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

before

SENATE JUDICIARY COMMITTEE

on

SCR-146

(PRETRIAL DETENTION)

Held:
May 19, 1983
Room 348
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator John F. Russo, Chairman
Senator John A. Lynch
Senator Edward T. O'Connor, Jr.
Senator Carmen A. Orechio
Senator Raymond J. Zane
Senator John H. Dorsey
Senator John P. Gallagher
Senator William L. Gormley

ALSO PRESENT:

John J. Tumulty, Team Supervisor
Office of Legislative Services
Aide, Senate Judiciary Committee

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I N D E X

mjz: 1-52

SENATE CONCURRENT RESOLUTION No. 146

STATE OF NEW JERSEY

INTRODUCED JANUARY 11, 1983

By Senator GRAVES

Referred to Committee on Judiciary

A CONCURRENT RESOLUTION proposing to amend Article I, paragraph 11 of the Constitution of the State of New Jersey.

BE IT RESOLVED *by the Senate of the State of New Jersey (the General Assembly concurring):*

1. The following proposed amendment to the Constitution of the State of New Jersey is hereby agreed to:

PROPOSED AMENDMENT

Amend Article I, paragraph 11 to read as follows:

11. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except [for] *as may be provided by enactment of law in* capital offenses when the proof is evident or presumption great, *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.*

Any law providing for the denial of bail shall require a hearing at which time the defendant shall be given the opportunity to be heard.

2. When this proposed amendment to the Constitution is finally agreed to, pursuant to Article IX, paragraph 1 of the Constitution, it shall be submitted to the people at the next general election occurring more than three months after such final agreement and shall be published at least once in at least one newspaper of each county designated by the President of the Senate and the Speaker of the General Assembly and the Secretary of State, not less than three months prior to said general election.

3. This proposed amendment to the Constitution shall be submitted to the people at said election in the following manner and form:

There shall be printed on each official ballot to be used at such general election, the following:

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.
Matter printed in italics *thus* is new matter.

a. In every municipality in which voting machines are not used, a legend which shall immediately precede the question, as follows: If you favor the proposition printed below make a cross (×), plus (+), or check (√) in the square opposite the word "Yes." If you are opposed thereto make a cross (×), plus (+), or check (√) in the square opposite the word "No."

	Yes.	DENYING RELEASE ON BAIL TO PERSONS IN CERTAIN CIRCUMSTANCES Shall the amendment to Article I, paragraph 11 of the Constitution providing that bail may be denied, after a hearing, in capital offenses, or to assure appearance of the defendant, or for the protection of other persons as provided by enactment of law be approved?
	No.	INTERPRETIVE STATEMENT This constitutional amendment would permit by enactment of law that a court could deny bail, after a hearing, in capital offenses, or for the protection of others, or where release of the defendant would not reasonably assure his appearance as required.

STATEMENT

Article 8 of the federal constitution provides that "excessive bail shall not be required." The federal courts have interpreted this provision to allow for preventive detention; however, this body of law has been developed by case law and not statute. Even though the federal constitution has been interpreted to allow pretrial detention, article I, paragraph 11 of the New Jersey Constitution provides that "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses." Therefore, except for capital offenses where the prosecutor can show that imposition of the death penalty is likely, all offenses are bailable.

This proposed constitutional amendment would 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. This will enable the Legislature to develop a pretrial detention system similar to the federal system. In conjunction with due process standards, this proposed constitutional amendment would require that any such law provide a hearing at which the defendant has had opportunity to be heard.

SENATOR JOHN F. RUSSO, CHAIRMAN: Good morning. We have some seventh and eighth graders from Haddon Heights here, and I want to welcome you and all others to this Judiciary Committee hearing. I'll take just a few minutes to explain to you youngsters what we are doing.

The Judiciary Committee is a Senate Committee that considers bills dealing with law enforcement, nominations of the Governor, and so forth, and we first discuss them and consider them here. If we release them favorably, they go then to the floor of the Senate for a vote. If they are passed there, then it starts all over again in the Assembly, and their Judiciary Committee and the Assembly vote. Then they go to the Governor for his signature.

What we are doing today is, we're having a public hearing on a Constitutional amendment. The New Jersey Constitution says that when you commit a crime, other than in a death penalty case, you are entitled to bail. There is a proposal before us that would allow the Constitution to be amended so that in certain instances bail could be denied one who is considered a threat to the community, or some such thing.

We are going to hear from witnesses today on whether that is a good or a bad Constitutional amendment. If it passes this Committee and goes to the floor of the Senate for a vote and passes, and then in the Assembly the same thing, then it goes on the ballot. The public has to vote on any amendment to the Constitution. If they pass such an amendment, the Constitution is considered amended, and we go from there.

So, that is basically the purpose of this morning's hearing. This afternoon we will be discussing a number of different bills on different subjects, but this morning we are limiting ourselves to this Constitutional amendment.

Now, the bill in question, and I'm speaking to the audience in general, is SCR-146. Is Senator Graves coming?

MR. TUMULTY: Yes, he is coming.

SENATOR RUSSO: He is coming, okay. We have a list of witnesses starting with Senator Graves, who is not here yet, so we will go on to George Schneider, the Essex County Prosecutor. I understand Michael D'Alessio of the New Jersey State Bar Association is with you on this. Is that it?

MR. SCHNEIDER: Yes.

SENATOR RUSSO: George, you are not here as a prosecutor; you're here as a representative of the bar, or are you here as a prosecutor?

MR. SCHNEIDER: I'm here as both. I want you to be aware of the problems the bill would present to the criminal justice system in the Essex County Prosecutor's Office.

SENATOR RUSSO: Okay. Oh, I'm sorry; I forgot one other thing, the members of the Committee. I am Senator John Russo, Chairman. To my far left in the blue suit is Senator Edward O'Connor of Hudson County. To his right is Senator Raymond Zane of Gloucester County and that area. To my right is John Tumulty, our Staff Aide; to his right is Senator John Dorsey of Morris County and that area. Sitting all alone is Senator William Gormley of Atlantic County. Mr. Prosecutor, please go ahead.

G E O R G E S C H N E I D E R: I'm here both as a member of the Criminal Law Committee of the State Bar Association and also as the Essex County Prosecutor. Most of you, I'm sure, are familiar with the volume of criminal cases in Essex County. We probably have two or three times as much criminal activity in the way of complaints and indictments as any other county in the State. We expect to have in excess of 25,000 indictable criminal complaints come through our system this year. The last couple of years we have averaged over 200 murders, almost 3,000 aggravated robbery-type crimes and almost 1,000 aggravated sexual assault cases. I mention these because these are the

type cases that are referred to in the preventive detention bill, as it is being referred to.

I feel as the Essex County Prosecutor that the bill is unnecessary. It does not cure a problem which is of any significance in Essex County. It creates, I believe, more problems to the system than it cures. Let me start out by saying that if we have preventive detention-type situations, there is no place to put these people that we intend to preventively detain anyway, because the chaos in our prison system in Essex County and throughout the State is an extreme problem. I see it everyday in Essex County, where the people on the street who may be inclined to commit criminal offenses, know the prison situation is such that, if they do get caught, it is unlikely that they will do any time. A custodial sentence, in my experience, is really the only solid deterrent to anyone who commits a violent crime. The fact that we do not have any place to put them is something which I'm sure everybody who testifies here will address, but I want to address briefly the problem it causes to our office.

As I stated, we will have approximately 25,000 indictable criminal complaints coming into our system -- the Essex County Prosecutor's Office -- through the year. A great number of these, say, at least 5,000 to 7,000, will be the type of offenses, murders, armed robberies, sexual assaults, arsons, and so forth, that would fall within the present bill. Presently, we have a bail system in our office and in the courts of Essex County which I believe works. On occasion you will have someone who gets out on bail who repeats the crime, but it is not such a serious problem that we need to go to the effort of drafting a Constitutional amendment and/or any legislation which would prevent people from making bail.

What it does for our office is create a tremendous amount of additional work. Obviously, in these days of tight budgets, we cannot afford to hire any more personnel, nor have the present personnel work any harder than they already are. We have in the office now eighty assistant prosecutors, which is a tremendous amount, but we do that type of work in volume and quality and quantity. What this bill would require us to do then, is in all cases where preventive detention would apply, we would have to have -- I would see a special section, maybe a bail section comprised of two or three assistant prosecutors, and maybe four or six investigators, who would have to prepare the written notice under oath to the defendant that we intend to apply for preventive detention and, also, we would have what we call a mini trial, similar to the present probable cause hearings. Our Supreme Court has ruled that probable cause hearings are really not an integral part of the system, and they have really discouraged the use of probable cause in the interest of moving cases more quickly, and in the interest of making the Speedy Trial Program a success.

Any hearing that is provided for in this bill would require us to present evidence about the case. It would also require us to gather and prepare, and provide to the defendant, discovery materials way ahead of the normal time when they would be ordinarily provided. Ordinarily, they are provided at the time of indictment. Many of these cases may never reach the indictment stage, so you would be doing unnecessary work also. A good 40% of the cases where criminal complaints and indictable offenses are filed never reach the indictment stage. They are weeded out in the screening process before that, so you would have all this unnecessary work within seventy-two hours of arrest. You say, "Well then, why doesn't the prosecutor just not ask for preventive detention?" Well, if we are going to just avoid the bill, why have it? If we are not going to use it, why even have it? If we do have it, and if we decide that we are not going to use it, that we are not going to take advantage of the preventive detention rights that we may have, then

what we will be doing is, we will be setting bails which we figure will be high enough to secure the presence of the defendant at all stages of the proceedings. When you weigh the seriousness of the offense, and his record, and so forth, you decide that this man, or woman, would need a bail of, say, $10,000, or $20,000, or $50,000, in order for us to safely say that he is going to hang around, that he is not going to flee the jurisdiction based on what he has to lose and what he has to gain. So, when we set these bails and they cannot be made by the defendants, then I would predict that a defendant would then argue that, "Listen, this is, in effect, preventive detention. There is a preventive detention procedure here, and by setting this $10,000 bail on me, you are avoiding the statute and are just detaining me unfairly by reason of setting a high bail." That type argument, in most cases, would not have merit. However, what it would do is, it would then stimulate further judicial proceedings. That is, he would then file motions, and argue that this is, in effect, preventive detention, and now let's have a hearing. What it does, if I'm making myself clear, is create a lot of work unnecessarily for the prosecutor's office, the public defender's office, the courts, and for any other private counsel, where there is not a problem, as I see it, in Essex County that warrants such a drastic measure.

SENATOR RUSSO: George, as I understand your testimony, if we have someone who is a danger to society, we should not have the right to detain him simply because it is going to put more of a work load on the Essex County Prosecutor's Office, or any other office? Is that a reason not to pass this bill?

MR. SCHNEIDER: Well, aside from the Constitutional issue, and aside from the practical issue of the overcrowding in the jails, it is not necessary. If a person is such a dangerous person, and we can just show, as we do now, that because of his criminal background and his lack of any real roots in a community -- no job, no family -- that he is just a hardened criminal who is preying on our community, what we will do then is, we'll argue, as we have for years, that this man, if he is given a bail of anything less than $30,000 or $50,000, is not going to hang around. So we, in effect, are setting a bail which is reasonable under all the circumstances, and we do not have to go through all these kinds of hearings and set up testimony and discovery, and so forth.

SENATOR GORMLEY: Mr. Chairman?

SENATOR RUSSO: Bill, bear with me for just a minute, and let me finish. You see, with all due respect, I happen to-- So there is no mistake about it, I'll try to conduct the hearing without reflecting my personal viewpoint, but I have to totally agree with you, but for none of those reasons.

MR. SCHNEIDER: I said when I started that everybody is going to have their own reasons. They are mine.

SENATOR RUSSO: I was waiting for, and looking for you to say there were some. But, this bill, in itself, is dangerous to our society. Let me say why I think it is, and see what your comments are as a prosecutor. I fully recognize that the bill is a very popular bill, and that the position you and I are taking--

MR. SCHNEIDER: Philosophically it's popular, sure it is

SENATOR RUSSO: Oh no, to the public--

MR. SCHNEIDER: We have a serious crime problem, and we are going to keep these people out of circulation -- of course, it's popular.

SENATOR RUSSO: How can you argue that these dangerous people should be on the streets, you know, and so forth? That is the attitude of the public, and of some of my colleagues. But, you know, I guess it was Shakespeare who said, "He who doesn't profit by the lessons of history is

doomed to repeat them." What brings that to mind in this kind of situation is-- This is, and I emphasize it to everyone, my viewpoint alone. You haven't heard from the rest of the Committee; you will, and they may disagree with me. But, you know, under this bill we allow basically two people to decide who is dangerous, the prosecutor and the judge, don't we, under this bill, or under the proposal that was mentioned that would follow this bill?

MR. SCHNEIDER: The judge would make the decision.

SENATOR RUSSO: But, it is the prosecutor first.

MR. SCHNEIDER: The prosecutor doesn't make the decision; the prosecutor applies to invoke the preventive detention. So, he is making a judgment that he is arguing that it is.

SENATOR RUSSO: If the prosecutor doesn't make the application, he has made his decision that, all right, so--

MR. SCHNEIDER: To that extent, that's right.

SENATOR RUSSO: If he has made a decision, that goes before a judge who has to make the final decision. Right?

MR. SCHNEIDER: Right.

SENATOR RUSSO: He has to make a decision as to who is dangerous. Now, look, I recognize that these analogies are almost ludicrous in today's society, but the point is the Constitution has been changed everyday, and it is the way it is because of what has happened in the past, not necessarily because of these instances, but they are an example of what could happen. For example, with this kind of a statute, or this kind of a Constitutional amendment to be implemented in the statute-- In Nazi Germany, it was dangerous for the Jews.

MR. SCHNEIDER: Well, I do not agree with that analogy.

SENATOR RUSSO: All right, you do not have to agree with it. I am just giving you a viewpoint and asking you to comment on it.

MR. SCHNEIDER: Okay, I was just going to give you my opinion. My sitting here in silence does not mean that I agree with what you are saying, Senator, in all due respect.

SENATOR RUSSO: You are going to have a chance to--

MR. SCHNEIDER: I do not think that any analogy of our criminal justice system to Nazi Germany applies.

SENATOR RUSSO: Well, let's go over to Spain.

MR. SCHNEIDER: I think it is overdone.

SENATOR RUSSO: Let's go to Spain during the inquisition. If you were a Protestant, you were dangerous. And, let's go to Baltimore in 1681. If you were a Catholic, you were dangerous. I'm pointing out, George, that my position on this is, who is dangerous is not necessarily determined in the framework of the kind of hearing we would have today, namely, are you a dangerous rapist? Are you a dangerous murderer? If this kind of Constitutional amendment is made, it may be that if some time in the future, if society changes, it would allow those individuals, prosecutors and judges-- As you know, I was a prosecutor, and I do not mean to say that we cannot trust them, but you are allowing human beings to determine who is dangerous.

Now, these people, to sort of get it all out, and we're doing that now--

MR. SCHNEIDER: We're doing that now; we're doing the same thing now.

SENATOR RUSSO: No, you're not.

MR. SCHNEIDER: Sure we are. The prosecutor makes an application to the court for certain bail, what he thinks is appropriate, whether it be no bail or $100,000 bail, and then the judge makes his decision whether or not that is appropriate, or he reduces it. We're doing the same thing.

SENATOR RUSSO: On a motion before an appellate court if the bail is excessive, that could be set aside.

MR. SCHNEIDER: Under this bill, or under the present law.

SENATOR RUSSO: Oh, no; oh, no.

MR. SCHNEIDER: Sure it can.

SENATOR RUSSO: No, no. Under this bill, all you have to prove is that there is sufficient evidence that the person is dangerous. You do not have to prove anything about the bail, because there is no bail. We're not even talking about bail.

MR. SCHNEIDER: My point is that human beings, and I'll go along with human beings over anybody else anyway, are making the decisions under the present law, just as human beings are making the decisions under the proposed legislation.

SENATOR RUSSO: But, under the present law, George, if the defendant can show that bail is excessive-- See, here is the thing I think we have to remember, and you certainly know it. This Constitutional amendment is talking about people who have not been convicted of the crime, and maybe not yet even been indicted, as you pointed out.

MR. SCHNEIDER: They have not been indicted. Go ahead.

SENATOR RUSSO: We are talking about people who in the eyes of the law are innocent, aren't we?

MR. SCHNEIDER: Presumably, yes.

SENATOR RUSSO: That is the presumption of innocence. Therefore, what does "presumably innocent" mean? It means you are innocent. We must assume you are innocent, okay? You have not been convicted of a thing. You have not been convicted of a thing; you have not even been indicted, maybe, and we are allowing the system to say, "You are dangerous, and we are not even going to set bail for you. You are going to go to jail, and you are going to stay there until your trial comes up."

That to me is far different than setting bail, maybe high bail, where the judge agrees with the prosecutor. Now we have an appellate to process whether bail is excessive or not. Under this amendment, you do not get into that at all. You see, the danger is, is there sufficient evidence that he is a danger? I am bothered by the philosophy of it, not the practicalities of it, as you are, namely, prison overcrowding, the work load in the prosecutor's office, and so forth. I am bothered by the philosophy of it, us, in our society, allowing a Constitutional amendment so that we can then say, "You are going to be put in jail. You have not been convicted of a thing, but you are dangerous." That is my viewpoint, and I want to hear your comments on this philosophical opposition to it, as we have heard your comments on the practical aspect of it.

MR. SCHNEIDER: Well, the only people who would be detained under the present law, as I see it, who have not been convicted of anything, would be those who are charged with murder, and those who are charged with some type of crime against the system, meaning a crime against a witness in a criminal activity, under pressure. The majority of people who would fall within this bill would have been convicted of something, because the second section of the statute provides for persons who are charged with a first degree offense, such as -- and they name them -- who have been previously convicted of a first degree offense within the last ten years--

SENATOR RUSSO: George, excuse me; let me interrupt you there. You are referring now to the enabling legislation?

MR. SCHNEIDER: Right.

SENATOR RUSSO: We currently refer to that because it is pending, but if this passes, that doesn't have to be the statute that passes, okay? If this passes, it means that basically we have the right to say someone is

dangerous and, therefore, we are going to keep him in jail. So, we are not limited to that statute at all. That statute is on a separate issue.

MR. SCHNEIDER: Well, I guess then what we do now is, we get down to strictly a philosophical argument.

SENATOR RUSSO: That is what I think.

MR. SCHNEIDER: Because I'm arguing from the point of view that if this Constitutional amendment passes, then there will be certain legislation which will implement what the philosophy of the amendment attempts to carry out. So, I really cannot argue on the Constitutional amendment without knowing what the result is going to be.

SENATOR RUSSO: That is part of the problem.

MR. SCHNEIDER: That's right.

SENATOR RUSSO: And, not only that, but even if the result would be the present statutes that are pending, ten years from now it might be different. Like say, if you had blue eyes, or what have you, to be facetious. You see, the problem is, if the Constitution is amended, it just means the ball game is wide open and you can do whatever you want to in regard to setting standards, because we are not limited to the present statutes. That is why I think the philosophical concern is paramount, because if this is amended, ten years from now, or twenty years from now, any Legislature can have a wide open ball game.

MR. SCHNEIDER: Well, that is why I mainly emphasize the constitutional issues and the philosophical issues, rather than the practical at this stage, but there is going to be some type of legislation and it is going to be similar to, I assume, what's here, because in order to accomplish anything from the Constitutional amendment, you are going to have some type of enabling legislation.

SENATOR RUSSO: There could be a new bill introduced tomorrow, you know, that could go far beyond the present ones that are pending. The point is, that if the Constitution is amended, and the Constitution reads "as amended," now you can fit anything into that you want, as long as it fits into that. Senator Gormley?

SENATOR GORMLEY: Just to keep everything consistent, I disagree with both of you, which will probably be the way it will run today. First of all, on the issue of discretion, I have no problem giving the discretion with regard to ten years from now, blue eyes, and all this, because really, the reason why we are here and why we have a Judiciary Committee, I feel, is because we do make decisions as to whether or not discretion should be given, whether it be mandatory sentencing, or not mandatory sentencing, whether there be a death penalty, or not a death penalty, and on occasion you do have to look at those very tough questions when you are affecting an individual's rights. We affect now the right to life, in effect, with the death penalty. If we are to say there is an exclusion to indictment, or precondition, I think that is going a little too far. I think there is an obligation to the public that at a certain point in time there should be justification for not giving bail. On the other hand, Mr. Prosecutor, in regard to the fact that we can set the bail high enough, I feel that this Constitutional amendment -- and I am not talking about the bill right now -- makes the system more legitimate, because what you are saying, in effect, is "We can set the bail high enough so that they can't get out," but the point is, wouldn't it be more honest to say, "We are just setting it at a level at which we hope they can't make bail." It seems to be a Russian roulette system. That is the way it comes across to me. I think that is what has been done in the past; bail was set high enough so that they couldn't get out. That's good, but suppose they do get out because they do make it.

MR. SCHNEIDER: Bail is not set high enough so they do not get out, because that would probably constitute what is paramount to preventive detention. That is not what is done. What is done is, bail is set at an amount which would discourage or deter anybody from fleeing the jurisdiction, because they would have too much to lose. What you do is, you weigh. This man faces ten years maximum, but he will probably not get ten years because there is no room for him. Maybe he will get a year, or a year and a half to two years. What is the likelihood that he is going to flee to avoid that year sentence? That is the weighing factor, and you say, "Well, $5,000 should hold this guy." That is what you say. You do not say, you know, "Let's set it so he can't get out." You say, "Let's set an amount that is reasonable enough." I mean, you know, we are prosecutors, but we are also aware of the Constitution and of the man's rights.

SENATOR GORMLEY: I understand that, but I can't help but think the reality is that you are looking for an amount, in certain circumstances, where they couldn't get out. I can't believe that there hasn't been a case that you've had, with the volume of cases you have had, where you did not hope the amount was set at such a level that someone did not get back on the street pretrial. I mean, I would. I mean, admittedly you have to abide by the guidelines of the Constitution. I understand that; the Committee understands that. But, there must be certain circumstances where you are hoping the bail is high enough so that the person just can't get out. Now, I know what you have to say for purposes of an appeal -- I know what you have to say. But,there are certain circumstances-- You can search a person's records of his background for the nature of the proof that you already have in hand that you do not want that person on the street, and you want the bail high enough so that that person is not on the street. That is just human nature. Let's forget what would be down for purposes of appeal.

MR. SCHNEIDER: You're right. There is no question that we ask for bail as the prosecutor -- well, I'll speak for myself -- that I ask for bail that would effectively keep this man in custody, but the reason why I want to keep him in custody is, if he gets out he is gone, and the case is over. For instance, we had a case in Essex County a couple of weeks ago, where two of my detectives were shot in a shoot out up in the Arena parking lot. The man had $2 million worth of cocaine. He had had about $8 million worth of cocaine which the other codefendants made off with and got away. We know who they are and where they are, and we'll get them, but they are gone. I asked for a bail of $1 million on this man, because I didn't want him out there because he would have been gone, and we would have lost the whole case.

SENATOR GORMLEY: But, don't you think, and obviously that is--

MR. SCHNEIDER: He had twenty-seven prior arrests.

SENATOR GORMLEY: Fine guy, but don't you think there is a legitimate -- and I am not trying to carry it to extremes -- public concern besides just the fleeing, which is rightfully your concern at this time? But, also the fact that there might be somebody in front of you who might say, "Boy, I really do not want him on the street." I mean, I still--

MR. SCHNEIDER: Yes. I, as private citizen George Schneider, feel that way.

SENATOR GORMLEY: Up front, you do not want that person on the street?

MR. SCHNEIDER: I feel that way, but I as prosecutor cannot feel that way.

SENATOR GORMLEY: But, assume you were given a Constitutional amendment so that you could feel that way and you could do it under the law, don't you think you would exercise that with all due discretion?

MR. SCHNEIDER: As a private citizen, I would like that; as a prosecutor, I think it is unnecessary and ineffective under the present legislation proposed. Now, you put me in a tough position, because I do not know what is going to result from this amendment.

SENATOR GORMLEY: We are not going to make it easy for you, I can tell you that much.

SENATOR RUSSO: Before we get to Senator Dorsey, I think I would like to point out too, incidentally, that when the next prosecutor comes in, because George would never do this, but the guy in front of him, convicted of a relatively minor crime, might be a freeholder who is cutting his budget, say, and we don't want him out on the street.

SENATOR GALLAGHER: We don't want him prosecuted either.

SENATOR RUSSO: Before we go on to Senator Dorsey, let me make one thing clear which I think we can agree on. We are not, in this amendment, talking about murder cases, any murder cases. Correct? Because all murder cases today involve the death penalty, at the discretion of the State in a way under the bill, and, therefore, every murder case is a capital case and, therefore, is nonbailable. Am I correct, George?

SENATOR GORMLEY: Felony murders.

SENATOR RUSSO: Felony murders, Bill? Okay.

MR. SCHNEIDER: All murders are not capital cases either.

SENATOR RUSSO: Well, all murders involving the alleged perpetrator, where you must seek the death penalty in a first degree murder case under the present law.

MR. SCHNEIDER: Yes, death penalty cases.

SENATOR RUSSO: Yes, capital cases.

MR. SCHNEIDER: Right, but not all murders are capital cases.

SENATOR RUSSO: Are not -- correct me on my own bill -- all murder cases where the perpetrator is recording them all capital cases?

MR. SCHNEIDER: No.

SENATOR RUSSO: No, not all? With what exceptions?

MR. TUMULTY: Involving murder cases, even if you are the guy who did it, you may not be subject to the death penalty, unless you did it purposely or knowingly.

SENATOR RUSSO: Well, okay. I should have said "all first degree murder cases." All first degree murder cases--

MR. SCHNEIDER: What used to be called first degree murder cases.

SENATOR RUSSO: Right. Then, are they today nonbailable under the system? Is that correct?

MR. SCHNEIDER: That is the effect of it, yes.

SENATOR RUSSO: Okay. So, the point I am trying to make is, we are not talking about those people under this amendment. We do not need this amendment for them, because they can be denied bail today. We're talking really of the non-first degree murder cases, and then the nice guys like the rapists, the robbers, and so forth. We are not talking about the first degree murderers. I just wanted to get that clear; I wanted it totally clear in my own mind. Senator Dorsey, do you have any questions?

SENATOR DORSEY: No.

SENATOR RUSSO: Senator Gallagher?

SENATOR GALLAGHER: Yes. George, before I ask you a couple of questions on this, that fellow with the twenty-seven arrests--

MR. TUMULTY: That is a pending case.

MR. SCHNEIDER: I know it is a pending case, but these are facts that were brought out at a bail hearing; facts about his prior record were made public at a bail hearing, so I am not revealing any confidential information.

SENATOR GALLAGHER: What was the bail that was set?

MR. SCHNEIDER: A million dollars.

SENATOR RUSSO: He might not have been subjected to being held under this kind of legislation, even though it is pending? He might not be considered a danger to society?

MR. SCHNEIDER: Well, he would have, because under this legislation he had first degree crimes committed within the last ten years for which he was convicted. So, that type of person would be considered a danger to society.

SENATOR GALLAGHER: He would?

MR. SCHNEIDER: Yes.

SENATOR GALLAGHER: Okay. As a prosecutor, not as an individual, have you had any situations where you felt that, for the safety of others, whether they were involved in that particular case or just generally, it would have been better to have this person denied bail?

MR. SCHNEIDER: Yes, I have had situations where I felt that if this defendant were released he would kill or harm witnesses or victims.

SENATOR GALLAGHER: Okay. So, under the present situation, all you can do is try to go for what someone might consider excessive bail?

MR. SCHNEIDER: That's right.

SENATOR GALLAGHER: You can't go for just a straight denial of bail?

MR. SCHNEIDER: That's right.

SENATOR GALLAGHER: So that this amendment, as such, could be opened up, to a degree, maybe not to the degree that the Chairman feels it might be. Hopefully, we are going to continue to have responsible people down here like ourselves, regardless of who is sitting here. It could be opened up to cover some circumstances where individuals, for the protection of others, should not be permitted bail?

MR. SCHNEIDER: I could live with that. If it is such a case that-- It's a rare situation; I mean, if you have 8,000 indictments, then maybe you will have a half a dozen of those 8,000 where they will be threatening victims or witnesses -- maybe twenty -- but I could live with that type of thing if that were in the bill.

SENATOR GALLAGHER: Don't we always say if anything is worth saving, it is one life?

MR. SCHNEIDER: I agree with you 100%, Senator.

SENATOR GALLAGHER: Thank you very much.

SENATOR RUSSO: There is another way to do it, Senator Gallagher. There is another way to do it. Any judge who would make a determination, following a prosecutor's recommendation that a man is going to hurt somebody, or threaten somebody, or so forth, that he is a danger, would also, that same judge, probably go along with the determination that bail should be $1 million, or whatever. And, that is allowed. That is one of the factors they consider, not undersetting bail today, whether or not -- not only whether he will show up, but whether or not he is likely to commit another crime. Isn't that right?

MR. SCHNEIDER: Yes, Senator.

SENATOR RUSSO: So, you see, you might say all we are doing is paying lip service by allowing high bail, but you know the Constitution then is still preserved. We do not allow the danger of maybe you and me being wrong, that the legislators in the future won't be as reasonable and competent as we are -- they might not. So, we take away the danger, and still solve your problem, and the prosecutor keeps that man off the street, in those few instances where he has had that, without tearing the Constitution apart. Senator O'Connor, do you have any questions for the prosecutor?

SENATOR O'CONNOR: Isn't what the amendment seeks to accomplish essentially what the practice is in Federal court now? That is to say, bail can be denied where the defendant is a threat to the community?

MR. SCHNEIDER: I don't know; I am not aware of it. I would say I don't think so; I do not think they can do it either.

SENATOR RUSSO: The Federal Constitution is different than ours. It does not require bail, and ours does. Correct me, Prosecutor.

MR. SCHNEIDER: Obviously, I do not practice in the Federal courts, so I am not familiar with the present status.

SENATOR RUSSO: I think that is correct, Ed. The Federal Constitution has been interpreted traditionally as not requiring bail, and our Constitution does require bail, and that is why this amendment is before us. We have to have a Constitutional amendment.

SENATOR O'CONNOR: Okay.

SENATOR RUSSO: Is that it, Ed?

SENATOR O'CONNOR: Yes.

SENATOR RUSSO: Senator Zane?

SENATOR ZANE: Mr. Prosecutor, let me ask you something. In the course of a given year, how many people may come before you, either George Schneider the individual or George Schneider the prosecutor, who might strike you that you may want to have a tool like this available to you, among the 8,000 indictments you might have, if any at all?

MR. SCHNEIDER: You know, again, it is difficult to answer, because the proposed legislation may be, as Senator Russo said, totally different than what actually happens down the road. I don't know. Under this type of legislation, very few. I think we can accomplish the safety and the assurance of returning to face the music, if you will, by asking for, and the judge using his good judgment and giving a bail sufficient to hold the man, so he doesn't flee. So, I cannot put a number on how many cases where it would help us, because I don't even know what the law is yet, for one reason.

SENATOR ZANE: Isn't it sort of semantics when you have an individual whom you determine should have a high bail-- Well, let me phrase it this way. Some people will commit the same crime, yet for one potential defendant you may well want a much higher bail. Am I right?

MR. SCHNEIDER: That's right.

SENATOR ZANE: Okay. And, your reason for wanting that much higher bail is to be certain that that person is around and is available. Am I correct?

MR. SCHNEIDER: Yes.

SENATOR ZANE: And, therefore, would it not really be your intent, by setting that high bail, to make the bail almost so high within the parameters of the Constitution to prevent a person from being on the street? Isn't that really what you are seeking?

MR. SCHNEIDER: Well, it is to prevent people from fleeing the jurisdiction or, in some cases that may come up, to prevent them from causing harm to those who may testify or cooperate againt them. It is a weighing process. As I said earlier, you have to make a determination of what amount of money is going to deter this person from fleeing the jurisdiction or doing any further antisocial conduct. That is what it amounts to, and there are a lot of things you consider. If you have two people committing the same crime, person "A" maybe has never been convicted before, has a job, has worked for a company for twenty years, has a family, children in school, and so forth. This guy is a reasonably good citizen. He has maybe, you know, a couple of prior arrests for minor things, but he has a lot to lose by fleeing jurisdiction. He has a home; he has a family; he has a job; he has a lot to lose. Another person charged with the exact same type offense has no job,

has no family, has no roots in a community, has no reason to hang around. He is more likely to flee, so you would argue, "This man has no reason to hang around here, judge. We need a high bail to hold him."

SENATOR ZANE: Don't you sometimes, from a practical side, actually say to yourself, "We are going to ask for bail so high he can't get out?" I mean, this is an open public hearing, and I would like to--

MR. SCHNEIDER: That is the same question Senator Gormley asked me, and I have to answer the same way to the exact same question. I feel that way, sure I do. I have that thought enter my mind, "We ought to keep this guy in jail." There is no question about it that I think that way. I thought that way about the guy who shot my two detectives. We can't let him out on the street.

SENATOR ZANE: But, that's you as George Schneider, is that correct? Is that what you're saying?

MR. SCHNEIDER: Yes.

SENATOR ZANE: Why to you feel that that is contrary or inconsistent with your position as prosecutor, with the responsibility that a prosecutor has for the people? Why do you have a problem reconciling that?

MR. SCHNEIDER: Well, it is consistent in that I'm asking for the same thing as "Joe Citizen" as I am as "Joe Prosecutor." I'm asking for the same thing; I'm asking that this man remain in custody, that he not be let out on the street. Joe Citizen doesn't want him out because Joe Citizen is afraid this guy may come and harm him, or his family, or spread this cocaine around his neighborhood, to his children or to his friends. Joe Prosecutor doesn't want him out because he wants to make sure, unquestionably, that this guy pays the price of doing business and, if he can get up $2 million cocaine deals, he is liable to make a million dollars bail, or make a couple hundred thousand dollars bail, so it has to be a million to hold him. We do not want him on the streets again for the same reasons, but we take different paths to get there.

SENATOR RUSSO: Are there any other questions? (negative response) Prosecutor, thank you for coming and, while you are here, let me just add my congratulations to you for the outstanding job you did on the recent homicide case in Essex County.

MR. SCHNEIDER: Thank you.

SENATOR RUSSO: We hope that you will be able to come to the hearing we are having on May 26, where we are going to be talking about the procedural aspects of the death penalty law with the participants, hopefully, from Monmouth and Essex trials, not as to the merits of the law or anything of that sort, but as to how it is working out procedurally in the first few trials. We hope you will be able to come and give us your thoughts on that.

MR. SCHNEIDER: I will make every effort to be there, Senator.

SENATOR RUSSO: Thank you very much.

MR. SCHNEIDER: Thank you, gentlemen.

SENATOR RUSSO: (speaking to visiting students as they are leaving) Have a nice day folks, and thank you for coming down. I hope you enjoyed it. Mr. Michael D'Alessio, New Jersey State Bar Association, Criminal Law Section.

M I C H A E L D' A L E S S I O: The State Bar Association has taken the position that they are against the amendment, and actually we discussed, also at length, the bill. Obviously, the thought crossed our minds that the bill is not carved in stone as being part of what may happen, but it was a rather lengthy bill so we discussed that also. Our feeling was, and we reached a reasonable consensus, that even though the Committee is made up of lots of different kinds of people, public prosecutors, public defenders, and the private bar, basically we do not think that the State needs a preventive

detention bill. And, inherent in that discussion is that there is a great danger attendant to a preventive detention bill, or preventive detention amendments that permit it.

It creates an enormous amount of practical problems, and I think George Schneider covered those in pretty great detail. It creates other problems, and one of the other problems is that it puts a stigma on somebody who is detained. It affects the concept of a presumption of innocence, that is to say the public or potential jurors feel that a man who some judge decided was too dangerous to be released-- That's really what the test was under the act, but there would have to be some serious criteria, obviously.

SENATOR O'CONNOR: May I ask a question here?

MR. D'ALESSIO: Sure.

SENATOR O'CONNOR: How would the jury know that? How would the jury know that a defendant was detained pretrial?

MR. D'ALESSIO: They read the papers. Assuming that tomorrow the man is detained and he is tried in three or four or five months, if the case is serious enough to warrant that kind of coverage, those people who are potential jurors read the newspapers. They may remember.

SENATOR O'CONNOR: Wouldn't it be the responsibility of the trial judge, in the first instance, to make that determination?

MR. D'ALESSIO: That is a hope, but that's all that is.

SENATOR RUSSO: You have the same problem with a lot of other things, not only the indictment--

MR. D'ALESSIO: You have the same problem with a lot of other things.

SENATOR RUSSO: -- you know, or the prosecutor's statements about what the evidence is.

MR. D'ALESSIO: Well, but he can't make statements other than to say what he says the charges are, and everybody knows that an indictment is not proof of guilt, and people most often, although they understand that a charge--

SENATOR RUSSO: Or, the same thing would be "informed sources in the U.S. Attorney's office" or "the prosecutor's office said," and it's all out in the newspapers. That is the same problem.

MR. D'ALESSIO: Well, you are always dealing with the public, sure, but that is different than a judge saying, "This man is dangerous." Remember, the finding is not that we think he might be dangerous, or we feel that there could be a danger, he says, "We find the man is dangerous." That is the finding he estimates. That is a serious problem.

SENATOR RUSSO: See, Mike, Ed is absolutely correct. You know, I have, whether I am right or wrong, difficulty with arguing against this kind of a concept on what I call, you know, these "nitpicking" reasons. I mean, this either has a serious philosophical or conceptual problem, or it doesn't. This business about whether somebody reads it in the newspaper, that's nonsense. That is a thought that is really a silly reason not to pass this Constitutional amendment. I think there are a lot of good reasons not to pass it.

MR. D'ALESSIO: Right.

SENATOR RUSSO: You know, I think that is why--

MR. D'ALESSIO: Yes, but you know you have to think in terms -- as lawyers, we have to think in terms of not only what philosophically one person might feel on a Committee about the bill. I do not speak for the Bar Association when I say personally my feeling is historically, if you give the State that kind of power, you are asking for an abuse. That is a personal feeling. My public feeling is that if that is around and you do not consider practically what the legislation could be, you are being short-sighted.

Let's not amend the Constitution and then two years from now be involved in a terrible debate because somebody says, "Let's make the bill say, if you are dangerous, you can be detained, and let's also add that if you have one prior misdemeanor conviction where someone was threatened, that constitutes dangerousness." You see, you have opened up a Pandora's box for no reason. That is what George's point was -- for no reason. There really isn't any necessity to do this, and that is why the practical has to be intertwined with the philosophical.

I might respond to you, Senator, if I may about the Federal. The Bail Reform Act, which is the Federal Congressional act -- the Bail Reform Act of 1968 or 1969 -- is the present Federal bail act. It is much more liberal than New Jersey's bail. The United States Supreme Court has said that under the eighth amendment there is no right of bail, but the Congress has not taken them up on it yet, and probably will not. The Bail Reform Act does not permit preventive detention in Federal criminal cases. Now, it just so happens that the District of Columbia, as I recall, may have a preventive detention act, and the Supreme Court of the United States has not necessarily said a state cannot deny bail. But, in the Federal courts presently, where I do practice quite a bit, bail must be set. As a matter of fact, the Bail Reform Act, as I said, is far more liberal than our rule. We have a court rule that covers criteria of bail.

SENATOR O'CONNOR: Doesn't the judge have to determine in the Federal system whether or not-- Isn't one of the factors there whether or not you are a threat to the community?

MR. D'ALESSIO: It is one of the possible factors he can consider, but it cannot be the overriding factor, so bail has to be set. But, then you are up against the same problem. The prosecutor says, "Set bail at a million," the defense attorney says, "Release him in his own custody," and the trial judge has to set something reasonable or the appellate courts can review it. It is not as if the prosecutor can say, "We think the man ought to have a million dollar bail," and the judge just nods his head. A judge can say, "I don't think so. You haven't shown me enough. I think that is unreasonable," and he can set it lower. And, the appellate courts will review it.

SENATOR O'CONNOR: Isn't it a practical consideration, also, if bail is set at a high figure based upon the fact that the man may flee the jurisdiction, and under the various practices in different counties, and I am most familiar with Hudson County-- Bail is reviewed, I think, just about every week, and if the man does not make bail, the longer he is in jail the lower the bail becomes. Don't you reach--

MR. D'ALESSIO: It is a practical matter because of overcrowding. That is what happens in most of the counties; there is a review, until you get to a point where a man can't make a bail that everybody pretty much thinks is reasonable. He may not make bail, or she may not make bail, and they may go to trial as a jail case.

SENATOR O'CONNOR: Well, don't you eventually come to the point where the man who is really being detained, not because he might flee the jurisdiction, although that is the reason which is given, but because he might be a threat to the community -- has the bail come down to the point where he may make it and get out? Isn't that going to happen in at least some of the cases?

MR. D'ALESSIO: Certainly, it can happen in some of the cases. In some of the cases, of course, understand the man is innocent, and he is not a threat to the community. By virtue of the charge against him or her, the bail is set high, because certain charges always trigger a reaction in bail. The person is presumed innocent, by the way, we all know that, but that is

not just a little pass word that somebody stuck in the court rules. That is the history of the revolution of this country. The man is presumed to be innocent, and the statistics on the commission of crimes by people on bail just aren't that overwhelming. The public, of course, whenever it does occur, rightfully reacts because the media reacts. But, it isn't that big a problem. We just do not see that as a big problem. We do not see that kind of situation that requires an amendment. I'm talking about an amendment to the Constitution permitting something that historically has never been permitted in this country. With the abuse that it tends to-- It is not a small matter to change the Constitution and say, "Okay, let's challenge our State Legislature to see what kind of legislation they can come up with that is not oppressive, where it does not have the potential for being oppressive," which is really the problem.

SENATOR RUSSO: Senator Zane?

SENATOR ZANE: Through you, Mr. Chairman, haven't a number of other states adopted legislation similar to this, either by Constitutional amendment or whatever their procedures are?

MR. D'ALESSIO: You know, I'm not certain. I do not know if there have been-- I know the District of Columbia had a preventive detention bill.

SENATOR ZANE: Okay. Aren't we also losing sight of the fact that-- We're all setting this up as if the prosecutor goes in and he asks for no bail, and being detained, and a judge makes a decision based upon that recommendation. Aren't we losing sight of the fact that this obviously would be, as Mr. Schneider indicated, a mini trial, but, nevertheless, an advocacy proceeding. I mean, he is going to be represented. You know, arguments are going to be made for the defendant, and don't we have somewhat of an obligation to look to the general public? I don't know how we can separate, and I appreciate the dichotomy that the prosecutor can adopt-- The prosecutor's responsibility, I think, goes beyond trial, and I think, also, he is the highest law enforcement officer in his particular county, and in each county I think he has an obligation to the general public as well. If that strikes him, or an individual's conduct strikes him as being a clear and present danger, or whatever, I think he has that obligation as an individual to come forward with that.

So that I don't get out too far, I have some problems about whether we are putting a wall around, or a fence around this State and other states, from a constitutional standpoint and the rights of the individual. I have some difficulty with that, but--

MR. D'ALESSIO: I do not understand what you mean by that, I'm sorry.

SENATOR ZANE: Well, you know, should this bill be held until next year, 1984? Are we beginning some real "big brother" thing with that? That concerns me philosophically.

MR. D'ALESSIO: It is a serious concern--

SENATOR ZANE: Yes, I understand that.

MR. D'ALESSIO: --because the prosecutor is an advocate. He is on one side of the case. He may feel, and we like to think they all act in good faith-- I have known George for fifteen years, and I have no question about that. But, suppose you have a case where the evidence isn't so great, but the impact in the community is that this man is dangerous, and the prosecutor feels duty bound to say, "Listen, judge, we think the man is dangerous. You shouldn't put him on bail," and the man is innocent. I don't know if the man is innocent or not.

SENATOR ZANE: Yes, but you are suggesting abuses.

MR. D'ALESSIO: The potential for abuse historically is 100% probable.

SENATOR ZANE: The potential for abuse is so replete within our law, prosecutors-- Let me tell you something, or let me ask you this. Maybe I should ask the prosecutor this. Don't you feel that a prosecutor, if he wants an indictment of someone, can get it?

MR. D'ALESSIO: Easy.

SENATOR ZANE: Absolutely. Can't that be an abuse?

MR. D'ALESSIO: It is, potentially.

SENATOR ZANE: So, maybe we should do away with grand jury proceedings.

MR. D'ALESSIO: We should; there is no question about that, but that is a whole other hearing, by the way. You know, you don't need it, because a man like George Schneider doesn't need a grand jury to know who to charge and who not to charge But, aside from that, why should we invite more abuse because we are responding to something that isn't necessarily a problem, because maybe the public isn't educated properly about what is going on in the system. I'll tell you the guy who is educated. When he comes to my office and he is a businessman who has never been in trouble, and he says, "Do you know what that son of a gun cop did to my son last week? He locked him up for a lefthand turn. I want a trial; I want an appeal; I want the best lawyer." I say, "Wait a minute, what's the problem?" Here is a guy who says we need preventive detention, but when his son gets locked up for making a lefthand turn, he understands what a police officer can do if he doesn't like you from the last time he locked you up, for instance.
Fortunately, it doesn't happen often. But, the ordinary citizen doesn't have any contact with bail jumpers, or with what happens with people who can't make bail, or what happens to the presumption of innocence, or what happens to the affect of the trial. They read a newspaper article about a man who is on bail who commits another crime, and they say, "They should have kept that guy in." First of all, there may not even be a determination that he committed the first crime; he is under indictment. He may be innocent.

SENATOR ZANE: I think your suggestion is that this would probably, or possibly -- and this is maybe your concern -- be used frequently, and I view it--

MR. D'ALESSIO: It will be used as a tool of prosecution, undoubtedly.

SENATOR ZANE: Just a second. In light of some of the language that is in it, and in light of the other legislation, Senator Paolella's legislation, whether we consider it or not as the companion to it at this point, I think there are certain safeguards that restrict the use of this -- very restrictively.

MR. D'ALESSIO: Not in the amendment to the Constitution, there is not.

SENATOR RUSSO: No, not at all, Ray.

SENATOR ZANE: I understand that.

SENATOR RUSSO: Senator Paolella's legislation may be followed by Senator Smith's five years from now, or Senator Jones' ten years from now, which will go far beyond--

SENATOR ZANE: I understand that, I understand that, but that which we are presently considering, and that which I think reasonable men and women would accept as safeguards, if you will, for the defendant, I think are set forth within Senator Paolella's bill. I just do not think that that wide abuse-- I just do not feel it is fair to totally speak against the bill based upon extensive abuse. I just have a tough time thinking that would be there.

MR. D'ALESSIO: I think it is unfair to characterize it as one where there might be extensive abuse, unless you do the weighing process and

say, "What is it we're getting in return for the potential?" The answer is, not much; historically nothing, and practically, not much. So, why should we take the risk? That, I think, is the process that goes on philosophically when you talk about the amendment. What you can lose is substantial. What you gain is really not very much. We just do not think, in a system, defense or prosecution, that there is a whole lot to be gained by it.

I want to stress that the Criminal Law Section is made up of all sorts of different kinds of people from different kinds of practices, and nobody is in favor of the bill. That is not without significance in our Committee. We don't usually reach a consensus.

SENATOR RUSSO: Thank you. I just want to make two points. Ray raised a question about the public's attitude and should the prosecutor reflect that. For whatever it's worth, I think in 1962, when the war was the way it was, there was a CBS poll, and 82% of the public was in favor at that time of abolishing the Bill of Rights, insofar as the--

MR. D'ALESSIO: Senator, a great percentage of them did not know what it was when it was read to them. Was that part of the poll?

SENATOR RUSSO: How can one make a logical argument, for example, based upon only what we know from the newspapers, not prejudging innocence or guilt. A man like (inaudible); should he be out on the streets? Now, you can use those unusual hard cases and make a hell of an argument--

MR. D'ALESSIO: He is not on the street.

SENATOR RUSSO: I am just saying.

MR. D'ALESSIO: But, he won't be under the present act. You see, that's why, under the present situation, he isn't anyway.

SENATOR RUSSO: You're pointing out that this isn't necessary. I am just saying to you, though, that that is an argument that could be made by a proponent -- "How can you let such a dangerous person out on the street?" You know, the hard case of the thing is that we have learned that laws shouldn't make bad law. But, anyway, there are forty-eight states that have a similar Constitutional provision as ours, and the staff advises me that just Massachusetts and the District of Columbia have adopted this kind of legislation. If that is correct, then that answers that question.

Are there any other questions of Mr. D'Alessio?

SENATOR GORMLEY: Just on a clarification, because we have been going back and forth a little bit on this point. Your opinion as to setting bail as it pertains to the dangerous nature of the individual, not him actually fleeing, but, do you feel that whether or not the individual is to be considered dangerous is a factor in setting the level of bail?

MR. D'ALESSIO: It is not supposed to be.

SENATOR GORMLEY: Yes, that's what I mean.

MR. D'ALESSIO: But, it is impossible to differentiate between a person's background and his potential, or her potential, for showing up at trial. When you say, "Mr. Gormley has six prior convictions for robbery, and he is charged with robbery; he has no job; he has been arrested in three different states in his forty-one years, or forty-two years, or thirty-six years, or whatever, and, judge, we want a bail of $350,000," and the defense lawyer says, "That is not bail; that is just holding the man." If the court understands the concept of bail, and if we understand it, what the answer is, is it may well be that, no matter what the bail is, if this man can make it he is going to flee, so we are going to set a bail at a point where it becomes impractical for him to either get the money and throw it away, or he may not be able to make it. So, when you say dangerousness, no, but what about the fact that his background precludes a reasonable position that he is not going to take off.

SENATOR GORMLEY: I don't dispute that; that is the law.

MR. D'ALESSIO: That is what the law is.

SENATOR GORMLEY: We are going back and forth a little bit on this factor, considering whether or not one is dangerous. I agree with what you are saying, and I agree with your conclusion of the law. My only point was, it had been brought out that -- it seemed to be peripherally brought up that the danger that one presents to society would have an effect on the amount of the bail. Admittedly, we are talking about it in the subconscious, or shall we say, in the background, because fleeing is the only concept which you can actually take into consideration.

MR. D'ALESSIO: But, it doesn't matter then, does it? It works the way it is then.

SENATOR GORMLEY: No.

MR. D'ALESSIO: Sure it does.

SENATOR GORMLEY: No, it doesn't. How can you set a dollar amount on how dangerous a person is. Once danger is determined, there shouldn't be a dollar amount.

MR. D'ALESSIO: You can't. How do you determine dangerous?.

SENATOR GORMLEY: How do you determine that there should be a death penalty? Obviously these are hard questions. I don't know. You know, we could do this-- How do you determine there should be a mandatory sentence?

MR. D'ALESSIO: I mean, what dangerousness comes down to is a judge says, "You know what, I think the guy is dangerous."

SENATOR GORMLEY: That's right.

MR. D'ALESSIO: And, he can say that for a variety of reasons.

SENATOR GORMLEY: That's right.

MR. D'ALESSIO: And, there is virtually no way you can dispute his discretion if a man has at least one prior arrest, is there?

SENATOR GORMLEY: That's right. But, what we're--

MR. D'ALESSIO: What is the potential for abuse there, though?

SENATOR GORMLEY: But, what we're doing is, we're saying we're vesting in the same system that replaced all this other trust, and all these other decisions. We're just adding this to the law.

MR. D'ALESSIO: Oh, I'm sorry. You're right, but look at what you are giving up. I am not suggesting that the system doesn't work at the discretion of the judges. Of course, it does. When all is said and done, the judge says, "Bail is $200,000, or bail is $50.00." Okay, but look what you have added. Look at the risk you have taken by adding the dangerousness concept. Look at the terrible abuses that can result from it. Remember, an appellate court can review the dollar amount. They can review it every month, or every week, or tell the trial courts what the bail is. The concept of dangerousness, though, is really a guess. It has nothing to do with the present condition. What they say is that a man has done a bad thing in the past, and we, therefore, think he is now presently dangerous. Who is going to say he is wrong? How does an appellate court say a judge is wrong about that? The standard of review is going to be a joke. No appellate court is going to say, "Judge, I think you were wrong. The guy's prior robbery doesn't make him dangerous."

SENATOR GORMLEY: Well, now we're getting into the bill again, but--

MR. D'ALESSIO: Well, the concept.

SENATOR GORMLEY: The concept, but don't you think there are obvious -- and, you know, I don't want to give you the obvious examples -- circumstances where you are going to say the guy is dangerous?

MR. D'ALESSIO: Yes.

SENATOR GORMLEY: That is why--

MR. D'ALESSIO: What does that mean, that he is going to commit the crime again?

SENATOR GORMLEY: No. It means he is a danger to society.

MR. D'ALESSIO: Well, that means he is going to commit the crime again. If he is a danger and he stays home, it doesn't matter, does it? If he is a danger and he goes out and robs another bank, it matters.

SENATOR GORMLEY: All we are saying is that we are giving the discretion to a judge.

MR. D'ALESSIO: No, you are giving the discretion, plus you are adding an area of abuse, which is historically very, very serious.

SENATOR GORMLEY: Then, you can say that everything you are given through a court is a potential area of abuse.

MR. D'ALESSIO: Yes, it is.

SENATOR RUSSO: So, why not one more?

MR. D'ALESSIO: That's right. Well, why not one more big one, though. We're not talking about a small one now; we're talking about a big one, the area of pretrial detention. No determination as to your guilt; nothing more than some basic evidence that comes forward.

SENATOR GORMLEY: But, with a strict set of standards.

MR. D'ALESSIO: It is not so strict. We know one bill; we do not know the rest of the bills. This isn't something that happens when a man is being tried; this is way before the trial. This is to hold him before he has been proved guilty of anything.

SENATOR GORMLEY: I think we all understand the concept. The question is, should there be a vehicle, without having to set a dollar amount, that holds that (inaudible) of incarceration? Yes, without question, there should be.

MR. D'ALESSIO: No, the answer in my opinion is no. There should not be such a vehicle. That is too much of a restriction on a person's liberty.

SENATOR GORMLEY: (part of Senator Gormley's response inaudible) There is never one too dangerous to be held? There isn't a potential that there could be someone so dangerous and so obvious to anyone that that person should be incarcerated?

MR. D'ALESSIO: The answer is, he should be held, but the answer is, we have a way to do that now.

SENATOR GORMLEY: No, we don't. In effect, we don't, because he is a real danger to society if--

MR. D'ALESSIO: Let me ask you this then. A man has never been arrested before. He is forty years old, he has a job, he is accused of rape, murder and arson, and the only evidence of dangerousness are the facts in the case, for which he has not been tried yet, but of which he has only been accused. We go before the court under some new bill that says, "Listen, the judge can consider the present case. Forget the prior, but he can consider the evidence in the present case. We are going to have this mini trial," which is all it is. It is not really a trial, by the way, okay? Is he dangerous?

SENATOR GORMLEY: Wait a second. If I have three eye witnesses--

MR. D'ALESSIO: Is he dangerous?

SENATOR GORMLEY: Well, let me answer the question first.

MR. D'ALESSIO: You are going to tell me that if you have three eye witnesses who said he did it--

SENATOR GORMLEY: Whom I consider creditable, that I would--

MR. D'ALESSIO: So, you have tried the case already.

SENATOR RUSSO: Why have a trial?

MR. D'ALESSIO: You have tried the case already then.

SENATOR RUSSO: Why not do away with jury trials, and leave it to the judge and the prosecutor then? It would be the same thing really.

SENATOR GORMLEY: Well, if you have what I consider to be a level of proof that is of high caliber, then I say you do it.

SENATOR RUSSO: That is like a truck knocking down a cyclone fence.

SENATOR GORMLEY: I can go find a few rape examples, and I'll give those. We can go back and forth all day long on this.

MR. D'ALESSIO: The problem is, you've determined guilt way before you have ever gotten to the real issue, and the man is being held, or the woman is being held, because of the charge itself, you see?

SENATOR GORMLEY: You can say that about everything, but we have to recognize that there are points in our society where maybe we just can't wait for a trial. Maybe we just can't wait. Maybe someone is that dangerous that you just can't wait for a trial. And, it's not that I want to see the Constitution ripped apart, but there are some obvious examples. We can go back and forth with examples, as I said, all day long, but there are some obvious circumstances where I really think, and this is being repetitive, that you are just setting a high bail, when, in fact, you say a person is dangerous.

MR. D'ALESSIO: Those are the hard cases that make bad law, you're right. You are right, there are.

SENATOR RUSSO: Senator Zane?

SENATOR ZANE: Mr. D'Alessio, let me ask you something. The Constitution presently provides that if someone is accused of a capital offense, they can be detained. Correct?

MR. D'ALESSIO: Yes.

SENATOR ZANE: What is your position on that? Do you feel that that is wrong because that is improper--

MR. D'ALESSIO: Traditionally, they had the bail hearing where the proof was evident or the presumption great. Personally, I am against that, but that is presently in the law.

SENATOR ZANE: You are against that?

MR. D'ALESSIO: Well, because the concept is the same. You see, the basic concept is the same. Somebody comes up and says, "Yes, we have an eye witness who said he saw it." The proof is evident, the presumption great, so no bail.

SENATOR ZANE: So, your position, really, is in opposition to that as well?

MR. D'ALESSIO: I have been in opposition personally; I do not speak for the Bar Association, but as a lawyer, I am personally against it.

SENATOR RUSSO: Senator Gallagher?

SENATOR GALLAGHER: On these cases other than murder which calls for the death penalty, do we get adequate protection right now?

MR. D'ALESSIO: Say that again.

SENATOR GALLAGHER: In situations where there are murders, but they do not qualify for the death penalty, do you feel we have sufficient protection right now for the general public?

MR. D'ALESSIO: Do you mean for people accused and bail?

SENATOR GALLAGHER: Yes.

MR. D'ALESSIO: The answer is yes. Let me tell you my experience. I was a public defender in Essex County for four years, and I have been in private practice since then, a total of fifteen years doing almost nothing but criminal work, and I'll tell you the best bail risks, and anybody who is in it knows, and those are people accused of murder. They are the best bail risks in the system; the best parole risks in the system. It's strange, but it's true. The least chance of repeat arrests are people on bail for murder. I don't know why that is, but that happens to be a fact.

SENATOR GALLAGHER: All types?

MR. D'ALESSIO: All types of what?

SENATOR GALLAGHER: Murder.

MR. D'ALESSIO: I do not know how they have broken the statistics down.

SENATOR GALLAGHER: Robbery, felony murders?

MR. D'ALESSIO: Felony murders -- I don't know how they have broken the statistics down, but I suspect it is probably true.

SENATOR GALLAGHER: What are the worst offenses?

MR. D'ALESSIO: Narcotics offenses, burglary, breaking and entering, rather petty offenses, strangely enough.

SENATOR GALLAGHER: You are concerned about the use of dangerousness when determining bail, and you are concerned about laws that may be passed here in the Legislature that follow this Constitutional amendment. I do not think we have enough checks on the Legislature and the type of things that are passed. I am sure there are a lot of people here today who have probably taken action against some of the things we have done. They do not feel it is necessary to fight some of the things we have done, but some may be in court now trying to get the death penalty thrown out. Do you think there are adequate checks in this society to safeguard against some of the legislation that is passed, so that you would not have to be too concerned about what comes after this?

MR. D'ALESSIO: One of the adequate checks-- You're putting the cart before the horse, because the answer is yes. Let me tell you what I think the most adequate check is on the Legislature's abuse of power. It is the State Constitution and the United States Constitution, and now you are changing that. When you start changing the Constitution itself, which is the basic check and balance against the abuse of any kind of power, whether it be prosecutorial or legislative or executive, you're fiddling with something that is very, very serious. The problem is not in the good faith of legislators or prosecutors or defense lawyers or judges. The problem is that by the time it trickles down to the courtroom, all the good intentions in the world are often replaced with just a little bit of abuse. And, one of the checks against the abuse is the concept of a Constitution. We are one of the few countries in the world which historically recognizes how important that can be. That is my philosophical feeling on that. I do not think we should be changing it open-ended, saying, "Well, let's change it and then we'll hope for the best when the legislation comes down." It is too late then, because then the Constitutional attack on it, which is one of the real weapons against abuse of liberty, is gone. The amendment makes that attack go out the window, and the Supreme Court will say, "Well look, the Legislature said it was okay; it must be the will of the people so, so be it. It's too late."

SENATOR GALLAGHER: Thank you.

SENATOR RUSSO: The Legislature definitely reflects the thinking of the day, you know, oftentimes. That is why we want the system in the Constitution, so that it will be subject to the daily thinking of the Bill of Rights and what have you. Are there any other questions for Mr. D'Alessio? (negative response) Thank you very much for coming, Mike.

MR. D'ALESSIO: Thank you.

SENATOR RUSSO: Senator Graves, do you want to speak now? Since you are the sponsor, we will extend you the courtesy of setting your own time when you would like to come up, if you would like to come up.

SENATOR GRAVES: I would like to wait until after the next speaker, but I would ask one consideration. Could you, also, put me on maybe toward the end, so you can put my other bill up so I can go home? (laughter)

SENATOR RUSSO: The problem with that is, your other bill is--

SENATOR GRAVES: I want to remind you about a couple of your bills I have on Monday.

SENATOR RUSSO: Having fulfilled my commitments, I'm sure you will honor yours. I think if there is a bill that is not, you know--

SENATOR GRAVES: The one on mandatory exemption for taxing seniors.
SENATOR RUSSO: It is listed; I have listed all the bills for 1:30.
SENATOR GRAVES: Oh.
SENATOR RUSSO: And, certainly, if I move something, you know, this morning, and then somebody shows up to testify on it--
SENATOR GRAVES: Could you let me testify on my part?
SENATOR RUSSO: Oh, sure.
SENATOR GRAVES: Okay.
SENATOR RUSSO: Sure we can.
SENATOR O'CONNOR: I would be happy to take the opposition point of view, if somebody wants me to.
SENATOR RUSSO: The what?
SENATOR O'CONNOR: The opposition point of view, so you can do that in the morning.
SENATOR RUSSO: Okay, next is Mr. John Cannel, Assistant Public Defender, Department of the Public Advocate. Good morning, John. Senator Dorsey, would you start this for a moment, and I'll be right back with you.
J O H N M. C A N N E L: Good morning. I have given you a prepared statement, and I do not propose to repeat that. Also, I will try not to repeat much of what has been said before.

First, I want to make it very clear I have much less of a problem with the Paolella bill than I do with the Constitutional amendment itself. I'm not sure I like any change at all in the area, but the danger is in the Constitutional amendment and in the breadth of the Constitutional amendment proposed. I'm also not terribly concerned with the practical problems. Yes, there will be practical problems in putting this thing in, problems of finding more space, finding more manpower and finding more money. If this were worth doing, we could pay those bills, but I just don't think it is worth doing. I think it is basically a bad idea, and what makes it a bad idea, is the fact that what we are doing is moving the determination of guilt from a criminal trial before a jury to a hearing before a judge. When we decide to lock a man up without even giving him an opportunity for bail, what we are saying is, "He can be punished now. We have decided he is dangerous; we have decided he is the person who should be punished."

Now, there are people who are dangerous and should be locked up. That is what a criminal trial is about, and that is what we use it for. At the end of the criminal trial, we know that he is dangerous, we make a determination as to sentence, and the sentence is imposed. The problem with leaving it, is that what we are talking about doing is really very, very basic. To go and throw away the presumption of innocence, to throw away the fact that a man is innocent and cannot be punished until after the jury trial, is a very big thing to do.

Now, I think as has been outlined here before, it is pretty clear that there are not a whole lot of cases where this would be applied in any case. As a matter of fact, the newspaper reports on the views of various people involved in the drafting have seemed to indicate they are talking about a small number of cases. If they are talking about a small number of cases, they are not going to have any effect on the crime problem at all, not in any real significant way. Well, the best analogy, I guess, is that of medication. You would not hesitate to take a medication with very serious side effects if you had a disease that this medication had a good chance of curing. But, if you are not suffering from a disease, then why put up with the side effects, especially if they are major. Well, in this case we have a problem that, according to George Schneider, who is really more experienced than anyone else in the State at this point, and Mike D'Alessio, and, incidentally, it is my view as well, we have a system that imposes bails on

people which prevent particular kinds of problems. We do not have a problem. Now, to go and change the Constitution to deal with it, is to open ourselves to all kinds of side effects merely to solve a problem which does not exist. Basically, if a thing isn't broken, don't fix it. And, the reason you shouldn't fix it is, because you are not going to fix it, you are apt to break it, and I think that is what we are doing.

The present bail system allows bail to be turned down on three bases. One, a capital case. The theory is that a person who is at the risk of his life will not show up, no matter what you do. Two, where no bail will assure his attendance. Let's say you have a person who is an international drug dealer, a native of South America, with a passport in his pocket. There may be absolutely no amount of money that will assure his attendance. A judge does not have to give him bail. Many judges have not read the Johnson case and are not fully aware of it, but bail can be denied in those cases. Three, there is substantial law around the country where the person might affect the integrity of the trial by killing witnesses, or bribing witnesses, or something else of that sort. That, too, is a ground for denial of bail, because in that situation, again, just as we have a right as a society to insist that he be back for a trial, we have a right to insist that he come back for a trial that will be a fair trial of the issues.

So, we have a system that works. In place, this Constitutional amendment would put in that magic standard of dangerousness. Well, perhaps my problem with it is the fact that I began the practice of law many, many years ago in juvenile court, and you hear many strange things said in juvenile court. One of them-- The judge who I appeared before on a regular basis was a very fine man and a very careful judge, and he believed that if a young man in high school had one marijuana cigarette in his possession, he was a danger to others. He should be able to be locked up immediately, because he is a danger to others, since somebody else might see him smoking it and decide it is a good idea. When there is that much disagreement among good, intelligent, careful people as to what dangerousness means, I just don't think we should commit our protections to that standard. If it is felt there is something necessary that should be done in this area and, again, I oppose it and would continue to oppose it, then what is drafted in terms of a Constitutional amendment should be as careful, should be as particular as the bill which has been proposed as a companion to the Constitutional amendment. It should specify what crimes, what amounts to dangerousness and what kind of process needs to be engaged in before we make that determination. Then what you are really doing is advancing the criminal trial and, in fact, if there is a problem with some people on bail who are dangerous, and I do not think there are that many -- as I said, I don't think there is a problem -- then maybe what we should be looking at is a speedy trial, because we can achieve a speedy trial. We have been working for it; we can do more on the subject. Then, you won't have the guy on bail for very long, and you will have solved the problem without throwing away the protection of a trial by jury and the presumption of innocence. Thank you.

SENATOR DORSEY: Are there any questions from the members of the Committee? Senator O'Connor?

SENATOR O'CONNOR: No, I have no questions at this time.

SENATOR DORSEY: Senator Zane?

SENATOR ZANE: Yes. Mr. Cannel, what is your position regarding the present Constitution whereby one can be denied bail and incarcerated for a capital offense?

MR. CANNEL: I think it is appropriate as it is applied, that is, what the Constitution has said is, if a person is at the risk of his life, he may not show up, no matter what restraints you put on him.

SENATOR ZANE: Do you really think that is the only standard which is applied to that? Do you think that is the only reason that is provided for within the Constitution?

MR. CANNEL: That is historically supposedly the reason; that one goes back to England.

SENATOR ZANE: You do not believe it had anything to do with his likelihood of being dangerous?

MR. CANNEL: No. As a matter of fact, it is applied in a great many cases with very individual murders. While it is true that murderers on bail and murderers on parole are very good risks, there are very few of them in that category, so they are very well chosen, and they are very particular people. But, no, I do not think it is the risk. In fact, if you are talking about risk in the recommission of crimes, then the bad check person is the person who should always be locked up.

SENATOR ZANE: But, your suggestion then would be that that provision which we are talking about right now is primarily for the protection of the potential defendant?

MR. CANNEL: Well, it isn't for protection of the defendant; it is protection of society from the risk that the defendant will not return for trial.

SENATOR ZANE: What is that protection we are seeking for society? Why are we seeking that kind of protection for society?

MR. CANNEL: Because after the trial, if he is guilty, we should lock him up. That is the problem -- if he is guilty.

SENATOR ZANE: Forget after the trial, because that is not what we are dealing with. We are dealing with before the trial. Isn't the reason that we have a provision such as that within the Constitution because it is felt that that individual may well be dangerous?

MR. CANNEL: No. The purpose of it is to make sure that we can determine who is dangerous and then set a trial. Let me take a recent case from your county.

SENATOR ZANE: That is semantics.

MR. CANNEL: Well, it may be semantics in certain applications, but it isn't in all applications.

SENATOR ZANE: There is at least an assumption that he is dangerous, if that is why you are incarcerating him beforehand, isn't there?

MR. CANNEL: No, not necessarily. It may be that he committed a murder, and you have no belief that he will ever commit another crime. But, it is the kind of crime that you feel, if he is convicted, he will get the death penalty, or he will get a mandatory thirty years, or whatever. Therefore, he is not going to show up for trial. Often you will have a situation-- Let me take the one of the diet doctor case. The woman who killed him is probably a very good risk that she will never commit another crime. At the same time, legitimately there is, however, a very significant risk that if you were to let her out -- at least that is what the judge decided -- that she wouldn't be around at trial time. That is really the basis of the great majority of those.

Now, I won't tell you there is never a situation where even the current standard is abused, and there are times when the current standard is unfortunate. There was a recent case in your county where a person would have been considered dangerous under this bill. He was charged with two rapes of, you know, good, fine, outstanding citizens, and his record was not wonderful. High bail was set for him, because the theory was he would not return for trial. We do not know whether he would have returned for trial or not. We do know that at the trial, one case was dismissed, and in the other case he was found not guilty, because scientific evidence made it impossible

that he was the person who committed those crimes, notwithstanding the identifications. Such cases exist.

SENATOR ZANE: Mr. Cannel, your entire practice has been as a defense counsel. Is that correct?

MR. CANNEL: Not quite. I worked for the Justice Department, Criminal Division, Special Projects Section, and I did a little private work at one point.

SENATOR ZANE: I have no further questions.

SENATOR RUSSO: Is there anyone else? (no response) Thank you very much, Mr. Cannel.

MR. CANNEL: Thank you.

SENATOR RUSSO: Jeffrey Fogel, Executive Director, New Jersey ACLU.

J E F F R E Y E. F O G E L: Thank you, Senator Russo and members of the Committee. I have supplied the Committee with a two-page statement of the ACLU's position on this measure, and I hope not to repeat what was said in that statement, or what others have said before me, much of which I agree with. But, I do wish to take up on some themes that were begun in the previous deliberations, and to point out some factors which I do not think have been brought to the attention of the Committee yet.

First, I would like to say that I share the view of Senator Russo, that philosophically we are opposed to the notion of preventive detention. Primarily, that is grounded in the notion that people are presumed to be innocent in our criminal justice system and, again, if we want to be honest, and there is a strong belief in the public that we should not have that system, we should reexamine the entire United States Constitution, rather than take it apart tangentially through the back door of the bail system. There are certain facts and empirical evidence which demonstrate precisely the point I am seeking to make on this, which is to say that we know that those who are detained prior to trial are more likely to be convicted, and we know statistically that among those who are convicted or detained prior to trial, they are likely to receive considerably higher sentences, two to three times higher in our State alone. The statistics are not ones that I have made up, but I have cited them in our memo and I took them out of a note from a Supreme Court decision, State vs. Johnson, which was previously discussed here.

So, we know, not only as a philosophical matter is the presumption of innocence put aside when we lock someone up prior to trial, but we know the impact of locking that person up and keeping him locked up prior to trial is specifically to cause the kind of harm the presumption of innocense was designed to protect against. The question of protection here is not simply the protection of an individual defendant, but it is the protection of a system of government and a system of criminal justice, which I think Senator Russo has pointed to quite appropriately.

Now, on the question of dangerousness, I think there are some examples that are even closer to home which we might point to, in addition to those suggestions about the use of this kind of system, say, in Nazi Germany or elsewhere. We know, for example, that the United States of America locked up in detention facilities a large number of Japanese Americans, because some people in the military thought that by virtue of their ethnic background they were a danger to America. They did not think that people with German backgrounds were a danger to America, although we were at war with Germany, and Germany was a much more formidable foe, as we all know. But, they felt that because of the ethnic background of Japanese Americans, they were a danger to America. It seems apparent now that most Americans, and certainly the Congress which has appointed a commission to study the question, are a little embarrassed about the fact that in the heat and passion of war, we

selected that one ethnic group to identify as dangerous, and locked them up in concentration camps. Nonetheless, it happened, and it can happen again, as that commission has pointed out, and others as well. There is no adequate remuneration for those people who lost their livelihoods, their homes, and portions of their liberty, for that determination of dangerousness.

We had a recent case in the United States Supreme Court, the State of California vs. Lawson, a case involving a gentleman who was arrested under a California statute which provides that you must identify yourself to a police officer when that police officer demands identification, when under the circumstances it seems appropriate for the police officer to believe that he needs identification, a standard, I suggest, similar to the one being discussed today of, where it is necessary, where it may be dangerous, you must identify yourself. Well, we had the good faith efforts of prosecutors and defense lawyers, and in twenty-seven instances the gentleman was convicted under that statute. The determination was made by a judge that that person should have, under the circumstances of his arrest, identified himself. The United States Supreme Court, in an unanimous decision, said, "We cannot give that power to judges. We have the greatest respect for judges -- we are judges ourselves -- but, we cannot give that power to judges to make that kind of determination. We must look to specific conduct and to see whether or not someone has committed a specific anti-social act, before we deprive them of liberty." I suggest that is very similar to the problem that this Committee and that the Legislature faces today.

Yes, it may be true that if put to a vote, and this is of grave concern to me, whether on the ballot in November, or in a poll, that many people would vote for the notion that judges be allowed to incarcerate people prior to trial. If you will recall, the Bill of Rights is not a majoritarian document. There is an interesting tension in the Constitution between being a Democratic majoritarian society, and the Bill of Rights was designed in order to protect the individual against the majority. So, to suggest that we can put up the Bill of Rights for a majority vote, is to suggest a very contradiction to what the notion of the Bill of Rights is itself.

We have alternatives which have not been explored, and I would like to get to those in a second. But, let me say this. The Province of East Jersey passed a statute in 1682, the language of which is precisely the same as we have in our current Constitution, "A right to bail guaranteed, except in capital cases where the proof was evident and the presumption great." I am not sure of the precise language, but that was the precise language in that 1682 statute. That precise language was adopted, I think, by virtually every other colony when they became independent states in 1776, or thereafter, when they passed Constitutions in that precise form.

Our Constitution in 1776 did not adopt the language, but read in that statute through the common law, and it was available to the citizens of New Jersey until the framers of our second Constitution in 1844 determined that it should be made a matter of constitutional mandate. That, of course, was reexamined in 1947, and at the convention there it was reaffirmed that that was a necessary and important right for the citizens of the State of New Jersey.

Now, rather than an act of constitutional convention, we have a proposal that we amend that portion of the Constitution to allow for preventive detention. When this measure first arose, and it arose in the Assembly, I contacted Assemblyman Kern who was the sponsor of the legislation, and asked Walter, whom I knew, what was the nature of the problem that he saw that required an amendment to the Constitution to affect the right that we had had in the State of New Jersey for three hundred years. This is a very radical proposition, to overturn three hundred years

of history. This is not something I would hope the Legislature would consider doing lightly, not simply because of the right involved, but out of deference to the history of our own forefathers, out of deference to the history of our own State, and so even for that matter I think it would require careful consideration. Walter Kern said, "Well, Jeff, you know I do some criminal work and so I do note that sometimes people do not show up for trials." I said, "Well, could you elevate that, Walter, to a statistic. How serious is the problem?" He said, "Well, frankly, no, I do not really know." I said, "Have you inquired?" He said, "Well, to tell the truth, this is something I was requested to propose by the Kean Administration." So, I contacted the Governor's Office and sought the same information. The answer I got was, "No, no one has made an investigation of what the nature of the problem is in New Jersey with respect to people not showing up for trial, or with respect to people committing offenses while they are on bail." I called the Administrative Office of the Courts, which is responsible for maintaining that kind of information. They informed me that no one had ever requested that information before and, if it was requested by an appropriate public body, it would be provided. But, it seems that none of the proponents, including the Governor's Office itself, has even cared to look into the nature of the problem, or to inquire of the Administrative Office of the Courts what the nature of the problem is, before proposing what I consider to be one of the most radical measures presented to the Legislature this year, if only, again, because it is something we have had in our State for over three hundred years.

It is that which concerns me, notwithstanding the fact that I can have confidence in the individual good faith of individual legislators, but that the process is sometimes overtaken by rhetoric that does not allow for careful consideration and, if we are talking about a measure this serious and this radical, and we do not have any one of the proponents looking into the nature of the problem, then I think we have a serious problem with the process itself.

Were there people who did not show up for trial in 1685? Were there people who committed offenses while they were on bail in 1687? Did those facts occur in 1725? Did they occur in 1795? Did they occur in 1840, prior to the constitutional convention of 1844? Did they occur in 1900? Did they occur in 1920? Did they occur in 1940? Of course, they occurred. Of course, throughout history there have always been people who have not shown up for trial. There have always been people who have committed offenses while they were on bail. But, was it deemed by virtue of the fact that one or more instances may have occurred in a given year, that an important principle of individual liberty, an important historical document be overturned because of that? No previous Legislature has suggested doing so in the three hundred year history, and none of our constitutional conventions have thought of doing so, notwithstanding the fact that those things do occur, and they may be an unfortunate part of a system that believes in the presumption of innocence. How often are we told in civics classes, "it is better that a hundred guilty men go free than one innocent man go to jail?" Well, if we take the proposition that is being asserted here today, we reverse that on its head and say, "It is better that a hundred innocent people go to jail than one guilty man go free," because if our concern is the one possible rare victim who is hurt by the one possible rare defendant who will commit a crime while on bail and, of course, that is going to occur, we are going to have to maintain in pretrial detention a considerable number of defendants, in order to ensure that none of them commit offenses.

So, the whole proposition of the presumption of innocence, and the whole foundation of that criminal justice system is overturned, when the

perspective is taken that we must protect ourselves against any possible rare instance of violence in a society, even to the detriment of the Bill of Rights and of the rights we have had in the State of New Jersey for over three hundred years.

Has the Committee, has the Legislature, has the Governor explored other alternatives to deal with what might be a problem? And, I say might, because no one has presented here today in the testimony in this public body, or in the testimony before the Assembly, or in any conversations I have been able to have, that there is a problem. We have had Prosecutor Schneider here, with probably more practical experience in this area than anyone in this room, certainly including myself, to say, "It is not a problem." We have had others here who have testified, perhaps from a more philosophical point of view, including myself, who say, "Well, I haven't seen the problem," and certainly nobody has even made an effort to see whether there is a substantial problem.

But, there are alternatives, and I think we can discuss those alternatives, and in those terms you can look at the practical implications of pretrial detention. You can look at the costs that would be involved in pretrial detention for Prosecutor Schneider's special bail unit, the extra judicial time, the public defender time that will go into it, for the time that we are going to have to be paying money to keep someone incarcerated in that period of pretrial. Are there other alternative uses for that money that might accomplish the same result, without having an impact on the rights I have discussed? Well, there are several I can think of. We can categorize certain classes of cases, as this Committee is considering doing with S-1457, I think it is, which would be the mechanism to implement this amendment to the Constitution, and identify those cases and say those cases move on a special track. Those cases get tried four weeks from indictment. The evidence seems to be elsewhere where this is looked at. Where speedier trials are instituted, you have a much more significant impact on rearrest rates than you do with the notion of pretrial detention, because whatever has been done in the area of looking at the potential of people who commit offenses while they are on bail, one thing is absolutely clear in the literature. Unfortunately, the proponents have yet to examine the literature, and that has not been presented to the Committee.

The National Institute of Justice Division of the United States Department of Justice published a lengthy report in 1981 called "Pre-trial Release, A National Evaluation of Practices and Outcomes," and one thing they were sure about in this area was that there was no way to predict who was dangerous. There was no way to predict who would commit another offense in the period of time between arrest and trial. That was the one clear piece of evidence that was available from the studies of the two jurisdictions that had preventive detention, and of every other jurisdiction they had studied. That is the position, also, of the American Psychiatric Association, if we look at the perspective of a professional organization which had some responsibility in predicting people's behavior. They say it can't be done; the United States Justice Department's best studies say it can't be done; and, I haven't heard anyone who has suggested that judges are illuminated with the kind of wisdom that no one else in the society has to make the kind of determination as to what somebody is likely to do in the future, not a determination of fact as to what they have done in the past, but a prediction and a projection of what that future will be, because if we get to that point, there may be those in the society who feel that once we have identified particularly dangerous juveniles, and we can see them on our streets today at twelve and thirteen years old, and we can corroborate that information with disciplinary reports from public schools and social service

investigations, that these persons are likely to be dangerous persons when they reach the age of majority-- I can see in the current law and order rhetoric, some people proposing that we simply incapacitate those people for the rest of their lives. We'll have a hearing, then we'll have a lawyer and there will be due process, but what will it be due process of? They guess as to whether or not a person will commit an offense in the future. If anything runs counter to the notions of the Bill of Rights, if anything runs counter to our notions of criminal justice, that notion runs counter.

The alternatives have to be explored before we take the kind of radical step that is being proposed today. Those alternatives include speedier trials in certain types of cases, and I am not talking about six months or ninety days. You can do it in four weeks, if you identify those few cases in which it is said that this law will apply. Increase supervision. We never have given enough money to the probation services, either for those who they are supervising post-conviction, and certainly not for those who they are supervising pretrial. They can be required to appear every single day. There are new technologies and methods for having people under forms of house arrest pretrial, where they would be required to return home at eight o'clock at night. Otherwise, they could continue working, provide for their families and importantly, and this is something that has not been mentioned to this Committee, to assist their lawyers. Let's recall that in our State, somewhere between 80% and 85% of criminal defendants are represented by the public defender's office and, when we look at some of the crimes that would be at issue in this preventive detention bill, it would probably be even more. I know because I have done some pool work for the public defender's office in the past, that the resources are simply not there to provide the kind of defense that some private lawyers are capable of providing. So, most of us doing that kind of work had to rely on the defendants to identify witnesses, to take us to crime scenes, and so on. They were a key and critical part of the process of pretrial investigation and preparation for the trial. That is one of the reasons why we find that the conviction rates go up so substantially when someone is held in pretrial detention, without regard as to whether or not they are guilty.

So, we have a variety of alternatives which have yet to be explored and, on the other hand, we have a radical proposal to overturn three hundred years of history in our State. It seems to me that the better part of valor in this instance will be the wisdom to examine those alternatives in light of the nature of the problem that has yet to be presented to this Committee, or any other Committee of this Legislature, but should it be presented, let's explore those alternatives. Thank you.

SENATOR RUSSO: Thank you, Jeff. Having been on the opposite side of you so many times on so many issues, I think this is the first time we find ourselves in agreement. It shows you that there is always hope. Maybe some day you and Senator Graves will be on the same side of an issue.

MR. FOGEL: Yes, we are. We both agree there should be more money made available to public libraries, particularly in the major cities of our State.

SENATOR RUSSO: One thing that we sort of touched upon indirectly, but I would just like to point out, is that if you read what is going on the ballot, it may all pass unanimously, because it repeats the present law in two of the three instances. For example, it says, "Shall the amendment to Article I, paragraph 11 of the Constitution providing that bail may be denied, after a hearing, in capital offenses," and who wants to argue with that, that is the present law, "or to assure appearance of the defendant," well, that is present law, "or for the protection of other persons," and that is the change. But, if you read it, voting a vote of "no" to the average

layman sounds like he is against even the present law and would like to have even the capital cases bailable, even though the problem isn't going to appear. So, I think that should be pointed out, you know, whether it can be changed or whether it can be resolved.

MR. FOGEL: I would only add, despite my obvious passion on the subject, that were I not knowledgeable and looked into the factors that I have addressed to the Committee today, I would be hard-pressed to vote against that proposition.

SENATOR RUSSO: You mentioned that there is certain information available from the Administrative Office of the Courts. John Tumulty was out of the room at the time, so I would like you to repeat that. And, John, I would like you to get it for us.

MR. FOGEL: Well, I just simply called the Administrative Office of the Courts to ask them what statistics they had on people who had not ultimately appeared for trial, or people who were either arrested or indicted while they were awaiting trial. They said, "Nobody had previously asked for those statistics. An appropriate request from an appropriate public body would presumably get those statistics."

SENATOR O'CONNOR: Senator Russo, I would also like to have access to the reports that Mr. Fogel referred to.

SENATOR RUSSO: Can we get them, Jeff?

MR. FOGEL: I will be happy to make copies of them and supply them to the Committee. I missed the opportunity to say, particularly to Senator O'Connor because it is something from his county that has always struck me, and that is the legend above the old Hudson County Courthouse which is, "The precedent makes the law. If you stand well, stand still." I do not think that needs any further comment in the light of my comments.

SENATOR RUSSO: Are there any other questions?

SENATOR O'CONNOR: May I just ask one question? The statistics that you refer to that relate there is a higher conviction rate with people who are detained pretrial and, also, the sentences they receive are two to three times greater than those who are not detained pretrial. Was any qualitative analysis ever done of those to indicate what types of prior records the people had?

MR. FOGEL: Not on those statistics, no. Those I took out of a Supreme Court opinion and they cited a variety of studies that had been done as of 1977, I think it was. I did not--

SENATOR O'CONNOR: So that, at least with respect to the sentencing component of that statistic, that may not be all that accurate, because someone could be convicted of an armed robbery and, you know, get a three to five-year sentence, whereas someone who has a history of two or three prior armed robberies could be looking at something a whole lot more serious.

MR. FOGEL: It is conceivable, certainly on the sentencing side, particularly since you assume that people in jail awaiting trial may be those charged with more serious offenses and you would expect higher sentences. But, the statistics as given by the Supreme Court were a comparison of the same offenses, and the sentencing rates of those same offenses. And, of course, any problem that might exist in those statistics would not exist on the conviction rate, because we do not now hold hearings except in capital cases to present proof to a judge as to the likelihood of a conviction before determinations of pretrial release are made.

SENATOR RUSSO: Thank you again, Jeff.

MR. FOGEL: Thank you.

SENATOR RUSSO: Dean Don Gottfredson of the Rutgers School of Criminal Justice.

PROFESSOR VON HIRSCH: I am Professor von Hirsch. We were going to testify together, but in the interest of time I will testify.

SENATOR RUSSO: So, you are Professor Andrew von Hirsch of the Rutgers School of Criminal Justice?

PROFESSOR VON HIRSCH: Yes.

SENATOR RUSSO: And, you are speaking for yourself and for Dean Don Gottfredson? (affirmative answer)

(FROM AUDIENCE): Excuse me, Senator. After this particular witness, could we add Assemblyman Kern to the list of speakers? He was quoted in the last testimony, and I always think it is nice if you are quoted that you be allowed to go over the quote.

SENATOR RUSSO: All right. Go ahead, Professor von Hirsch.

P R O F E S S O R A N D R E W V O N H I R S C H: My name is Andrew von Hirsch. I am a Professor at the Graduate School of Criminal Justice at Rutgers in Newark. My primary interest has been in the area of sentencing, and I have been consultant to a number of different jurisdictions on sentencing reform. But, in connection with that, I have, and Dean Gottfredson has too, done a little bit of studying on the issue of how well we are able to predict dangerousness.

Let me just start with a few preliminary comments first on the proposal in general, and then go on to talk about the accuracy of prediction. The one thing that has come out in the testimony, of course, is that this is a pretty fundamental change. I mean, when I have an introductory course in law, which I give for entering M.A. students in our school, the one thing I explain which is special about this country is that, except if you are mentally ill, you have a right to retain your liberty until you have been convicted of a crime. That is in contradiction, not only to, you know, horrible places like Nazi Germany, but to some other more authoritarian countries where most people who are suspected of unpleasant conduct, or who are considered dangerous, are locked up before they are convicted. And, yes, we have a bail system, but first of all it is subject to the requirement of excessiveness. It is mainly directed toward flight, and you can pay the bail if you have the money.

What we are talking about here is a very fundamental change, and the other thing which was mentioned was that it is a very sweeping proposal. In other words, there are no requirements that the charge involved be a serious charge. The existing law says you have to have a capital case. The way this reads, this could be anything.

Number two, there is no requirement that the prospects be high -- that the probability of offense be high, or that there be a serious offense involved, and I hear that, of course, the argument is the Legislature would not be so unwise as to, you know, draw overbroad legislation, but, of course, the answer is, to the extent that argument is true, you don't need constitutional provisions at all. The same thing is true, of course, about the guarantee of free speech. In other words, if the Legislature never wants to interfere with free speech in an unappropriate way, you also would not need a guarantee, and yet we thought we did.

Also, one of the things that does strike me which has been mentioned, is the "truth in packaging" issue. I just made a whole experiment; I took the proposition and gave it to some people who I knew would be people who would rather dislike the idea of preventive detention, and everybody thought it was perfectly fine. "What is unusual?", and so forth and so on. It is written, in other words, it is interesting that if the Legislature wants to give up a very fundamental tradition in this country, and wants to give up three hundred years of New Jersey history, then maybe at least as a minimum, the proposition should be put in a way which reflects what the bill is about. This is a preventive detention bill; this is a bill that says you can be locked up before you are convicted, if a judge

suspects you are dangerous. That is what it is about. If that is true, I think you will get some people -- there are some civil libertarians who vote -- who might not like it. One of the things is that here it is written in a way which is very cunning.

By the way, there was a mention of the Japanese internment. I could write you a similar proposition which proposes internment of Japanese, or whoever, which is also so cunningly put that everybody would vote for it. I don't know if that is a way of -- you know, I have some problems with fairness with this.

Let me just talk a little bit about the question of prediction of dangerousness. One of the things there has been a lot of discussion about this morning is that dangerousness is a condition, it's a thing, it's something that some people have and some people don't. There is a history in criminology of studies attempting to predict dangerousness which goes back to about 1924. In 1924, there was a criminologist -- several criminologists who tried for the first time to develop statistical studies to predict who is a risk and who isn't. What these studies tend to show is that, okay, you have some marginal success in predicting risks, based on someone's prior record, his offense history, his employment background and, essentially, his social class kind of things. There are problems in using those factors. When you make those kinds of predictions, there have been some attempts to count how often you miss and how often you hit. What all of these studies overwhelmingly tend to show, is that in even the most sophisticated predictive studies that are available, the majority of people who you classify as dangerous will be people who, if you follow their activities subsequently, do not commit the predicted conduct. There is a technical term in our business which is called the "false positive." As you remember from medicine, a positive is, you know, if you go to your doctor and he says something positive, then you don't feel so positive it means that the bad condition is present. A false positive is one which shows up as a danger, or as a problem on your test, and it turns out the test is wrong.

I did a paper a long time ago, in 1972, in the area of sentencing, following up predictions of dangerousness, and one of the studies was the prediction of dangerousness among kids having a fairly substantial record of prior criminal conduct, just the sort of thing that, I guess, would be talked about here. At that point, when they followed up the predictions, for every one person who was classified dangerous and who subsequently was arrested for a dangerous act, eight were misclassified, that is, were people who did not, at least so far as we knew, commit the predicted dangerous act.

In the meantime, there has been a lot of work on trying to improve these rates, and I am fairly well up on the recent studies. The best studies show roughly this. About 60%, more than half, of the people who you predict to be dangerous, in fact, won't be. One of the things I think is a question, in other words, it's a nice thing to say, "Well, don't you want to lock up this dangerous person to protect the public," but remember, most of the people you so classify are going to be people where you are wrong, and the reason is, of course, because we are not very good at predicting the future. There is a lovely cartoon that the New Yorker published years ago, in which you see a prosecutor, in a typical prosecutorial attitude, pointing to a defendant who is cowering in the witness chair, and saying, "Where will you be next Tuesday evening?" Well, it is easier to show where you were last Tuesday evening when the crime was committed, than to try to begin to make this kind of prediction.

There is one other point, though, which the studies may be useful for, which is another problem of prediction, which may prove to be a tremendous headache in terms of, above all, the legislation that this

Committee may be facing in the future. Predictions have another problem besides the so-called "false positive." It is the reverse problem. There is a second kind of error, namely, a substantial number of people who you predict are safe, won't be safe. There is the so-called "false negative" problem. What that means in practice, is that if you institutionalize a system where judges have to decide who is and who isn't dangerous, and who is going to be subject to pretrial detention, a lot of people who judges are going to release, irrespective of what criteria they use, are going to be people who subsequently commit crimes. What does that mean? I think we know what that means in the area of parole. We have seen the problem with parole boards, that whatever standard they use for dangerousness, they always miss cases. They always miss people who then commit horrible acts, and then there is horrendous public pressure to say, "Let's expand the net. Let's prevent Schmidlap, who we missed -- let's deal with that case so we won't have a similar problem."

One of the interesting things I think you probably all read, is that in the Hinckley case, the psychiatrist is being sued for having missed the fact that Hinckley was dangerous. Well, the point is, you always miss. The result is, in that way, that what is going to happen, is that once you have this kind of provision and you do not have a constitutional protection that simply bars this kind of issue from being treated, whatever bill is written, and I hear that the present bill is very cautious -- what is going to happen is that a lot of people, or a certain number of people, are going to commit bail crimes, and then the pressure will be on to widen the net and widen the net. The result will be over time. Not that the Legislature is going to be vicious and decide to lock up all Rumanians, or whatever it is, just for the fun of it, but what is likely to happen is what tends to happen with parole, namely, you begin to say, "Well, we can't release these people, and we can't release these people, and we can't release these people," and I think that you will get pretrial detention bills that try to widen the scope of pretrial detention in every legislative session, just as you now have bills in every legislative session to impose mandatory minima to narrow the scope of parole, etc., etc. I wonder whether, in view of what people have said about the nature and seriousness of the problem, this is the kind of business that we would want the State to be in.

Those are the essential points, and then I also subscribe to some of the more sort of philosophical and legal points that were raised, especially by Mr. Fogel and others. Thank you.

SENATOR RUSSO: Thank you, Professor. Are there any questions? (no response) Okay, thank you very much. The next three witnesses who are involved with the PBA, are Martin Barrett from the New Jersey PBA, William Palatucci, and Anthony Cicatello. Are all three of you here?

MR. BARRETT: Just me.

ASSEMBLYMAN KERN: Mr. Chairman, I have another meeting where I am a member of the Committee. May I speak now?

SENATOR RUSSO: Okay. We'll hear you in just a second, Mr. Barrett. Come on, Walter.

SENATOR ZANE: Mr. Chairman, may I ask the Professor just one question?

SENATOR RUSSO: Oh, yes.

SENATOR ZANE: Professor, just very briefly-- The present Constitution provides for those charged with capital offenses to be detained without bail. What is your position on that?

PROFESSOR VON HIRSCH: I think that one of the interesting things about that provision is that it does not build in the dangerousness criteria. It doesn't say, "We can keep those suspected murderers who are

going to commit other murders, and release those suspected murderers who aren't." The theory is, and you can debate about the theory, especially in capital cases, other climates are more attractive if New Jersey's possible prospect is that it might execute you. I think that is the theory, and I think that is reflected in the fact that the existing law doesn't build in a dangerousness criteria. So, for example, I think the case was mentioned of Jean Harris, who almost certainly is not dangerous, but who would also be retained under that provision. That is a very, very different scheme than what this amendment proposes.

SENATOR ZANE: Don't you think dangerousness is implicit in that three hundred year old law?

PROFESSOR VON HIRSCH: No.

SENATOR ZANE: You do not?

PROFESSOR VON HIRSCH: No, I do not, because I think the reason is, if that were true, I think you would have had in the law some sort of criterion which would have allowed you to pick and choose among accused murderers, depending on who was and who was not a risk.

SENATOR ZANE: You then do not have a problem with that provision of the Constitution that provides for detention on capital offenses, or you do? I am not getting clearly through from you, your thoughts.

PROFESSOR VON HIRSCH: Okay. I guess on that provision, I would not have a problem with it, and the reason would be simply that it seems to me the one case when the issue of flight-- It is sensible, if someone is facing execution, or possible execution, when he has strong enough reasons for possibly leaving, that you would want to keep him around. But, as I said, that is very different from building in a dangerousness criteria.

SENATOR ZANE: Don't you also think that the likelihood of incarceration, virtually for the rest of your life, poses the same danger, or the same concern that would result in flight? For example, I believe at this point that the professional drug pusher today under our law, something that we passed a number of years ago, provides for a minimum of thirty years or life imprisonment. I think we have a provision in our law that has existed for quite some time that rape is also thirty years incarceration, if convicted. Now, those two are not capital offenses under present law, but if a man is in his mid to late forties, that is the rest of his life. Don't you think the same likelihood of flight exists there?

PROFESSOR VON HIRSCH: The problem is simply one of where you draw the line. In other words, what is a sufficiently severe-- You see, one of the things is, there are two possible answers. One is yes, in which case the next question is, "What about twenty years?" The other is, "No, we'll leave it at life." It is simply a common sense distinction, I think, of where you draw the line about someone who faces such severe potential consequences that you are really worried about his flight.

But, the one thing is, whatever the rule should be, I don't think it is one that should distinguish among people charged with that offense between those who are dangerous and those who are not.

SENATOR ZANE: Professor, in all due respect, if I were grading your paper, I would have to write down that you didn't answer the question.

PROFESSOR VON HIRSCH: In what respect?

SENATOR ZANE: Don't you feel the likelihood of flight is just as great with someone who is, if in fact convicted, going to spend the rest of his life in jail?

PROFESSOR VON HIRSCH: It is slightly lower than it would be if someone is facing execution.

SENATOR ZANE: Therefore, if there was an extension of the law based upon the reasons that you approve the detention for one accused of a

capital crime, wouldn't that logically extend to cover someone who may well spend the rest of his life in jail?

PROFESSOR VON HIRSCH: I would have much less opposition to that kind of proposal than to the preventive detention proposal that is being talked about here.

SENATOR ZANE: Therefore, maybe what you are really talking about, is that the preventive proposal should have greater clarification, that conceptually you are really not opposed to it. Is that not correct?

PROFESSOR VON HIRSCH: No, that is not correct, because what I am opposing is a bill which allows you to determine whether or not a person goes to prison, not on the basis of the nature of the charges against him, but on the basis of someone's prediction of whether or not he is likely to do it again. That seems to me in principle a fundamentally different position, and that is the position which this bill takes. Also, by the way, this proposal has no restrictions on the nature of the charge whatsoever, so even the most trivial, in other words, the "U" turn, the illegal "U" turn, could be covered by this kind of Constitutional provision.

SENATOR ZANE: Thank you.

SENATOR RUSSO: And, incidentally, another thought would be, if there is a determination that flight is likely, you could basically solve the problem, as I think Prosecutor Schneider pointed out, with a very high bail that the fellow can't meet, because he wondered why we need this. Why do you have to allow a determination that someone is dangerous? If there is a likelihood of flight -- that is under present law, and in the Constitution itself.

SENATOR ZANE: Isn't that addressed with the State vs. Johnson, the likelihood of flight?

SENATOR RUSSO: Yes, I think so. And, of course, the Constitution itself presently provides, I think, for that. Certainly, the cases under it do. The other point I would like to pass on, is that there are some people who are far more likely to flee when facing five years in prison, than another person who is facing thirty years.

PROFESSOR VON HIRSCH: Well, there is a point where you draw the line; it would have to be drawn somewhere. I would think, for example, that genuine life imprisonment is pretty much like capital cases. If you are talking about five years or ten years, I think that is different. But, one of the things about flight, you see, is that it is a different principle, because the reason historically that flight has been taken into account is, you can't have a criminal trial at all if the person disappears. There is no way ever to adjudicate the case. That is very different, because, for example, if you have someone who is not likely to flee, you can decide that he is guilty and then, depending on what the rules of sentencing are, you can take into account his dangerousness in the sentence. But, you don't have the problem that you have if you begin to say, "Well, we think he is a danger to society."

Again, there are other systems. By the way, the French system is the classical case, where probably -- I'm not sure half, but a great number of people who are in the system of incarceration are people who are there before trial, and there is unlimited pretrial detention based on dangerousness. It is something which at least commentators on that system think is one of the less attractive features of that law. I would rather be facing criminal procedures here, than I would in a country like that.

SENATOR GALLAGHER: Mr. Chairman?

SENATOR RUSSO: Yes, Senator Gallagher.

SENATOR GALLAGHER: Professor, do you feel that the potential for flight is more important than the potential for danger to the person of

someone else, or are you more inclined to go along with the principle of flight because it is easier to measure?

PROFESSOR VON HIRSCH: The answer is "yes," I do think flight is more important for the following reason. If you cannot prevent flight, then you can never bring anyone to justice for any crime, and that is the reason, it seems to me, that you should have a rule about flight. It also includes, not only flight, but the issue of protection of witnesses, for the same reason. That is why historically we have had the flight idea as an exception to the general rule against prediction. If you are talking about including dangerousness, of course human life is very important, and human safety is very important, but then you are shifting to a fundamentally different system where you can lose your liberty, not on account of what you did do, and what someone has shown you have done, but on account of what you might do. One of the witnesses, I think Mr. D'Alessio, raised one of the interesting problems in the way this has been written. It may be that the "evidence" is all just part of the current charge. So, you may really begin to start locking up a person who you think is dangerous because he has done the murder, and then, lo and behold, he didn't do the murder, and that also ruins the prediction about his dangerousness.

SENATOR GORMLEY: Excuse me, but don't we also say that they might flee, and maybe, if you take a poll, 90% of them would not have flown, or whatever. We could say the same thing about fleeing, but you're saying that fleeing makes it that dangerous.

PROFESSOR VON HIRSCH: That's right.

SENATOR GORMLEY: No, no. What are the statistics on fleeing? Have they done a poll on fleeing, or have they only done dangerous?

PROFESSOR VON HIRSCH: I think they have only done dangerous. By the way, you will find the difference is, it is much harder to do without the rule of flight, because if you didn't have the rule on flight, you would get a substantial number of people who would never be tried. In other words, it is part of making sure that a trial occurs. The difference with future dangerousness is simply that it adds a basis for locking people up which we have never had in our Constitution.

SENATOR GORMLEY: But, what I'm saying is, it is the same basis as future fleeing. You are using a crystal ball under either circumstance.

PROFESSOR VON HIRSCH: Yes, and a faulty crystal ball. That is why I think it is a problem to take the flight rule, which we already have, and which is problematical enough, and load it with a new basis. You see, the other thing about flight in the way it works in practice, is that the people you are worried about are usually the people that have certain fairly recognizable characteristics, the main one being no residential stability here. If you are talking about dangerousness, you are going to have a large group of people who have a bad prior record, a whole series of things, and you are going to start choosing among them, and it is going to be something that will be used in a much more sweeping way, I think, based on what has happened with dangerousness in, let's say, the area of sentencing.

SENATOR GORMLEY: But, what I'm saying is, the same flaws in the criteria that you would use for dangerousness are also the same flaws that you already use in fleeing -- minimally they are the same.

PROFESSOR VON HIRSCH: The tradition of future conduct always has the same problems. The only thing is, you are extending the use of prediction beyond what is being used now to a large category, because a lot of people who will meet the flight criteria will fail under the dangerousness criteria, a lot of people. So, what you are doing is, you are taking a whole group of people who would not fail under the flight criteria, and you are making them subject to imprisonment on the basis of a very fallible set of predictions.

SENATOR RUSSO: Okay, Bill?
SENATOR GORMLEY: Fine.
SENATOR RUSSO: Thank you again, Professor.
PROFESSOR VON HIRSCH: Thank you.
SENATOR RUSSO: Let's now go back to Assemblyman Walter Kern.

A S S E M B L Y M A N W A L T E R M. D. K E R N, J R.: It is sufficiently broad enough that I got entrapped in it, but I feel like a fish out of water.

I understand, and I wasn't here, that there were some comments about my involvement in the issue. Perhaps someone could enlighten me as to what was said.

SENATOR GORMLEY: Well, why don't we get Mr. Fogel?

MR. FOGEL: Yes. My office contacted your office about what the nature of the problem was with bail. You indicated that you, in your practice, had seen people who didn't show up who had committed offenses, but that you were not aware of any statistics. I think that is fairly accurate of what I said.

ASSEMBLYMAN KERN: Well, I can confirm the fact, based on my experience as a municipal prosecutor, that it is a problem, and I know it is a problem throughout our criminal justice system. We have an awful lot of people who have the potential and, in fact, follow through on it; when they are arrested, and they are indicted, and they are awaiting trial, while they are waiting, they are out committing another offense. It is quite common; in fact, it is extremely common with burglaries.

The proposals, and I guess we are talking about Senator Graves' bill here-- Right? I happen to be the sponsor of the same proposal in the Assembly, and it is awaiting posting in the Assembly. It has been favorably released by the Assembly Judiciary Committee. Obviously, I am supportive of the proposal. The Professor mentioned that you are talking about two different groups of people, and that is definitely true. Bail is set up to ensure that someone shows up, and the standards for bail are for that purpose. We are not talking about the same group of people. We're talking about a group of people who have a potential for dangerousness. They are recidivists; they have bad records, and we know, based on what they have done in the past, and not the offense they are charged with, that they are likely to do it again, and victimize society -- by their records.

SENATOR RUSSO: By their records?

ASSEMBLYMAN KERN: Right.

SENATOR RUSSO: Why don't you amend your proposal to say, "Any repeat offenders will be denied bail?"

ASSEMBLYMAN KERN: I think that is something the Committee ought to consider.

SENATOR RUSSO: Do you think so?

ASSEMBLYMAN KERN: I think so.

SENATOR RUSSO: Over my dead body, but it is certainly worth consideration if somebody promotes it. But, Walter, think about what you just said. Recidivists should be denied bail, is what your statement comes down to. "If you committed a crime once, don't get arrested again. We're not going to bother about your guilt or innocence. You're going to be in jail until you are tried, if it's a month, six months, or a year, because you have committed another crime." That is what you just said. I don't think you mean that, but if you do, you do. Is there anything else?

ASSEMBLYMAN KERN: No.

SENATOR RUSSO: Thank you.

ASSEMBLYMAN KERN: Thank you.

SENATOR RUSSO: Martin Barrett.

MR. BARRETT: Here is a copy of my statement, which I am going to read.

SENATOR RUSSO: You are appearing on behalf of the State PBA, is that correct?

M A R T I N B A R R E T T: That is correct. I am the Legislative Cochairman for the New Jersey State Policemen's Benevolent Association.

SENATOR RUSSO: You requested, also, that Bill Palatucci and Anthony Cicatello from the PBA speak.

MR. BARRETT: They are our lobbyists.

SENATOR RUSSO: Okay. Go ahead, Martin.

MR. BARRETT: The New Jersey State PBA strongly supports Senate Concurrent Resolution 146, which would amend the New Jersey Constitution to permit the denial of bail in specific cases where the person arrested would pose a danger to the safety of others.

The PBA believes that this legislation, when added to the improved sentencing provisions contained in the revised Code of Criminal Justice, the mandatory minimum sentencing provisions of the Graves Act, and the enactment of the capital punishment legislation sponsored by Senator Russo, will greatly restrict the criminal activities of the most violent and hard core criminals.

Prevention is a key word to public safety, and prevention through deterrence is an approach that must be seriously considered.

We need to prevent that class of crimes which cause people to bar the windows of their homes, which make citizens afraid to walk the streets at night, and which force us to carry the correct change if we choose to ride a bus or buy gasoline at night.

Killers, rapists, robbers, and burglars of dwellings -- if we can deter these types of criminals, then we can afford experimentation with rehabilitation for most other common forms of crime.

Temporarily restricting the ability of a dangerous criminal to commit crime is a legitimate and appropriate function of government.

What we need to do is to concentrate on those few categories of criminals who have infringed so much on the freedom of our life styles in recent times.

Persons accused of committing crimes are entitled to the full protection of their constitutional rights. There should be no doubt about that. However, when these constitutional rights are interpreted in such a way that they are magnified beyond the bounds of reason and common sense, then the inevitable result is a mockery of the law.

To give criminals their full constitutional rights is one thing. To give them the upper hand, and place the police and other aspects of the criminal justice system in a subservient position, is unjustifiable nonsense.

Regardless of what conditions or causes have been used to explain the known extent of crime, it is certain that this increase in criminal activity has threatened the peace, security and general welfare of the public.

Crime has become one of the most serious problems facing the American public, if not the most serious problem. Crime is getting so serious, that we dare not confine ourselves to halfway measures. Either the nation is going to control crime, or crime is going to control the nation.

Men and women who respect the law are entitled to equal protection, but they are being deprived of that protection when killers, rapists, and other hard-core violent criminals are allowed to walk away minutes after their arrest.

The life of a citizen, the protection of innocent children, and freedom from violent crimes are just as important to the public as the

protection of this country from its enemies. The American public would not stand back and allow this country to be overrun by enemies from outside. Then, why have we allowed the enemy from within to continually roam our streets in search of the next victim?

One of the major reasons for the increase in serious crimes is the recidivist, the repeat offender. He commits about two-thirds of all crime. This means that today we face a corp of hardened and experienced criminals who have been arrested time after time, only to keep on committing more crimes. Why do they keep on committing crimes? Partly because current bail procedures often enable this hard-core criminal to receive the same considerations as the first time offender. Hence, this type of criminal, given easy bail, becomes free to commit additional crimes. And he does.

Concerning the pretrial detention, which is the basic consideration today, Article I, Section 11 of the New Jersey Constitution provides that, "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great." Article I, Section 12 states that, "Excessive bail shall not be required."

Although the bail provisions of the New Jersey Constitution appear to indicate the availability of bail for all non-capital offenses, the New Jersey Supreme Court has recognized and approved the denial of bail to ensure the presence of the accused at trial, where it is clear that regardless of the amount of bail the accused will flee.

In addition, trial courts throughout the State now have the discretion to impose conditions on pretrial bail, as well as indirectly placing restraints on the accused person's ability to commit further crimes.

The very fact that the New Jersey courts have already recognized the above exceptions to the New Jersey Constitution's bail provisions, indicates that other exceptions might also be approved.

In the case of the State vs. Johnson, the New Jersey Supreme Court recognized the dilemma involved in allowing bail to an individual who manifests physical symptoms which indicate that his release would pose a danger to himself or to the community.

SENATOR RUSSO: Excuse me, Martin. While most of the Committee is still here-- You have an eight-page statement.

MR. BARRETT: Six.

SENATOR RUSSO: And, you are on Page 3. Is it possible to sort of summarize it, if you can?

MR. BARRETT: Fine, I'll try to break it down. On Page 5 are our recommendations for what should be incorporated in the Constitutional amendment for denial of bail. These are the five basic reasons we believe a person should be denied bail.

Where the offender manifests an identifiable physical, mental, psychological, or emotional condition which indicates that his immediate release could endanger himself or the community; where pretrial release could constitute a serious threat to the integrity of the judicial proceedings, such as: where the defendant has threatened the safety of witnesses, where the safety of jurors is in question, where the defendant threatens to interfere with pretrial investigations and, finally, where the offender is a habitual, hard-core criminal.

We feel that the New Jersey Constitution is basically similar, if not exactly the same, as the California Constitution, and the California courts, in Bean vs. County of Los Angeles, authorized that, "The applicant should be admitted to bail as a matter of right, unless it could be shown that his condition was such that for his own safety, or for the protection of society, it would be proper to deny bail."

I put that in for the record, and now I will be happy to answer any questions.

SENATOR RUSSO: Martin, I just want to make one or two brief comments. This is very rare; I think it is the first time I find myself on the opposite side of the PBA, or at least one of the few times. On Page 1, you say, "Temporarily restricting the ability of a dangerous criminal to commit crime is a legitimate and appropriate function of government." I just want to remind you that he is not at that point when he is at liberty and has not been determined to be a criminal of any type at all, let alone dangerous. There has been no special determination.

You talked about "why has the enemy from within been allowed to continually roam our streets?" He may or may not be, as I think the Professor pointed out. Until he is convicted, he may not be the enemy. It may also be that we have the wrong guy. I know that has happened many times. Then, you also touch on recidivists, and that is very similar to what we talked about with Assemblyman Kern. Basically, it seems as though what you are saying is, if he has a prior record, then automatically we should deny him bail.

MR. BARRETT: We would not say automatically; we would say there has to be some sort of determination that someplace along the line, whether a person has to go out and shoot five people on five different days, or whatever it is, a determination will be made by the Legislature. There has to be some sort of seriousness involved where the person can be denied bail.

SENATOR RUSSO: Well, you understand though, perhaps someone with a viewpoint that, under this Constitutional amendment, this doesn't either limit or define what can follow. It simply amends the Constitution. Now, we can have any number of things happen. You know, they may be good laws, they may be bad laws, but the Constitution will have to be amended if this passes and is approved by the voters. It may not only apply, as you say, to the violent criminal, whoever he is, if he is even the right guy. The point is, this isn't a case of where we generally have incarceration after he is determined to be a violent criminal, or excuse him -- as you know I agree with you on, obviously -- after it has been determined that he has committed a violent murder. We're talking now about putting him in prison, when he has only been accused, and hasn't yet been convicted of any of those things.

So, I know we have covered a lot of that ground, but I just wanted to mention another viewpoint. Are there any other questions for Mr. Barrett? Senator Gallagher?

SENATOR GALLAGHER: On Page 4, Marty, of your statement, you deal with the Eighth Amendment to the United States Constitution. You say, "In denying the right to bail under the Eighth Amendment, the Federal Court stated, 'In England that clause has never been thought to afford a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.'" What court was that?

MR. BARRETT: You may not believe this, but in my copy there is no Page 4.

SENATOR GALLAGHER: Is that right?

SENATOR RUSSO: It's Carlson vs. Landon I think he is referring to, at the end of the second to the last paragraph.

SENATOR GALLAGHER: You have no idea about that page?

SENATOR RUSSO: The only thing I know is that the Federal Constitution-- John, are the words in the Federal Constitution identical to ours, or are they different?

MR. TUMULTY: No, they are not the same.

SENATOR RUSSO: They're not the same, so that--

MR. BARRETT: They are; they are exactly the same.

SENATOR RUSSO: Pardon?

MR. BARRETT: They are exactly the same. It says that in the statement on the back of the bill, I think.

MR. TUMULTY: From the eighth to the twelfth are not. I thought he meant the one about "All offenses except capital offenses shall be bailed," but that is not in there. That is not in the Federal Constitution. There is a phrase about excessive bail under the Constitution, though.

SENATOR GALLAGHER: What level, the Supreme Court?

SENATOR RUSSO: Citations in the Supreme Court, yes, 342 U.S., 1952. Are there any other questions? Martin, I want to thank you very much. The Reverend Dudley Sarfaty, New Jersey Council of Churches.

Let's sort of see if there is anyway, without depriving anyone of his full right to speak-- We do not want to cover all the ground that perhaps was covered, which would be repetitious, because we have a full afternoon session. If we have to continue on, we'll have to, but if there is anyway you can help us without compromising your position, we would appreciate it.

REVEREND DUDLEY SARFATY: I will try to do that, Mr. Chairman, by being brief. I do not believe that this is just another chairing of the Judiciary Committee on legislation, and I would like to suggest that there is something basically religious and basically American about the role that the Judiciary Committee of a Senate has to play in protecting what I want to call the American compromse, the compromise involving church and state, the compromise involving freedom in the state, and even the compromise we have to make when we try to determine public policy.

This the five hundredth anniversary of Martin Luther's birthday, and some of you may hear some discussion in the course of this year of the conflict that went on between Martin Luther and the Vatican, which happily has been raised now to a much more creative level, on whether or not it was possible for one to attain perfection in the world. I would like to take the approach to that problem that I think the Catholic bishops are taking in the final edition of their Pastoral Letter on the issue of peace, that is to talk about some principles I think we will agree on and then leave to you the very heavy deliberation of how you apply those principles in the real world, where, of course, this proposed amendment would have its effect. And, that is not an easy thing to do.

Martin Luther said, "We must sin bravely," and he was not, as scholars do not all agree, suggesting that all of us leave where we are, go out and find something evil to do, and undertake to do it. What he meant was that there is a limitation upon our human efforts, no matter how hard we try and, over the years, all of you, and the Council of Churches have had discussions as to how to try to achieve the closest thing to what some of us thought was perfection in the real world, if possible, and I guess it is fair to risk -- I shall risk it -- that we agree we have never attained perfection in any of the legislation that we either, between us, wanted or did not want.

I remember your speech, Mr. Chairman, when the death penalty bill was enacted, suggesting that we would not know until we met our Maker whether it was wise or not. There is a humility that religious perspective forces upon the civil state. This is the great heresy of the Russians. The Russians confuse the state with God. The glory of the American compromise is that we are committed to not confusing the state with God. The Bishops do not believe, for instance, that mankind, though it has the power to destroy the world with a nuclear war, it doesn't have the authority to do that.

So, we place a limitation of perfection on the secular state. We try, in our Constitution, to carry over from the common law and from the religious rootage of our own country, a limitation set upon the State in its performance. Sometimes we fail; I think we failed with the Japanese. At least living on the east coast as a young person, I was far more afraid of what the Germans might do -- and I remember the fear of air raids -- than I was afraid of what the Japanese might do.

We live with imperfection in all of our decisions, and even our permanent decisions. The question of psychiatric release has been referred to. How can even a responsible psychiatrist know -- there is no magic art in psychiatry -- what good or evil things his patient is going to do once he is released? Christopher Deitz spoke last night; none of you were there, but he was talking about what has happened in the development of New Jersey's parole system over the past ten years. He raised the question of how close we could come to perfection in the parole system, and he dealt with this problem of how many people who are put out on parole are going to commit crimes again. He talked about the anxiety he has at night when he reads the New York papers or the Philadelphia papers saying that someone on bail has committed a crime. There is a fair chance in those media areas that those people would be New Yorkers, or maybe people from Connecticut, or people from Pennsylvania.

SENATOR RUSSO: You meant someone on parole?

REV. SARFATY: Didn't I say that?

SENATOR RUSSO: You said "someone on bail has committed a crime." You meant someone on parole.

REV. SARFATY: Right. I gather from the people before me that nobody has those statistics. The parole estimate, and it is only that, not a scientific study, is that only about 4% commit crimes, which is a lot to the public, and which is a frightening thing. It would be marvelous if there was a way to stop it, but there is 96% who do not commit another crime. I am trying to suggest that there is no perfection in any solution that we made. Whether or not you change the American Constitution essentially to write in an issue of incarcerating people for violence and not just for unwillingness to appear again, you are not going to succeed totally. I guess I would suggest then going beyond the general principle, which I hope you agree to, that it is very dangerous for us to begin to weaken this constitutional protection.

I realize there is a statistical possibility that any one of us, on his way home, could get killed by a person who is charged with a crime in New Jersey, whose record is not what we would consider that of a worthy citizen, but I think that is a risk we have to run. I am suggesting that when we each leave here, we are going to risk passing someone who has a psychiatric history, and whose doctor has let him out, and that we are going to risk passing 4% of the people who are out on parole whom the chief parole officer of our State personally worries about and feels are dangerous. But, I think that as long as we have decided in America to limit the power of the civil state, that we have to continue to limit the power of the civil state, and realize that no matter how simple it may seem, the offhand statement that no one is perfect applies to what you and I will do, what the State does, and what we face in the future.

I certainly can think of people who I would like to see under lock and key. My problem is, that the longer I think about it, the longer the list gets, and I realize that somewhere in that process I'm violating other people's constitutional rights. So, I think, sir, that as we enter 1984, we ought to make sure it remains a joke, and not a reality in America, as far as the power of civil liberties in the United States is concerned. I am happy to be here on a day that I agree with the Chairman.

SENATOR RUSSO: For a change.

REV. SARFATY: But, I will be very honest, and say it gave me considerable pain as I was approaching my turn, to realize that there are at least three Senators here who have very serious anxieties about our failure to solve the criminal problems in our society. As a non-lawyer, and not seeming to be too naive, I do think a speedy trial, I do think the development of a healthy society, and I do think even the solution of our country's economic problems in the long run, are going to bring more safety on the streets than any other law that you and I, or us together, conceive.

SENATOR RUSSO: Thank you, Reverend. Are there any questions? (no response) All right, we appreciate your coming. Now, look, we have four witnesses left, and it's one o'clock. Senator Graves, are you going to be here this afternoon?

SENATOR GRAVES: No, I am not going to be here this afternoon. That is why I asked your indulgence, and I waited until last, so that I could speak.

SENATOR RUSSO: I have no problem. I assumed you were going to be here, because you have another bill on.

SENATOR GRAVES: No, I can't be. I asked you to give me five minutes on that bill.

SENATOR RUSSO: Well, I can't, because it is listed for one-thirty. You understand that. I can't call a bill and have people show up today-- Oh, I'm sorry, you asked though if you could speak, but yet we still could pass the bill on.

SENATOR GRAVES: Yes.

SENATOR RUSSO: Do you want to do that?

SENATOR GRAVES: Am I going to be hampered in being able to speak on my bill? Is that what you're telling me?

SENATOR RUSSO: You can say anything, Frank. Whatever courtesy you want, I am prepared to give you.

SENATOR GRAVES: Okay.

SENATOR RUSSO: What would you like to do first?

SENATOR GRAVES: I would like to wrap up this bill here, if I have your permission to do it.

SENATOR RUSSO: You sure do.

SENATOR GRAVES: Okay. And, if I have your permission, I will speak for five minutes on my other bill, no longer, and move on and make room for everybody else.

SENATOR RUSSO: Okay, but before you do-- After Senator Graves, suppose we carry over the last three witnesses until we resume this afternoon, rather than-- Does anyone have special problems with that? (someone answers from the audience) What is the problem?

SHERIFF NICKOLOPUS: I have to be back for another meeting.

SENATOR RUSSO: You are?

SHERIFF NICKOLOPUS: Sheriff Nickolopus.

SENATOR RUSSO: Where do you have to be, Sheriff?

SHERIFF NICKOLOPUS: Back in Somerset County. I should be there at one o'clock, but, obviously, I can't make that.

SENATOR RUSSO: I don't think you are going to make that.

SHERIFF NICKOLOPUS: That's right.

SENATOR RUSSO: Let's see then if maybe we can try to dispose of you after Senator Graves.

SHERIFF NICKOLOPUS: Thanks a lot.

SENATOR RUSSO: Then we will take our break and come back. Okay, Frank?

S E N A T O R F R A N K X. G R A V E S, J R.: I promise you, Senator, I'll go rapidly. What concerns me is, I wonder if those who are here with sympathy and compassion for those who may have committed the crime -- I wonder where their standards and feelings are for those who are laying in hospital beds, or in funeral parlors, or wherever it might be, who have had these crimes committed against them. I also wonder if there is a full understanding of what we are doing. What we are doing, and what I am asking to be done, is to give our constituency the right to vote on something. I do not think we should belittle our constituency, because our constituency are the ones who have put us here. What we are saying to our constituency is, "Would you like to have the right?", or "You will have the right to say yes or no to an amendment to the Constitution, which will cause other things to happen, which do not automatically if you say 'yes' say that everybody who does something wrong is denied bail and is going to be put under lock and key. There are also mechanisms of protection in that particular category. The mechanism of protection is that we, as legislators, will have to write some laws, and have public hearings, and go through the process of two houses, and go to the Governor's desk, before it is implemented."

There is plenty of insulation for the protection, but what is going on now, is that I sit in a double role. In the role of the chief executive of a city, I am seeing repeatedly those who are out on bail continually commiting crimes, and there is great concern. Walter Kern brought forth here that he did it for the Governor's Office. I am not doing this for the Governor's Office. I had staff preparing this, and the Governor's Office contacted me and said that there was already a declaration of possible amendments to the Constitution in the Assembly, and would I be suggestive if what I was thinking about was brought together with what they were thinking about.

When I listened to them, I said, "Yes, it seems to be the same thing that I'm on." So, it isn't that we are going to take anyone who has committed a particular crime and just willfully say, "You are denied bail. You are going to be put behind bars, and you will wait there until your trial." It isn't so. There are all kinds of insulation here, and the most important insulation is that other great factors have to take place. The voter makes a decision that he wants this mechanism put into position. The court still has something to say. Third, and finally, and last, those who the constituency will elect this November will be making the decisions on what is going to be done by implementation of laws next year.

So, that is that one particular concern, and I will quit there so I do not abuse my time. But, I'll ask you--

SENATOR RUSSO: That is all right; it is an important bill.

SENATOR GRAVES: I will ask you for three minutes on my other bill.

SENATOR RUSSO: Let's stay with this one first, then go on to the other one.

SENATOR GRAVES: Okay.

SENATOR RUSSO: Let me offer a response, Frank, because as you have known for some time, I don't agree with the bill. It has nothing to do with you as the sponsor; I am sure you are sincere in your efforts. I just totally disagree. It is sort of strange that--

SENATOR GRAVES: And, I respect you, and totally agree with the bill.

SENATOR RUSSO: I understand. It is sort of strange that someone who could, I guess, probably be labeled somewhat of a conservative in criminal law matters, as I have been-- I haven't had a bill I felt more strongly on in a long time than this one. And, you see, there are a couple of things I would like to respond to, and briefly.

You say, shouldn't we have as much concern for the fellow in the hospital bed as we do for those who have committed the crime? It's nonsense to even suggest that I, or Jeff Fogel, or Reverend Sarfaty do not. That's nonsense. We just disagree with you on this issue, not because we are not as concerned about the victims as you are-- And, I hope nobody believes that we aren't. You say, why aren't we as concerned about the victim as we are about those who have committed the crime. Gee, Frank, aren't we going to have a jury trial?

SENATOR GRAVES: I said, accused of committing a crime.

SENATOR RUSSO: No, you didn't; you meant to say "accused," okay. I think we ought to be equally concerned about the victim as those accused of a crime, because that fellow is facing prison, and he might not be guilty. Now, once he is convicted, I guess that is when I draw the line and become a real hard-liner, because now that he has been convicted of a violent crime, it's a long time he is going to spend in that prison. But, just as dangerous is the fact that we might convict him, and put him in prison, and he isn't even the right man. You see? But, he spent three, six or nine months in a State prison, or wherever, because we thought he was dangerous. That is another viewpoint. That doesn't mean that you are wrong and I am right -- it's just another viewpoint.

You say we should give our citizens the right to vote. I mentioned the CBS poll earlier. If the people that sent me here think that my function here is to request the majority view, you know, on all cases, then they better get me out. If they tell me I have to take my conscience away from me, whatever intelligence I have, or whatever logic, then they ought to elect someone else. That is not a representative democracy. Your suggestion is that we go to a true democracy where we, in effect, have everybody count and then we have a government by plebiscite. I don't agree with you, Frank. I do not agree with you that whatever today is the popular opinion in my district, ought to be the way I vote. You know, if I don't have any conscience problems about whether I think I should-- You know, I am their representative, but to say that that is all that matters, no, because some terrible things would have happened in this country over the years. Even you and I today would agree, that though they were popular at the time, they would hae been terrible. So, I do not agree with that point.

You talked about the fact that we have a lot of protections, because any bills that come up we have public hearings, and all that. You know, sometimes we even have Committee hearings, because they don't get referred to Committees. I am not prepared to make the assumption that the legislators of the future will all do a very careful and thorough job. I am not even sure we do today, and I include myself on a lot of the bills, or that we do it the way we are supposed to. Things get very busy and very hectic down here. Why, we even get bills on the board once in a while during a very busy session -- no reflection on you, Mr. President -- where we don't even see the bill, let alone-- But, that happens by accident. The President has assured me he is going to correct that, hopefully.

SENATOR ORECHIO: It will never happen in the next session.

SENATOR RUSSO: And then finally, Frank, even aside from all the arguments on the issue in general, I find the language in this amendment terribly, terribly misleading. The language and the way it reads -- I can't vote "no," even though I feel as I do, in a sense. Maybe I can, because I am involved in it, but it is terribly, terribly misleading. It repeats the current law and throws in a new provision and, in effect, makes it clearly appear as though if you vote "no," you are voting against no bail in capital cases. And then, also, about the fleeing.

So, I just wanted to throw out some contrary viewpoints as one who disagrees with you on this issue. You know, maybe I will change my mind or something, or you will, but at least right now we have an honest, intellectual disagreement. Those are some of the reasons I have, other than what was offered before, explaining how I feel. Is there anyone else?

SENATOR ORECHIO: Mr. Chairman, while it is fresh in my mind, I would just like to respond to you. I can recall not too long ago when you made an impassioned plea to me to put a bill in on one of the referenced amendments.

SENATOR RUSSO: Did I? You see, even when I criticize legislators, I say "even myself." That makes my point that I spoke the truth. Senator Lynch.

SENATOR LYNCH: Frank, forgetting for the moment that we are here on such a proposed drastic change, which seems to be based on perceptions, rather than based upon any analysis of why we are here and what we are really addressing, and what it is going to mean to us, I can see where it is going to lead to some natural abuses occurring literally overnight, when one compares it to what is taking place with our Judiciary today and the pressure that is being brought to bear upon us in the sentencing procedure, where they are taking isolated instances of minimal sentences, noncustodial sentences or short-term sentences, without portraying all the facts, and without going into the judge's record of five, six, seven, eight, nine or ten years of consistent sentencing in a sensible manner, and isolating one case and saying, "You must have made a mistake," or "You've done something wrong," when any type of lenient sentence that he may hand out will never be proven out for fifteen, twenty or twenty-five years, before someone can say that they were rehabilitated without a need for ten years of incarceration. What is going to happen here is that you can't possibly address each and every person who is on bail, or proposedly on bail, and to analyze who is going to commit a crime and who is not in that interim period, because the only way you can do that is to put them all away and leave them there.

The first time any judge has someone out on bail who may not have appeared to be dangerous, but who commits a crime while on bail, he is going to be called on the carpet by the public, and by the media, and by some of us in the Legislature who are always so courageous to act sometimes. It seems to me you are putting an inordinate burden on the Judiciary, and it is going to lead to abuse after abuse after abuse, because the judge is going to say to himself, "If there is any possible question in my mind, I'm not going to let him out. If I am the one who has to make that decision whether he is going to do something while on bail, then I am going to say, not me, because I may be up two years from now for a ten-year appointment. I may be up for reappointment three years from now. I may have to go a lot longer than that, and I am not going to be called on the carpet as being one who lets out felons who, even though they haven't been convicted, are on bail through my craziness." I think the abuses we are looking at here far outweigh the good that can be gained, because you can't assess the good that is going to be gained because you can't predict who is going to commit a crime while on bail.

SENATOR RUSSO: Ray?

SENATOR ZANE: Senator Graves, I have some problems with it, and I think I might be more comfortable if somehow your bill were tied to another bill -- or if your resolution were tied to another bill with standards. I guess anyone who heard any questions I had this morning would think I am 100% in support of it, and I don't think I am. Conceptually I can see the application of it in real dangerous situations, but I too am concerned about those abuses, and I am concerned about protecting what I think are the rights

of the American people. I do not mean that I, myself, am out to protect those rights as such, but it does concern me that this represents an erosion that would permit abuses. I would rather see something with standards that we can be looking at simultaneously with this, and even if it takes another year to take this through, I don't think it is important that mid 1984 would be the appropriate year.

I do not really see that it has to be done right now, and I wonder what your thoughts are of having a bill, whether it is Paolella's bill, or whose bill it is, that moves simultaneously with this, and your bill be tied to that, so that it wouldn't go to the voters until we have those standards, because to some extent I find us looking at something in the abstract. If I knew that there was someone who was very likely to go out and harm a number of people, and it need not necessarily be a capital crime, I would probably feel that, yes, we ought to be doing something to protect the people. But, the vagueness of this is what bothers me, and those rights and that system that we have of "innocent until proven guilty," I just feel is a road to obtain it by this, in and of itself. I just think that standards should go with it. Do you have any feelings about your bill being held, or tied first to standards, before we act upon it? Do you have a problem with that?

SENATOR GRAVES: First, I would think that I would want to see that we made every attempt to tie them together now, with time to put it on the ballot if we could. Second, one thing I learned here in the last five years, is that locking yourself into a position is almost tantamount to saying that you are not going to get anything done that you feel might be right. So, I have tried never to put myself in that particular position. I would rather see us get something, than get nothing whatsoever. I would rather have tried to do something and failed, than not to have done anything whatsoever. Perhaps this could be amended; perhaps some different wording could be put into this particular box that we are making presentation to.

If you feel that it is going too far too quickly and doesn't permit the necessities of what Senator Lynch has said, then perhaps something could be written into what we're giving our constituency the right to vote on. I am not adverse to that; I would be strongly supportive of it. I do not believe that because I believe in something that everybody else should, but I do believe what is permitted out there now is having an adverse effect on the people we are trying to protect. I do not feel that right now we are able to offer them the full strength of government that we would like to say we are. Maybe what I am supportive of here is taking it further than what it should be and, if it is, I'm willing to get onto the middle of the road with you, and I'm willing to meet what it is. I'd work with you; I know from what you're saying yours is a very strong position on it, and it is just adverse to what I see as a compromise. But, if the three of you are saying -- who are also lawyers -- that there is an area of compromise that could be made by doing something, I am supportive of it, because I want to see it happen, and not necessarily the way I want to see it happen, but the way that those who have practiced in courts could understand from what I am driving at. So, I am not adverse to it.

SENATOR ZANE: Mr. Chairman, my position really isn't like that. I do not think I could support this resolution, as written, with the language we have. Conceptually the idea of detaining someone for something that would strike all of us as an act whereby someone should be detained, I probably could support, but I just think we need those standards, or some companion measure to go with this, to tie it down to that. And, also, that the people of this State, when they vote, recognize what they are voting on. When Assemblyman Kern was here and spoke earlier about his experiences as a municipal prosecutor, and indicating that people did not show up for

municipal matters-- I do prosecute in a municipality, and I'll be damned if I would want to see someone go to jail and the key thrown away because of their failure to appear in a municipal court. And, that was almost implicit within his feeling as to the genesis of this bill. That concerned me gravely. No pun intended. (laughter)

SENATOR RUSSO: Senator Orechio?

SENATOR ORECHIO: Senator Graves, earlier Mr. Fogel, and Senator Lynch followed up with the same observation that there have been no statistics generated to develop what the depth or extent of this problem really is. I was just wondering, can you tell me if you have statistics in terms of the State counties, or maybe municipal courts, that could shed some light on this?

SENATOR GRAVES: I have strong statistics for one city, the only one of the 572 communities in the State, that being Paterson. It is a major problem with those out on bail.

SENATOR ORECHIO: Do you have any numbers on that?

SENATOR RUSSO: Do you have any compilation, Frank? Have any studies been done there, or any compilation made that you know of?

SENATOR GRAVES: Well, I have detective bureau reports; I will get them all to you. It is very high; it is not a low area whatsoever, it's a very high area.

SENATOR RUSSO: Could we get a summary of it? In other words, instead of reports on each individual case which we would have to wade through, could be get a summary showing, namely, the defendant, the fact that he was released on bail and had committed another crime and, of course, what the crime was, so we can see whether, even if your proposal was law, he would have been incarcerated.

SENATOR GRAVES: Yes, I'll get that. Could we take some middle of the road approach on this, and talk about specific types of crimes. You know, I do not like to put people in jail, you all know that, but could we deal with certain types of crimes, and maybe even address it this year. I'm talking about rape; I'm talking about--

SENATOR RUSSO: The thing is, you are probably guaranteed more than any one of us here of being back next time, primarily because you are a nice person, and primarily because or your outstanding record in the Legislature.

SENATOR GRAVES: I want to see what is behind your saying this.

SENATOR RUSSO: Frank, in all honesty, I am not sure there could ever be a compromise where I could ever support SCR-146. I'm being fair when I say that. But, Frank, this really, whether you're right, or I'm right, is so important that I think a push to get it on this year -- an issue so important -- plus there is really no reason to do it, is a mistake. You are going to be here, and I think when you get all that information, and all of those statistics, you may then decide it was right. You may finally then decide to support it. Probably neither will happen, but at least you are going to have more comfortable feelings, not only here, but on the floors of the Senate and the Assembly. You're changing a fundamental constitutional right, and maybe you should be, but not with haste. I mean really, even though I know I speak from a viewpoint contrary to yours, maybe that is why I am willing to delay. But, no, it isn't. I mean, if it is going to pass, it might as well pass now as next year, but we ought to at least know what we are doing, those of us who are going to be for it, and your name is going to be on it, if it turns out to be a disaster.

SENATOR GRAVES: The only thing I say differently is, why do we keep talking about next year? Why don't we make a legitimate attempt to throw something together in time for this year? We are going to be back here four times in June.

SENATOR RUSSO: Well, time is so short to get all this information and all the statistics. What is the deadline for a Constitutional amendment?

SENATOR ZANE: August.

SENATOR RUSSO: It has to pass both houses.

SENATOR O'CONNOR: As you know, to your shock, I told you this morning that I was prepared to support this. But, having heard what I heard this morning, I at least changed my opinion to the extent that I would like to see some additional information. I do not know whether this would be satisfactory to Senator Graves, but I would like to see some kind of committee, such as we have studying the insanity defense, study this and make recommendations. I don't know whether that would fit into his time frame, but that is where I am at the present time.

SENATOR RUSSO: You would never get that done by August. To get anything done this year, it would have to pass both houses before we adjourn, which is probably in June.

SENATOR GRAVES: I am supportive of what you are saying.

SENATOR O'CONNOR: I am concerned now that a vote that would be taken on this would be on an emotional basis, rather than on the actual facts.

SENATOR RUSSO: I have a feeling that right now -- I don't know, I haven't polled anyone yet -- that it would go down. I have that feeling just from listening to the comments and talking to the Senator. From your viewpoint, we have everything to gain and nothing to lose.

SENATOR GRAVES: Okay, my viewpoint is that the foundation could still be there and you might make some alterations while we are building it, but the need is there, and all I am offering you is that, hopefully, you will take the foundation and you'll put it together by committee or otherwise.

SENATOR RUSSO: Why don't we put in a resolution Monday to have a commission, like we did with the insanity thing, to get all the facts and information, and get a report. If we can get it done in time, we can get it done. If we can't, we can't -- but, at least, do it one way.

SENATOR ORECHIO: I would imagine, Mr. Chairman, that among all the agencies that might have information for us, if we sought information from the AOC, maybe within a short period of time we could have the information.

SENATOR RUSSO: I don't know; there may be a lot more information that can be obtained by such a commission like we did on the insanity thing.

SENATOR GRAVES: Maybe thirty days from now we will know more about what the foundation is of the bill and, by getting the input from other members of this Committee, we can put something together that all of us can live with. But, how it stands now is a problem in my opinion. Maybe this one takes it too far. The only thing that makes me so strongly supportive of this is that it has so many mechanisms voted into it. The people get a chance to vote; we have to do it. I'm sure this isn't the type of legislation that would go out with no reference and be rushed through helter-skelter. I think we are selling ourselves short. But, it is more important to see it happen than to have it killed.

SENATOR ORECHIO: Of course, you have a clear record of the role of the Constitution. When it is affecting society in a certain way and you make a change, the thing is, I think deliberation is important.

SENATOR GRAVES: I am not afraid of taking a look at it thirty days from now, if we can possibly do it.

SENATOR RUSSO: Let's try that. If the Committee feels, and the sponsor, and all of us, that we have had enough time and that we have all the information we need, we can go ahead. If not, we can just wait. Let's do that since the sponsor is in agreement. I do not think there is a need for a vote. I think what we best do is hold the last three witnesses until the

matter is brought up again, because you might be testifying on the wrong bill if you testify today. There is no point in going through the-- Now, you have missed your meeting up in Somerset, Sheriff. Anyway, we will then carry this matter for thirty days and see where we stand at that time.

If there is anyone who has further information they would like to get to the Committee and to the sponsor, please feel free to do so.

SENATOR GRAVES: What about the fact that the bill has already been released? What about the technicality?

SENATOR RUSSO: That is no problem; we are just continuing this public hearing.

SENATOR ORECHIO: I would like to make the suggestion, Mr. Chairman, that any amendments be mailed.

(UNIDENTIFIED COMMITTEE MEMBER): What?

SENATOR RUSSO: He said that any amendments would have to be mailed. Can it be referred back to the Committee, John?

MR. TUMULTY: It can be referred back to the Committee.

SENATOR RUSSO: To comply with the Constitutional requirements--

MR. TUMULTY: You have to have-- If you want to amend a portion of the bill, you have to have another hearing. It has to be on the same-- (inaudible)

SENATOR RUSSO: Why should that be a problem?

SENATOR ORECHIO: Mr. Chairman, may I make a suggestion? Why don't you, with your authority as Chairman, appoint a subcommittee. Maybe they could study the proper (Senator Orechio cannot be heard here at all).

SENATOR RUSSO: All right. I will let you know who will be on it Friday, and they will work with you. It will not be a subcommittee; it will be a separate committee to work with you. Let's do that. Let's do this. We'll put it back into the Committee for that purpose. Frank, let me assure you, again, as I did before, that my feelings toward the bill have nothing to do with the scheduling. Thirty days, you know, should be--

SENATOR GRAVES: All I can ask is that you try.

SENATOR RUSSO: It will not be buried because I am against it.

SENATOR GRAVES: May I have my two minutes before I go?

SENATOR RUSSO: Yes, you may.

SENATOR GRAVES: What is the number of the bill on mandatory sentencing?

(Unidentified Committee Member): It's 3154.

SENATOR GRAVES: I consider this an even more pressing problem than maybe this piece of legislation, though the long-range of this one might be more important.

What is going on in not only the bigger cities, but what is going on in even the more affluent communities? I'll give you an example. North Haledon is in Passaic County. I can give you bigger cities which have more of the problems than North Haledon does, but North Haledon has the same types of crimes. Gentlemen, there seems to be a new sport, a new hobby, by the perpetrators of today, and that is to single out and find senior citizens or disabled persons, people who cannot defend themselves in any degree whatsoever, and then after preying upon them, not being satisfied with just taking whatever monetary considerations they may have -- watches, rings, lockets, money, or whatever it might be -- they are viciously beating them up on the streets and in their apartments, doing physical harm to them beyond normal description.

We have to meet this particular problem with the specifics that, if a person takes on a senior or a disabled person -- by disabled I mean someone where the disability is apparent, if the person is in a wheelchair or on crutches, or is walking with some mechanism to give him the necessary body

strength to carry on -- that he face, upon arrest and conviction, a mandatory sentence, the same as we have done with those who use guns in the commission of a crime. It is not necessary that they do it with a gun when they commit this crime, or we wouldn't need this particular law.

We have to offer, from a legislative point of view, strength to the Judiciary to give comfort to our constituency that we are aware of what is going on there. In North Haledon, within the last seven days, two individuals broke into a home. Their average age was about twenty-five. Their sport was to take two seventy-three year olds-- They took the seventy-three year old man, yanked him out of bed, dragged him down to the basement, and made his wife come down while they physically beat him up for three hours. Then they ransacked his house. Now, we are not talking about an area or an individual town where there is a rampant run of crime. We are talking about one of the more passive municipalities in the State, where something like this would never even be thought of, but it is extending itself beyond our city limits. Let's talk about the case where a couple of people broke into a home in Newark and the man was in a wheelchair. It was apparent that he was over eighty years of age, and that he couldn't get out of the wheelchair. They were not satisfied with just robbing him; they beat him to death in the wheelchair.

Okay, so I know that comes under Senator Russo's bill; they murdered the man. But, I'm talking about the fact that he doesn't necessarily have to die. I'm talking about where they are breaking into homes or apartments, or at high noon on the street. After they have taken what they wanted to, their sport now is to break the ribs, break the noses, or break the legs of their victims. I'm talking about the eighty-three year old person on the other end of that stick. I'm asking you, if you are not supportive of the legislation I have, to at least release the Graves/Orechio bill, let it get on the floor, and give us a chance to vote on it. Senator Russo has said that he would be more agreeable if it broadened itself to include the handicapped. I accept that; I'm sorry I didn't think of it to begin with, because I meant it for them too, not just seniors.

SENATOR RUSSO: I think, Frank, that the result of the discussion was not that the crime would be any different, but that the legislation would provide that in the sentencing of a defendant for a crime, the age and infirmity of the victim would be a factor that the judge would take into account. Isn't that what we finally resolved as a compromise? I believe it was, and I can live with that. My difficulty, if we are going to pick on the language, Frank-- My difficulty with this bill is that, aside from any Constitutional question, we, in effect, say, you know, "If you beat up someone who is sixty-six, you commit one crime or get one sentence. If he happens to be sixty-four, you get another one." Now, why shouldn't it also apply if the victim is a child? They are just as defenseless, you see?

So, I think you should provide that for purposes of sentencing -- this is what I thought you had suggested in conference today -- that the age, physical condition and so forth of the victim should be taken into account. Now there we avoid any Constitutional problems, saying the mere age of the victim determines the severity of the sentence or the type of crime. Frank, would that (inaudible) really accomplish your same purpose?

SENATOR GRAVES: We talk about age; we do recognize ages in this State. We recognize age when we raise the drinking age; we recognize it when we raise the gambling age; and, we recognize it about who can gamble in casinos and who can go to the racetrack. We recognize age when you get your driver's license. We recognize it when we give you a free license to fish at a certain age, or something in a particular category. We have a history of recognizing an age as a component of making our decisions. Again, the

history of getting things done here is to compromise, but I strongly suggest that the need is what the intentions of the origin of this Graves/Orechio bill is, and that is to go out to give to those who--

SENATOR RUSSO: You're throwing Senator Orechio's name in, and there are seventeen other names on there. I think he is trying to use you, Senator Orechio.

SENATOR ORECHIO: Mr. Chairman, I think he is making a point. Here you have a class of victims who generally do not have the ability to defend themselves, and whether or not sixty is the number -- maybe that could be debated.

SENATOR GRAVES: Sixty-five should be the number.

SENATOR RUSSO: Look, I thought we had resolved this. You were there.

SENATOR GRAVES: No, you said--

SENATOR RUSSO: You can accomplish the same thing by saying that these are factors -- for example, you know, with the death penalty we tell the jury whether he is a habitual offender, and so forth. These are factors to consider in sentencing. This does something different, and I think we have some serious Constitutional problems even aside from that. You take a crime and you say, "Okay, here is the crime, and if the victim is over a certain age" -- and I think you used the age of sixty--

SENATOR GRAVES: I meant it to be sixty-five; I'm sorry.

SENATOR RUSSO: Pardon?

SENATOR GRAVES: It was supposed to be sixty-five; that must have been a staff problem.

SENATOR RUSSO: Then you say, well then--

SENATOR GRAVES: I told Carmen to give this to my Committee.

SENATOR RUSSO: Why don't you do it the other way. You know, you would accomplish the same purpose, you would get the same result. Everything is the same. We are not changing the category of crime. You are then at least leaving that discretion to the judge.

SENATOR GRAVES: I want to throw a red flag out there to the intended perpetrator against senior citizens. The red flag has to be, "You are going to get something mandatorily, depending upon the degree of crime, if you attack that senior citizen." If I negotiate it down further, then I am negotiating and eroding what I am trying to get across.

SENATOR RUSSO: I thought you negotiated it in conference that day, and we came to an agreement.

SENATOR GRAVES: No. I will remind you of what I think you said. You said that if I include the handicapped, then I am not just characterizing into one age category, I'm taking in the handicapped. I said, "Fine, anything to get your support."

SENATOR RUSSO: Imagine we cannot find a victim with a birth certificate. We have a problem then, don't we?

SENATOR ORECHIO: Senator Russo, I just want to make one point that Senator Graves has mentioned. I think he is also suggesting that the senior citizen population is a popular population for these kinds of characters to prey on. When they go into a neighborhood, they look at the clothesline, and they look at the various trimmings on the house, and so forth, and then make a determination of what the age of the homeowner is.

SENATOR RUSSO: That is the Federal way. They are going to go down and get a printout of homeowners, you know, with the "S" on it so they will know the ones who get the deduction? They are going to have a list then of everybody -- they will know who the senior citizens are.

SENATOR GRAVES: I want to talk about those thousands of senior citizens who have migrated to Ocean County who have mite. Did you get the point?

SENATOR RUSSO: I get the point.

SENATOR ORECHIO: We should get the names from the special Senate Committee on Aging.

SENATOR RUSSO: I am going to need that after voting against this bill aren't I, Frank?

SENATOR GRAVES: Are you going to vote against this one, too? I urge the Committee-- How on God's earth could you say that is a bad bill? It has seventeen cosponsors from both sides of the aisle, and it is specifically offering a device for safety.

I have to go back to Paterson. I urge you to release this bill and at least get it on the floor, and please change the age to sixty-five.

SENATOR RUSSO: We'll take it under consideration.

SENATOR GRAVES: Are there anymore questions before I leave?

SENATOR ZANE: I have just one quick one, Frank. Would you have any problem if the bill were amended to consider the infirmity, the defenselessness, etc. and the age of a person, because, as pointed out, you could also have children involved, women who are defenseless, etc.? I do think the job is absolutely right. My instincts are that you would probably have some Constitutional problems with it, despite the fact that I am a cosponsor of the bill.

SENATOR GRAVES: Well, we thought we were going to have some problems with the mandatory sentence for using a gun, but the Supreme Court just upheld it.

SENATOR ZANE: Yes, but that is one that cuts across everybody who uses a bill, and the other legislation you talked about, with age, those are privileges really -- the privilege to fish, the privilege to drive a vehicle, etc.

SENATOR GRAVES: All I ask is, please do not deteriorate the meaningfullness of this bill. Get it out on the floor.

SENATOR RUSSO: This hearing is adjourned.

(HEARING CONCLUDED)

Michael D'Alessio

NEW JERSEY
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STATEMENT OF THE NEW JERSEY STATE BAR ASSOCIATION
TO THE
SENATE JUDICIARY COMMITTEE
MAY 19, 1983

SCR-146

The New Jersey State Bar Association wishes to thank the Senate Judiciary Committee for the opportunity to speak today on Senate Concurrent Resolution 146.

The New Jersey State Bar Association opposes this constitutional amendment and the concept of pre-trial detention based upon the recommendation of the Criminal Law Section of the State Bar. This Section is composed of both prosecution and defense counsel.

This Resolution provides for a constitutional amendment denying bail where a trial judge finds it necessary "for the protection of other persons, or where release will not reasonably assure the defendant's presence." Enactment of this constitutional amendment will allow the adoption of a pre-trial detention system. Any law providing for the denial of bail, pursuant to this amendment, shall require a hearing and opportunity for the defendant to be heard.

Accompanying this enabling legislation is S-1457, the "Bail Act of 1982." S-1457 implements the constitutional amendment by providing for preventive detention of persons charged with a violent crime, or previous offenders charged with a first or second degree crime. The prosecutor must bring the case before the court within 72 hours of the defendant's arrest if denial of bail is to be sought.

Pre-trial detention is undesirable. This legislation is contrary to a basic principle of our criminal justice system, that an individual is presumed innocent until proven guilty. It may result in the incarceration of innocent people.

Additionally, New Jersey jails are already overcrowded with individuals who cannot meet their bail requirements or who are serving sentences. The present system would have a difficult time tolerating the additional burden of defendants who are denied the setting of bail. The concept of bail was designed to alleviate the burden on jails and prisons by securing a defendant's presence in court without detention until trial. Bail was never meant to be used as punishment.

The procedures for notice and hearing in those instances where the prosecutor seeks detention will place an intolerable burden upon the resources of the prosecutor's office. In order to move for detention, the prosecutor would have to provide the necessary court pleadings as well as complete discovery. All this within 72 hours of the defendant's arrest and before an indictment is handed down. The hearing would be, in effect, a mini-trial at which time the prosecutor would be called upon to reveal the substance of the case despite the fact that the investigation may yet be in progress.

It is the belief of the Criminal Law Section of the New Jersey State Bar Association that prosecutor's offices are generally satisfied with the present system. Further, it would appear that the benefits of pre-trial detention are far outweighed by the resulting costs in time and jail space.

The New Jersey State Bar Association respectfully urges you to oppose this legislation. Thank you for this opportunity to present our views on this important legislation.

STATEMENT OF JOHN M. CANNEL, Assistant Public Defender

I appear today to oppose concurrent resolutions amending the constitution so as to allow denial of bail to certain persons charged with crime. The proposal goes to the heart of the criminal justice system; it makes fundamental changes in that system. As a result, I must go back to basics to state my reasons for opposing it.

Basic to our system of law is that a person is considered to be innocent until he is proved guilty. No man may be punished for a crime until it is shown that he has committed that crime. The purpose of a criminal trial is to make that determination - whether the person has committed the crime and may be punished for it. The proposed constitutional amendment would make significant changes in this sytem. There would be cases where a person could be jailed without the possibility of bail before his trial, before he has been shown to be guilty. This amounts to considering certain people guilty and dangerous before a trial, before a jury has decided the issue of guilt. This change makes a gap in the basic protections afforded by due process in criminal cases.

This change, in addition to being unwise, is unnecessary. Bail is now set based on the likelihood that the defendant will return for trial. This is a sensible standard; it is

appropriate to assure that society gets its chance to prove the defendant guilty. Generally, the more serious the charge and the more clear the case against the person charged, the more incentive that person has to flee and not return for trial. Setting bail on this basis protects society and still gives us all the protection of being presumed innocent. As a result of this basis for setting bail, the conditions of bail are made more onerous in serious, solid cases. Often the defendant cannot make bail in such cases. The court also has the power to deny bail where no bail will insure that the defendant will return for trial. This principle can be used in any appropriate case and it underlies the principle that bail may be denied in any death penalty case. With all this concurrent law, there is sufficient power given to a trial judge to set an appropriate bail and deny bail where that denial is justified.

The arguments in favor of the constitutional amendment proposal seem to be based on the theory that enactment will reduce crime. There is no basis in fact for these arguments. There is very little clear data but what there is seems to indicate that very few crimes are committed by persons released on bail. Locking up even all persons charged with crime would probably not have a significant affect on the level of crime in our society. The sponsors say only a few people would actually be denied bail by this constitutional proposal.

If that is so, there would certainly be no affect on the level of crime. The real answer to the problem of crimes committed by persons on bail is speedy trial. That goal is achievable (with some cost) and does not involve discarding basic protections. There is certainly too much crime in our society. Unfortunately, the answers to this problem are not simple. There has been a tendency to look for simple magic solutions that will eliminate the crime problem overnight. Such solutions do not exist. It is not responsible to try to lead the public to believe that an overnight solution to the crime problem is possible.

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LEGISLATIVE MEMORANDUM

TO: New Jersey State Legislature DATE: May 19, 1983

FROM: Jeffrey E. Fogel, Executive Director

SUBJ: S.C.R. 146

THIS BILL IS DISAPPROVED

The right to bail, except in capital cases has been guaranteed to the citizens of our state for over 300 years, first by statute (Chapter VIII of the 1682 Laws of the Province of East Jersey) and since 1844, by Constitutional provision (Art. I., paragraph 11). S.C.R. 146 would place on the November ballot a proposition to amend our Constitution, and to reverse that 300 year history, by allowing judges to deny bail in any case where the judge believes that "release will not reasonably assure the appearance of the defendant" or where the judge believes it "proper" for "the protection of other persons."

The ACLU opposes preventive detention as well as 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 fundamental proposition of our criminal justice system: the presumption of innocence. Statistical evidence to support this foundamental right to bail is ample. For example, 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).

Moreover, basic notions of due process of law are violated when those persons awaiting trial, who have been convicted of no offense, are subject to punishment. That proposition is graphically and dramatically demonstrated by the grave conditions and overcrowding in our county jails. 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 of law.

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, published by the U.S. Department of Justice'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 S.C.R.146 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.

New Jersey State Policemen's Benevolent Association, Inc.

Organized 1896 **Membership Over 20,000**

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May 19, 1983

TO: The Senate Judiciary Committee

FROM: The NJ State PBA, Inc.

RE: Senate Concurrent Resolution 146

Dear Senators:

On behalf of the members and supporters of the New Jersey State Policemen's Benevolent Associatio, Inc. (PBA), please accept the attached comments in support of SCR 146.

Our membership respectfully requests your support for this important legislative proposal.

On behalf of our membership,

Respectfully yours,

Marty Barrett, Co-Chairman
Legislative Committee

The New Jersey State P.B.A. strongly supports SCR 146 - which would amend the New Jersey Constitution to permit the denial of bail in specific cases where the person arrested would pose a danger to the safety of others.

The P.B.A. believes that this legislation when added to the improved sentencing provisions contained in the revised Code of Criminal Justice , the mandatory-mininum sentencing provisions of the " Graves Act ", and the enactment of the Capital Punishment Legislation, sponsored by Senator Russo, will greatly restrict the criminal activities of the most violent and hare-core criminals.

Prevention is a key word to Public Safety, and prevention through deterence is an approach that must be seriouslt considered.

We need to prevent that class of crimes which cause people to bar the windows of their homes; which make citizens afraid to walk the streets at night ; which force us to carry the correct change if we want to ride buses or buy gasoline at night.

Killers , rapists, robbers, and burglars of dwellings - if we can deter these types of criminals - then we can afford experimentation with rehabilitation for most other common forms of crime.

Temporarily restricting the ability of a dangerous criminal to comit crime is a legitmate and appropriate function of government.

What we need to do is to concentrate on those few categories of criminals who have infringed so much on the freedom of our life-styles in recent times.

Persons accused of committing crimes are entitled to the full protection of their Constitutional Rights.... There should be no doubt about that.. However.. when these constitutional rights are interpreted in such a way that they are magnified beyond the bounds of reason and common sense, then the inevitable result is a mockery of the law.

To give criminals their full constitutional rights is one thing. To give them the upper hand, and place the police and the other aspects of the criminal justice system in a subservient position - that is unjustifiable nonsense.

Regardless of what conditions or causes have been used to explain the known extent of crime, it is certain that the increase in criminal activity has threatened the peace , the security and the general welfare of the public.

Crime has become one of the most serious problems facing the American public... if not the most serious.

Crime is getting so serious, that we dare not confine ouselves to half-way measures. Either the nation is going to control crime.. or .. crime is going to control the nation.

Men and women who respect the law are entitled to equal protection , but they are being deprived of that protection when killers , rapists , and other hard-core violent criminals are allowed to walk away minutes after their arrest.

The life of a citizen , the protection of innocent children, and freedom from violent crime is just as important to the public as the protection of this country from its enemies.

The American public would not stand back and allow this country to be overrun by enemies from outside. Then why has the " enemy " from within been allowed to continually roam our streets in search of the next victim?

One of the major reasons for increases in serious crimes' is the " recidivist " - the repeat offender. He commits about two-thirds of all crime. This means that today we face a corp of hardened and experienced criminals who have been arrested time after time, only to keep on committing more crimes. Why do they keep on committing crimes ? Partly because current bail procedures often enable this hard-core criminal to receive the same considerations as the first time offender. Hence, this type of criminal , given easy bail, becomes free to commit additional crimes. And he does !!!

PRE-TRIAL DETENTION

The basic issue under consideration is whether bail may be denied to certain persons accused of committing non-capital crimes in a limited number of situations.

Article I , section 11 of the New Jersey Constitution provides that " all persons shall , before conviction , be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great. "

Article I , section 12 states that " excessive bail shall not be required ."

Although the bail provisions of the New Jersey Constitution appear to indicate the availability of bail for all non-capital offenses , the New Jersey Supreme Court has judicially recognized and approved the denial of bail to insure the presence of the accused at trial ,where it is clear that regardless of the amount of bail the accused will flee.

In addition , the trial courts throughout the State now have the discretion to impose conditions on pre-trial bail , as well as indirectly placing restraints on the accused ability to commit further crimes.

The very fact that our court has already recognized the above exceptions to the Constitution's bail provisions indicates that other exceptions might also be approved.

In State v. Johnson , the New Jersey Supreme Court recognized the dilemma involved in allowing bail to an individual who manifests physical symptoms which indicate that his release would pose a danger to himself or to the community.

Although not judically recognized in this State , it is conceivable that situations might arise where the pre-trial release of a defendant might be denied without impugning the Constitution's requirement of pre-trial bail.

Just as there may be cases where no amount of bail is sufficient to insure the presence of the accused , so too , the pre-trial release of certain offenders may provide potential for the accused to commit additional heinous crimes.

The significance of the judicial approval of placing conditions on pre-trial bail should not be ignored. The United States Court of Appeals has held that all courts have the inherent power to place restrictive conditions on the granting of bail. (U.S. v. Smith, 444 F. 2d 61 (8 Cir. 1971) The court in Smith further held that restrictive conditions of release in non-capital cases prior to trial are plainly reasonable and not constitutionally offensive to the constitutional prohibition against excessive bail.

The 8TH Amendment to the U.S. Constitution has not been held to require that bail be granted to all offenders as a matter of right. The 8 TH Amendment to the U.S. Constitution is identical to the Article I , section 12 of the New Jersey Constitution, stating that " excessive bail shall not be required . " In denying the right to bail under the 8 TH Amendment, the Federal Court stated " In England that clause has never been thought to afford a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail ." (Carlson v. Landon , 342 U.S. 524 (1952)

The authority conferred on the courts to impose pre-trial conditions should be expanded , as such conditions and limitations are the only means that the prosecuting authorities can effectively recommend some degree of control over criminals awaiting trial.

The New Jersey State P.B.A. believes that consideration should be given to whether a court might constitutionally deny release on bail in certain situations, including the following:

(1) Where the offender manifests an identifiable physical, mental , psychological , or emotional condition which indicates that his immediate release could endanger himself or the community.

(2) Where pre-trial release could constitute a serious threat to the integrity of the judicial proceedings, such as :

A. Where the defendant has threatened the safety of witnesses.

B. Where the safety of jurors is in question.

C. Where the defendant threatens to interfere with pre-trial investigations.

D. Where the offender is a habitual, hard-core criminal.

While the New Jersey courts have not as yet authorized the denial of bail under the above circumstances, the California courts have had occasion to deny bail under similiar situations. The bail provision contained in the California Constitution (Art. I Section 6) is identical to that of the New Jersey Constitution.

In Bean v. County of Los Angeles , 255 Cal. App. 2nd 754, 60 Cal. Rptr 804 (App. 1967) the court stated that the applicant should be admitted to bail as a matter of right... unless it could be shown that his condition was such that for his own safety , or for the protection of society , it would be proper to deny bail.

Wholly apart from the pre-trial bail provision contained in the New Jersey Constitution , is Article I , section 1 , that provides that all persons"have certain natural and unalienable rights, " which include " defending life and property " and " of pursuing and obtaining safety and hapiness. "

Article I , section 2, of the New Jersey Constitution states that " Government is instituted for the Protection, security , and benefit of the people. "

As is clearly outlined in these articles of the New Jersey Constitution , the public has rights , too. One of these rights is to be protected against criminal activity.

The most basic function of any government is to provide for the safety of the public . The fundamental rights.. the safety of our homes, of our streets, and places of business , cannot continue to be eroded. The sophisticated criminal , the hoodlum, and the thrill freak must be stopped.

Career law enforcement officers are very much aware that guidelines must be established for the protection of the individual's rights. However, these guidelines must be realistic , if we are to protect the rights of innocent citizens.

We , as police officers , believe that more concern and effort should be placed on helping the victims of crime , instead of worrying about the violent criminal.

If the public wishes to be free from crime and violence... and there is no doubt that that it does..... it is the duty of the Legislature to enact laws that will safeguard the citizens of New Jersey.

A commitment is needed , and needed now, if we are to control and reverse the rising tide of crime and violence.

Once again, the membership of the New Jersey State Policemen's Benevolent Association (P.B.A.) appeal to you to enact legislation that will protect society.

Through your leadership and determination , a better and safer New Jersey will emerge , where our citizens can once again walk the streets without fear... and free from attack.. and violence.

Respectfully submitted ,

NEW JERSEY STATE
POLICEMEN'S BENEVOLENT ASSOCIATION (P.B.A.)

MARTY BARRETT , CO-CHAIRMAN
LEGISLATIVE COMMITTEE

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May 19, 1983

STATEMENT OF STEPHEN LATIMER ON BEHALF OF
PUBLIC INTEREST LAWYERS OF NEW JERSEY
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY OPPOSING SCR#146

Thank you for affording Public Interest Lawyers of New Jersey the opportunity to present to this committee its concerns about SCR 146. We join with several organizations who have testified here today in opposition to the proposed amendment. Our opposition is threefold and I will address each reason in turn. First, this measure is contrary to the legitimate and historical purposes of bail. Second, available evidence indicates that the measure will neither reduce the number of fugitives at liberty, nor reduce the number of persons at liberty who commit crimes while awaiting trial for other offenses; but will serve primarily to exacerbate the overcrowded conditions in our county jails. Third, there are means less restrictive of individual liberty and more consistent with concepts of fairness and rehabilitation that will accomplish the same ends.

Historically, the function of the money bail system has been to require an accused to post security such that the financial loss resulting from flight and forfeiture of bail will effectively deter flight. Thus it is that bail in excess of $2.5 million may be appropriate for one such as the notorious Mr. DeLorean while $100 may be excessive for a young minority person living in certain areas of our inner cities. Significantly, in the latter half of the twentieth century criminal justice planners and practicioners have come to realize that money bail is not the most significant factor in assuring the appearance of a defendant in court. The individual's ties to his or her community have been recognized as a more accurate

barometer of the individual's willingness and ability to appear.

A study released by the Lazar Institute, founded by the United States Department of Justice's National Institute of Justice found that 87% of all released defendants appear for every required court date, and that the actual fugitive rate was a mere 2% of all defendants at large on recognizance or on bail. With the ability of the system to function as efficiently relying on reasonable money bail and community ties, that portion of the proposed amendment that provides for a denial of bail "where the release will not reasonably assure the appearance of the defendant as required," is simply unnecessary. We fear that the the provision will introduce an unconscionable measure of arbitrariness in the pre-trial release process.

Not only does the proposed amendment run contrary to the historical purposes of bail, but its inevitable effect will exacerbate conditions existing in the county jails, with no significant impact on the number of crimes committed while the defendant is awaiting trial. On the latter point I would merely state that the Lazar Institute study found that their is no way to accurately identify defendants who are likely to commit crimes while released. As this committee well knows, the county jails in this state are filled well beyond designed capacity. This has resulted in litigation against several of those jails for the purpose of reducing overcrowding and alleviating the harsh and ofentimes barbaric conditions that accompany overcrowding. The use of preventive detention can only serve to exacerbate those conditions.

Moreover, SCR 146 will increase the hardship on defendants' families and others who may be dependent on him or her for financial and other support. The use of preventive detention will, in many cases, remove a wage-earner from the work force and result in a real loss of income to the family. The obvious effect will be to force that family on the public assistance at a substantial cost to the government.

In State v. Johnson, 61N.J. 351, 361, No. 6 (1972), the Supreme Court of New Jersey recognized that pre-trial detainees are two to three times more likely to receive prison sentences than those released on bail. It is also

almost a cliche that a detainee is more likely to be convicted than one who has been free on bail or on recognizance. The reasons are many. But, one important consideration is that an incarcerated person who must rely on the strained resources of the Public Defender or assigned counsel cannot effectively participate in his or her own defense. If at liberty, the individual could do much of the fact-gathering and investigation that limited resources make it difficult for appointed counsel to accomplish.

In sum, Public Interest Lawyers of New Jersey believes that the proposed amendment is contrary to the historical and legitimate purposes of the pre-trial release system, and will not accomplish the ends which it seeks to achieve. Its only effects will be to exacerbate the existing problems in the criminal justice system and to harm the society at large. However, there are alternatives which do not need a constitutional amendment, but may be implemented through existing mechanisms or simple legislative action.

Those mechanisms include release on recognizance and expanded use of the 10% cash bail system. Where some supervision and support is necessary for the defendant's and society's well-being, there should be an expanded use of Pre-trial Intervention. Other systems of supervision and support under the umbrella of the PTI system or county probation departments may be utilized where that support will assist in the rehabilitation of a defendant. Programs exist in various cities in the United States whereby, through probation departments, defendants are released under the supervision or custody of church groups and other public and private agencies, including, where appropriate, the defendant's employer. If properly established and administered, programs like those will accomplish the ends sought to be accomplished by the proposed constitutional amendment without its attendant harms.