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TESTIMONY IN SUPPORT OF A1910

to the

ASSEMBLY JUDICIARY COMMITTEE

submitted by

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Thank you for the opportunity to speak in support of A1910, a bill that endeavors to fix New Jersey's deeply flawed system of pretrial release and incarceration and, in the process, improves the functioning of the entire criminal justice system.

My name is Alexander Shalom and I am Senior Staff Attorney for the American Civil Liberties Union of New Jersey. The ACLU is a private, non-profit organization founded in 1920 to promote and defend the founding American principles of freedom, justice and equality. We have approximately 12,000 members in New Jersey and hundreds of thousands nationwide.

The overuse of pretrial detention is one of the single largest obstacles to achieving our shared goal of ensuring equal justice. We must guarantee that the outcome of no defendant's criminal case is determined simply by his ability to pay. Bail reform that establishes pretrial alternatives for lower-risk offenders is not only laudable, it is critical and the ACLU wholeheartedly supports such efforts.

We should make no mistake about the impact of pretrial detention on our fellow New Jerseyans. In the words of the United States Supreme Court from some four decades ago:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.[1]

[1] *Barker v. Wingo*, 407 *U.S.* 514, 532-33 (1972); *see also* John Irwin, *The Jail: Managing the Underclass in American Society*, (University of California Press, 1985) (finding any length of incarceration had negative effects on family and community ties).

It is clear to many who practice criminal law, particularly those who represent the indigent accused, that a vast number of indigent defendants continue to be subject to pretrial detention and plead guilty solely because of their poverty.[2] It is even occasionally acknowledged by courts.[3] As a result of their inability to prepare a defense and their desire to be released from jail, individuals subject to pretrial detention are more likely to plead guilty than those who obtain pretrial release.[4] Numerous commentators have noted that a defendant's desire to win immediate release gives prosecutors much more leverage to extract pleas from detained defendants than from those free on bail.[5]

New Jersey's pretrial justice system is broken at both the bottom (poor, non-violent defendants held pretrial despite low risk) and the top (rich, high-risk defendants who are released despite huge risk of flight and danger). The ACLU-NJ recognizes that a limited, select group of defendants may be held without bail, as a tool to protect the public and ensure the defendants' presence at court hearings.

So, animating all discussion of pretrial detention is a tension between the desire to keep communities safe and courts running efficiently and the need to ensure that when people plead guilty they do so only because they are, in fact, guilty, and not to escape onerous conditions of jail and the havoc it wreaks on their personal lives.

A1910, as drafted, does a good job of striking the balance between ensuring that poor people are not needlessly detained and that communities remain safe. There are, however, three areas where we seek to work with the sponsors to ensure that bail reform in New Jersey will have its intended effect:

- **Speedy Trial Protections:** First, any changes to the bail system that will result in more or longer pretrial detention – such as the creation, through constitutional amendment, of the ability to hold defendants without bail – must be accompanied by assurances of

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[2] *See, e.g.*, David Feige, *Indefensible: One Lawyer's Journey into the Inferno of American Justice*, Little Brown and Company, New York: 2006, pp. 186-187 (discussing role of public defenders in explaining coercive effect of pretrial detention to indigent defendants).

[3] *See People v. Llovet*, N.Y.L.J., Apr. 24, 1998, at 29, 30 n.7 (Crim. Ct. Kings Cty. 1998) ("Many of the pleas of guilty to misdemeanors were by defendants who could achieve their freedom only by pleading guilty. (Plead guilty and get out, maintain your innocence and remain incarcerated in lieu of bail.) Thus if all defendants had the economic wherewithal to make bail, it is clear that many fewer . . . would plead guilty").

[4] *See Barker*, 407 U.S. at 533 n.35 (*citing* Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. Rev. 631 (1964)); *see also* Joseph Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. Ky. L. Rev. 1, 50 (2005) ("A person in jail is more likely to accept a plea bargain to end his time in jail, especially if probation is offered, than is a person who is out on bail. The same pressures do not apply to a released defendant as to one who is incarcerated."); John Clark and D. Alan Henry, "The Pretrial Release Decision," *Judicature* (1997), pp. 76-81 (finding that defendants who were detained before trial were more likely to plead guilty, were convicted more often, and were more likely to receive a prison sentence than defendants who were released before trial).

[5] *See* Hans Zeisel, *The Limits of Law Enforcement* v. 48 (1982); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 444 (1971); Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 Crim. L. Bull. 419, 438 & n.68 (1992) (reporting that defendants often languish in jail for longer than the likely sentence and, when eventually brought to court, plead guilty in exchange for time served).

increased speedy trial protections. While there may be reasons to ensure that a defendant is detained until his trial, no conception of "innocent until proven guilty" requires a person to wait in jail for a year, or even years, before getting to vindicate his or her rights. There are several models in use in other states;[6] we are eager to work with the sponsors to craft a speedy trial requirement as part of A1910 that suits New Jersey's needs and ensures that defendants don't languish in our county jails indefinitely.

- **Limit Pretrial Detention Without Bail:** Second, holding a defendant without bail is an extraordinary response to risks that puts strains on the presumption of innocence and therefore must be used sparingly. Defendants held without bail must be a small subset of defendants – and must be those who pose the greatest risk of flight and danger to the community. As currently written, A1910 would allow a person who is charged with stealing a seventeen-year-old's bicycle to be held without bail. Suffice it to say that that bicycle thief is not among the riskiest defendants who should be subjected to this extreme response. The class of defendants eligible to be held without bail must be narrowed to ensure that it includes only defendants who truly pose unacceptable risks.

- **Ensure Judicial Review of Bail Conditions:** Third, A1910 provides that: "The court may not impose a financial condition that results in the pretrial detention of the person." This requirement is excellent, but it needs a mechanism for review and enforcement to be effective. In Washington D.C.'s statute there is a good model which provides for review of any monetary bail set, where a defendant is thereafter unable to post bail and obtain release.[7] That language should therefore be added to Section 3d.

With these modifications, we believe that New Jersey's system of pretrial detention and supervision will move closer to achieving its purposes of protecting the public, ensuring defendants' presence in court, and, preventing non-violent offenders from needlessly being held in jail.

The quest for equal justice demands such efforts; we applaud the sponsors for drafting such an important and valuable bill and urge this Committee to strongly support of A-1910, with amendments.

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[6] Thirty-eight jurisdictions set a definite amount of time within which a defendant must be brought to trial.

[7] DC ST § 23-1321(c)(4) reads: "A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed."