

COMMONWEALTH OF PENNSYLVANIA

HOUSE OF REPRESENTATIVES

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME AND CORRECTIONS

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In the matter of:	:
	:
Public Hearing on	:
	:
House Bill 2073	:
	:
Post Conviction Hearing Act	:
	:
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Pages 1 through 108

22 Capitol Annex
Harrisburg, Pennsylvania

Wednesday, July 30, 1986

Met, pursuant to notice at, 10:00 a.m.

BEFORE:

DAVID W. SWEET, Chairman

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WITNESS

TESTIMONY

William H. Platt

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Richard Goldberg

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P R O C E E D I N G S

1
2 CHAIRMAN SWEET: Call the Subcommittee on Crime
3 and Corrections to order.

4 The purpose of our meeting today is to take some
5 testimony on House Bill 2073. This legislation deals with the
6 Post Conviction Hearing Act.

7 It was to be considered by the House Judiciary
8 Committee several weeks ago. It was the feeling of the
9 majority of the members of the Committee at that time that the
10 matter was of sufficient complexity and controversy that
11 perhaps we ought to devote at least a warning towards hearing
12 some intelligent comment about both the legislation and the
13 problems of the Post Conviction Hearing Act.

14 Therefore, we are here today, really to find out,
15 A, whether or not there are problems with the Act in terms of
16 the volume of petitions and the way that they are handled and
17 the problems with the system, and secondly, I think to see
18 whether House Bill 2073 is an appropriate solution, whether
19 it comports with both the Constitution and our traditional
20 notions of justice and fair play.

21 So with those as the key focus, the key points to
22 be considered, we would like to begin here.

23 Let me start first by identifying the members of
24 the Subcommittee who are here. Bill Baldwin, on my far left;
25 Bob Reber; Allen Kukovich; Lois Hagarty, who is the prime

1 sponsor of House Bill 2073; Jeff Piccola; Chief Counsel for
2 the Minority, Mary Wolley (phonetic); John Connley, Mike, both
3 Chief Counsel for the Majority.

4 Without any real further ado, I would like to
5 introduce our first witness, Bill Platt, who is the distinguished
6 District Attorney from Lehigh County, who chaired I believe a
7 committee or subcommittee of the Pennsylvania District
8 Attorney's Association on this issue and also Mr. Richard
9 Goldberg, who is an Assistant District Attorney with the
10 Philadelphia District Attorney's office.

11 These two are going to give us some perspective
12 on this legislation.

13 Mr. Platt?

14 Whereupon,

15 WILLIAM H. PLATT

16 having been called, testified as follows:

17 DIRECT TESTIMONY

18 MR. PLATT: Thank you, Chairman Sweet. I
19 appreciate the opportunity to speak on behalf of House Bill
20 2073, which is legislation that had its roots in a special
21 committee of the Pennsylvania District Attorney's Association
22 which I chaired and which I still continue to chair.

23 That committee was formed because of the feeling
24 of the Pennsylvania District Attorney's Association that there
25 were abuses and problems with the current Post Conviction Hearing

1 Act and with the court interpretations of that act.

2 We felt that it was time and appropriate for
3 legislative change of that law. The Committee met a number of
4 years ago and drafted what really appears now as 2073, with
5 some changes.

6 The bill as introduced by Representative Hagarty
7 did not contain all of the amendments that were ultimately
8 produced by the DA's committee.

9 Those amendments are incorporated as part of my
10 testimony. They are pages A-1 through A-6 of the testimony.
11 The changes that we would suggest be incorporated into 2073
12 are underlined and incorporated in that testimony in that
13 manner.

14 So will all have those areas. I might add that
15 after the legislation was drafted the Pennsylvania District
16 Attorney's Association, by resolution, I think unanimously
17 enforced adoption of the legislation, being the feeling of the
18 District Attorney's Association that the present Post
19 Conviction Act by its terms and as construed by the courts
20 has had a detrimental effect on the criminal justice system,
21 law enforcement, the finality of criminal cases and upon
22 public confidence in the law.

23 I have been designated and redesignated and
24 redesignated chairman of the ad hoc committee for purposes of
25 advocating this legislation.

1 I still continue in that capacity. I am speaking
2 on behalf of the District Attorney's Association of
3 Pennsylvania and on my own behalf as District Attorney of
4 Lehigh County.

5 I should tell you that in addition to those
6 positions, I am the Chairman of the Pennsylvania Supreme
7 Court's Criminal Procedure Rules Committee.

8 I must tell you that I am not here wearing that
9 hat. That committee a few years ago, when the old PCHA was
10 about to expire in order to fill what they felt was a
11 procedural void, adopted proposed rules of criminal procedure
12 to govern collateral relief of criminal convictions in
13 Pennsylvania and set forth and the Supreme Court adopted
14 those rules, setting forth the procedural aspect of this.

15 When we drafted this legislation, this proposed
16 legislation, we were aware of what the Supreme Court had
17 done in the procedural area and steered clear totally of what
18 the Supreme Court of Pennsylvania considered procedural and
19 tried to address only the substantive areas.

20 That is the reason why there may appear to be
21 some voids in this legislation when you read. It is because
22 we stayed out of the area of procedural rule making.

23 What we are talking about is collateral review of
24 criminal convictions. It is important to keep in mind that
25 we are talking about review of a case after a jury trial or

1 after a guilty plea in which the burden of proof was on the
2 Commonwealth to prove a case of guilt beyond a reasonable
3 doubt to the satisfaction of twelve jurors.

4 The defendants in such situations, as we all know,
5 have a constitutional right to counsel and if they so desire
6 have the assistance of counsel throughout the stages of these
7 proceedings.

8 In addition, we are talking about review of a
9 judgment that was reviewed or could have been reviewed had
10 the defendant so elected on post verdict motions by a three
11 judge panel in the Common Pleas Court and then could have been
12 reviewed and with the assistance of counsel reviewed, had
13 the defendant so desired, in the Superior or Supreme Courts
14 of Pennsylvania and a direct appeal theoretically, at least
15 to the Supreme Court of the United States.

16 So we are talking about something that, of
17 necessity, is cold potatoes. We are talking about something
18 that of necessity has had a number of levels of review.

19 As you know, in Pennsylvania, even on direct
20 review if there is a claim of ineffective assistance of
21 counsel or something of that sort at that level by the
22 defendant timely made, he is entitled to the appointment of
23 new counsel to litigate that issue on direct appeal.

24 The District Attorneys of Pennsylvania, the people
25 who litigate these matters on direct appeal and on post

1 conviction and in Federal habeas corpus on behalf of the
2 Commonwealth of Pennsylvania, have for some time felt that
3 they have been inundated by diluge of frivolous petitions.

4 I think if you searched the record of the
5 Appellate Courts and the State Courts at the trial level, you
6 will note very, very few petitions under the Post Conviction Act
7 are ever really granted.

8 Most of them are found to be frivolous. The
9 valid claims can get buried in the mores of frivolous claims
10 that are filed under the current Pennsylvania Law.

11 We felt that the appropriate vehicle for changing
12 the law was by legislative change to the act itself, primarily
13 because of the case log loss that has occurred with regard to
14 our current PCHA.

15 Pennsylvania PCHA is much broader in its allowing
16 for hearing and its allowing for litigation of numerous
17 matters than the Federal habeas corpus act is itself.

18 It is important to keep in mind where our PCHA came
19 from and where State post conviction remedies and collateral
20 remedies came from initially.

21 They were vehicles that were developed by the
22 states in response to expanded Federal habeas corpus rights
23 through court interpretation.

24 It was felt and I think properly so, that it would
25 be less expensive and more convenient and more proper to

1 litigate constitutional claims collaterally in the State Court
2 system rather than the Federal Court system.

3 To fill that void and avoid the necessity of
4 people from Lehigh County Xeroxing court files and taking
5 witnesses down to Philadelphia, for example, and litigating
6 in another forum, that, Pennsylvania, as did every other state,
7 should have a vehicle to allow for states to review these
8 matters themselves.

9 That is what has happened. Unfortunately, for
10 Pennsylvania, in the areas of defining the so-called Sixth
11 Amendment right to effective assistance of counsel and the areas
12 of multiple hearings and multiple petitions, our courts have
13 loosely interpreted the language of the current PCHA to the
14 effect that the rights, at least to litigate, and we are
15 really talking about frivolous litigation primarily here, is
16 much greater than it has to be in order to comport with
17 Federal Constitution standards.

18 In addition, from reading the newspapers, I am sure
19 you are all aware of the so-called abuses that are occurring
20 apparently in the city of Philadelphia as a result of the
21 ineffectiveness of counsel issue.

22 It caused the Philadelphia Court of Common Pleas
23 to adopt a court rule because of the number of lawyers, first
24 of all, who were self-proclaiming their ineffectiveness, I guess,
25 in effect planting the seeds of ineffectiveness in the trial

1 level so that later on their clients would have the benefit
2 of an issue that they could litigate at some other time.

3 The Philadelphia Court of Common Pleas initially
4 developed a local court rule that provided that self-proclaimed
5 ineffectiveness of counsel would result in an automatic
6 referral of that lawyer to the disciplinary board of the
7 Supreme Court of Pennsylvania and that in any other case
8 where the court found ineffectiveness of counsel, it would be
9 referred to a three-judge panel of the trial courts of
10 Philadelphia for the purpose of determining whether or not
11 that lawyer should be referred to the disciplinary board.

12 That rule has been amended by the Common Pleas
13 Court in Philadelphia to provide that even self-proclaimed
14 ineffectiveness now goes to a three-judge panel to review
15 before going to the disciplinary board.

16 But in terms of what is going on in the real
17 world, I think this Committee should take notice of that. There
18 is a problem.

19 The problem manifests itself primarily in
20 Philadelphia, but not exclusively so. Lawyers are twisting
21 their ethics and they are planting seeds of ineffectiveness
22 in many, many cases just to provide another level of review
23 to criminal cases.

24 Most of the PCHA litigation that occurs contrary
25 to popular belief does not occur in the more significant cases

1 and does not occur, in my subjective feeling--I have
2 difficulty statistically compiling these things--but occurs
3 in old cases.

4 The significant cases that are involved generally
5 in Lehigh County are at least ten years old. I am litigating
6 at the present time--as a matter of fact I have a hearing
7 tomorrow on a conviction I obtained in a murder case nine
8 years ago.

9 That conviction was a hard fought and hard won
10 conviction of first degree murder. The lawyers put me through
11 the ringer and did an extremely capable job.

12 Now, there is a claim that they were ineffective.
13 There is a claim that they didn't interview a supposed witness.
14 We are ready for a hearing on that now.

15 One of the problems is that these lawyers were
16 public defenders at the time. We are now trying to obtain
17 for their use, the file of the defender's office.

18 He cannot be found. Now, it may show up at some
19 point, but nobody seems to be able to locate it. In the
20 interim, this nine-year period, there was some Federal
21 litigation where the trial judge and the defense lawyers were
22 sued by the defendant.

23 We are checking the county solicitor's office.
24 We are checking the AOPC to see if they may have the files to
25 determine where they are.

1 It is difficult to respond to these cases after a
2 long period of time. I am litigating a Federal habeas corpus
3 in a ten-year old murder case where they bypassed, believe it
4 or not, the Pennsylvania Post Conviction Hearing Act because
5 there seems to be an avenue of relief in the Federal act that
6 wasn't in the State act.

7 That is a very expensive process. I Xeroxed
8 over 800 pages of notes of testimony to send down there. We
9 have sent down all the court records and files.

10 If the hearing is granted, although I think there
11 will not be one, we will have to send witnesses down to
12 Philadelphia, as well.

13 The area is a problem area. It does consume a
14 lot of court time. There are always cases on our hearing
15 lists involving post conviction hearing acts.

16 I think the best analysis of the problem that I have
17 been able to find is an article written by Judge Friendly of
18 the Second Circuit.

19 That article was part of the impetus for the way
20 we drafted our law. That article I have appended to my
21 testimony as well.

22 That is B-1 through the various numbers in the
23 B section. I would implore all of you after today's testimony
24 to read that article.

25 I think that article will answer a lot of the issues

1 and allay some of the concerns that may be addressed by later
2 witnesses.

3 No one, not even the most dark hearted district
4 attorney we could find anywhere in the face on the earth,
5 would want to deny collateral relief to an innocent man, or
6 woman, for that matter.

7 We want a vehicle to exist that persons who were
8 wrongfully convicted because of a constitutional violation,
9 that should be cognizable at some point but was not, would be
10 available to them.

11 We feel that our bill does that and does more.
12 There was some objection the last time this bill came around
13 to our use of this whole star of an innocent man in the
14 introductory section of the bill in Section 9542.

15 That was intended by way of showing what we really
16 meant by this law. We wanted to provide a vehicle for
17 innocent individuals.

18 The amendments to that bill add, not some more
19 language, but allay some of those fears and clarify the intent.
20 We add the language, and by which persons can raise any claim
21 which are properly a basis for Federal habeas corpus relief.

22 That language was added so that the scope of the
23 subchapter comports to the areas where relief is allowed later
24 on in the specific areas of relief.

25 Certainly, we are not saying that only if an

1 individual can prove that they are absolutely innocent of
2 a charge can they get post conviction relief under our bill.

3 That is not true. The specific areas where
4 relief is allowed are the proper areas in the areas that
5 I believe no one could object to.

6 I think they are all proper and covered. In
7 addition, this bill does provide, and with good cause, that
8 any claim that is cognizable under Federal habeas corpus is
9 cognizable under our State law.

10 As I recall the last time we had hearings on this,
11 people were thinking that was foolish to put in. But it is not
12 foolish, because of the advantages of litigating in the State
13 courts and because as we all know, the law expands and
14 contracts sometimes with court decisions.

15 We want to be able to litigate and give defendants
16 in Pennsylvania their full constitutional rights as interpreted
17 by the Federal courts.

18 There are better waiver provisions I feel in the
19 proposed legislation and there is also a time limitation
20 proposal that I think comports with Federal law wherein
21 relief can be denied after a period of time or the delay is
22 prejudicial to the ability of the Commonwealth to prove its
23 case.

24 That is basically a quick run down of my
25 testimony. I would be happy to answer any questions. Mr.

1 Goldberg is here as well from the Philadelphia District
2 Attorney's Office to answer any questions that the Committee
3 has.

4 CHAIRMAN SWEET: Thank you, Mr. Platt. Before
5 we get to that, let me just introduce a couple of other
6 members who have come in.

7 Representative Dave Mayernik, down at the end
8 table there. Next to him, I am not sure if I introduced
9 Mike Edmundson before, who is the Chief Counsel for the
10 Committee.

11 Mike Bortner from York County came in. On the far
12 right, although not always on the far right in political
13 philosophy, Kevin Blaum from Wilkes-Barre and Jerry Kosinski
14 from Philadelphia.

15 I might also point out to the members something
16 that I didn't know that the lady, Mrs. Hagarty has told me.
17 In the DA's Association testimony where the appendices start
18 under A-1, is the copy of the bill as it would have been
19 amended by Mrs. Hagarty?

20 REPRESENTATIVE HAGARTY: I think it is just the
21 amendment, Dave.

22 CHAIRMAN SWEET: Just the amendments?

23 REPRESENTATIVE HAGARTY: Yes.

24 CHAIRMAN SWEET: At any rate--

25 REPRESENTATIVE HAGARTY: Oh, no. It is.

1 Bill, it is a copy.

2 MR. PLATT: There are some gaps. Where the
3 language goes on forever, in order to save time, put a couple
4 dots in there.

5 CHAIRMAN SWEET: Oh, okay. At any rate the
6 Committee never considered those amendments, I believe, at
7 the meeting, where Mr. Platt was talking about amendments.

8 Some of that language is included there. It is
9 not in the bill as you have before you.

10 I would like to open it up for questions. I
11 will start with the prime sponsor Mrs. Hagarty.

12 REPRESENTATIVE HAGARTY: Thank you, Mr. Chairman.

13 Mr. Platt, do you have any figures which would
14 help explain to the Committee the number of cases which our
15 courts are faced with as a result of PCHA petitions?

16 MR. PLATT: We have attempted several times to
17 compile figures. It is very, very difficult to do that. We
18 did do a survey of district attorneys several years ago to
19 determine the volume of cases in given counties.

20 That survey is incomplete and inconclusive in
21 terms of total numbers of cases. I would be happy to review
22 anything you want here.

23 The biggest county, of course, is Philadelphia.
24 Back in '82, for example, the County of Philadelphia on
25 January of 1982 had 508 Post Conviction Hearing Act petitions

1 pending.

2 There were 260 new petitions filed during that
3 year and 335 petitions disposed of during that year. On
4 December of 1982 there were 433 petitions pending in the
5 city of Philadelphia.

6 You have got to remember what this means. This
7 means that these are cases, as I told you, where there has
8 been the ability to exhaust direct appeals and that a petition
9 is filed by a prisoner, that means that counsel must be
10 appointed if it is at least the first petition, usually at
11 public expense at this point, because it is probably an
12 incarcerated prisoner.

13 It means that a district attorney must be assigned
14 to review that file. Sometimes we are fortunate enough to
15 have the DA who tried the case, who was involved in the case
16 available and sometimes they are not.

17 There must be a review of the files, a search for
18 the files, sometimes. There must be an attempt to verify the
19 allegations or negate the allegations in the petition.

20 That sometimes means contacting police witnesses,
21 police investigators, private witnesses, uncovering them. Then
22 ultimately in Pennsylvania in every case where it is the first
23 petition, there must be a court hearing and a court proceeding
24 with the attendant judge time and so forth and so on.

25 Then there is the right to appeal through the various

1 appellate courts again, with counsel and so forth and so on.

2 Mr. Goldberg has prepared the current figures
3 for the city of Philadelphia, for the past year, and has done
4 a cost analysis.

5 I think it might be important for you to get an
6 idea of what it would cost the city of Philadelphia to litigate
7 the currently pending Post Conviction Hearing Act petition issues.

8 Whereupon,

9 RICHARD GOLDBERG

10 having been called, testified as follows:

11 DIRECT TESTIMONY

12 MR. GOLDBERG: In Philadelphia now there are
13 692 pending PCHA cases. So far this year we have received
14 221 new petitions, so that we are looking at new petitions
15 from prisoners, 440 petitions.

16 Those are, of course, supplemented by amended
17 petitions by counsel, so that you have a constant turnover
18 of paper.

19 The cost to the court system, which is just the
20 cost of staffing the courts, the legal staff and the substantial
21 cost of transporting prisoners, because everytime the case is
22 listed, prisoners that are incarcerated in Dallas or Western
23 State Penitentiary must be transported to Philadelphia.

24 That is \$750,000 a year. On an average 250
25 cases are disposed of. So it is over \$3,000 in costs to the

1 court itself.

2 You add to it the cost of district attorney's
3 office, the cost to the Commonwealth for paying for an
4 attorney for the petitioner.

5 In Philadelphia, you get an attorney whether it is
6 your first petition or your eighth petition. The cost per
7 case is well over \$5,000.

8 To litigate the cases that are pending in
9 Philadelphia, the cost is, just to dispose of what we have,
10 not even including the 400 petitions we are getting this year,
11 is \$3,698,000 plus.

12 So that that is the expense alone of the cases
13 if we were just to dispose of what we have now.

14 REPRESENTATIVE HAGARTY: Mr. Platt, do you have
15 figures from the rest of the State?

16 MR. PLATT: I have figures from selected
17 counties if you want them, back from the time we did the
18 survey, which was 1982.

19 CHAIRMAN SWEET: Why don't we have those submitted,
20 if you can. Many of us--

21 MR. PLATT: I have duplicate copies.

22 CHAIRMAN SWEET: While we have great respect
23 for the city of Philadelphia, we would also be interested in
24 what the impact on more average sized counties in the criminal
25 justice system as well.

1 MR. PLATT: The problem with this is that these
2 figures were obtained back in 1982. There have been changes
3 in the Philadelphia DA's office where these figures were
4 maintained.

5 I have been unable to get all of the figures
6 together. There were other counties that did submit. As a
7 matter of fact I went through to find my submission for
8 Lehigh County that I know I sent in, and it is not in the pack.

9 It is an incomplete list. You are happy to have
10 them. They are here.

11 CHAIRMAN SWEET: Fine. If you would--we will get
12 them from you when you are finished.

13 Are there other questions, Mrs. Hagarty?

14 REPRESENTATIVE HAGARTY: Yes.

15 Mr. Platt, you referred to the ineffective
16 assistance of counsel standard. Could you explain to the
17 Committee the current standard in Pennsylvania, what the other
18 problems (words inaudible) what the problem in terms of
19 voluminous PCHA petitions are and how this bill changes that
20 standard?

21 MR. PLATT: Without appearing to be facetious, it is
22 difficult to do. But I think a fair statement of the current
23 law in Pennsylvania is if you say the magic words, ineffective
24 assistance of counsel, that is enough to get you to a hearing
25 and if you say the words, ineffective assistance of post

1 conviction counsel, you can piggyback and continue to
2 piggyback forever and ever.

3 In my testimony, I quoted from a decision of the
4 Pennsylvania Supreme Court, a dissenting opinion, and a
5 decision of the Superior Court of Pennsylvania, alluding to
6 this fact, that numerous petitions on and on and on by the
7 claims of ineffective assistance of counsel.

8 What we tried to do in our draft of legislation
9 is restrict the definition to that of the Sixth Amendment
10 in line with Federal case law which is basically founded in
11 the Strickland opinion of the United States Supreme Court, which
12 for the first time attempted to define ineffective assistance
13 of counsel under the Sixth Amendment as a matter of Federal
14 law.

15 I think in my testimony I quoted from Strickland
16 and set forth what that standard is, as I recall. I did on
17 page five where I said, in quoting from the court decision
18 that in giving meaning to the requirement of ineffective
19 assistance of counsel, however, we must take its purpose to
20 insure a fair trial as the guide.

21 The bench mark for judging any claim of
22 ineffectiveness must be whether counsel's conduct so undermined
23 the proper functioning of the adversarial process that the
24 trial cannot be relied on as having produced a just result.

25 The court held that counsel's performance would have

1 to be found to have been deficient and that the deficient
2 performance prejudiced the defense.

3 What we have tried to do is take Strickland's
4 language and apply it to our Pennsylvania law, which I think
5 is a more restrictive standard than we certainly have at the
6 present time.

7 It has got to be significant. It has got to
8 effect the truth determining process.

9 REPRESENTATIVE HAGARTY: Thank you.

10 CHAIRMAN SWEET: Is that it?

11 REPRESENTATIVE HAGARTY: That is all.

12 CHAIRMAN SWEET: Representative Kukovich?

13 REPRESENTATIVE KUKOVICH: Nothing.

14 CHAIRMAN SWEET: Representative Reber?

15 REPRESENTATIVE REBER: Just a few questions.

16 CHAIRMAN SWEET: Go right ahead.

17 REPRESENTATIVE REBER: Mr. Chairman, everytime a
18 subject similar to this or this subject comes up, there is
19 always statistics given as to the number of petitions filed.

20 I am always troubled, I am always concerned by the
21 omission of (word inaudible) data, if you will, as to the
22 number of orders entered where relief was granted, if you will,
23 with regard to the petitions that were filed,

24 Do you have any statistical analysis as to that?

25 MR. PLATT: Well, I do believe there have been some

1 studies. I can give you my subjective views from my local
2 experience in Lehigh County and from a review of Pennsylvania
3 Appellate Court case law; very, very few.

4 I think that highlights part of the problem that
5 we face under our current PCHA law. Most of the petitions,
6 the vast majority, in the ninety percent are frivolous
7 petitions that are filed either to get a free trip back home
8 or to attempt to litigate something they feel that because of
9 the delay of time and everything, cannot be litigated.

10 That troubles me, because of the expense to the
11 system, because of the appearance of the ludicrousness of the
12 system to the general public.

13 As I said, no one, no one wants to close the
14 doors to a meritorious petition. What we would like to do is
15 attempt to restrict it so that so many frivolous petitions
16 don't even get to the point where they are having hearings
17 in requiring the expenditures of vast amounts of money.

18 Very few have merit. But that doesn't mean that
19 very few are heard. Because under Pennsylvania law today,
20 they are all heard.

21 MR. GOLDBERG: Sir, in the fifty decisions that we
22 have had, this calendar year, we have had one new trial
23 granted and that order has already been vacated.

24 REPRESENTATIVE REBER: When the committee, which
25 I understand from your testimony that you chair this particular

1 legislation was formulated, in the course of that committee
2 deliberation and discussion, was there any inneraction by any
3 defender groups or any other members of the Bar Association
4 or anything of that nature, other than the District Attorneys
5 Association and their support?

6 MR. PLATT: Well, this was a committee of the
7 DA Association. It was an internal committee that came up
8 with the proposal to bring it forward.

9 The only inneraction that has occurred, occurred
10 when the bill was first introduced back in, I guess, '82 or
11 '83, and there was quite a bit of testimony.

12 I recall being in the Montgomery Bar Building
13 when you heard testimony on that. There was a lot of comment.
14 I think a lot of misunderstanding about what the purpose of
15 this bill was.

16 I suspect there is some misunderstanding today
17 as well. The perception that I got back then and maybe the
18 vibes that I am feeling today are that we are attempting to
19 require that a defendant prove that he is innocent before
20 he can even file a petition.

21 That is not true. I think a fair reading of
22 this and a fair reading of the case law, a fair reading of the
23 law review article by Judge Friendly, should assure you that
24 what we are trying to do is weed out some of the frivolous
25 petitions, trying to restrict the definitions that have just

1 gone judicially wild in Pennsylvania, even to the dissatisfaction
2 of our appellate courts.

3 REPRESENTATIVE REBER: I guess, though, it would
4 be fair to say after listening to all of that, that the
5 product that we have before us in 2073, is basically a product
6 that had a genesis in the District Attorney's Association, as
7 far as input into the language that is contained in the
8 manner and the philosophy of the (words inaudible).

9 Is that correct?

10 MR. PLATT: That is true with one cautionary
11 word. We did take into consideration some of the problems that
12 were expressed by the Pennsylvania trial lawyers, by the
13 defender association, and so forth.

14 That led to some of the amending language in here
15 because we felt that we would like to clarify as much as we
16 could and perhaps let them know that we don't have a knife
17 hidden behind our backs.

18 REPRESENTATIVE REBER: One last question. On
19 page four of the bill, in the section that regards the
20 eligibility for relief, in the second section beginning on
21 line thirteen through line twenty-two.

22 MR. PLATT: I don't have that.

23 REPRESENTATIVE REBER: I am sorry. On page four,
24 what I seem to view as the limitation of constitutional rights
25 section (words inaudible).

1 In line eighteen, it says, with (words inaudible)
2 resulting in conviction of an individual. My concern is
3 this, by that limitation language, it appears to me that
4 there is a grant given position that a constitutional
5 rights have already (words inaudible).

6 And the appellants, if you will, petitioners,
7 if you will, has to also show over and above--well, for that
8 matter it does not have to show.

9 It could in essence be stipulated that his
10 constitutional right in some way, shape or fashion has been
11 violated.

12 What we are now saying though is notwithstanding
13 that fact, we are going to ask him to show that it was also
14 likely that as a result thereof, if you were convicted of that,
15 not taking into effect what kind of ripple affect it might
16 have had in prejudicing the jury on the entry of that verdict
17 or some other effect of that.

18 I am just wondering what your thoughts are or
19 your comments are in regard to the justification taking current
20 law which has basically a specific listing of the various
21 types of fundamental constitutional rights and now limiting
22 them further.

23 In all fairness to you, let me say the reason for
24 my concern on that, I think it is (word inaudible) that we are
25 talking about these kind of issues today when the U. S. Senate

1 is interviewing a new Chief Justice of the United States
2 Supreme Court, who obviously I think from his track record
3 of decisions has taken every and any step that he could take
4 in this area to limit, if you will, the constitutional rights
5 of a criminal defendant.

6 My concern is that there is an obvious eroding
7 of those. There has been with some of the, as I like to call
8 it, the harmless air decisions and what have you.

9 I think it is time for the State Legislature
10 who in years past has relied upon the Federal Courts, the
11 Supreme Court, if you will, to become somewhat of a (word
12 inaudible) for civil liberties and things of that nature,
13 to begin to wake up and realize that it is the State
14 Legislatures that are going to have to look to the protection
15 of these particular types of concerns.

16 I think this is something that we are seeing,
17 at least I am reading a lot about it, in the articles that
18 are leading up to this confirmation hearing.

19 I think that has really somewhat of a concern
20 in my mind as to why (words inaudible), although I am not
21 philosophically as far to the left as my prior remarks tend to
22 give you the thought that I am.

23 I am concerned about where this particular
24 philosophical, idealology, in the constitutional law,
25 especially in the criminal side is going.

1 That is the reason why of all the bill, I just
2 point to that as a troublesome area. I would enjoy to hear
3 some of your comments.

4 MR. PLATT: I would be happy to respond to your
5 concerns. Number one, there was an omission of a word on
6 line nineteen.

7 We put that in in our proposal. That would be--
8 was likely to have resulted in the conviction of an innocent
9 individual.

10 That is one way of referring to it. Secondly,
11 or so undermine the truth determining process that no fair
12 adjudication of guilt or innocence could have taken place.

13 It seems obvious to me that you can't talk about
14 constitutional rights and avoid. There are situations that
15 we can all think of where a constitutional right can be
16 violated and it would be of no consequence to the guilt
17 determining process.

18 Suppose for example a defendant has the right
19 to be present during his trial. Suppose a violation of that
20 occurs by a conference in judge's chambers between his
21 lawyer, the DA and the judge.

22 Technically, it may be that the defendant should
23 have been present. But if that had no effect on the outcome
24 of the case, and you know, couldn't even arguably have affected
25 the outcome of the case, why should we say for that reason we

1 torpedo the entire process that he went through where guilt
2 was proven beyond a reasonable doubt, wherein there was
3 appellate review, wherein he had the ability even on the
4 direct appeal process to then and there claim that I had
5 ineffective assistance of counsel for this reason and freshly
6 state that it prejudiced it.

7 One of the problems I have with the PCHA, as I
8 indicated on my direct testimony, is we are looking at this
9 thing far, far removed from the time when recollections are
10 fresh, when records are available and so forth and so on.

11 Pennsylvania does have a vehicle. If a defendant
12 was genuinely injured by something his counsel did, he is
13 probably going to know that in most cases right after that
14 trial or right during the trial and could raise it on the
15 appeal process under current law now.

16 What we are trying to do here is provide a vehicle
17 so that the injustice that none of us, not even to be
18 Chief Justice Renquist, you know, would applaud, would say
19 this right and this is proper.

20 This is the extraordinary relief remedy that we
21 are talking about. We are trying to address that unique
22 individual that even with all the cards of the system stacked
23 in his favor, you know, suffered an injustice.

24 I think this bill does address that. It addresses
25 it in two ways. It sets forth a standard that we think is

1 proper and it also sets forth a standard that goes beyond
2 that and says, anything else that is cognizable on Federal
3 habeas corpus is cognizable under this bill.

4 I think this bill does protect those individuals
5 that we are all concerned about. There aren't many of them,
6 As you all know, the criminal justice system today, if it
7 makes mistakes, usually makes mistakes against the Commonwealth
8 and in favor of the defense.

9 It will cut back on some of the abuse. It will
10 cut back on some of the perceptions of abuse that are
11 occurring all too often today.

12 CHAIRMAN SWEET: Thank you very much.

13 Unless any of the other members have just a
14 burning question to ask Mr. Platt, I would like to move on
15 at this point because we do have other witnesses who I think are
16 going to argue both sides of the case intelligently and out of
17 courtesy to them, we ought to try to move on.

18 MR. PLATT: By that you mean I didn't argue both
19 sides intelligently.

20 CHAIRMAN SWEET: No, I did not, Mr. Platt.

21 REPRESENTATIVE BORTNER: I sort of have a burning question.

22 CHAIRMAN SWEET: Well, we will take a vote after
23 you ask the question. Go ahead, Mike.

24 REPRESENTATIVE BORTNER: I am not so sure how
25 burning this is. It is kind of a general question I think.

1 I have a lot of sympathy with you. I have
2 handled a number of these cases as assistant district attorney.
3 I have been the subject of two of them as a public
4 defender.

5 I agree with you that most of them are frivolous.
6 I know the two cases I was involved with, they were totally
7 frivolous.

8 But I honestly don't see how the change in the
9 act is going to make that much difference. I guess the point
10 that I am raising is this--I think you put your finger on it.

11 These cases don't get reversed very often. We
12 don't end up having to retry most of these cases. The drain
13 on judicial resources occurs in having to have a hearing,
14 transport the prisoner from Rockville or Huntington or Dallas
15 or wherever, appoint additional counsel.

16 I don't see anything in this act that allows the
17 judge or would make it more likely that a judge can dismiss
18 the case or dismiss a petition without a hearing.

19 To me the only way that you can really dig into
20 this problem, and I think, start to do what you are hoping to
21 do is if you can dismiss these cases without hearing.

22 I am not sure under our Consitution that you can
23 do that.

24 MR. PLATT: I think that is part of the problem.
25 There are a couple areas we are trying to address, are the

1 multiple petitions.

2 In some counties--I know in Philadelphia and
3 elsewhere, you are talking about five, six petitions, one
4 after the other.

5 Under this bill, time delay is an out, if it is
6 a truly prejudicial delay to the Commonwealth. In addition,
7 if you will look at the procedural rules that were promulgated
8 by the Supreme Court in anticipation of the expiration of the
9 old PCHA, I think you will find that they were more liberal
10 than the current PCHA in terms of the ability to dismiss for
11 failure to particularize.

12 We took that into account when we drafted this as
13 well. It also more narrowly restricts the range of areas
14 where relief is allowed.

15 I think there will be more of an ability to find
16 frivolousness on the face. I think it will eliminate, certainly
17 multiple petitions and hopefully initial petitions as well
18 from going to hearing.

19 REPRESENTATIVE BORTNER: This is not going to
20 result in--I just don't see it resulting in a real--you are
21 not going to cut the petitions in half or anything that
22 dramatic.

23 I just don't see that happening.

24 MR. PLATT: Well, I think it will over time. I
25 think the history with the Federal habeas corpus based on the

1 new interpretations by the Supreme Court has shown that there
2 has been a drop of Federal habeas corpus and I would hope
3 that we would have the same thing.

4 REPRESENTATIVE BORTNER: One last quick question.
5 I am curious to hear from you as a person involved with
6 this Commonwealth.

7 We are going to hear from one of the State trial
8 judges, their panel. Their conclusion was not much could be
9 done legislatively, that it was constitutional and it was
10 going to result in the--the only way it would change is as
11 the Supreme Court and the appellate courts bring the pendulum back
12 toward the middle in the way they apply for ineffective
13 assistance and counsel (word inaudible).

14 They feel that is happening. Do you see that
15 happening?

16 MR. PLATT: It is happening. I think we could
17 put the pendulum with this legislation. I think we could
18 eliminate some of the problems that judges do have in
19 overruling precedent.

20 The vast majority of these cases are heard in the
21 Superior Court. They feel more and more constrained than the
22 Supreme Court to follow the precedent of that court,
23 obviously.

24 So I think this would help. I reviewed the
25 reports of the trial judges and did some checking on my own.

1 I think there was some undercounting in that. They only have
2 to sit there and hear them and decide them with briefs and
3 everything else from the Commonwealth.

4 We have to put them together and respond to them.
5 It is onerous burden.

6 REPRESENTATIVE BORTNER: I would have some more
7 questions, but in the interest of time I will--

8 CHAIRMAN SWEET: Well, thank you, your question
9 while not burning, was certainly important and significant
10 and worthy of being asked.

11 Mr. Platt, we thank you. I should have used the
12 preposition, additional intelligent testimony, not other
13 intelligent testimony.

14 We thank you for taking the time to come up and
15 talk with us. We may be getting back to you in terms of further
16 information.

17 One additional question counsel had, if you would
18 leave the information, the current information you had on the
19 Philadelphia PCHA hearings as well, it would be appreciated.

20 Thank you very much.

21 MR. PLATT: Thank you very much, sir.

22 (Witnesses excused.)

23 CHAIRMAN SWEET: Our next witness is a gentleman
24 who has been very helpful to the Committee on numerous
25 occasions and testifying on these kinds of matters, Mr.

1 Harold Yaskin of the Defender Association of Philadelphia.

2 Mr. Yaskin?

3 Whereupon,

4 HAROLD YASKIN

5 having been called, testified as follows:

6 DIRECT TESTIMONY

7 MR. YASKIN: I am here--

8 CHAIRMAN SWEET: Under the category of additional
9 intelligent testimony.

10 MR. YASKIN: No. I am here also for the Public
11 Defender Association of Pennsylvania.

12 I have heard the testimony of Mr. Platt and heard
13 the comments of some of the members. Let me just say that no
14 one really likes PCHA petitions.

15 Prosecutors don't like it. The judges don't like
16 it. The public defender doesn't like it. The lawyer that is
17 being accused of ineffective assistance of counsel doesn't like
18 it.

19 Neither does the lawyer who is representing the
20 petitioner. However, this bill still permits Post Conviction
21 Hearing Act petitions.

22 It doesn't get rid of them. I don't think it gets
23 rid of them without a hearing. I think a Post Conviction
24 Hearing Act petition can be framed within the confines of this
25 particular act to allow a hearing.

1 I don't think it will cut down on the number of
2 hearings at all. I did some checking with the State Court
3 Administrator's Office as to the number of petitions that are
4 filed each year.

5 The last year that they compiled statistics is
6 1982. In that year there were 1,073 petitions filed
7 Statewide.

8 The year before there were less and the year before
9 that there were a little more. There were 953. So there were
10 about 1,000 petitions filed Statewide each year.

11 It is my position that the present act is the
12 proper post conviction act and should be kept. House Bill 2073
13 and I presume the act, or the bill, rather, that should be the
14 amended bill, not the one that was originally introduced.

15 Is that right, Mrs. Hagarty?

16 REPRESENTATIVE HAGARTY: House Bill 2073 does not
17 have amendments in it.

18 MR. YASKIN: Presently, does not have amendments.

19 REPRESENTATIVE HAGARTY: That is right.

20 MR. YASKIN: But there was a set of amendments
21 that were proposed and were available at the last judiciary
22 committee hearing.

23 REPRESENTATIVE HAGARTY: That is correct. At
24 the time I (words inaudible) the bill (words inaudible) the
25 amendments had been incorporated.

1 MR. YASKIN: All right. That is the one that I
2 looked at.

3 This would only allow defendants who were
4 convicted of crimes they did not commit or were serving
5 unlawful sentences from applying for Post Conviction Hearing
6 Act.

7 Pennsylvania has had a long tradition of being
8 a State in which we give rights to everyone. I don't see any
9 reason why the present concept of providing relief from
10 convictions obtained without due process of law, should not be
11 the standard in Pennsylvania.

12 I don't see why Pennsylvania should be in the
13 forefront of some theory that was proposed in the Law Review
14 Article ten or fifteen years ago.

15 By the way, I have read some of Judge Friendly's
16 opinions when he was with the Second Circuit. In his opinions
17 he did not expose the material that he exposes in his Law
18 Review articles.

19 I have also read a recent United States Supreme
20 Court case that talks in terms of filing Federal habeas
21 petitions for innocent defendants or where there is the
22 culpable showing of factual innocence.

23 The rule that was laid down last month by the
24 United States Supreme Court in a case called Cowman (phonetic)
25 versus Wilson, was that the only time a culpable

1 showing of factual innocence must be shown in a Federal
2 habeas corpus petition is when you file the second habeas
3 corpus petition.

4 In the first Federal habeas corpus petition you
5 can file and you don't have to have make a culpable
6 showing of factual innocence.

7 So I don't see why Pennsylvania even has to go
8 beyond the Supreme Court. We know where the Supreme Court is
9 going.

10 They haven't gotten to that point yet where a
11 petitioner for collateral relief has to show or has to allege
12 factual innocence.

13 I don't think we ought to go that far. In addition
14 if you do file a--if you do pass, rather, this will, you may
15 run afoul of Article 1, Section 14 of the Pennsylvania
16 Constitution, which states that the writ of habeas corpus
17 shall not be suspended unless, in case of rebellion or
18 invasion for public safety may require it.

19 If you are going to take and prohibit a certain
20 class of prisoners, those that are guilty but yet there has
21 been a problem with their trial, if you are going to prohibit
22 those people from filing a proposed conviction release, you
23 may be suspending habeas corpus for these individuals.

24 Now, in terms of the problems dealing with
25 incompetent counsel. We have a standard in Pennsylvania which

1 is known as the Commonwealth (word inaudible) Washington
2 versus Maroney (phonetic) standard.

3 It was adopted in 1967. It holds that an
4 inquiry is to be directed as to whether an attorney's conduct
5 had a reasonable basis designed to effectuate his client's
6 interest.

7 That is the standard in Pennsylvania now. It has
8 probably been interpreted 5,000 times by our appellate courts.
9 Every trial judge knows what that standard means.

10 Every prosecutor knows what that standard means.
11 Every defense lawyer knows what that standard means. You are
12 being asked in this bill to adopt a different standard, a
13 standard that the U. S. Supreme Court handed down in the case
14 called Strickland versus Washington.

15 There has been very little case law on Strickland
16 versus Washington. Who knows how long it is going to take
17 them to get to the point where we are now with our present
18 standard.

19 So I think that for that reason alone, we should
20 not in any way change the act. There is a section in here,
21 Subsection 4 which would allow the right of appeal where a
22 meritorious appealable issue exists.

23 Now, that sounds very nice to say that a defendant
24 can only appeal if there is a meritorious issue. But who is
25 going to decide whether or not there is a meritorious issue for

1 appeal.

2 Is the trial judge the one who wouldn't permit,
3 or permitted something to happen originally in his courtroom,
4 is he the one who is going to say, no, or is he the one that
5 is going to say, yes, this is a meritorious issue?

6 Is the prosecutor the one that is going to decide?
7 Is the defense lawyer the one who is going to decide? Is it
8 going to be the appellant court itself that is going to decide
9 whether or not there was a meritorious issue?

10 So you are not getting rid of appeals by permitting
11 only meritorious appealable issues to go up. Now, I think
12 Mr. Platt said something about the prejudice exception to the
13 filing of petitions which is in Subsection B.

14 He said that this was the Federal standard. I
15 take issue with that. It talks in terms of two items. It
16 talks in terms of where the Commonwealth has been prejudiced
17 in its ability to respond to the petition or its inability to
18 retry the petitioner.

19 The Federal standard right now is only in its
20 ability to respond to the petition. The language and ability
21 to retry the petitioner is a proposed amendment to the Federal
22 habeas rules.

23 It is not, as far as I know, gone into effect.
24 So here again, we are being asked to go beyond that which the
25 Federal courts and Federal legislation have gone.

1 Now, in reality, prisoners are still going to
2 bring petitions. The only thing is whether we want our
3 Commonwealth to be known as a--where we will allow petitioner
4 relief even if he has no culpable claim of innocence, if
5 something went wrong at his trial that--something that should
6 not have happened at his trial that calls out for a new trial.

7 I think we ought to keep the present law. I think
8 that it doesn't call for massive release of prisoners. As a
9 matter of fact, I would say the last time I can recall that there
10 was massive release of prisoners was back in the 1960's
11 when I first started in the defenders, when we had all the
12 pre Gideon cases.

13 Gideon was the right to counsel case. All the
14 defendants who went to jail without counsel, they filed
15 petitions and that was the only time the PCHA ever gave
16 mass relief to anyone.

17 I don't even think it is giving minimal relief
18 any more. I wish I could figure out some way of perhaps
19 giving prisoners more relief, but I can't think of any right
20 now.

21 But I really don't think we ought to restrict
22 their right to get relief if there has been a violation of
23 due process of law somewhere in their proceeding.

24 Just one other thing, they talk about no bail being
25 granted during pendency of a PCHA petition. As I say, I have

1 been around for a long time. I can only recall maybe two or
2 three cases in which bail has been set pending a Post
3 Conviction Hearing Act petition.

4 Those were cases when the newspapers were crying
5 out that an innocent man was in jail or something and the
6 district attorney sort of agreed but yet wanted to do some
7 more investigation.

8 The district attorney usually agreed with the
9 setting of bail. Since there may be one or two of these
10 cases every five to ten years, I don't believe there should
11 be an absolute prohibition against the setting of bail.

12 Believe me, trust the judges. They are not going
13 to set bail in PCHA cases unless they really have to. So I
14 would ask you to eliminate that particular section.

15 CHAIRMAN SWEET: Thank you very much, Mr. Yaskin.

16 I would point out that two addition members have
17 walked in, John Cordisco from Bucks County and the (word
18 inaudible) republican judiciary committee, Nick Moehlmann who
19 is directly behind you.

20 I would only ask one sort of facetious question.
21 I assume in paragraph three of your testimony, the Public
22 Defenders Association is a Statewide association of county
23 public defenders and not police defenders.

24 MR. YASKIN: Oh, yes. That is my mistake.

25 CHAIRMAN SWEET: I trust that typo was Freudian in

1 in nature.

2 MR. YASKIN: It was. I am sorry.

3 CHAIRMAN SWEET: Questions.

4 MR. YASKIN: I didn't even read that paragraph.
5 I thought it was correct.

6 REPRESENTATIVE HAGARTY: Take Jerry. He has his
7 hand up. Then I do have some questions.

8 CHAIRMAN SWEET: Okay.

9 Representative Kosinski?

10 REPRESENTATIVE KOSINSKI: Thank you, Representative
11 Sweet.

12 The first thing I want to say, Harold, is that I
13 agree with you on the bail issue.

14 I think it is very, very--bail is set in many of
15 the PCHA's. I do have a problem and I do have a question.
16 The first problem is I hear some of these people--you are the
17 first speaker today with (words inaudible) later on this
18 afternoon to be concerned about access to the courts for the
19 convicted prisoners.

20 I think we are cutting that access in any way.
21 What I am concerned with is the number frivolous claims brought
22 up, not allowing the small percentage of claims that do have
23 merit to be heard in a timely manner.

24 I think we have to all be concerned about that
25 issue. But one thing that bothers me is the contradiction in

1 your testimony.

2 First you say that the Hagarty bill won't change
3 anything because the prisoner will still be able to appeal
4 constitutional issues.

5 MR. YASKIN: No, no. I said they will still be
6 able to appeal.

7 REPRESENTATIVE KOSINSKI: Right.

8 MR. YASKIN: And the appellate courts will decide.

9 REPRESENTATIVE KOSINSKI: And then you claim
10 we are suspending habeas corpus. I cannot see in any way,
11 shape or form.

12 MR. YASKIN: Well, if someone picks up this
13 bill and interprets it to mean that under the Friendly
14 theory that you have to have a culpable claim of innocence
15 or show a culpable claim of innocence before you can file
16 a Post Conviction Hearing Act petition, then you are suspending
17 the right of habeas corpus to those individuals who may be
18 guilty but there was some flaw in bringing them before the
19 courts and finding them guilty.

20 If you look at Section 9542, it says, this
21 subchapter provides for an action by which persons convicted of
22 crimes they did not commit or serving unlawful sentences may
23 obtain collateral relief.

24 All right.

25 REPRESENTATIVE KOSINSKI: Yes.

1 MR. YASKIN: Only persons convicted of crimes
2 they did not commit nor those serving unlawful sentences
3 may obtain collateral relief.

4 Then it goes on to say that the action established
5 in the subchapter shall be the sole means of obtaining
6 collateral relief and encompasses all other common law and
7 statutory remedies for the same purpose that exists when this
8 subchapter takes effect including habeas corpus and coram
9 nobis.

10 So what you are saying--

11 REPRESENTATIVE KOSINSKI: Read on.

12 MR. YASKIN: Well, it says, this subchapter is
13 not intended to limit the available remedies in the trial
14 court or in direct appeal from the judgment of sentence nor
15 is the subchapter intended to provide a means for raising
16 issues waived by a proceeding.

17 REPRESENTATIVE KOSINSKI: When is habeas corpus
18 suspended?

19 MR. YASKIN: It is suspended by saying that only a
20 person--only two classes of prisoners can bring post
21 conviction proceedings.

22 Post conviction proceedings is in lieu of habeas
23 corpus.

24 REPRESENTATIVE KOSINSKI: And what is the prisoner
25 going to allege?

1 MR. YASKIN: Well, he may allege that he was
2 convicted of a crime that he did not commit.

3 REPRESENTATIVE HAGARTY: Or?

4 MR. YASKIN: What? Serving unlawful sentence.

5 REPRESENTATIVE KOSINSKI: Right.

6 REPRESENTATIVE HAGARTY: If I could add--

7 MR. YASKIN: Well, that is a small percentage of
8 cases.

9 REPRESENTATIVE HAGARTY: I mean if I can just
10 add, because I think it is on this point, if I may Jerry.

11 REPRESENTATIVE KOSINSKI: Yes.

12 REPRESENTATIVE HAGARTY: You have indicated through-
13 out your testimony that all we allow are claims that are
14 cognizable because someone is alleging culpable claim of
15 innocence and that we have cut out due process.

16 How can you say that when this so clearly says,
17 or so undermine the truth determining process that no fair
18 adjudication of guilt of innocence could have taken place
19 is beyond me, because if that is not a classic definition of
20 due process, I don't know what it is.

21 With all due respect, Mr. Yaskin, you have
22 totally ignored that entire due process portion which you can
23 certainly continue to bring.

24 MR. YASKIN: Then you ought to reword your scope
25 of the subchapter.

1 REPRESENTATIVE HAGARTY: You may have a drafting
2 difficulty, but the claim that we somehow, when it so clearly
3 says that, we are cutting out due process is an absolute,
4 you know, failure to read this bill.

5 MR. YASKIN: Well, then you have to reword your
6 scope of the subchapter. I mean, if you read your scope of
7 the subchapter you figure that what is in the act is what
8 is in the scope of the subchapter.

9 It is not in there.

10 CHAIRMAN SWEET: Okay. Do you have additional
11 questions, Jerry?

12 REPRESENTATIVE KOSINSKI: No.

13 CHAIRMAN SWEET: Representative Hagarty?

14 REPRESENTATIVE HAGARTY: I just have one quick
15 question.

16 Do the Philadelphia Defender's Office, do you
17 represent litigants in PCHA's at all?

18 MR. YASKIN: Presently, we do not.

19 REPRESENTATIVE HAGARTY: You represent no
20 defendants in Post Conviction Hearing Act petitions?

21 MR. YASKIN: Presently, we do not.

22 REPRESENTATIVE HAGARTY: So you are speaking from
23 no experience as a Philadelphia defender. Is that fair?

24 MR. YASKIN: No. I have represented in the late
25 sixties and early seventies many people on Post Conviction

1 Hearing Act petitions.

2 REPRESENTATIVE HAGARTY: But not as a Philadelphia
3 public defender?

4 MR. YASKIN: Yes, as Philadelphia public defender.

5 REPRESENTATIVE HAGARTY: In the early seventies
6 is the last time?

7 MR. YASKIN: In the early seventies, yes.

8 CHAIRMAN SWEET: Thank you.

9 Are there questions from any of the other members?

10 Representative Bortner?

11 It doesn't even have to be burning or important
12 this time.

13 REPRESENTATIVE BORTNER: This is one that was
14 left over from Mr. Platt actually, so I will ask it of you
15 instead.

16 One of the other concerns I have here is that
17 it seems to me that if you start to base relief, and I may be
18 reading this all wrong, but if you base relief on language
19 whether it is likely to have resulted in the conviction of an
20 innocent individual or a culpable claim of innocence or
21 meritorious issue, it seems to me that you may be requiring
22 additional litigation as well as reducing some.

23 In other words, there has got to be a way to
24 determine those questions. It seems to me you are almost
25 going to be required to relitigate a case and determine the

1 likelihood of an innocent individual being convicted or whether
2 there is a culpable claim of innocence and so forth.

3 I mean do you see any of that or am I completely
4 missing the point of it?

5 MR. YASKIN: I see that. No, you are not missing
6 the point, because I mentioned it in my prepared statement.
7 We have years and years of experience with our present act.

8 All the terms have been defined. Everyone knows
9 what everything means. If you are going to start out with a
10 new act, you are going to have ten years of litigation to
11 determine the answers to all those questions that you are
12 posing.

13 The lower courts, the trial courts, will just be in
14 a state of flux. They won't know what these terms mean until
15 after the appellate courts have spent ten years figuring out
16 what they mean.

17 So I agree with you.

18 REPRESENTATIVE BORTNER: Let me ask you one
19 question also as a member of the defense bar, although I
20 don't believe in any of the arguments that I have written
21 that the public defender's office has been involved in this.

22 That is the intentionally laying the groundwork
23 for ineffectiveness assistance of counsel which disturbs me
24 very much.

25 First of all, just the ethics of doing that.

1 Secondly, I can't understand that lawyers aren't concerned
2 about getting sued.

3 They must have much less concern about that than
4 I do.

5 MR. YASKIN: I think the lawyers that you are
6 talking about--and by the way, they are not public defenders.
7 The lawyers that you are talking about, perhaps have done
8 this act as part of their fee arrangement with the defendant.

9 In other words, it is part of the service that
10 they are providing the defendant, which includes doing this
11 so that, you know, if he loses at the trial level or if a
12 guilty verdict is found it would be a way for him to get
13 out from under the proceeding, get him a new trial.

14 As I say, I think it is done--if it is not
15 specifically done within the terms of the fee arrangement
16 there is a pretty good understanding that it is part of the
17 fee.

18 You are right. There are no public defenders
19 involved.

20 REPRESENTATIVE BORTNER: Are the judges?

21 MR. YASKIN: The judges--let me just--

22 REPRESENTATIVE BORTNER: It was my experience,
23 I think you can see a PCHA coming a mile away. I mean you
24 can see it when you are litigating the case probably from the
25 first time you meet the defendant.

1 In my county, which is York County, some of the
2 judges, and we will hear from Judge Cassimatis, sort of try
3 cases defensively.

4 To a certain extent I think they are preparing
5 for PCHA's. They dismiss the jury and ask the defendánt
6 the defense rests its case, have you called all your witnesses,
7 have you talked to your counsel, has he called the witnesses
8 you want, getting everything on the record, I think really
9 preparing for the waiver aspect of this act.

10 That makes sense to me. Are judges in your
11 county, in Philadelphia, doing that sort of thing?

12 MR. YASKIN: There are cases which when a public
13 defender is representing the defendant there is tension between
14 the lawyer and the defendant.

15 In those cases where the judge can see that
16 tension, he usually questions a defendant about trial
17 strategy, whether he agrees with what the lawyer is doing
18 at that particular time and so forth.

19 So they do it in some cases, but they don't do it
20 in all the cases.

21 REPRESENTATIVE BORTNER: I realize there is a
22 balance there. Defense lawyers still have the responsibility
23 I think technically and otherwise to handle their case.

24 I think certain statements and colloquies on the
25 record could provide the basis for the waiver of certain issues

1 that might come up later, like not calling a witness that you
2 say you told your lawyer and he refused to call him.

3 MR. YASKIN: Or not putting the defendant on the
4 stand.

5 REPRESENTATIVE BORTNER: Right.

6 MR. YASKIN: Yes. That should be done. Perhaps,
7 you know, Mr. Platt is here, perhaps, you know, he can propose
8 some rules to the procedural rules committee that judges
9 do certain things during the course of a trial to show that
10 the defendant is aware of what is taking place and that the
11 defendant agrees with what is taking place.

12 This may cut down on the number of PCHA's.

13 REPRESENTATIVE BORTNER: Well, the reason I ask
14 that is it seems to me that the key to this is the waiver
15 aspect.

16 That is the one way that would allow a judge to
17 dismiss a petition without a hearing, one of the few ways.
18 If it is obvious from the record that you are raising an issue
19 that has been waived, I think that is one of the few ways
20 that you could probably dismiss a petition without having to
21 go to a hearing and bringing the defendant in for testimony
22 or appoint counsel.

23 These are all the things that I know consume an
24 awful lot of district attorney's time and court time as well.

25 MR. YASKIN: Of course, you understand that even

1 in those situations, the defendant can file a pro se appeal.
2 to the appellate courts and in most instances the appellate
3 courts will send the case back to the local court for the
4 appointment of counsel.

5 REPRESENTATIVE BORTNER: Yes.

6 MR. YASKIN: And, of course, with this new bill
7 the same thing can happen.

8 REPRESENTATIVE BORTNER: But you could waive
9 the issue on appeal just as you can waive it for purposes of
10 PCHA.

11 MR. YASKIN: But the appellate courts will not
12 listen to it unless the defendant has a lawyer.

13 REPRESENTATIVE BORTNER: Thank you.

14 CHAIRMAN SWEET: Thank you, Mr. Bortner.

15 I am just as a member of the Bar who doesn't do
16 much criminal business, am shocked at, even implicitly there
17 are these negotiations that include intentional error for the
18 purposes of permitting PCHA.

19 It is at least common enough that you as a
20 practicing member of the Bar in Philadelphia are not only aware
21 of an isolated case, but perhaps aware of the way the business
22 is done.

23 It sounds like it is more than one or two people
24 doing it.

25 MR. YASKIN: Well, the Inquirer only had one or

1 two or perhaps three or four instances.

2 CHAIRMAN SWEET: Well, let me ask you this
3 question and be done with it. Is your knowledge of this,
4 without divulging any sources, is your knowledge of this
5 practice limited to your reading in Philadelphia Inquirer
6 articles or is it a result of experience in criminal defense
7 work in the city of Philadelphia?

8 MR. YASKIN: It is my reading of the Philadelphia
9 Inquirer. It is looking at the lawyers involved and it is
10 looking at the defendants and the type of crimes that the
11 defendants have committed.

12 CHAIRMAN SWEET: Does that mean that it is more
13 than just your reading of the Philadelphia Inquirer?

14 MR. YASKIN: Well, obviously if the Philadelphia--

15 CHAIRMAN SWEET: You have heard about it.

16 MR. YASKIN: No, no, no. I haven't heard about it.
17 But the Philadelphia Inquirer tells me it is a narcotics
18 case or it is an arson for hire case, you know I get a pretty
19 good idea.

20 There is bucks involved. There is money involved.

21 CHAIRMAN SWEET: Okay. I guess I am not going
22 to get quite out of you either what I want or need.

23 MR. YASKIN: No, no. I don't have no personal--I
24 have never talked to a lawyer who said he has done this for
25 money.

1 REPRESENTATIVE HAGARTY: I have.

2 CHAIRMAN SWEET: Representative Hagarty has.

3 MR. YASKIN: But I just have this feeling that
4 the cases involved, pretty good amount of money, the cases
5 usually involve, if not organized crime itself, the (word
6 inaudible) of organized crime.

7 The lawyers are the type of lawyers who represent
8 these kinds of defendants day in, day out.

9 CHAIRMAN SWEET: Well, in your opinion then is it
10 more than just one or two isolated cases? I mean there is
11 some--

12 MR. YASKIN: The only ones that I know of are the
13 ones that the Inquirer brought out. Now, of course, Mr.
14 Goldberg of the district attorney's office, his office is the
15 one that prepared the memos that formed the basis for the
16 Inquirer articles.

17 He may know of more that were just in the
18 Philadelphia Inquirer.

19 CHAIRMAN SWEET: I am not trying to put you on the
20 spot for a newspaper. I don't think there are any more here.

21 Thank you very much, Yaskin.

22 MR. YASKIN: Thank you.

23 (Witness excused.)

24 CHAIRMAN SWEET: Our next witnesses were unable to
25 be here today, which is a bit unfortunate because I know they

1 had some substantial testimony to provide to us, but it is
2 my understanding that Ms. Rok and Mr. Gruenstein will be
3 submitting testimony for the record which I am sure will be
4 digested and read by many of the members.

5 Our next witness is Peter Goldberger, who is here
6 representing the American Civil Liberties Union.

7 Mr. Goldberger?

8 Whereupon,

9 PETER GOLDBERGER

10 having been called, testified as follows:

11 DIRECT TESTIMONY

12 MR. GOLDBERGER: Thank you, Mr. Chairman, members
13 of the Committee. On behalf of the 10,000 members of the
14 American Civil Liberties Union of Pennsylvania, thank you for
15 the opportunity to testify today.

16 My name is Peter Goldberger. I currently
17 practice law in Philadelphia, although for a number of years,
18 as you some of you who have had prior contact with me, I
19 was a professor at (words inaudible) Law School and then
20 (words inaudible) in Los Angeles.

21 I submitted extensive written testimony. I am not
22 going to read all through the testimony, of course. But I
23 will go through all of it and try to get the highlights and
24 major points as a way of (word inaudible) telling where our
25 concerns lie.

1 I am sure you know that the ACLU is a private
2 and nonprofit organization which is concerned exclusively,
3 with the preservation of civil liberties.

4 We are also concerned (words inaudible) with the
5 availability (words inaudible). I am going to be talking a
6 little bit about the question that Representative Kosinski
7 alluded to which is the relationship of the PCHA to the
8 traditional writ of habeas corpus (words inaudible).

9 I am sure that you realize that the ACLU does not
10 support the legislation. There are two basic reasons which
11 I am going to address.

12 One is the bill would change aspects of the
13 PCHA which are not a problem, not a legislative problem. That
14 is essentially what Mr. Yaskin has addressed (words inaudible).

15 There are traditions which I (words inaudible)
16 so that their meaning is very clear and will be the subject
17 of--have to be the subject of litigation unless clarified.
18 (words inaudible) clarified.

19 That would be a sufficient reason not to pass some
20 kind of legislation in this area. But the most important
21 reason is that the purpose of the bill is to hamper and
22 (words inaudible) the prisoners who should have access to
23 other remedies in our view.

24 Finally, I will outline to you the argument that
25 the bill in its current form appears to violate the Federal and

1 State Constitutions.

2 I will start out by saying that we do not deny--it
3 cannot be denied that a great many PCHA petitions are filed
4 in Pennsylvania, too many, that many of them, probably most,
5 probably most by far, are totally lacking in the (word
6 inaudible).

7 I will start out by saying it also cannot
8 honestly be denied that the PCHA does provide an avenue to
9 (words inaudible), some of which are substance and some of
10 which are only procedure, but all of which are important,
11 sometimes of crucial value to the wrongly convicted or
12 sentenced individual and also to society as a whole, not just
13 for that individual.

14 The question is to what extent, if any, we can
15 let out the bathwater without watching the baby go down the
16 drain.

17 Our (word inaudible) is not very much. The
18 fundamental cause--and no one has mentioned this really yet--
19 the fundamental cause of the large number of PCHA petitions in
20 Pennsylvania is not something that the legislature has any
21 power to do anything about.

22 That is the State Supreme Court's strict
23 technical waiver doctrine that they apply on direct appeal.
24 These rules did not consider (words inaudible) all issues which
25 were not properly raised and considered in the trial court.

1 Most other jurisdictions, including Federal
2 appeals court do not require the formal post verdict motions
3 that Pennsylvania requires, even for issues that have already
4 been raised at the trial.

5 Most other states, as well as the Federal courts
6 have a principal claim or fundamental (word inaudible) which
7 allows the important issues to be raised on direct appeal
8 which were not presented (word inaudible).

9 Our Supreme Court, on the other hand, has
10 openly refused to hear such issues. The direct consequence
11 and the main consequence of that is to shift the work from the
12 Supreme Court to the courts of common pleas by causing a flood
13 of PCHA petitions by prisoners who feel legal errors were
14 committed in their trials (words inaudible) incorrectly.

15 Some of them may appeal it correctly, but
16 (words inaudible). Under the State constitutional separation
17 of powers doctrine which is also the product of interpretation
18 by the State Supreme Court, there is nothing the legislature
19 can do about those rules.

20 Only the Supreme Court can undo that particular
21 mess which is of its own creation. Now, until that time, too
22 many PCHA petitions will be filed no matter what the PCHA
23 or successive law says.

24 (Words inaudible) Court of Common Pleas no matter
25 what.

1 Now, it is a little hard to offer a helpful
2 (words inaudible) Bill 2073 for a couple of reasons. First
3 of all, I am not sure, I don't think we have had consistency
4 yet this morning, what exactly we are talking about.

5 Are we talking about 2073 with or without
6 (words inaudible) amendments? I can address it either way.

7 CHAIRMAN SWEET: Why don't you address it with the
8 amendments, although--I am really--the charge to witnesses
9 today was to talk about the whole problem as you perceived
10 it.

11 So feel free to deviate from that if you want. I
12 think the most practical thing to do is address it with
13 Representative Hagarty's amendments included.

14 MR. GOLDBERGER: I certainly will assume that the
15 word which was inadvertently omitted, the word innocent
16 in subsection one of the main section of the bill would be
17 added back (words inaudible) of the draft.

18 I am specifically talking about 9542 Sub 1,
19 Sub 2-A. I gather, if I understood what you said correctly
20 an hour ago, or so, that was a typographical error in printing
21 of the bill.

22 Where it says that the error was likely to have
23 resulted in the conviction of an individual, but it meant to
24 say an innocent individual.

25 REPRESENTATIVE HAGARTY: Yes.

1 MR. GOLDBERGER: Otherwise that subsection wouldn't
2 mean anything if it wasn't already covered by the introductory
3 language which requires that the conviction results from the
4 error (words inaudible) that the error be the cause of the
5 conviction, that there be prejudice in our (words inaudible).

6 I won't go through all the technical interrelated
7 questions drafted, which I mention in my testimony. I will
8 just give you one example.

9 Looking at that same area, we have that under
10 two, the little Roman numeral ii, it talks about incompetence
11 of counsel.

12 I assume that that means ineffective assistance of
13 counsel which is the constitutional term. There is no legal
14 concept of the competence of counsel, so I assume that means
15 ineffective assistance of counsel.

16 I think it is a significant difference in its
17 implication. Even the most competent defense lawyer, who is
18 here at the moment, but I will say the second most competent
19 (words inaudible) is ineffective on occasion through mental
20 strain, lapse of attention, ignorance of a particular legal
21 rule.

22 It doesn't make the lawyer incompetent, which is
23 an overall assessment of ability. We are talking about
24 ineffective assistance on a particular occasion.

25 Now, that is an example, an instance of the violation

1 of the Constitution of the Commonwealth and the Constitution
2 of the United States.

3 It is therefore a specific example which is
4 encompassed within the general area of little Roman numeral i.
5 The general rule of (word inaudible) instruction is implemented
6 by law in Pennsylvania in Section 1933 of the (word inaudible)
7 instruction act (words inaudible) specific provision and a
8 general provision on the same subject that the specific
9 controls.

10 Does that mean that the language of the sub
11 Roman numeral i does not apply in the claim of ineffective
12 assistance, which instead are covered only by little Roman
13 numeral ii (words inaudible) something which covers the whole
14 (words inaudible).

15 That critique is also true of little Roman numeral
16 iii, for example, which also constitutes a violation. It is
17 particularly a question about little Roman numeral v, which
18 talks about violations of the provisions of the Constitution of
19 the United States, all of which are addressed in little number
20 i, but with qualifications.

21 If a specific controls the general, then i is
22 more specific than v. You have lost the value of your
23 catchall phrase.

24 (Words inaudible) if it talks about the U. S.
25 Constitution. I am talking about the way (words inaudible)

1 what it leads into is self-contradiction and confusion which
2 would generate litigation over the meaning of the act.

3 The act doesn't do even what it was intended to
4 do because it doesn't answer those questions.

5 The second point, that the bill goes beyond
6 existing law by stating in the introduction that it shall be
7 the sole means of obtaining collateral relief.

8 We are talking--there was some discussion of that
9 earlier. You have to look at that in relation to section--
10 the other section of the judicial code, which is not supposed
11 to be amended by this bill, which is 6501 in the sections
12 that follow, which define habeas corpus.

13 (words inaudible) the original habeas corpus
14 shall not be available if a remedy may be had by a post
15 conviction hearing proceedings authorized by law.

16 What that seems to say is that if a claim is not
17 available under PCHA (words inaudible) claims would be
18 excluded by the (words inaudible) amendments, then they may be
19 brought in habeas corpus.

20 So no claims are excluded if you (words inaudible)
21 together. You just lose the benefit of the streamline
22 procedure of the PCHA.

23 All claims that are excluded from PCHA revert to
24 habeas corpus under the existing statutes of the Commonwealth.
25 Or if the intent is to entirely supersede the habeas remedy

1 and change the meaning of the existing law 6501, then that
2 is where it would be the suspension clause problem which I
3 will address in a few minutes.

4 So either way you are in a hopeless (words
5 inaudible). The (words inaudible) I want to talk about now,
6 would (word inaudible) without a remedy, many cases which do
7 not involve innocent persons, which do not involve undermining
8 the truth determining process, which is much less than due
9 process.

10 (Words inaudible) Representative Hagarty, it is
11 about half of due process. There is also a fair procedure
12 without regard to truth.

13 I will give you a couple examples of those. There
14 is where I think anyone who is interested in justice would
15 want relief to be granted if these cases came up, but which
16 would be excluded by the statute.

17 I think they are realistic possibilities. First is
18 the prohibition of successive prosecutions, which is section
19 111 of the Crime Code, that is we have a provision in our
20 law in Pennsylvania which is not double jeopardy, not (words
21 inaudible) double jeopardy (word inaudible) that they could
22 prosecute it in another jurisdiction for the same act.

23 You can't then be prosecuted again and be punished
24 again in Pennsylvania. Take for example an official say of
25 the township government who solicits a bribe.

1 It would be potentially a crime under our State
2 bribery statute. It would also be a crime under Federal
3 extortion statute.

4 Let's say the FBI gets there first. The person
5 is convicted and punished by the Federal courts. A political
6 opponent who happens to be the district attorney in the
7 county, goes after that person locally and prosecutes under
8 bribery under the State law.

9 Let's say the attorney doesn't know this provision
10 of the law. There are certainly many attorneys who don't
11 know many provisions of the law.

12 It is not brought up, therefore it is waived at the
13 trial. The person is convicted in the State court as well.
14 It means (words inaudible) lawyers anybody files PCHA.

15 We have a State statutory nonconstitutional, non
16 Federal violation, not affecting guilt or innocence, but a
17 total injustice of (words inaudible) excluded by this law.

18 (Words inaudible). Another case is someone who is
19 prosecuted under one of our new mandatory sentencing laws
20 (words inaudible).

21 Say someone who gets into a fight and (word
22 inaudible) aggravated assault. At the time of the fight he
23 has just stepped out of his car.

24 He has got a gun in the car which he possess
25 legally. Someone misunderstands (words inaudible) gun law.

1 He just (words inaudible). He finds out that it is not covered
2 by the mandatory statute because the gun was not (words
3 inaudible) possessed in (words inaudible) the crime.

4 That person should be able to get that sentence
5 corrected. But it is a sentence in excess of the law for
6 maximum, and therefore is excluded from being raised by this
7 law.

8 That hurts him lose a just claim. Most people are
9 not (word inaudible). Let's turn to people who are (word
10 inaudible), who are worse off, completely worse off with this
11 new law (words inaudible).

12 With that (words inaudible). That is only used
13 (words inaudible) a person who looks very likely that they are
14 innocent but because of the mechanical procedures in the court
15 system, the sentence can't be vacated right off the bat.

16 That person ought to be out of jail today, right
17 now, as soon as he realizes that he (words inaudible). The only
18 way to do it is bail.

19 Without bail you can't implement PCHA for the
20 innocent. Second, there is a proposed jurisdictional
21 requirement that the person currently be serving a sentence.

22 Well, many people are out on bail, pending appeal.
23 Someone's whose innocence is discovered outside of the trial record,
24 rely on bail pending appeal would have to go into prison to
25 bring a PCHA under this law, because he wouldn't be serving a

1 sentence.

2 That needs to be a person who is under sentence
3 rather than serving sentence, because whether he is serving
4 a sentence or not is irrelevant to when he makes (words
5 inaudible).

6 There is other provisions that make it worse, but
7 (words inaudible). The rule limiting ineffectiveness
8 counsel that are raised to overcome complaints of waiver,
9 that is subsection 4 of 9543 on page five of the bill, that the
10 failure to litigate the issue prior to or during trial or
11 during direct appeal could not have been the result of (words
12 inaudible) counsel.

13 Under this bill the district attorney can imagine
14 and articulate a procedure for tactical reason why a lawyer
15 might not raise that issue at trial (words inaudible).

16 Apparently (word inaudible) is not permitted.
17 (Words inaudible) question whether as a matter of fact the
18 lawyer was ignorant of the law or fell asleep at the switch
19 at that moment that the error was committed or something like
20 that.

21 It focuses on what could have happened rather than
22 what did happen. Of course, it could have been a factor (words
23 inaudible) case involving an innocent person even it did happen
24 it can't be brought up because a waiver would be required by the
25 law.

1 The final area of how an innocent person is made
2 worse off by this law is the question of whether the alleged
3 error made conviction of an innocent person likely for a fair
4 trial impossible.

5 That is the two subsections of little Roman numeral
6 i (words inaudible). Again, it is another situation where
7 the language of the statute talks about what is possible
8 rather than what is legal.

9 What really happened in the case may be that
10 there wasn't a fair trial. What really happened in the case
11 may be that an innocent person was convicted.

12 It could be (words inaudible) of evidence could
13 show that. And yet, if it was possible for there to be a
14 fair trial, even though there actually wasn't, the law
15 prohibits really this amendment (words inaudible).

16 So there is one last thing I want to turn to, if I
17 could just take one more moment before we get to
18 constitutionality, and that is, that while (words inaudible)
19 person absolutely makes it the main benefit of PCHA should
20 be available to the innocent.

21 We should not forget that constitutional rights
22 exist for everyone, including the (word inaudible) guilty.
23 When rights of criminal are vindicated, they are vindicated
24 not for the benefit of the criminal, but for the benefit of
25 society.

1 Society gains through that process. What we gain
2 are precedence, which are set in those cases which are then
3 used as our standards of law.

4 Those standards of law govern future cases. They
5 (word inaudible) a constitutional system from totalitarianism
6 so that the law (words inaudible) instead of on the basis of
7 whether (words inaudible).

8 They protect the innocent person in future cases.
9 We use guilty people in our system as Guenia pigs in a
10 (word inaudible) experiment.

11 We develop our principals from (word inaudible) in
12 most cases. Though I agree with Mr. Platt that our system
13 works overall very well. Most innocent people are not convicted,
14 and therefore do not appeal, and therefore are not available
15 to set precedence in all cases.

16 We need the guilty people to set those precedences.
17 We don't set them free, but we use them in our system as a
18 component of our system (words inaudible) a very serious and
19 important one.

20 So let me turn now to the constitutional question.
21 Article 1, Section 14, Pennsylvania Constitution, says that the
22 privilege of habeas corpus shall not be suspended.

23 The privilege of the writ of habeas corpus shall
24 not be suspended. What does that mean? The Federal
25 Constitution has the same provision in it.

1 In fact, it was copied in the Federal Constitution
2 from the Pennsylvania Constitution, which is ten years older.
3 Also the Federal due process law requires, as interpreted by
4 the Supreme Court, in 1949 that the State afford a clearly
5 defined process by which prisoners may raise claims of denial
6 of Federal rights.

7 The Pennsylvania Supreme Court has interpreted
8 this (word inaudible) clause to mean that habeas corpus cannot
9 be abrogated and that the legislature--this is a direct quote--
10 may not encumber access to habeas corpus in a fashion which
11 results in a practical deprivation of that right.

12 Similarly, and in fact (words inaudible) the U. S.
13 Supreme Court consistently says that the suspension clause,
14 the Federal suspension clause, requires that any modern
15 post conviction remedy that displaces habeas corpus, must
16 afford protection which is exactly commensurate with the
17 (words inaudible).

18 I will be (words inaudible). The courts have
19 ruled that the current PCHA satisfies this standard. But the
20 proposal which excludes claims and it is intended to exclude
21 claims--it wouldn't work if it didn't exclude claims and
22 especially because (words inaudible) but also because (words
23 inaudible), which is a part and parcel of (word inaudible)
24 habeas corpus (words inaudible) habeas corpus (words inaudible).

25 I believe it is very doubtful that the bill would

1 meet the suspension clause for those reasons.

2 In addition, if the proposed sponsored amendments
3 were enacted with the delay provision, the delay prejudicing
4 retrial, and the rule on successive petitions, these are
5 substantially more restrictive than has ever been (word
6 inaudible) in traditional habeas corpus and therefore, suspend
7 the writ in violation of the constitution.

8 This excessive petition amendment in the sponsor's
9 amendment for example, would implement a full writ to the
10 (words inaudible), that it would eliminate the issues that
11 could have been raised (words inaudible).

12 The Supreme Court has expressly ruled that habeas
13 corpus does not and cannot encompass (words inaudible) and
14 only encompass rules (words inaudible) issues have been raised.

15 That recent Supreme Court case even the one that
16 has gone the furtherest which is the June 26th case that
17 the act referred to said that a second petition would raise
18 the issue which has actually delineated in a prior petition,
19 then the courts may impose a culpable claim of innocence
20 require (words inaudible) not apply only successive petitions
21 and then only the petitions which raised issues which had
22 actually been raised, not those that could have been raised.

23 So that provision to my (word inaudible) clearly
24 goes beyond what habeas corpus allows and therefore if
25 enacted would be (words inaudible).

1 Enactment of the bill could also (word inaudible)
2 the due process clause, separate from suspension, because
3 in the ways that I have already mentioned and others as well,
4 it encumbers presentation of Federal issues which are required
5 in some instances under that 1949 standard.

6 (Words inaudible) including Federal constitutional
7 claims which normally would be raised if little Roman numeral
8 i were to govern all claims and which might or might not be
9 governed by little Roman numeral v, depending on what (words
10 inaudible) mean in the context of the whole law.

11 In addition, the proposed catchall then is little
12 Roman numeral v, on page five of the bill, does not cover
13 Federal statutory or treaty violations (words inaudible) but
14 proposed (word inaudible) amendment were enacted, that
15 problem would be (words inaudible).

16 Without that amendment, if the bill is passed
17 should be added. It clearly would be a (words inaudible) and
18 a violation of due process.

19 You may be surprised to learn that there are
20 Federal statutes to grant rights to defendants and prisoners
21 in State proceedings.

22 Just to name a few examples; the interstate
23 agreement on the (word inaudible) is a Federal statute. It
24 has been held by the Third Circuit to be a Federal statute
25 which provides those rights for people with State (words

1 inaudible).The Federal wiretapping law prohibits the use
2 of illegal wiretap evidence in State court proceedings and
3 the (word inaudible) Federal court.

4 It should be abated for PCHA cases and (words
5 inaudible) Federal habeas, even though it's statutory. The
6 international prisoner transfer (word inaudible) that permit
7 people to be switched from a Mexican prison or a Turkish
8 prison to American prisons, grants certain rights that have
9 to be enforceable.

10 So you do need the statutory (words inaudible)
11 language in there also. So I am done with my substantive
12 comments.

13 If the privilege of the writ of habeas corpus
14 is to be protected (words inaudible) constitution (words
15 inaudible) liberty, 650 years, three times as long as
16 there has been a Commonwealth of Pennsylvania or a United
17 States of America.

18 It is not something that (words inaudible)
19 lightly. This bill is not (words inaudible).

20 CHAIRMAN SWEET: Thank you very much, Mr.
21 Goldberger. When I came over, I was wondering why the ACLU
22 didn't have Mr. Schmidt here today since he usually provides
23 very (word inaudible) testimony and I now know why.

24 I would hate to have the burden summarizing and
25 simplifying your testimony for the purposes of floor debate.

1 given what has been said and the points that you have raised.

2 Let me just ask one question and then I will yield
3 to the other members.

4 It came up concerning this strategy and tactics
5 question. I am not very familiar with practicalities of this,
6 but I take it what happens is that one of the arguments that
7 is made by the prosecution is that the defense lawyer could
8 have raised an objection and chose not to because they had
9 some strategy.

10 Now, after the fact, and this is now some years
11 maybe after the fact, I take it what happens--let's say this
12 thing did get to hearing, the lawyer is called in, and the
13 questioning is going to go something like, did you fail to
14 make this objection because you had some overall tactical
15 plan.

16 The bill, as I understand it, would allow the
17 prosecution later on to be able to argue that there was a
18 rational or conceivable tactical plan.

19 Under the point I think you are raising, the
20 attorney would have to testify that he had a rational strategy
21 or plan.

22 The test wouldn't be whether one existed in an
23 objective way, rather that attorney at that time did have that
24 plan and followed through on it.

25 Am I making myself clear?

1 MR. GOLDBERGER: I think so.

2 CHAIRMAN SWEET: We are asking an attorney to
3 prejudice his client in fact, or at least his former client.
4 At least for some lawyers, that will create a dilemma, a
5 person one, if not an ethical one.

6 MR. GOLDBERGER: Yes. As I understand Section
7 9543, Sub 4, as proposed, that is this provision that gets
8 to that point.

9 CHAIRMAN SWEET: Yes.

10 MR. GOLDBERGER: The question that you outlined
11 which is essentially the way the questioning goes at a PCHA
12 hearing is irrelevant.

13 In fact, the lawyer doesn't have to be called as a
14 witness. It becomes a matter for counsel to argue for the
15 district attorney and new counsel for the petitioner to
16 argue whether there could have been a rational reason and the
17 question is whether there was a reason becomes irrelevant.

18 I am suggesting that that is wrong, because there
19 may have been a reason or there may not have been a reason.
20 And whether there could have been a reason shouldn't be the
21 question.

22 Now, let's say under the--

23 CHAIRMAN SWEET: Excuse me one second. If there
24 was a reason, then clearly there could have been one.

25 REPRESENTATIVE HAGARTY: Yes.

1 CHAIRMAN SWEET: So at least that part of it we
2 put aside.

3 MR. GOLDBERGER: Sure.

4 CHAIRMAN SWEET: Now, the question is just whether
5 or not we ought to allow argument between counsel as to whether
6 there could have been one and if there could have been one,
7 then it was not ineffective counsel or whether we are just
8 going to put whole debate aside and merely try to get at--
9 inside that lawyer's mind and make him admit.

10 I mean how else beside getting the lawyer on the
11 stand and getting him to admit that there was a tactic.

12 MR. GOLDBERGER: The bill says that the petitioner
13 has to prove that it could not have been the result of a
14 rational strategy, so that the lawyer's testimony under the
15 bill would be irrelevant.

16 If the lawyer gets up there and says that it was
17 not a rational strategy. I fell asleep at that moment or it
18 was not a rational strategy, I was ignorant of the court
19 decision which generated that legal doctrine.

20 CHAIRMAN SWEET: Well, isn't that likely what
21 he is going to say?

22 MR. GOLDBERGER: Not in my experience. My
23 experience is actually with lawyers who feel personally attacked
24 by PCHA petitions alleging ineffectiveness.

25 I believe this is an unprofessional reaction, but

1 this has been my experience, that they feel personally attacked
2 that they switched loyalties and that they testified for the
3 district attorney in effect.

4 That has been my experience. Now, I am sure there
5 are lawyers who don't. I have been named in post conviction
6 petitions as having rendered ineffectiveness assistance.

7 I will tell you what I did. First of all, I got
8 on the witness stand when I was called and I asserted the
9 attorney-client privilege until the Judge ordered me to answer.

10 I knew that the Judge would order me to answer.
11 But I felt that the ethics of the profession required that the
12 Judge tell me to answer, rather than I decide to testify.

13 Then when I was asked questions, I told the truth.
14 The truth was that we had done something which my client--
15 exactly what my client ordered me to do against my advice in
16 that particular case and that it was something that under
17 appellate decisions he had the right to make the decision about.

18 He wanted to plead guilty that day. I hadn't
19 investigated the case adequately. I told him that I hadn't
20 investigated the case adequately and I thought it was
21 premature of him to plead guilty.

22 He said, no, no, I know what I am doing. I want to
23 plead guilty. When I got on the witness stand to tell the
24 truth, what could I do, I told the truth.

25 I told the judge that he wanted to plead guilty.

1 I thought it was a stupid thing to do that day.

2 REPRESENTATIVE HAGARTY: Does he get a new trial
3 then?

4 MR. GOLDBERGER: Of course, not. The petition was
5 denied. He went back to jail to serve the rest of the maximum
6 sentence that he had received, which is exactly the correct
7 result.

8 REPRESENTATIVE HAGARTY: What difference did it
9 make if you wanted to plead guilty, whether you were effective
10 or not?

11 MR. GOLDBERGER: Because if I had in some way
12 coerced him to plead guilty that day without--or had told him
13 I wouldn't investigate the case or something else, he would
14 have been entitled to a re--to reconsider the voluntaryness
15 of his guilty plea.

16 CHAIRMAN SWEET: Do any of the other members have
17 questions.

18 MR. GOLDBERGER: Does that answer you?

19 CHAIRMAN SWEET: Yes. That answers it. It seems
20 to me that there is both a practical and ethical dilemma
21 involved.

22 MR. GOLDBERGER: Yes.

23 CHAIRMAN SWEET: Or a set of dilemmas involved.

24 MR. GOLDBERGER: Yes.

25 CHAIRMAN SWEET: This language was designed to --

1 MR. GOLDBERGER: There is no ethical rule that
2 bars attorneys from testifying to the truth at a PCHA hearing
3 or any other proceeding.

4 Once ineffective assistance has been raised, it
5 automatically waives the privilege and the lawyer will have
6 to testify.

7 CHAIRMAN SWEET: But you at least felt moved to
8 have the Judge order you to do it and you didn't do it--

9 MR. GOLDBERGER: But I felt that the public--that
10 private confidence in the attorney-client relationship required
11 that I not make the decision that the privilege had been
12 waived.

13 CHAIRMAN SWEET: Oh, you didn't base that decision
14 on one of the ethical standards or cannons. You just--

15 MR. GOLDBERGER: I believe that until a Judge
16 tells you to testify against your client, you don't testify,
17 but I knew he would.

18 I knew that would be the first thing he would say.

19 CHAIRMAN SWEET: Are there other questions from
20 members on this side of the room?

21 Anyone over here?

22 REPRESENTATIVE : Just one quick question.

23 CHAIRMAN SWEET: Go ahead.

24 REPRESENTATIVE : What was the date?

25 When did that happen in your particular case on the guilty

1 plea scenario? Just out of curiosity.

2 MR. GOLDBERGER: It was three years after the case
3 was handled. So I guess it would have been 1980, that
4 particular case.

5 CHAIRMAN SWEET: Representative Hagarty?

6 REPRESENTATIVE HAGARTY: Just briefly, because I
7 don't want to go into all of the issues on which I disagree
8 with your conclusions, but one that did concern me particularly
9 was your allegation that the defendant convicted under the
10 State law and Federal law for the same series of acts, but a
11 different name of the crime, you thought that that would not
12 be cognizable under this PCHA bill if this were to become
13 law.

14 The reason that I disagree with that conclusion is
15 first of all it seems to me that the ineffective assistance of
16 counsel would cover that.

17 I think that our court would interpret it that way.

18 MR. GOLDBERGER: I see the language that limits
19 ineffectiveness cases to those which were likely to have
20 resulted in the conviction of an innocent individual.

21 This person I (word inaudible) was not innocent
22 but was guilty only of one crime and not two.

23 REPRESENTATIVE HAGARTY: The definition, I lost it
24 now.

25 MR. GOLDBERGER: I am looking at 9543, two, sub two

1 on page four.

2 REPRESENTATIVE HAGARTY: (Words inaudible)
3 undermine the proper functioning of the adversarial process
4 that the trial cannot be relied on (word inaudible) to produce
5 the just results.

6 MR. GOLDBERGER: I am sorry. You are looking in
7 the amendment rather than the language of the original bill.
8 That is where my problem is.

9 REPRESENTATIVE HAGARTY: I am not sure. Because I
10 have the bill. I am looking at the amendment. Okay. I am
11 looking at the amendment.

12 I agree with you that we need that additional
13 language. With that language it seems to me that that would
14 have been an unjust result and therefore it would be
15 cognizable under ineffective assistance of counsel.

16 MR. GOLDBERGER: What if it was a guilty plea?

17 REPRESENTATIVE HAGARTY: If it were a guilty
18 plea?

19 MR. GOLDBERGER: Yes.

20 REPRESENTATIVE HAGARTY: I think it is still
21 ineffective assistance of counsel.

22 MR. GOLDBERGER: But that provision, that
23 substitute provision is limited to trials. Is it not?

24 REPRESENTATIVE HAGARTY: Okay. I will take a look
25 at that specifically. I certainly agree with you that the

1 intent in an instance like that, that it should be cognizable.

2 MR. GOLDBERGER: Well, once you get into a just
3 result standard, everything can then be litigated. It all has
4 to go to a judge.

5 You would stop the finding of standard, as you have
6 to. I think you need everything to be able to go to a judge
7 unfortunately.

8 You can't stop petitions from being filed that way.

9 REPRESENTATIVE HAGARTY: Well, we feel this would
10 stop certain petitions. Although I agree with you that it is
11 not going to have a broad result, you know, of eliminating any
12 great volume of petitions.

13 The other question I had, was you indicated that
14 the delay section in here, the standard that we have now put
15 in that a delay would prejudice the Commonwealth, that it could
16 not be brought, that you thought that was clearly unconstitutional.

17 I am curious then what your reaction is to the
18 states which have statute of limitations. I understand from
19 reviewing Judge (words inaudible) review, that there are two
20 states which have absolute statute of limitations (word
21 inaudible) the PCHA and then have modified (words inaudible).

22 So I am wondering how this can be unconstitutional
23 if other states have actual statute of limitations for PCHA's?

24 MR. GOLDBERGER: I hope I didn't say that that
25 particular provision was clearly unconstitutional. I think I

1 couched--

2 REPRESENTATIVE HAGARTY: I thought you did, but I
3 may be wrong.

4 MR. GOLDBERGER: I couched my testimony fairly
5 carefully on the constitutional question. There are a few
6 provisions which I think are clear--would clearly violate
7 this suspension clause.

8 The total denial of bail is one of those. The
9 delay provision I think, I think what I said, was that a
10 good argument could be made or a strong argument.

11 I do that deliberately, because I don't want to
12 bluster in front of the Committee. I am not saying that this
13 is totally unconstitutional.

14 I think that that raises a serious question of
15 constitutionality.

16 REPRESENTATIVE HAGARTY: Let me make a--

17 MR. GOLDBERGER: But to finish answering your
18 question, an absolute statute of limitations on post conviction
19 relief is clearly unconstitutional under the suspension clause.

20 REPRESENTATIVE HAGARTY: Do you know there are other
21 states which have those--if that has been litigated? There
22 are states that do have absolute statute of limitations.

23 MR. GOLDBERGER: I do not know.

24 REPRESENTATIVE HAGARTY: Let me guesstrate then.
25 What provisions of this bill, other than the bail provision are

1 telling us today, in your belief, are clearly unconstitutional?

2 MR. GOLDBERGER: Without being sure that I got the
3 whole list--because I didn't prepare a separate list that way.
4 Little Roman numeral v, without the sponsor's amendment to
5 add laws and treaties, is clearly unconstitutional.

6 REPRESENTATIVE HAGARTY: Okay. Can we assume for
7 this purpose, since I want to understand for my own purposes,
8 since you have come to a very (word inaudible) conclusion
9 with regard to this bill, what, if amendment, you still feel
10 is clearly unconstitutional?

11 MR. GOLDBERGER: I have to be careful, because I
12 was told that the amendments were not before the Committee.

13 REPRESENTATIVE HAGARTY: Okay.

14 MR. GOLDBERGER: So I came only directly addressing
15 the bill.

16 REPRESENTATIVE HAGARTY: Well, in any event, I
17 heard you. If that were not included, the bail provision.

18 MR. GOLDBERGER: The bail provision, yes.

19 REPRESENTATIVE HAGARTY: Is there anything else?

20 MR. GOLDBERGER: The--oh, dear, what is the other
21 one?

22 CHAIRMAN SWEET: Well, I think you just said the
23 statute, an absolute statute of limitations.

24 REPRESENTATIVE HAGARTY: That is not in here,
25 though, Dave.

1 CHAIRMAN SWEET: Oh, if we had one.

2 REPRESENTATIVE HAGARTY: That is not in here.

3 MR. GOLDBERGER: I am sorry. Now, where is the
4 amendment with the successive petition? I believe that one,
5 I would put in that category as well.

6 Yes, 9544, add B, the addition B, that an issue
7 would be waived if the prisoner failed to raise it and it
8 could have been raised, to extend the waiver rule to the full
9 scope of traditional res judicata.

10 I am sorry to be speaking so technically here.
11 But an issue that could have been raised as compared to an
12 issue that was in fact raised.

13 CHAIRMAN SWEET: Let me further refine your
14 question. It violates the State Constitution.

15 MR. GOLDBERGER: We are talking here principally
16 about--

17 CHAIRMAN SWEET: Because you are talking about
18 suspending the State's right, writ of habeas corpus right.

19 MR. GOLDBERGER: Yes.

20 CHAIRMAN SWEET: The State constitutionally based
21 right.

22 MR. GOLDBERGER: The last time the Supreme Court
23 of the United States directly addressed the question of whether
24 the suspension clause of the Federal Constitution applied to the
25 State was in 1917 when they held that it did not apply.

1 I do not think that would be good today, but it
2 hasn't been addressed and I am not going to claim that I know
3 that it applies.

4 Probably the issue would never be raised because
5 of this due process rule, that states have to provide an
6 effective opportunity of some kind to present Federal issues.

7 I am not sure--I do not know myself whether the
8 res judicata rule here would violate the due process clause
9 of the Federal Constitution.

10 That keeps changing.

11 REPRESENTATIVE HAGARTY: Now, let me--

12 MR. GOLDBERGER: I believe that would be a
13 suspension that even the State Supreme Court of Pennsylvania
14 would have to say (words inaudible).

15 REPRESENTATIVE HAGARTY: No matter what, though
16 we allow in this bill any petitions be brought if it would be
17 cognizable under Federal habeas corpus.

18 MR. GOLDBERGER: Yes.

19 REPRESENTATIVE HAGARTY: You would agree with that?

20 MR. GOLDBERGER: Yes.

21 REPRESENTATIVE HAGARTY: Then how are we suspending--

22 MR. GOLDBERGER: Once you have the laws and
23 treaties, yes.

24 REPRESENTATIVE HAGARTY: Once we have laws and
25 treaties. How then can you say that we are extending--that we

1 have an absolute label which extends the full (words inaudible).
2 We don't.

3 We never have an absolute waiver because it would
4 be cognizable under Federal habeas corpus.

5 MR. GOLDBERGER: No. Because that is a--unless
6 the statute is revised substantially in form, little v, which
7 describes the violation of the United States, is a subsection
8 of 9543 sub 2.

9 There are one, two, three, four, cumulative
10 requirements. Waiver is a separate and additional requirement
11 that has to be alleged and proved under the bill.

12 So that even though you allege the Federal
13 Constitution violation, you must also show that the error has
14 not been waived.

15 REPRESENTATIVE HAGARTY: Let me ask (word
16 inaudible). Do you read it that way (word inaudible)?

17 REPRESENTATIVE : (Words inaudible).

18 REPRESENTATIVE HAGARTY: I'm sorry. Okay.

19 In any event, I will take a look at that.

20 MR. GOLDBERGER: Even the best lawyers can lose
21 their train of attention at the moment.

22 REPRESENTATIVE HAGARTY: Okay. The bail and
23 waiver rules. Is there anything else you see that is
24 unconstitutional, clearly unconstitutional?

25 MR. GOLDBERGER: The--well, I think I mentioned

1 three. Probably the waiver rule. Certainly the bail rule.
2 Certainly the successive--that is part of the waiver rule,
3 successive petitions.

4 It is two aspects of the waiver rule. I should
5 mention one other provision if we are going to get into the
6 amendments, which doesn't mean anything as written.

7 I am trying to be helpful as well as unhelpful.

8 REPRESENTATIVE HAGARTY: I am asking these questions
9 for you to be helpful. I am not claiming that this bill is
10 perfect.

11 I want to make sure I understand a problem if
12 it may exist.

13 MR. GOLDBERGER: Page five, line fifteen and
14 sixteen, which again would expand the waiver rule, the
15 sponsor amendment which expands the waiver rule.

16 Little Roman numeral ii of that provision that
17 the waiver does not--would not constitute a State procedural
18 default barring Federal habeas.

19 That provision is meaningless, because the Federal
20 courts look to the State system to define what is a State
21 procedural waiver.

22 The Federal courts don't articulate the standards.
23 This is a rule under which the Federal courts respect State
24 sovereignty in defining waiver rules.

25 So you can't incorporate a Federal standard into

1 your State statute because the Feds have preempted you by
2 saying, you define the standard.

3 You can't define the standard by reference. You
4 have to define it yourself. I think that is about as deep
5 as I can go in complication here.

6 CHAIRMAN SWEET: Are there any other questions?

7 Jeffrey, Representative Piccola?

8 REPRESENTATIVE PICCOLA: Just briefly.

9 The scenarios or hypothetical things (words
10 inaudible).

11 MR. GOLDBERGER: Yes.

12 REPRESENTATIVE PICCOLA: They were in fact
13 hypothetical. They were not actual cases.

14 MR. GOLDBERGER: Those are hypotheticals which I
15 believe to be realistic.

16 REPRESENTATIVE PICCOLA: But they did not actually
17 occur?

18 MR. GOLDBERGER: I do not know of a real case
19 in which they have occurred.

20 REPRESENTATIVE PICCOLA: Do you know of any real
21 case that was successfully brought under the PCHA that would
22 have been unsuccessful or could have not been brought under
23 this (words inaudible) as amended by (words inaudible)?

24 Do you know of any actual cases?

25 MR. GOLDBERGER: I did not do the research to dig

1 that out. I think it is a very good question. I would like to
2 assign an ACLU summer law student or something to look for you,
3 if you really want to follow up on it.

4 REPRESENTATIVE PICCOLA: I want to ask Mr.
5 Yaskin that same question.

6 You are not aware of any, either?

7 MR. YASKIN: No.

8 REPRESENTATIVE PICCOLA: Thank you.

9 That is all I have.

10 CHAIRMAN SWEET: Thank you. We accept your
11 proffer of volunteer help. We would probably be interested.

12 MR. GOLDBERGER: I don't know if they will come up
13 with anything, but I will ask them.

14 CHAIRMAN SWEET: Thank you very much, Mr. Goldberger.

15 MR. GOLDBERGER: Thank you.

16 (Witness excused.)

17 CHAIRMAN SWEET: Our last witness of the morning
18 is Judge Cassimatis from York County. Judge Cassimatis chaired
19 I believe a committee of the Pennsylvania Trial Judges on this
20 very issue.

21 Your expertise, Judge, has already been certified,
22 not only by that exhalted office but by Representative
23 Bortner who has had private conversations with me about you
24 and about your appearance today.

25

1 Whereupon,

2 EMANUEL A. CASSIMATIS

3 having been called, testified as follows:

4 DIRECT TESTIMONY

5 HONORABLE CASSIMATIS: Thank you.

6 CHAIRMAN SWEET: Thank you. We appreciate the
7 fact that you would come up and donate your lunch hour to
8 enlightening us on this matter and on the trial judges
9 feelings on this issue.

10 HONORABLE CASSIMATIS: Thank you.

11 CHAIRMAN SWEET: By the way, we rarely, if ever
12 engage in such scholarly gymnastics. Don't think that you are
13 watching the usual deliberations of the Committee.

14 HONORABLE CASSIMATIS: I am afraid if you are
15 going to get into technicalities, you are going to find out
16 how much I don't know.

17 REPRESENTATIVE HAGARTY: He doesn't think that is
18 scholarly anyway, Dave.

19 HONORABLE CASSIMATIS: There was a time when I was
20 embarrassed to say that, but I am no longer embarrassed to say
21 that.

22 I have my cirricula vitae if anyone is--

23 CHAIRMAN SWEET: No. Representative Bortner, as I
24 said, has already certified you as an expert.

25 HONORABLE CASSIMATIS: Fine. I don't have any.

1 I didn't have time to prepare written remarks. I drafted some
2 last night and this morning while I was running and on the
3 way up I revised them.

4 Honorable Representatives, I am pleased to have a
5 chance to express to you the feelings of the judges, at least
6 those of us who served on the special projects committee of
7 1980 and '81, as we reviewed this subject.

8 I have no reason to believe that the views which
9 we expressed were contrary to the consensus of the judges
10 in the conference.

11 I have no reason to believe that they would differ
12 today, although it has not been the subject of any study. One
13 of the problems with PCHA is that it is a very emotional
14 issue.

15 The perceptions are often not supported by the
16 realities. The judge who presided at a trial one or two years
17 before and then is faced with a PCHA application, finds his
18 stomach churning as he thinks, here this defendant has had his
19 direct appeal, it has been exhausted, and now he comes back and
20 he wants another bite of the apple.

21 If it happens to be the second, third or fourth
22 PCHA appeal, the stomach churns all the more. Not only trial
23 judges are exposed to this emotional response, but the chief
24 justices of the United--of the various state courts are.

25 Our review was stimulated by the fact that then

1 Chief Justice Eagen had attended the chief justices conference
2 and they were concerned about the spread of PCHA proceedings
3 throughout the United States.

4 That chief justices conference adopted a resolution
5 that the conference of chief justices look into a unified appeal
6 mechanism as was in place in the State of Georgia as dealing
7 with the PCHA issue.

8 Justice Eagen spoke to our annual meeting of the
9 State conference of trial judges and mentioned this and
10 suggested that our own conference might be an appropriate
11 organization to inquire into the PCHA problem and come up
12 with recommendations.

13 A special projects committee was assigned to do
14 that. Judge Blakely of York originally headed it. He resigned
15 his commission and I was appointed to complete it.

16 We did complete it and file our report, a copy of
17 which I believe you have. One of the first things we decided
18 to do were to get some facts and find out just what are in
19 PCHA applications.

20 We had the assistance of a statistician in the
21 AOPC who guided us and to be certain that what we were doing
22 was statistically valid.

23 I think the margin of error was something like
24 five percent. So we had supposedly a ninety-five percent
25 accurate sampling.

1 We found that in--we took the year 1979. We found
2 that there were 867 PCHA petitions filed. 662 filed from
3 nine counties with about one-third, 308 of them in Philadelphia
4 and about one-sixth, 144 in Allegheny.

5 So you have one-half filed in those two counties.
6 Of the total petitions filed, 102 or about twelve percent
7 were dismissed without any hearing.

8 We then went in and examined what was complained
9 of. We found that in eighty percent of them incompetency of
10 counsel was raised.

11 As you all know this is a basic constitutional
12 issue. Fifty percent of them raised claims of infringement of
13 constitutional rights developed after the original conviction,
14 but required to be retroactively applied.

15 REPRESENTATIVE HAGARTY: Excuse me. What
16 percentage did you say?

17 HONORABLE CASSIMATIS: Fifty percent of the claims
18 raised involved in infringement of constitutional rights
19 developed after the original conviction but required to be
20 retroactively applied or raised other constitutional claims
21 not specifically covered in the grounds for relief in the PCHA
22 Act.

23 Twenty-five percent also raised issues pertaining
24 to (word inaudible) evidence, which was not available at the
25 time of the original trial.

1 These, of course, add up to more than one hundred
2 percent because of the multiple issues raised.

3 We also checked the aging of the various cases to
4 find out when was the alleged act, when did it occur. We
5 found, as you will remember in our tables, a great majority
6 of these involved cases that were litigated within two years.

7 We concluded as a footnote to my remarks at the
8 moment that a statute of limitations, although crossed with
9 other problems, wasn't really going to solve the PCHA problem
10 because the great majority of them were raised on cases that
11 were filed--that occurred within two years.

12 The committee recommended that this study be
13 on-going to see if there were any changes in trends or any
14 new developments that would indicate that the problem was
15 expanding, contracting or that the nature of the problem was
16 different.

17 The study was not expensive to conduct. Our
18 budget which we got from the AOPC was \$10,000. That included
19 purchasing legal research from the Dickinson School of Law from
20 our consultants and some law students over there.

21 A lot of that money would not have to be spent
22 again. So what it really involved was getting a
23 statistician and someone to go back to the samplings, statistical
24 valid samplings, go to the courthouses, get out the dockets of
25 those cases and find out what was alleged, when did the

1 underlying offense occur and the like.

2 My first suggestion, which I would like to urge
3 very strongly, is that before you (word inaudible), what is
4 the reality of this situation today as distinguished from
5 what is the perception of the problem today.

6 I think there is a strong perception that there are
7 two areas right now that are crying for relief. The one is
8 the successive filings of PCHA applications.

9 How to deal with this problem. The second problem
10 is, and this is more recent, that counsel are raising their
11 own inefficiency or testifying in a manner that supports that
12 they were inefficient, incompetent.

13 As you know, our own Supreme Court has taken some
14 action in this regard and has urged the lower courts to
15 refer cases in which counsel are testifying that they were
16 incompetent and that there is some evidence to indicate that
17 there may have been--these are my words--sandbagging, that the
18 matter should be referred to the disciplinary board for action.

19 If you will remember that Philadelphia initially
20 provided for an automatic referral of this and now has
21 modified that to provide that a panel of three judges examine
22 each case and determine whether or not a referral ought to be
23 made.

24 The problem of successive petitions is something
25 you were speaking about earlier. Waiver seems to be the way

1 to deal with that.

2 The conclusion of our own committee was that there
3 was very little that could be done legislatively to deal with
4 successive petition filings and that it was going to take
5 a different ruling by the appellate courts, both the Federal
6 and the State, to really be able to make any impact on this
7 area.

8 While I have not studied all the cases carefully,
9 I would suggest that there has been in more recent cases,
10 a constriction, as it were, of what a petitioner must prove--
11 not a constriction--but you must prove more to get--to succeed
12 in a incompetency of counsel claim.

13 Waiver I would suggest to you is being found more
14 readily today in appellate courts than it might have been
15 eight, ten years ago.

16 You all know, and I am not going to bore you with
17 the history, but the parameters and the ability within which we
18 can act in this area are very narrowly circumscribed.

19 The genesis of all of this is the rights of
20 habeas corpus in the Federal courts. In furtherance of the
21 principal that that jurisdiction in the Federal courts won't
22 attach until State remedies are exhausted.

23 We have tried to structure a remedy in the PCHA
24 process that is orderly, meaningful and is creating a body of
25 law that is providing guideposts to all of us.

1 We cannot do away with the problem by extinguishing,
2 rescinding the PCHA act, because if we do that we are back to
3 writs of habeas corpus and we are back to writs of error (words
4 inaudible).

5 So to the extent that any legislation is incomplete,
6 doesn't deal with the entire problem, that is not going to
7 solve our problem.

8 I don't have any articulate, strong, negatives
9 to what is in the bill. I would suggest there is some
10 contradictions in it.

11 Maybe if I study it--I read it twice. If I read
12 it a third time, the contradictions may not appear. But
13 I notice that in--I am looking on page four, lines thirteen
14 and fourteen, where they are talking about, that his conviction
15 or sentence resulted from one or more of the following.

16 Subsection 1 there talks about a violation of
17 constitutional rights in which event he must prove one of two
18 things as set forth in line eighteen and line twenty.

19 Then in line twenty-three, it sets forth what he
20 must prove in the event of incompetence of counsel and what
21 he must prove is something different than what preceded it.

22 Incompetence of counsel is also a constitutional
23 based argument. So I don't see how you can set up different
24 criteria for the constitutional right in subsection 1 and
25 then different criteria in subsection 2, incompetence of counsel,

1 which is also constitutionally based.

2 It seems to me you have got to be consistent
3 on those two issues. The waiver section that is in the present
4 statute has been eliminated in terms of putting the burden of
5 proof on the petitioner and raising a presumption that it was
6 done in a knowing and understanding way.

7 I suppose that the law would still imply that the
8 petitioner has the burden of proving that. I wondered why
9 the waiver section was deleted.

10 There may be some purpose that escapes me. It
11 seems to me to delete that waiver section, means to take away
12 the principals and guideposts we now have in appellate court
13 jurisdictions which have interpreted those sections.

14 There are other things I could say. In the interest
15 of time, I won't. The Georgia appeal, the unified appeal, which
16 has a lot of sex appeal, as being a good way to dispose of
17 these in a judicially efficient way.

18 Unified appeal means that on the first direct
19 appeal, any collateral attacks must be raised concurrently.
20 So that you are not going to have a later collateral attack.

21 The Georgia statute which the chief justices
22 conference pointed to as doing this, exempts from its
23 application incompetency of counsel claims.

24 We saw by our own sampling that that would
25 eliminate about eighty percent of the cases. There are other

1 problems with it, too.

2 Let me stop there and try and answer some
3 questions.

4 CHAIRMAN SWEET: Thank you very much, Judge. One
5 of the sidebar conversations that I was engaged in here was
6 that we too are engaged in trying to get some facts and some
7 data and some information about this problem.

8 The district attorney association has some data
9 admittedly. Inconclusive was one of the words used. The AOPC
10 apparently has funded some operations to do this.

11 Perhaps with your help, we will try to get the
12 AOPC to provide us with some additional information. It
13 was also mentioned by the way that \$10,000 seemed like an
14 adequate sum of money to study this thing.

15 We are spending considerable amounts on other
16 matters that some of these members are involved in with the
17 State police, with a great deal more controversy.

18 I have no further questions.

19 Lois, do you have questions?

20 We thank you, Judge, for coming and are
21 interested in your thoughts. Also I am personally concerned
22 that we seem to have a lack of ready information on the
23 volume and the nature of this problem since we do constantly
24 hear people's subjective comments about how it is burdening
25 the courts and the prosecutorial system.

1 HONORABLE CASSIMATIS: We concluded, by the way,
2 that in 1979 the PCHA remedies were requiring the equivalent
3 of two full-time judges throughout the State.

4 We had about 315, I think, trials at the time.
5 So we were estimating roughly about 4,000 hours of judge time
6 required in all the PCHA applications in 1979 and saying 2,000
7 per year per judge.

8 That is two judges.

9 CHAIRMAN SWEET: I am not sure what the rate of
10 compensation for a judge is right now. But we heard some
11 testimony earlier that it was going to cost--

12 HONORABLE CASSIMATIS: Too low.

13 CHAIRMAN SWEET: I am sure of that. It was going to
14 cost \$3 million to take care of the backlog in Philadelphia in
15 one year.

16 At any rate, Lois.

17 REPRESENTATIVE HAGARTY: First, let me apologize
18 for mispronouncing your name.

19 HONORABLE CASSIMATIS: That is all right.

20 REPRESENTATIVE HAGARTY: I was curious about,
21 and I did briefly, at least, look at your notes (words
22 inaudible), but that was the only copy.

23 I think I saw it. Just so you understand, I don't
24 think the other members of the Committee, other than
25 Representative Bortner, reviewed that.

1 I was curious as to the Georgia unified appeal.
2 Your indication is that in Georgia the only grounds then
3 under PCHA or other collateral relief or incompetence of
4 counsel, everything else must be brought or is raised on direct
5 appeal?

6 HONORABLE CASSIMATIS: Yes. But they lay the
7 constitutional framework for that to succeed. They set forth
8 a very detailed procedure involving I think thirty-some issues
9 which must be raised pretrial in a formal pretrial conference.

10 The judge, defense counsel and the prosecuting
11 attorney must do it. Such questions as, defendant have you
12 fully discussed all of your defenses with your client--with
13 your attorney.

14 Put it on the record. Are there any witnesses
15 that you want subpoenaed that your attorney is not planning
16 to subpoena?

17 Counsel, why aren't you subpoenaing these witnesses?
18 All this stuff is in a pretrial--is all transcribed. The
19 Georgia statute only applied to capitol cases.

20 It is a cost benefit issue.

21 REPRESENTATIVE HAGARTY: Is there any reason
22 that it only applies to capitol cases?

23 HONORABLE CASSIMATIS: I am sure that it is the
24 question of the cost. To go through this very detailed kind
25 of prevention to assure that the defendant's constitutional

1 rights are protected, requires such a detailed record that
2 it wasn't thought to be cost efficient to do it in noncapitol
3 cases.

4 REPRESENTATIVE HAGARTY: So I take it then you
5 are indicating that that approach would probably consume more
6 time than our current PCHA laws.

7 HONORABLE CASSIMATIS: Yes.

8 REPRESENTATIVE HAGARTY: And disregard (words
9 inaudible).

10 HONORABLE CASSIMATIS: Sure. If we concluded that
11 the PCHA process in '79 required two full-time judges in
12 Pennsylvania, imagine how many more it would require if in
13 every criminal proceeding we had to have the judge spend all
14 that additional time in pretrial conference, having colloquys
15 with the defendant before the trial and after the trial in
16 making sure that anything on his mind is on the record.

17 REPRESENTATIVE HAGARTY: That was the only question.
18 Thank you, Judge.

19 CHAIRMAN SWEET: Thank you.

20 Are there any other questions?

21 Representative Bortner, this is a unique chance
22 for you to be at the bench and the Judge to be at the bar.

23 HONORABLE CASSIMATIS: His chance to get back at
24 me after all these years.

25 REPRESENTATIVE BORTNER: Thank you. Judge, I just

1 have a few questions. I am very interested in the subject of
2 waiver.

3 We discussed this. It seems to me that that is
4 probably the best area that maybe something could be done
5 to at least eliminate the number of hearings that would have
6 to appear in court.

7 Let me ask you first, can you pretty much project
8 (words inaudible) cases, as a judge trying criminal cases,
9 is going to result in a PCHA?

10 Can you kind of see them coming?

11 HONORABLE CASSIMATIS: Yes and no. You are not going
12 to get a PCHA, not usually, on a DUI or some of the minor
13 offenses, misdemeanors.

14 I think one of the guideposts some of us used in
15 our own committee work was, if it is likely to get State time,
16 then I think that increases the risk.

17 The more time he gets, I think the greater the
18 risk that there is going to be a PCHA relief filed.

19 REPRESENTATIVE BORTNER: I guess this is (word
20 inaudible) in a certain extent that the Georgia unified appeal
21 and I have seen in your courtroom and some of the other judges
22 that try cases somewhat defensively and do some of these things
23 you are talking about, put on the record after the defense
24 closes their cases, ask the defendant whether his witnesses
25 have been called, whether all the questions have been asked that

1 he wanted to have asked of witnesses.

2 Do you see that as a way of laying some of the
3 groundwork for the waiver?

4 HONORABLE CASSIMATIS: Yes. It is a way. In
5 fact, our committee came up with a proposed colloquy for the
6 judges to follow on a selected basis in cases that they thought
7 were a high risk for later filed PCHA application.

8 When we presented that to the conference, they
9 said another colloquy? We now have guilty plea colloquies.
10 We have got waiver colloquies.

11 We have got post verdict colloquies, sentencing
12 rights colloquies, appeal colloquies and now you are laying
13 on another colloquy. Forget it.

14 In other words, the response we got was very
15 emotional. We circulated it. How much that is in fact being
16 used, I don't know.

17 REPRESENTATIVE BORTNER: That was my next question.
18 Do you get any feel for whether judges individually are
19 doing some of that thing?

20 HONORABLE CASSIMATIS: No. I don't have any feel
21 for that.

22 REPRESENTATIVE BORTNER: Do you sense that--do you
23 see a difference--I think you sort of alluded to this--in
24 the appellate court approach to the PCHA's?

25 HONORABLE CASSIMATIS: Yes. I think that they are

1 making the burdens on the petitioner greater in terms of
2 finding waiver, in terms of showing prejudice and that kind of
3 thing.

4 REPRESENTATIVE BORTNER: Thank you, Judge.

5 Thank you very much, Mr. Chairman.

6 CHAIRMAN SWEET: Thank you, Mike. You were a
7 tactful politic as always.

8 Representative Baldwin?

9 REPRESENTATIVE BALDWIN: On the issue of the
10 waiver and the colloquy that you developed, that is really
11 something that is out of the realm of the legislature.

12 That would have to come from the Supreme Court.

13 HONORABLE CASSIMATIS: Yes. The waiver has to be
14 knowing and understanding. One of the best way, in fact about
15 the only way of getting that waiver, is being sure as
16 counsel, that at the time the event occurs which is alleged
17 to give rise to the waiver, he must have been counseled.

18 This is why almost all the judges that I know,
19 when you have a first time filed PCHA application, even though
20 it may appear frivolous on the fact and there is very little
21 to it, we will appoint an attorney to represent him.

22 I, in my orders, direct that attorney to confer
23 with the defendant and for the purpose of raising all issues
24 that might be raised in the PCHA application.

25 Then I--now, I think I have laid the groundwork

1 for a waiver in the event of succeeding filed applications.

2 REPRESENTATIVE BALDWIN: Thank you.

3 CHAIRMAN SWEET: Thank you very much.

4 REPRESENTATIVE BALDWIN: Do you then at the hearing
5 ask the petition, you know, did you followup with that at the
6 hearing.

7 Have you raised all your arguments? Are there
8 any--would you like to amend your petition orally today? Do
9 you do any of that, Judge?

10 HONORABLE CASSIMATIS: We--I just had a case
11 recently where I did that, where this was--yes. I asked him
12 is there anything else that you want to raise other than what
13 your counsel--I asked counsel initially to state for me what
14 were the issues that he was raising.

15 I asked his client if he had something else he
16 wanted to raise. He did say he had one other thing. So we
17 got it on the record.

18 CHAIRMAN SWEET: Thank you.

19 Two quick comments that I would like to make.

20 One, Mr. Platt if you--

21 Judge, we thank you for coming up here and for
22 spending the time with us.

23 (Witness excused.)

24 CHAIRMAN SWEET: Mr. Platt, if you have anything
25 in the nature of rebuttal from what you have heard, we will not

1 listen to it now, but we would certainly urge you to
2 correspond or contact us, if you have any reaction to any of
3 the comments that were made subsequent to your own testimony.

4 Secondly, through the good office of Representative
5 Hagarty, President Judge Cirello of the Superior Court was
6 contacted.

7 That court obviously has a great deal of interest
8 in this subject. Judge Cirello was unable to be here today
9 and testify, but I understand that he is going to be presenting
10 us some written testimony, which we can also reflect upon,
11 since certainly the Superior Court thoughts and attitudes
12 about this would be most helpful.

13 If there is nothing further before the Committee,
14 I declare this hearing in not only recess, but adjourned.

15 (Whereupon, the hearing was concluded.)
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C E R T I F I C A T E

I hereby certify that after House of Representatives
personnel tape recorded these hearings, they were transcribed
by me, to the best of my ability.

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