

TESTIMONY OF DAVID M. McGLAUGHLIN

ON HOUSE BILL #2414

May 1, 1990

I appear before this committee today as a representative of the Pennsylvania Association of Criminal Defense Lawyers. In that organization, I occupy the position of chairman of its amicus curiae committee. This is a committee that files briefs in the state and federal appellate courts in Pennsylvania. We choose our topics carefully, and generally limit our participation to cases of state-wide importance.

The association itself is comprised of nearly three hundred and fifty members who practice criminal defense law in various counties around the state, and in federal court. Because of our work, we are in daily contact with the criminal justice system. Our association is the only state-wide organization working strictly on behalf of public and private criminal defense lawyers. One of our primary goals is to foster the protection of individual rights and to seek improvement of the criminal law, its practice and procedures. Above all, we strive to promote equality and fairness in the criminal law.

I have personally been involved in the criminal justice system from every angle since 1972. For seven years I worked in a state prison in Maryland, one of the most unique prisons in the world, Patuxent Institution. From 1979 to 1982, I was a prosecutor; working with and under Representative Haggerty of this committee. Since 1983, I have been actively engaged in the

practice of criminal defense law. Since that time, I have been involved in several cases of first impression.

I appear here today to set forth our organization's opposition to the adoption of House Bill #2414 regarding the constitutional amendment to Article I, §8 of the Pennsylvania Constitution.

Upon first learning of this proposed constitutional amendment I was struck immediately by what I perceived to be a very great lack of understanding of the historical development of our present state and federal constitutions, and our federalist system of government. First of all, it must be remembered that our state constitution pre-dates the federal constitution by several years. More importantly, our bill of rights was adopted as the first article of that constitution and not added on as a group of amendments later. While this is not to demean the importance of the federal bill of rights, it serves to illustrate the importance our Pennsylvania founders placed upon the recognized fundamental rights guaranteed to all citizens in the first article of our constitution.

On a broader scale, we must not forget that the idea of a central, federal government made up of the various colonies, was met with a great deal of suspicion then because the idea of the independent sovereign states surrendering certain powers to this central government was very new at the time. We must also not forget that the ratification of the federal constitution was obtained by only the slimmest possible margin and that one of the major selling points to the people in the ratification process and

debate was the fact that the various state constitutions already had, for the most part, bills of rights incorporated into them, and that the lack of a bill of rights in the federal constitution would be remedied in the near future if ratification was obtained. That promise was fulfilled with the adoption of the first ten amendments.

Finally, we must not forget the tenth amendment to the federal constitution which reserves to the states all powers not expressly set forth and granted to this central federal government. This shows a clear recognition of the importance states' rights would play in the future of our country.

Closer to home, we must remember the fierce independence displayed by early Pennsylvania colonists. Even after the ratification of the constitution, there was the famous whiskey rebellion in western Pennsylvania which was, in essence, a revolt against the federal government and its newly enacted tax on grain. There was also the lesser known Fries rebellion in Bucks County, which had to do with the levying of a grossly unfair tax, and we must remember the fiery colonial senator from western Pennsylvania, Senator William McClay, a rabid anti-federalist. He would not be in favor of this bill.

Yet now, we have a proposed amendment which seems to ignore two hundred and fifteen years of history and worse yet, displays a deep lack of understanding of the state-federal dichotomy upon which the health of the republic depends.

To be sure, our state supreme court has staked out a position that it may freely provide greater privacy protections

for Pennsylvania citizens under Article 1 §8 than those called for by the federal constitution, as interpreted by the United States Supreme Court. But these cases have been very few in number. Moreover, what is wrong with providing such protection?

In addition, this committee should remember that the Pennsylvania Supreme Court does not always deviate from the federal interpretations of fourth amendment law. In a landmark case I handled, Commonwealth v. Gray, the Supreme Court of Pennsylvania adopted the U.S. Supreme Court's decision in Illinois v. Gates as the law of Pennsylvania. This was in spite of stiff opposition and, what I felt was a sound historical analysis of why we should not adopt that decision. Thereby, the evidentiary requirements for issuance of a search warrant were relaxed.

Yet what about reasons for rejection of House Bill #2414? Seventy-six (76) years ago, the United States Supreme Court, with a make-up far different than what it is today, recognized that if the Fourth Amendment to the United States Constitution meant anything at all and was not merely words on paper, there had to be some sanction imposed upon the police for a violation of its terms and conditions. In United States v. Weeks, that sanction became known as the exclusionary rule which prohibited the police from utilizing the fruits of their illegal activity if such activity was determined to be illegal under fourth amendment analysis. Yet it was another forty-seven (47) years before the United States Supreme Court made that rule applicable to the states through the Fourteenth Amendment to the United States Constitution. That landmark decision was Mapp v. Ohio. In both Weeks and Mapp, the

Supreme Court recognized that to grant the right of privacy and to be free from unreasonable searches and seizures, but to withhold a remedy for its violation is really to have no right at all. Any government can place words on paper and call it a constitution. It is only our willingness to back-up those words with strong actions that separates us from any other totalitarian judicial government. Yet since the decision of the United States Supreme Court in Illinois v. Gates, we have seen a steady erosion of fourth amendment protection to the point where in my view, any protections claimed under the fourth amendment are illusory. Under the decision of United States v. Leon, the United States Supreme Court indicated that it doesn't matter if a search warrant turns out to be illegal as long as the police act in good faith in obtaining it. I ask the members of this committee when have they ever heard the police admit to bad faith in anything? It is almost ludicrous to expect that one would. Rather, the harsh reality of our system is that some guilty people must be set free in order for all of us to enjoy the constitutional protections guaranteed to us.

No one, not even criminal defense lawyers wish to appear to be 'soft' on crime. I am certain that applies especially to elected representatives such as yourselves. Yet we must remember that in the so-called war on drugs and the crisis atmosphere which has been generated thereby, we should not, "throw out the baby with the bath water", and reduce or eliminate our constitutional protections. In fact, it is at just such times that we must be ever more diligent to preserve these hard fought and hard won

personal freedoms we all enjoy.

This committee must remember that the only forum in which the limits of these rights are tested is in the criminal courts. Thus, the person claiming the protection of such rights will almost invariably be somebody charged with a crime. Yet the price we must be willing to pay for our freedoms is the discharge of certain people we know to be guilty in order to ensure the protection of us all. For as sure as I am sitting here, without checks and balances on their authority and power, police arrogance knows no bounds.

Other fundamental questions arise in consideration of the effect of House Bill #2414. Why tie our privacy protections to the federal law? Why permit the Supreme Court of the United States to dictate to the citizens of Pennsylvania what their privacy protections will be and what they will not be? Why strip the Pennsylvania Supreme Court of its ability to interpret our state constitution more broadly than the fourth amendment is interpreted by the United States Supreme Court? Why strip Pennsylvania citizens of important and fundamental rights they now enjoy regarding privacy of their bank records, their phone conversations, and their homes, cars, and personal effects? Simply asked, where is the need for such an amendment?

What this appears to be is a carefully engineered end-run on the exclusionary rule, and to force our Supreme Court to abandon this doctrine as the law of Pennsylvania, much as the federal government has done in the fourth amendment area. Yet we all need the exclusionary rule. As I said before, we need to

allow some individuals to go free in order that the police know there are limits on the police actions which they may take against a citizen. The exclusionary rule makes for better police work in the long-run, and it really is applied in only a relatively few number of cases considering the tremendous number of criminal matters prosecuted in Pennsylvania. In the recent Philadelphia District Attorney's campaign, winner Ron Castille boasted of a very high conviction rate. While this conviction rate included guilty pleas, it must be remembered even in that small percentage of cases which went to trial and resulted in not guilty verdicts, any suppression motion that was made was most likely denied.

Since my entry into the legal world, and more specifically, the criminal court system in 1980, I have been shocked and dismayed at the steady erosion of a defendant rights I have witnessed in this state and country. It used to be that the Commonwealth had the resources, and the defendant had the law. This created a delicate balance between the individual and the government which was seeking to prosecute. Now, there is an ever increasing imbalance in favor of the state, and against the individual. This represents a fundamental shift in our perceptions of the ever present tension present between the individual and their government. It must be remembered, the basis of our government is freedom and a limit on government intrusion. What this amendment does is to further tip the balance in favor of the state and against the individual, and against personal privacy rights and personal freedoms. I urge this committee to remember the well used cliché that, "if it ain't broke don't fix it." The

present constitution is working quite well and the Supreme Court's interpretation of it is not so restrictive on law enforcement that their efforts have been overtly or substantially hampered. In fact, Mr. Preate, his predecessor, and the various district attorneys around Pennsylvania have received just about everything they have asked for in the last seven years from the legislature. I urge this committee to halt this one-sided trend and reject House Bill #2414, as not being in the interests of the citizens of Pennsylvania; not criminals, but all citizens. For if we begin tampering with our state constitution, and our bill of rights, where will it end? I urge this committee to not begin the journey down that road. Reject 2414.