PUBLIC HEARING

before

ASSEMBLY JUDICIARY COMMITTEE

on

ASSEMBLY CONCURRENT RESOLUTION 77

(Proposes an amendment to the Constitution denying release on bail to persons under certain circumstances)

Held:
December 13, 1984
Room 446
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Martin A. Herman, Chairman
Assemblywoman Angela L. Perun, Vice Chairwoman
Assemblyman Eugene H. Thompson
Assemblyman Walter M.D. Kern, Jr.

ALSO PRESENT:

Steven V. McGettigan, Research Assistant
Office of Legislative Services
Aide, Assembly Judiciary Committee

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ASSEMBLY CONCURRENT RESOLUTION No. 77

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 27, 1984

By Assemblyman HERMAN, Assemblywoman PERUN, Assemblymen SHUSTED, KERN, Assemblywomen WALKER, FORD and COOPER

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

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

a. In capital offenses when the proof is evident or presumption great; *or*

b. Where release will not reasonably assure the appearance of the defendant as required; or

c. Where the court finds, based upon clear and convincing evidence, that there is a substantial likelihood that the person's release would result in great bodily harm to the victim, the victim's family, persons involved in circumstances surrounding the alleged offense or the defendant. 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,

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.

it shall be submitted to the people at the next general election occurring more than three months after the 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 the general election.

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

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

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."

b. In every municipality the following question:

	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 where the court finds that release would result in great bodily harm to certain 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 where release of the defendant would not reasonably assure his appearance as required, or where the court finds that release would result in great bodily harm to the victim, the victim's family, persons involved in circumstances surrounding the alleged offense or to the defendant.

STATEMENT

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." At the present time only capital offenses are not bailable.

This proposed constitutional amendment would allow the Legislature to enact legislation providing for bail except for capital offenses, or where release will not reasonably assure the appearance of the defendant as required, or where the court finds, based upon clear and convincing evidence, that there is a substantial likelihood that the person's release would result in great bodily harm to the victim, the victim's family, persons involved in circumstances surrounding the alleged offense or the defendant. This proposed constitutional amendment would also mandate that any law providing for the denial of bail would require a hearing at which time the defendant would have the opportunity to be heard.

ASSEMBLYMAN MARTIN A. HERMAN (Chairman): Good afternoon. I would like to call this public hearing to order on ACR-77. Are there any witnesses here at the present time who would like to give testimony on this particular bill? (affirmative response) As the Chairman, I relinguish my right to make an opening statement since I am the sponsor. However, I will reserve -- for the Committee and myself -- the right to make closing comments for the purpose of the record.

Who would like to testify on this bill? (there is a show of hands here) Will you please come forward? May I have Mr. Jeffrey Fogel from the ACLU first?

JEFFREY E. FOGEL: The Committee has heard me before on the general issue of preventive detention and on this bill in particular. Obviously, the Committee has already voted on the bill, so the purpose of my testimony is not to-- Well, I am still hopeful that I may change some minds. It is not unusual for someone to vote in Committee, and then vote the opposite way on the floor. However, presumably the purpose of the constitutionally-required public hearing is to provide an opportunity to air the issue in public, so that the public can see that the important issue is moving through the Legislature before it might appear on the ballot next November.

I hope the Committee will recall my memo of March 23, 1984, and will incorporate it into these proceedings so that I need not repeat it.

ASSEMBLYMAN HERMAN: That will be done and it will be considered a part of your testimony for this particular hearing.

MR. FOGEL: That memo dealt with ACR-77, and ACR-83, which was sponsored by Assemblyman Kern. I won't repeat the major issues, but just the substance of what our position is.

As a general matter, our position about preventive detention is that it violates the basic and fundamental notion of the presumption of innocence. In that memo I quoted Chief Justice Joseph Weintraub in the State vs. Konigsberg, in which he stated 24 years ago that release on bond is a concomitant of the presumption of innocence. It was thereafter pointed out by the Supreme Court in the State vs. Johnson, a leading case on bail in our State, that the statistics indicate that

those who are incarcerated prior to trial are considerably more likely to be convicted, and that those who are convicted who have been incarcerated prior to trial are at least two to three times more likely to receive prison sentences, thereby graphically demonstrating the fundamental proposition that this kind of preventive detention prior to trial does, in fact, as a practical as well as a theoretical matter, interfere with the presumption of innocence.

If I might, let me simply repeat what this ACR-77 would allow. We now have a constitutional provision which allows bail to be denied in a capital offense when the proof is evident or the presumption great. What that means in practical terms is, when a prosecutor has a capital case and wishes to have the person interned before trial, there must be evidence presented to a court to indicate there is a strong likelihood of conviction, not simply that there is an accusation -- it hasn't reached the stage of indictment yet -- but that there is a strong likelihood of conviction and, given the fact that the person is facing the death penalty, it warrants incarceration prior to trial. As I pointed out in my memo, we first had a law guaranteeing the right of bail, as it currently appears in our Constitution, in 1682 under the British, and certainly, God knows, the British had great concern for the potentiality of danger to the British authorities during the Colonial War that was waged in New Jersey, as well as elsewhere. So, I am not impressed by those who say the dangers are graver today than they were in the seventeenth or eighteenth centuries. I can assure you that King George III considered the dangers to the crown by the colonial insurrection in colonies such as East Jersey to be considerably greater than anything we face today.

The proposed constitutional amendment would allow a judge to deny someone bail, in addition to the current Constitution, under several circumstances. One is, release will not reasonably assure the appearance of the defendant as required. In that section, I have constantly argued with the Committee that the Committee should not create such a radical departure from the 300-year-old history, which I have mentioned, and the constitutional provision, without some evidence that it is necessary. And, of course, there has been no evidence

presented to this Committee as to the necessity in any one of these areas, but let me point to this one in particular.

We have no evidence before this Committee as to the extent to which people do not appear ultimately for trial. The evidence that was presented to this Committee was done by myself in the form of a transmittal to the Chair of a portion of the Lazar Institute study, funded by the Department of Justice, which indicated, at least nationwide, that there was an approximate 4% non-appearance rate at trial. Of that 4%, there is no way -- frankly, simply, and profoundly -- to determine which 4% of our criminal defendants will not appear for trial. In fact, this bill will allow a municipal court judge to lock someone up before trial where he or she has made an illegal left turn, if the judge believes that that is the only way to make sure that the person will appear for trial. This is a substantially greater authority than I would hope anyone in this room would wish any judge to exercise, but, nonetheless, this proposal being passed by the voters would allow a municipal court judge to keep someone incarcerated prior to trial on an illegal left turn, and possibly even on a parking ticket.

With respect to Section c., it would allow the court to deprive someone of bail where there is a conculsion by the court -- and we do not know yet what due process will be afforded, since the bill has not moved before the Committee -- that the person's release would result in great bodily harm to the victim, the victim's family, persons involved in circumstances surrounding the alleged offense, or the defendant.

Let me deal with what I consider to be the silliest part of that, which is, we are now going to allow judges to deprive someone of bail where the judge determines that that person might be a danger to himself. As I understand it, we have involuntary commitment laws that specifically deal with the question of how to protect people from themselves. I didn't think we wanted to make this a criminal justice issue, but apparently this Committee has decided to do so. I would say that this is an indication of the thought that has gone into this. I would hope that we are not going to abolish civil commitment laws. I

would hope that those people who are so sick that they present a danger to themselves would be in mental institutions, and not incarcerated--

ASSEMBLYMAN HERMAN: (interrupting) How do you come to the conclusion that the bill says that?

MR. FOGEL: Section c.: "Where the court finds, based upon clear and convincing evidence, that there is a substantial likelihood that the person's release would result in great bodily harm to the victim, the victim's family, persons involved in circumstances surrounding the alleged offense, or the defendant." That is, you can lock up the defendant where you believe the defendant is a danger to the defendant. I can give you only one example of that, a young man whose case I am working on now who was incarcerated in jail in West New York for the heinous offense of trespassing. He hung himself; he is in a coma now, and the best indication is that he will be a vegetable for the rest of his life. And, I don't know whether or not he is guilty of the crime of trespassing. What I do know is, it was inappropriate to have put him in a jail cell for that offense and, to the extent that one might have known that this person was a danger to himself, I hope that no one here would want to keep him in a penal institution, especially before trial. That person should have been in a mental institution. We have other concerns about that case, but I think that that kind of an anomalous result could result from this measure.

Finally, the measure seeks to deal with the problem of -- and there has been some testimony that this was the concern which prompted the measure -- the potential for threat and intimidation of witnesses, victims, and others who may have an impact on a witness or a victim. Once again, we have really had no testimony before this Committee. I don't think I have missed a hearing at which this matter has been discussed. I do not recall any testimony before this Committee about the extent of that problem. I do recall Congressman Florio testifying about an incident in his congressional district in South Jersey, in which a middle-class man was released on, I believe, $1,500 bail in a wife abuse case. Now, whether or not that bail was appropriate, I don't know. I wasn't sitting there in the first instance. I know of no information that has indicated that that--

ASSEMBLYMAN HERMAN: (interrupting) But, the issue in that case was not whether the bail was high or low. The issue in that case was whether he had the potential for doing harm to the victim.

MR. FOGEL: Right, whether he should be out on bail.

ASSEMBLYMAN HERMAN: That is exactly right.

MR. FOGEL: To the best of our knowledge, nothing has happened since he has been out on bail. So, if anything, that one case that was brought before this Committee--

ASSEMBLYMAN HERMAN: (interrupting) I think you are also misstating the case. I believe that in that instance he was put out on bail, he went out, and, in essence, physically ravaged his wife. He beat up on her.

MR. FOGEL: That is not the testimony I heard, or the article I read. I heard the concern that that might occur. I certainly heard that concern from Congressman Florio, and that the low bail would allow him to leave too easily. However, I think that the fact that nothing occurred thereafter is support for our position, and not his. I have felt that a better approach was that which was suggested originally by Assemblyman Girgenti, which this Committee has modified. I don't know whether A-574 is reported out as modified yet, but I believe it will be. Assembly Bill 574 -- at least as originally proposed by Assemblyman Girgenti -- would allow a court, where there was any evidence of a potential threat to a victim or a witness, to impose bail conditions which would prohibit a defendant from communicating with specified victims or witnesses about whom there was proof that there was a potential danger, including a condition of bail prohibiting him from coming within a certain geographic distance.

This is very reminiscent of the kinds of orders that may be issued today under the Domestic Violence Act and, of course, the ACLU supported the Domestic Violence Act. We still support the Domestic Violence Act; however, we don't think the police have been adequately trained in the Domestic Violence Act. I was shocked by something I saw on T.V. out of Newark, in which an obviously abused woman was told that it was she who had to leave the house, not her husband. I am hoping to deal with that directly with the Newark Police Department. But, it is

not through an absence of concern for that matter on our part that we oppose this measure. It is that we support the Domestic Violence Act. We believe that we should read the Domestic Violence Act, where it is appropriate, into the bail conditions.

I noted in The New York Times just last week that a special subcommittee of the Assembly of the New York Legislature was appointed to deal with the problem of crime victims. Two years ago, they came up with a measure that passed the Assembly, which provided substantially the kinds of conditions that Assemblyman Girgenti proposed in A-574. They are now holding hearings to see whether or not that measure is working well and to what extent it would have to be strengthened or another approach taken. It seems to me that is the appropriate process to use when we are dealing with such a fundamental long-term constitutional right as the right to bail in New Jersey.

For our part, we would be happy to participate with the Committee, or anyone else, in devising whatever measures are necessary to protect battered spouses in our State. However, I don't think that the thrust of this bill is in that direction; I don't think that when it is used it will be used for that purpose; and, I don't think it is going to provide the kind of protection, in any event, that is thought to be provided here.

The Bar Association -- as the Committee knows -- is opposed to this measure. Most of the county prosecutors are opposed to the measure. We are opposed to the measure. I know the New Jersey Association of Corrections is opposed to the measure. The Council of Churches is opposed to the measure. The New Jersey Coalition of Penal Reform is opposed to the measure. The only testimony in favor of this measure so far before this Committee in the approximate four or five hearings we have had was by Congressman Florio, and that was with respect to one single case.

ASSEMBLYMAN HERMAN: You forgot the sponsor of the bill.

MR. FOGEL: I'm sorry, the sponsor of the bill, and the other members of the Committee who have supported the bill. There is no question about that. I'm talking about testimony from members of the public.

I gave an editorial in opposition to this measure to the Committee Aide today. This only appeared on Tuesday, December 11, in The Record. I have more copies available for the members of the Committee.

ASSEMBLYMAN HERMAN: If you wish to submit it for the public record, you are more than welcome to do so.

MR. FOGEL: To sum up, we are very concerned about this measure, and about the disruption and violation of the basic notion of the presumption of innocence, that we only incarcerate and punish people after due process, not beforehand. Yes, this is a more narrow measure than ACR-83. Yes, this is a more narrow measure than the measure that went through the Legislature in its last session. Nonetheless, no substantial evidence has been introduced either before this Committee or before the Senate Judiciary Committee, which also considered the prior measure which would indicate that: (a) we have a significant problem in either regard in this State, which must be dealt with, or (b), having such a problem, the only alternative to our current system would be radical surgery of an important provision in our Constitution of a right that the citizens of New Jersey have had for 300 years. We have here a more narrow measure than we have seen before, although, as I have indicated, a municipal court judge, under this bill, is going to be able to lock someone up in municipal court who he thinks is a danger to himself, as well as those people who he feels may not show up for trial after a parking violation. That is considerably broader than I think even the sponsor had originally suggested he was looking for in this bill.

As to that issue, which is a narrow one, I still think there are other measures which could go first. There is a much more considered way to look at this issue by the Committee. There are many more experts available than the Committee has reached out for. For example, no one from our schools of criminal justice has been asked to appear here. When we did have someone from the schools of criminal justice, it was at my behest. I was not able to get him here today. He testified before the Senate Judiciary Committee as to the impossibility of predicting two questions: future criminal conduct, and non-appearance rates.

I only wish the Committee was reaching out in that same way to get all of the available research, information, and expertise we have in our State, before we move this matter. I can tell you that as a normal citizen, the way this measure is written to appear on the ballot in November, I would vote yes on both of these measures. Why? The measures, as they are put on the ballot for the citizenry, say, "Do you believe that people should be denied bail where it is necessary to secure their appearance for trial?" Well, if I knew nothing else, I might say, "Yes," but what I know is, only 4% do not appear, and there is no accurate way to predict which 4%. Is that information going to be given to the public? No. Is any other information? This is not an issue which is susceptible to public debate and public vote in the form in which it is presented to the public in this bill. I don't think any members of the Committee would suggest that we submit fundamental constitutional questions to the public all the time, because the Constitution is a document protecting minority rights. I hope we don't think those are subject to -- I won't call it a whim of the public -- let's say it is a long-standing feeling of the public. Nonetheless, it is designed to protect the minority against the majority. It is inappropriate to put that question to the majority. The form in which the question is put on a very complicated issue like that can only result in one answer, and that is going to be yes in this instance, unfortunately. We will not be able to wage the kind of information campaign that is going to be necessary to give the public a full opportunity to vote on this. My concern, frankly, is that the Committee has not reached out for the expertise, the information, and the statistics which are, or may be, available in our State, to determine whether or not any measure is necessary and, if so, whether such a radical measure as this is necessary.

I have been in my position as Executive Director of the ACLU for three years now, and I consider this measure to have the gravest civil liberties implications of any measure that has emerged from this Committee. One of my concerns, in addition to those I have raised, is that there are many others in the Legislature who would take this door and slam it wide open or, in fact, take it off its hinges. There are

those who would propose pretrial incarceration in any serious offense, regardless of whether or not the person would appear, and regardless of whether or not there was any basis for predicting future criminal conduct. That is my final concern, that the Committee take seriously the potentiality, that is, open the door for which there are others waiting to take the hinges off.

ASSEMBLYMAN HERMAN: All right, thank you. Your testimony does have impact, okay? I would like to think that we are sensitized, even on the second, third, or fourth go-around. I have asked staff, by the way, to look at the issue of if we amend the bill, under our setup, whether we have to have another public hearing on the amended bill. I think we may.

ASSEMBLYMAN KERN: Definitely.

ASSEMBLYMAN HERMAN: Yes, I think we do. I have no objection to doing that, by the way. As the sponsor, two arguments have impressed me here today. One is the comment about "or the defendant." I am willing to have the bill amended. I think the easiest way would be a floor amendment. The other argument is about assuring the appearance of bail. I am still open on that issue to amending the bill in that regard. See, some amazing things can happen when you keep trying. You may not totally sell us on the whole concept, but some of the things you say make sense. I will have certain rebuttals for the record, but I want to give everyone a fair opportunity to participate in the process since they waited during the afternoon to do so.

So, thank you very much, Mr. Fogel.

ASSEMBLYMAN THOMPSON: I would like to ask Mr. Fogel a question.

ASSEMBLYMAN HERMAN: If you want to ask him a question, you may.

ASSEMBLYMAN THOMPSON: Mr. Fogel, are you familiar with certain alleged instances of abuse in California and Illinois with reference to this type of statute? It really deals with the question of preventive detention.

MR. FOGEL: Frankly, I am not. I know there are a very limited number of jurisdictions--

ASSEMBLYMAN THOMPSON: (interrupting) For the record, I would like to point out that a judge released, I believe, approximately 150 people in the Los Angeles area earlier this year on a similar type statute. There had been some type of abuse where they just picked people up and said, "Well, you are going to harm yourself; let me put you in jail." The same thing happened in Chicago.

ASSEMBLYMAN HERMAN: We're not looking to do damage to the Constitution. I think Mr. Fogel has known for a long time that my concern has been fair play and equal access to the process. I will have my observations for the record after I give everyone the courtesy of expressing theirs.

MR. FOGEL: May I submit this editorial for the record?

ASSEMBLYMAN HERMAN: You sure may, absolutely.

MR. FOGEL: I want to thank the members of the Committee for the opportunity.

ASSEMBLYMAN HERMAN: You're more than welcome, sir. The next speaker on my list is Winifred Canright, Quaker Council on Corrections. What I would ask subsequent witnesses is, if the arguments have been made, you do not necessarily have to make them all over again. You can say, "I've been here; I have listened to the testimony of Mr. Fogel," or whomever, "and I agree; but I would like to supplement the record with," and so on. That doesn't mean we are going to stop you from talking, but just as a matter of courtesy, we hope you will not repeat verbatim what you already agree with. Ms. Canright, would you please come forward?

WINIFRED CANRIGHT: I think I will probably make a poor presentation. I have written down what I thought was a nice one, but with the pressure of time, I am going to skim and it may not be as well connected and as logical as I would like.

I am going to focus on the last point that Jeff mentioned. The thing that disturbs me most about this bill is giving persons preventive detention because of the fear that they might not appear for trial.

ASSEMBLYMAN HERMAN: If I tell you that will be amended-- I am very inclined to amend that out.

MS. CANRIGHT: Okay, I'm glad, because one of the points I wanted to make is that the Chief Justice-- This is on my last page and I would like to read it to you. Chief Justice Burger addressing the American Bar Association said, "Restore to all bail release laws the crucial element of future dangerousness based on a combination of the particular crime and the past record to deter crime while on bail." You know, he completely left out the dangerously flexible clause, "to assure appearance of the defendant." I think the Chief Justice should have a great respect for the Constitution, and should know what is constitutional. My guess is -- and this is purely speculation -- that he felt this sentence about the failure to appear was something that was so speculative, so vague, that he cut it out completely.

ASSEMBLYMAN HERMAN: I think you have made your point. Is there any other point you would like to make with regard to the bill?

MS. CANRIGHT: Yes, there is.

ASSEMBLYMAN HERMAN: Please do.

MS. CANRIGHT: It is the point that this is not purely a criminal matter. It is the point that you and I, our families, and some of the people we most respect, could be caught in this, if we took the side of something that was opposite. For instance, during the last three weeks, we have heard news reports about people in Washington protesting on the subject of the South African treatment of blacks. Who gets arrested? Some of the most highly-respected people in the country -- several Congressmen, I think one Senator, a bishop, a rabbi, or I think several rabbis, several important members of the clergy, high educators, a few blacks -- I think Andy Young was one of them -- and the former Lieutenant Governor of New York. These are not common criminals, and yet if a judge making a determination had a bad headache, or was worried about his large investments in South Africa, he could very easily put them into preventive detention on the excuse that they might not appear for trial. It could happen to those kinds of people. It has happened over and over again to some of the highest people. Two Nobel laureates have been put into this kind of detention because of their attitudes.

ASSEMBLYMAN HERMAN: I think you have made your point.

MS. CANRIGHT: But, it is not only them. There are people on the common level, like us. If you have a daughter who is a teacher--

ASSEMBLYMAN HERMAN: If we are going to amend that provision out, tell me what else you object to in the bill.

MS. CANRIGHT: Okay. I think the point is, there are constructive ways to handle it. We do not have to be as harsh as we are.

Is there a possibility of having a limit on the time that a person could be kept in preventive detention?

ASSEMBLYMAN HERMAN: Ma'am, we are amending the whole section. I think you have made your point. You've won the day on that point. That is what I am trying to tell you. I think your testimony has been very fine in that regard, as has Mr. Fogel's.

MS. CANRIGHT: I am trying to talk as fast as I can.

ASSEMBLYMAN HERMAN: I am just asking whether you have any other comments. The only section left is Section c. of the bill. Do you have any other comments not related to the potential denial of bail?

MS. CANRIGHT: What is Section c.? You can speed me up if you will tell me what it is.

ASSEMBLYMAN HERMAN: That is the one on harm to the victim, denial of bail based on harm to the victim.

MS. CANRIGHT: I do not have a comment on that, because I thought there would be lawyers here who would do that.

ASSEMBLYMAN HERMAN: Okay. I think we are making progress here today, and thank you so much for appearing. It is always a pleasure to see you and to hear you.

MS. CANRIGHT: Just let me say this one more thing. The thing I am worried about is the creeping and hacking away at the Constitution. If your daughter was a teacher and she went on strike--

ASSEMBLYMAN HERMAN: But, ma'am, you've already won. I don't mean to be rude, but we have already covered that point. You have won that point. You know what they say in the sports world, "When you are ahead, you quit on points."

MS. CANRIGHT: Okay, I'll quit on points. Don't forget it, though.

ASSEMBLYMAN HERMAN: Thank you so much. Is Karen Spinner here from the New Jersey Association on Correction? Again, assume for the purpose of the record that I, as sponsor, intend to amend the bill dealing with that particular issue. Please proceed, Ms. Spinner.

KAREN SPINNER: I am in perfect agreement with what Jeff Fogel said before. I just have a couple of comments I would like to draw to the Committee's attention.

One has to do with the possible impact of pretrial detention on the current situations in the county jails. The jails are excessively overcrowded. A review of the pretrial population for the last three months--

ASSEMBLYMAN HERMAN: (interrupting) Are you making reference to Paragraph b., Paragraph c., or both?

MS. SPINNER: Just the entire concept, b. and c.

ASSEMBLYMAN HERMAN: Okay.

MS. SPINNER: Even c. may have an impact when we are talking about--

ASSEMBLYMAN HERMAN: If standing alone? Assume that Paragraph c. is standing alone.

MS. SPINNER: Standing alone? Even for that point, I think it is important to state that we have a pretrial population now of almost 3,500 each day. Many of these people are there not because they are dangerous, but because they haven't been able to make their bail. The costs of detention are staggering, approximately $156,000 a day. That is an important point I would like to share with you. We are spending a lot of money on it, and that may not be the best use of our resources. If you are going to amend the bill, we are very happy about that.

I do have written testimony, which I will give you for the record.

ASSEMBLYMAN HERMAN: You are more than welcome to submit your statement as part of the record. Our next speaker will be Reverend Dudley Sarfaty, New Jersey Council of Churches.

REVEREND DUDLEY SARFATY: Good afternoon, Assemblyman Herman. You know how to get me down here to wish you holiday greetings.

ASSEMBLYMAN HERMAN: Thank you, sir; the same to you.

REV. SARFATY: The New Jersey Council of Churches, sir, has bought into the basic American theoretical compromise, that is, you cannot have the priest ruling the country. Theoretically, that would be great if you knew that the priest always reflected the will of God, but you can't, so, therefore, you make a compromise and you have civil law. We also know from our religious perspective that civil law makes mistakes. The Department of Institutions and Agencies has had people escape from its facilities who go out into the neighborhood and cause unhappiness.

I think the perception of most sociologists is that you can't predict this. Therefore, you can't put everyone in manacles. And you know, I think as well as I, that if you were going to lock up everyone who might commit a crime, you would have to lock up--

ASSEMBLYMAN HERMAN: Since we are going to amend Paragraph b. out, tell me if you have any objection or comments on Paragraph c., which deals with the issue of detention of a defendant who poses a harm to the victim.

REV. SARFATY: Yes, sir. I was going to get to that.

ASSEMBLYMAN HERMAN: I beg your pardon; go ahead. I thought you were talking about the other section.

REV. SARFATY: I was going to waste some of your time expressing our respect for the Judiciary Committee, and the slight embarrassment of having to protect the Constitution, in this case, from the Judiciary Committee, which seems to me to be the issue.

ASSEMBLYMAN HERMAN: From your point of view.

REV. SARFATY: I said, "my perception." I am the one who is nervous about having to do so, because of my long-standing respect for this Committee on subtle things like prayer in the schools, where we agreed on constitutional subtleties.

We think that any kind of preventive detention of a person who has not been adjudicated guilty, or who cannot be called in for a parole violation on the basis of whatever he is charged with before the judge, eats into that concept. Though I am not an attorney, it appears to me that there have been processes tried where a person who is perceived by someone in authority, and out of good faith, to be a

threat to society and/or a victim of a crime, can be controlled by the stipulations of details of his bail release, to whit, having to report to some public official on a regular basis, having to stay out of the house of his alienated spouse, and being subject to immediate jailing if he should ever show up there in order, in that case at least, to protect her from violence, which is certainly a concern. There are citizens all over the State who are concerned about the fact that lots of people with records of violent crime or potential causes of further crime-- I think there are ways not against the victim, but against new victims. We want to protect the new victims, as well as the old victims.

I would suggest, though I cannot give you the legal name for it, that there is a phrase for trying to do something in the simplest way possible in the law, and we think that tightening up the habit and practice of setting conditions upon bail to prevent violence and crime is better than tinkering around with the Constitution.

I gather we still share the same basic attitude toward the Constitution, so I will not make my long theoretical speech; however, since this is for the record and you may be going to the public with it, we certainly will say, among other things, that this is moving us a step closer in the direction of South Africa, where a couple of dozen people have been held lately, and thousands over the year, on no charge, with no hearing, but simply on a kind of preventive detention.

ASSEMBLYMAN HERMAN: I respect your position and your opinion, but if we are going to deal with the bill, I am not going to let you make comments for our public record-- Would you show me, in the bill, where it says there is no hearing provided under Section c.? Sir, you have made inferences regarding my integrity.

REV. SARFATY: No, sir. I am not a lawyer, and I didn't indicate--

ASSEMBLYMAN HERMAN: (interrupting) No, no, not as a lawyer, but as a member of the State of New Jersey public, as someone who understands the English language. The bill says, "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." Do you

equate that, sir, with South Africa? I am really offended that you would even make that observation. We can have differences of opinion as to the Constitution, but if you are telling me that in this bill it provides for a no-hearing setup, you and I certainly have a large difference of opinion, and you have not read the bill.

REV. SARFATY: No, I did read the bill; however, I did not memorize it.

ASSEMBLYMAN HERMAN: Well, here is the bill, sir.

REV. SARFATY: I've seen the section where it talks about the hearing. I don't question that it is there.

ASSEMBLYMAN HERMAN: So, how does that equate with South Africa?

REV. SARFATY: Let me try to start over again.

ASSEMBLYMAN HERMAN: Please do.

REV. SARFATY: Let me suggest, sir, that any system which allows preventive detention, without trial and conviction, I would equate with South Africa.

ASSEMBLYMAN HERMAN: Like murder?

REV. SARFATY: Well, I understand there is a process in the law at this point -- and it was referred to earlier in this hearing -- where when someone is charged with murder and everyone agrees there is a high possibility of conviction, he can be held by the court.

ASSEMBLYMAN HERMAN: That's not like South Africa? Isn't that the same thing, sir? What is the difference?

REV. SARFATY: That is not what I was talking about. Particularly, I am thinking of political and religious crimes and things like charges of civil disturbance and occasions down the road from an immediately well-intentioned effort to cut the crime rate, which eat into the long-range theoretical constitutional protections. I didn't mean to say that you hadn't carefully worked out a process, but what I think I am trying to say, without offense to the Chair or anyone else on the Committee, is that the only thing that is appropriate in our country is trial and conviction. A short cut of that process, even by well-intentioned people, becomes a terribly dangerous risk of injustice. That was my intended message.

ASSEMBLYMAN HERMAN: That is a point of view which I respect; everyone is entitled to make his point of view. However, I think we have to translate the record actually as the bill is written, as well.

REV. SARFATY: I appreciate that. What I am trying to say is that to open the door at all, I think is dangerous. When one starts opening that door-- I can think of places where I would be tempted myself to want to put someone away who I thought was a danger. I think that once you give anyone the right to do that, you get into trouble.

ASSEMBLYMAN HERMAN: If I can get a flavor for where you are, if you don't mind, do you think that even capital offenses, such as murder, ought to be bailable?

REV. SARFATY: Sir, I am not a constitutional lawyer.

ASSEMBLYMAN HERMAN: You don't have to be, sir. You have come here to express a moral opinion on the Constitution. Obviously, even a person accused of murder has the same presumption of innocence as someone accused of taking candy from a candy store. What I am asking you, sir, is, do you believe, based on your understanding of the presumption of innocence, that we should be permitted in even capital offenses to deny bail to people accused of murder? That is a very direct and easy question.

REV. SARFATY: It is certainly very clear and very direct, but I am very uneasy because I think we have a very touchy compromise at the moment that I personally do not want to disturb.

ASSEMBLYMAN HERMAN: Where do you see the distinction, because obviously in a murder situation the victim is already dead. Okay? So there should be an easier situation when we release that person because he has already killed the so-called victim. There isn't any victim; the victim is six feet under.

REV. SARFATY: I am aware of that, Mr. Chairman. I also know that lots of murderers -- and I don't have those statistics at my fingertips -- are not likely to murder again.

ASSEMBLYMAN HERMAN: So we should release them on bail before they are convicted, because in this situation-- I mean, if we are going to be constitutionally consistent, wouldn't you say-- We cannot compromise our constitutional principles; we all agree with that,

right? If you have a principle, you have to keep it and you have to stick to it.

REV. SARFATY: Yes, sir.

ASSEMBLYMAN HERMAN: I'm asking you, sir, for your constitutional understanding. If we are going to be consistent, is it the position of the Council of Churches that in cases involving capital offenses, such as first-degree murder, it should be a bailable offense?

REV. SARFATY: I'm saying that I am neither authorized nor confident to comment on that. I think you have used your intellectual power to outwit me, because we have a compromise which is working that I am not authorized to try to undo. I realize the compromise we have on charged murderers is a compromise; I am just suggesting that if we start making more, we are running a very dangerous risk.

ASSEMBLYMAN HERMAN: I'm suggesting that you will have another opportunity -- since we are going to have another public hearing -- to perhaps come back and discuss that question with us, if you would like to.

REV. SARFATY: I'll see, sir, if I can get some relevant advice so that I don't put my foot in my mouth.

ASSEMBLYMAN THOMPSON: I would just like to make one comment. Obviously, this is a Sixth-Amendment problem dealing with the constitutional right to bail. As the article in The Record stated, "jail or bail." It is obvious that the reason persons are held on capital offenses, although there is a presumption that the person is innocent until brought to trial and convicted, is the likelihood of the person returning to court on the due date. That is a determination the judge has to make.

The problem with the proposed legislation is not only that it is a violation of our whole constitutional concept that a person is innocent until proven guilty, but it gives the court the power to incarcerate persons for doing practically nothing, which is obviously a distant argument when you are talking about an alleged capital offense. This could go as far as a trespass offense, or whatever; the court would still have that type of power. That is the problem.

ASSEMBLYMAN HERMAN: Reverend Sarfaty, do you have any other comments you would like to make for the public record?

REV. SARFATY: Yes, sir.

ASSEMBLYMAN HERMAN: Please continue.

REV. SARFATY: I'm glad you're not the county prosecutor and I am not here on a charge. I'm sure I would be convicted instantly.

ASSEMBLYMAN HERMAN: Well, maybe I would be your defense lawyer and you would be acquitted. There is another side to that coin.

REV. SARFATY: That is the positive way to look at it, Mr. Chairman. Thank you very much.

ASSEMBLYMAN HERMAN: Thank you so much. Happy holidays. Is Joan Wright here? (negative response) Oh, Joan left.

I would like to say that this Committee always has an open, free, and intensive dialogue with its witnesses. I would like to think that more times than not the Committee tries to listen carefully to the witnesses. As the sponsor of the bill, I would just like to make an initial observation, since obviously we will have to have another hearing. I have been impressed with that portion of the testimony which points out to me the potential involuntary commitment proceeding involving the defendant himself. That is not my intent, and I will move to amend the bill to take out, "or the defendant," in Section c. Likewise, I am convinced of the logic and presentation of facts involving the question of appearance in Section b. I will move to amend that particular section.

I am not convinced, based on my own experience as a practitioner for 21 years in the criminal justice system, and as someone who does his fair share of domestic relations work, that Section c. should be eliminated as well. In fact, I think Section c. is carefully crafted, along with the statutes that have been passed in California and other places, to balance the rights of all people in the justice system, what I would like to call the "equal access to justice system." In my view, if we have a system of justice -- and now I am testifying for the purpose of this public record, which led me, in fact, to introduce this piece of legislation -- which allows defendants to be put on bail so that they can terrorize their victims or the victims' families to the extent where the victim, in essence, becomes locked up within his own home, which discourages victims from appearing

in court and participating in the process -- and that is more than domestic violence; we see that often today in organized crime cases -- that to me is not justice. Justice means that everyone has equal access to the courts, both the defendant and the victim, and the other witnesses in the trial. Using one's freedom to deny another person his freedom and his access to the court, is something that the Legislature should be concerned about. I recognize that we have to constitutionally craft it very carefully. I think we have made great strides in that regard. I don't think that being released on bond is a license to remove or intimidate your victim. I see that there is a difference. Bond is not a ticket for mayhem or terror. I think there is a balance here.

I am going to let the Committee have their say -- I know we have different points of view here -- for the purpose of the record. We will go to Assemblyman Thompson, then to Assemblyman Kern, and probably we will do it one more time because we are going to make amendments to this bill. Assemblyman Thompson?

ASSEMBLYMAN THOMPSON: In following what you are saying, Mr. Chairman, I would like to point out that you should examine what the problem is with this type of legislation. One of the problems, if you find out what happened in California, is that it is not just the statutes, but it is the way they use the statutes in Los Angeles and other places. They took this statute and just went out and grabbed people and locked them up. They had to go to Federal court to get the people out.

ASSEMBLYMAN HERMAN: We are amending out Section b., Assemblyman Thompson. Consider Section b. out of the bill. I can empathize and understand what I think are very valid arguments raised here today concerning Section b. Contrary to the initial impression of some of our witnesses, the Committee and the sponsor occasionally do move, notwithstanding whether the bill has been released or not, to an argument that has been made again, and perhaps made clearer for the Committee, or maybe I understand it better for the first time. Okay?

ASSEMBLYWOMAN PERUN: Assemblyman Herman, was there a clear second to your motion before? Was that a formal--

ASSEMBLYMAN HERMAN: We don't really need a motion at this time because this is a public hearing.

ASSEMBLYWOMAN PERUN: I thought this would divest us then of any confusion about where you stand on the matter of Section b.

ASSEMBLYMAN HERMAN: Assemblyman Kern?

ASSEMBLYMAN KERN: I want to pick up on what the Chairman said and relate for the record an incident which occurred on December 9, 1984 in our own State in the City of Paterson. I am going to quote this from a newspaper article: "A Paterson man, acquitted of murder in 1980 and awaiting trial in an unrelated murder of 1983, shot to death his 18-year old daughter who had filed sex-related charges against him, the police said yesterday." Now here is the type of person that this particular legislation would address, someone with a known record of violence, who has been in trouble with the law on other charges. If ACR-77 were law today, I am convinced that this type of thug would never have been able to kill his own daughter. I think that is what the legislation attempts to address.

My only caveat is, I think that ACR-83 is a much more comprehensive piece of legislation. I think it offers the public and the victims greater protection than the bill that has been released and is presently being given a public hearing. I just wanted to state that once again for the record.

ASSEMBLYMAN HERMAN: Thank you very much. Is there any other further public comment? (no response) Hearing none, we will close the record on the bill prior to its being amended.

I want to thank everyone for staying. Contrary to some public impressions, the process does work, or at least can be improved upon, for all those who don't think it works exactly the way they would like to see it work.

This hearing is adjourned.

(HEARING CONCLUDED)

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JEFFREY E. FOGEL
Executive Director

EMIL OXFELD
President

LEGISLATIVE MEMORANDUM

TO: Assembly Judiciary Committee

FROM: Jeffrey E. Fogel, Executive Director

RE: ACR 77, ACR 83

DATE: March 23, 1984

THIS BILL IS STRONGLY 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). Both ACR 77 and ACR 83 would place on the ballot a proposition to amend our Constitution, and to reverse that 300 year history by allowing judges to deny bail in any case "to assure appearance of the defendant" or where it is thought necessary or "proper" for the protection of "certain other persons."

The ACLU opposes the principle of 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. As stated 24 years ago by our Supreme Court, "release on bond is a concomitant of the presumption of innocence." State v. Konigsberg, 33 N.J. 307 (1960). Statistical evidence to support this fundamental 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 proces of law are violated when those persons awaiting trial, who have been convicted of no offense, are subject to punishment. Once again our Supreme Court has stated that "refusal of freedom in violation of the mandate of our organic law would constitute punishment before conviction, a notion abhorent to our democratic system." That proposition is graphically and dramatically demonstrated by the grave conditions and over-crowding 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 are 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 releasd 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 these two potentially draconian measures on the grounds that they interfere with long-held constitutional rights including the presumption of innocence, and do 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 three hundred 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.

The Record

Jail or bail?

It's not just an empty legal promise: Anyone accused of a crime is presumed innocent until proven guilty in a court of law. But a bipartisan group of lawmakers in Trenton seems intent on taking that long-held guarantee off the books. They've proposed to amend the state Constitution to allow courts to lock up suspects without bail.

The measure, sponsored by Assemblyman Martin Herman of Gloucester County, would supposedly prevent crimes. It would allow the court to jail accused persons considered dangerous, such as wife batterers or child abusers. Judges would also have the power to deny bail to a defendant who might skip town before his day in court.

While everyone wants to stop criminal violence, this preventive-detention proposal is laden with legal and practical problems. First of all, it's impossible to predict with any certainty whether someone will commit a crime. Judges might err on the side of jailing people who have no intention of breaking the law. Remember that a jail sentence is a punishment. Under this measure, we could be punishing people for crimes they didn't commit — in violation of the principle that everyone is entitled to his day in court.

In addition, prisons are already overcrowded with people found guilty in court. Filling them up with people who may not even have broken the law would burden the system further. For dangerous suspects, or ones with the means to flee, judges can set very high bail.

Finally, the great majority of suspects do not fail to show up in court. The government's best evidence is that only 2 percent of accused criminals flee justice.

The Herman measure is designed to allay public fears about crime, but there's more than enough evidence to show that it is a misguided and unworkable solution to our crime problems.

TESTIMONY AT THE PUBLIC HEARING ON ACR-77

PRE-TRIAL DETENTION

December 13, 1984

My name is Karen Spinner and I am the Director of Public Education and Policy or the New Jersey Association on Correction. The Association on Correction is a tatewide citizens organization working to improve the effectiveness of New Jersey's riminal justice and corrections systems. We are also concerned with the enormous conomic, social and humane costs associated with the administration of these systems.

ACR-77 is of serious concern to us because it proposes a significant change in he New Jersey State Constitution which taints the cherished legal notion of innocent until proven guilty". Our constitution currently permits bail for all ffenses except capital crimes. Bail's purpose is to assure that the accused will ppear in court to answer the charges filed against him or her.

The new factors introduced here as grounds for denial of bail, i.e. pre-trial etention are: 1) "release will not reasonably assure the appearance of the defendant s required; and substantial likelihood that the person's release would result in reat bodily harm to the victim, the victim's family, persons involved in circum-tances surrounding the alleged offense or the defendant."

Let's look at the first, "release will not reasonably assure the appearance of he defendant as required." Nationally, the figure for individuals who fail to appear or trial is 4%. Statistics for New Jersey, if available, would most likely be omparable. What we are talking about here is trying to predict an individual's uture behavior. Critics of the current bail system often believe that people on bail re responsible for committing other crimes. A study of 1980 arrest cycles conducted y the Administrative Office of the Courts showed that only 15.5% were rearrested

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significant because there is no breakdown on the type of crime committed and could range from very minor crimes like loitering to something more serious. What this provision in the proposed amendment will require is accurate prediction of an accused's future behavior. Research done in this area indicates that there is considerable room for error. The Greenwood scale for determining who should be selectively incapacitated only correctly identifies high risk offenders 45% of the time. That is a substantial margin of error.

The second provision deals with the protection of the victim and at the committee level this was specifically mentioned as being essential for the protection of domestic violence victims. The Prevention of Domestic Violence Act provides a procedure to protect these individuals through restraining orders and compliance with the same may be made a condition of bail. Failure to comply will result in their return to jail. Strict enforcement of that statute is a more appropriate response to this problem.

Costs of a preventive detention policy also need to be considered. They are both economic and human. This proposed amendment would require a hearing before anyone could be detained pre-trial and this is an important safeguard. However what impact will this have an already crowded court calendar? Will this not in essence amount to two trials? While testimony given by the defendant at this hearing will not be admissible against him/her on the issue of guilt in any other judicial proceeding, this existing testimony becomes a permanent court record. Will not the existence of such testimony color a judge or jury's perception of the case when the accused is actually brought to trial? There is a substantial body of literature which indicates that defendants who have been detained in jail because they could not make the bail set for them by the court are more likely to be convicted than those who were able to afford bail. Is it likely that a defendant who is denied bail through a court hearing would suffer any lesser fate especially when a judge has already determined that he/she was likely to abscond or commit another crime?

And then, what of the impact on the already overcrowded county jails? A review of their pre-trial populations during the past three months indicates an average pre-trial population of 3486. Using the figure of $45/day which is the rate DOC reimburses for the cost of state prisoners held in county jails (which may or may not represent actual costs), the cost for pre-trial detention is staggering - $156,870/day. While this population is fluid with some individuals entering and leaving due to bail being posted, there are still a significant number of individuals who are detained pre-trial because they are unable to meet the conditions of bail imposed by the court. There are many

oor people in jail who are unable to post what we might consider reasonable bail f $1500 or $2000 even under of 10% cash bail program.

In addition, the county jails are operating at 130% of capacity. As we are all ware, many jails in New Jersey are under court order concerning the conditions of vercrowding.

There is no compelling evidence which demands the proposed constitutional mendment permitting pre-trial detention. The bail system as it currently exists eeds improvement and there is legislation proposed to do this. The New Jersey ssociation on Correction is supportive of that effort while steadfastly opposing his proposed constitutional amendment.