survive scrutiny under the Due Process Clause. The first is the detention of a person who is innocent of the charges brought against him. Because Congress recognized that "regulatory" detention could not be justified on the basis of predicted dangerousness alone, a person who is acquitted of the charges against him must be released, regardless of his predicted future conduct. The "small but identifiable group" Congress sought to detain was composed of persons who were both guilty of past criminal conduct and believed to be likely to commit future offenses. A significant risk of error, therefore, is that an innocent person may be detained for an extended period before his innocence is established at trial. The second error which must be avoided is the detention of a person who, even if guilty as charged, is not likely to present a danger to the community. This individual too, falls outside the net which Congress intended to cast.

Stat. § 969.035(8) (60 days). Arizona, California and Virginia do not specifically incorporate time restrictions on pretrial detention, relying instead on their respective speedy trial provisions.

Of course, any time limits must be applied in such a way as to ensure adequate opportunity for defense preparation. *Cf.* 18 U.S.C. § 3161(c)(2).

Although the government baldly asserts, quoting *Schall*, "There are simply no 'additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes.'" Pet. Br. at 39, a quick review of the procedures available under Section 3142 belies this claim.

1. *Procedures to Minimize the Risk of Erroneous Detentions of the Innocent.*

a. *Standard of Proof*

Despite the gravity of the interest at stake, Congress has provided nothing more than the requirement of a finding of probable cause to protect against the detention of innocent persons. Even the District of Columbia law requires a showing of a "substantial proability" that the defendant committed the offense. 23 D.C. Code § 1322(b)(2)(C), presumably more than the mere probable cause Section 3142 requires. *See United States v. Edwards*, 430 A.2d at 1339 (analogizing standard to "likelihood of success" standard to obtain civil injunction). Congress rejected this higher standard although it "might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted," Sen. Rep. 98-225 at 18, because it relied on the holding in *Edward* that probable cause was constitutionally sufficient. In the case of a defendant who is arrested following a grand jury indictment, which serves as a determination of probable cause, *United States v. Contreras*, 776 F.2d 51 (2d Cir. 1985); 8 *Moore's Fed. Practice* ¶ 5.102 [1] n.2 at 5.1-6-7 (2d ed. 1985), this means no hearing at all, on the issue of guilt or innocence.[20] At best, even after a preliminary hearing,

[20] These, of course, are the very cases in which the government's interest in avoiding a hearing is weakest, since the government has had ample opportunity to gather its evidence. Moreover, in these cases, the government has little bona fide interest in objecting

Fed. R. Cr. P. 5.1(a), a "probable cause" determination means an intolerable risk of error when the stakes are as high as they are under Section 3142.[21] In several recent cases, this Court has stressed the importance of a high threshold of proof justifying deprivations of liberty like those at issue here. *Addington v. Texas* (clear and convincing evidence of mental illness and dangerousness required for involuntary civil commitment); *Allen v. Illinois*, —— U.S. ——, 106 S.Ct. 2990, 2993 (1986) (noting that dangerous sexual psychopath's commission of specific criminal acts must be proved beyond a reasonable doubt); *Jones v. United States*, 463 U.S. 354, 367 (1984) (person found not guilty by reason of insanity has had commission of criminal act proved beyond a reasonable doubt; risk of error in proof of mental illness by a preponderance of the evidence diminished by the defendant's concession that he is mentally ill).

In *Addington*, this Court rejected arguments that the standard of proving mental illness and dangerousness to justify involuntary hospitalization should be the same as the standard in a criminal trial. The Court noted that civil commitment is "not punitive" 441 U.S. at 428, and

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to providing "discovery" to the defense, since the government's disclosure obligations under Fed. R. Cr. P. 16 are already in effect.

[21] "[W]hen applied literally," as it has been in some districts, "subsection (f) automatically allows a prosecutor three extra days for investigation and preparation for the detention hearing. As a result, the statute provides for the possible detention without bail of every person charged with a federal crime." Note, "Problems with Granting Prosecutors' Requests for Continuances of Detention Hearings," 39 Stan. L. Rev. 701, (forthcoming 1987). This practice refutes the government's claim that Section 3142 provides more procedural safeguards than the statute in *Schall* because "the juvenile detention procedures did not require a preliminary finding of probable cause." Pet. Br. n.21 at 39. As this Court noted in *Schall*, "[i]f a juvenile is detained at his initial appearance and has denied the charges against him, he is entitled to a probable cause hearing to be held not more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner."

that the nature of the inquiry is fundamentally different than the proof of facts in a criminal case. *Id.* at 429. The Court squarely rejected, however, the preponderance of the evidence standard:

> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.

441 U.S. at 427. The same is true here. As in *Addington*, the government should be required to provide "clear and convincing" proof of guilt before the court may order preventive detention.[22] The existing procedure is little better than a coin toss.

b. *Opportunity for Confrontation*

A higher standard of proof would be virtually meaningless without a real opportunity to test the government's case and to offer exculpatory evidence. The interest of the accused in retaining his freedom is even greater than that of the parolee is retaining his conditional liberty on

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[22] History and current practice support this requirement. Early colonial laws allowed the denial of bail in capital cases "where the proof is evident, or the presumption great." Duker, "The Right to Bail: A Historical Inquiry," 42 Alb. L. Rev. 33, 80-81 (1977). See also *Hunt v. Roth*, 648 F.2d 1148, 1159 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982). Although bail was denied in capital cases because of risk of flight rather than probable dangerousness, *United States v. Edwards*, 430 A.2d 1326 n.6, it was understood early that even in capital cases, a special showing was required to justify making an exception to a general rule favoring release on bail.

With one exception, *see* Code of Va. § 19.2-120(2), the states which permit pretrial detention for non-capital offenses on the basis of dangerousness require more than probable cause of guilt before a defendant may be detained. *See* Ariz. Const. art. II, § 22(3) (Cal. Const. art. I § 12(b) (fact evident presumption great); Colo. Const. art. II, § 19(b) (proof evident presumption great); D.C. Code § 23-1322(b)(2)(C) (substantial probability); Fla. Stat. § 907.041(4)(b) (substantial probability); Wisc. Stat. Ann. § 969.035(6)(a) (clear and convincing).

parole release. In *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), this Court held that although not entitled to "the full panoply of rights" due a criminal defendant, a parolee must receive before revocation:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Astonishingly, a presumptively innocent person accused of a crime receives less protection from an erroneous deprivation of liberty than a parolee, who has already been convicted and sentenced.

If he is lucky enough to have a preliminary hearing at all, the accused will have no opportunity to confront the witnesses against him, since the real witnesses will be insulated by one or more layers of hearsay. Fed. R. Cr. P. 5.1(a). *Cf. Schall v. Martin*, 467 U.S. at 275-76 (noting that under New York statute probable cause must be based on non-hearsay). Even though the risks arising from confrontation of witnesses cannot reasonably be said to be greater in a preventive detention hearing than they are in a parole revocation hearing, under Section 3142 the government bears no burden of justifying the denial of confrontation by "good cause." Questioning of witnesses in preliminary hearings is often restricted even if the question undermines the credibility of the government's evidence. *See, e.g., Coleman v. Burnett*, 477 F.2d 1187, 1200-1202 (D.C. Cir. 1973).[23] Nor does the defense have

[23] For example, it is not uncommon for counsel to be denied an opportunity to examine a witness on his opportunity to observe

a meaningful opportunity to counter the government's case,[24] least of all an innocent person accused of a crime he did not commit who has no opportunity to gather evidence and to establish his innocence. At a minimum, a pretrial detainee is entitled to a hearing as full and reliable as the one which a parolee must receive before revocation of parole.[25]

2. *Procedures to Minimize the Risk of Erroneous Detentions of the Nondangerous*

In *Williamson v. United States*, 184 F.2d 280, 282-3 (2d Cir. 1950), Justice Jackson, as Circuit Justice, denied the government's motion to revoke the bond of allegedly dangerous persons convicted of violating the Smith Act, pending consideration of their petition for a writ of certiorari. He wrote:

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the person committing the crime, even though the unreliability of the identification should be relevant to the existence of probable cause. *See e.g., United States v. King*, 482 F.2d 768, 775 (D.C. Cir. 1973).

[24] Congress rejected a proposal to confer immunity on the defendant's testimony at the preventive detention hearing. H.R. 5865, 98th Cong., 2d Sess. *See* H. Rep. 98-1121 at 58 (additional views of Reps. Frank and Glickman). *See United States v. Perry*, 788 F.2d at 115 (discussing dilemma and holding that judiciary may confer immunity); ABA Standards, Pretrial Release, 80-5.10(c) (1985); 23 D.C. Code § 1322(d)(6) (1981) (testimony of defendant inadmissible as evidence of guilt).

[25] It is clear that the final revocation hearing contemplated by *Morrissey* is more elaborate than the "preliminary hearing" conducted to detain a parolee—temporarily—pending a revocation hearing. *See* 408 U.S. at 487. But even at the initial hearing, "a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm of his identity were disclosed, he need not be subjected to confrontation and cross examination." *Id.*

> it is still difficult to reconcile with traditional American law the jailing of persons by the Court because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsumated offenses is so unprecedented in this country and so fraught with danger of excess and injustice, that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses on those of which the defendants stand convicted.[26]

This Court has said that, "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct." *Schall v. Martin*, 467 U.S. at 278. But although it is possible to predict dangerousness, those predictions are notoriously and intolerably unreliable.[27] *See generally*, Ewing, "Schall v. Martin: Preventive Detention Through the Looking Glass," 54 Buff. L. Rev. 173 (1985). There may be legitimate reasons for relying on such predictions in other contexts—when we are dealing with persons who have

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[26] The convictions were ultimately affirmed. *Dennis v. United States*, 341 U.S. 494 (1951).

[27] Even the Justice Department had its doubts about the reliability of these predictions. In testimony before the House Committee on Civil Rights, Civil Liberties, and the Administration of Justice, Deputy Associate Attorney General Jeffrey Harris stated the government's case as follows:

> While surely predictions [of dangerousness] were not infallible, it is clear that the presence of certain combinations of offense and offender characteristics . . . have a strong positive relationship to the probability that the defendant will commit a new offense while on release.

Hearings at 164. *Accord* Sen. Rep. 98-225 at 9 ("strong positive relationship to predicting the probability"). U.S. Dept. of Justice, Bureau of Justice Statistics, "Pretrial Release and Misconduct" 4 (1985) (correlation between prior record and misconduct, but not predictive enough to be more likely than not); INSLAW Study at 58. "A strong positive relationship to the probability" is not the stuff of which clear and convincing evidence is made.

already been convicted of a crime for purposes of sentencing, *e.g.*, *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (opinion of Stewart, Powell and Stevens, JJ.), *Barefoot v. Estelle*, 463 U.S. 880, 890-902 (1983), or persons who have been convicted and sentenced for purposes of parole, *e.g.*, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 6 (1979). Prediction is, by definition, the best we can do and predicted dangerousness, however unreliable, is only one of many factors which enter into these decisions. If the prediction of dangerousness is to be the basis for detaining a person pretrial, due process requires that the inherent unreliability of such predictions be minimized to the greatest extent practicable.

a. *Standard of Proof*

It is unclear what the government's ultimate burden of proof is under Section 3142. The statute requires clear and convincing proof of the facts the judicial officer relies on to find dangerousness. "The statute says nothing, however, regarding the degree of belief in dangerousness these facts, once proven, must produce in the mind of the judicial officer before the accused may be detained." Natalini, "Comment: Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984," 134 U. Pa. L. Rev. 225, 234 (1985).

Congress has cast additional doubt on the government's burden of establishing dangerousness by creating statutory presumptions of dangerousness when the accused has been charged with certain enumerated crimes. 18 U.S.C. § 3142(e)(1), (2). Strangely, this presumption of "clear and convincing" proof arises from a showing of probable cause [28] that the defendant committed one of the specified

[28] A presumption which bootstraps probable cause into clear and convincing evidence is facially invalid. *See Ulster County Court v. Allen*, 442 U.S. 140 (1979). This case, of course, does not present an occasion specifically to consider the validity of the presumptions.

crimes. *See generally* Natalini, "Comment: Preventive Detention and Presuming Dangerousness under the Bail Reform Act of 1984," 134 U. Pa. L. Rev. 225 (1985); Fishbein, "Unconstitutionality of Rebuttable presumptions in the Bail Reform Act of 1984" (1986) (unpublished ms. on file at the Yale Law Journal).

Unless the government shows that the accused will prove a danger to the community by clear and convincing evidence, the risk of erroneous determinations is excessive. There is nothing unattainable about this standard. *See Addington v. Texas*, 441 U.S. 418 (1979). To the extent that Section 3142 accepts a lesser showing, it violates the Due Process Clause.

b. *Notice*

Section 3142 is also deficient because it does not provide a person accused of a crime with notice and a meaningful opportunity to rebut the claim that he is dangerous. *See* ABA Standards, *Pretrial Release*, 10.5.10(b) (right to pre-hearing discovery) 10-5.4(a)(ii) (prosecutor's motion to detention must specify grounds for believing defendant meets standard for detention.") "Safety of the community," is such an all-inclusive term, that a defendant notified that the government is moving for preventive detention will have no way to know what specific facts the government will try to establish at the hearing, and which he must then try to rebut. Yet, even in the dangerous and restrictive environment of a prison, an inmate faced with internal disciplinary proceedings is entitled, under the due process clause, to notice of the facts the prison intends to rely on at the disciplinary hearing. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). The risk of error when the defendant is caught by sur-

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The use of the presumptions does, however, cast some doubt on the enforceability of the "clear and convincing" burden of proof in a realm of inherently speculative and unreliable evidence.

prise and has no way to contradict the government's evidence is intolerable.[29] Yet, Section 3142 does not require the government to provide the defense with notice of what it intends to show at the hearing. This renders the defendant's right to seek a continuance of the hearing in order to prepare, 18 U.S.C. § 3142(f), an empty formality in most cases.

c. *Opportunity for Confrontation*

The "clear and convincing" standard is meaningless, if it is based entirely on hearsay evidence and proffer which the defendant has no opportuntiy to test through confrontation. Section 3142(f) suspends the normal rules of evidence, and opens the gates to hearsay. Our experience in the District shows witnesses with personal knowledge of the events to be proved may be removed from the courtroom by one or more layers of hearsay.

The liberty interest at stake in a preventive detention hearing is greater than that of a parolee in avoiding revocation.[30] The right to confront and cross-examine witnesses must be available here on the issue of future dangerousness. This right cannot be limited, as it is in Section 3142(f), to the cross-examination of "witnesses who appear at the hearing," when those witnesses are

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[29] *Edwards* held that notice of the prior acts relied on to establish a "pattern of behavior" manifesting dangerousness was constitutionally required; the court found the notice on Edwards satisfied constitutional standards, because Edwards' counsel had received a copy of his statement admitting several prior offenses before the hearing, and because counsel attended a lineup. 430 A.2d at 1340-41.

[30] The higher standard for proving the facts relied on to predict dangerousness requires a correspondingly greater opportunity to investigate bias than is required in a suppression hearing where the only issue is probable cause at the time of arrest. *See United States v. Raddatz*, 447 U.S. 667, 679 (1980); *United States v. Matlock*, 415 U.S. 164, 173-75 (1974); *McCray v. Illinois*, 386 U.S. 300 (1967).

mere conduits for unreliable and unsubstantiated charges. *See* ABA Standards, *Pretial Release* 10-5.10(c) (normal rules of evidence should apply at detention hearings).

Deprived of notice and the opportunity to gather evidence, and the opportunity to contradict evidence by cross-examination, an accused person faced with a preventive detention hearing is virtually powerless to overcome the government's allegations. The plight of the defendant who must overcome a presumption of dangerousness is even bleaker. Section 3142 omits safeguards which are essential to the discovery of the truth.

D. The Government's Interest in Unreliable Procedures.

The government asserts an interest in detaining a "small but identifiable" group of dangerous persons charged with federal crimes. But the government has no valid interest in detaining the innocent or the nondangerous under Section 3142.[31]

To the extent that the government's interest in avoiding the procedures we have discussed is to prevent dis-

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[31] A person wrongfully detained under the 1984 Bail Reform Act has no post-deprivation remedy for the loss of his employment, or the physical and emotional suffering he has endured. The judge who entered the detention order will be immune from liability, *Stump v. Sparkman*, 435 U.S. 349 (1978), as will the prosecutor, *Imbler v. Pachtman*, 424 U.S. 409 (1976), and the witnesses who testified against him, *Briscoe v. Lahue*, 460 U.S. 325 (1983). The government has not waived its sovereign immunity with respect to such claims. 28 U.S.C. § 2680. A detainee who is acquitted will not even have the consolation of jail credit for time served.

This Court has considered the availability of post-deprivation remedies in a number of contexts. *E.g.*, *Bivens v. Six Unknown Agents*, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting) (effect of availability of civil remedy on 4th Amendment exclusionary rule); *Rose v. Mitchell*, 443 U.S. 545, 583 n.4 (1978) (Powell, J., concurring) (availability of civil injunctive relief, criminal prosecution); *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (post-deprivation remedy for loss of prisoner's property).

closure of potential witness and evidence to the defense, this interest is entitled to little weight. Increasingly, the federal and state courts have rejected the "ambush" model of trial, and have encouraged more complete discovery before trial in criminal as well as civil cases. *E.g.*, Fed. R. Cr. P. 26.2 (disclosure of witness statements); Fed. R. Cr. P. 12.1 (notice of alibi defense). As this Court said in *Dennis v. United States*, 384 U.S. 855, 871 (1966), "[There is a] growing realization that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice."

The federal courts are well-equipped to limit examinations to prevent improper efforts at discovery,[32] while preserving the defendant's rights to test the evidence on which the government is relying to deprive him of his liberty before trial. In comparison to the individual liberty interest at stake, the government's interest in avoiding more reliable fact-finding procedures is insignificant.[33]

In fact, the government's interest should be compatible with the interest of the accused in reliable decision-making. The imprisonment of the innocent impairs the public interest in assuring all citizens the unfettered enjoyment to life, liberty, and property, so long as they do not

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[32] *See Coleman v. Burnett, supra.* Any interest in avoiding harm to a particular witness can be satisfied, on a showing of good cause, by appropriate protective orders. The presumption, however, should be in favor of full cross-examination, just as it is in parole revocation hearings. *Morrissey v. Brewer*, 408 U.S. at 489.

[33] The government certainly has no interest in a lower standard of proof simply because at an early stage in the case it has little evidence. Although no one argues that the applicable standard should be the same as that for conviction, the defendant's liberty interest requires that the evidence to detain for months or years be more substantial than what is required to justify an arrest. Moreover, as a practical matter, many federal detention hearings will follow an extensive grand jury investigation and an indictment.

violate the law. The more erroneous preventive detention decisions that are made, the greater the harm to the sense of security from wrongful imprisonment which every citizen should enjoy. The denial of procedural safeguards which would make preventive detention decisions more accurate cannot be justified solely on the ground that it will be easier for the government to win detention hearings without them.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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