P U B L I C H E A R I N G

before

ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY AND
DEFENSE COMMITTEE

on

ASSEMBLY CONCURRENT RESOLUTION NO. 119

(A Concurrent Resolution proposing to amend Article I,
Paragraph II of the Constitution of the State of New Jersey)

Held:
June 28, 1982
Room 316
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Martin A. Herman (Chairman)
Assemblyman Eugene H. Thompson
Assemblyman Thomas J. Shusted

ALSO:

Bradley B. Brewster, Research Associate
Office of Legislative Services
Aide, Assembly Judiciary, Law, Public Safety
and Defense Committee

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I N D E X

ASSEMBLYMAN MARTIN A. HERMAN (Chairman): I will now open this public hearing. Ladies and gentlemen, the first item on the agenda is the public hearing on ACR-119. This public hearing has been scheduled and duly noticed. It is a Concurrent Resolution proposing to amend Article I, Paragraph 11, of the Constitution of the State of New Jersey. This proposed Constitutional Amendment will allow the Legislature to draft legislation providing for bail, except for capital offenses or where release will not reasonably assure the appearance of the defendant as required, or where, for the protection of other persons, it would be proper to deny bail.

I presently have on my list the following individuals: Mr. Oliver Quinn, New Jersey Association on Correction. Is Mr. Quinn here?

MEMBER OF AUDIENCE: He is outside. I will get him.

ASSEMBLYMAN HERMAN: All right. Do we have a representative from the Office of the Attorney General? (no response) I am going to rely on their prior statement in support of that bill. We will make that statement in support of the bill part of the public record. Is Mr. Jeffrey Fogel, Executive Director of the ACLU, or anyone on his behalf, here? (no response) Is anyone else here who is not on the scheduled list of speakers to be heard on ACR-119? (no response) I see someone representing the ACLU is here. With that in mind, we will call on Mr. Oliver Quinn.

O L I V E R B. Q U I N N: Good morning.

ASSEMBLYMAN HERMAN: Do you have a copy of your prepared testimony?

MR. QUINN: Yes, sir.

ASSEMBLYMAN HERMAN: Thank you, Mr. Quinn. You may begin.

MR. QUINN: Thank you, Mr. Chairman. Mr. Chairman and members of the Committee: My name is Oliver Quinn. I am the Executive Director of the New Jersey Association on Correction.

The New Jersey Association on Correction is pleased to appear before you to express its views on Assembly Concurrent Resolution No. 119, and specifically on the complex issue of pretrial detention.

This resolution would put before the voters of New Jersey a proposal to amend the State's Constitution so as to allow the Legislature to develop a pretrial detention system. Amending the Constitution is an action that should be restricted to situations in which the objective is significant and attainable by no other means.

Pretrial detention is the detention of an individual accused, but not convicted of a criminal offense. It is euphemistically referred to as "preventive" detention because, theoretically, it prevents the detained individual from predicted criminal behavior during the period between arrest and trial, or from not appearing for trial. What it is, in fact, is the total deprivation of liberties fundamental to American citizenship. This deprivation is premised on unqualified predictions of future behavior by judges and prosecutors. More often than not, these predictions are premised on the accused person's prior criminal activity. In other words, a citizen having been convicted of and having served a sentence for prior criminal conduct, and having then been accused of subsequent criminal conduct, is de facto found guilty of the subsequent offense because, to use the proposed resolution's language, the proof is evident or presumption is great. Further, he or she is predicted to be inclined to commit still more crime. This raises several problems to NJAC:

1. The standard of proof in criminal cases is "beyond a reasonable doubt". Thus, the imposition of pretrial detention based on standards of evident proof or, even worse, on a great presumption, constitutes a diminution of the required proof for persons with prior criminal records. This raises serious equal protection questions which must be considered by the Legislature.

2. While NJAC has the utmost respect for the State's judiciary and prosecuting bar, we are dubious as to the predictive powers of these judges and lawyers, and cannot support the sanctioning by law of these quasi-psychic abilities, absent some firm basis for this action.

3. NJAC is not convinced of the need for pretrial detention. There is, we concede, a common perception that many crimes are committed by people free on bail pending trial. We further understand that responsible legislators must respond to the perceptions of their constituents. However, we suggest that prior to embarking on the course of action proposed by this resolution, the Administrative Office of the Courts or another appropriate body should make public, at the request of the Legislature, data documenting the actual amount of crime committed by persons on bail, thereby establishing in fact the need for this extreme action.

4. NJAC shares this Committee's concern with the crisis of overcrowding in our prisons and jails. There are already many people in our jails solely because their financial circumstances preclude them from meeting their bail requirements, even though they have not been found guilty of any crime. One prediction that I do feel comfortable with is that pretrial detention will exacerbate the overcrowding crisis unless concrete steps to relieve that problem are taken. NJAC has long advocated the implementation, where appropriate, of responsible alternatives to incarceration, and continues to do so. We further call upon the Legislature to review the criminal code, which fuels our overcrowding crisis with its inflexible sentencing scheme.

5. It is unclear whether pretrial detention will be limited to capital offenses or not. If not, we are concerned as to the harm that pretrial detention will be used to protect against. Will its imposition be limited to threatened physical harm, or will pecuniary harm be included? Must the threat be overt, or can it be implied from prior conduct or other speculative facts? Will an individual arrested for a non-violent

property offense, but who has prior convictions for violent offenses, be considered so dangerous as to warrant pretrial detention?

6. The requiring of a bail hearing, while a laudable procedural protection, itself raises a broad spectrum of issues. What standard of proof will apply at such hearing? Will specific findings of fact be required as the basis for pretrial detention? Will heresay evidence, or other evidence inadmissible at trial be admissible at a bail hearing? Will there be a limitation put on the length of time that one can be detained prior to trial? And if there is, then given the complications involved in preparing a defense where the defendant is detained, will such a defendant be required to go to trial prematurely?

Assuming that it is shown that there is much crime committed by persons on bail, I suggest the following for your consideration:

A. The implementation of a system which sets bail in relation to the financial circumstances of the accused, coupled with an inquiry into the source of the posted surety. A $200 bail requirement might be relatively insignificant to many of us here, but to a poor person, that is quite a significant amount of money to come up with at one time, particularly if there is an inquiry for the purpose of assuring that the source of the money does not negate its effectiveness as a surety. In other words, does the money in fact establish some financial or other liability if the accused does not appear for trial?

B. The focusing of specific resources on monitoring pretrial releasees in order to prevent violations of pretrial release conditions should be considered. The legitimate factors which determine whether or not an accused person is a threat to the public safety occur after the initial pretrial release -- that is, commission of a criminal act, or violation of release conditions. This suggestion would establish an accountability factor without eradicating the presumption of innocence that is

fundamental to our system of criminal justice, and without denying due process to the accused.

The New Jersey Association on Correction shares this Committee's determination to protect the public safety. At the same time, we recognize that our criminal justice system is built on a balancing of the rights of the accused and the interests of the society at large. This balance is the foundation for society's confidence in the criminal justice system, and it must be preserved. I am not suggesting that no form of pretrial detention can exist compatably with this balance of interest. The Legislature's response to many of the issues I have raised here today will determine that, and will determine the New Jersey Association on Correction's position on any specific pretrial detention system that may ultimately be proposed by you for New Jersey.

We are prepared to work with you in this most sensitive and difficult task. Thank you for the opportunity to appear before you.

ASSEMBLYMAN HERMAN: Thank you very much. I would just like to ask you one question. What is your position as to whether this Constitutional Amendment is needed or not? Could we have a system of pretrial detention without a constitutional amendment?

MR. QUINN: My reading of the Constitution is that you could not have one without a constitutional amendment.

ASSEMBLYMAN HERMAN: Thank you very much. I note that our next speaker is a representative of the Attorney General's Office. In due respect to the Attorney General's Office and pursuant to a request made by Mr. Thompson, we will hold the record open for one week, provided, however, that all testimony not taken here today that is to be submitted in support of this record, must be in the hands of the Committee Staff, Brad Brewster, on or before Tuesday, July 6th, the next working day. If it is not received by him -- I don't care whether it is in the mail or whereever it is -- by the end

of the working day, it will be presumed as not part of the record. We will leave it open for that.

I believe Mr. Thompson has one question of Mr. Quinn.

ASSEMBLYMAN THOMPSON: I have a couple of questions. You stated that this would implement a system which sets bail in telation to the financial circumstances of the accused. I wanted to ask you this: Would you be in favor of eliminating the bail process altogether, except in certain cases? In other words, historically, the bail process has been to the disadvantage of people without money or people with less means. In other words, it seems that the prosecutor, the judge, the police, the bondsman, the surety company, and the court personnel are all involved in taking money away from a person who could least afford it. I was wondering whether or not you would be in favor of a limited bail system in New Jersey? The question with bail concerns whether or not the defendant will come back on the due date to court. The majority of them come back. It seems like a lot of money is going into another system and never comes back to him or the community that he represents. What is your feeling on that?

MR. QUINN: My Board hasn't addressed that question, so I can't speak for them. Personally, my feeling is that there should be some reform of bail. Bail has, in fact, been used in New Jersey, and nationally, in a manner that discriminates against people because of their financial circumstances. There should be some effort put forth to identify other mechanisms besides money sureties for guaranteeing a person's appearance at trial.

ASSEMBLYMAN THOMPSON: I have one more question. It seems like, when you are dealing with the merits of a pretrial detention, there is a possibility that you could have two trials. In other words, if you have a hearing and you say, "What standard of proof are we using? Will hearsay evidence be admissible?" -- do you think that it brings up a constitutional issue of due process? In other words, if a judge-- It is like a probable cause hearing, but different in this type of thing, dealing with pretrial detention.

ASSEMBLYMAN HERMAN: Is the question, "Does the standard of proof have to be the same for this hearing as well as a full hearing?"

MR. QUINN: I think if the standard of proof is not the same, then you come perilously close to having two trials on the same matter, with different sets of proof. Unless there is some way to totally insulate or isolate jurists, they will be aware of what happened the first time. So, I think it creates a prejudice against the defendant before the trial even begins.

ASSEMBLYMAN THOMPSON: So, if a person is held and is bail or release, that creates a presumption that he is guilty, because the judge held him for trial.

MR. QUINN: Exactly. If evidence that is inadmissible at trial is admissible at the bail hearing, then the effect of that evidence will be transferred.

ASSEMBLYMAN HERMAN: Thank you very much, Mr. Quinn. As I said, we will keep the record open for the Attorney General. Anyone else who wishes to submit testimony must do so by July 6th. I would like, at this time, to call on Mr. Jeffrey Fogel.

J E F F R E Y E. F O G E L: Good morning, members of the Committee. My name is Jeffrey Fogel. I am the Executive Director of the American Civil Liberties Union of New Jersey. I have presented the Committee with the two page memoranda on our position on the provision before the Committee.

ASSEMBLYMAN HERMAN: If you could just wait one moment, sir, while we distribute them. I will instruct the stenographer to make the memorandum an addendum to the transcript.

MR. FOGEL: I don't want to repeat what I have put in writing, nor do I wish to repeat the excellent comments of Mr. Quinn, an able advocate for a number of the positions which I would otherwise assert. I do want to mention to the Committee the grave concern with which we hold this bill before the Committee, before the Legislature, and before the people of New Jersey.

We hold this as a grave matter for several reasons: One is, some of the matters about which Mr. Quinn spoke, having to do with presumptions of innocence in our criminal justice system, balances between the rights of accused, and the needs of society to protect itself against those who would commit violent acts. At the same time, we consider this a grave matter because of the process by which this matter has been presented to the Committee, and the process by which we fear that it may be presented to voters.

Some of the questions that Mr. Quinn raised, I explored. On developing the memorandum, I contacted a number of people in order to determine the extent of this problem, if there is such a problem in the State of New Jersey. I assume, by the introduction of this bill, and by the comments of the Governor, that there was a problem in New Jersey with respect to persons not appearing for trial and further, that there was a problem in New Jersey with respect to persons committing crimes while on bail or other forms of surety. So, the first place we contacted was the Administrative Office of the Courts. We asked them what the statistics were for the number of persons in New Jersey who were not in fact appearing for trial. I was told that there are no statistics being kept by the Administrative Office of the Courts. I then asked them if they had statistics on the number of persons committing crime while on bail in New Jersey, and was informed that they were not keeping those statistics either. It was recommended to me that I contact court administrators at the county level to see whether they were keeping such statistics.

I pursued that question with four county court administrators and determined that no such statistics are being kept at the county level either. This, of course, is not to say that such statistics could not be kept, because they could be. This is an area where if there was a concern and if there was a direction from either the Legislature, the Governor, or the Administrative Office of the Courts, such statistics could be

gathered, and within a short period of time -- six months to a year -- we could determine the nature and extent of any such problem.

The point is there is a bill before this Committee which will ultimately seek to amend a provision in the New Jersey Constitution, inaugurated in 1844, to provide certain rights for the people of New Jersey, without any statistical basis, without any empirical data, and without any experience to indicate that there is any such problem before the citizens of New Jersey. It is a grave situation when the Legislature will propose on its own, or to the citizens of New Jersey, that a provision of our Constitution, particularly one dealing with fundamental rights and liberties, be amended without any basis on which to tell the citizens of New Jersey that a problem exists. Frankly, in some respects, I find it appauling that we would amend such an important provision in the Constitution without any empirical data, research, study, or experience, to indicate that any change, whatsoever, was needed.

There are some statistics which are available on a nationwide basis, some of which I have presented in my memorandum. One such study, which was performed under the jurisdiction of the United States Justice Department, found that 87% of all released defendants appeared for every required court date, and that those who, for the most part, had missed the court appearance did not do so intentionally, and that the actual rate of those persons who are not appearing for trial, was somewhere in the area of 2% of all released defendants. Is that the kind of significant problem which warrants the amendment of a constitutional provision, extent in New Jersey for 140 years, that has provided benefits and protections for the liberties of our citizens? I suggest it is not.

More importantly, although the statistics are not readily available on the question of those who are convicted of crimes while on bail or other forms of release, what is available, in terms of statistics is, that there is no

accepted methodology for determining -- this is a point that Mr. Quinn made -- who, among that group of people, might commit crimes either by virtue of their past criminal record, by virtue of their community ties, by virtue of their employment records, by virtue of their income, or, any other factor. So, we will be providing -- if this passes -- a provision which will allow judges to deny bail without any basis on which those judges can determine which of the tiny miniscule percentage of those people may not show up for trial, or the miniscule percentage of those who are released on bail might commit a crime. He has no basis on which to determine who, of the 2% will not appear for trial, or who, of the 2%, will commit a crime while on bail.

We are providing an opportunity for judges to, helter-skelter, make determinations which are going to have grave effects not only on the individual person who is held prior to trial, but in the criminal justice system itself. We are doing so because the statistics are very readily available. They are accurate. And, they have been cited by our Supreme Court. They have indicated that those who are in jail awaiting trial, convicted of no offense, are considerably more likely to be convicted after trial, and those who are in jail having been convicted of no offense and are kept in pretrial detention, are likely to receive jail sentences two to three times longer than those who are not held pretrial. The likelihood, unfortunately, is that this provision will apply once again to those who are the poorest and have the least resources to protect themselves in the criminal justice system.

One of the reasons why criminal defendants are held in jail prior to trial and have higher conviction rates -- One of the reasons they have higher jail sentences is that the overwhelming majority of them come from poverty and minority communities; the overwhelming number of whom are represented by an already burdened public defender's office who lacks the resources to make the kind of investigation necessary in

criminal areas. Too often the defendants are called upon to provide the investigative resources for the public defender's office that the public defender's office should have available to itself. I know this as a criminal defense lawyer; I know it as somebody who has worked as a pool attorney for the Public Defender's Office. And, I am fully familiar with the kinds of resources available to that office, and of the kinds of resources needed by a criminal defense attorney; and of the fact that most of us were calling on our clients to provide their necessary investigative work, to provide the names of witnesses, to provide the names of alibi witnesses, witnesses to the offense of the crime, character witnesses, and other forms of investigation. Too often this falls on the defendant. Because it falls on the defendant, particularly the poor defendant, if that defendant is incarcerated prior to trial, that defendant has less of a chance than any other defendant, to provide himself with the kind of defense that is called for under our Constitution and that of the United States.

Secondly, I think it is a matter of danger to the citizens of New Jersey. It is a matter of a dangerous precident that we would amend a provision in our Constitution -- once again, not something that was passed five years ago, or 10 years ago, or 50 years ago, or even 100 years ago, but rather 140 years ago. We will do so in what may be characterized by the public as the whim of certain politicians who feel that this is a way to demonstrate to the public that we are getting tough on crime.

The answer is, there is no way to determine who is committing these offenses if any are being committed. We don't have those statistics; therefore, we can well be assured that this will have no impact on crime whatsoever. The impact it will have is on those kept in jail prior to trial, and on setting a precident that we will amend an important protection for individual rights and liberties in our Constitution without sufficient study, without empirical data, research, or experience,

and that we are creating a problem where none exists, and we are amending a Constitution to deal with that non-existent problem.

ASSEMBLYMAN HERMAN: Let me ask a couple questions, if I may. The study that you note, the U.S. Justice Department's National Institute of Justice Study, when did that take place?

MR. FOGEL: I believe it was published in 1980. I can make that available to the Committee.

ASSEMBLYMAN HERMAN: I would appreciate if you would do that. Does that study delineate who the 2% is?

MR. FOGEL: No. Do you mean by breaking down factors? I don't believe so. But again, I would have to look at that, and I will make it available to the Committee.

ASSEMBLYMAN HERMAN: Your impression regarding whether or not this Legislature actually needs a constitutional amendment to establish pre-detention legislation--?

MR. FOGEL: Absolutely. The Constitution could not be clearer in that respect.

ASSEMBLYMAN HERMAN: I would like to point out that the reason I asked you and the prior witness that question is, it was the position of the Public Defender's Office, at an earlier consideration of this matter, that the Constitution already provided the framework for allowing the legislature to pass a pre-detention statute. You would disagree with that?

MR. FOGEL: I would. My concern is, and I think what I have expressed here is, unfortunately, too often -- and I don't say this as --

ASSEMBLYMAN HERMAN: I am not asking you for philosophy, I am just asking you for your impression of whether you would be in favor of or against the position. You would agree that if it is done, it has to be done by constitution?

MR. FOGEL: If it is to be done correctly, it would have to be done by constitution. Judges do it now in isolated instances. If a poor person is held on $200,000 bail, that, in effect is preventive detention.

ASSEMBLYMAN HERMAN: I'm glad you raised the last question of $200,000 bail, because that leads me to my next question. As you know, Assemblyman Shusted and I come from the southern portion of the State. Recently, there has been an alleged shooting of a State Trooper by a person reported to be a member of a major gang who has posted $135,000 cash bail. When it came to the day of the plea, he did not appear. If we are talking about public perceptions and public concerns for safety, how do you -- and talking about keeping the "poor" in jail -- respond to the public's obvious outcry in matters such as this, and how do we address -- even if it is a small percentage of the cases -- this legitimate public concern?

MR. FOGEL: I don't doubt that it will be a concern. I would have to say, very frankly, there is no way to guarantee that every defendant will appear at every court proceeding, unless we lock every defendant up prior to trial and we do not let them out until the proceedings are completed. I am not sufficiently familiar with this individual instance, although I have read about it, to know whether or not the judge had before him or her the information necessary to determine the appropriate way in which this defendant could have been released. The questions of release of defendant are not solely questions of monetary considerations. A person can be released to the custody of a responsible person in the community, be it a clergyman, or a clergywoman, or somebody from an educational setting, and so on. If there were evidence, for example, that the gentleman in question were very rich, perhaps $130,000 was not much of a surety for that person to play. We certainly know that Robert Vesko, when he was charged with certain offenses, was in a position to put up more money then would be required by the state, and Mr. Vesko, to a lesser outcry, has yet to be available in New Jersey or elsewhere.

ASSEMBLYMAN HERMAN: Let's stop there just for a moment. How does the State legitimately respond in those situations involving alleged grave offenses against the State

in which the issue of money, regardless of what the sum may be, is not an appropriate admonishment, or whatever you want to call it, in order to compel attendance?

MR. FOGEL: For example, I know in Essex County, where I practice law, there were provisions at that time, where the judge required a defendant to call the bail project every day. If there was any indication on any individual day that the defendant was not available, an attempt was made to locate the defendant personally, so that the matter could be nipped in the bud long before it came to the question of a failure to appear at trial or plea bargaining. Those kinds of things are possible . A defendant could be required, in extreme circumstances, to appear every single day at the Probation Department or at a bail program - such as we had in Essex County - in order to ensure that person's appearance. There are many, many ways by which we can ensure a defendant's appearance at trial without going to the grave step that is suggested in this legislation.

ASSEMBLYMAN HERMAN: I have just one more question. I don't want to argue the issue with you, because this is only a public hearing. I am just trying to elicit your responses. Even though it may be small, can't you envision situations in which -- using this case in the abstract without defaming anyone or impinging on their ability to get a fair trial, if they ever show -- assuming that we have a situation, such as the case with the trooper, in which a person was caught redhanded in the act of shooting the trooper, and is a member of an organized criminal family or organization, and money is not a problem, do you really think that whatever the State does, even if it is a question of trying to have them come on a daily basis, is really going to compel the attendance of that particular individual?

MR. FOGEL: Yes.

ASSEMBLYMAN HERMAN: You really do?

MR. FOGEL: Well, I think if it is a question of appearing--

ASSEMBLYMAN HERMAN: I am asking you for you opinion.

MR. FOGEL: If it is a question of appearing on a daily basis, for example, at the Probation Department, and early on that person does not appear, there would be more than adequate time and resources, given the money that has been put up, to find that person and to bring that person to justice. I have no doubt whatsoever about it.

ASSEMBLYMAN HERMAN: What you are really saying is that in a limited number of cases, when the probablity is that they aren't going to show up, and you have extreme methods of having them appear on a daily basis, you have a greater headstart in catching them?

MR. FOGEL: Assemblyman Herman, let's suggest also that we don't have escapes from our jails as well. We can't make our jails escape proof, we can't make our system escape proof, we can't make our judicial system -- and this is most important -- infallible. To the extent that we could make it infallible, I might be taking a different position before this Committee. But, we are not infallible. We do have a constitution. That constitution has served us well. I don't think we have seen evidence to indicate that it needs to be changed.

ASSEMBLYMAN HERMAN: Let me ask you this: Doesn't that constitution also protect the victim?

MR. FOGEL: Yes, in certain respects.

ASSEMBLYMAN HERMAN: What do you mean in certain respects? In a criminal proceeding, isn't due process of law of equal importance to the victim as it is to the defendant in the process? Doesn't that victim have an equal stake in seeing that there is a fundamentally fair process and ajudication?

MR. FOGEL: The process of the criminal law is one by which it is the public and an individual defendant that are involved. They are not two private litigants. Yes. The victim has a particular interest in the outcome, but the public has a greater interest in the outcome.

ASSEMBLYMAN HERMAN: You and I will both agree that the greater interest the public has in the outcome is making sure that all of the facts are presented, and that the issue is joined in with the victim and the defendant so that justice is served.

MR. FOGEL: To the best extent possible.

ASSEMBLYMAN HERMAN: Okay. In that particular regard, I will raise the question again: Doesn't the public have an equal right, if not a greater right, in making sure that those who are charged with serious crimes appear, and to the extent that they don't, their rights are equally infringed upon, if not more so?

MR. FOGEL: I'm not sure I understand the thrust of the question.

ASSEMBLYMAN HERMAN: I think you understand--

MR. FOGEL: Yes. I understand that the public has an interest in securing the appearance of criminal defendants, particularly in serious matters. I also understand that the public has an interest in securing the individual rights and liberties that have existed in our nation since its inception, and in many instances, the preservation of those rights and liberties will be more important than what happens in one individual case with one individual defendant.

ASSEMBLYMAN HERMAN: What you are really saying is that on balance, if we have to err, if the process has to abrogate, that it is better to do so on the side of individual liberty than on the public's potential right to be secure?

MR. FOGEL: I would not accept the bifurcation of the public's interest - between its interest in individual rights and liberties and its interest in personal secutity. Both are interests that belong to the public. The public's interest in individual rights and liberties may, in fact -- as I have suggested -- be more important than what happens in any individual case.

Secondly, in the instances in which I was a criminal defense lawyer, I can recall three instances where defendants did not appear at trial. In each of those instances, the appearance of those defendants was secured by the State Police and by local police. The cost of securing that was paid for out of the bail money put up, and nothing was lost, ultimately, to the public, as would be lost by the amendment of this Constitution.

ASSEMBLYMAN THOMPSON: I have one question. From your experience, aside from being picked up, without being charged, and held, what is the difference in this legislation and the preventive detention statutes of the Union of South Africa?

MR. FOGEL: I am not familiar, specifically, with the preventive detention statutes in the Union of South Africa.

ASSEMBLYMAN HERMAN: It's a shame, because that was a hell of a leading question.

MR. FOGEL: I take it that to the extent that they provide for detention without a determination of guilt prior to trial, that there is very little distinction, at least theoretically.

ASSEMBLYMAN HERMAN: Thank you very much.

ASSEMBLYMAN KERN: You made reference to empirical data. Did you contact any prosecutors offices?

MR. FOGEL: I contacted the Attorney General's office.

ASSEMBLYMAN KERN: Did you contact any prosecutors?

MR. FOGEL: Individual prosecutors?

ASSEMBLYMAN KERN: Yes.

MR. FOGEL: No. I did not.

ASSEMBLYMAN KERN: I would suggest you might want to do that. I think you find that -- at least in my experience as a county prosecutor -- there were many bail violators.

MR. FOGEL: But, if that is true -- and I couldn't argue with you because I wasn't there -- it would be particularly easy for those statistics to be made available to this Committee. It would seem to me an obligation on the part of the Committee to draw out those statistics.

ASSEMBLYMAN THOMPSON: Let me say this, for the record: I have a bill dealing with defendants. Persons released on bail would commit certain types of crime. What happened was, I was trying to get the same type of statistics in Essex County. The prosecutor's Office became very defensive. What happened was, I wrote a letter to the assignment judge who had individuals out on three or four bails, for all sorts of crimes, who were committing crimes again. What happened was, the judges were running the sentences concurrently. So, when I had this legislation drafted, I went up there and they got very defensive and would not give me the information. They said they didn't have it.

ASSEMBLYMAN HERMAN: Thank you very much.

MR. FOGEL: Thank you.

ASSEMBLYMAN HERMAN: Is there anyone else here that would like to testify, either in support or against ACR-119? (no response) I will note for the public record that there are no other citizens who wish to give testimony this morning. I will repeat that the record will be kept open until July 6 on this matter, at which time it will then be closed officially and request will be made for the typing of the transcript. With that in mind, I will entertain a motion to close the public hearing, subject to the submission of additional documents as of July 6, 1982.

ASSEMBLYMAN THOMPSON: So moved.

ASSEMBLYMAN SHUSTED: I second it.

ASSEMBLYMAN HERMAN: Roll call.

(Mr. Brewster calls roll)

Assemblyman Thompson - yes.

Assemblyman Kern - yes.

Assemblyman Shusted - yes.
Assemblyman Herman - yes.
MR. BREWSTER: All yes.

(Hearing Concluded)

Addendum

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY
38 WALNUT STREET
NEWARK, NEW JERSEY 07102
(201) 642-2084

LEGISLATIVE MEMORANDUM

TO: New Jersey State Legislature
FROM: Jeffrey E. Fogel, Executive Director
RE: A.C.R. 119- Proposed amendment of Article I, paragraph 11 of the New Jersey State Constitution

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THIS BILL IS DISAPPROVED

The right to bail, except on capital cases, has been guaranteed by the New Jersey Constitution since 1844. A.C.R. 119 would place on the November ballot a proposition to amend that provision to deny bail in any case where release will not reasonably assure appearance or for the "protection of other persons".

The ACLU opposes all forms of preventive detention and the application of conditions of bail unrelated to securing the appearance of the defendant at trial or adversely affecting persons because of their race or economic status.

This position is grounded in the fact that persons awaiting trial have been convicted of no offense and should not (except in the most extreme circumstances) be subject to restrictions on their liberty and may not be subject to punishment.

The grave conditions and overcrowding in our county jails demonstrates that proposition. Those conditions have led to rulings from both our federal and state courts that pretrial detainees are presently being subjected to punishment in violation of due process. Moreover, it is well established that an accused who has been detained for the period before trial is more likely to be convicted than an accused who has been free on bail or other conditions of release. Also, as our Supreme Court has noted, pretrial detainees are two to three times more likely to receive prison sentences than those released on bail. State v. Johnson, 61 N.J. 351,361 n.6(1972).

Release on personal recognizance should be the normal and usual method for the release of all persons accused of crime. When additional assurances of appearance is deemed necessary, acceptable alternatives, such as release in the custody of a supervisory person, organization, or probation officer, bail bond, or restrictions on travel or abode may be utilized.

Under present case law, a judge takes into consideration a number of factors in determining the amount of bail to set to secure the presence of an accused at trial proceedings: the prior record of the defendant, the seriousness of the charge, the defendant's record on bail, if any, his/her reputation and mental condition, the length of defendant's residence in the community, family ties and relationships, employment status and financial condition, the identity of responsible members of the community who would vouch for the defendant, and any other factors indicating the defendant's mode of life or ties to the community or bearing on the risk of failure to appear.

One of the underlying assumptions of the proposed constitutional amendment is that flight after release on bail is a serious problem. A recently released study, by the Lazar Institute, funded by the U.S. Justice Department's National Institute of Justice, found that eighty-seven percent (87%) of all released defendants appeared for every required court date. Many defendants who missed a court appearance did not do so intentionally and the actual "fugitive" rate was found to be two percent (2%) of all released defendants.

The amendment also attempts to address the problem of persons who commit a crime while on bail. The Lazar Institute study found that there is simply no way to accurately identify such defendants.

The ACLU of New Jersey opposes A.C.R. 119 on the grounds that it interferes with long held constitutional rights including the presumption of innocence and does not address or relieve any substantiated abuse or problem with the present bail system. Instead of tampering with a constitutional right secured for the past one hundred and thirty eight years the legislature should be dealing with the very real abuses which do infect the practical operation of our bail system. Too often high bail is used not as a means of securing the defendant's appearance at trial but rather for "preventive" detention purposes. Most importantly, our bail system has for too long discriminated against poor persons and those of lower economic status contrary to basic principles of equal protection of the laws. Bail reform measures should be directed at these abuses of constitutional protections rather than non existent or inflated claims of flaws in the system.