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April 12, 1990

Honorable Thomas R. Caltagirone, Chairman
House Judiciary Committee
House of Representatives
Harrisburg, PA 17120

RE: House Bill No. 683

Dear Chairman Caltagirone:

We are writing to you to voice our apposition to House Bill No. 683 which proposes an Amendment to Article V of the Constitution. It is unwarranted and unwise in several respects.

First, the legislature should not distort the meaning of well settled legal terms and definitions to achieve a particular result. If there is to be a constitutional amendment it should not be through the device of labeling trial by jury a "substantive" right. It is an important and substantial right but not a "substantive" one, for it has long been recognized as a mode of trial, and therefore a matter of practice and procedure. See, e.g., Adams v.U.S., 317 U.S. 269, 279 (1943); Commonwealth v. Wharton, 495 Pa. 581, 587-89, 435A.2d158, 162 (1981) (opinion in support of affirmance). Substantive law, as distinguished from the right to jury trial, and other procedural matters in the courts, provides the definitions of conduct declared to be criminal and the punishment for violations of these criminal laws. See, e.g., State v. Molnar, 410 A.2d37,42 (N.J. 1980); State v. Smith, 527 P.2d 674, 677 (Wash. 1974) (en banc).

Second, the proposed amendment may wreak unintended havoc, and at a minimum, uncertainly, with respect to several matters not now contemplated. The constitutional amendment is apparently intended to overrule the Pennsylvania Supreme Court's decision in Commonwealth v. Sorrell, 500 Pa.355, 456 A.2d 1326 (1982), and to render Rule 1101, Pa.R.Crim.P. (governing waiver of a defendants's right to a jury trial) a nullity. As a result of the constitutional amendment, because of the wording chosen, the effect may be to invalidate all or most of the Rules of the Pennsylvania Supreme Court (see Rules 1101-1122) relating to the conduct of jury trials. Because the constitution will provide that the right to a jury trial is a "substantive right", all matters related to this substantive right may be viewed as

substantive, rather than as matters of practice and procedure subject to the Supreme Court's Art. V rulemaking power.

Finally, and most importantly, the proposed constitutional amendment should be rejected because it unwisely removes from the judge the aurthority to decide whether the defendant should be permitted to waive his constitutional right to a jury trial, instead placing that power in the hands of the prosecutor.

Rule 1101, Pa.R.Crim.P., as it is written, and as it has been construed by the Pennsylvania appellate courts, does not give the defendant the absolute right to insist on a trial without jury. The judge exercises discretion in ruling on a request for a non-jury trial and may deny the request and order a jury trial whenever he finds that a non-jury trial would be inappropriate. A non-jury trial request can be denied if the defendant is attempting to obtain an impermissible advantage through judge shopping[1], or because the judge believes that information he knows about the case or the defendant potentially taints his impartiality[2] or for any other appropriate reason.

Under Rule 1101, the prosecutor has the right, and even the duty, to make the judge aware of any reason why a non-jury trial would be inappropriate. If the alleged reason is that the judge cannot be fair to the Commonwealth, a motion for recusal is available to the Commonwealth. What the prosecutor does not have, and would be conferred by the proposed constitutional amendment, is unbridled power to make the ultimate decision of whether to permit the defendant to have a non-jury trial. Pursuant to the constitutional amendment, a prosecutor could insist on a jury trial for a variety of improper purposes, including an attempt to appeal to the passions and prejudices of the jury in a publicized case or one where the complainant is a very sympathetic individual, or in a complicated intricate case, to hopefully confuse the jury or simply to harass a defendant with the added burden and expense of providing a defense at a jury trial.

Rule 1101, by eliminating the requirement of a prosecutor's approval for a bench trial, imposes a check on the prosecutor's power to force a jury trial, a restraint parallel to that imposed on a defendant's ability to insist on a non-jury trial.

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[1] E.g., Commonwealth v. Pettiford, 265 Pa.Super. 466, 402 A.2d 532 (1979); Commonwealth v. Garrison, 242 Pa.Super.509,364 A.2d 388 (1976.

[2] Commonwealth v. Sorrell, supra, 500 Pa. at , 456A.2d at 1329.

Rule 1101 wisely gives the trial judge the power to pass on the defendant's request for a waiver subject to the prosecutor's objection that the request is made in bad faith. The existing Rule thus offers significant protection against bad faith conduct of either the prosecution or the defense.

The proposed constitutional amendment is based on an unwarranted distrust in the ability and impartiality of our judiciary without any justifiable basis and places and more faith in the impartiality of prosecutors than in courts.

Non-jury trials are essential to the functioning of our overcrowded criminal dockets, and there is no evidence that Rule 1101 is not being properly implemented by our courts. Therefore, the proposed constitutional amendment is unwise and unnecessary.

Respectfully submitted,

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Chief, Law Reform

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LNS/JWP:mc

cc: Bill Andring, Esquire
Staff Counsel
House Judiciary Committee

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April 30, 1990

Honorable Thomas R. Caltagirone
Chairman, House Judiciary Committee
House of Representatives
Harrisburg, PA 17120

Re: House Bill No. 2414

Dear Chairman Caltagirone and Members of the House Judiciary Committee:

We are writing to register our objections to House Bill 2414, which provides that the right to privacy and search and seizure protections afforded to Pennsylvania citizens by the Pennsylvania Constitution shall be limited to those minimum protections afforded by the Fourth Amendment to the federal Constitution as interpreted and construed by the United States Supreme Court. While this proposed constitutional provision is couched as an "amendment" to Article I, Section 8, in fact it is a repealer of that basic and fundamental provision which, by its inclusion in every Pennsylvania Constitution since 1776, has protected the citizens of this Commonwealth since Colonial times.

One of the principal causes of the American Revolution was colonial reaction to abuses of the Crown in the utilization of generalized search warrants which allowed customs agents and other law enforcement officials entry into any building without any demonstration of need or reasonableness. It is significant that Pennsylvania adopted its Bill of Rights and search and seizure proscriptions in 1776, well before the 1791 adoption of the first ten amendments to the United States Constitution which included the Fourth Amendment and its proscription against warrantless searches and those conducted without probable cause.

It is not, however, simply "priority" which speaks in favor of retaining Pennsylvania's independent protection of privacy rights and proscription against improper, unwarranted or unlawful searches and seizures. The Pennsylvania and federal proscriptions should be considered as complementary protections to the citizens of this Commonwealth and the United States, respectively. Our system of

government is a federal system with the federal government having limited power and responsibilities and the respective states retaining all others, including the police power. Implicit in this notion of federalism is the right and responsibility of each of the states to adopt practices and policies -- legislative, administrative, and judicial -- which will meet the needs of that state's citizens. The federal Constitution's Bill of Rights provides only the absolute minimum level of acceptable protection; the federal Constitution and the United States Supreme Court leave the states free to consider their own particular circumstances in adopting and enforcing laws, policies and practices which best suit their particular demographic, geographic, economic, historic, and other circumstances. Substantive and procedural rules, laws and regulations that might be appropriate for Alaska might not be suitably applied in Hawaii, or in Pennsylvania.

Again, this nation was founded -- and Pennsylvania provided a leadership role in the process -- because of opposition to abuses by the central authority. In order to prevent, or at least limit, such abuses, the founding fathers devised a tripartite system of government with legislative, executive and judicial branches acting in tension to check and balance one another. Implicit in this scheme is the understanding that regularly elected legislators and executives would be subject to popular attitudes and perceptions. Judges, on the other hand, elected at far less regular intervals, and, as a practical if not legal matter, having essentially life tenure, are not supposed to be, and in fact are not, as subject to the caprice of public opinion and attitudes. The practical effect of this is that while judicial attitudes do change, they change more slowly and less extremely than public opinion and the positions of the executive and legislative branches. This is more than desirable, it is absolutely necessary. Due process, equal protection and fundamental fairness, the hallmarks of the judicial function, are absolutely dependent on deliberateness and restraint. It is precisely that kind of deliberateness and restraint that has, on rare occasion, caused the Pennsylvania Supreme Court, after appropriate consideration, to decide that the bare minimum protections afforded by the federal Constitution and the United States Supreme Court are insufficient to protect the rights of Pennsylvania's citizens to their privacy and the security of their homes, papers and possessions.

In Smith v. Maryland, 442 U.S. 735 (1979), the United States Supreme Court held that installation and utilization of a device which allowed government officials to obtain a record of every telephone call an individual made, did not constitute a search. Under this decision, no warrant or demonstration of probable cause had to be shown by a police officer, sheriff or other official in order to obtain and use a list of all telephone calls made by any individual. In Commonwealth v. Melilli, Pa., 555 A.2d 1254 (1989), our Supreme Court rejected such a limited view of this Pennsylvania Constitution's search and seizure provision, and held that Article I, Section 8 of the Pennsylvania Constitution was intended to guard individual privacy rights and required a demonstration of probable

cause and a search warrant before officials could obtain records of an individual's telephone calls. The Court held that citizens of this Commonwealth do have an expectation of privacy in their telephone calls and that Article I, Section 8 protected that expectation of privacy.

In U.S. v. Miller, 425 U.S. 435 (1976), the United States Supreme Court held that copies of a bank depositor's records were not protected by the search and seizure proscriptions and could be seized without either a warrant or a demonstration of probable cause by government officials. Considering this issue as a matter of state constitutional law under Article I, Section 8 of the Pennsylvania Constitution, the Pennsylvania Supreme Court held, in Commonwealth v. DeJohn, Pa., 403 A.2d 1283 (1979), that the right to privacy does not necessarily depend on an individual's presence at the scene of the seizure or on his physical possession of the material seized. "Recognizing modern electronic realities," the Court held that an individual's personal bank records, in which he had an expectation of privacy, were protected from a warrantless search in Pennsylvania even though Xerox or electronic copies of such materials could be obtained without infringing on the depositor's own access to the records.

The Melilli and DeJohn cases reflect a consensus view of the right to privacy and the kind of protection to which citizens of this Commonwealth are entitled. These cases illustrate the difference in scope, breadth and intention between the federal and state privacy and search and seizure provisions. While federal concerns generally are directed at more serious violators and federal searches and seizures are conducted by more highly trained officials (F.B.I. and Treasury agents, U.S. attorneys, etc.), state police and prosecutorial responsibilities extend down to the most petty offenses and may be carried out by relatively untrained individuals. Indeed, state investigations and prosecutions may be conducted at the county level by individuals with personal or political motivations and are significantly more likely to involve harassment and impropriety than are federal investigations. This illustrates the potential differences that might motivate federal and state Supreme Courts to conclude that differing minimum protections are appropriate.

Melilli and DeJohn reflect a concern for the individual and his or her right to privacy that does credit to the Pennsylvania Supreme Court and calls into question the wisdom of putting a muzzle on its power to protect the privacy rights of Pennsylvania citizens by repeal of Article I, Section 8.

If this body has any doubt about the appropriateness of independent state action, it might consider the acceptability of delegating its legislative authority to the House and Senate in Washington. While admittedly there are differences between the enactment of legislation and the performance of judicial functions, such distinctions are a matter of degree; Pennsylvania judicial procedure should not and must not depend entirely upon the dictates of the United States

Supreme Court, sitting in Washington and deciding upon minimum standards for all of the states.

We are obviously and earnestly opposed to the shortsighted negation of judicial responsibility represented by House Bill 2414. As noted above, this provision, couched in terms of an "amendment," is in actuality a repeal of Pennsylvania's longstanding and significant role in protecting the privacy rights of its citizens. If this legislature is, in fact, intent on achieving the purposes reflected in this "amendment," it would be far more honest to simply propose to Pennsylvania's citizens a repeal of Article I, Section 8 of the Pennsylvania Constitution.

For the above reasons we urge the House Judiciary Committee and all members of the House to reject House Bill 2414 and its backhanded attempt to repeal Article I, Section 8 of the state Constitution protecting the privacy rights of Pennsylvania's citizens.

Respectfully submitted,

John W. Packel
Chief, Appeals Division

Leonard N. Sosnov
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JWP/LNS:sas