

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

In re: HB 683 and HB 2414

* * * * *

Stenographic report of hearing held
in Room 418, Minority Caucus Room,
Main Capitol Building, Harrisburg, PA

Tuesday,
May 1, 1990
10:00 a.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN

MEMBERS OF COMMITTEE ON JUDICIARY

- | | |
|--------------------------|----------------------------|
| Hon. Jerry Birmelin | Hon. Paul McHale |
| Hon. Michael E. Bortner | Hon. Nicholas B. Moehlmann |
| Hon. Lois S. Hagarty | Hon. John F. Pressmann |
| Hon. Richard Hayden | Hon. Robert D. Reber |
| Hon. Joseph A. Lashinger | Hon. Karen A. Ritter |
| Hon. David J. Mayernik | Hon. Michael R. Veon |

Also Present:

- William Andring, Chief Counsel
- David Krantz, Executive Director
- Katherine Manucci, Staff

Reported by:
Ann-Marie P. Sweeney, Reporter

ANN-MARIE P. SWEENEY
536 Orrs Bridge Road
Camp Hill, PA 17011

127
+ 38
165 pages X

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PAGE

Walter W. Cohen, First Deputy Attorney
General, Office of Attorney General..... 3

David M. McGlaughlin, Pennsylvania Assn.
of Criminal Defense Lawyers..... 12

John W. Packel, Chief, Defender Assn. of
Philadelphia..... 31

Leonard N. Sosnov, Chief, Law Reform,
Defender Assn. of Philadelphia..... 35

Scott Burris, ACLU of Pennsylvania..... 71

James P. MacElree, Chester County District
Attorney, President of the Pennsylvania
District Attorneys Association..... 92

Leo Marchetti, Pennsylvania FOP.....101

APPENDIX128

1 CHAIRMAN CALTAGIRONE: We'll start with
2 the hearing and we'll start with the Honorable Walter
3 W. Cohen, the First Deputy Attorney General from the
4 Office of the Attorney General.

5 MR. COHEN: Thank you, Mr. Chairman,
6 members of the committee. I am here on behalf of
7 Attorney General Ernie Preate, who is not in
8 Pennsylvania today, to testify in support of House Bill
9 683, which, as you know, is a bill proposing an
10 amendment to the Constitution of the Commonwealth of
11 Pennsylvania to establish trial by jury as a
12 substantive right.

13 We have a prepared, brief prepared
14 statement which I have submitted to the committee, but
15 I wanted to just again very briefly highlight the
16 central premise of our position, which is that the
17 right to a trial by jury is appropriately, we believe,
18 a right to be vested in the Commonwealth and the
19 prosecutor in the same way that it is vested in the
20 defendant. The question may arise as to what is the
21 nature of the problem and what types of matters are we
22 concerned about, why are we addressing a bill to do
23 something which the Pennsylvania Supreme Court had
24 ruled the context of how it had been done by this
25 General Assembly back in, I believe, 1978 and to

1 address why that decision should be overturned by a
2 constitutional amendment. I think the answer to that
3 lies in the peculiar nature of both other legislation
4 that this General Assembly has passed and of the
5 adversary process that historically we have established
6 in this country for our criminal, and for that matter
7 civil, but we're addressing criminal trials.

8 The General Assembly has, over the past
9 decade of the '80's, spent a considerable amount of
10 time and devoted a lot of attention to the development
11 of legislation that would impose mandatory sentences
12 for a variety of offenses. One of the major concerns
13 that we have seen, and I speak more broadly here as a
14 prosecutor than just from the perspective of the cases
15 handled by the Attorney General, Attorney General's
16 Office, but more broadly as a prosecutor the cases that
17 we have seen which would be cases that should come
18 within the purview of the concern articulated by this
19 bill are cases where a judge may be inclined to impose
20 a sentence that is less than the sentence intended by
21 the legislature as a mandatory sentence for an offense
22 that has been committed. Examples, I think, are most
23 readily seen in the whole area of death by motor
24 vehicle and the whole drunk driving area, and what I'd
25 like to highlight for the committee is an experience

1 that I had as a young assistant district attorney in my
2 second week of trying cases in the Philadelphia
3 criminal court system.

4 I was assigned to a courtroom where there
5 was a list of waiver cases in front of a judge and on
6 one of those cases I presented my evidence, it was a
7 drunk driving charge, it was a case where the evidence
8 established from police testimony that the defendant
9 was, about 3:00 o'clock in the morning, driving his car
10 weaving the wrong way on a one way street. The police
11 officer stopped the car, came up to him, asked him to
12 get out of the car, he didn't. The officer opened the
13 car door, the driver fell out of the car. He was then
14 taken into the police district and the Breathalyzer
15 showed .27 level of alcohol. At that time, the
16 statutory presumption was .15, not .10 as it is today,
17 and those are basically the facts of the case.

18 The defendant did not take the stand but
19 the defense's character testimony came from a minister
20 in the man's community and the man's committeeman. The
21 judge was a former ward leader in Philadelphia of the
22 same ward that this man resided in. The man was found
23 not guilty. One could say that that was due to the
24 inexperience of the prosecutor in the second week of
25 trials being unable to establish proof beyond a

1 reasonable doubt, but at least this prosecutor raised
2 enough of an objection at the bar of the court that the
3 judge asked me to come to sidebar and I did and I told
4 him I thought that we certainly had established a case
5 that would establish guilt of the charge of drunk
6 driving, and his response to me was, "Mr. Cohen, I had
7 so many phone calls about this case there was nothing
8 else that I could do."

9 The judge is deceased, I don't remember
10 the defendant, and it's not relevant, really, as to who
11 the people were, but that was an example of a/ case and
12 really an example of the type of case that Justice
13 McDermott cited in his dissenting opinion in the
14 Commonwealth v. Sorrell, the Pennsylvania Supreme Court
15 case which had held that the legislature exceeded its
16 constitutional authority in the passage of the
17 amendments to the Judicial Code which were in conflict
18 with the rules of criminal procedure, particularly Rule
19 1101.

20 In that dissent, Justice McDermott
21 basically highlights at the end of his opinion the
22 reason and the types of cases, and I think perhaps he
23 was speaking from his experience in the Philadelphia
24 criminal court system as a Common Pleas Court judge for
25 many years when he made reference to the problems of

1 judge shopping, the problems of judge bias, if you
2 will, in particular a viewpoint of some members of the
3 judiciary that reflects a view of the lack of
4 seriousness of some offenses which is inconsistent with
5 the view that this General Assembly has set forth in
6 the Criminal Code.

7 We believe that one important balance to
8 that problem is the capacity of the attorney for the
9 Commonwealth to be able to request a jury trial. The
10 United States Supreme Court has held that statutes of
11 that nature are not inherently unconstitutional and has
12 upheld such statutes. Such statutes exist in States
13 throughout this country, and given the nature of
14 Commonwealth v. Sorrell, the ruling of the Supreme
15 Court there, it seems appropriate that here we cannot
16 proceed by an ordinary statute but rather have to
17 proceed by constitutional amendment to directly address
18 the issue and to again strike the balance in favor of
19 giving the prosecutor the right to demand a jury trial.

20 That's basically our position, and I'd be
21 glad to answer any questions.

22 REPRESENTATIVE HAYDEN: Mr. Chairman?

23 CHAIRMAN CALTAGIRONE: Representative
24 Hayden.

25 REPRESENTATIVE HAYDEN: Thank you.

1 BY REPRESENTATIVE HAYDEN: (Of Mr. Cohen)

2 Q. Mr. Cohen, could you tell me what year it
3 was when you had that first experience with that drunk
4 driving case?

5 A. 1968.

6 Q. Not to suggest that things have changed
7 that dramatically in Common Pleas Courts in the city of
8 Philadelphia, but I think that if your premise is that
9 had you had the right in that particular case to
10 request a jury trial that that somehow would have
11 accomplished a fairer result, what is to prevent, in
12 that particular situation, a judge who has received
13 however many phone calls he has or is predisposed to
14 rule against the Commonwealth despite the overwhelming
15 evidence, where does it prevent that judge from
16 granting the defense suppression motion in light of --
17 if in fact the Commonwealth had requested a jury trial
18 and gotten a jury trial, or what's to prevent a judge
19 in that particular case from sustaining a defense demur
20 at the end of the Commonwealth's evidence? I mean,
21 what is there that systemically would be corrected in
22 granting the Commonwealth's right to correct the kinds
23 of abuses in the kinds of cases you mentioned here?

24 A. In other words, you're suggesting, I
25 guess, that if you have judges who are not going to

1 carry out their responsibility -- if that is where they
2 are headed, there's nothing to stop them from finding
3 another way to get to the same place. And I suppose
4 there is some merit in that. The problem is that this
5 General Assembly and any legislative body can only
6 address so many possible areas of abuse or concern. If
7 you have a jury present, the likelihood, I think, the
8 pressure perhaps on the court, the visibility of the
9 issue is a little bit greater. So I think the tendency
10 of the judge to make a ruling, and I assume we're
11 talking about a ruling that is inconsistent with what
12 the facts are that are before the court when the court
13 makes the ruling, because obviously there are times
14 when it is appropriate to make such a ruling to sustain
15 a demur, but if it's a case where the jury has heard
16 certain facts, I think the likelihood is less. I think
17 it's just a little less likely.

18 Q. I'd like to address the question with
19 respect to whether there is a perceived problem outside
20 of let's say the two major counties in the
21 Commonwealth, either outside of the city of
22 Philadelphia or Allegheny County, with respect to the
23 concept of judge shopping, which I know this had its
24 genesis from a couple of cases I think back in the
25 mid-1980's in the city of Philadelphia in which the

1 district attorney was upset at the time, Ed Rendell was
2 upset with what some judges were doing with respect to
3 attempting, in his perception, to avoid the imposition
4 of mandatory sentences in cases in which the
5 legislature had required that mandatory sentences be
6 posed.

7 A. Right.

8 Q. I know that the concept of judge shopping
9 in a jurisdiction which has 85 or so Common Pleas
10 judges is probably more prevalent than it would be in
11 other counties. I was wondering, in light of the way
12 most other counties handle their criminal dockets where
13 you have perhaps -- we were in Berks County last night,
14 there are eight judges in Berks County. I spoke to one
15 judge who had 72 trials last year, they were all jury
16 trials. I have been in Bucks County where there are
17 eight or nine judges in Bucks County, and the tendency,
18 it would seem to me, would be less in counties like
19 that where the judge you ended up with was more a
20 function of just the random nature as to how your case
21 got placed in front of that judge, rather than some
22 conscious decision on the part of the defense bar to
23 get in front of one judge and decide they don't want
24 that judge, they are going to go to another judge, and
25 then at that point giving the Commonwealth the right in

1 fact to demand a jury trial. I'm just wondering if
2 this is really perceived to be a problem in any of the
3 county, well, particularly beyond the county of
4 Philadelphia.

5 A. Well, I think it's not helpful for us to
6 start to develop an anecdotal kind of record. I have
7 heard of, in fact yesterday, of an instance of a case
8 in Cumberland County, but I think the likelihood is
9 greater just by the numbers in the larger cities.
10 Obviously, you have a lot of counties with a single
11 judge, you have even, I guess, a couple of multi-county
12 single judge districts. Judge shopping there is, I
13 guess, not very easy to do. And also some counties, I
14 believe, have an individual judge calendar system where
15 once you're assigned to the judge, that's it. That
16 judge hears the case. And it's curious that in
17 Philadelphia on and off for 20 years or so has had
18 under discussion and various proposals have come
19 forward from the Bar Association and other groups that
20 studies come out that recommend an individual judge
21 calendar in Philadelphia, and it never gets beyond the
22 talking stage. But if we -- I think what we need to do
23 is to deal with the concept as a concept and say if the
24 right to a trial by jury is appropriate for the
25 defendant, as obviously it is, and if there are other

1 jurisdictions including the Federal system that permit
2 the prosecutor to exercise that right, why not just do
3 it?

4 Q. Thank you.

5 CHAIRMAN CALTAGIRONE: Any further
6 questions?

7 (No response.)

8 CHAIRMAN CALTAGIRONE: Thank you. We
9 appreciate your testimony.

10 MR. COHEN: Thank you.

11 CHAIRMAN CALTAGIRONE: Dave McGlaughlin.

12 MR. McGLAUGHLIN: Thank you, Mr.
13 Chairman. Thank you.

14 Good morning. My name is David
15 McGlaughlin, and I am a private criminal defense
16 attorney. I appear before this committee today as a
17 representative of the Pennsylvania Association of
18 Criminal Defense Lawyers. In that organization I
19 occupy the position of the Chairman of the Amicus
20 Curiae Committee. This is a committee of course that
21 files briefs in Federal and State appellate courts here
22 in Pennsylvania and as friends of the court. We join
23 in certain cases of statewide importance. We try to
24 limit our participation to such types of cases. I
25 believe it's because of my extensive experience in the

1 appellate courts over the last 11 years, having handled
2 well over 500 cases, that I was tapped to offer my
3 remarks on behalf of the organization.

4 This organization itself is comprised of
5 nearly 350 members who practice criminal defense law in
6 the various counties around the State and in Federal
7 court. And because of our work we are in daily contact
8 with the criminal justice system and our association is
9 the only statewide organization working strictly on
10 behalf of public and private criminal defense lawyers.

11 One of our primary goals, of course, is to foster the
12 protection of individual rights and to seek improvement
13 of the criminal law, its practice and procedures.
14 Above all, we strive to promote equality and fairness
15 in the criminal law.

16 I have personally been involved in the
17 criminal justice system from every angle since 1972.
18 For seven years I worked in a State prison in Maryland
19 known as one of the most unique prisons in the world by
20 chance called Patuxent Institution, and from 1979 to
21 1982 I was a prosecutor working in Montgomery County
22 working with and under Representative Hagarty, I might
23 add, and of course I became friendly and acquainted
24 with Representative Lashinger as well.

25 Since 1983 I have been actively engaged

1 in the practice of criminal defense law and since that
2 time I have also handled several cases of what we call
3 first impression, cases that raised issues in the
4 Pennsylvania courts that had never been addressed
5 before.

6 I appear here today to set forth our
7 organization's opposition to the adoption of House Bill
8 2414 regarding the constitutional amendment to Article
9 I, Section 8, of the Pennsylvania Constitution. While
10 I do join in the opposing views that will be expressed
11 with regard to House Bill 683, our organization has not
12 taken an official position on that in the sense that we
13 do find as a statewide organization that the, shall we
14 say, the controversy over that bill seems to center
15 more in the urban areas of Philadelphia and Allegheny
16 county.

17 Members of the committee, upon first
18 learning of these proposed constitutional amendments I
19 was struck by what I perceived to be a lack of
20 understanding of the historical development of our
21 present State and Federal Constitutions and our
22 Federalist system of government. First of all, it must
23 be remembered that our State Constitution pre-dates the
24 Federal Constitution by several years. More
25 importantly, our Bill of Rights was adopted as the

1 first article of that Constitution and not added on
2 later as a group of amendments. While this, of course,
3 is not to demean the importance of the Federal Bill of
4 Rights, it serves to illustrate the importance that the
5 Pennsylvania founders placed upon and the fundamental
6 rights guaranteed to all citizens in that first article
7 of the Constitution. We must not forget, I believe,
8 that the idea of a central Federal government made up
9 of the various colonies was met with a great deal of
10 suspicion at the time because the idea of the
11 independent sovereign colonies, and of course they
12 became sovereign States after the revolution, giving up
13 and surrendering these powers to this new concept of a
14 Federal government was very frightening to a lot of
15 people. I think we should do well to recall that the
16 ratification of the Federal Constitution was obtained
17 only by the slimmest possible margin and that one of
18 the major selling points to the people in the
19 ratification process and the debate that it centered on
20 at that time was the fact that the various State
21 Constitutions already had, for the most part, Bills of
22 Rights incorporated into them and that the lack of the
23 Bill of Rights in the Federal Constitution would be
24 remedied in the near future if ratification was
25 obtained, and of course that promise was fulfilled by

1 the adoption of the Bill of Rights shortly thereafter.

2 But to sort of clarify, there was a major
3 objection to the ratification of the Federal
4 Constitution at the time because it did not have a Bill
5 of Rights, but the way the proponents of the new
6 Constitution overcame that opposition was to point out
7 to the various State legislatures that they already had
8 Bills of Rights incorporated into their various State
9 Constitutions, which of course would serve to protect
10 the individual citizens of each individual State.

11 We must not also forget the 10th
12 amendment to the Federal Constitution which does
13 reserve to the States all the powers not expressly set
14 forth and granted to the Federal government, and this
15 shows a clear recognition of the importance the States
16 rights would play in the future of our country.

17 Closer to home and to wrap up the history
18 lesson, ladies and gentlemen, it's things I think we
19 should recall in our history, the Pennsylvania history.
20 One thing that stands out in my mind is the famous
21 Whiskey Rebellion of 1791. We must recall that that
22 was a rebellion against a Federal tax placed on grain.
23 Now, admittedly the militia was called out, the
24 rebellion was quelled, but it was the type of event
25 that should illustrate the value of independence that

1 Pennsylvania has historically placed on its sovereignty
2 and on its citizens' rights.

3 There's the Fry's Rebellion that not too
4 many people would know about. That happened in Bucks
5 County which also had to do with the levying of a
6 grossly unfair tax. And we must, I think, invoke the
7 memory of Senator William McClay from western
8 Pennsylvania who was at the time probably one of the
9 most outspoken anti-Federalists of his day, and I
10 submit by way of an unprovable prediction that Senator
11 McClay would certainly not be in favor of this bill,
12 because now we have a proposed amendment which seems to
13 ignore the 215 years of history, and worse yet, in my
14 view, displays a lack of understanding of the
15 State/Federal dichotomy upon which the health of this
16 Republic and our State depends.

17 To be sure, our State Supreme Court has
18 staked out a position that it may freely provide
19 greater privacy protections for Pennsylvania citizens
20 under Article I, Section 8, than those called for by
21 the Federal Constitution as interpreted by the United
22 States Supreme Court. But ladies and gentlemen, those
23 cases have been very few in number, and besides, I
24 asked the question, what's wrong with providing such
25 protections? What's wrong with providing greater

1 protections under our State Constitution in the area of
2 privacy and searches and seizures than required by the
3 Federal Constitution? I don't find anything
4 objectionable about that. I'm happy that I live in
5 Pennsylvania because of that.

6 In addition, this committee should
7 remember that the Pennsylvania Supreme Court does not
8 always deviate from the Federal interpretations of the
9 fourth amendment law. In a landmark case that I had
10 handled personally, Commonwealth v. Gray, the Supreme
11 Court adopted the United States Supreme Court's
12 decision in Illinois v. Gates as the law of
13 Pennsylvania. This was in spite of stiff opposition
14 and what I felt was a sound historical analysis of why
15 we should not adopt that decision. But in adopting it
16 thereby, the evidentiary requirements for the issuance
17 of a search warrant were relaxed, and that became the
18 law in Pennsylvania.

19 Well, what about the reasons for
20 rejection of 2414? Members of the committee, 76 years
21 ago the United States Supreme Court, with a makeup far
22 different than it is today, recognized that if the
23 fourth amendment to the United States Constitution
24 meant anything at all and was not merely words on
25 paper, there had to be some sanction imposed upon the

1 police for violations of its terms and conditions. In
2 United States v. Weeks, that sanction became known as
3 the exclusionary rule which prohibited the police from
4 utilizing the fruits of their illegal activity if such
5 activity was determined to be illegal under fourth
6 amendment analysis. Yet it was another 47 years before
7 the United States Supreme Court made that rule
8 applicable to the States through the 14th amendment.
9 That decision, of course, was the Mapp v. Ohio
10 decision. In both Weeks and Mapp, the Supreme Court of
11 the United States recognized that to grant the right of
12 privacy and to be free from unreasonable searches and
13 seizures but to withhold a remedy from its violation
14 was really to have no right at all.

15 And any government can place words on
16 paper and call it a Constitution. It was only our
17 willingness to back up those words with strong judicial
18 actions that separates us from any other totalitarian
19 government. You know, even the Russians up until
20 recently when they rewrote it they still had a
21 Constitution, and if you ever read some of the sections
22 in that Constitution, they talk about the rights of
23 privacy, the rights of the individual, the sanctity of
24 freedom, and so forth, but we all know that up until
25 recent events what things were like in Russia. It was

1 our willingness to back up our words that separates us.

2 Since the decision of the United States
3 Supreme Court in Illinois v. Gates we have seen, in my
4 view, a steady erosion of fourth amendment protection
5 to the point where any protections claimed under the
6 fourth amendment I feel are at this point illusory, and
7 you don't even have to take my word for it so much as I
8 brought along an article which I recently received in
9 the mail. It's a law review article from the
10 Georgetown University Law Center. The most recent
11 publication that they have, it's summer of 1989, but
12 the article just came out. Now, in there is an article
13 by Professor Silas Wasserstrom, a professor at
14 Georgetown University. The professor wrote an article
15 five years ago called, "The Incredible Shrinking Fourth
16 Amendment," and he's followed it up five years later
17 with a second article on, he said he probably should
18 have called it "The Still Incredible Shrinking Fourth
19 Amendment," and he sets out in here, ladies and
20 gentlemen, instances and arguments as to why the
21 Supreme Court, United States Supreme Court,
22 interpretations under the fourth amendment have
23 drastically eroded our protections and our freedoms
24 under the Federal Constitution. I urge this committee
25 of course in that regard to study that a bit and to see

1 if I'm not correct in my analysis that the protections,
2 privacy protections, have in fact been eroded by the
3 United States Supreme Court.

4 We have the United States v. Leon, a
5 decision that talks about even if a search warrant is
6 issued and it turns out that it's illegal -- imagine,
7 the police have come into your home with a warrant,
8 they've performed an illegal search, an illegal search
9 in your home, and yet under United States v. Leon it
10 says that as long as the police were acting in good
11 faith, that's okay. Well, now, I ask the members of
12 this committee, have you ever heard of a police officer
13 admit to acting in bad faith? I don't think you're
14 ever going to find that it comes out in a court of law
15 that a police officer admits that he was acting in bad
16 faith.

17 Ladies and gentlemen, no one, and not
18 even criminal defense lawyers, believe it or not, wish
19 to appear to be soft on crime. I am certain that
20 applies especially to certainly elected
21 Representatives, but we must remember that in the
22 so-called war on drugs and the crisis atmosphere which
23 has been generated thereby, we shouldn't use the old
24 cliché "throw out the baby with the bath water" and
25 reduce or eliminate our constitutional protections. In

1 fact, I submit it is at just such times that we must be
2 ever more diligent to preserve these hard-won and
3 hard-fought freedoms that we all enjoy.

4 The only forum, let's not forget that the
5 only forum in which limits of these rights are tested
6 is in the criminal courts. Thus, the person claiming
7 the protection of such rights will almost invariably be
8 somebody charged with a crime, yet the price we must be
9 willing to pay for our freedoms is the discharge of
10 certain people we know to be guilty in order to insure
11 the protection of us all. For as sure as I'm sitting
12 here, I submit that without the checks and balances on
13 their authority and power, police arrogance knows no
14 limits, and that has been proven historically
15 throughout the centuries.

16 Other fundamental questions arise in
17 considerations of the effects of House Bill 2414. Such
18 questions as why tie our privacy protections to Federal
19 law? Why permit the Supreme Court of the United States
20 to dictate to the citizens of Pennsylvania what their
21 privacy protections will be and what they will not be?
22 Why strip our Supreme Court of its ability to interpret
23 our State Constitution more broadly than the fourth
24 amendment is interpreted by the U.S. Supreme Court?
25 Why strip Pennsylvania citizens of important and

1 fundamental rights they now enjoy regarding privacy of
2 their bank records, their phone conversations, their
3 homes, cars, and personal effects?

4 Simply asked, ladies and gentlemen, where
5 is the need for this amendment? What this appears to
6 be is a carefully engineered, in my view, end-run on
7 the exclusionary rule and to force our Supreme Court to
8 abandon this doctrine as the law of the Pennsylvania,
9 much as the Federal government has done in the fourth
10 amendment area. Yet I submit that we do need the
11 exclusionary rule. As I said before, we need to allow
12 some individuals to go free in order that the police
13 know there are limits on the police actions which they
14 may take against the citizens. I suggest to you, I've
15 had considerations with law enforcement personnel for
16 many years and I suggest to you that they are not that
17 opposed to the exclusionary rule because the more
18 candid supervisory personnel that I've spoken to over
19 the years have indicated that it actually makes their
20 officers better officers. It forces them to do their
21 homework, it forces them to get warrants, it forces
22 them to establish probable cause, and they don't find
23 that a bad thing, and frankly neither do I.

24 To point out, in the recent -- and plus
25 this is not, the exclusionary rule is not applied to

1 that many cases across the board. To give you an
2 example, in the recent Philadelphia DA's race, the
3 winner, Ron Castille, boasted of a very high conviction
4 rate. Now it did include, of course, guilty pleas, but
5 it must be remembered in that small percentage of cases
6 where the verdict was actually not guilty, that means
7 that the case went to trial, and if there had been a
8 suppression motion filed in that case, the fact that
9 the case went to trial illustrates that the suppression
10 motion was denied. And of course the Commonwealth, if
11 they feel they are egregiously wronged by a ruling on a
12 suppression issue, can appeal that case before the
13 trial. They can appeal that case, and I read cases
14 like that with more frequency.

15 Let me conclude my remarks by saying that
16 since my entry into the legal world, and more
17 specifically the criminal court system in 1980, I have
18 been shocked and dismayed at the steady erosion of a
19 defendant's rights that I have witnessed in this State
20 and country. It used to be that the Commonwealth had
21 the resources and the defendant had the law. This
22 created, in my view, a delicate balance between the
23 individual and the government which was seeking to
24 prosecute. Now there is an ever-increasing imbalance
25 in favor of the State and against the individual, and I

1 suggest this represents a fundamental shift in our
2 perceptions of the ever-present tension between the
3 individual and their government. It must be remembered
4 the basis of our government is freedom and a limit on
5 government intrusion. What this amendment does is to
6 further tip the balance in favor of the State and
7 against the individual, and against personal privacy
8 rights and freedoms.

9 I urge this committee to remember another
10 well-used cliché that if it ain't broke, don't fix it.
11 The present Constitution is working quite well, in my
12 view, and the Supreme Court's interpretation of it is
13 not so restrictive on law enforcement that their
14 efforts have been overtly or substantially hampered.
15 In fact, Mr. Preate, his successor, and the various
16 district attorneys around Pennsylvania have received
17 just about everything they have asked for in the last
18 seven or eight years from the legislature. I urge this
19 committee to halt this one-sided trend and to reject
20 House Bill 2414 as not being in the interests of the
21 citizens of Pennsylvania. This is not to say it's in
22 the interest of criminals, but it's in the interest of
23 all citizens. If we begin tampering with our State
24 Constitution and our Bill of Rights, where will it end?
25 I urge this committee to not begin the journey down

1 that road, and I thank you very much for your time. I
2 would certainly be willing to entertain any questions
3 if you have them.

4 CHAIRMAN CALTAGIRONE: Thank you.

5 BY CHAIRMAN CALTAGIRONE: (Of Mr. McGlaughlin)

6 Q. Knowing a little bit about history,
7 because that was my major in college, especially early
8 American history, don't you find it kind of ironic that
9 in times of crisis that our national government, the
10 United States government, imposed certain sanctions on
11 its citizens to preserve the government as we're so
12 fond of today, to protect this country from the outside
13 threats first of all in the Civil War, of course most
14 recently in World War I and again in World War II?
15 Don't you find that, you know, interesting as far as
16 what we are as a people and what we've had to do in
17 order to preserve the freedoms that we enjoy?

18 A. Well, perhaps are you talking about in
19 the civil war the suspension of the writ of habeas
20 corpus?

21 Q. Yes, exactly.

22 A. If you may recall, Mr. Lincoln lost that
23 case. The Supreme Court said he was wrong to do that.

24 Q. The point that I'm making though is the
25 extraordinary efforts that we had to impose and take to

1 preserve our democracy.

2 Let me get right to the specifics. I was
3 in Philadelphia a couple of weeks ago and anybody that
4 lives in that area, and I was particularly in the 2400
5 block directly across the street from an elementary
6 school in a Hispanic area, looking at the razor ribbon
7 on the top of the roof and looking at the fortified
8 Crack house, just standing there in marvel, and then
9 going inside that school and looking at the innocent
10 little faces of those children having to go through
11 that battlefield every single day, the teachers and the
12 principals in there, the principal that I talked to had
13 indicated they have a turnover of the teachers that's
14 unbelievable, and incidents of what's going on in that
15 whole section, I'm talking about block after block
16 after block. It's like a no man's land. The police
17 don't even particularly care to go into that area. And
18 I think to myself, where are we headed as a State and
19 as a nation if we can't get a handle on that situation?
20 Does it eventually have a possibility to totally
21 destroy us? Is it that kind of a threat or is it just
22 something that will pass again and chalk it up in the
23 history books as another American experience?

24 A. Mr. Chairman, personally, I share many of
25 your thoughts. In fact ironically I was in one of

1 those neighborhoods on Saturday for a wedding. One of
2 our staff people in our law firm was getting married,
3 and my eyes were opened, too. Except when I'm visiting
4 a crime scene in preparation for some case I must
5 confess I rarely go into such neighborhoods, and I was
6 frankly appalled. Without broadening the debate in
7 terms of our solutions to this ever-present problem, I
8 don't feel, Mr. Chairman, that the answer is to weaken
9 the Constitution. More vigorous law enforcement. A
10 Crack house, if you knew it was a Crack house, then
11 certainly the police should know it's a Crack house and
12 they should take the appropriate steps to get the
13 warrants, to file the forfeiture petitions, to do their
14 homework and find out whose house that is and to take
15 the appropriate investigatory steps to initiate a
16 prosecution. We're not here opposing prosecutions or
17 opposing police work. We simply want to point out that
18 we don't feel it's a good idea to change our
19 Constitution and tie it to the fourth amendment and the
20 U.S. Supreme Court. We don't trust the U.S. Supreme
21 Court, Mr. Chairman. As conservative as they are right
22 now, give me the Pennsylvania Supreme Court any day of
23 the week over the U.S. Supreme Court. I'll take my
24 chances with our State court.

25 CHAIRMAN CALTAGIRONE: Chairman

1 Moehlmann.

2 REPRESENTATIVE MOEHLMANN: Mr.
3 McGlaughlin, I just want to thank you very much for a
4 well-prepared and well-spoken presentation. We do this
5 a lot and Representative Hagarty has just noted to me
6 the pleasure it is to listen to a presentation as
7 well-prepared as yours and I agree with that.

8 MR. McGLAUGHLIN: Thank you very much.

9 REPRESENTATIVE MOEHLMANN: I came into
10 this hearing pretty much on the other side of the
11 question as you and you've weakened my resolve. In
12 fact, you've thoroughly convinced me, and I assure you
13 that I shall stay thoroughly convinced at least until
14 the end of the next speaker.

15 MR. McGLAUGHLIN: Thank you very much for
16 your kind remarks.

17 CHAIRMAN CALTAGIRONE: Representative
18 Hagarty?

19 REPRESENTATIVE HAGARTY: No questions.

20 CHAIRMAN CALTAGIRONE: Representative
21 Lashinger.

22 REPRESENTATIVE LASHINGER: Thank you, Mr.
23 Chairman.

24 Just to recognize that David was and is
25 an able practitioner, but one being from Montgomery

1 County would have thought that Representative Hagarty's
2 prosecutorial mentality would have filtered down better
3 than that.

4 REPRESENTATIVE HAGARTY: He used to say
5 the right things. At least he still knows how to
6 speak.

7 MR. McGLAUGHLIN: Let me say that the
8 fundamental ideals are still intact, Representative.

9 REPRESENTATIVE HAGARTY: We were an
10 idealistic DA's office.

11 CHAIRMAN CALTAGIRONE: No other
12 questions?

13 (No response.)

14 CHAIRMAN CALTAGIRONE: Thank you very
15 much, sir.

16 MR. McGLAUGHLIN: Thank you very much.
17 Oh, and there was some problems in
18 getting this cleaned up for submission for the record.
19 I will have sufficient copies to submit this to the
20 record today.

21 CHAIRMAN CALTAGIRONE: Thank you. .

22 Let's see. The Honorable James P.
23 MacElree, Chester County District Attorney, and
24 President of the Pennsylvania District Attorneys
25 Association.

1 MR. MacELREE: Good morning, Mr.
2 Chairman.

3 I note that the Philadelphia Public
4 Defender's Office is here and I thought perhaps you'd
5 like to hear from all of the defense point of view at
6 one time and then I'll be glad to go after them.

7 CHAIRMAN CALTAGIRONE: Certainly, if they
8 care to come forward, since I think they were added to
9 the list.

10 REPRESENTATIVE HAGARTY: They wouldn't
11 accept that at a trial, let me point out. It's an old
12 prosecutor's trick.

13 MR. PACKEL: Good morning. My name is
14 John Packel. I'm an attorney with the Public
15 Defender's Office in Philadelphia County, and I guess
16 I'm going to buy a little bit of clean-up for Dave
17 McGlaughlin, whether he needs it or not or wants it or
18 not. I'm here to address House Bill 2414 and I'm not
19 going to read. I've submitted a letter I think
20 outlining my position and I'm not going to read it.
21 But I would like to respond to a couple of issues that
22 were raised and I would like to make a few additional
23 remarks.

24 First of all, I don't think from a
25 historical perspective that restrictions on individual

1 freedoms have ever served this country very well.
2 They've happened - alien and sedition acts, internment
3 of the Japanese, the suspension of habeas corpus - and
4 I think in virtually every one of those situations the
5 lesson that we've learned after the passage of a short
6 while is that these restrictions and limitations on our
7 liberties have been horrible and serious mistakes. I
8 don't know and I don't think any of us can tell where
9 the future is going to take us, us being you and I, the
10 Supreme Court of the United States, and the
11 Pennsylvania Supreme Court.

12 The thing that I do say and I do strongly
13 urge upon you is that preserving this provision in the
14 Pennsylvania Constitution which has been there for over
15 200 years is a safety net, and I think that a few of
16 the examples, and there are only a few, of where the
17 Supreme Court of Pennsylvania has gone beyond the
18 United States Supreme Court will well-illustrate the
19 kind of safety net that the Pennsylvania Constitution
20 and Article I, Section 8, can and does provide.

21 Would you like police officials or a
22 county official who may be opposing you to go to a bank
23 and obtain your bank records so that he could know what
24 money you have, where you've got your money, and where
25 it goes? Would you like police officers or officials

1 or county officials to be able to go to the telephone
2 company and check all of your telephone records without
3 any statement of probable cause, without giving any
4 reason for doing so and then use those against you?
5 The United States Supreme Court, in two decisions, has
6 said that telephone records can be obtained by the
7 police and used against someone without a warrant,
8 without a demonstration of probable cause. The United
9 States Supreme Court has said that your bank records
10 are not papers in your possession and therefore are not
11 subject to fourth amendment protections, to privacy
12 protections.

13 In each of those cases the Pennsylvania
14 Supreme Court has said that's not right. Under the
15 Pennsylvania Constitution, we find that a person does
16 have a privacy interest in his bank records and that
17 State officials cannot obtain those records and use
18 them against him and that a person has a privacy right
19 in the telephone calls that he makes, that the State
20 cannot simply get a list of everyone you call. Suppose
21 I'm running for office and I've got a girlfriend that
22 my wife doesn't know about. Someone can go in and get
23 my telephone records. That's terrific. I don't have a
24 girlfriend and I'm not running for office so I'm fairly
25 safe. My bank records may be another story.

1 But I would urge on you that the
2 protections that the Supreme Court of Pennsylvania has
3 provided and is likely to provide in the future beyond
4 those afforded by the United States Supreme Court are
5 not any radical things that are going to keep Crack
6 houses running. I think that what we've got is a
7 little parade of horrors. This is not a panacea.
8 This is something that's going to damage the security
9 of the people in Pennsylvania, and it's not going to
10 close down any Crack houses. I would challenge you to
11 tell me of a decision of the Supreme Court of
12 Pennsylvania going beyond the United States Supreme
13 Court that is going to make life appreciably harder for
14 the police when it comes to street crime and the drug
15 epidemic and the kind of things that your constituency
16 is worried about.

17 The protections that are afforded are
18 substantial protections and they are important
19 protections, but they are not in any way crippling to
20 the war on drugs and to the crackdown that you're
21 looking for on violent crime that poses a threat to
22 members of the community.

23 I really don't have much more to say. I
24 would be happy to respond to any questions. Mr.
25 McGlaughlin has gone through the history and I

1 certainly subscribe to that. In fact, I think that our
2 presentations on paper are going to be fairly parallel,
3 but I would be happy to answer any questions.

4 CHAIRMAN CALTAGIRONE: Thank you.

5 Any questions from the committee?

6 (No response.)

7 CHAIRMAN CALTAGIRONE: We're going to
8 leave you off unscathed.

9 MR. PACKEL: Okay, well, I think Mr.
10 Sosnov is going to speak about the right to a jury
11 trial.

12 CHAIRMAN CALTAGIRONE: Okay.

13 MR. SOSNOV: Good morning. I'm Leonard
14 Sosnov, and I'm Chief of Law Reform at the Defender
15 Association of Philadelphia, and I'm here today to
16 speak on House Bill 683.

17 I think for several reasons it's a bad
18 idea and should be rejected as a constitutional
19 amendment. First of all, it's clear that the
20 Constitution divides up the authority among the three
21 branches of government in Pennsylvania as far as the
22 promulgation and enforcement of the criminal laws. The
23 legislature has the authority to make substantive law,
24 determine for the public what conduct should be
25 punished as criminal and what the penalties should be.

1 The executive enforces the laws and then the
2 Constitution, under Article V, Section 10(c), wisely
3 gives the Supreme Court and the courts in general which
4 oversee the trial of cases the right to promulgate
5 rules of criminal procedure and the rules of civil
6 procedure.

7 The practice and procedure involves how
8 cases are tried in the courts, and we've had this
9 division of constitutional authority for some time now.
10 And I think this amendment, first of all, does a lot of
11 harm to this constitutional balance. There are
12 hundreds of rules of criminal procedure that the
13 Pennsylvania Supreme Court has promulgated. Naturally,
14 given hundreds of rules of criminal procedure, and I
15 might at hundreds of rules of civil procedure, there
16 are some rules that the prosecutors aren't too happy
17 with; there are some rules that the defense bar is not
18 too happy with. The Supreme Court calls it as it sees
19 it as far as what the best practice and procedure is
20 for the courts and here we have one rule, Rule 1101,
21 which is now being subject to a constitutional
22 amendment. So I think first of all it's bad precedent
23 to take one rule of practice and procedure and say
24 we're going to have a constitutional amendment if we're
25 just not satisfied with what the Supreme Court has done

1 with that area of practice and procedure. It sets a
2 bad precedent for the future as far as when anybody is
3 unhappy with the way the Pennsylvania Supreme Court has
4 fulfilled its constitutional duty in determining what
5 the proper practice and procedure is.

6 I think another major problem with this
7 legislation is the way that this amendment is to be
8 accomplished, the actual language chosen. What the
9 amendment says is that trial by jury is a substantive
10 right. That is the same thing as putting in the
11 Constitution the color red should be the color blue.
12 What I mean by that is the trial by jury is not a
13 substantive right. Substantive has a well-defined
14 legal meaning, a well-understood legal meaning.
15 Substantive law, and there are cases not only from
16 Pennsylvania but from jurisdictions all over the
17 country, that define substantive as basically defining
18 what conduct is criminal and the punishments for that
19 conduct. The mode of trial, how a case is tried,
20 whether it be trial by jury or a nonjury trial,
21 cross-examination, other rights during trial, they are
22 important rights and substantial rights but they are
23 rights of practice and procedure. They are not
24 substantive rights.

25 So first of all, if there is going to be

1 a constitutional amendment it shouldn't say trial by
2 jury is a substantive right. It should say something
3 like this matter of practice and procedure, the right
4 of a defendant to waive a jury trial and have a nonjury
5 trial, shall be subject to absolute veto by the
6 prosecutor but at least should be treated honestly in
7 the Constitution. I think it's bad practice to put in
8 something is a substantive right when in fact it's a
9 procedural right, as those terms are understood in the
10 law.

11 Another problem with the language chosen
12 is that I understand from what the Attorney General has
13 said and the analysis submitted with the bill that this
14 amendment is aimed at one particular rule of criminal
15 procedure, as I mentioned before, Rule 1101, which
16 provides the means for a defendant waiving his
17 constitutional right to a jury trial. And it provides
18 that it's up to the judge to have discretion whether or
19 not to accept the defendant's waiver of his right to a
20 jury trial and the prosecutor does not have an absolute
21 veto power. If it's geared to one rule of criminal
22 procedure that it seeks to overturn, the language again
23 chosen is very poor. The language says trial by jury
24 is a substantive right. It does not hone in on this
25 one particular problem, if indeed it is a problem, and

1 I disagree that it is a problem. But it doesn't hone
2 in on that.

3 So the problem is that the Pennsylvania
4 Supreme Court has approximately 25 rules of criminal
5 procedure dealing with jury trials. For example,
6 specifying the number of peremptory challenges, how
7 voir dire is to be conducted, all manner of rules of
8 criminal procedure that are in the 1100 series after
9 Rule 1101. The language chosen for this constitutional
10 amendment will throw all these other rules in doubt
11 because it hasn't specified the real problem that it
12 perceives and it attacks. We are going to have
13 litigation of the courts, confusion, and somewhat chaos
14 because it's not going to be clear whether the
15 Pennsylvania Supreme Court has the power now under the
16 Pennsylvania Constitution to regulate jury trials in
17 any way.

18 In other words, if this document is going
19 to say trial by jury is a substantive right, then where
20 does the Supreme Court get the power in any way to make
21 any rules governing trial by jury? It will create a
22 big problem because now trial by jury, even though it's
23 long been recognized as something to do with the
24 procedure of trying a case, now it's left open because
25 it says it's a substantive right to doubt whether the

1 Supreme Court has any power at all to promulgate any
2 rules in this area, which does not seem to be the
3 intent of this legislation. And in fact, in the bill
4 analysis submitted with it, it obliquely recognizes
5 this problem. The last line of the analysis submitted
6 with this bill says, without explaining any further,
7 after explaining that the main purpose of the bill is
8 to attack the Sorrell decision, which upheld the
9 Supreme Court's Rule 1101, the last line says, "but
10 House Bill 683 may be broader in scope than the
11 legislative repeal of Sorrell." I think that should be
12 explained. I don't think you pass a constitutional
13 amendment and just say, well, heck, it may cause a lot
14 of other changes in the law and not just the one that
15 we want to change here. And I submit to you that it
16 will cause a great deal of problems and at least it's
17 owed to this body an explanation of how much broader in
18 scope it's contemplated and how much broader in scope
19 the effect may be.

20 The principal complaint I have with this
21 constitutional amendment is that it converts what has
22 long been recognized for hundreds of years as a
23 defendant's right, constitutional right, to a jury
24 trial into a sword that the prosecutor can use against
25 a defendant. It's always been recognized this is a

1 right of the defendant - he can waive his right to a
2 jury trial - and now this constitutional amendment
3 seeks to give it as a tool to the prosecution in its
4 arsenal against the defendant.

5 What is proposed here in this
6 constitutional amendment is not at all novel. In fact,
7 the Pennsylvania Supreme Court, when they originally
8 promulgated Rule 1101 in 1968, it provided in essence
9 the exact same thing as this constitutional amendment.
10 In 1968, Rule 1101 provided the defendant can waive his
11 right to a jury trial as long as he has the consent of
12 the judge and the prosecutor. So the initial rule
13 provided that the prosecutor had to give permission
14 before a defendant could have a nonjury trial. The
15 Supreme Court watched that rule in effect for five
16 years, from 1968 until 1973. In 1973, the Supreme
17 Court, after observing that rule in practice for five
18 years, decided instead the wiser course was vest the
19 discretion in the prosecutor to determine -- excuse me,
20 not the prosecutor, the judge to determine whether the
21 defendant could waive his right to a jury trial and not
22 to give a prosecutor absolute veto power. And since
23 1973, for 17 years the Supreme Court has watched this
24 rule in practice and has seen no reason to change it.
25 And I submit that there is no reason to change it, that

1 it makes perfect sense and that there's no evidence to
2 demonstrate a need for a change.

3 Under rule 1101 as it's currently
4 written, as I said before, it's the judge's discretion.
5 The defendant has no right to force a nonjury trial.
6 Defendant goes into court and he says, I want a nonjury
7 trial. I don't want to be tried by you, Your Honor.
8 You're sitting hearing jury trials, but I want a
9 nonjury trial. I want to go to another judge who's
10 hearing nonjury trials, as is the system in some
11 counties, as in Philadelphia. If the judge perceives
12 that the defendant is doing that for an improper
13 reason, for example, at the last minute he's asking for
14 a nonjury trial because he wants to go to some other
15 judge, he doesn't like this judge, he's trying to
16 engage in judge shopping, there are repeated decisions
17 of the Pennsylvania Supreme Court and the Superior
18 Court, the judge can deny the defendant's request. The
19 judge has discretion whenever he determines that the
20 defendant is doing it for an improper reason to insist
21 that the defendant has a jury trial. What this
22 constitutional amendment does is give the prosecutor
23 the decision rather than the judge, and I submit
24 there's no reason why we should believe the prosecutors
25 are more unbiased, are more fair than judges in this

1 Commonwealth. There's no evidence to support that,
2 there's no reason to believe that.

3 Under the constitutional amendment, we
4 give the prosecutor the right, and indeed it will
5 happen in some cases, to use an improper motive for
6 forcing a jury trial. Just to give a few examples, and
7 this is why many jurisdictions just like the
8 Pennsylvania Supreme Court have determined that there
9 shouldn't be absolute veto power by the prosecutor.
10 Given a well-publicized case, a case with a lot of
11 publicity that stirs the passions and prejudices of the
12 community, the prosecutor may have a weak case but
13 rather than have a fair, objective judge figures I will
14 have a better chance in front of a jury, given all the
15 pretrial publicity and given the seriousness of this
16 case, given the natural sympathy for the victim, even
17 though there is not much evidence of the defendant's
18 guilt, I would be better off with a jury trial because
19 I can appeal to the passions and prejudices involved,
20 of course not directly, indirectly, and hope that I win
21 the case that way.

22 Take another example. Very complicated
23 case. A case where again the prosecution's case is
24 weak, it's an extremely complicated case. Prosecutor
25 may think a judge, understanding the law, understanding

1 the complexities of this case, understanding that I
2 have a weak case, may acquit the defendant. Hopefully
3 though in a jury trial, given 12 laymen, perhaps I can
4 confuse the jury, perhaps I can win this case, even
5 though it's weak. So I'll ask for a jury trial. Under
6 this constitutional amendment, the judge is completely
7 powerless. The judge can't do anything. The judge
8 can't say, no, we're going to have a nonjury trial.
9 You only want a jury trial because you want to confuse
10 the jury in this complicated case. I know what you're
11 trying to do. The judge has no power whatsoever. This
12 gives absolute power to the prosecutor.

13 Another instance in which it can be
14 abused is you have a defendant who has enough money to
15 hire a good, private attorney to represent him for a
16 nonjury trial which will last one day but not
17 sufficient funds to hire that good, experienced lawyer
18 for what would be a one-week or two-week jury trial.
19 And he asks for a nonjury trial and the prosecutor in
20 that situation could ask for a jury trial simply to
21 harass the defendant, because in that situation he
22 knows the defendant could not afford to retain that
23 lawyer for a two week jury trial. And in that
24 situation again the judge would have no power, with
25 this constitutional amendment, to intervene. And in

1 that situation the defendant would lose his chosen
2 lawyer and would instead get an appointed lawyer, and I
3 might add at county expense, for the one-week or
4 two-week trial which would ensue.

5 I think when such a drastic step is
6 contemplated as a constitutional amendment, the people
7 that move for the constitutional amendment I think
8 should have to present some evidence, some
9 documentation of some abuse which requires this drastic
10 step. The Attorney General came here today and offered
11 us a 1968 case as evidence of why we needed this
12 constitutional amendment. And then when Representative
13 Hayden asked him, could you tell us the experience in
14 some counties, he said, I don't think an anecdotal
15 approach would be very useful here. But what we had
16 was one anecdote from 1968, 22 years ago. I submit
17 that's not very useful, and in fact if the proponents
18 of this constitutional amendment had to document a need
19 for this, they could not.

20 There's been some talk of a problem where
21 perhaps a judge would avoid a mandatory sentence,
22 perhaps he would give the wrong verdict, a verdict that
23 was less than that required, find somebody not guilty
24 or find him guilty of a lesser charge to avoid a
25 mandatory sentence. I submit to you in Philadelphia

1 County, for one thing, it's not happening. Defendants
2 are getting mandatory sentences in drug cases right and
3 left. It's simply not happening.

4 Secondly, if in fact there is a rare
5 instance where a judge acts improperly, and of course
6 that is the fear, that's the only reason that we can
7 even speak to this constitutional amendment, some fear
8 that judges acted improperly sometime, that the
9 prosecutor has remedies. There are a few very good
10 remedies that the prosecutor could employ. If the
11 judge in a case where there's overwhelming evidence,
12 and we could take the Attorney General's example, take
13 any example, the evidence is overwhelming of the
14 defendant's guilt and the judge says not guilty, and
15 the judge then in the case he gave made the outrageous
16 comment afterwards that I had to do it because people
17 were calling me up, I would like to know what the
18 Attorney General, the prosecution's office, who was the
19 prosecutor at the time, what they did in response that
20 to that. That's outrageous if a judge ever did that.
21 That judge should have been reported to the Judicial
22 Review Board, and that is a remedy. That judge, the
23 next time a case came up, there should be a motion for
24 recusal. Just like the defense can move for recusal
25 when a judge has shown bias against a defense, the

1 prosecution has the right to remove for recusal when
2 there's bias in favor of the defense. I mean, that
3 judge could have even been arrested. I mean, that is
4 an obstruction of justice to say I decided a case
5 because people called me up. To base a constitutional
6 amendment on an anecdote like that which all of us
7 would recognize as exceedingly rare I say is
8 ridiculous.

9 There's also the power of the press. In
10 a rare case if there is a judge out there who is
11 deciding more than once a case that a defendant is not
12 guilty or not guilty of a most serious charge when the
13 evidence is obvious and overwhelming, there is no
14 problem in Philadelphia, and the district attorney does
15 it all the time, of going to the press and putting
16 plenty of pressure on that judge to do his duty the
17 next time around. There is no pervasive problem and
18 there are remedies in place when there is the very
19 isolated instance of a judge not using his power
20 properly.

21 Finally, I'd like to say it's clear that
22 we need nonjury trials. They serve a very important
23 function right now and they have for many years. We
24 have seriously overcrowded prisons, not only the
25 defendant has a right to a speedy trial but it's

1 extremely important for the public to have speedy
2 trials. If we get many more jury trials, because the
3 prosecutor has the right, and maybe the prosecutor in
4 Philadelphia decides they don't trust judges in general
5 so they're going to exercise, and we don't know this
6 because this constitutional amendment hasn't been
7 passed yet, but let's say this constitutional amendment
8 is passed and we get a district attorney who decides in
9 general I don't trust judges with nonjury trials so I'm
10 going to insist on a jury trial in every case involving
11 drugs or I'm going to insist with these five judges
12 every time on a jury trial, the system will grind to a
13 halt if you give the prosecutor the power and it's used
14 in that way.

15 We need nonjury trials. We have
16 seriously overcrowded prisons, and for the defendant's
17 right to a speedy trial and also for the right of the
18 public. Thank you. I'd be glad to answer any
19 questions.

20 CHAIRMAN CALTAGIRONE: Representative
21 Hagarty.

22 REPRESENTATIVE HAGARTY: Thank you.

23 BY REPRESENTATIVE HAGARTY: (Of Mr. Sosnov)

24 Q. First, I was concerned about your comment
25 that this is a procedural right. You have concluded

1 from the fact that the rules provide for the manner of
2 jury selection and other procedures with regard to jury
3 selection that somehow that makes the basic right
4 itself a procedural right. Is that the basis of your
5 conclusion, that this is a matter of procedure?

6 A. No, it's based on the well-understood
7 legal definitions of what practice and procedure is
8 versus substantive.

9 Q. Well, how do you find that the basic
10 right to a jury trial is a matter of procedure and not
11 of substance?

12 A. My quibble is not with whether it's
13 important or substantial. In other words, the right to
14 cross-examination or confrontation, to pick other
15 examples. They are substantial. They are important.
16 They're built right into the Constitution. If I could
17 go on--

18 Q. Well, I disagree with you. I don't
19 find--

20 A. If I could answer your question.

21 Q. The fact that the rules of the procedure
22 detail the manner of cross-examination does not lead me
23 to conclude that the right to cross-examination is a
24 matter of procedure. That's the conclusion you're
25 reaching.

1 A. I'm not reaching this conclusion. This
2 conclusion has been reached by almost every court that
3 has considered this issue. In other words, practice
4 and procedure, the definition is the manner in which
5 cases are tried in the courts. Substantive law and
6 what the legislature does as far as substantive law is
7 determine the rights of people out there in society and
8 the punishments for violating what's defined as
9 criminal conduct.

10 Q. Well, tell me where you have a case that
11 says that the sixth amendment right to
12 cross-examination, the right to a trial by jury, is a
13 matter of procedure, not the manner--

14 A. I've cited--

15 Q. No, what you have cited for me is the
16 manner of cross-examination, the manner of jury
17 selection.

18 A. No. No. I've submitted a letter to this
19 committee and my letter cites some of those very cases
20 you're asking for.

21 Q. Well, I want to--

22 A. Could I please answer your question?

23 Q. Yes.

24 A. My letter to the committee cites the
25 cases, in the United States Supreme Court and in other

1 courts, that have said trial by jury is a matter of
2 practice and procedure. The majority opinion in the
3 case of Commonwealth v. Sorrell cites to several cases,
4 many cases, so the cite to that case, Commonwealth v.
5 Sorrell, the case that's under attack, says exactly
6 what I've said today. This is not my proposition I've
7 come up with.

8 Q. Are you suggesting that our rules of
9 criminal procedure could take away the right to
10 cross-examination since it's a matter of procedure?

11 A. No, because certain basic rights that are
12 guaranteed in the Constitution and they aren't practice
13 and procedure but they are the ultimate rights in this
14 country, they can't be taken away by anybody - by the
15 legislature, by the Pennsylvania Supreme Court. In
16 other words, the Pennsylvania Supreme Court can't
17 modify the United States Constitution. They can't
18 reduce the rights that are provided there. But it
19 doesn't mean that it's not a matter of practice and
20 procedure

21 Q. I find that an incongruous result.

22 A. It's not incongruous--

23 Q. And I certainly find nothing in that to
24 suggest that we can't amend our Constitution, as we
25 have done before, to provide another constitutional

1 right, which is what this bill obviously calls for.

2 A. In response to the last thing you said,
3 there is nothing to prevent this body from amending the
4 Pennsylvania Constitution. In other words, I have not
5 come here to say that your constitutional amendment, if
6 you choose to do that, would itself be
7 unconstitutional. That's not what I'm saying.

8 Q. Okay. I'm also concerned about your
9 suggestion that somehow the prosecutor is going to
10 misuse the reasons for jury waiver, but on the other
11 hand the defendant you have not indicated ever has the
12 wrong motive for jury selection rather than judge
13 selection.

14 A. No, that's not what I've said. What I've
15 said is this constitutional amendment creates the
16 potential for the prosecutor to misuse it. There is no
17 check on the prosecutor by this constitutional
18 amendment.

19 Q. The check is the jury, if I might
20 suggest.

21 A. No, no, the check that I'm talking about
22 is the check as to whether the defendant can waive the
23 right to a jury or not. If the prosecutor insists on a
24 jury trial after this constitutional amendment, the
25 judge has no check on that choice. The beginning of

1 your question was what if the defendant wants a nonjury
2 trial for an improper motive, and the answer to that is
3 that right now the defendant does not get away with
4 that. Rule 1101 provides, and it's been interpreted
5 many times by the courts, the judge says no to the
6 defendant, you cannot waive a jury trial.

7 Q. But my question was, when the defendant
8 wants the jury for an improper motive, there is
9 obviously no check on that.

10 A. And there can't be because the United
11 States Constitution, for over 200 years now, has
12 provided the defendant has a constitutional right to a
13 jury trial.

14 Q. Absolutely, and we want to provide that
15 the prosecutor does.

16 A. Well, so far nobody has felt that the
17 Constitution, at least the Federal Constitution, has to
18 be amended to say that the defendant has a
19 constitutional right to a jury trial and the prosecutor
20 has a constitutional right to a jury trial.

21 Q. It concerns me greatly that you suggest
22 that an improper motive by the prosecutor somehow
23 prejudices the defendant. The defendant is entitled to
24 a jury trial. It is that jury that he gets to hear his
25 case. The motive of the prosecutor is irrelevant.

1 A. No, it's not irrelevant because the
2 examples that I've given are real examples of what has
3 happened.

4 Q. What difference does it make? He gets a
5 jury to decide. You're suggesting that the right is
6 not to a jury trial.

7 A. No, I'm suggesting that in reality a
8 lawyer could use the very fact of a jury trial to gain
9 a tactical advantage, use it for an improper motive to
10 gain a tactical advantage the person shouldn't have.

11 A. Defendant does it all the time.

12 Q. Well, the defendant has a constitutional
13 right to a jury trial, and if you think that that's a
14 better system, if that's the reason of this
15 constitutional amendment because you want to give the
16 prosecutor the chance to improperly ask for a jury
17 trial, I can't respond to that. I say that that's not
18 a good reason to amend the Pennsylvania Constitution.

19 Q. No, that's not the reason I'm suggesting.
20 My other concern is you suggested that somehow if the
21 judge is improper that the proper remedy is for the
22 district attorney to criticize in the press that judge.

23 A. That's not the primary remedy.

24 Q. Well, I'm curious because you cited that
25 one of the things that the prosecutor's office in

1 Philadelphia can do when they find a judge has acted
2 improperly is go to the press. The Defenders
3 Association, in my reading of the Philadelphia
4 Inquirer, is the first one to point out that the
5 district attorney has no business going to the press to
6 criticize a judge. So I'm curious now, are you
7 suggesting that this is the proper remedy and that the
8 district attorney is proper in going to the press when
9 a judge has acted leniently?

10 A. No, but I'm saying in fact that it does
11 happen and they have been doing that.

12 Q. I see. That's the fact, but that's not
13 okay?

14 A. I don't think that cases should be tried
15 in the press, myself. I say that as a practical
16 matter. The other two remedies that I did suggest,
17 that is a motion for recusal and referral to judicial
18 review board, are proper remedies and they can be
19 employed in the rare instance when in fact a judge has
20 acted improperly.

21 Q. I was also curious about your suggestion
22 to this committee that a reason that a prosecutor might
23 request a jury trial was because of a great deal of
24 publicity. You know and you failed to suggest to the
25 committee that in those cases a motion for a change of

1 venue is the proper defense motion.

2 A. The motion for change of venue, though,
3 is very difficult to sustain so that even though the
4 defense can make a motion for a change of venue, it may
5 not work.

6 Q. But obviously if the jury is going to be
7 prejudiced as a result of extensive pretrial publicity,
8 our law provides that a change of venue is the proper
9 result.

10 A. That is a practical matter. Given the
11 subtleties of real life as a practicing criminal lawyer
12 and knowing what goes on in real life, you may not have
13 a successful motion for a change of venue and in fact
14 the publicity works against you.

15 Q. Well, might I suggest to you that as a
16 practical matter there are times when prosecutors feel
17 that the Commonwealth gets a fairer opportunity before
18 a jury trial also.

19 Thank you.

20 A. Thank you.

21 CHAIRMAN CALTAGIRONE: Representative
22 McHale.

23 REPRESENTATIVE McHALE: Thank you, Mr.
24 Chairman.

25 BY REPRESENTATIVE McHALE: (Of Mr. Sosnov)

1 Q. Representative Hagarty questioned you I
2 think from the perspective of a former prosecutor.
3 I'll tell you initially I'm a former criminal defense
4 lawyer, and having said that, let me tell you that I'm
5 deeply troubled by your testimony and that my
6 perspective on this legislation, at least for the time
7 being, is far closer to Representative Hagarty than it
8 is to you. That's kind of a forewarning.

9 How long have you been a criminal defense
10 lawyer?

11 A. For 18 years.

12 Q. And if you could give us a rough
13 estimate, and I know this is difficult, how many cases
14 have you handled in that period of time?

15 A. I've handled hundreds of cases. I mean,
16 I don't know the exact total.

17 Q. When was the last time you had a judge,
18 over the objection of the criminal defendant, force a
19 case to a jury trial?

20 A. I can't personally answer that because I
21 do--

22 Q. Have you ever had such a case?

23 A. Yes, I have, and members of our office
24 have had it very often. It happens very often.

25 Q. When was the last time you had that

1 experience where a case actually, in years?

2 A. No, I can't respond to that because I
3 haven't done a nonjury trial, maybe I've done one in
4 the last six or seven years. So it's not--

5 Q. When was the last time--

6 A. But I know it happens very frequently.

7 Q. Not in my neck of the woods.

8 A. Your neck of the woods is not
9 Philadelphia.

10 Q. Well, most of the State is not
11 Philadelphia.

12 A. No, but I'm saying this bill supposedly
13 responds to a problem that basically is in
14 Philadelphia, from what I hear.

15 Q. I think that's wrong. I think this is an
16 issue of statewide constitutional significance. And
17 let me be fair to you. I don't mean to put you in a
18 position where you lack an opportunity to respond.

19 A. No, in Philadelphia I can tell that as a
20 matter--

21 Q. Hold on. We've heard a great deal about
22 Philadelphia, but this would apply statewide and is an
23 important issue to 67 counties, not just one county.
24 In the real world of criminal prosecutions, perhaps
25 outside the city of Philadelphia, we'll exclude one of

1 the 67 counties for a moment, it's virtually unheard of
2 either in a civil matter or a criminal matter that a
3 trial judge will exert any influence to bring a case
4 before a jury when the parties, or in this case the
5 criminal defendant, waives a right to a jury trial.
6 I've never heard of that happening in my county, Lehigh
7 County. It may have happened, and I guess
8 statistically it probably has happened, but speaking of
9 the real world, it's virtually unheard of. It takes
10 three years now in my home county to bring a civil case
11 to trial because of the crush of criminal prosecutions
12 which appropriately take precedence. We want to
13 provide a speedy trial to criminal defendants. A trial
14 judge is delighted when the criminal defendant waives a
15 jury trial.

16 Is there a flaw in that logic? If you
17 can present to me something from your experience that
18 will give us hard numbers or even an anecdotal account
19 to indicate that the safeguard which you have described
20 really takes place in the real world, does in fact take
21 place in the real world, I would find that encouraging,
22 because your argument is there is always the judge to
23 step in and compel a jury trial when the criminal
24 defendant, for unwarranted reasons, has waived the
25 right to a jury trial and instead seeks a nonjury

1 trial. I don't think that happens in the real world,
2 and if it does, tell me about it.

3 A. Well, it does to the extent I've cited
4 some of the appellate decisions in my letter. Well,
5 those were cases that upheld defendant complaints that
6 the judge overrode the defendant's choice to a nonjury
7 trial.

8 Q. It's going to happen, but how often does
9 it happen in the real world?

10 A. In Philadelphia it happens to some
11 extent, and I don't know what--

12 Q. What extent, is my question, sir? How
13 often?

14 A. I can't document, but I would say to some
15 extent we should look to the opposite side of the coin
16 of this constitutional amendment. To what extent can't
17 judges be trusted to make the decision? In other
18 words, there is nothing inherently horrible about a
19 nonjury trial.

20 Q. When you've got a judge who knows what
21 the backlogs are like, who is most anxious to move
22 along the cases as quickly as possible, there is an
23 institutional incentive for him to accept the waiver of
24 a jury trial and go nonjury. That is the real world.

25 Secondly, how are we to know, how is the

1 trial judge to know, again in the real world, when a
2 jury trial is being waived for an improper reason? I
3 submit to you, and I invite your comment, the trial
4 judge will hardly ever know that there is an improper
5 motivation compelling or causing the criminal defendant
6 to waive a jury trial and instead seeking to go
7 nonjury.

8 A. If I might ask in return, what are the--

9 Q. If you could answer my question, sir.

10 A. I think one of the principal improper
11 motives is judge shopping, which judges in Philadelphia
12 I know do say, no, I'm not letting you take this case
13 somewhere else.

14 Q. Yes, that's true. And what I'm
15 suggesting--

16 A. What are the other improper motives--

17 Q. If the criminal defendant walks in with
18 his attorney and says, "Your Honor, I'd like to judge
19 shop today, do you mind if I waive my jury trial?" how
20 is he to know this is not going to happen? You and I
21 have both been in a courtroom.

22 A. Right.

23 Q. In the real world of criminal
24 prosecutions, when that lawyer walks in with the
25 criminal defendant and says, I'm willing to waive the

1 jury trial, I want to go nonjury, and assuming he
2 doesn't wave a red flag and point out to the trial
3 judge that he's doing so for an improper reason, how is
4 the trial judge, who then has to decide whether or not
5 the case will go nonjury, to know that there's an
6 improper motivation? How is he going to know?

7 A. Often by the timing of the motion a judge
8 can tell, and I would suggest that besides this fear
9 about judge shopping, I don't know what the other
10 improper motives are that we have to fear to create a
11 constitutional amendment as far as defendants waiving a
12 jury trial. In other words, if there is an across-the-
13 board fear that defendants, there are all these
14 improper motives which I can't think of for defendants
15 taking nonjury trials, then you might as well have a
16 constitutional amendment saying that all trials should
17 be by jury. But I don't see this as a pervasive
18 problem of nonjury trials.

19 Q. Well, I don't want to argue with you but
20 I simply suggest to you that your safeguard is utterly
21 unrealistic. In the real world of all the courtrooms
22 that I've been in when a criminal defendant walks in
23 with his attorney, having been given competent legal
24 advice, and he advises through his attorney that he's
25 willing to waive a jury trial and go nonjury, in the

1 vast majority of cases what would be running through
2 that trial judge's mind is, I have an opportunity here
3 to avoid a three-day trial, if we can move the process
4 along a little more expeditiously, justice will be done
5 and it will be done more efficiently through a nonjury
6 trial. Therefore, it goes nonjury. And I've never
7 heard in my experience of a case where a judge, over
8 the objection of the criminal defendant, required a
9 jury trial. I just don't think that happens, and I
10 would submit to you if you reviewed the statistics
11 statewide, my supposition would be borne out by the
12 reality of how rare that compulsion to face a jury
13 trial is under current law.

14 A. Okay.

15 Q. Final question, if I may submit this to
16 you.

17 A. Could I say one thing briefly before the
18 final question?

19 Q. Yes.

20 A. I'd also like to point out that I believe
21 under this constitutional amendment that this leaves
22 open the prospect of prosecutors doing judge shopping
23 pursuant to this amendment. For example, in a city
24 like Philadelphia where you have some judges hearing
25 cases without a jury, and other judges hearing cases

1 with a jury, that's part of the system there, that a
2 prosecutor who gets before a judge who the prosecutor
3 feels just is not that tough a sentencer, maybe he's an
4 average sentencer and the prosecutor wants a real tough
5 sentence in this case and he knows the only judge
6 available among the jury trial judges is a very tough
7 sentencer, a prosecutor can say at the last minute, I
8 insist on a jury trial in this case. Under this
9 constitutional amendment, there would be no need to
10 state a reason and it would be done simply for the
11 purpose of judge shopping to get a very tough
12 sentencing judge in that case if a conviction results.

13 Q. The sentence would be bound, in most
14 cases, by the sentencing guidelines. Correct?

15 A. Well, no, sentencing guidelines are
16 simply that, guidelines, and the judge is not bound by
17 the guidelines.

18 Q. As a former member of the Sentencing
19 Commission, it is rare that a judge deviates from those
20 guidelines, so that your argument holds water up to the
21 point that we realize that again in the real world
22 there are parameters to the judge's discretion.

23 A. I think we went far afield on that.

24 Q. We did. This, I think, is the heart of
25 the issue: You have talked about separation of powers

1 in terms of procedure and substance, what the proper
2 role of the courts is versus the proper role of the
3 legislature, and you've talked about your perception of
4 poor draftsmanship in this particular constitutional
5 proposal, but I think the heart of the issue is
6 captured by Deputy Attorney General Cohen when he said
7 the State and the defendant are parties to a trial,
8 both require an equal voice as to the method of trial.
9 The defendant alone should not control the method of
10 trial. The prosecution cannot force a bench trial upon
11 a defendant; similarly, a defendant should not be
12 allowed to force a prosecution to have the case tried
13 without a jury. That's the heart of the issue, I
14 think, beyond separation of powers and beyond
15 draftsmanship. That's really the issue that's at stake
16 here. Would you tell me what's invalid, from your
17 perception, with regard to that argument?

18 A. I've been trying to do that. I believe
19 that the intention in putting in the constitutional
20 provision, the right to a defendant to have a jury
21 trial, was meant to provide the defendant a barrier
22 against possible government oppression, of trial by
23 members of the community, of a trial by his peers--

24 Q. You and I have both read about the
25 history of the Bill of Rights. I understand.

1 A. And it was not meant and should not be a
2 tool of the prosecution. In other words, it should not
3 be something--

4 Q. Why shouldn't the prosecution have a
5 tool? I admit to you readily that this would be a new
6 tool for the prosecution, but my understanding of
7 constitutional history is such that the jury represents
8 the conscience of the community, which is why you'd
9 find nobody more ardent than I am in defending the
10 right of the accused to appear before that jury, that
11 conscience of the community. If the tool to which you
12 object is really the conscience of the community,
13 what's wrong in providing that tool to prosecutors?
14 Yes, it will give them leverage; yes, it will be a
15 benefit to the prosecution, but ultimately we are
16 talking about requiring the criminally accused to
17 appear before the conscience of the community in an
18 effort to obtain justice both for the people and for
19 the criminally accused. What's wrong with that tool?

20 A. I would say that in general if we feel
21 that that's the preferable method for disposing of
22 trials, then we should have a constitutional amendment
23 to eliminate nonjury trials. If we're not going to do
24 that, if we're not going to say that that's the
25 preferable method, I don't think it should be a

1 prosecutorial tool. That's not the intent of a jury
2 trial, and I think the Supreme Court has had the
3 experience of I said since 1968 of dealing with both
4 forms. For five years they had exactly what this
5 constitutional amendment proposes. From 1968 to 1973.
6 This was not a radical move by the Pennsylvania Supreme
7 Court. They've had 22 years of experience. I just
8 don't think that it's acceptable that it should be a
9 prosecutorial tool. And if anybody differs with me,
10 there's nothing more that I can say. I mean, I've
11 given the reasons why I don't think it's a good idea.

12 Q. I respect your conviction and I respect
13 your conclusion, but I've heard very few reasons that
14 go to the substance of the issue.

15 REPRESENTATIVE McHALE: Thank you, Mr.
16 Chairman.

17 CHAIRMAN CALTAGIRONE: Chairman
18 Moehlmann.

19 REPRESENTATIVE MOEHLMANN: I'd just like
20 to add an anecdote, and I would not have except I guess
21 I'm relating this to Representative McHale. I had a
22 conversation, coincidentally just last night, with a
23 judge, who shall remain nameless, who told me that he
24 never does a nonjury trial and will not. Now, how do
25 you do that? Well, he tells the defendant that he

1 sentenced 27 people that day and he's known as the
2 hanging judge. Invariably the defendant will say, Your
3 Honor, my counsel is wrong, I want a jury trial. It
4 happens.

5 MR. SOSNOV: That's the indirect method.

6 REPRESENTATIVE MOEHLMANN: That's
7 indirect?

8 MR. SOSNOV: Well, I'm saying instead of
9 rejecting the defendant's expressed desire for a
10 nonjury trial, the defendant no longer has a desire.
11 There's nothing to reject.

12 REPRESENTATIVE McHALE: Mr. Chairman, it
13 I could suggest to the witness, I would be delighted to
14 have statistics on this issue. If you can provide
15 factual information that indicates that it is common,
16 that it happens with anything other than a rare
17 occasion for a trial judge to force a criminally
18 accused to go to a jury trial over the objection of the
19 criminally accused, I would find that information to be
20 very insightful. It may be threatened, but I think we
21 will find out that it very rarely happens.

22 MR. SOSNOV: I'm almost 100 percent
23 certain that there are no such statistics. I will
24 check that out, but I think that there are no
25 statistics kept for that.

1 REPRESENTATIVE McHALE: Well, the real
2 world is such that trial judges, in my opinion, are
3 delighted to avoid jury trials in order to prove the
4 process along.

5 CHAIRMAN CALTAGIRONE: Representative
6 Reber.

7 REPRESENTATIVE REBER: Thank you, Mr.
8 Chairman.

9 Mr. Sosnov, I think you have to be
10 somewhat concerned, as I am, over the past few years
11 there seems to be a proclivity with this legislature,
12 and more importantly mostly with this committee on
13 occasions, with attempting to tamper with the
14 Constitution. Be forewarned that it has happened and
15 is happening more frequently than in past history, so I
16 think there is some boding concern there in and of
17 itself.

18 REPRESENTATIVE MOEHLMANN: Come on, Bob,
19 say what you really mean.

20 REPRESENTATIVE REBER: You know what I
21 mean. And I really get worried when Hagarty and McHale
22 are so close together on something so substantive in
23 nature as this.

24 REPRESENTATIVE HAGARTY: He'll get to
25 vote. It's a constitutional amendment.

1 REPRESENTATIVE REBER: She interrupts
2 everyone. You're not the only one that is being
3 interacted upon.

4 I think there is one thing that we seem
5 to forget in this discussion, and that is the fact that
6 originally, originally, when this whole concept of
7 separation of powers was born there was the feel that
8 quote, "the judge," if you will, could not be gotten to
9 and was beyond reproach, and I do agree with you on the
10 pretrial publicity aspect. That, in fact, this
11 particular amendment could provide a tool to the
12 prosecutor to prejudice the mind of the appropriate
13 voir dire from which the jury might come and in fact
14 cause some problems. And I think that is a safeguard
15 that we have to look at in looking at legislation such
16 as this and a constitutional amendment such as this,
17 and I tend to agree with some of your comments and I
18 just wanted to state for the record that I don't think
19 we should immediately react to this for some of the
20 reasons that were stated.

21 I'm also concerned about the fact that
22 whether or not, as Representative McHale said, there
23 may be some statistics that are even de minimus in
24 nature that that in itself should be a basis. I think
25 the fact if there is any statistic whatsoever that

1 there is one instance or a few minor instances where it
2 took place we should be cautious to protect that
3 particular procedural right of the defendant under the
4 current state of the law, under the current state of
5 constitutional and common law development dating back
6 to, you know, the early times that we consider this.

7 Just some comments in mind, Mr. Chairman,
8 and I appreciate the opportunity.

9 Thank you.

10 CHAIRMAN CALTAGIRONE: Thank you very
11 much.

12 MR. SOSNOV: Thank you.

13 CHAIRMAN CALTAGIRONE: Jim, if you
14 wouldn't mind, we'll have last defense counsel. The
15 only problem is the ACLU attorney had asked if he could
16 go because he had to leave. Jim, is it all right?

17 MR. MacELREE: Yes.

18 CHAIRMAN CALTAGIRONE: Scott.

19 MR. BURRIS: Thank you.

20 Good morning. My name is Scott Burris.
21 I'm a staff attorney with the ACLU of Pennsylvania. We
22 are a nonpartisan, nonprofit organization of roughly
23 14,000 members whose sole purpose is the defense of the
24 rights and freedoms guaranteed by the United States
25 Constitution, Bill of Rights, and by our Commonwealth's

1 Declaration of Rights. In addition to being an
2 attorney, I am on the faculty of the University of
3 Pennsylvania Law School and the author of several books
4 and articles in the field of law.

5 I would like to thank the Chairman and
6 members of this committee for the opportunity to
7 testify on House Bill 2414. This proposed amendment
8 would limit the power of our Commonwealth Constitution
9 to protect Pennsylvania citizens against certain kinds
10 of unreasonable searches and seizures. It constricts
11 the privacy rights that Pennsylvania independently
12 confers on our citizens and cedes to the Federal courts
13 our State's power to determine how vigilantly the right
14 to privacy will be protected here.

15 Most significantly, the bill could well
16 have an impact beyond the criminal context. Family and
17 marital privacy, reproductive privacy, and
18 informational privacy are currently protected by the
19 Federal Bill of Rights, but all of them, and
20 particularly reproductive privacy, are under siege in
21 the Federal courts. Should the U.S. Supreme Court
22 weaken the right to reproductive privacy, for example,
23 Pennsylvania will need all the power it can command in
24 its Constitution to safeguard our privacy rights
25 independently under our own Constitution. HB 2414

1 throws that power away, and we urge this committee to
2 reject this extremely dangerous proposal.

3 Article I, Section 8, of the Pennsylvania
4 Constitution protects the right to be free from
5 unreasonable searches and seizures. It talks about the
6 people's right to be secure in their homes and their
7 persons and their papers and possessions from seizures
8 by the government. This amendment grew out of the
9 colonial citizenry's outrage over governmental abuses
10 under English rule. The framers of both our
11 Constitutions, Federal and State, had an ambivalent
12 view of government. They knew we needed it, yet they
13 also feared it. Their philosophy of government, and I
14 should say that it's safe to assert that we have never
15 had better philosophers of government before or after,
16 their philosophy of government understood that
17 government power is always subject to abuse. No matter
18 how good most people in government, no matter how
19 perfect the form of government, there is always going
20 to be abuse of the immense power that a government has
21 to wield if it's going to be effective.

22 Now, we have heard and I think a lot of
23 discussion that's gone on today has really been built
24 on an underlying feeling of "them or us," and I think
25 the "them" we're talking about today are criminals,

1 people accused of crime, people threatening our society
2 by their acts, and the "us" is all of us - prosecutors,
3 legislators, and the people. For better or for worse,
4 that's not the "them or us" that the people who wrote
5 our Constitution were thinking about. They wrote our
6 Constitution very much on the fear that "them" was
7 government and that "us" was every citizen, whether
8 accused of a crime or not. Our Constitutions were
9 explicitly designed with the primary purpose, certainly
10 our State Constitution which has its Bill of Rights in
11 Article I, of protecting the people from the abuses of
12 the government that they needed. We have to have
13 government, but we need that protection.

14 As you know, the Federal Constitution
15 provides a floor of rights below which no State can
16 sink, but not a ceiling above which no State can rise.
17 It's certainly well settled, as our own court has said,
18 that a State can provide, through its own Constitution,
19 a basis for the rights and liberties of its citizens
20 independent from that provided by the Federal
21 Constitution and that the rights so guaranteed may be
22 more expansive than their Federal counterparts. Like
23 others who have spoken today, I am proud that our State
24 court has, in some cases, interpreted our Constitution
25 more expansively than the Federal government.

1 As the Pennsylvania Supreme Court, and it
2 is an elected court, I think it's important to
3 recognize when we talk about something as emotionally
4 powerful to our citizens as privacy, has noted that the
5 survival of the language now employed in Article I,
6 Section 8, through over 200 years of profound change in
7 other areas demonstrates that the paramount concern for
8 privacy first adopted as part of our organic law in
9 1776 continues to enjoy the mandate of the people of
10 this Commonwealth.

11 Now it is, despite the fact that I think
12 it is very important that we have the potential and the
13 ability to more broadly protect our citizens under our
14 own Constitution than under the Federal one, it's
15 important to recognize that the number of instances in
16 which that occurs are not legion, but there are a few
17 important examples. Bank records have already been
18 talked about, I think, and I won't repeat the obvious
19 reasons why all of us probably have a reasonable
20 expectation of privacy in our bank records. Certainly
21 the idea that just because you write out a check and
22 give it to a bank teller you are therefore exposing
23 your entire collected, collated financial record to the
24 public is ludicrous. I mean, in other areas,
25 unfortunately not in this one, but in other areas the

1 Supreme Court of the United States has been sensitive
2 to the problem that new communications and data
3 collection technologies poses to freedom. It
4 recognizes, for example, in the area of criminal
5 records that the fact that a single criminal record
6 from a single court case might be available to the
7 public doesn't mean that someone has no legitimate
8 privacy interest in a collated nationwide data base
9 that has their entire criminal record in it. I think
10 that's important to recognize.

11 People now have the most amazing
12 capacity, both in the private and public sector, to
13 collect information about our finances. If you've ever
14 bought a house, if you've ever gotten a credit card, if
15 you've ever conducted any kind of financial activity,
16 there are computers that have your whole life story in
17 them. Now, I personally, and I'm sure this is true of
18 most Pennsylvanians, would not believe that that's
19 public information that anybody can get, and we need a
20 more subtle and a more sophisticated approach to
21 privacy than the Supreme Court's that now says, well,
22 if you give one piece of that information to anybody
23 you've given it out to the world. That's simply not
24 how most of us think, and I think that's not the kind
25 of privacy protection that most of us need. Only our

1 State Constitution right now protects us in that
2 situation.

3 Telephone numbers are also an important
4 area of additional protection under our State
5 Constitution. We've had two recent cases -
6 Commonwealth v. Beauford and Commonwealth v. Melilli -
7 which have affirmed that Article I, Section 8, requires
8 a warrant supported by probable cause before a pen
9 register can be used to collect and seize a list of
10 phone numbers. This committee, just two years ago,
11 apparently agreed with that by codifying that
12 requirement in the wiretap law. This, again, I think
13 is also very reasonable. People do not expect that
14 their telephone communications can be taped or listened
15 to, and they don't expect that the people they call can
16 become a matter of public record.

17 More importantly, it seems to me that --
18 well, that's been talked about enough. I'll go on to
19 the third one, and I think this gets us more directly
20 into the criminal realm and into court procedures -
21 automatic standing to assert privacy rights
22 self-incrimination. In Commonwealth v. Sell, the State
23 Supreme Court held that a defendant accused of a
24 possessory offense has automatic standing to challenge
25 the admissibility of evidence alleged to have been

1 obtained through an illegal search and seizure. The
2 Sell court was troubled by basic unfairness of
3 prosecutors getting the best of the bargain on both
4 sides of the fence. In order to resist a suppression
5 motion, the prosecutor would argue that the defendant
6 did not possess the searched item, so therefore it
7 couldn't claim protection under the Constitution, but
8 then in order to establish that the defendant committed
9 the crime of possession, the prosecutor would come back
10 and argue that the defendant did possess the searched
11 item. To resolve this conflict, the court, in Sell,
12 established a rule of automatic standing to challenge
13 illegal searches in possessory offense cases. The Sell
14 decision establishes standing only. It does nothing
15 more than permit the defendant to make the argument
16 that evidence was illegally obtained, that if the
17 evidence was not illegally obtained, evidence can be
18 properly introduced. But it does preserve an important
19 ability for a major class of offenders to at least make
20 the argument that what was done to them was illegal.
21 This kind of right to seek protection and sanction from
22 the court is exactly what previous people have talked
23 about as being necessary to give vitality to our
24 Constitution.

25 I think it's also important to understand

1 that Sell represents an important divergence in the
2 overall legal approach to privacy between our two
3 Supreme Courts. The United States high court's
4 analysis now hinges on whether the defendant had a
5 reasonable expectation of privacy in the searched item
6 or place with respect to society in general. The court
7 is now asking if other people can see it, can other
8 people get into your house or see in your house or look
9 over your fence or see your car and if other people can
10 see it, then you don't have a reasonable expectation of
11 privacy. Our Supreme Court has found this to be a
12 significant error because it shifts, and this is a
13 quote, "it shifts the focus from the unreasonable
14 government intrusion to a showing of the exclusivity of
15 the defendant's right of privacy." In other words, our
16 Constitution still says the search and seizure
17 prohibition is about government action, and so the
18 important thing is what do citizens think government
19 can do? It doesn't matter if you let your neighbor
20 into your house, you still have a right of privacy as
21 against the government, because it's the government
22 that we're worried about under Article I, Section 8.
23 It seems to me quite ironic that by focusing on
24 personal privacy and the general expectation of privacy
25 in society, the United States has weakened our right to

1 privacy in the fourth amendment. They are very wrong.
2 Our Supreme Court is true to the original intent and
3 has the right idea.

4 These few examples demonstrate that the
5 elected Pennsylvania Supreme Court has carefully and
6 deliberately provided greater protection of privacy
7 than the U.S. Supreme Court. While these decisions
8 arose in the context of criminal prosecutions, the fact
9 is that privacy principles that they represent
10 establish and protect that the innocent as well as the
11 guilty are going to be free from government intrusion
12 in this State that is not based on some kind of
13 reasonable cause. These principles are not extreme,
14 rather we think they represent the mainstream of
15 thought on privacy protection in this Commonwealth.
16 Indeed, especially when we're talking of emergencies
17 our rights need the most protection available. I don't
18 think we have to look any further than the round-up of
19 Japanese Americans during the Second World War, the
20 systematic suppression of pacifists' speech during
21 World War I, or indeed President Lincoln's suspension
22 of habeas corpus during the Civil War to see examples
23 of actions that were argued as essential at the time
24 and are remembered now as blots on our constitutional
25 record. No less a conservative than Justice Antonin

1 Scalia recently dissented from a decision of the
2 Supreme Court that allowed drug testing of a wide class
3 of customs employees. Justice Scalia said something
4 along the lines of we are immolating our constitutional
5 protections on the alter of the drug war, because in
6 that case he felt there was no evidence, no evidence at
7 all, that it was really a problem. All there was was
8 the hype and the hysteria about the drug war. We need
9 to be very careful at times like this to protect all of
10 us from the fears that naturally arise when we face a
11 serious social dislocation.

12 House Bill 2414 is a betrayal of our
13 nation's Federalist heritage. With this amendment,
14 Pennsylvania is giving up part of its sovereignty,
15 sovereignty that existed even before the U.S.
16 Constitution was even written. The U.S. Supreme Court
17 is increasingly reading the fourth amendment in a
18 cramped way, as you've heard, and there's no end in
19 sight to the reduction of rights that I think is going
20 to occur under the Federal Constitution. We need and
21 cannot surrender the State authority that House Bill
22 2414 wants to give up if we're going to protect our
23 peoples' rights from further curtailment.

24 Now, whether you agree with the State
25 Supreme Court's decision about bank records or phone

1 numbers or standing to challenge illegal searches and
2 seizures, House Bill 2414 doesn't just attack a
3 defendant's privacy rights, it attacks every citizen's
4 privacy rights. It doesn't just change a law or
5 technical rule, it changes our fundamental organic
6 compound among our citizens. The right to privacy is
7 under fire from an increasingly conservative U.S.
8 Supreme Court. House Bill 2414 would reveal one of the
9 two Constitutional provisions that is central in our
10 State to the doctrine of privacy which our Supreme
11 Court has built. Certainly I think if the Supreme
12 Court weakens the right to choose abortion, just for
13 one example, House Bill 2414 could prevent the Supreme
14 Court from protecting that right independently under
15 our own Constitution.

16 Even if you decide that you find a
17 particular aspect of the Supreme Court's interpretation
18 of our Declaration of Rights so repugnant that the only
19 solution is to amend our State Constitution after 200
20 years, are you really prepared to say you will never
21 agree with any State Supreme Court interpretation of
22 Article I, Section 8? Are you willing to gamble that
23 you will always and forever for the next 200 years
24 agree with every Supreme Court's decision that limits
25 Pennsylvania's privacy rights, no matter how extreme

1 that court might become in the future?

2 Finally, it seems to me that should House
3 Bill 2414 be put to the electorate for ratification, it
4 is really hard to believe that most voters will know
5 the full extent of the protection they will be losing.
6 If the General Assembly wants to propose taking away a
7 constituent's privacy rights and bank records and phone
8 numbers, isn't it fairer to these constituents just to
9 say so? To write an amendment that speaks specifically
10 to those issues? This amendment is really completely
11 opaque, and I think it's extremely daunting for people
12 without a law degree, and even for some of us with a
13 law degree, to take the time and read and understand
14 the State Supreme Court's latest search and seizure
15 cases.

16 For 200 years the Declaration of Rights
17 has made Pennsylvania the kind of society to which
18 nations throughout the world look as a model.
19 Throughout eastern Europe we've been inspired by the
20 sight of people fighting hard to get what we already
21 have. We urge you not to amend the Declaration of
22 Rights at all, and especially not with an amendment as
23 unlimited in scope as 2414. It is a terrible thing to
24 give away our own State's power to protect the privacy
25 rights of our citizens, particularly at a time in

1 history when the U.S. Supreme Court is toying with
2 fundamental reproductive privacy rights. Please reject
3 House Bill 2414 and keep our State Constitution
4 independent and strong.

5 Thank you.

6 CHAIRMAN CALTAGIRONE: Thank you.

7 Questions?

8 Representative McHale.

9 REPRESENTATIVE McHALE: Thank you, Mr.

10 Chairman.

11 BY REPRESENTATIVE McHALE: (Of Mr. Burris)

12 Q. Mr. Burris, if you were here for my
13 earlier questioning, what I'm about to say may surprise
14 you. I hope on reflection it does not. Your testimony
15 was superb.

16 A. Thank you.

17 Q. I happen to think that the testimony
18 which you've just presented to this committee was some
19 of the most thoughtful and insightful commentary that
20 I've heard presented to the House Judiciary Committee
21 since I've been privileged to be a member of this
22 committee.

23 Over the last year and a half, I've had
24 an opportunity to fairly carefully research the area of
25 the law upon which you commented, and I agree

1 completely with your conclusions. I am very greatly
2 concerned that if we were to adopt this constitutional
3 amendment that we would be surrendering basic values
4 and principles under the Pennsylvania Constitution and
5 that we would be acting in a way that directly
6 contradicts the history of Federalism under the United
7 States Constitution, and with that as kind of a
8 prelude, isn't it in fact true that the civil liberties
9 captured by both the Federal and State Constitutions
10 have gone through a process of evolution over the last
11 200 years and that in repeated cases the courts on both
12 the State and Federal level have, in each generation,
13 breathed new life into freedom both under Federal and
14 State law? The Bill of Rights is an evolutionary
15 document, isn't that true?

16 A. That's absolutely true.

17 Q. As I have read the constitutional
18 history, it's my understanding that some of the rights
19 under the Federal Constitution which we now take to be
20 basic were in fact at times in the past very
21 controversial and were only adopted on a Federal level
22 after individual States have, pursuant to their State
23 Constitutions, adopted those principles of civil
24 liberties within their individual jurisdictions?

25 A. That's right. I think we have often

1 ignored the important contribution of State courts and
2 State Constitutions in the development of our rights in
3 favor of the perhaps more dramatic and more headline
4 grabbing actions of the Federal Supreme Court.

5 Certainly one needs to look no further than the first
6 amendment, the basic right to free speech, which was
7 not really protected by the Federal Constitution at all
8 until after World War I and was not really secure until
9 the '50's and '60's. In World War I, numerous people
10 whose views were against the United States entering the
11 war were actually arrested and imprisoned simply for
12 stating those views, and we were told by the Supreme
13 Court of the United States that there was no protection
14 to be had.

15 Q. Specifically in the area of criminal law,
16 and I'm not 100 percent sure of my recollection but I'm
17 reasonably certain, isn't it true that long before
18 Gideon v. Wainwright guaranteeing the right to counsel
19 in criminal cases where the accused could conceivably
20 receive a prison term upon conviction, that individual
21 jurisdictions on a State level, and I think the court
22 of appeals for military jurisdictions -- forgive me for
23 the moment, I have forgotten the name formal name of
24 the military tribunal that has jurisdiction over the
25 UCMJ -- had adopted that principle of law didn't we,

1 within individual jurisdictions, consider and implement
2 the right to counsel before the Federal government,
3 through the decision of the United States Supreme Court
4 in Gideon v. Wainwright adopted that same principle of
5 law on a Federal level?

6 I guess what I'm really getting at here
7 is Justice Brennan was the one who described the
8 individual State jurisdictions as laboratories of
9 democracy. I think that's true in the area of civil
10 liberties as well as in areas of social experimentation
11 and substantive law. What would this bill do to our
12 opportunity to expand civil liberties in a way that
13 might be a precursor and perhaps a benefit to the
14 Federal government's consideration of the same issue?
15 Would you talk about that a little bit?

16 A. One of the miracles, or perhaps it's
17 unfair to the framers to call it a miracle, one of the
18 elements that was built prudently into our Constitution
19 was the flexibility of judicial interpretation of the
20 Constitution. We got a blueprint for government that
21 outlined certain basic rights but at the same time we
22 had a system for evolutionary change and
23 experimentation and adaption to new circumstances that
24 has worked wonderfully well for now 200 years. Of
25 course, it's not just true at our Federal level. Many

1 of our State Constitutions, upon which the Federal
2 Constitution was modeled, upon whose experience for 10
3 or 15 years the Federal Constitution had a chance to
4 profit by before it was written, also built this kind
5 of flexibility into their system.

6 What we're doing with an amendment that
7 says that the State can do no more than the Federal
8 government is as if it were taking away the grant from
9 that constitutional researcher. We have one less body
10 that can consider new issues, consider changes in
11 society's values and society's needs and come up with
12 reasoned, fact-based solutions to new problems as they
13 arise in, you know, a particular place in the country.
14 There can be no doubt that if you have 49 laboratories
15 instead of 50 there are going to be great discoveries
16 at some point that will not be made. What our Supreme
17 Court will do is simply send its clerks, judges, when
18 they go to the library will ignore the whole shelf of
19 Pennsylvania decisions and they will go right to the
20 Supreme Court, check out the latest Supreme Court
21 Reporter and find out what Pennsylvania law is. That's
22 not very encouraging to their legal initiative, and I
23 think it deprives us of the legal learning and
24 experience of our Justices.

25 Q. A few years ago Justice Brennan wrote a

1 law review article that I read, perhaps a year ago, in
2 which he expressed, I think with great clarity, the
3 belief that State courts, no less than Federal, have an
4 obligation to defend our civil liberties. Could you
5 give us just a very brief sketch of the importance, of
6 the history of Pennsylvania's Declaration of Rights and
7 give us some flavor, if you can, of the principles that
8 have been incorporated into that document throughout
9 its lengthy and admirable history?

10 A. Well, I think it's striking that when you
11 read our Declaration of Rights, the first article of
12 our Constitution, you can see that whole passages have
13 been borrowed by the Federal Constitution, not just in
14 spirit but actually you find the same words and
15 phrases, the same concerns. Pennsylvania was on the
16 forefront of those States that sought powerful
17 protection of rights. It's not entirely common to find
18 it in the first article of any State's Constitution,
19 and certainly that's a strong testimony to our
20 commitment to it. I think in many ways Pennsylvanians
21 led the way, or certainly were strong advocates in the
22 Federal Constitution of strong protection of rights,
23 and I should say in fear of the possible encroachments
24 upon basic rights of the Federal government.

25 Over time, as the Federal Constitution

1 came to be seen as the primary source of rights,
2 certainly in this century, there was a tendency to just
3 assume away State Constitutions. Justice Brennan
4 apparently read one too many case in which a State
5 Supreme Court or a State litigant didn't even mention
6 their own Constitution or in which a State Supreme
7 Court simply said, well, we don't even need to talk
8 about our Constitution, it's the Federal Constitution
9 that counts here. And like some others on the court,
10 Justice Brennan has been important in trying to point
11 out the importance of an adequate and independent State
12 ground of decision. In other words, if you can decide
13 a case under a State Constitution, there's no need for
14 it to be decided under the Federal Constitution simply
15 as a matter of judicial prudence. And we have seen, I
16 think, in response to greater attention by the Supreme
17 Court to State Constitutions greater willingness on the
18 part of State judges to take seriously the fact that
19 they, too, are interpreting documents with rich and
20 noble histories and that they, too, have an independent
21 obligation to insure that that jurisprudence is alive
22 and well and active and growing, that we have a Federal
23 system here and that means that first and foremost each
24 of us are citizens of our States and have rights there
25 that have perhaps nothing to do with the rights that

1 our framers put into the Federal Constitution.

2 Q. You've captured the issue well. In your
3 words, we do have a rich and noble history surrounding
4 the liberties guaranteed by the Pennsylvania
5 Declaration of Rights, and I think that's really what's
6 at issue here, whether or not that history is going to
7 be preserved. We have been leaders in the areas of
8 civil liberties. This legislation would convert us
9 into followers. And I have no doubt that our
10 Pennsylvania Supreme Court from time to time would,
11 under the State Constitution, reach certain conclusions
12 with which I might personally disagree, but to
13 eliminate the opportunity for leadership, to eliminate
14 the -- to reject our heritage of leadership under the
15 Declaration of Rights and surrender that leadership
16 responsibility to the Federal government and the United
17 States Supreme Court's interpretation of analogous
18 provisions under the United States Constitution would
19 be a very serious mistake flying in the face of
20 Federalism and flying in the face of substantive rights
21 that we have long guaranteed under our State
22 Constitution.

23 I'm sorry for going on at such length,
24 but I have very, very strong feelings about this. I
25 think that to surrender that leadership responsibility

1 and that leadership heritage might achieve some
2 short-term results in the area of criminal prosecution
3 that would be attractive to some individuals but it
4 would be at a tremendous historic cost.

5 Thank you, Mr. Chairman.

6 CHAIRMAN CALTAGIRONE: Thank you.

7 MR. BURRIS: Thank you.

8 CHAIRMAN CALTAGIRONE: If we could, to
9 speed things up a little bit, could Leo come up with
10 you, Jim, in case there are any comments that you'd
11 like to make?

12 MR. MacELREE: No problem with that at
13 all.

14 CHAIRMAN CALTAGIRONE: Would you please
15 join him?

16 MR. MacELREE: Thank you, Mr. Chairman.

17 My name is James MacElree. I'm the
18 District Attorney of Chester County, which together
19 with \$10 gets me coffee every morning, and the
20 President of the District Attorneys Association.

21 Representative Hagarty, at this time I
22 would like to express Chester County's gratitude for
23 your leadership in the spousal immunity bill. As you
24 probably are aware, we were able to get a conviction in
25 that particular case, and that worked out well.

1 REPRESENTATIVE HAGARTY: Thank you. I'm
2 pleased that the legislature could respond in a helpful
3 manner.

4 MR. MacELREE: And a speedy manner, too,
5 which is somewhat refreshing.

6 REPRESENTATIVE HAGARTY: Well, somewhat
7 speedy.

8 MR. MacELREE: Let me first address, if I
9 may, House Bill 683 and then I'll get to House Bill
10 2414. Let me suggest that the District Attorneys
11 Association is generally in favor of the concept that
12 the right to a trial by jury should be enjoyed by both
13 the Commonwealth as well as the defense. I believe it
14 was in the early to mid-1980's that in fact we passed a
15 resolution with respect to that that in fact the
16 legislature acted upon and we got a legislative
17 enactment in that area.

18 The Supreme Court of Pennsylvania has
19 seized power, in my view, in this State and they call
20 almost anything they want to a procedural rule and as a
21 result of that, they then change law pretty much any
22 way they want, and we see them just with the broad
23 stroke of a pen say it doesn't matter what the
24 legislature says or wants, we find that that infringes
25 on our rulemaking powers, and it's gone without any

1 further discussion of the area. A good example of that
2 is the Rule 1100 of the speedy trial rule, which under
3 that very same provision of the Constitution we're
4 talking about says the Supreme Court shall have no role
5 which changes any statute of limitations. Well, in
6 fact Rule 1100 did change the statute of limitations
7 resulting in cases being thrown out in less than the
8 statutory period of time.

9 There are a number of reasons that some
10 judges grant nonjury trials. Some of them are quite
11 noble because the defendant has asked for it and it can
12 speed the case process along, and others are not so
13 noble, and we've heard about some of those not so noble
14 reasons.

15 The bottom line to the whole thing is
16 that the people of this great Commonwealth should,
17 through the district attorney, have the same right to a
18 jury trial as a defendant does. It is an adversarial
19 process. Both sides have reasons for things that we
20 do, and I suggest that it just makes more sense to let
21 the jury make that final determination where in the
22 mind of the prosecutor it's appropriate for the jury to
23 make that particular determination. If he thinks a
24 judge is prejudiced for one reason or another, either
25 in favor of a defendant or against a particular law, as

1 we know in the DUI area for years and years there were
2 a lot of judges and perhaps still today just don't
3 believe DUI is a crime, and there are legions of cases
4 going on right now throughout the entire Commonwealth,
5 that defense counsel says, no, Judge, I want a nonjury
6 trial, and they are being granted as a matter of
7 course. And the bottom line, too, is there are a lot
8 of judges finding quickie "not guilty" verdicts in
9 areas that there should be a guilty verdict in and the
10 evidence is very clear that there should be a guilty
11 verdict in, and all we're saying from the
12 Commonwealth's standpoint is, hey, give us a shot in
13 front of the jury and let the jury decide these tough
14 issues.

15 I've talked to a number of assistant DA's
16 in Philadelphia who tell me that on a very regular
17 basis that there are judges who reduce verdicts and
18 come up with less than desirable results in these
19 nonjury trials, which are the greatest number of trials
20 in Philadelphia. There are fewer bench trials than
21 there are -- I'm sorry, there are more bench trials
22 than there are jury trials. Also under, I believe it
23 was DA Ed Rendell who at one point said, no more plea
24 bargains in Philadelphia, allowed defense counsel to
25 pick the judge they were going to go in front of and

1 allowed whatever to happen was going to happen, and it
2 had the same effect as nonjury -- I'm sorry, same
3 effect as plea bargains through this nonjury trial
4 selection. Certain judges had various prejudices and
5 everybody knew what the result was going to be. The
6 case was going to be dismissed, or even if there was a
7 guilty verdict there was going to be a very much
8 reduced sentence or there would be a verdict of guilty
9 in a lesser offense.

10 Let me point out an area that hasn't been
11 touched upon today and I think is of significance. A
12 couple of months ago I tried a pair of first-degree
13 murder cases and I ended up getting the death penalty,
14 but halfway through the trial, not really through the
15 trial, halfway through the proceedings the defendant
16 changed his tactic and he asked for a bench trial. And
17 I researched the law pretty carefully and I came to the
18 conclusion that under the current status of the law the
19 defendant is entitled to a bench trial on the issue of
20 guilt or innocence with regard to these murders, but
21 the Commonwealth, under the rules, is entitled to a
22 jury trial on the issue of the death penalty. And I
23 was sitting there wracking my brain, how in the world
24 am I ever possibly going to present the issue of the
25 capital case, the death penalty, to a jury who has

1 never heard the basic part of the case? To go to a
2 jury and say look, we want a death penalty, that's the
3 most harsh, that's the most significant thing a jury
4 can ever be called upon to do, and unless they're
5 absolutely 100-percent convinced of this defendant's
6 guilt, I mean, you take probable cause, throw it out
7 the window; you take reasonable doubt, throw it out the
8 window, unless they are absolutely 100-percent
9 convinced that this guy did it, they are never going to
10 come back with a death verdict. And the only way to do
11 that is to have all of that evidence in front of them.
12 So in the area of capital cases alone, this is the most
13 important thing. In some of the other kinds of cases
14 I'm less pumped up about it, but certainly in the area
15 of capital cases and major felonies it's absolutely
16 vital that the Commonwealth have a right to a jury
17 trial.

18 I am a little hesitant to make a comment
19 concerning the exact language in the bill, but I feel
20 an obligation to do that. The clearest language would
21 be that something along the lines in criminal court
22 cases the Commonwealth and the defendant shall have a
23 right to a trial by jury. I was a bit bothered by the
24 one comment that said, we don't know what this general
25 language that's currently in the bill may do, and I

1 don't, I don't pretend to be a constitutional scholar
2 or someone who can foresee all of the possibilities,
3 and I just bring to this committee's attention the
4 possibility that we certainly don't want this bill to
5 affect summary situations, we don't want it to affect
6 civil situations, and I just throw that out. If people
7 who are brighter than I am are absolutely convinced
8 that this is not a problem and this language works,
9 then it's fine by me. My major objective is to see
10 that the Commonwealth has a right to a jury trial, as
11 does the defendant.

12 One comment I'd like to make is when the
13 public defender's office was making the point, I think
14 it was them, was making the point about why we need to
15 leave things the way they are, they said, gee, you
16 know, in these days of prison overcrowding we shouldn't
17 have jury trials, and I'm thinking, what in the world
18 does one have to do with the other? Well, maybe it's
19 its own worst advocate from that standpoint. Obviously
20 he made the point, Representative, that you were making
21 in terms of what happens with these situations, and the
22 point is the judges intentionally come back with "not
23 guilty" verdicts or ignore minimum mandatory sentences
24 by using the nonjury process, and that's the only
25 impact that a jury trial bill or legislation could

1 possibly have on prison overcrowding is that judges are
2 using that as a tool to reduce sentences. And I think
3 that's proof enough of that issue.

4 I'll be glad to open it to any questions
5 anyone may have with respect to this area.

6 REPRESENTATIVE MCHALE: Mr. Chairman?

7 CHAIRMAN CALTAGIRONE: Representative
8 McHale.

9 BY REPRESENTATIVE MCHALE: (Of Mr. MacElree)

10 Q. I'll ask the same question of you, sir,
11 that I asked of the gentleman who testified earlier.
12 When was the last time you had a case that was
13 compelled to go to a jury trial over the opposition of
14 the criminally accused?

15 A. Well, let me make sure I understand your
16 question. You're saying when--

17 Q. When was the last time that a criminal
18 defendant waived his right to a jury trial only to find
19 that waiver rejected by the trial judge who then
20 compelled the accused to go to a jury trial over his
21 objection?

22 A. In the last 16 years that I've been doing
23 this, I have never ever seen that done except in an
24 instance in which the judge believed that that
25 particular defendant did not understand or comprehend

1 what he was asking for. But as long as a judge made a
2 determination that this was a voluntary choice or a
3 rational choice on the part of the defendant, they give
4 him the nonjury trial. As a matter of fact, our
5 benches from Chester County have openly stated numerous
6 times, gee, they don't understand why more defendants
7 don't ask for more nonjury trials because they'd be
8 glad to give them to them.

9 Q. So in 16 years in every case where the
10 criminally accused made a knowing waiver of a jury
11 trial, you have never seen the trial judge compel that
12 individual to go to a jury trial?

13 A. That's correct.

14 Q. How many cases have you handled in 16
15 years?

16 A. Oh, personally a couple of thousand. In
17 terms of being a supervisor over that period of time
18 maybe 30,000 or 40,000.

19 REPRESENTATIVE MCHALE: Thank you, Mr.
20 Chairman.

21 CHAIRMAN CALTAGIRONE: Representative
22 Hagarty.

23 BY REPRESENTATIVE HAGARTY: (Of Mr. MacElree)

24 Q. I just wanted to briefly thank you for
25 your language suggestion and I would like to make the

1 suggestion to the prime sponsor that this committee
2 amend the bill according to that change. I think
3 that's better language also.

4 A. It's clearer. I know what the effect of
5 that language is. I don't know what the effect of the
6 other language is.

7 Q. I agree with you and I see really no
8 purpose in a constitutional amendment to suggesting
9 whether something is substantive or procedural, and
10 there would be no point to suggest in the statute
11 because the Supreme Court wouldn't care what we had to
12 say on the issue, so I agree with you, the
13 straightforward way to do it is just to indicate that
14 there is a right to trial by jury by both defendant and
15 prosecution.

16 A. Thank you.

17 CHAIRMAN CALTAGIRONE: Thank you.

18 Leo Marchetti.

19 MR. MARCHETTI: Thank you.

20 Mr. Chairman, members of the committee,
21 I'm Leo Marchetti. I'm the past State National
22 President of the Fraternal Order of Police, and I've
23 been the liaison officer on the hill for the last 14
24 years. And my analysis of the two bills in question
25 here are as follows.

1 Speaking under House Bill 683, the bill's
2 purpose and amendment to the Pennsylvania Constitution
3 to provide the trial by jury is a substantive right
4 thereby authorizing the General Assembly to grant the
5 right of a jury trial to the Commonwealth on behalf of
6 the people in criminal cases. The F.O.P. supports this
7 legislation which grants to the people the same right
8 to demand a jury trial as an accused currently enjoys.
9 The General Assembly attempted to provide this right to
10 the people by Section 2143 under Common Law section
11 5104, but the State Supreme Court struck it down, that
12 statute, in the Commonwealth v. Sorrell case, a 1982
13 decision, by ruling that the statute was
14 unconstitutional, an infringement upon the procedural
15 powers of the Supreme Court.

16 That interpretation, right or wrong, is
17 the law. By amending the Constitution, the people can
18 be granted the same right to trial by jury and to
19 prevent any appearance that a defendant can shop for a
20 lenient judge. Successful law enforcement relies on
21 voluntary compliance with the law. That compliance,
22 encouraged by the image of our judicial system as fair
23 and impartial, that image is damaged by anything that
24 suggests that a criminal defendant has more rights than
25 his victim or the people of this Commonwealth who are

1 represented by the district attorneys. Nor is the
2 grant of the right to trial by jury to the prosecution
3 a new concept. Under Rule 23 of the Federal Rules of
4 Criminal Procedure, the government and the court must
5 agree to a waiver of trial by jury. As repeatedly
6 stated by the United States Supreme Court, the
7 Constitution confers an absolute right to trial by
8 jury, not to trial without a jury. Singer, U.S. The
9 right of the defendant would not be infringed by
10 granting to prosecution the right to demand a jury
11 trial. And for that reason, the Fraternal Order of
12 Police takes the position of supporting House Bill 683.

13 On your other legislation, House Bill
14 2414, I think we have a different position in that I
15 think that the types of crimes in this country have
16 changed over the past 200 years when our Bill of Rights
17 was presented. Years back we had assaults on people
18 and on property. Today the drug war scans many, many
19 other areas. Big money promotes big changes necessary
20 to combat them. Continuity in our laws, we believe,
21 would be part of that answer at least. It would assist
22 the law enforcement community instead of deviating from
23 one rule to another. So that House Bill 2414 proposes
24 an amendment to the Pennsylvania Constitution that
25 would conform the applicant of Article I, Section 8, of

1 the State Constitution to the fourth amendment of the
2 United States Constitution. Although the Federal and
3 State provisions are almost identical, our courts have
4 frequently granted greater rights to be free from
5 search and seizures under the State Constitution than
6 are granted under the Federal Constitution. Under
7 Commonwealth v. Schaeffer, 1937. Unfortunately, this
8 results in a great deal of confusion among even the
9 most highly trained police officers who must apply the
10 correct rule of the law whenever applying for a
11 warrant. The slightest deviation can result in the
12 exclusion of vital evidence, in the dismissal of
13 charges against a wrongdoer.

14 And I might add from personal experience
15 the reason why suppression hearings today are taking as
16 much time as the actual court cases. It is not for the
17 police to determine what are the rights of the criminal
18 suspect, and we are not here today to complain about
19 the proper enforcement of these rights. Yet, it does
20 make a police officer's task doubly difficult when he
21 or she complies with all of the procedures mandated
22 under the United States Constitution only to have the
23 court exclude evidence under a theory that the State
24 Constitution affords a suspect even greater rights.

25 In pursuing our efforts to stem the tide

1 of drugs in our Commonwealth, we cannot allow our
2 police officers to be unreasonably hampered by having
3 to deal with multiple standards as to whether a search
4 or seizure is legal. One of the most frustrating
5 things that can happen to a police officer is to
6 faithfully follow the rules, make a good arrest, and
7 then have a court decide that a mere restrictive rule
8 exists under the State Constitution and that the
9 evidence needed to support the arrest cannot be used.

10 Again, the Fraternal Order of Police
11 supports House Bill 2414 for the reasons stated above.
12 As I stated in the middle of the discussion, we are
13 dealing with a crime today that was not even heard of
14 225 years ago. Drugs is the big thing in crime today.
15 I think it's a new issue needing new rules and
16 regulations. I think that this is an attempt at least
17 to try to solve some of them.

18 I'm willing to listen to any discussion
19 or any answers from either of you.

20 CHAIRMAN CALTAGIRONE: Did you want to
21 make comments on that also?

22 MR. MacELREE: Yes, sir, if I may. Thank
23 you.

24 We should ask ourselves, why are
25 amendments needed to the Constitution? Or for that

1 matter, why are they permitted? And I suggest that one
2 of the reasons that they are permitted is in the event
3 that the balance of powers is upset or if one
4 particular branch of government steps too far out of
5 what is the public's perceived notion of what is
6 appropriate, we can amend our Constitution as part of
7 the flexibility in the original documents, both the
8 State and the Federal Constitutions. And in fact we've
9 done that in the criminal area before. Remember the
10 New York v. Harris kind of a concept with the perjury
11 aspect and the Supreme Court of Pennsylvania, contrary
12 to the Federal court, said, hey, look, if this guy can
13 get up and lie, he's going to be able to lie with
14 impunity. That was put to the people of this great
15 Commonwealth and the people said nonsense. We're going
16 to go with what the Federal interpretation here is, and
17 the Supreme Court of Pennsylvania was brought back in
18 terms of their earlier position.

19 When we talk about the search and seizure
20 issue, and it's important to recognize that 2414 is
21 really dealing with the search and seizure issue, I'd
22 like to talk a little bit about the underlying
23 philosophy here of the exclusionary rule just for a
24 second. We talk about rich and noble history. Well,
25 if we look about rich and noble history, we see for a

1 hundred years we didn't have this exclusionary rule.
2 We want to talk about rich and noble history? Our
3 founders never even envisioned it. It was a creation
4 of modern law.

5 Let's talk a little bit about the issue
6 of standing, because standing to object at a
7 suppression hearing, that's what brought this whole
8 thing to the floor, as I understand it. The defendants
9 are saying, and you heard the ACLU and the Defender's
10 Association argue, look, gee, the Commonwealth is
11 saying at one point we possessed it and at another
12 point we didn't possess it. They've got to make up
13 their mind. They can't have their cake and eat it,
14 too.

15 Let's look at it logically. Let's draw a
16 time line. What the Commonwealth is saying is that on
17 this side of the time line for suppression purposes,
18 we're saying that at the time the police seize the
19 material, the defendant was not in possession of it,
20 he'd hand it over to someone else. We're saying, hey,
21 we have a right then to get it from that someone else
22 and we shouldn't hear him complain about this. He gave
23 it to somebody else. He gave up his privacy interest
24 in it because he gave it to someone else. And we're
25 saying we're prosecuting him not on who had possession

1 of it at the time the police seized it, but we're
2 prosecuting on his possession of it at a time earlier.
3 So they are not inconsistent at all in that regard.

4 And what's happened is the Supreme Court
5 of Pennsylvania, which has proved that they are not
6 responsive to the citizens of Pennsylvania, they just
7 do pretty much whatever they choose to do, that they
8 have gone off and they have decided this thing contrary
9 to the way most any courts have decided. They have
10 taken this line of jurisprudence dealing with standing,
11 and it's been a long line of case decisions, and they
12 have just thrown it right out the window. And the
13 ultimate impact of that is for the drug runner in
14 Florida who gives the drugs to his mule to run all the
15 way up the coast and when that mule comes into
16 Pennsylvania and the drugs are seized from that mule in
17 Pennsylvania, that it gives immunity, in essence, to
18 the drug runner in Florida. If there is any problem
19 with the seizure of the drug from the mule in
20 Pennsylvania, the drug runner in Florida is out of it.
21 Even if that mule flips over and says, okay, look, I'll
22 tell you everything, I'll tell you who I got it from in
23 Florida, we can't use that, and under prior
24 Pennsylvania law we used to be able to use that.

25

1 There are all sorts of unforeseen
2 difficulties that can come up with it. We don't live
3 in a fishbowl, and it's important to talk about the
4 Federalist view and it's important to talk about
5 State's rights, but it's also important to look at we
6 live in a real world. Pennsylvania is bordered by New
7 York, New Jersey, Delaware, Maryland, West Virginia,
8 Ohio -- you all know this better than I do -- and the
9 Great Lakes. We have major airports, we have major
10 national highways, we have drug traffickers running all
11 over, and we have crime running all over. My goodness,
12 the computer crime alone doesn't even hit the
13 geographical areas. Anyplace that there's a phone wire
14 the computer crime can run.

15 We talk about, gee, do we want people
16 having access to our bank records? Well, they've
17 already got access to our bank records. I mean, we're
18 talking about whether the police can use the bank
19 records. Every credit card company has access to these
20 bank records and every other bank has access to them
21 and the insurance companies have access to them and
22 they're spread out all over the place. Who are we
23 kidding? We live in the real world. The bottom line
24 is the police should be able to use the information
25 that's available. Now, look, if I'm a criminal and I

1 go out and I commit a crime and I pay for that in cash
2 and I say, okay, fine, this crime is between you and me
3 and I'm paying in cash and don't tell anybody about it,
4 if the cops go to him and say, hey, you tell me about
5 it and he squeals on me, I'm in trouble. Now, they may
6 or may not find the cash, but if I'm so stupid as to
7 write a check and I give him a check, why shouldn't the
8 police be able to use that check against me? And
9 that's basically what we're talking about here when we
10 get it right down to nuts and bolts. And that's why
11 I'm suggesting that this makes some sense.

12 If we had judges who remembered that the
13 Constitution, both federally and State wise, and the
14 Federal court is as bad as the State court in this
15 regard, that the Constitution is the framework for us
16 to hang our laws and is the outside cage against which
17 we as politicians and law enforcement officials shall
18 not go beyond a certain area rather than trying to use
19 the Constitution to promote particular social patterns,
20 we would be better off. And all I'm suggesting in this
21 particularly limited area, the Constitution of
22 Pennsylvania is not hurt, as currently interpreted by
23 the Federal Constitution, to acknowledge that you must
24 have standing, to acknowledge that the possessory
25 interest must be concurrent at the time of the seizure.

1 CHAIRMAN CALTAGIRONE: Questions?
2 Representative McHale.

3 REPRESENTATIVE McHALE: Thank you, Mr.
4 Chairman.

5 BY REPRESENTATIVE McHALE: (Of Mr. MacElree)

6 Q. I know you were here for both sets of
7 questioning earlier, and as a result of that I think
8 you're aware that I vigorously support your position
9 with regard to House Bill 683. I think you're
10 absolutely correct in granting equal status to the
11 Commonwealth to seek a jury trial when compared to the
12 opportunity of the criminally accused to seek a jury
13 trial, no one is denied their constitutional rights, in
14 my view. I speak and I say that, I guess, to establish
15 some credibility in terms of what I'm about to say on
16 2414. You're right on 683. You're absolutely correct.
17 You could not be more wrong on 2414. What does the
18 exclusionary rule have to do with the intent and likely
19 result of 2414? You lost me in that argument. I
20 gather you dislike the exclusionary rule. What does
21 that have to do with the content of House Bill 2414?

22 A. Only to the extent that the evidence then
23 gets excluded, but the reason I brought up the
24 exclusionary rule was to respond to your earlier
25 statement that we have a rich and noble history.

1 Q. Do you deny that?

2 A. No, we do in fact have a rich and noble
3 history, but the rich and noble history also includes
4 the lack of an exclusionary rule so that regardless of
5 how outrageous the police conduct was, for at least a
6 hundred years the evidence was coming into our trials
7 anyhow. So it's--

8 Q. That was true in Federal court as well.

9 A. Oh, yes, State and Federal.

10 Q. Precisely. All right, go ahead, sir.

11 A. My point is that it only serves a limited
12 purpose to go back and talk about rich and noble
13 history, and we just have to be careful about how broad
14 we want to make it because we can all find exceptions
15 to any of those rules.

16 Q. Well, I think your argument very much
17 clouds, I hope unintentionally, the issue that is
18 involved here. It is Federal law which sets a standard
19 for the exclusionary rule. Whether or not we would be
20 confined to the Federal standard, the exclusionary rule
21 would survive until such time as the United States
22 Supreme Court--

23 A. Except that the Supreme Court of
24 Pennsylvania can expand it.

25 Q. That's true, and that would be a

1 legitimate issue for you to address, but your comments
2 went far beyond that and gave the impression that the
3 exclusionary rule to which you object has something to
4 do with the distinction other than scope between
5 Federal law and State law.

6 A. Well, that wasn't my intent.

7 Q. Okay, and I gather that. I just wanted
8 to clarify that the exclusionary rule is not a creation
9 of our State Supreme Court.

10 A. Well, that's correct.

11 Q. All right.

12 I think what you're seeking is uniformity
13 at the expense of liberty. If Pennsylvania does what
14 you advocate on 2414, shouldn't New York do the same
15 thing?

16 A. Yes.

17 Q. Shouldn't New Jersey?

18 A. Yes. And as have California,
19 Massachusetts, and Florida.

20 Q. You, therefore, would advocate that we
21 abolish search and seizure as a matter of State
22 constitutional law?

23 A. No.

24 Q. All right.

25 A. That is a typical -- as I listened to the

1 ACLU and the Defenders Association, I'm not willing to
2 make those kind of giant leaps. All I'm suggesting is
3 that it's appropriate to recognize that the Supreme
4 Court of Pennsylvania has right now taken a position
5 that is contrary to sound government, that is contrary
6 to protecting the freedoms of the general public, and
7 we have a right to rein them in.

8 Q. And you've picked the wrong way to do it.
9 Let's say, for the sake of analysis, I agree with you
10 in terms of the specific decisions of the Pennsylvania
11 Supreme Court. The remedy in that case is, through
12 carefully tailored constitutional amendments, to
13 override the substantive law as defined by the
14 Pennsylvania Supreme Court in the area that you've
15 mentioned. This goes way beyond that.

16 A. I don't object to that approach,
17 incidentally.

18 Q. Well, fine, because I think that's a very
19 important distinction. This, I think you will agree --
20 when I say "this" I mean House Bill 2414 -- goes far
21 beyond some individual and perhaps unfortunate
22 decisions by the Pennsylvania Supreme Court to say that
23 in the broad area of search and seizure, as captured by
24 the fourth amendment to the United States Constitution,
25 the Pennsylvania Supreme Court henceforth shall never

1 go beyond the minimum Federal standard. That goes way
2 beyond your complaint.

3 A. It goes beyond my complaint. I'm not
4 prepared at this time to say that it goes way beyond
5 it.

6 One of the difficulties that we run into
7 any time we try to change the Constitution to figure
8 out exactly what the long-term effect will be, and I
9 suppose what it boils down to is after having lived
10 through the Warren Court years and even seeing how some
11 of the previously stated positions of the Supreme Court
12 have now come back to the middle or perhaps even to the
13 right, I guess what we're suggesting is that, look, the
14 Supreme Court of the United States is taking a position
15 that is palatable to the people of the Commonwealth of
16 Pennsylvania, the Supreme Court, in the area of search
17 and seizure, the Supreme Court of Pennsylvania is not,
18 so therefore we want to direct the Supreme Court of
19 Pennsylvania "Thou shalt follow what the Supreme Court
20 of the United States is doing in this limited area of
21 search and seizure."

22 The other thing that remains viable and
23 is an ultimate quick control, even if this were to
24 pass, is the power right here in this legislature, as
25 you have done in the wiretap control law, is to pass

1 legislation that can rein the police in and that can
2 rein prosecutors in and set structures. Right now
3 federally under Title 3 one party consents, okay? That
4 is not the case in Pennsylvania. So we're not losing
5 the control of the legislature. The Commonwealth of
6 Pennsylvania has ultimate control here.

7 Q. You lose me. If we adopt this
8 constitutional amendment, we lose complete control.

9 A. Not true. The State--

10 Q. Well, let me finish.

11 A. Okay.

12 Q. If we establish the Supreme Court shall
13 be bound constitutionally in the area of search and
14 seizure--

15 A. Yes.

16 Q. --by whatever standard is set by the
17 United States Supreme Court--

18 A. Yes.

19 Q. --what control do we retain?

20 A. The legislature can come in and set
21 higher standards just by passing an act of legislation.
22 We're just saying the Supreme Court can't set higher
23 standards. Nothing stops the legislature from setting
24 higher standards. The legislature can come along and
25 say, the police shall not do something -- you can have

1 a banking privacy act, or you have a mental health
2 privacy act right now. Right this minute as a
3 prosecutor under existing State law I am prohibited
4 from going in and getting information about certain
5 mental health files, even of a first-degree murderer.
6 If the person is not insane, I can go get all the
7 medical records I want, but if they're crazy and there
8 are mental health records, I can't get them. Not
9 because of what the Supreme Court of the United States
10 or Supreme Court of Pennsylvania said, but because of
11 what the State legislature said. So even if we pass
12 the constitutional amendment envisioned in 2414,
13 nothing stops the State legislature from saying, okay,
14 look, here's the floor, but we're going to raise the
15 floor insofar as police action in Pennsylvania is
16 concerned. That doesn't make what you do in terms of
17 raising the floor unconstitutional.

18 Q. Well, I think that misunderstands
19 constitutional history. I think we've done that
20 already not in the form of legislative action but
21 direct action by the people ratifying the Constitution.
22 I think what the Supreme Court is doing is clarifying
23 what the Pennsylvania Constitution means as ratified by
24 the people.

25 A. Well, I disagree with that. I think

1 they're taking words that are almost exactly the same
2 as Federal court and they're just intentionally
3 interpreting them differently.

4 Q. And in the context of our history?

5 A. And they're taking a whole, you know, 25
6 or 30 years' worth of law that's been established and
7 recognized in Pennsylvania and surrounding States and
8 federally and they're just saying nonsense. We're just
9 going to get rid of the standing issue.

10 Q. I think your remedy is overly broad. I
11 agree with you, and I think you'd be surprised to the
12 extent with which I agree with you in the area of
13 substantive criminal law. But to take away the
14 jurisdiction of the Supreme Court wholly in this area I
15 think is an overly broad remedy when addressing the
16 issue.

17 A. We're not saying take away the
18 jurisdiction of the Supreme Court, though. We're
19 saying the Supreme Court of Pennsylvania has all the
20 jurisdiction in the world and the State courts and you
21 can make all rulings in the world you want to, it's
22 just that you can't raise the floor.

23 Q. Beyond that which has been dictated by
24 the United States Supreme Court.

25 A. That's right.

1 Q. Well, how much jurisdiction is that?

2 A. That's all the jurisdiction -- it has
3 nothing to do with jurisdiction.

4 Q. It has everything to do with--

5 A. It has to do with the scope of how they
6 can rule.

7 Q. Precisely. It has everything to do with
8 Federalism and what the meaning of our State courts--

9 A. But not jurisdiction though.
10 Jurisdiction is the subject matter over which someone
11 can act.

12 Q. We take away the subject matter. Often
13 that's referred to as subject matter jurisdiction, but
14 I think we understand each other whatever terminology
15 you want to apply to it. You would then advocate
16 uniform national standards binding on all State
17 jurisdictions in the area of fourth amendment Federal
18 law?

19 A. Yes.

20 Q. Because you think uniformity is the value
21 that ought to be pursued above all others, at least in
22 that context?

23 A. No.

24 Q. All right.

25 A. I do that because--

1 Q. Because you're satisfied?

2 A. --because right now in 1990 the way the
3 Supreme Court is interpreting fourth amendment issues I
4 believe makes more sense than the way the Supreme Court
5 of Pennsylvania is interpreting them, and additionally
6 if you look in terms of the rights of all the people of
7 the United States, I can get in my car right now and I
8 have the luxury of driving all the way to California.
9 If as I pass from State to State in terms of the search
10 and seizure issue there are different standards to be
11 applied, I don't know what I can do and what my rights
12 really are and really aren't.

13 Q. That's been the history of Federalism,
14 not only under the fourth amendment but under every
15 amendment to the Constitution.

16 A. I understand that, but just because we
17 throw out the term "Federalism" doesn't make it
18 absolutely right in all circumstances.

19 Q. I'm not saying that. I'm saying that the
20 history of Federalism has been such that we have
21 allowed 50 jurisdictions to make law that goes beyond
22 the scope of and not in conflict with Federal
23 constitutional law.

24 A. In some areas. And we also have a
25 tremendous amount of pressure in a lot of areas,

1 including the vehicle area and the taxing areas, to--

2 Q. Would you support similar uniform
3 provisions in the area of the sixth amendment, right to
4 counsel?

5 A. Probably based on current Supreme Court,
6 the Supreme Court of the United States, interpretation.

7 Q. What about in the area of the first
8 amendment?

9 A. Probably.

10 Q. And how about due process under the fifth
11 amendment?

12 A. No. That's so much all over the place I
13 don't know that I can form an opinion on that.

14 Q. What we're getting is you now want
15 uniformity under the first amendment, the fourth
16 amendment, the sixth amendment, why don't we just
17 abolish the State Bill of Rights, abolish the
18 Declarations or Rights that in many cases precede,
19 predate the Federal Constitution and simply adopt the
20 Federal constitutional standards uniformly?

21 A. Because there may be some things that are
22 unique to Pennsylvania that we wish to preserve. And
23 what I'm suggesting to you--

24 Q. Precisely what I'm saying.

25 A. I understand that, and what we have is

1 not a difference in that basic philosophy. What we
2 have is a difference in philosophy in terms of in this
3 particular area I think the Federal government is doing
4 it better than the State government.

5 Q. Maybe I agree with you. Then tailor your
6 remedy to that specific area.

7 A. And I have no objection to that.

8 Q. All right. I see the Chairman nodding
9 his head. He's been very generous to me.

10 I really want to emphasize to you that no
11 matter how much I might agree with you on the
12 substantive criminal law, this remedy is overly broad.
13 It flies in the face of 200 years of very noble history
14 under concepts of Federalism and the opportunity of
15 individual States to define the law as it is applied
16 within their unique jurisdictions. If you came before
17 this committee and said, look, there are problems with
18 these decisions rendered by the Pennsylvania Supreme
19 Court and we would like to change Pennsylvania State
20 law so that it conforms under our Constitution to the
21 Federal standard, I might give you a very responsive
22 hearing. But when you come in here under 2414 and say,
23 we wish to deny this subject matter jurisdiction
24 entirely to the Pennsylvania Supreme Court in order
25 thereby to achieve the result of conformity with

1 Federal law, your remedy goes far beyond the perceived
2 evil.

3 A. If I thought there was a way that we
4 could, as in 683 that there was a simple sentence or
5 two or paragraph or two that could do that, I'd be
6 pleased to do that. But frankly the area is so complex
7 I'm not sure of language that could actually accomplish
8 that. And the language we're talking about is really
9 paragraphed in both the Federal and the State
10 Constitution.

11 Q. But it goes beyond, and the debate
12 historically -- historically meaning the last two or
13 three years -- goes far beyond the fourth amendment.
14 You sat there a moment ago and you advocated uniformity
15 under the first amendment -- frankly, a very dangerous
16 concept, from my point of view -- uniformity under the
17 fourth amendment, uniformity under the sixth amendment.
18 We get to the point where States are effectively denied
19 the opportunity to define civil liberties within their
20 own jurisdictions.

21 A. No, your question to me was not whether I
22 advocated uniformity. Your question to me was whether
23 or not I would be satisfied to go with what the Supreme
24 Court is saying in those particular areas.

25 Q. That wasn't my question.

1 A. Well, that was my understanding. That's
2 what my answer was directed to.

3 Q. Well, that's the difference between night
4 and day. I might well agree with you on the substance,
5 but the process that you advocate is a very dangerous
6 concept. It is one that for all practical purposes in
7 the field of civil liberties would abolish Federalism.

8 A. Well, except that you're including the
9 whole when we're only talking about a very narrow
10 issue.

11 Q. I've never considered the fourth
12 amendment to be a narrow issue.

13 A. Well, it's narrow when you consider all
14 of the other bills of rights that we have. It's just
15 one of many. It's very important, but it's still one
16 of many rights.

17 Q. I think that shows an astonishing
18 insensitivity to the fourth amendment in its role in
19 American history

20 A. Oh, I'm very sensitive to the fourth
21 amendment, but what I object to is your
22 characterization of it that I am advocating everything
23 be changed or that everything will be changed just by
24 changing this one area. I am only suggesting a change
25 in this one area.

1 Q. I am suggesting that you read the dozen
2 law review articles that have been written in the last
3 three years where the philosophy that you advocate with
4 regard to the fourth amendment has been advocated
5 persistently and more broadly by very reputable
6 scholars with regard to the first amendment, the fifth
7 amendment, the sixth amendment. The uniformity that
8 you seek because it will make your job easier has been
9 advocated across the board with regard to the Federal
10 Bill of Rights.

11 A. I understand that, but that's not why I'm
12 here testifying. I'm not making that broad-sweeping
13 recommendation. I am only here--

14 Q. Advocating the first step in that
15 direction.

16 A. No. I'm only here advocating it as it
17 pertains to the fourth amendment. You may view it as a
18 step in that direction, but that's not my motive.

19 Q. Well, that's why I asked you earlier
20 about the first amendment, the fifth, and the sixth.

21 REPRESENTATIVE McHALE: Mr. Chairman, I
22 thank you. This is an issue that I hope would receive
23 very serious consideration before we would take action.
24 I can't think of any more fundamental change in our
25 State Constitution that we have considered during the

1 eight years that I have been here. At a minimum, I
2 think we all ought to be extremely cautious. On 683
3 I'm with you. On the substance of the criminal law
4 that you seek to amend under 2414 I may agree with you.
5 But with regard to the process that you advocate under
6 2414, the surrender of our State sovereignty to the
7 United States Supreme Court, I could not more strongly
8 disagree with you.

9 MR. MacELREE: And I have to respect that
10 position and I agree with you entirely when you suggest
11 that this is a proposition that must be studied very
12 carefully and we must go very slowly to understand the
13 full extent to which it may have an impact.

14 REPRESENTATIVE McHALE: We finally
15 reached agreement.

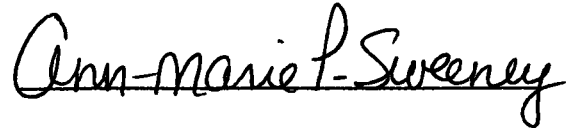
16 Thank you, Mr. Chairman.

17 CHAIRMAN CALTAGIRONE: Thank you. We
18 will now adjourn the hearing.

19 MR. MacELREE: Thank you.

20 (Whereupon, the proceedings were
21 concluded at 12:50 p.m.)
22
23
24
25

1 I hereby certify that the proceedings and
2 evidence are contained fully and accurately in the
3 notes taken by me during the hearing of the within
4 cause, and that this is a true and correct transcript
5 of the same.

6
7 

8 ANN-MARIE P. SWEENEY
9
10

11 THE FOREGOING CERTIFICATION DOES NOT APPLY TO
12 ANY REPRODUCTION OF THE SAME BY ANY MEANS UNLESS UNDER
13 THE DIRECT CONTROL AND/OR SUPERVISION OF THE CERTIFYING
14 REPORTER.
15
16

17 Ann-Marie P. Sweeney
18 536 Orrs Bridge Road
19 Camp Hill, PA 17011
20
21
22
23
24
25