

Public Hearing

before

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SENATE JUDICIARY COMMITTEE

SENATE CONCURRENT RESOLUTION No. 48

SENATE JOINT RESOLUTION No. 18

ASSEMBLY CONCURRENT RESOLUTION No. 20

and

The Committee also discussed Prison Overcrowding

LOCATION: Passaic County Jail
Paterson, New Jersey

DATE: May 26, 1992
10:30 a.m.

MEMBERS OF COMMITTEE PRESENT:

Senator William L. Gormley, Chairman
Senator Louis F. Kosco
Senator Bradford S. Smith
Senator John A. Girgenti
Senator Edward T. O'Connor, Jr.



ALSO PRESENT:

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

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Hearing Recorded and Transcribed by
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WILLIAM L. GORMLEY
Chairman
 JAMES S. CAFIERO
Vice-Chairman
 JOHN O. BENNETT
 LEANNA BROWN
 JOHN E. DIMON
 LOUIS F. KOSCO
 BRADFORD S. SMITH
 JOHN A. GIRGENTI
 EDWARD T. O'CONNOR, JR.
 RAYMOND J. ZANE

New Jersey State Legislature

SENATE JUDICIARY COMMITTEE
 LEGISLATIVE OFFICE BUILDING, CN-068
 TRENTON, NEW JERSEY 08625-0068
 (609) 292-5526

RESCHEDULED

NOTICE OF PUBLIC HEARING

The Senate Judiciary Committee will hold a public hearing on the following topics:

In the morning the committee discuss SCR-48 which:

Amends the State Constitution to provide that it is not
 cruel and unusual punishment to impose the death ^{penalty} on
 certain persons.

And in the afternoon the committee will discuss:

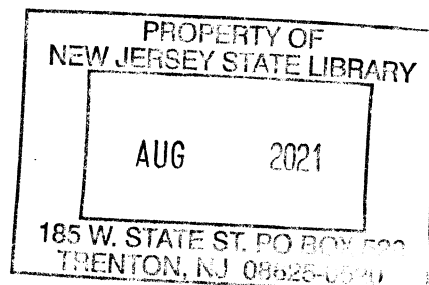
Prison overcrowding.

The hearing will be held on Tuesday, May 26, 1992 at 10:00 a.m. at the Passaic County Jail in Paterson, New Jersey.

The public may address comments and questions to John Tumulty, Judiciary Section, Office of Legislative Services, (609) 292-5526. Those persons presenting written testimony should provide 15 copies to the committee on the day of the hearing.

The original Public Hearing scheduled for May 11, on the topic of Prison Overcrowding was canceled and rescheduled as noted above.

Issued 4/10/92
 Rescheduled 4/29/92





WILLIAM L. GORMLEY
Chairman

JAMES S. CAFIERO
Vice-Chairman

JOHN O. BENNETT

LEANNA BROWN

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New Jersey State Legislature

SENATE JUDICIARY COMMITTEE
LEGISLATIVE OFFICE BUILDING, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-5526

REVISED

NOTICE OF PUBLIC HEARING

In addition to the previously announced legislation, the Senate Judiciary Committee will also hear testimony on:

ACR-20 Haytaian /Stuhltrager	Amends the State Constitution to provide that it is not cruel and unusual punishment to impose the death penalty on certain persons.
SJR-18 Kosco	Creates a Sentencing and Policy Study Commission

The hearing will be held on Tuesday, May 26, 1992 at 10:00 a.m. at the Passaic County Jail in Paterson, New Jersey.

The public may address comments and questions to John Tumulty, Judiciary Section, Office of Legislative Services, (609) 292-5526. Those persons presenting written testimony should provide 15 copies to the committee on the day of the hearing.

Issued 4/10/92
Rescheduled 4/29/92
*Revised 5/6/92

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<p>YES.</p>	<p>PROVIDING IT IS NOT CRUEL AND UNUSUAL PUNISHMENT TO IMPOSE THE DEATH PENALTY ON PERSONS WHO PURPOSELY OR KNOWINGLY CAUSE DEATH OR PURPOSELY OR KNOWINGLY CAUSE SERIOUS BODILY INJURY RESULTING IN DEATH</p> <p>Shall the amendment to Article I, paragraph 12 of the Constitution providing that it is not cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value be approved?</p>
<p>NO.</p>	<p>INTERPRETIVE STATEMENT</p> <p>This constitutional amendment would provide that it is not cruel and unusual punishment under our State Constitution to impose the death penalty on a person who is convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death if that defendant committed the act himself or paid for another to commit the act.</p>

STATEMENT

This proposed constitutional amendment provides that it is not cruel and unusual punishment to impose the death penalty on a person who has purposely or knowingly caused death or purposely or knowingly caused serious bodily injury resulting in death if he committed the act himself or paid another to do it. Presently the New Jersey murder statute, N.J.S.A.2C:11-3, provides that criminal homicide constitutes murder if:

(1) the actor purposely causes death or serious bodily injury resulting in death, or (2) the actor knowingly causes death or serious bodily injury resulting in death, or (3) the homicide was committed in the attempt or commission of enumerated crimes, the so-called "felony murder rule." Under the terms of the statute only a defendant who falls into categories (1) or (2) as listed who is convicted and who committed the act himself or paid another to do it may be eligible for the death penalty sentencing phase in which the judge or jury weighs aggravating and mitigating factors. This statutory scheme was called into question by the New Jersey Supreme Court in the decision of State v. Gerald, 113 N.J. 40 (1988) in which the court differentiated between "causing death" and "causing serious bodily injury resulting in death."

1 The Court stated: "We hold, on state constitutional grounds.
2 that a defendant who is convicted of purposely or knowingly
3 causing 'serious bodily injury resulting in death' under
4 N.J.S.A.2C:11-3(a)(1) and (2), or either of them - as opposed to
5 one who is convicted of purposely or knowingly causing death
6 under those same provisions - may not be subjected to the death
7 penalty." 113 N.J. at 69.

8 **This proposed constitutional amendment is intended to overturn
9 this portion of the court's decision in the Gerald case and
10 establish that it is not violative of the State Constitution to make
11 these defendants eligible for the death penalty sentencing process.**

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16 Amends the State Constitution to provide that it is not cruel and
17 unusual punishment to impose the death penalty on certain
18 persons.

SENATE JOINT RESOLUTION No. 18

STATE OF NEW JERSEY

INTRODUCED APRIL 6, 1992

By Senator KOSCO

1 **A JOINT RESOLUTION** creating a "Sentencing Policy Study
2 **Commission**" to study the State's sentencing and parole laws
3 **and policies** and make recommendations to ensure the most
4 **cost-effective** use of public resources in deterring crime,
5 **punishing offenders**, and protecting the public safety.
6

7 WHEREAS, The Legislature by enactment of the "New Jersey
8 Code of Criminal Justice," N.J.S.2C:1-1 et seq., and
9 subsequent amendments thereto, has sought to ensure the
10 public safety by preventing the commission of offenses through
11 the deterrent influence of criminal sanctions, by reforming
12 those offenders by confinement or incarceration when required
13 in the interests of public protection; and

14 WHEREAS, The sentencing provisions of the New Jersey Code of
15 Criminal Justice and subsequent amendments thereto
16 determine the likelihood that individual offenders will be
17 sentenced to a term of incarceration or parole ineligibility; and

18 WHEREAS, The cost of incarceration is significant and commands
19 an increasingly large share of scarce public resources; and

20 WHEREAS, There is a need to study the availability and use of
21 alternatives to traditional incarceration, including but not
22 limited to shock incarceration or "boot camp" facilities,
23 substance abuse treatment, intensively supervised probation
24 and parole, electronically monitored house arrest and curfews,
25 and assist forfeiture, in those cases where these punishment
26 alternatives can be used without jeopardizing the public safety;
27 and

28 WHEREAS, There is an overriding need to ensure the most
29 cost-effective use of limited public resources in the
30 sanctioning of offenders so as to achieve the benefits of a
31 rational, predictable and uniform sentencing scheme; and

32 WHEREAS, There is a need to study and review current laws,
33 policies, and practices which limit, enlarge, or otherwise define
34 the options and admit of discretion in the sentencing,
35 incarceration, and parole of offenders; now, therefore,
36

37 **BE IT RESOLVED** by the Senate and General Assembly of the
38 **State of New Jersey:**

39 1. There is hereby created a Commission to be known as the
40 "Sentencing Policy Study Commission" to consist of 18 members
41 as follows: two members of the Senate to be appointed by the
42 President thereof, who shall not be of the same political party;
43 two members of the General Assembly to be appointed by the
44 Speaker thereof, who shall not be of the same political party; the
45 Attorney General, or his representative; the Commissioner of

1 Corrections, or his representative; the Public Advocate, or his
2 representative; the Chief Justice, or his representative; the
3 President of the New Jersey Association of Counties, or his
4 representative; the President of the New Jersey County
5 Prosecutors Association, or his representative; the Chairman of
6 the Sheriffs Division of the New Jersey County Officers
7 Association, or his representative; the President of the New
8 Jersey State Bar Association, or his representative; and six public
9 members appointed by the Governor, no more than three of whom
10 shall be of the same political party, who shall serve during the
11 existence of the Commission. In selecting the public members,
12 the Governor should seek to include persons who have experience,
13 training, or academic background in crime victims' services and
14 counseling, vocational training, substance abuse treatment, or
15 judicial administration. The members appointed from a class of
16 holders of public office shall remain members until the expiration
17 of the Commission or until they cease to be members of the class
18 from which they were appointed, whichever occurs first. Any
19 vacancy in the membership of the Commission shall be filled by
20 appointment in the same manner as the original appointment was
21 made.

22 2. The Commission shall organize as soon as possible after the
23 appointment of its members. The Governor shall select from
24 among the public members of the Commission a chairman and
25 vice-chairman, and shall also select a secretary, who need not be
26 a member of the Commission.

27 3. The Commission is directed to study, review, and make
28 recommendations concerning New Jersey's current laws, policies,
29 and practices involving the sentencing, incarceration, and parole
30 offenders, the availability of treatment resources to respond to
31 the needs of drug and alcohol dependent offenders, and the use of
32 alternative and innovative sanctions. Without limitation of the
33 foregoing, the Commission shall study and review any and all
34 aspects of the criminal justice and correctional systems with a
35 view toward recommending the most effective and efficient use
36 of limited public resources in protecting the public safety and
37 achieving the goals and objectives of a rational, predictable, and
38 uniform sentencing system.

39 4. The members of the Commission shall serve without
40 compensation, but shall be reimbursed for necessary expenses
41 actually incurred in the performance of their duties. Staff and
42 related support services shall be provided by the New Jersey
43 Department of Law and Public Safety, and the Commission shall
44 be entitled to accept the assistance and services of such
45 employees of any State, county, or municipal department, board,
46 bureau, commission, or agency as may be made available to it and
47 to employ such legal, stenographic, technical, and clerical
48 assistance and incur such expenses as may be necessary in order
49 to perform its duties within the limits of funds appropriated or
50 otherwise made available to it for its purposes.

51 5. The Commission may meet and hold public hearings at the
52 place or places it designates during the sessions or recesses of the
53 Legislature and shall issue a final report its findings and
54 recommendations to the Governor and to the Legislature no later

1 than six months following the original appointment of all
2 members of the Commission.

3 6. This Joint Resolution shall take effect immediately and
4 shall expire upon the submission by the Commission of its final
5 report pursuant to section 5 hereof.

6
7

8 **STATEMENT**

9

10 **This Joint Resolution would create the "Sentencing Policy**
11 **Study Commission," a 18 member commission to study and review**
12 **current laws, policies and practices concerning the sentencing,**
13 **incarceration, and parole of offenders with a view toward**
14 **achieving the most effective and efficient use of limited practice**
15 **resources in protecting the public safety. Membership would**
16 **include two Senators and two members of the General Assembly,**
17 **to be appointed on a bipartisan basis; several Executive and**
18 **Judicial Branch officers; and six public members to be appointed**
19 **by the Governor.**

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23

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Creates a Sentencing and Policy Study Commission.

ASSEMBLY CONCURRENT RESOLUTION 20

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 13, 1992

By Assemblymen HAYTAIAN, STUHLTRAGER
and Collins

1 **A CONCURRENT RESOLUTION** proposing to amend Article I,
2 paragraph 12 of the Constitution of the State of New Jersey.

3
4 **BE IT RESOLVED** by the General Assembly of the State of
5 New Jersey (the Senate concurring):

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

8
9 **PROPOSED AMENDMENT**

10
11 Amend Article I, paragraph 12 to read as follows:

12 12. Excessive bail shall not be required, excessive fines shall
13 not be imposed, and cruel and unusual punishments shall not be
14 inflicted. It shall not be cruel and unusual punishment to impose
15 the death penalty on a person convicted of purposely or knowingly
16 causing death or purposely or knowingly causing serious bodily
17 injury resulting in death who committed the homicidal act by his
18 own conduct or who as an accomplice procured the commission of
19 the offense by payment or promise of payment of anything of
20 pecuniary value.

21 (cf: Art. 1, para. 12)

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

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

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

35 a. In every municipality in which voting machines are not used,
36 a legend which shall immediately precede the question, as follows:

37 If you favor the proposition printed below make a cross (x), plus
38 (+) or check (✓) in the square opposite the word "Yes." If you are
39 opposed thereto make a cross (x), plus (+) or check (✓) in the
40 square opposite the word "No."

41 b. In every municipality the following question:

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 underlined thus is new matter.

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YES	<p>PROVIDING IT IS NOT CRUEL AND UNUSUAL PUNISHMENT TO IMPOSE THE DEATH PENALTY ON PERSONS WHO PURPOSELY OR KNOWINGLY CAUSE DEATH OR PURPOSELY OR KNOWINGLY CAUSE SERIOUS BODILY INJURY RESULTING IN DEATH</p> <p>Shall the amendment to Article I, paragraph 12 of the Constitution providing that it is not cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value be approved?</p>
NO.	<p>INTERPRETIVE STATEMENT</p> <p>This constitutional amendment would provide that it is not cruel and unusual punishment under our State Constitution to impose the death penalty on a person who is convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death if that defendant committed the act himself or paid for another to commit the act.</p>

STATEMENT

The proposed constitutional amendment provides that it is not cruel and unusual punishment to impose the death penalty on a person who has purposely or knowingly caused death or purposely or knowingly caused serious bodily injury resulting in death if he committed the act himself or paid another to do it. Presently the New Jersey murder statute, N.J.S.A.2C:11-3 provides that criminal homicide constitutes murder if:

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1 The court stated: "We hold, on state constitutional grounds,
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7 penalty." 113 N.J. at 69.

8 **This proposed constitutional amendment is intended to overturn**
9 **this portion of the court's decision in the Gerald case and**
10 **establish that it is not violative of the State Constitution to make**
11 **these defendants eligible for the death penalty sentencing process.**

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16 Amends the State Constitution to provide that it is not cruel and
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* * * * *

S H E R I F F E D W I N E N G L E H A R D T: Ladies and gentlemen, if I may have your attention for just a few brief moments, I want to officially welcome you here to the Passaic County Jail, but before I do that I would like to call upon our Chief of Chaplains, Reverend Marcus Riggins, for a short prayer. Reverend Riggins, will you please step forward?

R E V E R E N D M A R C U S C. R I G G I N S, III: Could we all stand, please? Eternal God our Father: We come, Almighty God, to the quiet majesty of this moment. We come, Almighty God, mindful of our shortcomings, but we come, Almighty God, with grateful hearts and cheerful minds, looking unto you, Father, that you would set your spirit down, in, and around and about this gathering, that you would go forth and do fit as thou seeist. Touch our lives; touch our hearts, not only those who are gathered in this room, but those who are residents of this place. Keep us by thy power divine. In Jesus' name, we ask it all. Amen.

SHERIFF ENGLEHARDT: Thank you very much, Reverend Riggins.

Honorable Senators, public officials, Commissioner Fauver, members of the media, ladies and gentlemen: Welcome to the Passaic County Jail. On behalf of my staff and myself, we feel very honored. We consider it a great pleasure, and certainly a great honor to have so many Senators and so many dignitaries and officials choose this jail to hold their public hearings.

In the morning is going to be a public hearing pertaining to strengthening the death penalty laws. We will have lunch at 12:00; come back here to chapel, and we are going to have a public hearing, chaired by Senator Gormley, on jail overcrowding. We took you on a tour of the facility, and we were very, very proud to do that.

As I said -- some of you were there, and some of you weren't there -- this is the most overcrowded jail in the

State, probably one of the most crowded in the country, but you never heard Sheriff Englehardt complain about any problems in this jail as a result of overcrowding.

I believe, if the jail is run properly, prayerfully, and firmly, and you live by the Bible, that is, the rules and regulations set forth by the Corrections Commissioner; if you do what you are supposed to do, provide the prisoners with what they are entitled to under the law; if you are fair and if you are firm, you can run an overcrowded jail. If you have officers who are trained to handle situations that could take place, you can run an overcrowded jail. I will never use the excuse -- I never have, and I never will -- that I want prisoners released from this jail because of overcrowding.

It may be uncomfortable for the inmates, but that is their problem. I tour this jail every day. One complaint is that the jail is overcrowded, and my response is, "You create the overcrowding; I don't. If you don't like the overcrowding in this jail, don't break the law, and you will not be here." But do you know what? It can't be too bad, because the recidivism rate is 85 percent. They keep coming back all the time.

Welcome. I will be here all day to answer any questions that any of you may have pertaining to anything about the Passaic County Jail. At this time, I will turn the hearing over to our Senator, Senator Gormley. I want to single out that our next Congressman, Joe Bubba -- Senator Joe Bubba -- a good friend of mine, and I happen to be running with him-- This is nonpolitically, you know. I am not running for anything. There is nothing political about this. But, Joe, thanks for being here. Senator John Girgenti, a very close and personal friend, and so many of you-- I can't tell you in the proper terms how proud we are to have so many of you choose this jail. I am confident that when you leave this jail after your tour, you will agree with us that in spite of what you may

read about the horrors of the Passaic County Jail, you will not find any jail in this State that is run any better or more trouble free. Maybe you won't find one that is run as well.

Thank you for being here. I am going to turn the meeting over now to Senator Gormley. (applause)

SENATOR WILLIAM L. GORMLEY (Chairman): Thank you, Sheriff. Thank you for accommodating the members of the Committee today. We have a very busy schedule.

The reason, obviously, for this location, as he cited, is that this is the most overcrowded facility in terms of numbers. To be able to get some perspective for the members of the Committee, to go on a tour of the facility obviously was valuable. It is one thing to talk about double bunking and triple bunking, but to see it, and to see the experiences that are taking place-- I think that lends itself to the Committee function. Also, it is the nature of a county jail-- As some of you might know, I happened to have been raised in one, my father being a county sheriff. The nature of county jail facilities has changed dramatically over the last 20-some years, especially as a result of the number of prisoners that are coming from the State.

But before we go into the overcrowding issue, I am going to highlight Senator Kosco's bill -- SJR-18. Before we do that, we will commence the public hearing on SCR-48, which is sponsored by Senator Bubba. I would like to call up, as the first witness on SCR-48, the sponsor of the bill, Senator Joe Bubba. Senator Bubba?

S E N A T O R J O S E P H L. B U B B A: Thank you.

SENATOR GORMLEY: Can the people in the rear of the room hear me? (affirmative response) Thank you.

SENATOR BUBBA: Thank you very much, Senator Gormley. Welcome to you and the other members of your very prestigious Committee, the Judiciary Committee.

I want to clear up one rumor I have heard around here before we begin, and that is that the press will not be let out today. I want to assure you that most of them will be allowed to leave.

I am here today to testify--

SENATOR GORMLEY: Wait one second. We have some mechanical difficulties. I know we will overcome them. Does anyone else have to rig anything up? (affirmative response) Okay, wait one second. (different media microphones being set up)

SENATOR BUBBA: Are you all set?

SENATOR GORMLEY: All right? (affirmative response) Senator Bubba?

SENATOR BUBBA: Once again, I am here today to testify on SCR-48, a constitutional amendment to reinforce the wishes of the electorate to strengthen the death penalty. For all intents and purposes, we do not have a death penalty in New Jersey. We may have some 33 prisoners or so -- 33 people on death row; we may have a mandate from the people in this great State; but we have no death penalty. Why? Because we have a Supreme Court that concerns itself more with the criminals, more with the murderers, than the victims or the victims' families.

Isn't it a shame that it appears that the monumental job of changing our Constitution is easier than changing or removing the Chief Justice, or any Justice? This is a sad commentary on our own system, when one roadblock is used to prevent the will of the people to be carried out.

But, first of all, murderer after murderer have had their sentences reduced because the Supreme Court decided that the jury, first of all, wasn't charged -- or, rather was charged improperly. When that scenario was played out, sentence after sentence was set aside on the issue of proportionality.

Today, we are placed with a Supreme Court that sets aside sentences because it is unclear whether or not the murderer actually intended to kill the victim when he or she committed the act, as if we can climb into the mind of the murderer. The act alone should tell us his intention.

Let's talk about Zola, for example, who dragged the 75-year-old woman into her bedroom, sexually abused her, beat her, scalded over 60 percent of her body, and then strangled her to death. Was it his intention to really kill her?

Walter Johnson knocked on someone's door and asked if he could use the phone. He then grabbed the victim, struck the woman with a vase, broke the vase, and then used the pieces of the vase to stab her and kill her. When her husband came in, he knelt her husband down in front of him, and shot him execution style. Was it really his intent to kill the victims?

Ray Kise (phonetic spelling), who was at a New Year's Eve party, beat a victim, kicked the victim down the stairs, dragged the victim to the Delaware River, and then drowned him. Was it his intention to kill?

And, what about Ted Rose, who fired a sawed-off shotgun, point-blank, at a police officer -- Tony Garaffa? Did he intend to kill Tony?

Now, there are some people who will testify today and say, "Is the death penalty a deterrent?" Well, in the case of Thomas Ramseur and Richard Beginwald (phonetic spelling), both of them murdered individuals, were released on parole and then murdered again. In their cases, it would have been an absolute deterrent.

Then what about Koedatich, a fellow who admitted that he killed, and then felt as though he should say that he wanted the death penalty, and did not want an appeal? Yet, the Supreme Court ordered an appeal that will probably, based on The Trentonian editorial, cost \$2 million, to appeal a

sentence that the man did not want appealed. But the Supreme Court says he must have an appeal.

It is estimated, again by the editorial in The Trentonian, that the State pays an average of \$60,000 a year to house death row inmates. They have from a psychologist to a number of different people who serve their needs.

I believe it is time for this Legislature to move forward and place this question on the ballot in November, and once and for all let the people determine whether or not we should have a death penalty -- a real death penalty -- in the State of New Jersey.

I thank you for allowing me to speak today. I thank you for having the foresight to hear this -- you know, to perform the constitutional requirement to have this hearing. I think you ought to be applauded on the fact that you have come here to Passaic County to hold your hearings. I think you will readily see that we probably have the best Sheriff that anyone has in the State of New Jersey, and I know your own individual sheriffs certainly you hold in high esteem. But we have one of the best, and he has one of the best facilities, I think, in the State of New Jersey here. I thank you for coming.

SENATOR GORMLEY: Former Senate President John Russo.

J O H N F. R U S S O, ESQ.: Thank you, Mr. Chairman, members of the Committee, and Senator Bubba. It is kind of a, little of an awkward situation for me. I chaired this Committee for so many years, and this is the first time I ever had the privilege to appear before it. I'll see if I can somehow live up to the standards that you expect from former members.

Mr. Chairman and members of the Committee: First of all, I want to say, preliminarily, although I don't think it is necessary to any member of this Committee, that I do not come before this Committee on this bill -- this particular constitutional amendment -- urging restraint as one who, at

least some might call a liberal, a bleeding-heart liberal, or what have you. I come before you as the sponsor of the death penalty in New Jersey. I spent a lot of years as a prosecutor. Not that it is a bad name, but so far no one has yet accused me of being liberal, although I don't think that would be something I would be ashamed of. It has not been my record in the Legislature for 18 years. But I think, though, we have to be awfully careful when we are dealing with an issue such as this.

I have no criticism of the sponsor. Senator Bubba and I served many years together. I have no doubt that he is proposing what he believes is in the best interest of the people of this State. I come before you-- Incidentally -- and I should emphasize this -- I speak to you today entirely in my own personal, individual capacity, not on behalf of any group or any organization. I speak as the sponsor of the bill, and one who has lived with the issue for many years. Some of you might recall that I sponsored the death penalty that was, I think, three times vetoed by Governor Byrne. I never criticized him for that. He didn't believe in it. That is a view that had to be respected. Then finally, when Governor Kean took office, we put together the bill that is now the law of this State. We put it together after an awful lot of discussion regarding its terms.

But in any event, what I think we have to be extremely careful of is to react, or perhaps maybe overreact, some might say, to the Court's positions. I do not agree with Senator Bubba on one point he made, and that is that we don't have a death penalty in New Jersey. There is one individual now pending execution who would disagree with that, too. But also, you know, we tend to forget the way the death penalty was under prior law, before it was declared unconstitutional by the United States Supreme Court. I forget the year, but it was

actually shortly the last death penalty conviction in New Jersey, and it was one that I prosecuted in Ocean County.

But in any event, under the old death penalty law -- and under the law in most states -- appeals were part of the process, and really, I don't ever want to be, and I hope you don't either, and I don't think Senator Bubba does either, part of executing people just because they want to be executed. I think we have to live with a provision such as this. One of the things that has always concerned me about the death penalty, as one who has supported it, is that the public desire for a death penalty -- and it is overwhelming today; no question about it-- It was also politically popular, frankly, when I sponsored it, and it has become, perhaps, even more so.

Nevertheless, the one thing that will erode the death penalty in this State, is if we ever get to the point where either we have wholesale executions under circumstances that the public does not support, or if we ever make a mistake -- if we ever make a mistake. And that is something we have to live with, and it is something I am prepared to live with. It can happen. We are dealing with human events. If we ever execute someone who it is later determined not to have committed the murder, that single event will erode public confidence in the death penalty, and we may not have a death penalty. That is something that I, at least, believe we should avoid, because I do think the death penalty is a deterrent. I do think the death penalty is an important part of our law in those situations where it is justified.

Now, let me get to that, if I may for a moment. In New Jersey, as you know, there is no such thing as recorded sessions and things of that sort, so legislative intent is generally difficult. So I am basically giving you my recollection, what my intent was as the sponsor, and my discussions with the Governor, Governor Kean at the time. It was always -- it was always -- my intent as the sponsor, and

Governor Kean's, that the death penalty in New Jersey would be applied in only those unusually savage and severe murder cases where the defendant intended the death of his victim.

Now, first of all, let me say preliminarily, you know, it is interesting how the public sometimes misconstrues that. By that we do not mean that if you didn't intend to kill the victim but the victim died, that you get a free vacation somewhere on some island. You go to prison for life, with a mandatory minimum 30 years without parole. That is the penalty for murder in this State where the person dies, whether you intended the death or not, if the jury finds it is first degree murder.

The death penalty was to be applied only in those, first of all, unusually savage and severe murders where death was intended. Now, I don't mean to suggest to you for a moment that in the Zola case, and several of the others, that the defendant did not intend the victim's death. That isn't what the Supreme Court said. The Supreme Court simply said, as I understand it, that the jury must be properly instructed; that they have to make a finding that the defendant intended death. And if the jury does not find that death was intended, unanimously and beyond a reasonable doubt -- as it should be under our law -- then there is no death penalty in that particular instance.

That, at least, is certainly what I thought we were passing back in -- whatever year that was? -- '83 at the time of the signing, and every time before that. That is what I understand Governor Kean had in mind, and that is what I understand that most of the Legislature was voting on. Now, that does not mean there aren't some who either felt differently as to what we were doing, or who felt it should be changed. I have no quarrel with that. If the purpose of this constitutional amendment is because the death penalty should be enlarged to cover those instances, that is another issue.

What I am suggesting to you today is that we ought not to be too quick to overreact to the Court's decisions, because frankly, as I understand what I had in mind when I drafted the law, and the Governor, and the Legislature, the Court's decisions -- and I read each one -- are correct. The Court does not say, "These people must go free," and it doesn't even say, "These people are to escape the death penalty." It simply said that they weren't properly instructed under the law, namely that the jury must find that death was an intent under the circumstances.

Now, when Senator Bubba says -- and I respect that view -- we can't get into their minds-- We never can. We can't even get into their minds in some instances to prove that they committed the murder. But that is what the jury has to infer from the facts. Senator Bubba properly outlined those. He said, for example, when you take someone and do what the defendant did in certain instances, it is clear that death was the intent. That is probably true. The Court said, in Gerald, the jury must be instructed; that you have to find whether or not, under those facts and circumstances, death was the intended result.

I suspect that most of these reversals, when they come back to trial, will result in the death penalty. These people aren't free. These trials aren't over. Eventually we will get all the bugs sorted out. This is no different than it used to be under the old law. Do you remember the name Edgar Smith? That was a case that I worked on when I was with the Supreme Court as an assistant, when I got out of Columbia Law School, 14 years on death row; finally executed. This is nothing new. This is because we believe under this system of justice that we live under that we want to make sure -- that we want to make sure, as much as human events can be sure, that we are doing the right thing, because some day, I have no doubt about it-- You know, we can talk about the Court all we want, but I have

no doubt in my mind that we are going to see executions in New Jersey, soon enough, and frequently enough, and when that day comes, each one of us who is part of this process, and certainly I, as the sponsor, want to feel that at least we did the right thing, as much as we could under the circumstances.

So, I am suggesting today in this public hearing that this Committee go slowly; give thought to whether or not this is the right step to take. It is certainly a popular step. There is no question about that, as was the passage of the original law. It is very easy, when you look at the facts of some of these cases, to say they should be executed. The difficulty is, history has taught us some lessons. We've got to be sure that we move properly under the circumstances in something as important as this. It is not child's play, and it is not going to be fun when executions do start, and they will start under the present law. We do have a death penalty in New Jersey. It may not be as quick and as frequent as some would like. It is as quick and as frequent, or will be, as I certainly would like, as one who was involved in it.

So, I would ask you to consider those thoughts, I think, particularly because in the long run it is in the best interest of law enforcement in New Jersey; that is, the criminal justice system in New Jersey, because I think only this way will we continue to have a proper capital punishment statute that will serve as a deterrent, and not a public reaction against it.

So, thanks for listening to these thoughts, members of the Committee. I wish you well on a very difficult decision. I know how you have to feel, because you are dealing with something that is going to affect lives.

Thank you.

SENATOR GORMLEY: Senator O'Connor has a comment.

SENATOR O'CONNOR: Senator Russo, notwithstanding the fact that you made your disclaimer saying that you were not one

of those bleeding-heart liberals, and you looked right at me when you said that, I agree with your argument here today, and I do not consider myself a bleeding-heart liberal either. But I was hoping that you might comment, since you read all the death penalty cases, on the fact that this bill, or this SCR, whose intent is to overturn the decision in the Gerald case-- In the comments that were made by Senator Bubba, all of the cases that he referred to were not Gerald capital cases.

SENATOR RUSSO: Fourteen of them were, I think.

SENATOR O'CONNOR: Right. But each of the ones that were cited by Senator Bubba in his arguments were non-Gerald case decisions.

SENATOR RUSSO: Do you mean that they wouldn't be affected by this constitutional amendment anyway?

SENATOR O'CONNOR: Right.

SENATOR RUSSO: Well, you know, I think there are a lot more issues involved, as you point out, than the Gerald issue. These are the issues that you might say we are going through the growing pains of with the Court. I would probably be even more upset than Senator Bubba were the Court throwing out these convictions and ending any possibility of retrial or justice being done anyway. But on each of these issues, as I read them, I have no particular quarrel. The judges and prosecutors made, I felt, far more, or were following the law far less accurately than I thought they would, and I was kind of surprised.

In fact, you may remember -- I know Senator Gormley and Senator O'Connor do -- after the first several cases -- death penalty cases -- we had judges and prosecutors and public defenders in before the Judiciary at that time. It is amazing how many misunderstandings there were of what the law read and what it had in mind. I think we are just going through that. When we finish going through it, yes, maybe all 32 of these -- or whatever it is -- won't be executed, but enough will. I

think the public and we will be well satisfied that justice has been done. Hopefully we will feel that we did the right thing.

SENATOR GORMLEY: Thank you.

Next, John Holl, Assistant Attorney General. (no response) Not here right now, okay. William Lamb, County Prosecutors' Association of New Jersey.

A S S T. P R O S E C U T O R W M. F. L A M B, E S Q.:
Thank you, Mr. Chairman. My name is Lamb. I am the Assistant Prosecutor in Middlesex County. I am here on behalf of the County Prosecutors' Association of New Jersey, which supports SCR-48, as well as companion legislation in the Assembly.

I have testified on this bill before. I have given Mr. Tumulty a copy -- a synopsis of my remarks on that score. If it is appropriate, I would just incorporate those by reference into the record, rather than give you my whole spiel.

SENATOR GORMLEY: I think, quite frankly, after the last testimony-- I think maybe you could focus on Gerald. I think that would lend to a flow, in terms of -- in light of the Gerald decision, which you are familiar with, obviously.

ASST. PROSECUTOR LAMB: Senator, I am going to testify exclusively about Gerald, and nothing else, and about our attempts--

SENATOR GORMLEY: Well, that was on the point, wasn't it?

ASST. PROSECUTOR LAMB: --to see legislation enacted which would override the effects of that decision.

To place the matter in historical perspective, in 1982 the Legislature passed a new death penalty law, but we did not have a death penalty decision by the Supreme Court for approximately four-and-a-half years. In September of '87, the Court issued the Ramseur decision, which said in effect that the death penalty per se is constitutional, but the way in which it was implemented in that case ran afoul of the constitutional protections, or certain statutory safeguards that either were, or should have been read into the law.

In the aftermath of Ramseur, the Supreme Court utilized that decision to invalidate the first generation of death penalty cases -- probably 12 or 14.

In approximately October 1988, Ramseur was losing its efficacy as a death penalty invalidator, and the Court was compelled to find other reasons to invalidate the death penalty. So they hit upon the Gerald case, which creates in the law a distinction between those killers who intend to kill and those killers who intend serious bodily injury, but the victim dies anyway. In the latter case, according to our Supreme Court, the New Jersey Constitution does not permit the imposition of the death penalty.

It is interesting to me, as a person who litigates capital cases, that this argument was never made in Ramseur or any of the subsequent death penalty cases by anyone, including the rather talented and well-funded Public Defender Death Penalty Task Force, nor did anyone ever argue the point in the Gerald case itself. This argument was constructed exclusively by the Supreme Court. They determined that as a matter of constitutional law, even though no one, including the Public Defender's Office, had ever alleged such a thing, that our Constitution would not permit the imposition of the death penalty for a person who intended serious bodily injury, but not death. On that basis they invalidated -- my count is 15 death penalties.

What this does is make a distinction which I think is insupportable in logic or in morality. To give you an example: If I were to kidnap a Senator and demand ransom, and if the ransom were not paid, to deliberately murder the Senator I would be committing a death eligible murder. On the other hand, if I kidnaped a Senator and demanded ransom, and when my ransom demands were not answered I began to slowly dismember that Senator by first cutting off his ear, and next by cutting off his nose, and next by cutting off an arm, not

intending to kill the Senator, but to impress upon his friends in the Senate the seriousness of my demands--

SENATOR GORMLEY: Now that you have established that no one would pay the ransom under either circumstance-- (laughter)

ASST. PROSECUTOR LAMB: --and the Senator goes into shock and dies, that case, under Gerald, would not be death penalty eligible, because my intent was not to kill the Senator. In fact, that was the opposite of my intent. I would suggest to you that that result is morally absurd and legally preposterous.

In this State, not all murders are death penalty. It requires a knowing and purposeful act, plus at least one aggravating factor. New Jersey case law, as written, is very discriminating. Senator Russo was concerned, speaking for the Senate, that not every homicide be treated as a death penalty case. It isn't; under our law, it cannot be. Prosecutors make very conscious decisions in the exercise of their discretion to limit the cases that are death eligible to what I would consider, or characterize, as the worst of the worst.

But even if one agrees that there is a distinction in our Constitution which requires the Gerald result, the case law in Gerald is difficult to rationalize, because the Supreme Court has not always, or uniformly, applied its Gerald principle. In some cases it had said that even though the jury was not instructed that they had to distinguish between a killer who intended to kill and a killer who only intended serious bodily injury, there are some cases where the circumstances are so egregious, the crime is so horrific, that the error, or the lack of instruction was harmless, and the person should have been exposed to the death penalty anyway. Then, of course, the Court would go on to invalidate the death penalty on some other reason.

I would submit to you that if you analyze these 15 cases, you cannot find a coherent, philosophical thread. They

are unpredictable, irrational, and, in some cases, intellectually dishonest. To drive this point home, when I testify on this bill I bring this chart with me. This chart contains the 15 cases. Could I ask you to hold it here? (speaking to unidentified person) Thank you. These are the 15 cases in which a jury has returned a death verdict which involves the Gerald issue. I would submit that every single one of these cases involves the horrific, the gruesome murder that Senator Russo alluded to when he said, "When the Senate passed-- When the Legislature passed the death penalty law, we only intended the very worst of our murderers to be exposed to the death penalty." I invite anyone to find on this list one, out of 15, of these murderers who does not represent the worst of the worst.

If you review the crimes, though, you will find that you cannot rationalize the way the Supreme Court has utilized its Gerald principle. For example, in Hunt, the victim was stabbed 24 times. The Supreme Court said that the number of wounds clearly indicated an intent to cause death. The failure of the Court to instruct the jury on that point is harmless. There is no Gerald error.

In Pitts, the victim was stabbed 23 times. Again the same logic was utilized to say there was no Gerald error. But in its very next case, Davis, a woman was strangled with an electrical cord. She was then stabbed and mutilated after her death. The trial court in this case which took the guilty plea, was faulted-- It is not often that I get a Senator to come up here and-- (accepting help with chart from unidentified member of Committee)

UNIDENTIFIED MEMBER OF COMMITTEE: It's because I want to use it later.

ASST. PROSECUTOR LAMB: Thank you, Senator.

The Court which took the guilty plea was faulted for its failure to adduce from the defendant the fact that when he

strangled this person, when he mutilated her body after death, that he intended death and not just bodily injury -- serious bodily injury.

Or Kevin Jackson, the very next one listed, where the victim was stabbed 53 times, including 18 wounds to her genitals. In this case, the trial court was again faulted for its failure to ascertain from the defendant that he intended the victim's death, and not just serious bodily injury. I defy anyone who testifies today to rationalize those cases.

But it just doesn't stop there. Hightower robs a convenience store; shoots the clerk in the chest. She falls to the ground. As he is going to the till, she moves again. He shoots her in the neck. As he is finishing the robbery, she reaches up and apparently grabs his leg. He turns, puts the gun to her head, and pulls the trigger. In that case, the Supreme Court said, "No one on the jury could have conceived that this defendant did not intend Cynthia Barlieb's death. Therefore, failure to instruct the jury cannot be considered error."

In a Middlesex County case, Bryan Coyle-- The victim was chased down the street by Coyle, shot once in the leg, and dropped to the ground helpless. He was shot in the back the second time, rendered totally prostrate. Coyle then put the gun behind his ear and pulled the trigger. In this case, the Supreme Court said, "The jury should have been instructed that they could have found Coyle did not intend the death of his victim, only serious bodily injury." I defy anyone to rationalize Coyle with Hightower.

In McDougald you have the most horrific--

SENATOR GORMLEY: Excuse me, let's keep to the-- We have a number of witnesses.

ASST. PROSECUTOR LAMB: Okay.

SENATOR GORMLEY: We got the drift.

ASST. PROSECUTOR LAMB: Well, if you got my point, Senator, I will cut to the very end.

If there is any single decision which has demoralized prosecutors, which has bewildered the public, which has traumatized the families of murdered victims, which has frustrated what I would suggest is legislative intent, it is clearly the Gerald decision.

Senator Russo predicts that many of these gentlemen will be tried again and sentenced to the death penalty again. I can tell you for a fact that in the two Middlesex County cases, that will not happen. And I suspect that in many of these other cases it will not happen, because criminal cases, particularly homicide death penalty cases, are not like cheese or fine wine. They do not get better with age; they get worse. I would suspect that very few, if any, of these men will ever be executed. Indeed, I do not believe that very many of them will ever be exposed to another death penalty verdict.

The bottom line is this: What we are talking about is the Constitution of New Jersey. It is not the exclusive province of the Supreme Court or death penalty litigators. It is the people's Constitution. They have the right to pass upon the question themselves.

One of the things that Senator Russo alluded to -- and I just want to mention this in passing -- is that one of the problems with the death penalty has been errors in its implementation, the implication being that the cases have been tried by inept judges, by incompetent prosecutors, and by, perhaps, less than sterling defense lawyers. I can assure you, from personal experience, that only the very best trial judges are assigned to death penalty litigation; only the most experienced prosecutors prosecute these cases; and only the finest public defenders appear on behalf of criminal defendants. The canard that it is not the law, it is the prosecutors and the judges, should be put to rest.

The law as was written has been carried out. There is no real error in these cases. This Gerald principle is an invention of convenience. I would respectfully urge the Senate, on behalf of the Prosecutors' Association, to allow this amendment to go to the people.

SENATOR GORMLEY: Thank you. Just a comment. You may sit down; that's okay. I just didn't get that from Senator Russo's testimony, quite frankly, any aspersions as to the professionalism or capabilities of those people.

SENATOR RUSSO: (speaking from audience) I didn't mean to, if that was the impression.

SENATOR GORMLEY: We don't have to go back and forth on this. I am just saying that I didn't get that from the testimony.

ASST. PROSECUTOR LAMB: No, that is a comment that has been made publicly. As a matter of fact, when this hearing was televised in front of the Assembly Judiciary Committee, one of the witnesses said that.

SENATOR GORMLEY: I am just talking about what was said today. That's all.

ASST. PROSECUTOR LAMB: Right. I said, "the implication."

SENATOR GORMLEY: Okay, fine.

SENATOR O'CONNOR: May I just follow up, Senator?

SENATOR GORMLEY: Go ahead.

SENATOR O'CONNOR: Is there an objection on the part of yourself or the Prosecutors' Association to the determination -- as the general case lays it out to behave by the jury? Is there a problem with that?

ASST. PROSECUTOR LAMB: There is not a problem with it. To be candid, the Gerald decision has been met by the prosecutors. It is another issue we deal with. The issue is put to the jury and they can resolve it. I am not here to claim that they can't. The question is whether or not, in law or in morality, there should be a distinction between those who

intend to kill and those who intend something less. I'm saying that as a matter of constitutional law, it is unfounded. And secondly, even if you could find that distinction in the Constitution, the Supreme Court's application of it is irrational, unpredictable, and indefensible.

SENATOR O'CONNOR: You heard the very sponsor of the bill testify a short time ago that the death penalty, as it is now written in the State of New Jersey, was meant to apply to only the most serious of the capital cases.

ASST. PROSECUTOR LAMB: Senator, I would invite you, or Senator Russo, to demonstrate, or tell me, which of these 15, for example, would not have fallen into that category?

SENATOR O'CONNOR: Well, I don't think he says any of them. I think it is his conclusion that as long as the jury makes that determination, then that is something he is comfortable with.

ASST. PROSECUTOR LAMB: But what that would mean is that even if the jury made the determination, there is a distinction in our law between those who intend to kill and those who intend serious bodily injury and death results anyway. What this amendment would do would be to eradicate that distinction. Our point, on behalf of the prosecutors, is that we do not find that those who intend serious bodily injury but not death are any better, morally or legally speaking, than those who directly intend death. We think the issue should be put to the New Jersey voters. It is their Constitution.

Thank you, Senator.

SENATOR GORMLEY: Next we will have Jean D. Barrett, ACLU of New Jersey.

J E A N D. B A R R E T T, E S Q.: Good morning. Thank you for having me. As you have already said, I am Jean Barrett, and I am a lifelong resident of New Jersey. I am also a lawyer. I am in a two-lawyer firm, and we specialize in criminal defense. My partner and I have represented four

individuals, either presently or in the past, in death penalty cases on behalf of the Public Defender's Office. I must point out that if the Koedatich appeal cost \$2 million, not very much of it ended up in my pocket, because I represented him on appeal. I find that figure to be totally outrageous in terms of the cost of appellate work.

I am here to speak on behalf of the ACLU in opposition to this bill. I'm sure you all know the ACLU's position on the death penalty. I must say that I wholeheartedly agree with that position. That position -- just so I put all of my cards on the table -- is that the death penalty serves no legitimate social purpose; that it is disproportionately imposed on minority poor and underprivileged; that it sets the dangerous precedent of State-sponsored killing; and inevitably leads to State-sponsored execution of the innocent.

That having been said, I would like to talk about the Gerald decision and a little bit about what the previous speakers have said. First of all, I am in agreement with Senator Russo. I read just about every death penalty case the Supreme Court has decided. I see nothing in those cases on which I can hang my hat to see into the future that this Court will not allow executions.

Executions are going to happen in New Jersey. Remember, Texas and Florida passed their death penalties long before the death penalty was actually imposed in those jurisdictions. We will, as taxpayers of this State, pay for public executions. They will occur. Our Supreme Court is determined to do it. If they weren't, they would have declared the statute unconstitutional from the start, and they had adequate opportunity in which to do that.

The second thing I would like to talk about is the list, to my right and to the Senators' left, of cases where Gerald was an issue. I would like to point out, first of all, that those cases did deal with the issue of Gerald. The

prosecutor who preceded me referred to the cases as being 15 cases, but as I count them, five of those cases on his chart are cases in which the Supreme Court has rejected the application of Gerald to those facts.

Furthermore, I would also point out that the Pitts and Davis cases that the prosecutor referred to specifically -- excuse me, the Davis and Jackson cases, in which the Gerald rule did apply, were pleas where defendants put forth a guilty plea, and what the Court said was, in that case the defendant not only must give an adequate factual basis to support the death penalty, but that defendant must also be aware of the implications of his plea. Those cases were reversed solely on those grounds. The Supreme Court did not find that those facts met the standard under Gerald. In fact, they said that they probably did not. But they were guilty pleas, and if they are guilty pleas then facing capital punishment hearings thereafter, the factual basis must exist.

I would also like to talk to you for just a minute about the roots of the Gerald decision, because there has been some talk that this decision came out of thin air. This is totally untrue. The source of the Gerald decision, while it truly was not argued by the appellate lawyers who were appearing before the Supreme Court-- The source of the Gerald decision is prior New Jersey law. The death penalty in New Jersey, before it was declared unconstitutional in Funichello v. New Jersey by the United States Supreme Court, divided cases between intentional murders and unintentional murders. In order to be a capital case in New Jersey before Funichello v. New Jersey, the State must have proved that there was premeditation, deliberation by the defendant, or an instance of poisoning or lying in wait. Thus, under previous New Jersey law, the serious bodily injury intent was not sufficient to warrant the death penalty, and there were plenty of executions in the period that that law was in effect.

The Supreme Court's decision represents a coherent, philosophical thread, and that philosophical thread says that the death penalty should be imposed on only those people who actually intended to kill.

Now, the prosecutor also made an argument that I would like to talk about in terms of his kidnapping scenario and dismemberment and mutilation of the State Senate, one by one presumably. In that scenario, I would challenge the prosecutor to have ever been able to argue that to the jury--

SENATOR KOSCO: Did you say, "preferably"?

MS. BARRETT: No, "presumably." I would challenge the prosecutor -- and I assume he has never argued to the jury on behalf of a criminal defendant-- I would challenge the prosecutor to convince any jury that a defendant in that situation did not intend to kill. The question here-- I think we have to put our faith in jurors to make the right decisions and the right calls on intent. They make them every single day. That is what intent is all about. Every piece of legislation that you ever pass has a criminal intent to it, and a jury has to find that. They do it all the time. They infer it from the facts, and believe me, from those facts I would never be able to convince them not to infer that there was an intent to kill.

Juries are honest, forthright citizens of this State who actually become informed about the facts. You, as legislators, and also other legislators, are the representatives of the citizens of New Jersey. This is a very complex legal issue. Don't put it off on the citizens and on sound bites and on fast publicity. Make the decision yourselves. Understand what the questions are -- what the legal questions are. And educate the citizens. Explain to them why it is. Only intentional murders are what they really want to have proved in death penalty cases.

Thank you very much for your time. I trust that none of you will be slowly dismembered.

SENATOR GORMLEY: Thank you. That was a nice salutation.

SENATOR KOSCO: What class! You have a lot of class.

SENATOR GORMLEY: The next witness will be Brad Brewster, State PBA. I would also like to have Karen Spinner, New Jersey Association on Correction.

B R A D L E Y B R E W S T E R: At the same time?

SENATOR GORMLEY: She will come right after you. Just sit right there.

MR. BREWSTER: Thank you, Senators. On behalf of the 32,000 members of the New Jersey State PBA, we are here very briefly to testify in support of this constitutional amendment.

Very simply, the death penalty currently does not work. It is technically deficient, but worst of all from law enforcement's perspective, it undermines the simple principle of law, the rule of law, which is that the punishment should be sure, swift, and sensible. This interpretation by the Court does not make sense, and as a result 2C:11-3 should be changed.

The 32,000 members of the PBA put their lives on the line every day, and a change of this magnitude is something that is important not only in principle, but in fact. With that, we would add our voice of support for the measure.

SENATOR GORMLEY: Karen Spinner?

K A R E N A. S P I N N E R: Good morning, Senators. My name is Karen Spinner, and I am the Director of Public Education and Policy for the New Jersey Association on Correction. We are a statewide citizen organization which is interested in improving the criminal justice system.

We are opposed to SCR-48 because we believe the death penalty is immoral and inappropriate in a society that purports to champion human rights. The United States is the only Western nation that still imposes the death penalty, and it

continues to do so in light of evidence that it does not deter criminal behavior. It only dehumanizes and degrades the entire society, and permits us to divert our attention away from important issues of criminal justice reform.

We believe that this piece of legislation, which some feel will right a grievous wrong, is inappropriate. We believe the Supreme Court is correct in focusing on only those people who have seriously intended to kill, or commit murder, not those who just intend to commit bodily harm.

We understand the desire of some victims to have vengeance, but we would like to point out that when the State executes, we also develop new victims, those family members of the person who is convicted.

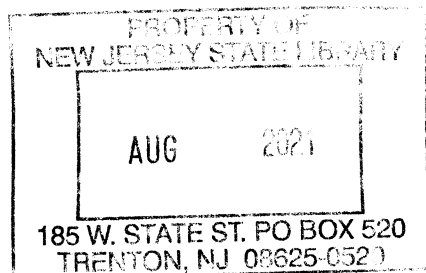
The convicted killer should be punished, and we believe that the New Jersey statutes that require a mandatory minimum term of 30 years without parole are a sufficient penalty for the crime of murder in this State. There is no way to restore the life of a victim. Taking the life of the defendant cannot do that, and we believe that allowing the criminal justice system to proceed with this extremely costly capital prosecution, which could still result in a 30-year sentence, is an inappropriate use of the resources for a highly questionable criminal justice goal.

Thank you.

SENATOR GORMLEY: Thank you.

Next I would like to have Richard Pompelo, Coalition of Crime Victims.

R I C H A R D P O M P I E L O, ESQ.: Good morning, Mr. Chairman, members of the Committee. I am Richard Pompelo. I am an attorney; I have been an attorney in the State of New Jersey for 20 years. I am the attorney for the New Jersey Coalition of Crime Victims organizations, and I am very, very proud to say that I am the founder and sole attorney of the New Jersey Crime Victims Law Center, which is the only crime



victims law center in this country, to which I devote approximately 50 percent of my time representing crime victims at absolutely no cost to them.

I speak to you from the perspective of not only representing crime victims, but also being a crime victim. On February 12, 1989, my oldest child was murdered. I say to you that people who are victims of crime, especially people who are victims of murder, do not have the incredible vengeance that many, many people think exists. I specifically recall the prosecutor telling me that he was not going to seek the death penalty in the case of the murder of my son because, in his words, "The crime wasn't heinous enough." That was his determination, and I remember simply accepting what he said, because as an attorney, and as someone who had just gone through, obviously, the greatest tragedy anyone could imagine, I accepted the fact as a law-abiding citizen that there would be justice in this State, and that the people who made the laws -- the legislators -- and the people who interpreted the laws -- the judges -- would do what was right and what was appropriate. I still believe in that.

In October of 1980, I was contacted by a young woman whose sister had been murdered. The individual who murdered her sister committed his second murder. He had been let out on parole after the first, after some time. According to the facts of the case in the testimony at trial, he had bludgeoned her sister at least 15 times with a hammerlike object, creating multiple fractures in her face, her nose and her jaw. The Supreme Court of the State of New Jersey, in October of 1990 -- and that was one of the cases on there -- based upon State v. Gerald, overturned the conviction.

This young woman called me because, again, representing victims-- I would like to tell you what was on the mind of this sister. She called me and wanted to sue Chief Justice Wilentz. I explained to her the laws of judicial

immunity and the pain she would go through in doing this, and the further frustration she would experience with the criminal justice process. I said that this was not the way to do it, and I did not suggest that she do it. Needless to say, she did not do it. But I noticed -- taken from one of the newspaper quotes -- what she had to say to The Star-Ledger back in October of 1980, and I read it to you. This is the perspective from the victim who is a layperson who does not understand the law, but only understands what justice is supposed to be. She said:

"Murderers have found a friend in the New Jersey Supreme Court. I just don't know where they are coming up with this logic. Defense attorneys must be thrilled. It boggles the mind. These guys on death row must be laughing," the victim's sister said. "I have given up on the system."

That is what is most critical to me; the fact that so many people have, in fact, given up on the system. Whether one believes in the death penalty or is against the death penalty is a matter of their own personal conviction. But for someone like me and the many individuals whom I represent, we believe in the system of justice in this country and in this State. We believe in the fact that our legislators took the time, the trouble, the personal anguish, and the effort to enact a law on behalf of the people, which they thought was appropriate and correct, that being the death penalty law.

All victims of crime, and I would suggest people throughout this State who understand and empathize with victims of crime and do not wish to be victims of crime-- All they want is that the justice system which they support act appropriately and not play games with the laws.

I quote from a statement made by Attorney General Robert Del Tufo in response to the decision of the case that I just spoke about. He stated -- again in the same article in The Star-Ledger back in October of 1990 -- "If the Court's

underlying message is that it philosophically objects to the death penalty and will not suffer its imposition, then it is time to eliminate the charade and to reassess directly and expressly the continued viability of the death penalty in this State."

I have read Gerald over and over and over, and I do not agree with the analysis of Gerald by some individuals in terms of what was originally intended by the entire Legislature in adopting this law. I have attended too many death penalty cases, many with victims whom I have come to support, and even represent. I received a letter from a juror in a death penalty case approximately a year ago, in which 11 of the jurors voted for the death penalty and one didn't. One of the jurors who voted for the death penalty wrote to me and said that this was the most horrific and troublesome process she had ever gone through in her life, and the instructions to the jury were so absolutely confusing that no one could make any sense as to what the law was supposed to be.

I suggest this to you: In that particular case, the individual who was on trial had been convicted of murder three times. This was his third murder. I suggest to you -- he is in Trenton State Prison now -- that if somehow he managed to escape and in doing so he knocked out a guard who hit his head against a wall, fell on the floor, and died; and he took that guard's gun and he escaped from the prison, and he grabbed someone out of a car at gunpoint and threw him in the trunk of the car and took off; and was driving down the street and went right past a school-- If there were 10 little children playing in front of the school in the road and he ran over all of them and killed them, if you apply the rule of Gerald as the Supreme Court wants you to apply it, then he would not be given the death penalty. While certain other aggravating factors, which I suggest was the intention of the Legislature, would prevail,

under the Gerald rule of intent, he could not be convicted. I say that that is an abomination. That is not the intent of the law.

It is time that this Legislature and the people in charge in this State recognize that murder is not about judges and lawyers and legislators. It is about innocent people. All they want is a reasonable system of justice, the justice system that they support and in which they have faith.

Thank you very much.

SENATOR GORMLEY: Thank you.

Next we will have the Reverend Charles Rawlings, Executive Director, New Jersey Council of Churches.

R E V E R E N D C H A R L E S R A W L I N G S: Good morning, Mr. Chairman.

SENATOR GORMLEY: Good morning.

REVEREND RAWLINGS: The ancient Greeks had a sense of life as drama, as theater, and I want to begin by reminding us this morning of some of the wisdom that we might derive from that tradition. This hearing is conducted in a larger context, similar in a sense to the way one, under ideal terms, would have hoped to explore a policy question in the time of the Greeks, in which all of the population was part of the chorus and everyone participated in the drama.

Everyone is here, but they are not all visible. We are in a jail in which probably -- I asked one of the pastors at the back of the room-- We are in a jail in which probably more than 75 percent of those incarcerated are either African-American or Latinos. We are thinking about the death penalty in a larger context, in which we have immediately behind us the disaster of Los Angeles. We have abundant evidence which the New Jersey Council of Churches has communicated recently to the joint budget hearings of the Legislature; abundant evidence of the growing gap between the rich and poor; the growing reality of racial separation in this

society. So we think about the death penalty today. We think about tightening it. We think about improving its harshness and its capacity for enforcement in a larger context which may, in some instances, be invisible to us by the way we order the room, but, in fact, is a context in which this society is moving more and more closely to the verge of social disaster.

Within that context, of course, the New Jersey Council of Churches believes that Christians cannot justify support for capital punishment. We are concerned that lost in the discussion of capital punishment, and lost in the discussion of Gerald, is the fact that there are other more fundamental ways to deal with the rise of violent crime in our society. An effective response to crime, we believe, means emphasizing the importance of prevention, providing all of our citizens with opportunities for education, training, and employment. It means shaping our criminal justice system to stress the rehabilitation of offenders, rather than a policy of retribution.

Having listened to the testimony that has preceded me, I cannot escape any more than anyone else the reality of the violence and the horror that people experience and the tragedy that befalls them. But that is why I reference the ancient Greeks. Those tragedies are part of a much larger drama in which this society has failed to deal with its fundamental problems, the need for justice and equity for all.

We believe, therefore, that an effort to change the way in which we apply the death penalty is a move in a direction that deceives us into believing that it is an effective response to a social situation in which capital punishment and the death penalty have never proved to be a deterrent. We urge you to think of the larger drama, the larger context in which we meet this morning, Mr. Chairman, and members of the Committee.

Thank you.

SENATOR GORMLEY: Thank you, Reverend.

Next, Carol Kasabach, Director of the Lutheran Office of Governmental Ministry in New Jersey.

C A R O L K A S A B A C H: Thank you for the opportunity to speak. My name is Carol Kasabach, Director of the Lutheran Office of Governmental Ministry in New Jersey. This is an office established seven years ago in New Jersey to advocate justice for the poor and the powerless.

Today I come before you to voice the Evangelical Lutheran Church in America's opposition to the use of the death penalty. Not only is the church opposed to this proposed State constitutional amendment, it has taken a stand against the use of the death penalty in all instances. Developed over a two-year period after discussions in congregations, synods, and regional hearings, a social statement was adopted by more than two-thirds majority vote at the second biennial churchwide assembly of the ELCA in September 1991. Those voting represented 5.3 million members in 11,000 congregations of the ELCA across this country. And in New Jersey, on May 18, the Policy Board of the Lutheran Office in New Jersey directed me to present the ELCA's social statement on the death penalty to you, and I have it attached to my written statement.

In a climate of violence, we grieve with the family and friends of the victim -- the violated one. Violent crime has a powerful, corrosive effect on society. Bonds of trust, the very assumptions that allow us to live our lives in security and peace, break down. Instead of loving, we fear our neighbor. We especially fear the stranger.

The human community is saddened by violence, and angered by the injustice involved. We want to hold accountable those who violate life, those who violate society. Our sadness and anger, however, make us vulnerable to feelings of revenge. Our frustration with the complex problems contributing to violence may make us long for simple solutions.

Some of the arguments that the ELCA has raised in its recent social statement in opposition to the death penalty:

1) Executions do not bring healing to victims' families. Because of the necessary appeal process, families are dragged through the experience again and again. A life without possibility of parole would do far more to enable family and friends to reach closure, to heal wounds, and to get on with their lives.

2) Legal executions give society the unmistakable message that life ceases to be sacred when it is thought useful to take it. It teaches the permissibility of killing people to solve social problems

3) Despite attempts to provide legal safeguards, the death penalty has not been, and cannot be made fair. The system cannot be made perfect, for biases, prejudices, and chance affect whom we charge with a capital crime, what verdict we reach, and whether appeals will be successful. According to the National Judicial Conference, 40 percent of the capital cases in judicial review of Federal habeas corpus proceedings have been overturned.

4) The worst and most dangerous criminals are rarely the ones executed. The death penalty is applied randomly at best and discriminatorily at worst.

5) It is a wasteful use of resources. It requires a disproportionate expenditure of time, energy, and money by courts, prosecuting attorneys, defense attorneys, juries, and courtroom and correctional personnel. It is actually cheaper to keep someone in prison for life than to go through the appeal process involved in capital punishment cases.

I have attached a document to my written statement entitled, "The Cost of the Death Penalty," which shows an analysis done in several states with regard to the use of the death penalty. Some of the states are: New York, Maryland, Kansas, Florida, and Indiana.

6) No conclusive study has shown it to be a deterrent. In fact, several studies have shown that violence and homicides have actually increased in the few months prior and after an execution.

7) Since human beings and human institutions are fallible, the innocent have been executed in the past, and will inevitably be executed in the future. Death is a different punishment from any other. The execution of an innocent person is a mistake we cannot correct.

I speak to you as a Christian and as a citizen. I guess it does seem appropriate that we are here in a chapel and I am facing the crucifix in front of me.

8) Do we, as Christians, really believe in the possibility of repentance, conversion, and human redemption -- that Jesus died for all sinners? To deprive a person of the possibility of reconciliation to God and humanity, or to end the life of someone who has received that possibility, is the real tragedy of capital punishment.

Where is New Jersey in relation to other states and the world with regard to the death penalty? Fourteen states have no death penalty: Rhode Island, Massachusetts, New York, Vermont, Maine, Iowa, Kansas, North Dakota, Wisconsin, Minnesota, Michigan, Alaska, Hawaii, and West Virginia.

"Outside the United States, capital punishment in the 1990s is usually associated with underdevelopment or lack of democracy, usually both. The death penalty no longer exists in any European community country. Most of the nations of the former Soviet bloc have abolished it, and the rest are considering doing so. Of the 2086 executions Amnesty International tracked in 1991, 1859 took place in two countries: China and Iran." "Time," May 18, 1992, p. 49.

As you wrestle with this serious moral and legal issue, I ask you to ponder some of the questions and answers

raised by my colleague from Nebraska, Jim Bowman, when that state was debating the repeal of the death penalty earlier this year. I am just going to refer one of the questions, and I will leave the rest of them for you to read:

Q. Surely the Bible prescribes the death penalty for persons who murder, doesn't it?

A. Murder is only one of the nearly 20 capital offenses which warranted death under Old Testament law. Others included adultery, fornication, lying, breaking the Sabbath, and insulting one's parents. By Jesus' day, however, most capital cases were resolved through some other form of restitution.

Intense moral deliberation produced the ELCA's statement on the death penalty. I encourage you to repeal the death penalty in New Jersey, not expand its scope.

Thank you very much.

SENATOR GORMLEY: Thank you.

The final witness will be Mr. Jim O'Brien.

J A M E S O ' B R I E N: Mr. Chairman, Senators: As you know, I am Chairman of the Coalition of Crime Victims Rights. I just have a short statement I would like to talk to you about.

Actually, the story I am going to tell you really ties in with both parts of the hearing, because I am going to tell you a story about a gentleman who was released from a Florida prison in August of 1982. The gentleman had committed murder and he was released early because of prison overcrowding. He made his way to New Jersey, and within five months this gentleman had murdered two young girls. One was an 18-year-old cheerleader from Parsippany who he abducted, raped, beat, and then repeatedly stabbed. A couple of days later he did the same thing to my daughter.

As I say, this gentleman was released early because of prison overcrowding. In doing the murders he committed, James Koedatich stabbed Amy Hoffman repeatedly. He did the same

thing to my daughter. But in the two cases, there was a difference. With Amy Hoffman, she died immediately. With Deidre, she lived for approximately an hour, a fine line as to whether Mr. Koedatich intended to kill either one of them. Nobody will ever know whether Mr. Koedatich intended to kill either one of them. I believe that is where our problem is.

The unfortunate part is, the two victims are dead. They will never come back. The Supreme Court, by their ruling, is asking the jury to play God. I can guarantee you that none of those men there will tell you that they intended to kill their victims, and they won't tell their defense lawyer they intended to kill their victims. So, how do we determine whether or not James Koedatich, or any of those men, intended to kill their victims, or just stab them, or just hurt them?

It is my contention that if a man puts a knife in his hand, or a gun in his hand, and he uses that gun or that knife or whatever other lethal weapon he may have, then he should pay the consequences for what happens through the use of that weapon. That is where the Gerald principle, to me, is wrong. There is no need to have a jury decide that. The consequences must be paid by that man.

As far as the statements made that only 15 have been affected by this decision in Gerald, at the end of the trial -- as Ms. Barrett talked about, the Koedatich trial -- and the retrial of this death penalty case, I went to the prosecutor and I said, "Well, if the jury comes back in and he is found guilty, it will be over. It will start at the Federal level." He said, "No, it won't." He said, "What will happen is, we will go back and we will probably get an appeal on proportionality, or we will get an appeal under the Gerald." The fact that the others were overturned prior to that-- They were overturned because the judge instructed the jury wrong. It didn't mean that those cases, if they were found guilty in

retrial, would not come back and face the Gerald or the proportionality trial again.

So, the others did not escape that. The fact that we have only one man sitting on death row who has already been tried and then overturned, and he is facing it again -- that's Mr. Begegnwald -- leads me to believe that you will not see those 32 men back on death row again. It has been many, many years so far. Prosecutors are completely discouraged, and I don't blame them. We are trying to get around the Supreme Court's rulings one after another.

I thank you very much for your time. I certainly hope -- and I support it -- that this amendment will go through.

SENATOR GORMLEY: Thank you.

Let me tell you, before we get a summation from Senator Bubba-- I am just going to make this final comment to tell you what we are going to do. We will be taking a break. We will be back at 12:30. We will then address SJR-18 dealing with prison overcrowding. Our first two witnesses at that time will be Commissioner Fauver and Judge Coburn.

Prior to Senator Bubba's comments, I would like to make, hopefully, what we would consider brief comments about the testimony. This is a difficult issue on either side. You garner a lot of respect for people who are courageous enough on either side to take very difficult and complex positions.

I cannot help but go back. Although I support the measure, I think that Reverend Rawlings made a very good point. There are conditions such as those that emanate from Los Angeles and whatever, that have nothing to do with this legislation today. Although I think this is a correct measure myself -- I am speaking personally now -- I think people cannot think of this as a panacea for far greater social problems that we have in society that we have to face that are far more complex, and need far more complex solutions than this measure.

I do appreciate the variety of opinions. In certain circumstances, it does take a lot to voice opposition to a measure of this nature, and I appreciate the quality of the testimony we have had today on either side.

Are there comments from any other Senators here today?

SENATOR GIRGENTI: Thank you, Mr. Chairman. I would just like to repeat what you said. I think you're right. This is a very difficult issue. I know a lot of people have come forward and really expressed feelings that they have held very strongly.

I happen to support the resolution I have in Committee, as you know. I feel that what has happened here is, it was a tough decision to vote for the death penalty a number of years ago, which I did. I think what has become, really an abomination, in terms of the application of this whole thing-- No one is bloodthirsty, wanting to see the death penalty just for the sake of having numbers. But on the other hand, I think that now we have reached a situation where technicalities have really denied justice, in many cases. We see situations where a number of incidents have happened, where certainly, to all intents and purposes, there was an intent to kill.

I think when the law was initially passed, there was a feeling that this was justice for the victims. I have seen many people throughout the years, because I have been involved in helping crime victims, and one thing I feel very strongly about is that we do have to have justice. The people who are victimized in this process-- Sometimes we forget about them and their families.

I truly believe that we are not debating a death penalty today, because that issue has been before us before. We are just trying, I believe, to put this into application, that it is applied the way I feel a lot of people felt originally it should be.

So, I do support this. I want you to know, it was a tough decision then, and also it is a tough decision today: But I think this is the right direction we should be heading in for the sake of the victims.

SENATOR GORMLEY: Senator Kosco?

SENATOR KOSCO: Thank you, Mr. Chairman. I don't find this a very difficult decision to make at all, because we were heading in the proper direction when we passed the death penalty. At the time, I was serving in the State Assembly, and I supported it then. One of the problems we have with legislation every time it is passed, is that we find that on the bottom of the bill-- After all the legal jargon takes place, there is a section of the bill that says, "Statement." The statement of the bill usually tells you exactly what the writer really, really intended the bill to do.

Unfortunately, after the many attempts I have made, and others have made, we have never been able to include the statement of the bill to be part of the bill, which I believe should take place. I think if the statement of the bill were included as part of the legislation itself, there would probably have been no need for this meeting we are having right now.

We are not here today discussing, or debating whether or not the death penalty should be in effect. The death penalty is in effect. What we are debating here today, and what we are hearing here today is very simple: a simple change in the regulation which, although the language is simple, the meaning is tremendous. It says: "It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death, who committed the homicidal act by his own conduct, or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value."

That is the amendment we are discussing here today. Now, we are not discussing whether or not the death penalty should be in effect. I strongly support it so that we do clarify the intent of the original legislation.

SENATOR GORMLEY: Brad?

SENATOR SMITH: Thank you, Mr. Chairman. I agree with Senator Kosco. I, quite frankly, do not have any problem with supporting this piece of legislation. I sit up here and I listen to what people are saying, talking about being against the death penalty. Quite frankly, I cannot understand why, if someone intends to cause serious bodily injury and it, in fact, results in someone's death-- Why should they not receive the death penalty? I don't understand that.

You know, the taxpayers are not at fault. They shouldn't have to keep these people for life. It goes before a court, it is determined, and that should be the end of it. As far as I am concerned, when these people pull the trigger, or stab someone, or injure someone so seriously that it results in death, they may as well have pulled the trigger on a gun pointed to their own heads.

They are the ones who are responsible for their death, not other people. Don't try to make us feel guilty about improving the death penalty, because those people who are convicted are the ones who have pulled the trigger on the guns that they have held to their own heads. That is the way I feel about it, and I will support this completely.

SENATOR GORMLEY: Senator Bubba, for final-- Oh, I'm sorry. Senator O'Connor. Excuse me.

SENATOR O'CONNOR: I was not intending to make a statement, but I am prompted by Senators Kosco and Smith.

Senator Kosco said that if the statement were part of the law we wouldn't be here today, and he's right. We wouldn't be here, because the statement -- and we heard it from Senator Russo this morning -- was that he did not intend the death

penalty bill to apply to other than cases in which the defendant intended to cause the purposeful and deliberate killing of the victim. You heard it from his mouth today. He did not intend it to apply to the serious bodily injury cases.

So, Senators, I disagree with you there. I think we have to realize that we are not simply making a minor change or clarifying a bill. We are making a major change. This case, assuming this becomes law, will apply to the serious bodily injury cases, which is a significant change in the existing law.

That is all I have to say.

SENATOR GORMLEY: Senator Bubba?

SENATOR BUBBA: Mr. Chairman, I thank you again for conducting this Committee hearing. I think it will be a very important decision that we make here today. I appreciate the remarks of all the esteemed members of this Committee. In particular, I thank Senator Girgenti, and I agree with his remarks. Whether it be me or Senator Girgenti or anybody in the Senate, I don't think that any of us have a desire to be bloodthirsty. I think we have a desire for justice. That is what I think we have not seen up until this point.

Senator O'Connor was right. He said it was not the intent of Senator Russo-- It was his intent, rather, that only those people who intended to kill be given the death penalty. When I cast my vote for it, I cast the vote because it was the only vote I could cast. Had I had the opportunity to change the bill at that time with this amendment, I would have done that. So, that is the reason I am here today; to make sure that things are changed. I think this constitutional amendment will bring, in my opinion, justice to this great State.

When Senator Russo says "only the most serious of capital cases" are the cases that he wanted to address, I have no doubt, and I know that was the case with him. It is my contention that when anybody's life is taken away, when a person is taken away from his family, that that is as serious

an intent as we need to consider. I think that person must pay the price for what he has inflicted on his fellowman.

I'm sorry that I didn't catch the name of the member of the ACLU, but they are concerned about what my numbers -- whether or not the number was correct of \$2 million. I have a copy of the editorial, and I would be more than pleased to share it with you. The figure that was quoted in the editorial was \$1 million to \$1.5 million. I applied some inflationary trends to it, so I made it \$2 million.

MS. BARRETT: (speaking from audience) I just wanted you to know that they didn't pay me all that.

SENATOR BUBBA: You didn't get any part of it?

MS. BARRETT: No.

SENATOR BUBBA: Well, we'll have to put another bill in. (laughter)

To the comment that execution will occur in this State sooner or later, I believe that is the case. But I believe that the executions will occur after this constitutional amendment is voted on.

Someone indicated that the members of the defendants' families suffer. My heart goes out to them, because it is true, the members of the families do suffer. But we must not lose sight of the members of the victims' families, who also suffer a great loss.

To the good Reverend who indicated that 75 percent of the inmates are black and Latino, I agree, but I think we all understand that 75 percent of the victims are also black and Latino, and those are the people we are most concerned about.

To Mr. Pompielo, my heart goes out to him. As he indicated, murder is not for judges and lawyers. It is against individuals. I think we need to reinforce and remind ourselves that the victims are the people we should have a great concern for.

And to Senator O'Connor, you know, you are absolutely right, because you indicated before when I addressed the points of some people who committed murder, that the Gerald principle did not apply to any of them. Well, that is the difference between you and I. You are a lawyer, and I'm not. I don't mean to be funny. What I am trying to say is that a layperson, someone who doesn't understand the law -- and maybe I am considered one of those people, as most of our constituents are-- We only understand one principle, whether it be the Gerald principle or some other -- let's call it the Bubba principle -- and that is that evil should be punished and good should prevail.

I think whether a person is stabbed 23 times and the Gerald principle does not apply, or 24 times, and when a person is stabbed 53 times, and the Gerald principle does apply-- I think those are the kinds of things that confuse the average person who is not an attorney. I believe that once this amendment gets placed before the people of the State of New Jersey, that we will end the confusion once and for all.

Thank you, Mr. Chairman.

SENATOR GORMLEY: Thank you, Senator Bubba. I would also like to thank those who testified.

We will, right around 12:30 or slightly thereafter, go into Senator Kosco's resolution, which, quite frankly, is of incredible magnitude given the recent court decision regarding the State payment of fees in terms of county institutions. It might not be perceived to be a time bomb today, but wait until the spring of '93. I think we are going to have to really spend not just this afternoon, but a lot more time on it. So we will commence that process a little after 12:30.

(RECESS)

AFTER RECESS:

SENATOR GORMLEY: Will everybody please have a seat, so we can get going? I want to thank everybody. I want to thank the Sheriff for the wonderful meal.

The topic for this afternoon will be overcrowding. We are going to deal also, as a focus point on it, with SJR-18, Senator Kosco's bill. The reason we are doing that is because we are dealing with a situation in which Senator Kosco's resolution came as a result of recommendations made that there be a commission, or panel, to review the costs of sentencing in this State, the problems we have from a budgetary perspective. What I would like to do is turn the hearing over to Senator Kosco for some initial comments, and then our first witness will be Commissioner Fauver. Senator Kosco?

SENATOR KOSCO: Thank you, Mr. Chairman. Back in April, the feature story in one of the newspapers was that because the Appeals Court ruled that New Jersey jails were no longer in an emergency situation, the cost, maintenance, and ultimately the public policy implications of overcrowding had to be addressed, with the decision that the Governor could no longer place State prisoners in 20 of New Jersey's 21 county jails through an annual executive emergency order. So, within a year, which brings us to April 29, 1993, the New Jersey Legislature must remove itself from having an emergency situation and dumping State prisoners in the overextended county facilities.

Now we are faced with the situation of providing proper funding to counties housing prisoners and providing for fair funding. There are approximately 3358 State prisoners and 15,000-plus county prisoners in county jails. That translates into nearly one out of every six county prisoners being from State prisons.

As the sponsor of SJR-18, which would create a Sentencing and Policy Study Commission, I have accepted the responsibility for reexamining criminal sentencing procedures as one way to try to reduce the overcrowding of the prisons. Quite frankly, we are looking to the point of making sure that the punishment fits the crime.

On April 6, I introduced legislation which would evaluate the current New Jersey sentencing and parole laws and the procedures in order to make recommendations which would provide for the cost-effective use of public resources. The three key areas are: deterring crime; punishing the offenders; and protecting the public safety of our citizens.

The proposed 18-member Commission would study and review the sentencing procedures, incarceration, and parole laws, policies and practices, and it would give a six-month window -- a six-month limitation on when the Commission would have to report back. This Commission would then become obsolete as soon as the Commission made its final report.

In conversations with individual law enforcement officers, we have learned that the Commission created through SJR-18 is exactly what we need. It was one of the recommendations that was made by the Governor's Management Review Commission. As a matter of fact, it was the first recommendation in their list of recommendations.

So, we picked up the ball with that, and we are running with it. Hopefully, this Commission, which will be set up by the Governor for 18 members, including members of the Assembly and members of the Senate, will be a very, very effective tool in addressing prison overcrowding.

SENATOR GORMLEY: Thank you, Senator Kosco. I think what we are going to find, and what we will have to address is, we have a situation now where sentencing and jails and everything-- You can't do either one in a vacuum. They are one and the same; the problems are one and the same. There is

obviously an impact in one direction or the other whenever you take an action to relieve pressures on either side.

Quite frankly, whenever you have circumstances of this nature, whenever you address situations like this, it is going to be necessary that we hopefully will be able to bring all sides together on any reform that might be recommended. Let's speak quite frankly: You will always have, whenever you talk about sentencing or whatever, or alternate forms of incarceration, or alternate forms of monitoring, or whatever, you are going to have the potential that that could be criticized. It is essential that we try to bring every facet of the community together if we are going to take action. So, I commend Senator Kosco on this measure.

I would now like to call Commissioner Fauver.

C O M M I S S I O N E R W I L L I A M H . F A U V E R :
Thank you, Mr. Chairman. I would like to make a couple of comments before speaking about the overcrowding. I wanted to say that although it was not my intent when I came here, I would certainly support Senator Kosco's resolution, because I think that is a necessity. As pointed out in my statement to the Committee, copies of which you have, I believe, a lot of the effects on the Department are created by laws where you bring more people in and keep them longer, or don't let them out, so they are both ends of the system that we do not control. We have to live with what is in there, the same as the counties do. I think it does take relooking at some of these issues, instead of just accepting and building on top of them. It is quite clear with the numbers that are backed up now, and even without that recent Court decision, that we are still going to have a problem in the next years to even maintain where we are. So I think with any kinds of changes that could be made, I would hope that they would be.

Now, I would like to comment on a couple of things since I sat through the hearing this morning. We heard about

people being released early. I would like to point out that through the three administrations that I have been involved with, there has never been an early release of prisoners in the State of New Jersey, or, to the best of my knowledge, in the counties, although there were some county court cases where people were released at a given time.

So, with all of the problems that have arisen, ways to deal with them have been found over the years so I can say, with a lot of pride, that that has not happened in this State. With three different Governors that has not happened, and I don't think it will happen. We have to find a way to cope with that Court decision.

We hear a lot about conditions, I think, in prisons. I would just like to comment that there-- Well, two things. One is, what you saw here today is the fact that overcrowding, in itself, is not a reason for a prison to not work well, or for a county jail not to work well. This jail, as has been stated a number of times today, is the most overcrowded in the State, and yet it runs well. It's clean; the food is good. The meal, I would like to point out, that you ate -- that we all ate at lunchtime today -- is the evening meal for the inmates. It was not something that was put on just for this Committee. I think that a great majority of our country jails run very well, despite the overcrowding.

The State system itself is overcrowded, about 135 percent of capacity. I am not going to just read through this statement because it is self-explanatory. It really goes into the number of different pieces of legislation that happened since the early '80s and the late '70s, that have created the problem of the numbers. We have gone as a State prison population from about 6000 to 20-some thousand today. That is basically in a 10-year period, so even though about 8000 to 9000 bed spaces have been added -- new bed spaces -- to the

State system in that same period of time, they have not kept up with the increasing number of inmates coming in.

More alternatives have been tried, and I think more alternatives have to be tried. I know Senator Kosco's Committee has been very concerned over the electronic monitoring. But again, as he has stated at meetings, and as other members of the Committee who are here today know, the intent was not to do away with electronic monitoring, but to ensure that it worked and ensure that the safety of the public was guaranteed. That is also our intent. I read in some newspaper accounts that this was, like, the end of electronic monitoring. I can assure you that it isn't, and that is still a viable alternative for sentencing.

But I think we have to look at -- within the Commission that is being proposed -- the length of sentences and the ability of the Parole Board to parole. Right now, roughly 50 percent of all the State inmates have sentences that are not under the jurisdiction of the Parole Board from day one. They have mandatory minimums which preclude them from being considered for parole.

Now, the problem with that is not that -- it is not being soft on crime or anything to have people not being considered who should be considered. I think what it does-- We hear there has to be more than just locking people up. To have any kind of program or have any kind of success with inmates trying to do something for themselves, there has to be some hope on their part that there will be some way that this will be put into place. So, if someone does everything he has been asked to do by the Parole Board, by the Department, by anyone else, and still has a period of ineligibility where nothing can be done about it, that is going to be a deterrent in the wrong way. It is going to deter people from trying to participate, trying to break drug habits, and things like that, that they have acquired over the years.

So, there has to be some kind of a carrot and a stick theory with this so that people have some hope; it is not just a hopeless situation. There are a lot of people doing heavy time in the State system, and I am not suggesting that they are the people who should fit into the category that I am talking about. But I think there are those who fall victims to technicalities, where they are not able to be considered by the Board.

I would like to mention, also, about the other handout you got this morning from the Sheriff. It was a 30-some-page inspection report which the State is required by statute to do on each of the county jails. As you can see, this one was very good. They are not all that good. But most of the problems stem from just not having the fiscal ability to do that. A number of years ago, the intent of the Legislature was to put some money forward in county construction and county aid for construction or expansion, by which the State would put up that money -- a portion of the money -- with the county agreeing to hold State inmates as the price for getting that money. That has worked out well with about 14 counties. It is, I think, something that even could be done with others.

The first two or three pages of this deal with the laws -- and I am not going to go through those -- that have caused the effect of having more people in--

SENATOR GORMLEY: Which is the most serious?

COMMISSIONER FAUVER: Excuse me?

SENATOR GORMLEY: Which of those laws is the one that has had the greatest impact?

COMMISSIONER FAUVER: Well, I am not sure. Collectively, they have had the impact. I think probably, going back to the very first one, which would be the Title 2C, the mandatory incarceration and the mandatory minimums, because it dealt with two areas, both the length and the ability -- the

judge not having the ability to decide. It took away a lot of judicial discretion, in my opinion, on that.

As I indicated, the growth rate was from about 6000 to almost 24,000 in about a 10-year period. Additionally, there is another 27,000 -- roughly 27,000 -- on parole. Having said that, there are over 160,000 people under sentence in the State, so there are alternative programs. There are 60-some-thousand on probation and, of course, the 27,000 on parole, so even though we have an overcrowding problem, because New Jersey does have a fine probation system, which has nothing to do with the Department -- it is a separate entity, as you know -- it has not reached the proportions that it could have reached if these alternatives were not in place. If you could just envision those extra 60,000 people being thrown into the system, of having to be incarcerated. In my opinion, that would bring the system down very quickly through court intervention.

The other material you got is the Correctional Population Growth Chart from '75 to '92. It shows the kinds of increases and the kinds of people who have come in.

Now to the decision itself which, Senator Gormley, you alluded to, the most recent decision about keeping the State inmates in the county jails. We are not sure on that yet -- in a meeting with the Attorney General's Office -- whether we are going to appeal the decision or not. There seems to be some leeway in it. For example, with a number of counties, they would be willing to continue to contract for State inmates, to keep them in the county jails, if the numbers could be lower. We already have an indication of that from at least three or four of the counties. That is one of the possibilities.

Also being considered is construction of a new prison and expansion of other kinds of alternative programs. Timing, in a sense, couldn't have been worse, as far as electronic

monitoring program expansion, because we have agreed to freeze that where it is until we do a thorough audit and so forth.

SENATOR GORMLEY: The cost of the new prison-- Do we have that? We have some money left in the former bond issue. Does that money cover the new prison, or does that fall short of what you would need for that new prison?

COMMISSIONER FAUVER: Well, it depends. I think if we did regular construction, it probably would fall short. One of the things we are looking at is doing maybe a lease/purchase agreement which would enable us to spread those payments out over the years, and not have to do it up front. Fifty million dollars for medium security beds, which is what we need, I might point out, would probably at best get us 1000 beds. We are talking about dormitory style, not very many actual cells. If that is the case, it would be similar to what you saw going through here today in the dormitory settings, where the control center is in the middle of the pod and then the dorms are around it.

SENATOR GORMLEY: What year -- '95, '96 -- at best case scenario, would they be ready?

COMMISSIONER FAUVER: Best case scenario, they probably could be ready within a year-and-a-half from the start of construction, because we are talking about modular construction, not trailers, but prefab, kind of one-story construction. The siting is more of an issue than the construction.

SENATOR GORMLEY: Siting is a problem in this State?

COMMISSIONER FAUVER: Siting is a problem in this State. I know that comes as a surprise. I'll entertain any offers that we might hear today.

SENATOR GORMLEY: We don't want to burden you with suggestions.

COMMISSIONER FAUVER: I didn't think so.

SENATOR KOSCO: Beautiful.

SENATOR GORMLEY: Is that okay?

COMMISSIONER FAUVER: I appreciate that. So, there will be some meetings between myself, the Governor's staff, and the AG's staff in the very near future; in fact, beginning this week, to try to come up with a plan to deal with that. As you say, it is a year away and time is ticking.

So, having said that, I am open to any questions.

SENATOR GORMLEY: I would like to talk about the Court case-- Let's talk about the potential problems for next April.

COMMISSIONER FAUVER: Okay.

SENATOR GORMLEY: As your counsel interprets the court case, do we see it as being resolvable? I assume you have to go back to the court for approval of any agreements between any counties, because there was an outline from the court.

COMMISSIONER FAUVER: Yes.

SENATOR GORMLEY: So you will have to go back.

COMMISSIONER FAUVER: Yes.

SENATOR GORMLEY: Would you prefer that there be a legislative remedy to this usurping the Court order? It would seem to me that this could be an area where we are waiving our prerogative and that we should take action, at least in terms of the criteria on these agreements between counties.

COMMISSIONER FAUVER: I'm not sure. I would have to check with my counsel on that. But I think--

SENATOR GORMLEY: But you see, what I--

COMMISSIONER FAUVER: I know where you're--

SENATOR GORMLEY: In other words, they have set the parameters out. We will yell a year from now, "There goes the Court taking it away from us." Should we be doing something now? Instead of the Court setting down the criteria for these intergovernmental agreements, should we be setting forth the criteria -- the Legislature?

COMMISSIONER FAUVER: I think that is an option. I am not sure. Some of the legislative decisions I might not be as happy with as the Court decisions, but then again I--

SENATOR GORMLEY: Oh, well, you do get points for being honest, Commissioner. Next speaker. (laughter)

COMMISSIONER FAUVER: I was only speaking of the Assembly. (laughter)

SENATOR GORMLEY: Oh, I understand. Wait until Chuck hears that. He'll take that well. But go ahead, I'm sorry.

COMMISSIONER FAUVER: No, that's--

SENATOR GORMLEY: But, in all seriousness, it seems as though we don't know exactly what is going to happen.

COMMISSIONER FAUVER: Right.

SENATOR GORMLEY: And even though you're saying a fast track if you find a site and you build 1000 beds, it seems as though in '93, in April, we could really be in a bind.

COMMISSIONER FAUVER: Yes.

SENATOR GORMLEY: It would appear that way. Also, certain counties, as I understand the decision -- of course, this is subject to interpretation-- As I understand it, certain counties might not be able to get as much as they are getting. I mean, it could be interpreted that way, also, because they are setting down criteria. Certain counties are satisfied with the \$45 a day, but they might not be-- Certain counties might be able to go higher, accept criteria that might limit other counties. Is that--

COMMISSIONER FAUVER: I think that's true, yes.

SENATOR GORMLEY: See, that could be a real problem.

COMMISSIONER FAUVER: There are two points to the decision: One is the cost of housing State inmates in the county jail, and the other is, can it be done under the executive order, or can it not? Does it have to be through an agreement with the county? Both of those have to be addressed.

SENATOR GORMLEY: I talked to Senator Kosco. He indicated to me that in terms of focus for the members of the Commission -- which is the subject of the bill -- that this would probably be their primary focus; to see what the impact

is going to be next April, and to come up with recommendations six months prior. You know, this could be shocking. We could actually come up with a suggestion before there is a crisis. Obviously, that is one of the reasons for the hearing today. What he suggested was focusing the resolution on this particular problem in terms of adding a paragraph directing them to particularly look at this and make recommendations back to the Legislature.

COMMISSIONER FAUVER: The worst case scenario would be that we would have 3400 or 3500 State inmates next year in April, with no place to put them, if nothing happens.

SENATOR KOSCO: Through you, Mr. Chairman--

SENATOR GORMLEY: Sure.

SENATOR KOSCO: Supposing one of the recommendations from the Commission was an alternative use for the bracelet program, to be used as an alternate sentencing? In other words, instead of putting a nonviolent person into -- instead of incarcerating him in a prison-- It would just be a different form of incarceration, as far as when I viewed the bracelet program. So instead of someone going into--

I don't know what the numbers would be in this prison right now as we sit here. How many people are occupying a bed, therefore becoming a statistic -- a numerical statistic -- who are only here because they did not -- not only, but are here because they did not make their alimony payments, or they had a number of violations on their motor vehicle, or they drove without an inspection card, or on the revoked list? I don't know what the number is, but I would suspect that it is a pretty good sized number.

Now, even though those people are only in prison for a night, or maybe a week or two, at the end of the year that bed is always being utilized for that particular purpose, taking that bed away from a person who should be incarcerated for a violent crime. My concern is that the bracelet program be

expanded to be used as an alternative to sentencing for nonviolent people, as opposed to letting people out of jail ahead of time, and therefore keeping people from coming in in the first place. I think also serving the same purpose-- That would be relieving bed spaces, and that is what this is all about.

COMMISSIONER FAUVER: Well, I am not sure what the numbers would be here in the county. The Sheriff could probably fill you in on that. But as far as those crimes you mentioned in the State system, there wouldn't be any relief, because they wouldn't get that far. They would be county sentences. But I agreed, and I told you I believed at the last hearing, that, you know, I support the expansion of that into that area -- the bracelet program. Also another population that the Sheriff pointed out during our tour was a group that are here, many of them because they can't make bail. If they are considered good risks and just can't make the bail, that is another possible target group for the bracelet program.

SENATOR GORMLEY: Senator Smith?

SENATOR SMITH: Commissioner, we saw an innovative way of expanding facilities today when we took the tour of this facility, through the triple bunking. I know the State has had, when it came to Burlington County, some trouble with even double bunking of prisoners. I was wondering if there is any double or triple bunking in State correction facilities?

COMMISSIONER FAUVER: Yes, there is. There is double bunking. We probably have about-- Almost all of the-- The new prisons are pretty near all double bunk. The Northern State Prison, Riverfront, and Camden are double bunk; Riverfront in its entirety; Northern almost in its entirety. The problem has been in the older prisons where the cells are smaller. That has presented a problem. We do have one wing in the Trenton Prison -- 4 Wing -- which does have three people in some of the cells. They are not double bunk -- or, triple

bunk; they are two and one, because the ceilings are too low. That, you know, is an innovative idea, because it gets-- One of our problems is people on the floor. We have insisted that the counties get them off the floor through our inspections. Although it is not ideal, it is certainly better than that.

SENATOR SMITH: Is that a possibility with respect to these newer prisons? They are built to double bunk. Is it a possibility that additional people could be placed in those cells?

COMMISSIONER FAUVER: Well, not in the cells, I don't think; in the dormitories. I don't think you saw that in the cells today, but in the dorms that we went through we saw it. I think what we would have to do to address what Senator Gormley said earlier on the cost issue, is to go to more small dormitories for medium security, which is not ideal, but is the best we can get out of this, as opposed to the individual cells. Then build a limited number of individual cells for the people who really need them. It is very much a trickle down kind of thing. How many can you get in there? But we definitely need secure beds. We do not need beds at camps or minimum security units.

SENATOR SMITH: You go by specific square footage requirements, don't you, with respect to--

COMMISSIONER FAUVER: We go by, yes, square footage requirements, by the number of showers and toilets that are available per numbers of people. There are American Correctional Association standards on this which we try to comply with in all areas, including construction.

SENATOR SMITH: I think one of the things that this Committee might do, is to look at those standards, because those are the standards that are being, in my opinion, forced on a number of county jails. In many instances, I think there is room for flexibility there, if those standards were more flexible. I think that could be a key area to look into.

I have to excuse myself. I have to be back in Cinnaminson.

SENATOR GORMLEY: Well, thank you.

SENATOR KOSCO: Drive carefully.

SENATOR SMITH: Okay.

SENATOR GORMLEY: Senator Girgenti?

SENATOR GIRGENTI: Yes, Mr. Chairman. First, again I want to thank you for bringing the hearing up here. I think it is very good of you to travel around the State to look at these facilities. I just want to say a couple of things, and then I want to ask the Commissioner a question.

First of all, in terms of the Sheriff, who is here, I know he has been involved for a great many years as the Sheriff of this facility. In my opinion, it is one of the best run facilities in the State. He is respected by all who know him, not out of fear, but basically because of his integrity and his responsibility to his job and his staff. It is no accident that this jail, which we know is the most overcrowded jail in the State, is run so efficiently. The Sheriff handpicks his officers -- you have met many of them here today, the Warden and other individuals -- for their professionalism and their confidence. I am grateful that the Sheriff has opened his doors to us today to allow us to see the facility, and for everyone else who was interested to come in here.

Commissioner, just a couple of things for you. Going back to what Bill Gormley said -- our Chairman -- now that this decision has been rendered, are there any plans in the works right now in terms of how we are going to deal with this? I mean, obviously you knew this may be coming down; this was in the courts. I know you mentioned some of the alternatives. We have a problem with the electronic monitoring. As you said, you have put a freeze on it right now until we have really corrected that problem. What other options are there, really, that we are going to explore?

COMMISSIONER FAUVER: Well, I think the Committee itself can look at parole, as an example. There are other programs in parole besides electronic monitoring, which has been basically-- The overwhelming majority have been inmates completing their sentences, as opposed to people who have been paroled.

In my opinion, the Parole Board would feel more comfortable in paroling more people if they were assured of more supervision. The Intensive Supervision Programs that now exist at both ends of the sentence -- the ISP and the ISSP-- One deals with inmates coming in, and the other with them after they leave. I think they are successful because of the kinds of caseloads they have and because of the kind of day-to-day, hands-on surveillance they have with the people who are put into these programs.

So I think there can be expansion in those areas. There are some groups now that are excluded by statute from being in them. I think if you look strictly at drugs as a prohibition against getting into any program-- We feel that probably almost 70 percent -- between 70 percent and 80 percent of our people have used drugs. You just take off a huge number from the top that would never be eligible for any of these programs. I think that is one possibility.

I think there are some things being done in the counties. I think you will hear a little later this afternoon about Morris County and some of the programs there, where the inmates in the county jails are out working and doing work -- working time off their sentences. I think there are a lot of possibilities on that for the use of inmate labor in the communities, which could help to earn more credits, or more time off. Then they would have been tested in the community for a brief period of time.

So I think either end, parole or probation, Senator, coming in, are ways to expand, but they are going to take money and they are going to take more staff to do it.

SENATOR GIRGENTI: How much of a percentage of the people held in, like, for instance, this county jail, are detainings? Do you know, roughly?

COMMISSIONER FAUVER: I think the Sheriff would estimate about a third. I would say probably half of this total are either pretrial or presentence, in any county jail you would hit. So it is a big pool to deal with.

SENATOR GIRGENTI: Do you feel that is an area you could work on in terms of, as you mentioned before, the electronic monitoring program -- the nonviolent--

COMMISSIONER FAUVER: Yes, I think that is an area for expansion. And I further think that if those counts can be reduced in the county jails, as I indicated in my opening remarks-- A number of the counties have indicated a willingness to house State inmates if their count was down, if they had a lower number. I mean, it would solve two issues at the same time.

SENATOR GIRGENTI: Has the option of Fort Dix been ruled out now as a possibility for the future?

COMMISSIONER FAUVER: Well, I don't know that it has been ruled out. I am not sure where it is. What we are trying to do is just maintain the unit we have there right now. We took over the old stockade about 10 years ago, and we have 500-and-some inmates in there. Our contract with them right now, currently expires December of this year. We were told we could get a one-year extension on that, but I don't have anything in writing yet. So my first concern is to maintain what we have, before trying to get something else there.

SENATOR GIRGENTI: But there is a possibility that you are going to work in that direction, trying to expand that program there?

COMMISSIONER FAUVER: I would like to, but I don't know how realistic it is.

SENATOR GIRGENTI: What about-- Are we going to move into shock incarceration type camps? Is that something that--

COMMISSIONER FAUVER: Well, shock incarceration-- Yes, that is another alternative that is being considered. Again, a relatively, you know, expensive one, because I think the key is-- We have looked at a number of states that do it. I thought New York had the best, from what I am aware of. Part of the thing they do is on the follow-up, after the person is released back to the community. It is more than just coming in and, you know, yelling and disciplining someone for "X" number of months or weeks. There has to be the follow-up, or it will wear off. There is no carryover.

SENATOR GIRGENTI: Just one final comment: Basically I agree with this resolution. I don't know why-- I don't think anyone would disagree, probably, with it. But the one thing I am concerned about is that, when there was a call for mandatory sentencing, I think it was a result of a wide discretion that was being given. In many cases, people were not being sentenced appropriately for their crimes. But I also see that we do-- It has to be looked at and probably analyzed again, because of the situation we have. But as long as any report, which we know would have to come back to the Legislature and we would have to make the final determination on it anyway-- It is just going to be a list of recommendations, basically, to us. Certainly it is something we should study and look at.

I want to thank you, Commissioner, for your cooperation. You have been at almost every meeting we have had lately, in terms of Law and Public Safety, the Judiciary. But, this is a big issue and it is important right now. It is going to continue, as the Chairman said, especially with the impact of the Court decision. There is a lot of work that has to be done before next April.

Thank you.

SENATOR GORMLEY: Senator Kosco?

SENATOR KOSCO: The rate of increase in incarceration, in 10 years, has gone up 293 percent, according to the numbers I have here. Yet the crime rate, supposedly, from the statistical standpoint, shows that it has been stabilized over that same period of time. From 1980, 80 out of every 100,000 residents were incarcerated. In 1990, it has moved to 271 out of that same 100,000. So the statistics are changing.

The interesting thing about it is that the violent offenses have decreased from 64 percent in 1987 to 45 percent in 1992. That is one of the reasons why I am looking at revisiting the sentencing problems and mandatory sentences, because I don't know whether -- if the violent offenses are decreasing, and yet we are increasing to 293 percent of the people we are incarcerating, maybe we are putting the wrong people away and letting the wrong people out early. That troubles me when I think about the fact that the violent offenses have decreased 64 percent -- from 64 percent to 45 percent, and yet the number of people we are incarcerating has increased to 293 percent.

If our intent is to put violent criminals -- convicted violent criminals -- into jails, evidently, according to the statistics I have, that is not-- We are putting the wrong people behind bars, and possibly letting the wrong people out. This is an observation that I point out. Hopefully, it will be part of this Committee's job to study these numbers. Either these numbers are not correct, or the opposite of what we are trying to accomplish is happening, where we are reducing the violent crimes out there, but we are not incarcerating that many violent criminals.

Do you understand what I'm saying?

COMMISSIONER FAUVER: Yes, I understand what you're saying.

SENATOR KOSCO: It sounds confusing, but it is just a matter of statistics that I am looking at.

COMMISSIONER FAUVER: Well, I think there is an answer to that. I think the first part, or the number of violent criminals that are in and the drop in crime -- violent crime -- is-- I would say, no, it is addressing the right people, because they are in. They are not out committing the crimes.

I think that huge increase on the other number is going to be just attributed, really, to drugs. That is the single most-- They will not show in most cases. They are crimes against public policy, as opposed to crimes against persons. So, statistically, they show in a different category.

SENATOR GORMLEY: Thank you, Commissioner. We certainly appreciate it. Obviously, we are going to have to deal with this on an ongoing basis. I talked to Senator Kosco, and we are going to have Legislative Services go over the Court opinion, because we don't want to be caught in the predicament of not anticipating both the best and worst of next April. Thank you.

COMMISSIONER FAUVER: Thank you, Mr. Chairman.

SENATOR GORMLEY: I would now like to call Dave Anderson, Administrative Office of the Courts.

DAVID P. ANDERSON: Thank you, Senator. I want to do a very brief introduction for Judge Coburn, prior to his remarks.

Annually, the Judiciary hosts a conference to discuss varied topics of interest, not only to the Judiciary, but to the public as well. This year's topic at the conference was, "Intermediate Sanctions and Probation." Judge Coburn is here today to talk about one aspect of the Intermediate Sanction Program, the S.L.A.P. program, which has gotten quite a bit of attention statewide. It has been very successful in Morris County and is branching out into other counties.

Judge Coburn is available for your questions.

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SENATOR GORMLEY: Thank you. Judge, we appreciate your taking the time, and your patience. You understand we have had a lot of important matters today.

Briefly, before you begin, the program has gotten a lot of attention, and you have provided a lot of your weekend time to make it a success. I would appreciate, while you go through your testimony, whatever suggestions you might make -- might give to the Committee that would hopefully enhance the program in other areas of the State, or give it some momentum, because it appears to be the type of program that Senator Kosco and Senator Girgenti and myself are looking to, to increase the amount of days for which a county facility is used.

With that, Judge, I appreciate your taking the time.

J U D G E D A N I E L R. C O B U R N: It is really a pleasure to be here. This program is an overnight success, if you don't want to count the last eight years that I have been working on it, and the last 443 days that I have spent every day working on the program since we decided to get more judicial intervention in it.

The best compliment, or the best credence I can give to the program is that in this room right now happen to be the only two people who are directly affected by the administration of criminal justice. That happens to be Jim O'Brien and Rich Pompelo, both of whom-- I have known Rich Pompelo for years. I know Mr. O'Brien because of circumstances. Without even asking them, I could pick any person from Morris County and ask them to stand up and tell you what they know about the S.L.A.P. program, and whether they think it is a good program. I would vouch that there would not be a soul, probably except for me on weekends, who would criticize this program. They both, when I mentioned it to them because I didn't want to embarrass them-- They both said they wanted to stay to hear at least what we had to say.

Now, the S.L.A.P. program is the Sheriff's Labor Assistance Program. It sounds somewhat like a chain gang, but really if you wanted to analyze it, it is something like community service under a correctional setting. There is a real big reason why it is a correctional setting. Because we run the program as an alternative to a jail sentence. The alternative is, you are sentenced to jail, and if you do not comply, you are in jail. There is no intermediate step. The intermediate step is, in or out.

A big plus. I was asked to administer all of the alternative programs in Morris County about a year-and-a-half ago, although I had been one of the persons who set up the S.L.A.P. program. We had community service; we had a bracelet program; we had high impact probation; we had fines; we had urinalysis; we had baby-sitting for people. We had pleading with them to do things. We try everything we can in the justice system to keep people out of jail, because primarily on the county level, what we are dealing with are people who are irresponsible. They're knuckleheads; they're stupid; they don't care. But most of them, at least on that level, are not what you would call "serious criminals." They can't be on the county jail level and be a serious criminal by law. If they, by law, are serious criminals, they are in the State prison system.

Now, beyond just those people who are in the county jail on criminal offenses, somebody asked the question, is there any general idea how many people are in on motor vehicle and other sorts of minor mandatory sentences? Morris County Jail is built for about 160. About a year ago, we had 355 in it. We have 400 people on the S.L.A.P. program serving mandatory sentences, who are not in jail. These 400 would be in that jail if they served their sentences. That's 755 as of a year ago.

Now what has happened is, we have 270 in our jail. We had 80 people less in our jail after we started implementing this program, by forcing people to pay for the lunch they are eating. There are no free lunches in Morris County. They are paying their fines. If they don't pay their fines, then they are going to be in jail. The intermediate step is S.L.A.P. The law provides -- and there are various statutes -- \$20 a day if you don't pay your fines, if the court decides you are able. In Morris County, if you don't pay your fine, it is \$25 a day on S.L.A.P. If you don't show up for S.L.A.P., you're in the jail.

It sounds like a program that would be very onerous. If you don't do your community service, we use an equation of six hours community service, for instance, on a drunk driving for one day in jail. If you don't do your community service, you get one day on S.L.A.P. for every six hours. If you don't show up for S.L.A.P., you go into the jail.

When we started this program it was a horror story, because we were trying to get people to act responsibly who, by their nature, were irresponsible. They are knuckleheads. They are your brothers, your sisters, your mothers, your fathers, your next-door neighbors, your kids. They are you. They are certainly me. I grew up being one of the classic knuckleheads of all time. As Dave Anderson is sitting here right now, just wondering how far I am going to go with the knucklehead routine--

SENATOR GORMLEY: Well, Dave is wondering if you are going to call him a "knucklehead." He just has his head down there, holding his breath.

JUDGE COBURN: Right. What happens is, people don't pay their parking tickets and they get their licenses suspended. People don't mail in their insurance checks on time. People are told to go to the IDRC; they don't go. People are told to pay a fine; they don't pay it. The reason

they don't pay it is because there has never been any enforcement, because no one is stupid enough to believe that they are going to put you in jail for \$20 a day. That is because it is too removed.

The Municipal Court to the jail is another world. They will walk out of the Municipal Court and say, "Free at last," and that's it. They don't know what the sentence was; they don't care. They go on with the rest of their lives. In Morris County, you walk out of the Municipal Court-- When I am thinking about it, Rich Pompelo used to be the municipal prosecutor in one of the towns that really uses the S.L.A.P. program, and all 39 towns use it. Those people walked out of that courtroom terrorized about this guy in Morris County, down in Morristown, by the name of Coburn, who was going to throw everybody in jail. Well, Coburn doesn't throw anybody in jail anymore. Coburn collects \$40,000 of overdue fines. Coburn gets a check for \$3000 from a woman who was beaten out of the money seven years ago. I put somebody on S.L.A.P. If they didn't show up for S.L.A.P., I put them in jail. They would say, "How do I get out?" and I would say, "Pay the \$3000." They paid it from Friday to Monday.

Coburn got \$2000 from a kid that no one wanted to take a chance on, on his fines. They wanted to lock him up. Last Friday, he had been working at a job, kept the job, and as a result of it joined the Credit Union and borrowed the \$2000, and was off of all of his fines. It is a money-making organization. It is a money-saving organization. I have-- Well, I don't have more press clippings than Senator Gormley, but I certainly have more as far as completely favorable.

SENATOR GORMLEY: That would seem to be a partisan comment.

JUDGE COBURN: I don't have any unfavorable press clippings. Mine are--

SENATOR GORMLEY: Senator Gormley has unfavorable press clippings. (laughter)

JUDGE COBURN: I know. When you turned around, I made that comment. I slipped that in.

SENATOR GORMLEY: That's okay. I must have been-- I won't ask what your party was before you rose to the bench.

JUDGE COBURN: None.

SENATOR GORMLEY: None?

JUDGE COBURN: That has become fashionable in Morris County, to be none.

SENATOR GORMLEY: Just none.

JUDGE COBURN: What has really happened is, it gets tremendous public acceptance. You cannot tell people that these are criminals. They say, "These are fellows doing community service." You cannot tell people in a black neighborhood, low-income housing, that there is something wrong with this group, when they sit and they wait for this group. People have told me, in the black area of Morristown, public housing, that it's the first time their kids have ever seen white people doing menial labor, picking up beer bottles."

This was not a game plan. This happened purely by accident. With the jail overcrowding, we had started this on a lower level. I was put in charge of enforcement, and I realized that people weren't doing anything. I felt like a complete idiot as a judge when I realized that someone was standing there taunting me that I couldn't put them in jail, because there was no room in the jail. That is when we started S.L.A.P., which gave us a little bit of a délay. Now, no one taunts anyone in Morris County, because you're in. We freed up those 70 spaces. We'll put them in for one day or two days or three days. An analogy is, you charge something on American Express. American Express, when you don't pay your bill, doesn't tell you to keep on charging things. They add a surcharge, because if I charge you-- If you run up a \$600 bill

and the only sanction that occurs is finally after you get sued you pay the \$600, why in the world would you think it was a credible system? But when you are on S.L.A.P. and you go into that jail for one or two days and you realize that you don't know when you are getting out, you realize it. S.L.A.P. is the surcharge on the system going in, and it is a profit on the system coming out.

The criminal justice system is two things right now: Slam, which is put them in, and scam, which is let them out. A judge sits there and he has to play back and forth. Depending on what the circumstances are, the judge will let somebody on probation or put somebody in. Now we have an alternative, which is S.L.A.P. If you are in our jail and you have 20 days or less before you are eligible for parole on the county level, which is pretty easy to figure-- If it is June 1 and your parole date is June 20, you have 20 more days to do, that you actually have to do. We will consider releasing you to serve your time on S.L.A.P.

We started that about four months ago. We must have had 50 people out with 20 days to go. Not one has missed a day of S.L.A.P. Not one has flunked their urinalysis. Not one has failed to pay their fines. Not one has been late for the S.L.A.P. program. So we use it as a lure for people. If they haven't learned in 120 days what they are going to learn, another 20 is no different. We use it as an in for those who have been given the opportunity to do their community service, which they flaunted; to pay their fines, which they refused to. They failed to make restitution, which is the most serious of all the financial obligations. You then have a victim, not a DETER penalty, not a court, but you have a victim who is saying, "I am out three grand. Where is my money? What sort of fraud is this judicial system?" And we get letters back saying, "Thank you. I never thought I would see the money."

Then we are running a credible system. If you don't pay the money, then you go in. If you don't show up for S.L.A.P., you go in.

I do less work now than I would have ever imagined. Our program is expanding by 25 people a week. We are processing 50 through a week. We are doing over 2000 individuals who will be on our program at some point during this year. We have gone from somewhere around 120 a year-and-a-half ago-- At the end of this year, I would suspect we will have 800 people serving mandatory sentences on S.L.A.P. There are days that I feel like Spartacus. We attack areas. Jim and Rich will both tell you, there is no church in our county that can't have S.L.A.P. There is no synagogue that can't have S.L.A.P. There is no senior citizen housing, no school, no public agency of any sort. Saturday, Sunday, and yesterday, we were building a ramp and a new doorway for a handicapped person in one of our towns.

I have an article here, which I will give you afterwards, which is the highlight of the entire program. It will summarize what we do. We also handle hardship cases. We have a woman who is a schoolteacher. She has a 32-year-old son who has cerebral palsy. He has to go to a day-care center every day. The ramp she used broke in front of her house. She couldn't take him; he was inside; she was losing her job. She contacted us through the S.L.A.P. network, which is basically to figure out where I am eating breakfast -- and I eat every Saturday and every Sunday in the same place -- or find someone who knows me. That is how you get in touch with S.L.A.P. She wrote us. The Sheriff approved it. We took five people. We did the ramp. It is a very touching article. There is more to it than that, but there is no other jail program in the State of New Jersey that on Valentine's Day got a valentine notice placed in the newspaper thanking, "God, S.L.A.P., and Santa Claus," from this woman and her child.

That is what the S.L.A.P. program is. It is a money-maker; it is a credibility maker; it is a publicity maker for the courts and the system, to finally say to people, "We are doing whatever the WPA did," which I heard when I was growing up, and whatever the CCC did, which I heard when I was growing up. The only thing I knew was that my parents always talked about that that was a better thing than locking up knuckleheads.

So, I take the position that what we are doing is using Patriot missiles to shoot down mosquitoes in our system. It affects the poor and the rich, male and female, across-the-board. It is a terrible system that really should save the jail space for the criminals. It is a little bit sick when you see a drug dealer who has cut a deal with the DEA or some State agency, and he walks out of jail. And the guy who was driving the car innocently at the scene-- It is his third revoked list, and he is in jail for eight days doing a mandatory sentence. There is something wrong with that.

This program has applicability to other counties. I know, Senator Kosco, Judge Russello from your county just called me this morning before I left, to tell me that Bergen is instituting the program July 10. I know Passaic has been up to our jail. They have sat in my courtroom and watched this program being presented. Nineteen of the 21 counties, in one way or another, are instituting the program. I think it needs statewide legislation. I think it is also applicable for the real horror story of the judicial system, which is one parent doesn't pay child support and the other one doesn't allow visitation.

Those are the cases where people shoot each other. Those are the cases where decent people become criminals; they become criminals overnight. But it can be worked another way. If one person says he or she isn't working, and the judge feels that they are, you don't have to put them in jail. Put them on

the S.L.A.P. program, and I'll tell you from Coburn's laboratory, which is all these knuckleheads I spend every weekend with, two days, and they will surface on their jobs, because they are not working for \$25 a day credit towards nothing on S.L.A.P., when they can go out and get a real job. And when mom or dad, whoever is the custodial parent, says, "I am not going to allow visitation because dad isn't doing this," or, "mom isn't doing this," they can work on Saturdays and Sundays, too. If I can pick up your bottles, and if I can do some painting, and if I can move cinder blocks, and if I can rake a field, I assure you, other people can, too.

SENATOR GORMLEY: Thank you, Judge. If I could, I would like to try to get a perspective of how we link--

JUDGE COBURN: Right. Let me also hand out this article.

SENATOR GORMLEY: --a program like this up. In terms of an overview of what you prepared on the issue--

JUDGE COBURN: There is a report. As a matter of fact, Mr. Tumulty has more than sufficient copies -- a 54-page report.

SENATOR GORMLEY: I would be curious, in the report, do you list the variety of mandatory sentences for which the program is applicable?

JUDGE COBURN: No.

SENATOR GORMLEY: I would be curious, because you would be able to-- If you could provide to us--

JUDGE COBURN: Yes?

SENATOR GORMLEY: --the types of offenses so we could cross-reference that in our deliberations, that would be important.

JUDGE COBURN: Eighty percent of all cases are driving on the revoked list. That is partially a reflection of the economy. It is also partially a reflection of the fact that

you can't get your license back until you have satisfied your sentence, which includes paying the fines.

Senator Kosco was talking about the bracelet program, or the anklet program. We have 26 people on S.L.A.P. on the bracelet paying off their fines at the rate of \$25 a day. They are the most nonviolent, probably the best drivers, or whatever else. My great story is of a person who I consider to be a friend at this point, after spending a year-and-a-half working side by side with him, who told me that in five weeks he is getting his license back. He will have worked off, or paid off all of his fines. He said he will not ride in a car, sit in a car, drive a car, stand next to a car, and he is going to have a party when he gets his license back, because he will finally, after all this time, have satisfied his debt. That is a very impressive statistic when you are working off \$175 a week on S.L.A.P. with an anklet on, and all it requires is that you accept some responsibility, which is be in your house when you are supposed to, don't drink, and don't drug.

We test them on S.L.A.P. We test them for alcohol. We just purchased two new units which are hand-held Breathalyzers. If you flunk that Breathalyzer, you're in. If you flunk your urinalysis, you're in. So we have the support of the prosecutor of our county, the municipal court judges, the public defender's office, and everybody else. Even Dave Anderson is supporting it, and he doesn't even live in Morris. I could get you that list, though.

SENATOR GORMLEY: We would just appreciate it, because what we are trying to do-- The public hears the word, "mandatory." When they just hear the word mandatory, in their minds it invokes something that is far different than what you might be thinking of. There they are going to let the violent offender out. I think what we have to do is list those offenses. I think it is also important to note that even though we have mandatory sentences in these cases, the

Legislature did provide for a procedure where you could avoid the overcrowding, if, quite frankly, the circumstances were presented with the energy of an individual like yourself.

JUDGE COBURN: I think restitution should be listed in that, because I don't think there is anything that does more of a disservice to the system than the bill that was passed by you folks saying that restitution is the top priority. Every study that I know of says the same thing; that when people are talking as victims of nonviolent crimes, they want their money back. They are not interested in DETER penalties and all this other stuff, because it means nothing to them.

I might tell you one other thing. I don't know what the story is with DETER. I keep on hearing a lot of it, but as an enforcement judge, I can put you on S.L.A.P. at \$25 a day on a fine. I can pressure you into paying that restitution, but it is very difficult when you are talking about DETER penalties to say to somebody, "You have to pay the \$1000 no matter how good your intentions are," or whatever else. If I had any suggestion at all for you, as Dan Coburn, private citizen, lawyer, and judge who does this, it would be to work out some alternative to paying the DETER penalty, such as the S.L.A.P. program or, for those people who just want to be smart alecks about it, incarceration in lieu of it. Incarceration gets their attention. The threat of incarceration gets their attention just as well.

SENATOR GORMLEY: What would you recommend-- You have probably thought about this on a statewide level. What do you think would cause it to, although it is used in certain counties to a certain degree-- What do you think would cause it to gain the intensity it has gained in Morris County? What would you recommend?

JUDGE COBURN: Is Lodi Passaic County, or is that Bergen?

SENATOR KOSCO: That's me.

JUDGE COBURN: Okay. When a judge from Lodi calls me up -- a municipal court judge -- and says, "Look, we have a nice kid. He lives in Morristown. He just had his third driving on the revoked list. I really don't want to lock this kid up in our jail, or in your jail, or anything else. I have heard about S.L.A.P. Can he serve his time in Morris County on S.L.A.P.?" That is a very encouraging point of view, as far as I am concerned.

I think when people realize that certainly there is no reason why a Monmouth defendant who commits a municipal court offense in Morris has to be locked up in the Morris County Jail, when he can go to Monmouth and clean your beautiful beaches-- He can certainly go down to Atlantic. I can picture 40 people walking down the beach in Margate at 5:00 in the morning, and by 9:00 off that beach and onto some highway, cleaning the highway for the rest of the day, and getting something out of it.

It happens to be a political issue in my county right now. The political issue is that two candidates are fighting over who likes the program better. No one is there saying, "I am opposed to this program." I think it is that WPA and community service mentality.

SENATOR GORMLEY: I would be curious, though, in exploring the need to institutionalize the focus on a statewide basis. The last thing I want to do is-- In other words, I don't want to tell the Administrative Office of the Courts what to do.

JUDGE COBURN: And I don't want to tell you what I think you should do without them approving it, either.

SENATOR GORMLEY: All right. I think we are going to say the same thing. Do you think there should be a structure that either deports or -- let's not pick the particular jurisdiction--

JUDGE COBURN: Yes?

SENATOR GORMLEY: --where somebody is focused, as you are focused in one county, but a person or structure focused on this procedure in every county to make this a part of what is done?

JUDGE COBURN: Absolutely. I can say that without even worrying about the AOC or the Chief Justice. There is no question that there has to be an enforcement procedure, and it has to be consistent. It can be consistently liberal, consistently conservative, but people on this level are basically irresponsible. As long as they know consistency, they know the ground rules, my experience has been that they follow them. We have better than 95 percent attendance on this program. I mean, I can't get 95 percent attendance with lawyers in my courtroom, much less litigants on this -- or participants. You would be amazed at who ends up before me on this program. We have had a number of lawyers; we have had a doctor; we have had a number of dentists. We have had a number of professors on the program. There is no one who is immune from stupid acts, and there is no one immune from being a knucklehead.

So, this is not just a bunch of lower income people. That is hardly the case. I happen to think that enforcement is critical, and the enforcement probably should be authorized, if not mandated, by some sort of amendment to, whether it be the penal code or the motor vehicle codes, so that this formula that we have been working on on an ad hoc basis, where I say, "Six hours in drunk driving is community service, so that should be one day of S.L.A.P--"

We can analogize as much as we want, but I would feel a lot more comfortable if someone said, "Okay, these are the ground rules, and this is the transfer procedure for Monmouth to Mercer. If there is a cost back and forth--" On the subject of cost, which I left out, we estimate that our program costs \$4 a day. Our jail estimate is about \$80 a day. We are

on the verge right now of making people start to pay to be on S.L.A.P. If you have to pay to be on work release, if you have to pay to apply to PTI, if you have to pay on other sorts of sanctions, like the bracelet program or the anklet program, then we are going to make people pay, because that would be another reminder, when they send in the check, that there is a judge, there is a system -- a correction system -- and there is a Legislature that expects some credibility. No free lunches.

SENATOR GORMLEY: So what we are saying is, the legislation, or program, as you envision it, could be self-supporting by costs that would be sustained by the participants.

JUDGE COBURN: It would be a profit maker, self-supporting in the outlay--

SENATOR GORMLEY: We will take "break even" on the State level right now.

JUDGE COBURN: I think so.

SENATOR GORMLEY: Okay.

JUDGE COBURN: I think so, because we did a job. The town allotted \$3000 for a museum to be fixed up. It was a \$13,000 job. We did \$10,000 worth of labor in three weeks. I will be glad to send each of you the articles about S.L.A.P. participants. The same day as that little article about the handicapped young man, we were the guests of honor. Four knuckleheads and one knucklehead who was not on S.L.A.P. were there in boots and, you know, macho carpentry clothes and all the other stuff, and here we were the guests of honor. All four of those guys told me that they have been back to the museum with their kids. They said to the kids, "See the stuff over here? I did this, and I did that." You don't have to classify yourself as a jailbird in order just to be stupid. So people do not view it that way.

At Christmastime, for the recycling centers we handle, people gave presents to the guys on S.L.A.P. I think Rich

Pompielo might know some of these stories better than I, because he is on the municipal level. But can you imagine? We said, "What do we do when people are giving Christmas presents to these nice young people who empty out their cars of newspapers?" If you said to them, "Well, they are criminals," they would look at you and say, "Not these guys," or, "Not these women." About 10 percent or 12 percent of our population are women, too.

SENATOR GORMLEY: Lou, any questions?

SENATOR KOSCO: No. I enjoyed the program.

SENATOR GORMLEY: Judge, thank you very much.

JUDGE COBURN: Thank you. I really appreciate it.
Thank you.

SENATOR GORMLEY: Thank you for your time. I would appreciate your getting us that information, and we will see what we can work on together in terms of trying to make the program more available, or more accessible on a statewide basis.

SENATOR GIRGENTI: Bill, just a minute.

SENATOR GORMLEY: Sure.

SENATOR GIRGENTI: One thing, Judge. The people on your program-- You know, I have read about it. You talked about the fact that nobody with parole ineligibility is on the program.

JUDGE COBURN: These are all county jail.

SENATOR GIRGENTI: Right.

JUDGE COBURN: These are all county jail. Most people who have parole ineligibility belong exactly where they are. We don't even come close to that. This is strictly, as I say, knuckleheads. Probably I am insulting somebody, but since I classify myself as one, I don't find it too insulting.

SENATOR GIRGENTI: Thank you.

SENATOR KOSCO: Thank you, your honor.

JUDGE COBURN: Thank you.

SENATOR KOSCO: Is David Ben-Asher here, from the Public Advocate's Office?

A S S T. C O M M. D A V I D H. B E N - A S H E R: As most of you know, I am Assistant Commissioner and Director of Litigation of the State Department of the Public Advocate. I would like to begin by indicating our wholehearted support for Senator Kosco's resolution, which is--

SENATOR KOSCO: I don't believe it.

ASSISTANT COMMISSIONER BEN-ASHER: --the right step at the right time.

SENATOR KOSCO: I must have done something wrong.

ASSISTANT COMMISSIONER BEN-ASHER: I would like to make some, hopefully, unknucklehead-like observations about prison overcrowding generally. We believe that alternatives should be found to this persistent and wholly unacceptable problem of prison overcrowding; alternatives which are preferable to the continuing -- which are preferable to continuing to add to costly prison beds.

The Public Advocate and the Public Defender have long been concerned about the severe and seemingly intractable overcrowding in our prisons and county jails. We represent inmates in jails in Bergen, Camden, Essex, Union, Ocean, and Monmouth Counties. We are involved with monitoring the conditions at all the other county jails in the State. Atlantic, Bergen, Burlington, Middlesex, Morris, Union, and Warren Counties all have correctional facilities operating at approximately 200 percent over capacity.

Here in the Passaic County Jail, the overcrowding has reached approximately 360 percent, making this county jail the most overcrowded in the State, and one of the most crowded in the entire country. Overcrowding is not just a matter of too many prisoners and too little space. It impacts on every aspect of jail operations, making the jails more dangerous to

the health and safety of the inmates, the persons who work there, and the public.

For example, due to overcrowding, proper sanitation in the jails cannot be maintained. New, often unhealthy prisoners receive inadequate medical screening and treatment. This vulnerable population, combined with the overcrowded, dirty, poorly ventilated conditions, greatly increases the risk of communicable disease, such as tuberculosis. Today's jails and prisons are seen as modern incubators where ideal conditions for the spread of tuberculosis meet the population most susceptible to it, and cause similar health dangers to the jail staff.

Overcrowding also greatly increases the tensions and hostilities in the facilities for prisoners and staff, while at the same time making the jails more dangerous because of the breakdown of classification and supervision.

The mental stress caused by overcrowding, along with often-reduced opportunities for constructive outlets, such as recreation or visits, can lead to serious disturbances, putting the lives of prisoners and staff in jeopardy. Classification suffers when jails are overcrowded. An effective classification system protects inmates by grouping them according to age, charge, and other factors affecting vulnerability. Without a functioning classification system, assaults are more common and staff and inmates are placed at greater risk because of the increase in uncontrolled violence.

Housing inmates in areas designed for other uses, such as gymnasiums or dayrooms, adds to this risk because adequate supervision is impossible. As halls become sleeping areas, corrections officers have extremely limited mobility within the facility. A jail built to safely house 450 inmates cannot function properly when it is instead holding 1700, as in Passaic County.

Safety for staff decreases, and stress rises; assaults become more routine and even accepted. It should be no surprise that the Passaic County Jail, the most crowded in the State, has been viewed as the most brutal by the recent Bergen Record series. Society, of course, has legitimate reasons to hold persons awaiting trial, or to punish convicted persons for their crimes. However, to force prisoners to endure terror and brutality from other inmates and officers, as well as filthy, vermin-infested conditions and possible exposure to tuberculosis and other diseases, is not acceptable in a decent, evolving society.

Further, the State-sentenced prisoners in county institutions are deprived of the job training and educational programs which they might otherwise receive if they were in the State institutions to which the court sentenced them. The presence of State-sentenced inmates is a major factor in the crowding at most county jails. Pursuant to executive orders, the Commissioner of Corrections has, for over a decade, required that county jails house inmates sentenced to State prison as a means of limiting the populations in the State prison facilities. Many jails that are severely overcrowded would be at, or near their designed capacity if not for the excessive numbers of State-sentenced prisoners.

For example, this jail now holds approximately 550 inmates who should be in State prisons. In Bergen County, where we are currently in litigation against the county and the Department of Corrections for overcrowded conditions, there are commonly between 300 and 400 State prisoners. The removal of these prisoners would greatly improve the conditions there.

Another example is in Camden County, where the new jail, opened in 1988, was immediately overwhelmed by the State-sentenced population, which approximates 550. Today there are about 1350 inmates in a jail built for 900 there. In this new state-of-the-art facility, inmates sleep together on

mattresses on the floor, with people forced to climb over others to use the toilet at night. Fights and brutality are commonplace, and can be attributed, at least to some extent, to the lack of security caused by the overwhelming numbers. Recently, as you know, the Appellate Division ruled that the State must cease using emergency powers to have State-sentenced inmates in county jails. This really should be seen as an opportunity to redirect the State's correctional policy. County jails are too crowded, too dangerous, and too unhealthy to continue to be used as a safety valve to prevent extreme crowding in the State prisons.

The way to deal with overcrowded conditions is not to build more jails and prisons. The last 10 to 12 years demonstrate the failure of this effort. Despite building additional prisons at a record pace and enormous cost, and the opening of several new county jails, the State's inmate population has continued to rise, and overcrowding continues unabated.

New Jersey cannot build itself out of this crisis. Adding prison and jail beds alone only further stresses the taxpayer in these tight economic times, without adding to the security that our communities are seeking. The root cause of overcrowding is the sentencing policies in place in this State. Overcrowding reflects not an increase in crime, but an increase in punishment. Mandatory sentencing and extended terms have led to overcrowding in every correctional facility in New Jersey, without bringing greater security to our communities.

To address overcrowding and the problems it produces, we must address these laws, as well as the sentencing practices that follow from them. With every mandatory sentencing law or provision for an extended term comes a cost; a cost in actual dollars and a cost in human terms. We should not continue to warehouse all those we do, leaving them without hope or a

future. The impact of the justice system, of which the prisons and jails are but a segment, on minority males is particularly of concern to the Public Defender. Unfortunately, a disproportionate number of our clients are minority males determined by the courts to be indigent. These young men are also those who fill the jails and prisons either because they cannot make, in any instances, even minimal bails, or because they are sentenced to incarceration when other alternatives should be, but are not available.

New Jersey should start viewing its correctional facilities as a limited resource, appropriate as a sanction for dangerous criminals. Alternatives to incarceration should be made a priority by State government before the overcrowded and unconstitutional correctional facilities explode and before a generation of young minority males are lost.

In considering alternatives to incarceration, I call to your attention the recent recommendations by the Supreme Court Task Force on sanctioning and probation, which was chaired by Justice Clifford. The Task Force stressed that a system of intermediate sanctions can improve the ways in which we punish offenders, while also improving the security of our neighborhoods. Resources should be provided for intermediate sanctions. You are familiar, and no doubt will become more familiar with those various alternatives, including, but not limited, of course, to ISP, ISSP, PTI, wristlets, treatment programs, work release, weekend sentences, community service, boot camp, programs such as S.L.A.P., and bail programs.

By providing such programs that require offender accountability, jail and prison overcrowding can be eased, while society's needs to punish and to safeguard its citizens is met as it should be. Alternative sanction programs which include assistance with drug treatment, employment training and placement, and housing are a far superior option for many inmates to the jail tenements we now have.

There is a widespread agreement that alternatives to incarceration are the only answer to the prison overcrowding crisis. However, the Clifford report cautions that intermediate sanctions can only work if there is first a broad consensus regarding their use and substantial involvement by community members. This effort needs to have the full support of policymakers in law enforcement, the courts, and Corrections, as well as community leaders at all levels.

Thank you. I will be happy to answer any questions, should you have any.

SENATOR GORMLEY: Just one question.

ASSISTANT COMMISSIONER BEN-ASHER: Yes?

SENATOR GORMLEY: Which of the alternatives-- I mean, we have listed the alternatives -- a variety of alternatives. Which of the alternatives would you stress the most; that you think would relieve overcrowding the most? In terms of ISP-- Which aspect? You know, obviously everything has to be put to work. Which one would you recommend?

ASSISTANT COMMISSIONER BEN-ASHER: Well, I would say the extent to which different of these programs are appropriate to different categories of defendants is something we could do a study on. It is not something I would have a reaction to off the top of my head. In terms of the value of the programs, my experience has been that every one of the ones I listed is of value to some substantial segment of the otherwise prison-bound population. The key here is to make them available so that judges can make the determinations in individual cases as to which is most appropriate, and to monitor them. It is that primary enforcement mechanism of judicial discretion which we lose as we drift more in the direction of mandatory sentences, which deprive the judges as the ultimate safety source the ability to determine how the needs of society and how the individual prisoner's needs can best be met.

SENATOR GORMLEY: Thank you.

ASSISTANT COMMISSIONER BEN-ASHER: Thank you.

SENATOR GORMLEY: We will again have Karen Spinner.

MS. SPINNER: Good afternoon. I first want to say that we wholeheartedly support Senator Kosco's proposal to have a sentencing commission. It is something that the Association on Correction has been interested in for -- probably since 1979, when the 2C code was implemented. I know the members who have been here since I have been testifying have heard we speak many times about the need to reassess mandatory sentences. It has been our goal over the last 10 years -- 10 to 12 years -- to really go into that reassessment. So we are wholeheartedly in support of that particular piece of legislation, and would be anxious to work with you on that issue so we could look at those kinds of situations.

With regard to prison overcrowding, it is clear that we can't build our way out of this overcrowding crisis. There are some options, however, that we might consider. One of the first that we have talked about is reviewing the somewhat artificial distinction between State and county prisoners. I say "artificial" because all State prisoners were county inmates at one time. You know, from one day to the next they become county and then State.

Perhaps there was a time when it made sense to run parallel correctional systems. We might be at that point where we want to let the State take over the responsibility for incarceration, and allow the counties, when they cannot find another option for an inmate, or an accused, who cannot be left in the community, to contract with the State to provide facilities.

We really believe that most of the -- at least half of the county inmates now, people being held pretrial, or being held on county offenses which are basically minor in comparison to people going into a State facility-- We would like to see the counties do more things in terms of alternatives. One of

the alternatives that could be used for someone being held pretrial might be a day reporting center or electronic monitoring. This would help minimize the number of people we hold in a county. Basically, county inmates don't need to be locked up. I think Judge Coburn went into that quite extensively. I can't add anything more to our concern that we do more things with county inmates, not locking them up. That would relieve the overcrowding on the county level significantly.

We believe that offenders whose crimes do not cause physical harm to the victims or the community should be allowed to remain in the community, with a high level of social control, however. We must design punishments that will hold the offender accountable, return something either to the victim or to the community -- either restitution or community service -- and enable that offender to be reconciled to society after the punishment experience. Costly incarceration should only be a last resort.

If an offender has an identifiable substance abuse history, this problem should be addressed as part of the sanctioning process. As Commissioner Fauver has stated a number of times over the years, a person should not have to come to prison in order to get drug treatment. We agree with that. There is a growing body of literature that indicates that even coerced treatment has an effect. It can be the punishment. I believe the code allows for that. People can be sentenced to treatment now, but there is no money. That is the crux of the matter.

With respect to State correctional facilities, there has to be a means of making the time individuals serve productive both for them as individuals and for society. The concept of units of punishment which the Sentencing Pathfinders Committee has discussed, could be utilized to move people down through the levels of societal control from total incarceration

to serving time in the community. But again, we need the adequate resources. Right now, we are not doing a good job in the community, partly because there is some reluctance, but also we do not have the money. I think ISP and ISSP do a great job, but there are not enough people on them, and I think our criteria is too tight.

We will always need some level of incarceration. I am a realist. You know, as much as I would like to see more people out on the street under community supervision, there are some people who cannot safely be let go. But we do believe at the Association that it is inadvisable to launch into building new facilities at this time, unless there is a concomitant commitment to devise intermediate sanctions and to close down inadequate facilities as the demand for incarceration lessens due to increased utilization of intermediate sanctions.

We are not going to solve our overcrowding crisis by pointing fingers and saying, "We tried it before and it didn't work," but we do need to work together as a community. I know that is one of the themes that the Judicial Conference has. It is important that we involve citizens in this process, particularly members who have suffered the incarceration experience, or their loved ones, so that we can look at how this impacts on that particular community of color. It is not enough for the lawyers and the professionals to chat about it and to devise solutions, but to involve those people who are basically involved in that system.

Thank you. I would be glad to answer any questions you might have.

SENATOR GORMLEY: Are there any questions? (no response) Thank you very much for your testimony.

The next witness will be John Holl, Assistant Attorney General.

A S S T. A T T O R N E Y G E N E R A L J O H N G. H O L L: Thank you, Senator. I have given the Committee a statement

that the Attorney General has prepared on the subject of prison overcrowding. I would ask that it be made a part of the record of the proceedings. The thing is, I won't read the statement since you have it there and can read it when you want, but there are a couple of key points in it that I think it would be important to emphasize.

The first one is, we actively and enthusiastically support Senator Kosco's resolution that would create a Sentencing and Policy Study Commission. We think we have reached a point where something has to be done, and something has to be done immediately. The courts, as you know, have essentially given us a one-year deadline to get the State prisoners out of the county jails. I think that would certainly be a very appropriate subject to add to the scope of SJR-18. As a matter of fact, in the Attorney General's statement, he also suggests that this Commission should explore the feasibility of possibly building some additional jails and prisons. That cannot be ruled out. That has not been emphasized here. That may be a longer term solution. It could easily happen that this Commission could find that people are being sentenced inappropriately, and that perhaps the sentencing law should be tougher. I don't know. Who knows what they will find.

Our primary concern in the Department of Law and Public Safety is the public's safety. I think that has to be the primary goal, and our sentencing system is to continue to ensure that. So certainly the new construction of prisons and jails has to be considered, and perhaps should also be added. If it is not already included in the scope of SJR-18, we would certainly encourage that.

One of the problems we have experienced in the past comes from the number of laws that are passed every year, you know, that require mandatory sentencing. We would suggest that this Commission also look into ways to explore, or create some

kind of a legislative filter, perhaps some kind of a sentencing impact statement when the law is introduced, similar to a fiscal note, because I think we counted 35 or 40 laws that -- I'm sorry, bills that are currently pending that would provide for some sort of mandatory sentence or something. There has to be a more coherent approach to that.

The only thing I would say in addition to the thing that are here in this statement, is that the Attorney General's Office supports the S.L.A.P. program and its expansion on a statewide level. That is not in here, but that is something that we do support. We support also the expansion of the Commission's mandate into the areas of the Court case and new jail and prison construction.

The other thing is, I can advise you, as it says in the statement, the Supreme Court has been petitioned in the Appellate Division case. So that is under appeal, even as we speak.

I would be happy to answer any questions.

SENATOR GORMLEY: Thank you. Are there any questions from members of the Committee?

SENATOR GIRGENTI: Just one

SENATOR GORMLEY: Go ahead.

SENATOR GIRGENTI: Would you like to see the bill amended to include the situation with the impact on any mandatory sentencing?

ASSISTANT ATTORNEY GENERAL HOLL: To my mind, Senator, there is no need to amend the bill--

SENATOR GIRGENTI: I thought that was what you were saying.

ASSISTANT ATTORNEY GENERAL HOLL: --to accomplish that. I think that is something--

SENATOR GIRGENTI: It is inherent.

ASSISTANT ATTORNEY GENERAL HOLL: Yes, that is what I believe.

SENATOR GIRGENTI: You would like to see that as part of any study?

ASSISTANT ATTORNEY GENERAL HOLL: That is correct.

SENATOR KOSCO: In the report here, you have a number of pieces of legislation that are presently in different forms, whether it be in Committee or whether they are just being introduced, that deal with mandatory sentencing. One of the suggestions you made in here that is really, I think, an important one, is that an impact on prison population -- a process that would be set up through your office on anything that would have an impact on the prison population. I think it is on page 8, at the bottom of page 8.

Then you go on to outline a whole number of mandatory terms: juveniles convicted of auto theft, a mandatory term; a mandatory minimum of two years without parole for convictions of assaulting or robbing a senior citizen; mandatory for certain offenses while you are wearing a bulletproof vest. You have a whole list of them in here.

Have you made, other than this piece right here-- Have you voiced your objections to this type of legislation to the Committees the bills have been put into?

ASSISTANT ATTORNEY GENERAL HOLL: Yes. I believe these bills are approached on a case-by-case basis in our office also. There are some that we think are good ideas. There are some others that we do not think are necessarily that great. The only thing that we are suggesting here, Senator, is-- This would not be done from our office. We think it should appropriately be done in the Legislature. There should be some kind of a process that filters through these bills as they come in. How many more people are going to be incarcerated for how long as a result of these bills? I think we should know that before we start adding some increased sentences.

SENATOR KOSCO: In other words, what you are suggesting is just like sometimes we ask for a fiscal note -- what it is going to cost--

ASSISTANT ATTORNEY GENERAL HOLL: It is that same kind of a process.

SENATOR KOSCO: Or say we are doing -- passing legislation dealing with taxicabs. The legislator will usually go to the taxi company and say, "What type of an impact will this have on your industry?" What you are suggesting is that we should--

ASSISTANT ATTORNEY GENERAL HOLL: I should go to Corrections or the courts or perhaps someone who would have that appropriate information.

SENATOR KOSCO: Okay. Thank you. That makes sense.

SENATOR GORMLEY: Basically, you're saying that mandatory sentences -- when a bill comes up for mandatory sentencing, it should have a fiscal note. That is what it is.

ASSISTANT ATTORNEY GENERAL HOLL: I guess it is a fiscal note, that's right.

SENATOR GORMLEY: It is a fiscal note; that is basically what it is. It doesn't say money, but it walks like a duck and it talks like a duck, and it is going to cost money. What you're saying is that as procedure in the Judiciary Committee, or Senator Kosco's Committee, when a mandatory sentence bill comes up, we would simply ask Corrections to provide what, in effect, would be a fiscal note to go with it. Not that people are for or against it, just so people know the actual cost of implementation in terms of the number of days or number of years in bed time that would be taken up either in county or State facilities.

ASSISTANT ATTORNEY GENERAL HOLL: That is correct.

SENATOR GORMLEY: Well, maybe we could discuss that with Senator DiFrancesco. Senator Kosco?

SENATOR KOSCO: One other comment, Mr. Chairman. One of the suggestions that was made just before was that-- I think it was called an "artificial distinction" between county and State prisoners. What about making all prisoners the responsibility of the State, with the counties paying the State instead of the reverse? What about that?

ASSISTANT ATTORNEY GENERAL HOLL: The thing is, there is a big difference, I think, between county prisoners and State prisoners, and I think Judge Coburn said the same thing. He has the knuckleheads. I mean, he does not have the serious criminal offenders. So, you know, to make that all part of a single system-- I am not so sure that that accomplishes anything, especially now. I am not so sure this is the realistic time to be considering that.

But there is a qualitative difference between the kinds of prisoners who are serving their time in county jail and those who are serving their time in a State prison. You know, the State prisoners tend to have committed very serious offenses.

SENATOR KOSCO: On the overcrowding of the prisoners-- I just happened to think of this as we were talking. We deem a prison to be overcrowded based on so many square feet per inmate? I mean, I don't know. I am asking a question.

ASSISTANT ATTORNEY GENERAL HOLL: I think this gets confusing when we talk about overcrowding, because you can see in here that we are not talking about-- The Attorney General wants to emphasize that his concern is prison population growth, not necessarily overcrowding. Simply because a prison goes beyond what is called its "rated capacity" when it is built -- you know, the architects and the designer say you can have "X" number of prisoners in this space -- that does not mean that one should go beyond that. You may go to 200 percent of that. You can steer somebody else through that very

safely. You can do that without violating the cruel and unusual clause of the Constitution.

SENATOR KOSCO: My question is, how do you determine that number? Are there so many square feet per person?

ASSISTANT ATTORNEY GENERAL HOLL: Well, there have been courts which decided in the past, you know, when a prison was overcrowded.

SENATOR KOSCO: No, but a court did not build this facility. An architect designed it, and based the number of occupants on a specific criteria. My question is, what is that criteria? Is it so many square feet per inmate? We just did a complete tour of this facility. And, as so accurately pointed out by the Sheriff-- He said, "As you go through now, it doesn't look that bad. But if you took all the inmates who are outside for recreational purposes, doing whatever they are doing on the outside, not inside the plant, and tonight bring them all back inside, this place is going to be pretty crowded, because it is pretty crowded just going through."

However, contrary to what some of the testimony is, it doesn't look as though there are any health problems; it doesn't look as though there are any major lists of people transmitting diseases. But I am looking at the number, at the criteria that is used for deciding how many people you are supposed to be able to put into a prison.

ASSISTANT ATTORNEY GENERAL HOLL: Senator, I am not an expert in this area, but I believe it does not have to do with the total space in the building. It has to do with the number of cells that were built and the size of those cells, as to how many inmates they can accommodate.

SENATOR KOSCO: A solution would be to change that criteria. Then we would not have an emergency situation, and there would be no more overcrowding problem.

ASSISTANT ATTORNEY GENERAL HOLL: Well, I am not so sure that is a--

SENATOR KOSCO: No, I'm just-- You know, if someone doesn't have a criteria, what is the criteria? If no one has it, then somebody could just come along and say, "Here is a solution. We will just change the criteria. Now there is no longer an overcrowded prison problem, and we don't have to address it. We already did."

ASSISTANT ATTORNEY GENERAL HOLL: That would be a creative way to approach it, Senator.

SENATOR GORMLEY: Sounds like what we did with the Turnpike last year. (laughter)

ASSISTANT ATTORNEY GENERAL HOLL: Senator, the problem is, I think, that the courts are getting involved in it at some point. They don't care what the rate of capacity is. They take testimony as to how crowded, in fact, a prison is, and then they will decide whether or not that crowded condition rises to the level of a constitutional question. That is why I don't think that would help the problem.

SENATOR KOSCO: I think we are going to have to get the answer to the criteria of how we come up the number of people -- prisoners -- by square footage, room size. If you go into a hotel, it says, "This room has the capacity for 229 people." You know, they have a criteria they use. There must be something like that with regard to a prison somewhere, or else somebody -- some legislator could just come along and change it.

ASSISTANT ATTORNEY GENERAL HOLL: That won't solve the problem, the more I think of it, Senator.

SENATOR KOSCO: Well, it would solve the problem with the Court, wouldn't it?

ASSISTANT ATTORNEY GENERAL HOLL: No, I don't think so.

SENATOR GORMLEY: I think the Court would-- Then we would get into our classic arguments with the Court in terms of--

SENATOR KOSCO: It would take another three years, and--

SENATOR GORMLEY: I think we would then get into a definitional-- It would be analogous to a Mount Laurel situation. I think we could redefine it, but I think--

SENATOR KOSCO: And look how we solved that problem.

SENATOR GORMLEY: Yes, we did a wonderful job on Mount Laurel.

SENATOR GIRGENTI: John, has the AG's Office taken any position on alternatives such as shock incarceration?

ASSISTANT ATTORNEY GENERAL HOLL: We support all of the alternative sentencing programs that have been mentioned here today.

SENATOR GIRGENTI: You mentioned that you support S.L.A.P.

ASSISTANT ATTORNEY GENERAL HOLL: We support the S.L.A.P. program, the boot camps. The Attorney General, himself, has been actively involved in trying to get the boot camps going in this State. We are involved with the courts with some Federal grant programs to expand these alternative sentencing type programs. The courts have applied for a grant from the Justice Department to get an urban boot camp going. So, these are things that we support. At the same time, we recognize that sometime very soon you are going to reach a point where there just aren't any more people who are appropriate to go into those programs. Certain people should be locked up; they should not be in these alternative programs.

SENATOR GIRGENTI: You were saying that in terms of the mandatory sentencing, you take each area-- You know, you have not taken a blanket policy on mandatory sentencing.

ASSISTANT ATTORNEY GENERAL HOLL: That is correct. If you create this Commission, they may decide they want to expand mandatory sentencing. I don't know. Perhaps that is doubtful, but we don't have a position on that.

SENATOR GIRGENTI: Just one last thing: The electronic monitoring program-- As a result of what has happened of late in terms of the incident in Paterson and other situations that have arisen, what is the position of the AG's Office at this point in time in terms of the usage of electronic monitoring?

ASSISTANT ATTORNEY GENERAL HOLL: Our position is the same as the Department of Corrections' position; that the program should continue. It should not be expanded.

SENATOR GIRGENTI: Freeze it at its present level until--

ASSISTANT ATTORNEY GENERAL HOLL: Until the study has been made; you know, the one that Commissioner Fauver talked about earlier.

SENATOR GIRGENTI: All right. Thank you.

ASSISTANT ATTORNEY GENERAL HOLL: Thank you.

SENATOR GORMLEY: Thank you. We appreciate your testimony.

ASSISTANT ATTORNEY GENERAL HOLL: Thank you, Senator.

SENATOR GORMLEY: Chris Olszewski, from PUBLIC? I really pronounced that wrong, didn't I? No, it will be Sheldon Kamm, from PUBLIC.

SHERIFF ENGLEHARDT: May I say something for a minute, first?

SENATOR GORMLEY: Yes, sure.

SHERIFF ENGLEHARDT: I would like to clarify the record before the Public Advocate leaves. There were some erroneous statements made. You toured the jail this morning -- all you Senators did. Unfortunately, the Public Advocate didn't see fit to come up here on time to join in the tour. He claims that we are the most overcrowded jail in the State, and possibly the country; that the jail was rated capacity as 450, and we have 1700.

Well, you toured the new facility, which opened up about two months ago, three floors, giving us 450 additional beds, which means that our rate of capacity now is 900, not 450, and our population is 1700 total. That means that we are approximately 200 percent of capacity, not 365 percent of capacity.

You toured the jail, unlike him. I am sure you would agree that the jail is spotless. It is as clean as most hospitals, if not cleaner. I would say it is the cleanest jail in the State of New Jersey. There are no rats; there is no infestation; there is no disease. I just wanted to straighten the record out. We are very proud of our operation here. I hope the Public Advocate will take the time someday; not judge by what he reads in the paper, but tour this jail.

He alluded to the series in The Bergen Record about the horrible conditions in this jail. I say, as you have, tour this jail and see for yourself. Don't judge by what you read in the press. Don't even believe me. You came down here, you toured this jail, and I am confident that when you leave here today you will agree that we have one of the finest run jails in the State.

Thank you very much.

SENATOR GORMLEY: Thank you, Sheriff.

S H E L D O N K A M M: My name is Sheldon Kamm. Before the Sheriff leaves, I would just like to say that their meatloaf is better than my wife's. (laughter)

SENATOR KOSCO: You're in big trouble now.

MR. KAMM: Mr. Chairman, members of the Committee: I would like to thank you for the opportunity to speak with you today. My name is Sheldon Kamm. I have come before you today as a member of PUBLIC -- People United for Bail Limitations, Improvements and Control. PUBLIC is a nonpartisan coalition of State residents, public officials, and business associations whose purpose is to improve bail procedures in New Jersey

courts on the municipal and county level, through the alleviation of the 10 percent cash bail option. The organization is coordinated by an Executive Committee of five members, consisting of: a former city police chief, a member of the bail profession, who is myself, and three other New Jersey residents.

I will not read through this entire testimony, since you have copies. I will keep my comments very brief.

I would like to preface my remarks, though, by saying, it is very heartwarming to see that the Legislature is now taking on a search for the root causes of the problem, rather than the Band-Aid and aspirin approach which has taken precedence in the recent past.

According to statistics released by the Administrative Office of the Courts, New Jersey maintains a consistent fugitive rate of more than 50 percent. This means that in more than half of all pending criminal cases in this State, the defendants have fled prosecution. In addition to the mockery this makes of our judicial system, this situation also provides serious safety and economic concerns to the residents of the State. Therefore, we have focused our efforts on eliminating the elements of the judicial process which contribute to this problem, in order to restore the integrity of our criminal justice system.

We believe that the 10 percent option is the primary culprit with regard to the fugitive situation, and that it has become an unfair burden to the taxpayers of this State, while providing a revolving door for criminals. Therefore, PUBLIC has embarked upon a campaign to raise the awareness of the existence of the 10 percent bail option and of its shortcomings. It is believed that New Jersey taxpayers will unilaterally support legislation or administrative action to eliminate the use of this option, once they become educated to the facts regarding the issue.

Jail overcrowding and the 10 percent bail option: The reason I have come before this Committee today is that most county criminal systems have continuously increased their use of the 10 percent option in the mistaken belief that it helps to prevent jail overcrowding. As most of you are aware, the 10 percent option was initiated in 1973 by an administrative directive from the Office of the Chief Justice of the New Jersey Supreme Court, as a means of relief for overcrowded prisons.

Its original intent was to alleviate overcrowding in local jails by allowing low risk defendants, who could not afford bail stipulations, to be released after posting a percentage of their original bail. Should the defendant fail to appear for the designated court date, he or she would forfeit the full amount of the bail and be required to pay the remaining 90 percent to the court. Initially, this option was to be made available to local residents involved in nonviolent and nondrug-related crimes, who posed a relatively low risk of flight from prosecution.

Today, however, the option has been allowed almost universally. With the exception of murder cases, many defendants accused of violent, sex- and drug-related crimes are allowed to post only 10 percent of their bail and are released. Although it is the sole decision of each judge presiding over a given case, the issuance of the 10 percent option has been increasingly encouraged during the past 10 years. Citing the problem of an overcrowded prison system, officials have sought to utilize the 10 percent option as one of several programs geared towards depopulating jails.

Ironically, even when the fugitives are reapprehended, the county courts have never collected the other 90 percent of the bail promised by the defendants. Even worse, most are usually re-released, again on 10 percent bail. In addition to never collecting the full bail amounts promised by those

defendants who flee prosecution, the courts incur numerous costs due to bail jumpers, which are ultimately incurred by New Jersey taxpayers. State taxpayers also foot the bill for law enforcement officials to reapprehend these criminals.

Yet, the most disturbing aspect of this situation is that no one has even reviewed the 10 percent bail program in this State during the past 18 years, either to evaluate its effectiveness or to determine any resulting problems. There has never been a study of whether the option has indeed provided any relief for the jail system, nor has anyone ever considered the side effects of such an action.

It is important to remember that when this program was initiated, no new jails had been constructed in this State for a number of years. The option, in its original intent, was seen as a short-term relief valve that could buy the counties time to construct new facilities. No provision or consideration was made for an analysis of the long-term impact. And today, with the 10 percent option in full swing for the past 19 years, we are still faced with the crisis of prison overcrowding, but with one new exception. According to the AOC, approximately 26,000 fugitive cases now exist in the New Jersey court system on a yearly basis.

Issues for concern and consideration: Chairman, and members of the Committee, it is important for me to underscore the fact that PUBLIC views jail overcrowding as a real and serious situation. The conditions of our prisons are deplorable, and the criminal justice system cannot effectively operate if there are no facilities to house convicted individuals, or any other systems in place to deal with this situation. However, too often, many involved with this issue have used "jail overcrowding" as a catchall reason for the continuance of such programs as the 10 percent cash option, which usurps the State judicial system. PUBLIC is concerned that the renewed emphasis and focus on jail overcrowding may

result in the expansion of such programs or the introduction of new, possibly even worse alternatives. Indeed, Commissioner Fauver just alluded to addressing overcrowding on a pretrial level earlier in the hearing. This concerns us.

I might say that we do not oppose the electronic bracelet program for sentenced prisoners where they have had time to evaluate the individual prisoner as to his risks. But we violently oppose the use of electronic bracelets for pretrial people, because obviously you have not had the time to search the record of the defendant, and you would be turning loose people you know nothing about.

SENATOR GORMLEY: So you would keep them incarcerated?

MR. KAMM: No, there are bail options.

SENATOR GORMLEY: Oh, bail. Okay. Go ahead. I thought you wanted to keep them in jail.

MR. KAMM: No.

SENATOR GORMLEY: Oh, you want them to have bail. Oh, okay. I'm sorry.

MR. KAMM: There are various bails.

SENATOR GORMLEY: Oh, bail. Okay, fine, bail. Just so there's bail, everything is okay. Go ahead.

MR. KAMM: In dealing with the State' jail overcrowding problem, we cannot view the solutions as an either/or situation. We should not, and cannot, view bursting prison cells as a bristling example of effective law enforcement. Yet, we cannot accept the high fugitive rate as an affordable and necessary evil if we are to alleviate jail overcrowding. We have already done that for the past 18 years, and now we have at least two major problems instead of one, and we never solved the first.

It is important for all members of the State's government, judicial system, and law enforcement community to view jail overcrowding and related issues as a whole, and not consider actions in a vacuum. Therefore, in addressing the

exploding prison populations in New Jersey, we suggest that this Committee consider a number of factors:

First and foremost, the apprehending and detention of criminals is not an option. If a crime is committed, the criminal or suspect must be apprehended and detained for trial, unless a bail can be posted which assures the defendant's return. In practice, pretrial options such as the 10 percent option are tantamount to ignoring the crime, especially since many who already fled on 10 percent, are again released on 10 percent if and when they are reapprehended.

During the course of procedure, we have a tendency to forget that the purpose is more than simply processing defendants through the system. We cannot let criminals run free simply due to overcrowded jails. If fear of jail overcrowding is the reason for establishing and perpetuating such things as the 10 percent option, then why arrest criminals at all? Any program that is developed to address the overcrowding situation must include all aspects of the judicial system in its consideration. The whole purpose of law enforcement must not be usurped.

I thank you very much for your time.

SENATOR KOSCO: Thank you.

Sheriff Joe Job.

S H E R I F F J O S E P H J O B: First, permit me to congratulate this panel for taking this most important subject up and bringing it into this area. I might say, at the outset, that I had the privilege of working with Sheriff Englehardt for a number of years, and I might say that he is not only one of the best sheriffs in the State of New Jersey, but certainly one of the best in the entire country; a man of great principle and character, a fair-minded individual, who has conducted himself in a manner which reflects favorably upon the people of this State. So I came here really to say that I am privileged

to have been associated with a fellow like Sheriff Englehardt, and the great work he has done over the years.

All of us know that overcrowding in a jail is probably the number one enemy of jail operation. Fortunately for me, I had a new jail built in Bergen County while I was the Sheriff, and I never had an overcrowded condition in the male wing. I did have in the female wing, which only held 18 people.

There are various methods, of course, of overcoming some of the problems that we have in our jails at the county level. May I say this, too? There is no such thing as a jail in New Jersey any longer. They are all prisons. Every county jail is a prison where hardened criminals -- individuals who have committed serious overt acts -- are confined. That is what bothers me when youngsters, or an individual, driving when drunk or a disorderly person, winds up in what is supposedly a county jail. He winds up in a place where he is mixed up with some of the worst element in the country.

So, while I had the privilege of serving as the Sheriff of our county, I had an agreement with Chief Justice Pashman, who was the Assignment Judge at that time, and then later Teddy Troutwinder was our Assignment Judge. I took it upon myself not to permit anyone in our institution who had \$2500 or less bail-- In other words, if there was only a \$2500 bail placed on an individual, I took the position that that could not be so serious as to adversely affect the people of Bergen County. Consequently, that individual was permitted out on the street; was not even admitted into our jail.

Serious consideration ought to be given by your honorable body, the Senate, to having a law of that kind put into effect, where individuals with \$2500 or less bail do not go into a county jail -- period. That would help to alleviate your conditions immediately. I'm sure, right now, that there are a couple of thousand individuals in our jails who do not belong there. And incidentally, it costs them about \$65 a

day. It cost the taxpayers \$65 a day in order to house one of those individuals. So it is not only financially beneficial, but it certainly does this: It does not put individuals who do not belong in a prison, in prison. As I say, county jails are not prisons.

I advocated a number of years ago, and sent it to the Bergen County Board of Freeholders, and then gave it to the State, that it should be enacted by the Senate and the General Assembly of the State of New Jersey, an act relating to the parole of persons confined in county jails, or any other county institutional -- correctional institution, and that parole boards be established in their respective counties. I have a copy of that which I am going to turn over to the Chairman. It says: "The Board of Chosen Freeholders of any county in this State may, by resolution, establish a county parole board which shall consist of three members: The Chairman, one associate member, and the sheriff of the county, who serves as an ex officio member."

That would help to alleviate a very serious situation that you have in this State, where your Parole Board, which amounts to a very few individuals, will have the heavy burden of taking care of the responsibilities of all of the 21 counties. Give serious consideration-- I had Senator Woodcock at that time, who was then a Senator representing Bergen County and my district, try to get that law enacted, but for some reason or another, it did not prevail.

So what I want to say to you people here today is, there is much to be done in the field of penology. We talked this morning -- and I didn't want to get into this -- about the death sentence. May I say this to you respectfully? When the Federal courts sentence an individual, they sentence him to an institution to be designated by the Attorney General of the United States. Representing him at that time, of course, was the United States Marshall. So he had to make a designation as

to whether an individual went to Leavenworth or whether he went to Atlanta or whether he went to Alcatraz. What I am saying to you people here is this: There are individuals in the various institutions, not only in this State, but throughout the entire country, who have sadistic tendencies. It is these individuals that we have to ostracize. Keep them off the streets. They are never to come out. I do not subscribe to just the death sentence, but they have to be ostracized from society, so that they do not go back and commit the same act over and over again.

Someone alluded to Smith this morning. Smith went out, after spending 14 years in the State of New Jersey prison in Trenton-- He went out to California and committed the same act all over again. These individuals who have sadistic tendencies-- Here is what the United States government does: When an individual-- If they have reason to believe that that individual is sadistically inclined, they send him away to the United States Public Health Hospital for a period of 90 days, where an adjudication is made as to whether or not this individual belongs in society. In a number of instances while I served as a United States Marshall, we had individuals who were sentenced to 10 years. When they got through with their study, those sentences went up to 20 years and 30 years. The reason for this was that the individual who had the competency to take a look at that inmate, see how he ticks and what makes him go-- He would come to the conclusion that he didn't belong in society, and he is ostracized. He goes away for 20 or 30 years, with no good time.

The other thing that is on the books that you people can take care of almost immediately-- I don't know how many of you know -- and I am sure that you do -- that when an individual is sentenced to a year in State prison, he is eligible for parole in four months. Just think about that. In four months, that individual can get out. But when that same individual is sentenced to 365 in the county jail, he has to do

10 months. The most he can get is two months off for good behavior, one out of every five days. Just think about that for a moment. A State prisoner doing a year can get out in four months. An individual who goes into a county jail has to do a minimum of 10 months if he is sentenced to 365 days.

So that is where you people can be doing some good; enacting legislation to take care of that oversight, which has been an oversight for many years. There is no reason in God's world why an individual should be serving 10 months in a county jail. A county jail should be nothing more than a holding center, and it should be for individuals who have committed minor crimes and crimes of moral turpitude that do not call for a stiff sentence.

So we can do a lot to eliminate some of the real problems we have in our jails -- in our prisons. That is what it amounts to.

I want to thank this honorable body for permitting me to speak here today. I want to thank you for the great service you are doing for the people of this State. This is a very important subject. The reason it is an important subject is, all of government looks upon anything that has to do with incarceration as the last rose on the petal. And this is what we are talking about. It gets the least attention. You people are doing something about it to focus attention on something that is a real problem to all of us in this State.

Thank you very much.

SENATOR GORMLEY: Sheriff, thank you. It was a pleasure to have you here today. I have known the Sheriff for a number of years. He was serving in Bergen County; my father was serving as Sheriff in Atlantic County. So we go back a number of years.

Next will be Reverend John Algera. We have two more witnesses left, and I am going to have to be leaving shortly. So I would appreciate it--

R E V E R E N D J O H N A L G E R A: I will be very brief.

SENATOR GORMLEY: I would appreciate that. Thank you, Reverend.

REVEREND ALGERA: Mr. Chairman, distinguished Senators, Sheriff Englehardt, and other guests: I come here this morning not representing -- this afternoon -- any interest group, other than as a pastor of this city for 14 years; as a pastor to many mothers and fathers whose sons have been incarcerated here and at State levels; and as a citizen who has seen what mandatory sentencing has done to our prison population in the last 10 years. I also come as someone who has supervised individuals in community service, everything from juveniles for auto thefts to stockbrokers on the Federal level for insider trading. I believe the issue here is for us to understand that even in our nation, prisons were begun only 200 years ago. They were begun by the Quakers as penitentiaries, places for people to become penitent before God, repent of the crime they had done, and be released. That is why they are called "penitentiaries." In 1790, Pennsylvania instituted locking people up as a permanent solution to the crimes. Currently, I believe the United States imprisons more people per population than any other nation, except the Soviet Union and South Africa.

Prison is not the answer for nonviolent offenders. For some, it needs to be. It does not reform; it does not change. I believe that mandatory sentencing were laws that were passed with good intentions, but with the wrong answer. I believe the purpose behind mandatory sentencing was to deter people from crimes. It absolutely does not do this. Study after study has proved that. It is a poor and an expensive punishment, and those who are poor economically bear the brunt of it.

I believe even as we look at the racial makeup of our prison population today -- 65 percent black, mostly men, which

make up less than 6 percent of our population-- This tells us that something is not working. It does not tell me that those men are committing more crimes than others.

I believe prison often makes people worse. They come out worse than they go in. I also believe that we need to protect our society from violent offenders, but that there are many other ways for nonviolent criminal offenses. One is restitution, which has already been mentioned. I recently read of a judge in the State of Michigan who, for an individual who committed a nonviolent crime of burglary, sentenced him to have his victim visit his house to take back as much of value as he had taken from him.

Community service is an option I have sought at every chance to supervise people. I would much rather, on a Federal level, see Leona Helmsley serving lunch at our soup kitchen here in this city eight hours a day for three years, than serving in a country club Federal prison, where she will end up. I believe many of the people imprisoned here are for drug-related charges, and we need positive solutions to drug and alcohol abuse. Incarceration is not a solution. I believe that intensive probation can be done on a much more efficient level than keeping people locked up, and on a much cheaper level. The S.L.A.P. program, the bracelets-- We can perfect that technology very quickly.

I just want to commend this Committee for looking into this. I think it is long overdue, and I want to commend you for it. I believe it can make a tremendous change. It is my desire not to see men and women locked up; to see them on the outside serving as responsible members of our society. So I want to commend you.

There is one organization on the national level called, "Justice Fellowship." It was begun by Mr. Chuck Colson, who was incarcerated himself, who has prepared some creative solutions, and is working with state legislative

committees all over the country. I would like to leave a book for Senator Kosco, who sponsored this, and a brochure for the rest of you on this.

Thank you.

SENATOR GORMLEY: Reverend, thank you very much.

The final witness -- excuse me, because I might not pronounce the name correctly because it is not typed, and I am getting old -- will be Martin Rudenski. Martin, come on up, please.

M A R T I N R U D E N S K I: Gentlemen, first I would like to apologize for appearing before you this way. I just heard about this hearing yesterday. I didn't get a chance to go home to shave, to put on a suit, so I apologize for that. Also, I would have had my notes typed, but again for the same reason, I didn't know about this hearing.

SENATOR GORMLEY: Well, you have to understand: If you want to have your notes prepared at a later time, the bill will be released in another day in Committee. So for a prior release, you could have your typed comments--

MR. RUDENSKI: I would like to get a current address to mail it. It will be in the mail this week.

I recently saw newspaper articles about the inmates in the Bergen County Jail filing a class action suit against the jail. I called Judge Ackerman in the U.S. District Court--

SENATOR GORMLEY: Excuse me, is this on Senator's Kosco's bill?

MR. RUDENSKI: It's on--

SENATOR GORMLEY: Is it on Senator Kosco's bill? That is what I want to know.

MR. RUDENSKI: No. It is on prison overcrowding.

SENATOR GORMLEY: Okay, fine. Stick to prison overcrowding, okay?

MR. RUDENSKI: Okay. Basically, prisoners not accused of any other crimes, imprisoned for debt or other noncriminal

acts, are not segregated from the criminal population, in violation of New Jersey Statute 30:8-5 and 30:8-6. According to New Jersey law, anyone committing such an act is guilty of a misdemeanor, and is subject to double damages and related civil suit.

I guess I am the only person speaking for the other side. I was incarcerated for nonsupport, and basically I spent 132 days in jail. I have had seven judges say to me that I have never been accused of any wrongdoing whatsoever. I have never had a trial. I have never been able to face any accuser. I have never had the opportunity for parole. I have never had the opportunity for alternative punishment. I spent 132 days in jail.

Basically, during the course of that time I found the following problems: I was refused the right to an attorney. I was refused law books. I had no access to typewriters. My legal papers disappeared. I had a habeas corpus which was supposed to be filed in Federal court, and four of the five copies disappeared in the jail mail. I could not send out certified letters, so I was unable to serve motion papers. Internal mail took up to 21 days; external mail took longer. It is possible that I was kept in jail an extra six weeks because of improper handling of my papers.

Jail is dangerous to the innocent as used by the courts to instill fear as a coercive tool. Noncriminals are forced into cells with murderers, thieves, drug dealers, and sex deviants. I was almost killed in the jail. I was refused medical treatment when injured. My foot was broken, and I incurred muscle and nerve damage. I had cell mates who tested positive for HIV; I had other inmates with tuberculosis.

Another cell mate returned from the psychiatric ward after two months on Thorazine, without being regulated off. He started to go homicidal and had to be removed from the cell before another attempt to kill me.

Drastic overcrowding, up to five inmates in a two-bed cell. In addition, those inmates who cannot be jammed into cells slept on the floor in the common area. They used the same sponge to clean toilets and eating tables for dining. No sheets, pillows, pillow cases, or towels, and dirty mattresses. No floor disinfectant. It took up to 10 days to see the doctor. His basic treatment was, "Stop smoking." When I told him that I didn't smoke, he said, "You should be getting better already."

My glasses were broken, and the jail refused to fix them. One of my friends came and picked them up and returned them. They were kept downstairs in the medical department before they were returned to me. Suicidals lived like animals. They were kept naked in cells, with urine and feces on the floor. They drank out of the toilets. No medication was provided for at least four days to another roommate who had a heart condition, ulcers, and spasms. He was not given heart medication; I never saw him get any ulcer medication; and he continued vomiting. He had trouble keeping food down. The sink room ran continuously for most of the seven weeks I was there, at an estimated six gallons per minute. We probably wasted 100,000 gallons of water in the jail.

There are a whole bunch of other things which are primarily minimal compared to these, so I am going to skip them in the interest of time. But I would like to respond to some of the other people who spoke here.

I am not a knucklehead, stupid, recalcitrant, irresponsible, and I am certainly not a hardened criminal. When I was in Morris County Jail, Paterson was used as a threat. If we didn't do what they told us to do, we would be sent from Morris County to Paterson. Using jails in support issues violates the State Court in a sex bias way. The State Constitution provides for no imprisonment for debt.

SENATOR GORMLEY: Excuse me. Have you sent these accusations to the Attorney General, or anybody, for review of these charges?

MR. RUDENSKI: I sent them to Judge Ackerman, to the special--

SENATOR GORMLEY: I am quite familiar with Judge Ackerman. He handled the cases involving public officials in Atlantic City.

MR. RUDENSKI: He is involved with a case in Bergen County at this time.

SENATOR GORMLEY: He was quite tough, as a matter of fact.

MR. RUDENSKI: I have gotten no response on these. I have also given copies of these--

SENATOR GORMLEY: Excuse me. You have forwarded them to Federal Judge Ackerman, right?

MR. RUDENSKI: And also to Judge Ahto, Judge Murphy, Judge Bozonelis, and Judge Hanifan in Morris County.

SENATOR GORMLEY: I know of Judge Ackerman. I know if there is a judge who does not shrink from his responsibilities, it is Judge Ackerman. If he were to think there was anything to be reviewed, I know he would send it to the appropriate authorities.

MR. RUDENSKI: These were documented.

I would like to make one other recommendation then.

SENATOR GORMLEY: Go ahead.

MR. RUDENSKI: Personally, what I observed was not an exception. This was the way it was run. I spent my time in jail on six separate occasions over the past two-and-a-half years. My recommendation is that legislation be passed to enforce total support orders; that judges be required to follow the rules of the court, and, above that, to follow their oaths to the Constitution. Basically, I had a judge say to me,

"Setting aside the Constitution for today," and that I was, "living in a fantasy world if I expected justice in court."

I believe strongly that legislators--

SENATOR GORMLEY: I'm sorry, I'll have to bite. What judge said that?

MR. RUDENSKI: Judge Ahto.

SENATOR GORMLEY: He said he was going to set the Constitution aside for that day, and that you were living in a fantasy world?

MR. RUDENSKI: I have that in a transcript. I don't have the transcripts here.

SENATOR GORMLEY: But he said that he was not going to go by the Constitution?

MR. RUDENSKI: That is correct.

SENATOR GORMLEY: Go ahead.

MR. RUDENSKI: My last recommendation is that legislation be passed to have judges, lawyers, and legislators basically spend a week in jail to see what it is like, before recommending how others should spend their time in the jail.

SHERIFF ENGLEHARDT: News reporters, too.

MR. RUDENSKI: Pardon?

SHERIFF ENGLEHARDT: And news reporters.

MR. RUDENSKI: News reporters also.

The thing that frightens me today is the--

SENATOR GORMLEY: I didn't think you two would be agreeing, Sheriff.

SHERIFF ENGLEHARDT: It's not my county.

SENATOR GORMLEY: Go ahead.

MR. RUDENSKI: --issue of judicial immunity. The amendment-- Again, I am not prepared to talk about this today--

SENATOR GORMLEY: I understand that, but go ahead.

MR. RUDENSKI: The issue is, at this point, if judges and court officers are made immune for their actions, they will

be blamed for all the things that are done wrong in the courts. My recommendation is that this legislation be denied.

SENATOR GORMLEY: Thank you for your time. If you would like to prepare that, it will be entered into the record. See Mr. Tumulty here.

MR. RUDENSKI: Where should I send that?

SENATOR GORMLEY: Send it right to this address. I'll take care of that.

I would like to thank everybody for participating today.

Just to follow up on the last comment that was made to take a week and spend time in an institution, having been raised in a county jail when my father was a sheriff, having the unique opportunity to have that as a place to see the problems and an era in corrections that was not nearly as tough or as difficult, I would like to say it is a very difficult job to be a sheriff, or anyone in charge of a facility of this nature. There is not a single solution to the complex problems we face.

One of the earlier witnesses brought up Los Angeles. There is a problem tied to, what are we going to do about dysfunctional families? What are we going to do about the family court system in this State? Not just law enforcement, but everybody has to work together in terms of providing a variety of solutions that focus on the individual.

Judge Coburn mentioned the S.L.A.P. program. Just as you have that individual emphasis on a person who might have a problem, so, too, we have to put that individual emphasis on the child in the urban area who might be the product of a single-parent family; might be the product of a dysfunctional family. So I don't think there is any one solution.

The resolution brought up by Senator Kosco is, without question, a step in the right direction. The Legislature -- politicians have reacted to the word "mandatory," and when it

is put in front of them they do vote, "Yes." We have to, as a group, say that maybe there are circumstances where there might be alternatives, and not fall victims to the 30-second time slot.

As someone who had a unique childhood, who was the son of a county sheriff, I have a great appreciation for what sheriffs like Sheriff Englehardt have to go through. No matter what you do you'll never be right, because you are running a correctional facility. Sheriff Englehardt and I might disagree from time to time -- all of us might disagree on what might be the perfect solution -- but when people give tirelessly, as has Sheriff Englehardt, as have a variety of other individuals, I think what we have to do is not let them hang out there. We have to provide solutions on the State level. If the jails are overcrowded, we have to provide the additional moneys. If they are triple bunked and they might be subject to criticism, we have to do things. We can't leave it with the brochure. We can't say, "Well, I gave you the mandatory sentence. I did my radio ad. I did my TV ad. I'm done." That is going to end. That is why Senator Kosco's resolution is such an excellent step in the right direction, because it is a direction towards a very realistic approach to the problems we face, so that a sheriff, a warden, a correctional official, whoever they might be, are not left there with what we have left them as a system.

So, we are going to look at this Court case as it comes up. We might disagree with some of the earlier speakers; we might not leave it to the courts, because it is the Legislature that should be involved in this process and set the criteria for reimbursement, and look to an overall solution.

I do want to get back to something that was said earlier about the death penalty. That is not the solution. I agree with the bill. But the solution begins with the child, begins with the individual, begins with-- We talked to one of the ministers earlier at lunch today about an outreach to the

children in the schools, so that they will know that they do not want to come here; so that the message that comes out from the Sheriff or anybody is, "This is the way this has to be run, but we do not advise you coming." We have to cross-reference those messages at a very, very early age. There is no simple answer to this. It is going to take decades and years to overcome many of the problems, but this is a step in the right direction. If we can avoid pandering and politics, hopefully we will be able to come up with some solutions that will really save some lives and give them a second chance or a better opportunity.

Senator Girgenti, Senator Kosco, would you like to make a final comment?

SENATOR GIRGENTI: Yes. Again, Mr. Chairman, I want to thank you for taking the time to come up here today. I think it is important that we see an actual, on-the-scene picture of a place such as this. I mean, the Sheriff has worked under, as you have pointed out, conditions -- the amount of people here, the way he has dealt with it. I have to say this about the Sheriff: He has told me from when I was first elected to office many years ago, that any time I wanted to come down here and tour this place unannounced, or whenever-- So this was not just a show for today. The fact is, any time -- and I have come here before, in terms of visits, unannounced-- You can come down here and look at this facility, not as a client--

SENATOR KOSCO: You clarified that, didn't you?

SENATOR GIRGENTI: You can come down here and look at this facility and, as you saw for yourself walking through the place, it is well run; it is efficiently run. The Sheriff has a competent staff, the people working with him: the Warden, the other individuals, the Deputy Wardens. You know, he has done an excellent job in terms of this facility under the conditions he has had to work with. They are not ideal,

obviously. There are problems out there. Part of our task is to try to help to alleviate some of the problems. Hopefully that will be one of the things that we can do.

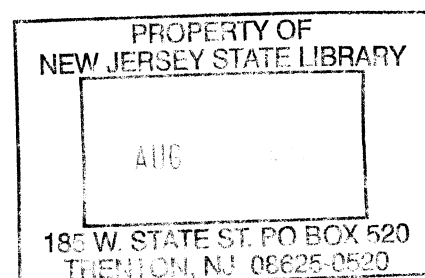
Certainly, I want to thank you, Bill, for taking the time. I know it is a long drive for you. You have to go back a long distance. But I think it is truly important that as the Chairman of the Judiciary Committee you had a firsthand observation of this facility. I think you will take that back with you. I thank Lou for coming, too. I appreciate it.

SENATOR GORMLEY: Senator Kosco?

SENATOR KOSCO: Thank you, Mr. Chairman. I, too, want to thank the Sheriff for the outstanding tour we took. If anyone is cynical or even has any kind of a thought that it was staged or choreographed, then my next thing would be to compliment you for doing it in such a quick period of time, because you only knew last week that we were going to be here. I think it was an excellent tour; I think it was very genuine, and showed the operation firsthand.

Secondly, I disagree with some of the remarks that were made by some of the people who said that you have to be there in order to appreciate it; you have to serve time in jail to know what it is like. You don't have to be poor to imagine what it would be like to be poor, nor do you have to be wealthy to imagine what it would be like to be wealthy. In today's world, with the information that is available, and the media hype on certain things, one can almost sit and imagine almost any type of an atmosphere you may want to be involved in.

We have all, as legislators, spent enough time reviewing certain things, looking at legislation, reviewing legislation, looking at rights and wrongs, to almost be able to put ourselves in many, many different positions at the same time and imagine what it would be like. This is one of those situations. It is not the first time that we have had the opportunity to look at a program firsthand and see what happens



in a place of incarceration. During my eight years as a State Assemblyman, I used to spend at least two days a week for a long period of time at Rahway State Prison. I worked on the Scared Straight Program with the inmates. I worked with the Sheriff of Bergen County on a number of situations in the Bergen County Jail, with the programs there.

So, most of us, through our service to our communities and to our State, have been involved in many of the programs. We are going to do everything we can to try to solve the existing problems. One problem is overcrowding in the prisons. One of the approaches -- and I stress that, one of the approaches -- to solving this problem, is to address the issue as to who is being incarcerated. Are we incarcerating the right people? Are we seeing to it that the people who should be incarcerated, are actually being incarcerated?

I think that is the approach this Committee is going to be taking. That is the angle that our legislation, at this point, is taking on it. This is probably the beginning of an awful lot of research into the problems we are experiencing in this State right now.

Thank you.

SENATOR GORMLEY: Well, thank you. I am going to go back to the Gormley correctional facility in Atlantic County.

Thank you very much.

SENATOR KOSCO: Thank you.

(HEARING CONCLUDED)

APPENDIX

William F. Lamb
First Assistant Prosecutor
Middlesex County Prosecutor's Office
Appearing on behalf of the County Prosecutors'
Association of New Jersey in support of ACR 20

In September 1982, legislation restoring the death penalty was enacted in New Jersey. In March 1987 --- some 4 1/2 years later --- the New Jersey Supreme Court finally issued an opinion on the death penalty law. In that case, State v. Thomas Ramseur, the Court decided that the death penalty law itself was constitutional but that the manner in which it had been administered to Ramseur had been improper. The Court, therefore, affirmed Ramseur's murder conviction, vacated his death sentence, and remanded the matter to the trial court for imposition of a sentence of life imprisonment.

Following the March 1987 Ramseur decision and for about 18 months thereafter, the New Jersey Supreme Court vacated every death sentence to come before it on the basis of failure to anticipate and apply the Ramseur principles. As subsequent death penalty cases began to conform to Ramseur and that case began to lose its applicability, the Supreme Court began to overturn death sentences on other grounds. Among these new death penalty impediments was a never before discovered distinction between murders where the accused intended the death of his victim and murders where the accused only intended serious bodily injury to his victim but the victim died anyway. According to the October 1988 case [State v. Walter Gerald] that created this distinction, only murderers who actually intend the death of their victims commit a death penalty eligible form of murder.

Interestingly, this distinction between the two types of murders had gone undetected by the Court in its previous 10 or so death penalty cases. Nor had it been offered as an argument by the Public Defender --- and this notwithstanding a generously funded Public Defender task force dedicated to invalidation of the death penalty statute. Rather, the Gerald principle is entirely a product of the New Jersey Supreme Court's invention.

The Court, moreover, declined to base its new found Gerald principle on statutory construction of the death penalty murder law, although it well could have. But that, of course, would have rendered the Gerald principle vulnerable to quick legislative eradication. Rather, the Court grounded the Gerald principle in a reading of the New Jersey Constitution, thus necessitating the far more arduous process of constitutional amendment to overturn it.

As with the Ramseur principles before it, this Gerald

principle immediately jeopardized a host of death penalty verdicts rendered before this Gerald principle was announced. In reviewing these cases, however, the Supreme Court did not apply Gerald across the board. Rather, it found that in some cases the manner in which the victim was killed so obviously demonstrated an intent to kill that no jury could have rationally concluded that the killer only intended serious bodily injury. In such cases, any violation of the Gerald principle was harmless [and the Court would then invalidate the death penalty on some still other ground].

To date, the Court has assayed its Gerald principle in 15 death penalty cases. As the following review demonstrates, the Court's application of its Gerald principle has been unpredictable, irrational and intellectually dishonest.

STATE V. GERALD AND ITS PROGENY

1. KILLER: WALTER GERALD (and accomplices)

VICTIM: PAUL MATUSZ, 55 year old man killed at home by intruders.

DATE OF DECISION: October 25, 1988

CIRCUMSTANCES OF CRIME: Victim beaten and stomped to death in own home by intruders. Sneaker prints still visible on face and forehead at time of autopsy. TV set dropped on head.

DOES GERALD APPLY: Yes, Gerald and accomplices may have only intended serious bodily injury.

2. KILLER: JAMES HUNT

VICTIM: EDWARD LAWSON, acquaintance of Hunt

DATE OF DECISION: June 9, 1989

CIRCUMSTANCES OF CRIME: Victim stabbed 24 times.

DOES GERALD APPLY: No, no rational jury could have concluded that Hunt intended anything less than Lawson's death.

3. KILLER: DARRYL PITTS

VICTIM: STACEY ELIZARDO, former paramour [Pitts also killed rival Paul Reynolds at same time he killed Elizardo, but Reynolds murder deemed a non-death penalty murder.]

DATE OF DECISION: June 24, 1989

CIRCUMSTANCES OF CRIME: Pitts stabs Reynolds 7 times and stabs Elizardo 23 times, killing both. Asserts "Vietnam syndrome" defense at trial.

DOES GERALD APPLY: No, assault on Elizardo so violent that death was inevitable.

4. KILLER: STEVEN DAVIS

VICTIM: BARBARA BLOMBERG, the girlfriend of a friend of Davis.

DATE OF DECISION: August 3, 1989

CIRCUMSTANCES OF CRIME: Victim strangled to death with electrical cord. After victim died, Davis stabs and mutilates her body. Davis waives trial; pleads guilty to murder to Blomberg; sentenced to death by judge.

DOES GERALD APPLY: Yes, judge at guilty plea faulted for failure to establish that Davis intended to kill victim, rather than just inflict serious bodily injury on her.

5. KILLER: KEVIN JACKSON

VICTIM: Female but name unmentioned in Supreme Court opinion.

DATE OF DECISION: April 18, 1990

CIRCUMSTANCES OF CRIME: Sadistic murder. Victim stabbed 53 times including 18 stab wounds to the genital area. Jackson waives trial; pleads guilty to murder to victim; sentenced to death.

DOES GERALD APPLY: Yes, judge at guilty plea faulted for failure to establish that Jackson intended to kill victim, rather than just inflict serious bodily injury on her.

6. KILLER: BRYAN COYLE

VICTIM: SETH LEMBERG, husband of Coyle's paramour.

DATE OF DECISION: June 11, 1990

CIRCUMSTANCES OF CRIME: Victim demands wife return from Coyle house. Coyle chases victim firing handgun. Victim

shot in leg on street, attempts to crawl away. Coyle shouts "Yahoo," follows crawling victim and shoots in back. Victim then killed by shot to back of head fired from point blank range.

DOES GERALD APPLY: Yes, if instructed on Gerald principles jury might have concluded Coyle intended less than death.

7. KILLER: FRANK PENNINGTON

VICTIM: ARLENE CONNORS, mother of barmaid who came to tavern to help daughter close up.

DATE OF DECISION: June 21, 1990

CIRCUMSTANCES OF CRIME: Victim shot in heart from close range. Pennington defense: did not mean to shoot [notwithstanding release of three separate safeties on handgun.]

DOES GERALD APPLY: Yes, jury could have concluded Pennington only intended serious bodily injury.

8. KILLER: RUSSELL LONG

VICTIM: ALBERT COMPTON, night manager of liquor store.

DATE OF DECISION: June 21, 1990

CIRCUMSTANCES OF CRIME: Compton shot in chest from close range by Long when no other customers in store. After arrest, Long tells fellow prison inmate that he "did not want to leave any witnesses behind."

DOES GERALD APPLY: Yes, jury could have concluded Long only intended serious bodily injury.

9. KILLER: TEDDY ROSE

VICTIM: PATROLMAN VINCENT GARAFFA, Irvington Police Department.

DATE OF DECISION: May 23, 1990

*DATE DECISION FILED: July 12, 1990

CIRCUMSTANCES OF CRIME: Patrolman Garaffa killed by single blast of shotgun pressed to stomach.

DOES GERALD APPLY: No, "It is inconceivable that defendant

was not 'practically certain' that his action would kill the officer"[notwithstanding defense claim that Rose was in panic and did not intend weapon to go off.]

10. KILLER: JACINTO HIGHTOWER

VICTIM: CYNTHIA BARLIEB, convenience store clerk.

DATE OF DECISION: July 12, 1990

CIRCUMSTANCES OF CRIME: Convenience store clerk first shot in chest, falls but rises again. Then shot in neck and falls to floor again. When touches Hightower's leg as he rifles register, shot in left side of head.

DOES GERALD APPLY: No, "it is virtually inconceivable that defendant intended serious bodily injury but not death."

11. KILLER: ANTHONY McDOUGALD

VICTIM: WALTER BASS & MARIA BASS, parents of McDougald's teenage girlfriend.

DATE OF DECISION: July 12, 1990

CIRCUMSTANCES OF CRIME: Victims attacked while asleep at home. Walter slashed across throat and stabbed in chest with knife; then McDougald and 13 year old accomplice bashed Walter in head with baseball bat. McDougald dropped cinderblock on Maria's head; bashed with baseball bat; cut Maria's throat and then shoved bat up Maria's vagina.

DOES GERALD APPLY: No, virtually inconceivable that jury could have concluded that McDougald intended to cause serious bodily injury but not death.

12. KILLER: JAMES CLAUSELL

VICTIM: EDWARD ATWOOD, filed a complaint against a drug dealer.

DATE OF DECISION: August 30, 1990

CIRCUMSTANCES OF CRIME: Contract killing. Clausell paid \$2000 to kill Atwood. Fires two shots through door as Atwood tries to close it, killing Atwood.

DOES GERALD APPLY: Yes, jury could have concluded that "hit" paid for by drug dealer was only to have Atwood

seriously injured, not killed.

13. KILLER: NATHANIEL HARVEY

VICTIM: IRENE SCHNAPS, recently widowed secretary living alone.

DATE OF DECISION: October 18, 1990

CIRCUMSTANCES OF CRIME: Victim attacked by burglar entering her apartment. Victim's skull cleaved by hatchet leaving brain exposed. Suffered numerous skull fractures, fractures jaw, multiple lacerations and massive loss of blood. At least 15 blows to head from hatchet according to medical examiner.

DOES GERALD APPLY: Yes, jury could have concluded Harvey did not intend to kill victim, only to injure her.

14. KILLER: SAMUEL MOORE

VICTIM: MELVA MOORE and KORY MOORE, wife and 18 month old son of Samuel.

DATE OF DECISION: January 23, 1991

CIRCUMSTANCES OF CRIME: Melva killed by more than 20 hammer blows to head crushing skull splattering brain about apartment. Baby Kory hammered to death in process "by accident."

DOES GERALD APPLY: Yes, although improbable jury could conclude that Moore intended less than death for Melva and/or that Kory's death was an accident.

15. KILLER: SAMUEL ERAZO

VICTIM: LUCY ERAZO, estranged wife of Samuel

DATE OF DECISION: August 8, 1991

CIRCUMSTANCES OF CRIME: Wife stabbed to death during domestic violence dispute.

DOES GERALD APPLY: Yes, jury could have concluded that minimally adequate evidence exists that Erazo only intended to cause serious bodily injury.

* * * * *

Based upon the experience of the past three years, the County Prosecutors' Association of New Jersey strongly supports the passage of ACR 20 or any alternative legislation designed to overturn Gerald. In our view, the Gerald decision represents an absurd, never intended construction of our death penalty murder law. Moreover, even if Gerald's judicially-created distinction between killers who intend to kill and killers who only intend serious bodily injury had some moral or intellectual justification --- and it has none --- the Gerald principle is still unworkable. As the Gerald progeny attests, application of the Gerald principle has produced results which are wildly inconsistent and which defy coherent explanation or analysis.

Perhaps more than any of its other decisions frustrating the implementation of our death penalty law, the Gerald decision has demoralized prosecutors, bewildered the public, traumatized murder victim families, defeated legislative will and accorded a windfall to New Jersey's worst killers --- all of whom have been spared the death penalty imposed by a jury of their peers and some of whom may not be subject to successful re prosecution. Clearly, the time has come, indeed it is long overdue, to undo the effects of Gerald and restore the New Jersey death penalty law to something more than a hypothetical punishment.

Last but perhaps most important, we must be mindful of the fact that the death penalty law is not the exclusive property of death penalty lawyers and Supreme Court justices. It is the embodiment of public will. After the bitter experience of 5 years of death penalty jurisprudence, it is important and necessary to reengage the citizenry in the death penalty debate. The legitimacy of the New Jersey Constitution and all legislative enactments ultimately rest, in large measure, on the consent and acceptance of the people of this state. Passage of ACR 20 and the public debate on the death penalty law which it will stimulate is therefore greatly in the public interest.

THE COST OF THE DEATH PENALTY

Important questions of criminal law and procedure, such as retention or repeal of capital punishment, necessarily involve a variety of moral, legal, constitutional, and practical issues. Neither proponents nor opponents of the death penalty would argue that the cost of a capital punishment system to the State ought to be the primary determinant. Nevertheless, the cost of each component of our criminal justice system impacts the efficacy of all other components. Scarce fiscal resources must be allocated. That allocation can rationally be made only when the Legislature has some awareness of the cost associated with criminal justice issues such as the death penalty.

Nearly 20 years ago, in Furman v. Georgia, the case which struck down capital punishment in the U.S. and forced states to rewrite their death sentencing statutes, Justice Marshall recognized, "When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life." Furman v. Georgia, 408 U.S. 238, at 358 (Marshall, J., concurring). While Justice Marshall's assessment was supported by logic, studies conducted since the reintroduction of the death penalty have proved the assessment understated.

It is extremely difficult accurately to predict or assess costs associated with capital punishment given the myriad components of the criminal justice system which bear on capital punishment. There is no doubt, though, that the heightened procedures applicable to death cases, described by many commentators as a court-imposed "super due process," cost significant sums of money.

* In connection with a bill which would have reinstated the death penalty in New York, the Public Defense Backup Center to the New York Senate Finance Committee, Assembly Ways and Means Committee, and Division of the Budget issued a report analyzing the costs of the death penalty to the State. That study, published in 1982, estimated that the cost of taking each capital case through the trial, sentencing, and direct appeal stages would amount to over \$1.8 million. The study did not consider the cost of state post-conviction and federal habeas corpus proceedings. New York did not reinstate the death penalty.

* A committee asked by the Maryland General Assembly to provide information on the fiscal impact of processing Maryland death penalty cases concluded in 1984 that cases in which the death penalty was imposed resulted in higher costs in every component of the criminal justice system than non-death cases.

* In 1987, Michael Hayden became the Governor of Kansas following a campaign in which he promised to reinstate the death penalty. Shortly after taking office, Hayden introduced a death penalty bill and also cut state agency budgets to meet a constitutional debt limitation. During the course of the legislative proceedings,

a law professor from the University of Kansas estimated that the State might spend \$50 million before the first execution occurred, and emphasized that most of the increased costs would be borne at the county level, either through increased property taxes or reductions in manpower for the criminal justice system. The Kansas Legislative Research Department estimated that reinstatement of the death penalty would cost the State nearly \$11.5 million per year above current costs, excluding post-conviction appeals. The Kansas death penalty bill did not pass.

* Florida is among the nation's leaders in terms of numbers on death row (289, as of 12/31/89), and people actually executed (19). A report published by the Miami Herald estimated that Florida's first 18 executions cost the State an average of \$3,178,623 per execution. The cost of executing Florida's 19th inmate, Ted Bundy, has been estimated at \$6 million. The cost of imprisonment in Florida for 40 years is about \$515,964.

* In 1989, a Fiscal Impact Statement filed with the Indiana Senate on a bill which would replace the death penalty with life imprisonment without parole indicated projected savings in excess of \$5 million per year by abolishing the death penalty.

* In 1989, a Fiscal Note filed in connection with an Alaska bill which would authorize capital punishment indicated that the increased costs associated with death penalty representation by public defenders only would exceed \$1.5 million per year. The Fiscal Note did not estimate prosecution, judiciary, witness, jury, or investigative costs.

* While most studies deal with state costs for trial, sentencing, and direct appeal procedures, state post-conviction proceedings and federal habeas corpus proceedings add to the governmental costs. The total projected costs for federal habeas corpus capital representation alone for fiscal year 1989 were \$15,712,328 for 340 cases.

Prepared by James Bowman, Director
Nebraska Lutheran Office of Governmental Affairs
January 1992

The Bible and the Death Penalty

Q: Surely the Bible prescribes the death penalty for persons who murder, doesn't it?

A: Murder is only one of the nearly 20 capital offenses which warranted death under Old Testament law. Others included adultery, fornication, lying, breaking the Sabbath, and insulting one's parents. By Jesus' day, however, most capital cases were resolved through some form of restitution.

Q: Doesn't God (Exodus 21:23 "you shall take life for life") command that murderers be executed?

A: On the contrary, "life for life," was intended to limit revenge - not encourage or sanction it. Addressing a society known for brutal revenge, this law limited punishment to no more than equal retribution. Furthermore, it was understood by Rabbis to advocate monetary compensation as opposed to the equal infliction of pain.

Q: How is God's justice expressed toward those who kill?

A: The purpose of God's justice has always been to reconcile the sinner to God (Ezekial, 33:11; 2 Peter 3:9). This explains why murderers such as Cain, Moses, David and Paul did not receive the death penalty, why cities of refuge were established, and why Jesus, from the cross, asked forgiveness for his murderers.

Q: Did Jesus ever address the death penalty?

A: Jesus was asked (in John 8:1-11) to sentence to death a woman caught in adultery. Jesus' answer "let him who is without sin cast the first stone," undermined the death penalty by pointing out that no one but God is qualified to pass this sentence.

Q: If not with vengeance, how shall Christians respond to the sin of murder?

A: The same Jesus who forgives and reconciles us to himself (Ephesians 2:5-6) calls us to extend mercy to those who offend us. Christ's concern is redemptive. We must give the opportunity for redemption to every sinner, without exception - even for a murderer who did not do that for his or her victim.



A Social Statement on:

THE DEATH PENALTY

This social practice statement¹ was adopted by a more than two-thirds majority vote at the second biennial Churchwide Assembly of the Evangelical Lutheran Church in America, meeting in Orlando, Florida, August 28-September 4, 1991.

A Climate of Violence

Violent crime is as ancient as the human family. Since Cain slew Abel, the blood of countless victims has cried out to the Lord (Genesis 4:10). Our hearts, too, cry out to the Lord who gives life. We grieve with the family and friends of the victim—the violated one.

Violent crime has a powerful, corrosive effect on society. Bonds of trust, the very assumptions that allow us to live our lives in security and peace, break down. Instead of loving, we fear our neighbor. We especially fear the stranger.

The human community is saddened by violence, and angered by the injustice involved. We want to hold accountable those who violate life, who violate society. Our sadness and anger, however, make us vulnerable to feelings of revenge. Our frustration with the complex problems contributing to violence may make us long for simple solutions.

Such are the circumstances under which we, as the Evangelical Lutheran Church in America, speak to the death penalty. At the request of a number of congregations to synod assemblies, and in response to the memorials of those synods, the 1989 Churchwide Assembly placed the issue of the death penalty on the church's social agenda. Discussions on the death penalty then took place in local churches and at synodical and regional hearings.

Points of View

Members of the Evangelical Lutheran Church in America have different points of view with regard to social issues.² While the Spirit makes us one in our *faith* in the

Gospel, we can and do vary in our *responses to the Gospel*.

While we all look to the Word of God and bring our reason to the death penalty issue, we can and do assess it with some diversity. Social statements of our church do not intend to end such diversity by 'binding' members to a particular position.³ Social statements acknowledge diversity and address members in their Christian freedom.

This church has not finished its deliberation on the death penalty. Members of the Evangelical Lutheran Church in America continue the deliberation, upholding together the authority of Scripture, creeds, and confessions; the value of God-given life; and the commitment to serve God's justice. Members continue their discussion, knowing they have in common the goals of justice, peace, and order.

As a church united in resistance to hate (Luke 6:27), we minister to an often vengeful society. As a Church united in joy over the good news of God's healing grace, we minister to a battered society. As a church heeding the call to do justice (Jeremiah 22:3), we minister to a broken society. As a church united for mission, we organize for ministries of restoration.

An Affirmation

On the basis of Scripture and the Lutheran Confessions we hold that, through the divine activity of the Law, God preserves creation, orders society, and promotes justice in a broken world. God works through the state and other structures of society necessary for life in the present age.⁴

The state is responsible under God for the protection of its citizens and the maintenance of justice and public order. God entrusts the state with power to take human life when failure to do so constitutes a clear danger to society.

However, this does not mean that governments have an unlimited right to take life. Nor does it mean that governments must punish crime by death. We increasingly question whether the death penalty has been and can be administered justly.

Ministries of Restoration

Lutheran theological tradition has maintained that society is ruled by the Law and is influenced and nourished by the Gospel. Renewed by the Gospel, Christians, as salt of the earth (Matthew 5:13)⁵ and light of the world (Matthew 5:14),⁶ are called to respond to violent crime in the restorative way taught by Jesus (Matthew 5:38-39)⁷ and shown by his actions (John 8:3-11).⁸

For the Evangelical Lutheran Church in America, following Jesus leads to a commitment to restorative justice. This commitment means addressing the hurt of each person whose life has been touched by violent crime. Restorative justice makes the community safer for all.

It is because of this church's ministry with and to people affected by violent crime that we oppose the death penalty. Executions focus on the convicted murderer, providing very little for the victim's family or anyone else whose life has been touched by the crime. Capital punishment focuses on retribution, sometimes reflecting a spirit of vengeance. Executions do not restore broken society and can actually work counter to restoration.

This church recognizes the need to protect society from people who endanger that society: removing offenders from the general population, placing them in a secure facility, and denying them the possibility of committing further crime (i.e., incapacitating them). Our challenge is to incapacitate offenders in a manner that limits violence, and holds open the possibility of conversion and restoration.

Doing Justice

Christians live in anticipation of the day when "justice roll[s] down like waters, and righteousness like an ever flowing stream" (Amos 5:24). In the meantime, God holds governments accountable to ensure justice. In a democracy, where government is by the people, justice is the responsibility of all citizens.

Violent crime is, in part, a reminder of human failure to ensure justice for all members of society.⁹ People often respond to violent crime as though it were exclusively a matter of the criminal's individual failure. The death penalty exacts and symbolizes the ultimate personal retribution.

Yet, capital punishment makes no provable impact on the breeding grounds of violent crime.¹⁰ Executions harm society by mirroring and reinforcing existing injustice. The death penalty distracts us from our work toward a just society. It deforms our response to violence at the individual, familial, institutional, and systemic levels. It perpetuates cycles of violence.

It is because of this church's commitment to justice that we oppose the death penalty. Lutheran Christians have called for an assault on the root causes of violent crime,¹¹ an assault for which executions are no substitute. The ongoing controversy surrounding the death penalty shows the weaknesses of its justifications. We would be a better society by joining the many nations that have already abolished capital punishment.

Executions in the United States

Despite attempts to provide legal safeguards, the death penalty has not been and cannot be made fair. The race of the victim plays a role in who is sentenced to death and who is sentenced to life imprisonment,¹² as do the gender, race, mental capacity, age, and affluence of the accused. The system cannot be made perfect, for biases, prejudices, and chance affect whom we charge with a capital crime, what verdict we reach, and whether appeals will be successful.

Since human beings are fallible, the innocent have been executed in the past and will inevitably be executed in the future. Death is a different punishment from any other; the execution of an innocent person is a mistake we cannot correct.

It is because of this church's concern regarding the actual use of the death penalty that we oppose its imposition. The practice of the death penalty undermines any possible moral message we might want to 'send.' It is not fair and fails to make society better or safer. The message conveyed by an execution, reflected in the attention it receives from the public, is one of brutality and violence.¹³

Commitments of This Church

As a community gathered in faith, as a community dispersed in daily life, as a community of moral deliberation, and as a church body organized for mission, this church directs its attention to violent crime and the people whose lives have been touched by it.

As a community gathered in faith:

- we welcome victims of violent crime and their families, standing with them and for them during their times of grief and anger;
- we welcome offenders and their families, supporting them in their recovery;
- we welcome partnership with faith communities within the correctional system, joining them in ministries of restoration;
- we welcome people who work in criminal justice and their families, recognizing the special burden that accompanies such work.

As a community dispersed in daily life:

- we continue to offer ministries of healing and reconciliation to victims of violent crime, to families of victims, and to neighborhoods that have experienced violence;

- we recognize and affirm ministries by those who, in word and action, announce the good news to the imprisoned and their families;
- we encourage the ministries conducted by people through their work in the criminal justice system;
- we seek further opportunity to serve people caught in cycles of violence, and call for training to respond to the fear and anger of individuals, families, and society.

As a community of moral deliberation:

- we invite and encourage moral deliberation on the causes and effects of criminal behavior, the function of punishment, and the role of the criminal justice system—a deliberation grounded in Scripture and informed by reason and knowledge, including the social sciences;
- we shall discuss criminal justice in connection with other issues of concern to this church, such as racism, poverty, abuse, and chemical dependency;
- we ask that available resource materials be distributed, and that a resource specific to the present statement be developed, printed, and distributed.

As a church organized for mission:

- we recognize that the government bears responsibility for protecting people, and give it our support in the exercise of this function;
- we commend public officials, and others, who shape the vision of a just society and work toward it;
- we know the Church is called by God to be a creative critic of the social order, and to speak on behalf of justice, peace, and order;
- we urge the abolition of the death penalty, and support alternative and appropriate punishment for capital crime, including the possibility of life sentence without parole;
- we call for an ongoing reform of the criminal justice system, seeking means of incapacitation that protect citizens while limiting violence and holding open the possibilities for conversion and restoration, and for education for future responsible citizenship in society;
- we direct state public policy offices and the Lutheran Office for Governmental

Affairs to work against the death penalty and for alternative and appropriate punishment for capital crime, such as imprisonment for natural life;

- we ask congregations, synods, agencies, and institutions of this church to support the work of state advocacy offices and the Lutheran Office for Governmental Affairs in effecting the abolition of the death penalty;
- we seek ways to work with our ecumenical partners, with other faith groups, and with other organizations with similar goals.

NOTES

1. Social practice statements “focus on policy guidelines for the ELCA’s responsibility in society. They are especially important in defining and developing priorities and directives for this church’s advocacy and corporate social responsibility practices. In their use as teaching documents, their authority is persuasive, not coercive” (“Social Statements in the Evangelical Lutheran Church in America,” adopted by the 1989 Churchwide Assembly).

2. The following are issues reviewed during churchwide deliberation on the death penalty. They are offered here as a summary of points of view presented in the course of developing this statement. Members of the Evangelical Lutheran Church in America should be aware of them and may find some of them helpful for further discussion.

In Favor of the Death Penalty

Those who support the use of the death penalty often do so on the basis of Scripture, especially “you shall give life for life” (Exodus 21:23b) and “let every person be subject to the governing authorities ... for the authority does not bear the sword in vain” (Romans 13:1-7; cf., 1 Peter 2:13-14).

Proponents of the death penalty remind us that the Lutheran tradition has stressed the scriptural distinction between Law and Gospel, maintaining the right of the state under the realm of Law to punish evildoers.

Those who would retain the death penalty testify to the value of the life God has given and the murderer has taken; they assert the value of the victim’s life by demanding the offender’s death.

Supporters of the death penalty feel it makes society safer by permanently incapacitating convicted murderers.

Proponents argue that states have written death penalty statutes limiting the risk of error and meeting standards set by the United States Supreme Court.

Advocates of the death penalty claim it to have a deterrent effect, causing would be murderers to hesitate before taking actions that could result in the loss of their own lives.

In Opposition to the Death Penalty

Those who oppose the death penalty often do so on the basis of Scripture, arguing that Jesus in his teaching abolished the death penalty in the Law (Matthew 5:38-39, assuming the Sermon on the Mount applies not only to Christians but to all peoples) and by example (John 8:3-11).

Opponents of the death penalty note from Scripture and the confessions that God ordained government for the sake of good order, and oppose a practice they believe to be violent, unjust, and, therefore, contrary to good order.

Those who would abolish the death penalty observe that executions violate the sanctity of the offender's life, which God has given and which God values despite the repulsiveness of what the offender has done.

Opponents claim the state need not implement the death penalty to incapacitate safely those who threaten society, as attested by the international movement away from the death penalty and toward alternative and effective means of incapacitation.

Those who would abolish the death penalty assert that it continues to fall disproportionately upon those least able to defend themselves, and to run the risk of an irreparable mistake.

Arguing against the death penalty, people point to the unlikelihood of proving that the death penalty has a deterrent effect, and note that executions contribute to a climate of vindictiveness and violence.

3. For more on social statements, see "Social Statements in the Evangelical Lutheran Church in America" (full reference at note 1).

4. "The Church in Society: A Lutheran Perspective," adopted by the 1991 Churchwide Assembly.

5. "You are the salt of the earth; but if salt has lost its taste, how can its saltiness be restored? It is no longer good for anything, but is thrown out and trampled under foot."

6. "You are the light of the world. A city built on a hill cannot be hid."

7. "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also. . . ."

8. The scribes and the Pharisees brought a woman who had been caught in the act of adultery; and making her stand before all of them, they said to him, "Teacher, this woman was caught in the very act of committing adultery. Now in the Law Moses commanded us to stone such women. Now what do you say?" They said this to test him, so that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. When they kept on questioning him, he straightened up and said to them, "Let anyone among you who is without sin be the first to throw a stone at her." And once again he bent down and wrote on the ground. When they heard it, they went away, one by one, beginning with the elders; and Jesus was left alone with the woman standing before him. Jesus straightened up and said to her, "Woman, where are they? Has no one condemned you?" She said, "No one, sir." And Jesus said, "Neither do I condemn you. Go your way, and from now on do not sin again." (On restoration, see also Matthew 5:(21-22) 23-24; Romans 12:19-21; 1 Thessalonians 5:15; 1 Peter 2:23.)

9. "In Pursuit of Justice and Dignity: Society, the Offender, and Systems of Correction," adopted by the Lutheran Church in America (1972).

10. The body of research on deterrent effect indicates, at best, conflicting evidence. Many proponents of the death penalty have abandoned the deterrence theory altogether, and argue for the death penalty on the basis of incapacitation or just retribution. Many opponents claim the death penalty stimulates crime, a claim for which there is also conflicting evidence.

11. "Capital Punishment," adopted by the Lutheran Church in America (1966) urged "the continued development of a massive assault on those social conditions, which breed hostility toward society and disrespect for the law." "Capital Punishment," adopted by The American Lutheran Church (1972) called for "the correction of conditions, which contribute to crime."

12. The United States Supreme Court, in *McCleskey v. Kemp* (1987), acknowledged the findings of the David Baldus study in Georgia, which showed that the murderer of a white victim was more likely to receive a death sentence than the murderer of an African American. The implication—that a white life is considered more valuable than an African American life in the criminal justice system—has been of concern to the United States Congress in the drafting of racial justice legislation.

13. William J. Bowers and Glen J. Pierce, "Deterrence or Brutalization: What is the Effect of Executions?" in *Crime and Delinquency* 26 (1980), 453-484.

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COMMISSIONER

DEPARTMENT OF CORRECTIONS

SENATE JUDICIARY COMMITTEE
PUBLIC HEARING ON OVERCROWDING

MAY 26, 1992

Since the early 1980's, New Jersey has paralleled the national experience, recording unprecedented increases in its prison population. The size of any prison population is dictated by two factors - how many offenders come in (admission volume) and how long they remain in custody (length of stay). In turn, these factors are governed by variables like crime rates, population demographics and policy initiatives. Of these, it can safely be concluded from available data that policy initiatives reflected in specific legislative enactments have been the driving force behind the surge in New Jersey's inmate population. These legislative enactments include:

Title 2C (1979)

This major reorganization of New Jersey's Code of Criminal Justice focused its sentencing provisions on the punishment philosophy of just deserts and presumptive sentencing. It provided for the imposition of mandatory incarcerative sentences and mandatory minimum terms of imprisonment. The code increased both admissions to the Department of Corrections and inmate length of stay.

Parole Act (1980)

Established parole eligibility time schedules for indeterminate commitments. Increased length of stay for those affected.

Graves Firearms Act (1982)

Provided for mandatory incarceration and mandatory minimum terms of imprisonment for carrying a firearm during the commission of a crime. Increased admissions and length of stay.

Capital Sentence Law (1985)

Provided for mandatory minimum terms of 30 years for murderers who are not sentenced to death. Increased length of stay.

Parole Violator Enhancements (1986)

Increased length of stay for parole violators sentenced for new crimes committed while on parole.

Comprehensive Drug Reform Act - CDRA (1987)

Revised the state's drug laws while creating new first degree crimes and providing for mandatory minimum terms. Increased admissions and length of stay.

New Jersey's state sentenced adult jurisdictional inmate population grew from a total of 5,886 in January 1981 to a count of 23,301 in May 1992. This represents an average increase of approximately 1,600 inmates per year or 130 additional inmates per month for 136 consecutive months. During this same time period, the Department added over 8,600 beds at its secure facilities in an aggressive construction and renovation campaign. However, growth in the secure facility population (12,600 additional inmates) exceeded capacity expansion (8,600 beds) by four thousand. These 4,000 additional inmates have largely been accommodated by double

bunking and other emergency measures that resulted in inmates being placed in areas never intended for housing use.

In addition to our efforts to increase space in state facilities as reflected above, additional programs and housing arrangements have been pursued to cope with the ongoing overcrowding problem. Programs such as halfway houses, ISP, ISSP and Electronic Monitoring/Home Confinement have been utilized. Despite these measures, the back-up in county jails of state sentenced adult offenders has increased from 200 in 1981 to over 3,200. Notwithstanding the Department's aggressive pursuit of capital expansion, use of diversion programs and reliance on space in county jails, we still are operating state facilities at an aggregate level of 132% of design capacity.

The Department of Corrections is not just responsible for inmates. Parole offenders who are supervised in the community are also under the jurisdiction of the Department. Discussions of overcrowding often overlook this group of offenders because housing is not usually at issue. However, increases in the parole population have been no less dramatic than that of inmates. Between 1981 and 1992, this caseload has grown from 9,000 to 27,000, an increase averaging 1,600 per year and 130 per month, virtually the same rate of growth seen in the inmate population.

It would be a pleasure to say that the worst of this growth is behind us. There are some encouraging signs such as a leveling of new indictable complaints filed, increased

prosecutorial screening of cases, increased parole release rates, etc, which could yield much lower growth in the inmate population 18 to 36 months down the road. However, it would be unrealistic to expect a dramatic change in our situation in the immediate future. Even if growth in the inmate population stopped today, we would still need another 5,000 to 6,000 additional bedspaces or program slots to accommodate the more than 23,000 inmates currently under the Department's jurisdiction.

The accompanying document, Correctional Population Growth and Characteristics - 1975 to 1992, provides a more detailed description of inmate population growth as experienced in New Jersey. I trust that you will find the information helpful. I would be pleased to respond to any questions that you may have.

Testimony Before the Senate Judiciary Committee on
Prison Overcrowding
May 26, 1992

My name is Karen A. Spinner and I am Director of Public Education and Policy for the New Jersey Association on Correction. The Association is a state-wide citizens group which is concerned about the enormous fiscal, social and humane costs of the criminal justice and corrections systems in New Jersey.

Prison overcrowding on a significant level has been a fact of life since the implementation of the 2C Code in 1979. A response to the perception that criminals are getting off lightly and only serving a tiny portion of their sentences, the 2C Code swung heavily in the opposite direction - moving the focus from the individual who broke the law to the kind of crime committed. Discretion on the part of judges was limited. Mandatory sentences began to fill up available prison spaces. Governor Byrne declared a state ~~inmate~~. New prison facilities were opened. Still the overcrowding continued. The Intensive Supervision Program was initiated. Community service became a popular sanctioning tool for adult offenders. But the prison population continued to rise with no end in sight.

County officials are fed up with bearing the burden of state inmates. They have suffered the brunt of the overcrowding crisis. Even with the bond money which enabled them to build new jails or significant additions to their existing facilities, they have shouldered the bulk to the overcrowding crisis with rates in some counties exceeding 200-300% of rated capacity. At the very worst, state prison facilities have not exceeded 130-140% of capacity.

How do we deal with a prison overcrowding crisis which is fueled more by changes in the law than in the level of crime? Our crime rate has remained relatively stable while the level of incarceration has escalated beyond any rational level of control. Study after study has indicated that there needs to be a reconsideration of mandatory sentencing statutes and parole ineligibility stipulations. It is time to systematically review the 2C Code.

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The Association wholeheartedly endorses a commission to review the sentencing structure in New Jersey. In keeping with the Judicial Conference on Sanctioning's Report, it is essential that the community be involved in this process. As experienced practitioners in the area of community based corrections, the Association would like to take part in this process of reviewing and shaping criminal justice policy for the 21st Century.

It is clear that we cannot build our way out of this overcrowding crisis. There are, however, some options that might be considered. One of the first is a review of the somewhat artificial distinction between state and county prisoners. All state prisoners were at one time the responsibility of the county. Perhaps, there was a time when it made sense to run parallel correctional systems. The time may have come when it is appropriate to allow the state to operate all penal facilities. The county could then contract with the state to house those alleged criminals who could not make bail. Counties could be given incentives to develop programs such as day reporting centers and house arrest with electronic monitoring to minimize the number of cells required for people who are too poor or lack supportive community ties to make bail on a conventional basis. Likewise, the kinds of offenders generally sentenced to county jail terms are appropriate for sanctions in the community. In addition to those mentioned above, these offenders could be given sentences of supervised community service, day fines, community restitution centers, or intensive supervision probation.

Offenders whose crimes do not cause physical harm to their victims or the community should be allowed to remain in the community. A high level of social control should be exerted over them. We must work to design punishments that hold the offender accountable, return something either to the victim or the community (restitution or community service) and enable the offender to be reconciled to society after the punishment experience. Costly incarceration should be the punishment of last resort.

If an offender has an identifiable substance abuse history, this problem should be addressed as part of the sanctioning process. As Commissioner Fauver has stated on numerous occasions, a person should not have to come to jail to get treatment. There is a growing body of literature which suggests that even coerced treatment has a benefit. But treatment goals cannot be subjugated to the goals of an artificial prison environment.

With respect to state correctional facilities, there must be a means of making the time individuals serve productive both for them as individuals and for society. The concept of units of punishment which the Sentencing Pathfinders Committee has discussed could be utilized to move people down through the levels of societal control from complete incarceration to serving time in the community. Adequate resources must be diverted to the level of community based sanctions if they are to work.

There will always be the need for some level of incarceration because some offenders are just too dangerous to live among us. However, the Association believes that it is inadvisable to launch into building new facilities at this time unless there is a concomitant commitment to devise intermediate sanctions and to close down inadequate facilities as the demand for incarceration lessens due to increased utilization of intermediate sanctions.

Overcrowding in our prisons cannot be resolved by pointing fingers, by saying "we tried it before and it didn't work", by locking them up and throwing away the key but by people working together to provide some rationality in sentencing and in punishment options.

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STATEMENT OF THE ATTORNEY GENERAL PRISON POPULATION GROWTH

There are few, if any, problems confronting our Criminal Justice system that are more acute than the burgeoning prison population in this State. There are undoubtedly many factors which have contributed to this growth; similarly, many avenues need to be explored for possible solutions. The need to find solutions has never been more pressing. With a recent Appellate Court decision, the State has been given a deadline requiring it to confront more directly the problem of State inmates housed in county institutions. While this case is still in the courts -- we are seeking review by the State Supreme Court -- it nevertheless points up the continuing nature of the problem and the increasing pressures upon us to come up with both short- and long-term solutions.

A recent study by the Department of Corrections points to some areas that seem to be heavy contributors to growth. In 1975, before the enactment of Title 2C and the Comprehensive Drug Reform Act, our adult inmate population was 5,600. In 1980, it grew slightly to 5,900. In 1982, significant growth could be seen as the adult inmate population grew to 7,900. By 1987, it was 14,300 and today it stands at nearly 23,000.

From the corrections viewpoint, population growth occurs whenever the number of incoming, newly sentenced prisoners exceeds the number of prisoners released from the system, either on parole or at the conclusion of service of the maximum sentence. The former number is referred to as the admissions rate; the latter number is referred to as the discharge rate. In New Jersey, the admissions rate at the State level has far exceeded the discharge rate for over a decade.

As a practical matter, the discharge rate represents the amount of beds presently available in the system to house newly sentenced prisoners. The problem is to provide beds for those prisoners who represent the extent to which the admissions rate exceeds the discharge rate. There are only two sources of bed space to house this category of prisoners. The first source is construction of new prison beds. The second source is to convert existing space within a prison into bed space.

As it stands now, the amount of monies remaining for new prison construction is insufficient to accommodate the number of State prisoners now backlogged in the county jails. As to the conversion of prison space into bed space, the Department of Corrections has for over a decade relied to a great extent on converting hallways, day room space, gymnasiums, classrooms and the like into bed space.

Corrections managers need extra bed space to handle the ebb and flow of population generated by the criminal justice process or to handle exigencies created by the risks inherent in the operations of a prison, which cannot be eliminated, but only minimized. For example, a local county facility needs extra bed space to accommodate large numbers of arrests due to a civil disorder, or a drug sweep, or any other organized law enforcement effort. All correctional facilities need to be able to adapt to the loss (or threat of loss) of beds due to prison rioting, adverse weather conditions (e.g. hurricane) and the like.

Before population growth became a national phenomenon, it was a rule of thumb of corrections managers that a facility should be operated at 90-95 percent of its available bed space. The unused beds, the so-called swing space, provided a safety valve which enable corrections managers to

handle the risk-of-business problems described above. This bed space was not to be used to accommodate regular admissions.

Corrections managers throughout this country have had to give up "swing space" in their facilities because of growing populations. In New Jersey, when swing space was lost at State and county facilities because of population growth, the State system took on the safety valve function for all State and county facilities. Thus, the Department of Corrections has a policy of taking from the counties any State prisoner who is a management problem, or State prisoners from counties whenever feasible so that it can better manage its own county population. Prisoners with special medical needs are always taken in from the counties and prisoners are transferred from counties in large quantities in order to avert, minimize or as a consequence of, a prison disturbance.

While a good corrections manager will forgo swing space for an effective safety valve substitute, prison managers encounter a significant downside when conversion beds are used to perform the safety valve function of swing space. The first space to get converted is typically programmatic space (i.e., gyms, school rooms, infirmaries, outdoor recreational yards and the like). From a management standpoint, it is easier to keep the peace if these services are not interrupted or eliminated. This is particularly so at the state level. - -

In normal times, a county jail confines either a pretrial detainee or a county-sentenced prisoner who will serve at most 90 days. The pretrial detainee is motivated not to act out because, if caught, the judge will know about it at the time of sentence. The county-sentenced prisoner only serves 90 days. He is highly motivated not to act out; his main interest is serving his time and getting paroled at first eligibility

which occurs over 90 percent of the time.) Thus, the transient nature of county jail populations is always a management advantage because, among other things, county inmates typically do not have an interest in getting organized sufficiently to challenge the authority of management. Indeed, most county jails never offered much in the way of programming and still do not.

At the State level, however, inmates are confined for 30 years, 10 years, or some other substantial period until they are paroled. An inmate's length of stay in a State facility, let alone in the system, is so long that the tendency to organize and challenge the authority of management is that much greater. Apart from their intrinsic benefits (e.g., skilled training, physical fitness, education, rehabilitation, programs tend to dampen this organizational, anti-establishment tendency. Thus, the reduction or denial of programming in a State facility virtually invites an inmate challenge to managerial control of the facility.

The Department of Corrections has always used conversion beds to perform the swing space function for the county and State facilities. Conversion beds are necessarily limited, although I cannot quantify for you how much space there is in the system available to be converted and how many beds that would yield. I know for certain, however, that there are far less conversion options available today than there were even a year ago. As difficult a problem conversion represents to State Corrections Managers, DOC is still willing to do it because the safety valve function formerly served by swing space is, simply, vital to effective corrections management. No corrections manager would operate a facility or a system with the knowledge that he has no meaningful ability to handle fluctuations in average daily population generated by risk-of-business problems.

Without a safety valve, it is not a question of whether a manager will lose control of a facility, but when.

We have now reached the point where hard decisions must be made. The State's prison construction program is, for all practical purposes, completed. The monies remaining for construction are insufficient to house the number of State prisoners now backlogged in county jails. The admissions rate of State prisoners continues to far outpace the discharge rate. Conversion beds are now the only source of beds currently available to house excess prisoners. Thus, the safety valve function conversion beds served is now being displaced by the pressing need of the Department of Corrections to handle regular admissions. The safety valve capacity of the corrections infrastructure is being lost. Something must be done, and done now, either to expand our prison and jail capacity, or to align the rate of admissions of new prisoners with the rate of prison discharges.

In approaching the problem of prison population growth, we must look to both short-term and long-term solutions. We must have a comprehensive plan that encompasses both. There are many areas in which components of a comprehensive plan can be found. We must approach this problem from a conceptual framework which recognizes that conscious policy decisions that increase prison intake require commensurate steps to accommodate that increase. These steps can include new construction, earlier release dates and other measures that ease overcrowding.

The primary goal of our Criminal Justice System must continue to be the preservation of public safety. With that in mind, we must not foreclose the option of constructing new prisons. While the capital construction costs of new prisons are significant, especially in these fiscally tough times, there are good and valid reasons for seriously

considering this option. A growing number of scholarly studies indicate that while it may cost approximately \$25,000 per year to keep a criminal behind bars, it costs society much more if that criminal is free to prey upon the public. Further, while we must seriously explore alternative sentencing programs, we must reserve the capacity to incarcerate violent offenders. Intensive supervision programs, while worthwhile in many respects, do not provide a sufficient level of public protection for repeat and violent offenders.

Recent studies have also shown that nearly 75 percent of all of the convicted criminals in this country are not incarcerated. Indeed, fewer than one in ten serious crimes results in imprisonment. To argue from these facts that we are imprisoning too many people and instead should be looking for other ways of dealing with our problem, ignores common sense and undermines our primary purpose of public safety. For these reasons, new construction of prison space must be seriously considered as part of any overall solution to our overcrowding solution.

In addition to considering new prison construction, we should also be looking very seriously at our sentencing policies and practices. The Department of Corrections has information that shows the impact of our sentencing policies upon our prison population. In 1975, drug offenders accounted for 11 percent of our adult inmate population. By January 1 of this year, that figure had grown to 36 percent. Violent offenders who accounted for 64 percent of the population in 1975 now account for 45 percent. The number of inmates serving a mandatory minimum sentence in 1982 was 11 percent. It is now 55 percent.

Of the adults who are serving mandatory minimum sentences, in 1983, three percent of them were serving a mandatory minimum sentence for a

drug-related offense, while 83 percent were in for a violent offense. Today, drug offenders account for 38 percent of the 12,000 inmates who are serving mandatory minimum sentences. Violent offenders constitute 49 percent of that population. Thus, it is demonstrably clear that the passage of Title 2C, the passage of the Comprehensive Drug Reform Act, the Graves Act have had significant impacts on our prison population. A far greater percentage of drug offenders and people serving mandatory minimums exist today than it did before these laws were passed.

To address these issues, we support SJR-18, introduced by Senator Kosco, which would create a Sentencing Policy Study Commission. This Study Commission would review all of the sentencing policies, practices and procedures in our State. Additionally, to ensure that the Criminal Justice System continues to perform its primary role of protecting the public safety, this Commission should explore construction of new prison space as a potential part of an overall comprehensive solution. While I am certainly not in a position to state now that these policies should be abandoned, or even modified, I am convinced, because of their demonstrable impact on growth, that we should explore their impact, their costs and benefits, and then make a policy choice as to whether they should be continued, abandoned or changed. The Sentencing Policy Study Commission should be required to study and review all aspects of our criminal justice and correctional systems with a view toward recommending the most effective and efficient use of our limited public resources in promoting the primary goal of public safety and of achieving the goals of a rational, predictable and uniform sentencing system. Their study should focus upon some of the following areas:

- ° Possible construction of new prisons and jails;
- ° A review of our parole laws and procedures with a view towards streamlining the process;
- ° The use of electronic monitoring in home confinement programs;
- ° The creation of shock incarceration programs in boot camps;
- ° Bail reform measures;
- ° Review of Title 2C mandatory sentencing policies;
- ° Review of the degrees of crimes and the ranges of sentences given therefore;
- ° Possible sentencing reform for repeat third and fourth degree offenders;
- ° Expansion of Halfway House Programs;

Another important function of the Sentencing Policy Study Commission would be to recommend a process through which new legislative initiatives that impact on prison populations would be filtered. Currently, our sentencing laws are changed in a rather piecemeal fashion, with little or no thought given as to their ultimate impact upon prison population. For example, there are now proposals pending which would

create a mandatory minimum term for juvenile offenders convicted of a second auto theft. Another bill would require a mandatory minimum of two years without parole for repeat convictions of assaulting or robbing senior citizens. Yet another bill would impose a mandatory minimum three year prison term for individuals who commit certain offenses while wearing bullet proof vests. Yet another bill would create a mandatory minimum one-year term for defendants who travel to another municipality to purchase controlled dangerous substances. Yet another bill would create a permanent parole ineligibility for all persons convicted of murder. There are dozens of other proposals which impact upon our sentencing scheme and in turn our prison population. Many of these proposals may in fact be good ideas. My only suggestion is that there be some standard screening process so that the impact of these bills upon future prison population growth is determined at the time the bills are passed. We must know the costs involved as well as the benefits.

One question which deserves serious consideration is whether our mandatory minimum sentences, especially in the area of drugs, could be shortened without sacrificing public safety and the deterrent effects of parole ineligibility terms. For example, how much greater is the benefit to society that comes from a three-year mandatory minimum term than from a one-year term? The Sentencing Policy Study Commission should review these issues. Some of the other areas in which we are attempting to address this problem include pilot programs with the County Prosecutor's Association for inmates for individuals who are unable to make bail but who are not deemed a public safety threat. These discussions are under way with the Division of Criminal Justice and various county prosecutors to develop a pilot

program that would utilize electronic monitoring for certain individuals unable to make bail.

Additionally, we are working with the Department of Corrections and the Administrative Office of the Courts to develop viable intermediate sanctioning programs. We have undertaken, along with the Commissioner of Corrections, to work with the Parole Board in an attempt to streamline their practices and procedures, although this is an area that should also be explored by the Commission.

We have expanded community policing funding through our Federal Grant Program in an effort to deter crime. We have seen a decline in drug-related arrests from its high-water mark a few years ago and we believe some of that decrease is the result of the deterrent effect of community policing programs in some of our urban areas.

We are also continuing, in the longer term, with education efforts such as the D.A.R.E. Program that involves law enforcement officers in demand-side efforts.

In conjunction with the federal government, we are currently exploring the feasibility of lifting some of the federal court orders in effect of some of our county jails. This is an area in which the federal government has indicated it would be willing to work with the various dates.

We must also expand treatment programs for incarcerated individuals so that they will not return to a life of crime upon their release.

As you can see, the problem of prison population growth in this State is multifaceted and extremely complex. It must be dealt with on a variety of levels at the same time.

PEOPLE UNITED FOR BAIL LIMITATIONS, IMPROVEMENTS AND CONTROL

Presentation To

The New Jersey Senate Judiciary Committee

May 26, 1992

Presented By

**Sheldon Kamm
Executive Committee Member
PUBLIC**

Introduction

Chairman and members of the committee, I would like to thank you for the opportunity to speak with you today. My name is Sheldon Kamm, and I come before you today as a member of PUBLIC, People United for Bail Limitations, Improvements, and Control. PUBLIC is a non partisan coalition of state residents, public officials and business associations whose purpose is to improve bail procedures in New Jersey courts on the municipal and county level, through the alleviation of the ten percent cash bail option. The organization is coordinated by an executive committee of five members, consisting of a former city police chief, a member of the professional bail industry (myself) and three other New Jersey residents.

According to statistics released by the Administrative Office of the Courts (AOC), New Jersey maintains a consistent fugitive rate of more than 50% (Attachments A and B). This means that in more than half of all pending criminal cases in this state, the defendants have fled prosecution. In addition to the mockery this makes of our judicial system, this situation also provides serious safety and economic concerns to the residents of the state. Therefore, we have focused our efforts on eliminating the elements of the judicial process which contribute to this problem, in order to restore the integrity of our criminal justice system.

We believe that the ten percent option is the primary culprit with regard to the fugitive situation, and that it has become an unfair burden to the taxpayers of this state while providing a revolving door for criminals. Therefore, PUBLIC has embarked upon a campaign to raise the awareness of the existence of the ten percent bail option and of its shortcomings. It is believed that New Jersey taxpayers will unilaterally support legislation or administrative action to eliminate the use of this option, once they become educated to the facts regarding the issue.

Jail Overcrowding and the 10% Bail Option

The reason I have come before this committee today is that most county criminal systems have continuously increased their use of the 10% option in the mistaken belief that it helps to prevent jail overcrowding. As most of you are aware, the ten percent option was initiated in 1973 by an administrative directive from the office of the chief justice of the New Jersey State Supreme Court, as a means of relief for overcrowded prisons.

Its original intent was to alleviate overcrowding in local jails by allowing low risk defendants, who could not afford bail stipulations, to be released after posting a percentage of their original bail. Should the defendant fail to appear for the designated court date, he or she would forfeit the full amount of the bail and be required to pay the remaining 90% to the court. Initially, this option was to be made available to local residents involved in non-violent and non-drug related crimes, who posed a relatively low risk of flight from prosecution.

Today, however, the option has been allowed almost universally. With the exception of murder cases, many defendants accused of violent, sex and drug-related crimes are allowed to post only 10% of their bail and are released. Although it is the sole decision of each judge presiding over a given case, the issuance of the ten percent option has been increasingly encouraged during the past ten years. Citing the problem of an overcrowded prison system, officials have sought to utilize the ten percent option as one of several programs geared towards depopulating jails.

Ironically, even when the fugitives are reapprehended, the county courts have never collected the other 90% of the bail promised by the defendants. Even worse, most are usually re-released, again, on 10% bail. In addition to never collecting the full bail amounts promised by those defendants who flee prosecution, the courts incur numerous costs due to bail jumpers, which are ultimately incurred by New Jersey taxpayers. State taxpayers also foot the bill for law enforcement officials to reapprehend these criminals.

Yet, the most disturbing aspect of this situation is that no one has even reviewed the 10% bail program in this state during the past 18 years, either to evaluate its effectiveness or to determine any resulting problems. There has never been a study of whether the option has indeed provided any relief for the jail system, nor has anyone ever considered the side-effects of such an action.

It is important to remember, that when this program was initiated, no new jails had been constructed in this state for a number of years. The option, in its original intent, was seen as a short-term relief valve that could buy the counties time to construct new facilities. No provision or consideration was made for an analysis of the long term impact. And today, with the 10% option in full swing for the past 19 years, we are still faced with the crisis of prison overcrowding -- but with one new exception -- According to the AOC, approximately 26,000 fugitive cases now exist in the New Jersey court system on a yearly basis.

Issues for Concern and Consideration

Chairman, and members of the committee, it is important for me to underscore the fact that PUBLIC views jail overcrowding as a real and serious situation. The conditions of our prisons are deplorable, and the criminal justice system cannot effectively operate if there are no facilities to house convicted individuals, nor any other systems in place to deal with this situation. However, too often, many involved with this issue have used "jail overcrowding" as a catchall reason for the continuance of such programs as the 10% Cash Option, which usurp the state judicial system. PUBLIC is concerned that the renewed emphasis and focus on jail overcrowding may result in the expansion of such programs or the introduction of new, possibly even worse alternatives.

In dealing with the state's jail overcrowding problem, we cannot view the solutions as an either or situation. We should not and cannot view bursting prison cells as a bristling example of effective law enforcement. Yet, we cannot accept the high fugitive rate as an affordable and necessary evil if we are to alleviate jail overcrowding. We have already done that for the past 18 years and now we have at least two major problems instead of one -- and we never solved the first.

It is important for all members of the state's governments, judicial system and law enforcement community, to view jail overcrowding and related issues as a whole -- and not consider actions in a vacuum. Therefore, in addressing the exploding prison populations in New Jersey, we suggest that this committee consider a number of factors:

- 1) The apprehending and detention of criminals is not an option. If a crime is committed, the criminal or suspect must be apprehended and detained for trial, unless a bail can be posted which assures the defendants return. In practice, pre-trial options such as the 10% option are tantamount to ignoring the crime -- especially since many who already fled on 10%, are again released on 10% if and when they are reapprehended.

During the course of procedure, we have a tendency to forget that the purpose is more than simply "processing" defendants through the system. We cannot let criminals run free simply due to overcrowded jails. If fear of jail overcrowding is the reason for establishing and perpetuating such things as the 10% option, then why arrest criminals at all. Any program that is developed to address the overcrowding situation must include all aspects of the judicial system in its consideration. The whole purpose of law enforcement must not be usurped.

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- 2) It is necessary to view prison populations in less general terms. We need to separate the prison populations between pretrial and sentenced inmates, and need to define overcrowding conditions in terms of state and county issues, in order to effectively address the problem.

For example, the overcrowding of state facilities is probably one of the worst problems. It is so bad, in fact, that the overflow of inmates into local prisons has compounded the problems faced by the county facilities. This is especially true in such counties as Passaic and Bergen, where the state inmates, prior to the recent court order, comprised approximately 25% of the total prison population (Attachment C).

Yet, the number of state inmates is not going to be affected by any system addressing pre-trial release at the county level. The state prison system has to be viewed and addressed as a separate issue. Although similar solutions may be applied on both the state and county level, they should be applied separately.

On the county level, a differentiation between pretrial inmates and those sentenced would also help officials to gain a better grasp of the situation and of potential solutions. In most instances, counties far exceed their capacity on sentenced inmates alone. According to information released by the AOC, county prisons are, on the average, 147% overcrowded (Attachment C). Even if pretrial averages reached 25% of the total populations (which is not likely), all of the county jails face tremendous problems with their over-capacity sentenced populations.

- 3) One possible option in alleviating the overcrowding situation is to review and revise sentencing practices. Monitoring programs or even community service programs may be more fit for some cases. I would warn, however, that the system cannot afford to expand programs that release drug offenders and violent criminals into society.

Although monitoring programs may be possible with sentenced inmates, I would also warn against its broad use in pretrial cases. In addition to the expense and difficult coordination involved in such an endeavor, such a system would provide no safety valve for society. In the case of sentenced inmates, there is at least enough information that can be compiled for review before release into the program. However, during pretrial, the time for a thorough examination of the case is not available. It is necessary to secure other forms of assurance for the defendants return for trial.

- 4) Although one solution to the jail overcrowding issue is politically unpalatable and highly controversial, sometimes we just have to face the fact that this state needs to build new jails. Public officials will no doubt face strong opposition due to cost and location, but the situation demands that such steps are taken.

Despite the variety of pretrial options and furlough programs that this committee or other officials can devise and recommend, the population figures themselves indicate the need for expanded facilities. County facilities are presently holding almost 19,000 state and county inmates, and there is no additional jail space. This, in view of the other estimated 26,000 fugitives who should also be incarcerated, illustrates the need for additional jails.

- 5) This committee should also review ways to alleviate jail overcrowding at the pretrial level, however, any solution must still ensure the return of criminal defendants for trial.

I must again underscore the fact that the 10% option, no matter how popular, does not contribute positively to either the fugitive situation or towards alleviating jail overcrowding. I believe that, once the 10% option is eliminated, this state will realize that the option, in fact, has contributed nothing to decrease the overcrowding situation.

For example, in Bergen County, the court system generally releases fewer percentages of pre-trial defendants on 10% bail than the courts in such counties as Passaic, Morris and Union. Yet Bergen County has no more or less of a jail overcrowding problem than the other three counties.

According to the AOC, the percentage of overcrowding at the Bergen County Jail is 233%, compared to 366% in Passaic, 203% in Morris, and 217% in Union. On a percentage basis, Bergen's state inmate population also far exceeds that of Morris and Union, and is even with that of Passaic (Attachment C).

However, it is important to note that Bergen's average fugitive rate is consistently and significantly less than the other counties indicated. According to statistics released by the AOC in November of 1991, Bergen's fugitive rate was only 6%, compared to 62% in Morris, 33% in Passaic, and 54% in Union (Attachment A).

In some instances, the 10% option and other pretrial practices have actually contributed to the jail overcrowding problem.

- * Many pretrial defendants, especially those career criminals, know and understand that if they wait long enough in the cell, their bail will be continuously lowered to the point where they will be able to meet the bail. Most who do not get the 10% bail option on the first shot, hang out and wait a week or even two -- knowing they will eventually get out. If there was no ten percent, these people would look for other ways to be released, at a price which will help ensure their return.
- * In reality, under the 10% program, a \$10,000 bail is in fact a \$1,000 bail. The problem is that the defendant needs to place cash in order to be released. This often limits a defendants options in gaining release.

Why don't we set the bails at adequate levels, with no false figures, and allow defendants a full range of options, such as cash, property bond or surety bond, through which supervision will be involved. Here, the defendant is able to be released much faster and easier, while society is protected by some form of supervision. This will especially help those defendants who presently cannot obtain release, even on 10%. Since 10% requires cash, and will not allow bail bonds or property bond as a form of release, most defendants remain in jail until their trial or until the bail is reduced even further.

- 6) Another option to consider at the pretrial level is to encourage the establishment of realistic bails. Over the years, there has been a steady trend of higher bails. Those within the judicial system must continue to re-educate themselves to the fact that bail amounts are not a punishment, but simply a security deposit to ensure the return of the defendant.

In some instances, this has caused defendants to remain in prison indefinitely. In other cases, the higher bails have simply served as a shell game -- where the public is provided a false sense of security, while, in reality, the defendant has been released on a 10% Option.

In other instances, amounts are so high that defendants cannot make the bail even with the 10% Option. Since cash is required, and other forms of bail are not allowed, many defendants cannot even afford the reduced bail.

If the 10% bond option were eliminated, and the bails became more realistic, we would be able to release more pretrial defendants through expanding the bail options. The key, of course, is that we would still ensure defendant supervision and return for trial.

Again -- I want to say that we of PUBLIC understand and realize the severity of the jail overcrowding issue in this state. It is an issue that must be addressed, immediately.

Yet, the safety of our citizens and the cost to taxpayers must also be considered. We cannot perpetuate systems, such as the 10% bail option, which usurp the judicial system. Yes, overcrowding is an issue, but let's not continue to compound that problems by enlarging the fugitive rate and the potential danger to society.

Thank you.

ATTACHMENT A

1991/1992
Analysis Of Fugitive Cases In Relation To Pending Cases

<u>COUNTY</u>	<u>NO. OF PENDING CRIMINAL CASES*</u>	<u>NO. OF FUGITIVE CASES*</u>	<u>PERCENTAGE OF PENDING CRIMINAL CASES</u>
Atlantic	3,457	2,336	67%
Bergen	1,065	64	6%
Burlington	902	470	52%
Camden	3,898	2,855	73%
Cape May	469	281	60%
Cumberland	1,063	555	52%
Essex	9,050	5,903	65%
Gloucester	1,692	1,054	62%
Hudson	3,464	1,880	54%
Hunterdon	175	98	56%
Mercer	3,487	1,944	56%
Middlesex	4,839	2,333	48%
Monmouth	2,581	986	38%
Morris	971	602	62%
Ocean	1,247	339	27%
Passaic	1,795	595	33%
Salem	1,221	987	81%
Somerset	469	203	43%
Sussex	217	0	0%
Union	3,148	718	54%
Warren	850	425	50%
Total	46,060*	24,628*	53%

Source: N.J. Administrative Office of the Courts/* As of November 1991.

ATTACHMENT B

Analysis Of Fugitive Cases In Relation To Pending Cases

<u>COUNTY</u>	<u>NO. OF PENDING CRIMINAL CASES*</u>	<u>NO. OF FUGITIVE CASES*</u>	<u>PERCENTAGE OF PENDING CRIMINAL CASES</u>
Atlantic	3,257	2,215	68%
Bergen	1,325	265	20%
Burlington	1,173	469	40%
Camden	3,635	2,508	69%
Cape May	578	347	60%
Cumberland	1,270	559	44%
Essex	11,260	5,405	48%
Gloucester	1,503	1,022	68%
Hudson	4,252	1,871	44%
Hunterdon	228	121	53%
Mercer	3,600	1,800	50%
Middlesex	6,887	3,719	54%
Monmouth	2,869	1,205	42%
Morris	1,458	554	38%
Ocean	1,300	338	26%
Passaic	1,832	751	41%
Salem	1,167	899	77%
Somerset	422	173	41%
Sussex	253	48	19%
Union	3,865	2,203	57%
Warren	946	454	48%
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Total	53,080*	26,952*	51%

Source: N.J. Administrative Office of the Courts

* As of September 1990.

ATTACHMENT C

Overcrowding at county jails

Number of state and county prisoners in county jails and the percentage of overcrowding as of April 30, 1992.

<u>County</u>	<u>State Inmates</u>	<u>County Inmates</u>	<u>Percent Overcrowded</u>
Atlantic	92	773	163%
Bergen	320	987	233%
Burlington	22	460	138%
Camden	608	1,335	147%
Cape May	46	183	127%
Cumberland	115	446	116%
Essex	85	1,733	115%
Gloucester	46	243	107%
Hudson	467	1,686	107%
Hunterdon	17	94	115%
Mercer	242	944	99%
Middlesex	108	1,179	189%
Monmouth	71	790	128%
Morris	50	292	203%
Ocean	98	391	95%
Passaic	601	1,664	366%
Salem	65	243	134%
Somerset	85	247	240%
Sussex	19	161	113%
Union	149	1,248	217%
Warren	42	162	213%
Total	3,348	15,261	147%

Source: N.J. Administrative Office of the Courts

